

<p><b>Title:</b> Copyright exceptions (for various purposes)</p> <p><b>PIR No:</b> BEIS015(PIR)-20-IPO</p> <p><b>Original IA/RPC No:</b> BIS0309; BIS0310; BIS 0311; BIS0312; BIS1057</p> <p><b>Lead department or agency:</b> Intellectual Property Office</p> <p><b>Other departments or agencies:</b>  <a href="#">Click here to enter text.</a></p> <p>Contact for enquiries:  copyrightconsultation@ipo.gov.uk</p>	<b>Post Implementation Review</b>
	<b>Date:</b> 04/11/2019
	<b>Type of regulation:</b> Domestic
	<b>Type of review:</b> Non-statutory
	<b>Date measure came into force:</b> 01/06/2014 and 01/10/2014
	<b>Recommendation:</b> Keep
<b>RPC Opinion:</b> not required (de minimis)	

<p><b>1. What were the policy objectives of the measure?</b></p> <p>The objectives of these exceptions were to make copyright works available for reasonable use, while not unduly restricting the rights of copyright holders. The intended effects were to: a) remove inconsistencies caused by the uneven treatment of different media types, b) reduce transaction costs and unnecessary rights clearance barriers, c) enable a larger quantity of high-quality research, and d) encourage the creation of new content.</p>
<p><b>2. What evidence has informed the PIR?</b></p> <p>This review has been mainly informed by a formal stakeholder consultation with input from publishers, educational institutions, archives, libraries and non-profit organisations (83 responses). We also held roundtable meetings with relevant sectors. Evidence provided by both was largely qualitative or anecdotal, and although we were unable to directly quantify the impact we found no evidence to suggest that the true impact differs from the original estimates.</p>
<p><b>3. To what extent have the policy objectives been achieved?</b></p> <p>Responses from stakeholders have indicated that the policy objectives have been met, and there was a strong consensus among stakeholders benefiting from the policy that the exceptions have been beneficial. The review indicated several benefits: 1) reduced transaction costs and rights clearance barriers, 2) widespread use, 3) new content creation, and 4) improved quality of education. There was less consensus in the responses from rights holder stakeholders: whilst some reported a fall in licensing revenue, many reported no noticeable fall in revenue or in the uptake of licences. Responses from beneficiary stakeholders appeared to indicate that the exceptions sometimes provided a fall-back option when licences did not provide the required content.</p>

Sign-off for Post Implementation Review: Chief Economist

***I have read the PIR and I am satisfied that it represents a fair and proportionate assessment of the impact of the measure.***

Signed: **Stephanie Dales**

Date: 01/04/2020

## Further information sheet

Please provide additional evidence in subsequent sheets, as required.

### 4. What were the original assumptions?

The following assumptions were made in the original impact assessments:

- **Research and private study** - We assumed that it was possible to implement the policy so that any scope for abuse or misunderstanding of the extension of the exception is minimised.
- **Education** - We assumed that the possibility for copyright owners to “license-out” of certain exceptions would remain and that safeguards would be put in place to minimise the risk of copyright material being widely shared.
- **Text and Data Mining (TDM)** - We assumed that the exception would not act as a channel for copyright infringement, as providers will not be prevented from applying technological protection measures to ensure security and stability. It was also assumed that the costs and benefits will grow as further technical applications emerge.
- **Public Administration** – The number of FOI requests used in the analysis were taken from the Ministry of Justice’s annual publication of statistics for FOI requests to government departments covering the 2011 year. The estimate for the cost per request were taken from a study by Frontier Economics (2006) and inflated to 2010 prices. Estimates by MOD of the % of affected FOIs informed our assumption.
- **Parody** – We assumed that the risk of this exception being abused, if the wide definition permits uses that stretch the meaning of parody, would be limited due to the restriction to “fair dealing”.
- **Quotation** – We assumed that works using extracts would not substitute or compete with originals due to the restriction to “fair dealing” and the fact extracts are limited to the extent necessary to serve their purpose.

### 5. Were there any unintended consequences?

The following unintended consequences were identified:

- The quotation exception is being used more widely than expected. Stakeholders reported that the quotation exception provides a practical alternative to the time-limited current events exception.
- Just over two fifths of the universities that provided evidence on TDM use reported that technological protection measures put in place for text and data mining are creating barriers, making the exception unworkable in some instances.

### 6. Has the evidence identified any opportunities for reducing the burden on business?

No opportunities for reducing the burden on business were identified by either: respondents to the call for evidence; or, the review process. However, rights holders made the case for greater legal clarity on what constitutes ‘fair dealing’ as they state that the expected cost of taking infringers to court to test this point would be prohibitive.

### 7. For EU measures, how does the UK’s implementation compare with that in other EU member states in terms of costs to business?

Whilst this measure utilises the European Copyright exceptions framework as a vehicle to implement reforms from the Hargreaves review, it is not implementing an EU measure. Therefore, there is no relevant comparison to be made with other member states.

# Review of the 2014 copyright exceptions for research & private study, educational use, text and data mining, public administration, quotation, and parody, caricature & pastiche

## Introduction

This report sets out the results of the IPO's Post Implementation Review (PIR) of some of the 2014 copyright exceptions legislation (the exceptions). The exceptions make copyright works available for reasonable use in education; research and private study; text and data mining; public administration; quotation; parody, caricature and pastiche.

In conducting the review, the IPO has considered whether and to what extent the exceptions:

- have achieved their original objectives
- are still required and remain the best option for achieving those objectives
- could be achieved in another way which involves less onerous regulatory provision.

## Context and purpose of the 2014 Copyright Exceptions

Prior to 2014, several copyright exceptions already existed for the purposes of using copyright material in the relevant areas. However, these did not cover all media types and were designed for a time when information and communication technologies were not widely available in educational institutions, libraries, research organisations and others. As technology advanced it became clear that the framework required updating, and, following the recommendations of the 2011 Hargreaves Review, the Government introduced new legislation to modernise the copyright exceptions framework while removing any inconsistencies between media types.

This PIR reviews the impact of the 2014 copyright exceptions for the purposes of:

- research and private study
- educational use
- text and data mining analytics
- public administration
- quotation
- parody, caricature and pastiche

The overall policy objective was to make copyright works available for reasonable uses while not unduly restricting the rights of copyright holders, in the above areas. The intended effects were to: a) remove inconsistencies caused by the uneven treatment of different media types, b) reduce transaction costs and unnecessary rights clearance barriers, c) enable a larger quantity of high-quality research, and d) encourage the creation of new content.

The background, rationale for intervention and policy objectives for each of the 2014 exceptions are briefly summarised in Annex A.

**Table 1: Estimated impact of the copyright exception in the impact assessments**

Exception	Net cost to business per year (£m)	Net Present Value (£m):	Total Cost (Present Value) (£m):
<i>Research and private study</i>	0	0	0
<i>Text and data mining</i>	0	0	0
<i>Education</i>	-0.31	2.67	25.75
<i>Public administration</i>	0	0	13.8
<i>Quotation</i>	-0.35	3.17	3.17
<i>Parody</i>	0	0	0
<b>Total</b>	<b>-0.66</b>	<b>5.84</b>	<b>42.72</b>

Due to the relatively low impact of each exception, we believe it is proportionate to group these together into one *de minimis* PIR. As can be seen in table 1 above, the combined annual net cost to business per year of these exceptions is below the £5 million threshold. Following the responses received during the call for evidence, we see no evidence to suggest the impact has been above this threshold.

### **Methodology / Review Process and stakeholder responses**

As the use of these copyright exceptions is optional, and there are no requirements for users to record the use of these exceptions, data is not widely available or routinely collected. Recognising the lack of evidence with which to make the assessment of whether these legislative measures had achieved their objective, the IPO published a call for evidence running from 30 January to 10 April 2019.

Stakeholders that might have benefitted from the exceptions were asked whether they had made use of them and if they could quantify the benefits. Rights holders were asked if there has been any noticeable impact from the exceptions, in terms of revenue and licence uptake. The call for evidence generated 83 written responses. The IPO held stakeholder meetings for some of the affected groups.

Virtually all responses from users of the exceptions, educational institutes, libraries, museums and archives were positive about the measures. Many confirmed that the exceptions reduced the time-consuming work associated with rights clearing and enabled broader access to content for non-commercial purposes. Responses frequently cited improved education and research quality, as well as the creation of new content, as an outcome of this. Additionally, the exceptions provided legal clarity for staff, students and researchers.

We received mixed responses from rights holders on these exceptions. For instance, the British Association of Picture Libraries and Agencies (BAPLA) reported that 60% of its members noticed a fall in revenue due to the education exception. Roughly 10% - 20% of BAPLA members reported a loss because of the text and data mining (TDM), parody and quotation exceptions. On the other hand, the Educational Recording Agency (ERA) and Copyright Licensing Agency (CLA) reported no major change in education licence uptake since 2014.

Broadcasters were largely in favour of keeping the exceptions, reporting for instance that the quotation exception has been entirely beneficial and has provided an invaluable alternative to the time-limited reporting current events exception. Additionally, the BBC felt the parody and pastiche exception has also been entirely beneficial, providing a clearer legal framework for parodies, supporting freedom of expression and leading to a general acceptance of parody and pastiche as part of culture.

It is important to note that the many users of the exceptions were only able to give qualitative statements, as use of the exceptions was largely not recorded. While some data is provided on the number of enquiries around the use of exceptions, the actual use of exceptions is not, and in most cases cannot be, recorded. Therefore, data provided likely only captures a fraction of the amount the exceptions may have been used. Additionally, it is not clear what proportion of users would have sought to clear rights as an alternative, given the high clearance costs.<sup>1</sup> It is therefore difficult to determine what baseline to compare the impacts to.

For instance, the British Film Institute (BFI) reported that it currently makes 60,000 titles available on dedicated terminals. Of these, 25% are made available under licences with the other 75% made available under the exceptions. The BFI estimated that it saved £2.4 million on clearance costs for the 45,000 unlicensed titles. However, without the change in legislation it

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<sup>1</sup> Based on the Pricewaterhouse Cooper (PwC) report "An economic analysis of education exceptions in copyright" (PwC, 2012), it takes a total of five hours for a teacher to clear the use of copyright material.

seems unlikely that the BFI would have sought to clear 45,000 titles, so it is unlikely that this service would have been provided to the same extent.

Even though it was not possible to make a global estimate for costs/benefits over the last five years from the stakeholder responses only, the information provided should be sufficient to determine whether this policy had a net positive outcome.

### **Issues and recommendations from stakeholders**

Several issues and recommendations were made in relation to the exceptions covered by this PIR. As they do not impact on the functioning of the exceptions as they stand, the IPO will consider all of these matters. However, anything requiring legislative changes – that is, anything other than suggestions about the guidance – would need to go through the usual policy-making process. In particular, to make a case for change would require significant evidence to show the need for the change from the requesters, as well as evidence of the related impact on both users and rights holders.

#### *Guidance on fair dealing*

Anecdotal evidence was provided to indicate that users of the parody copyright exception are confusing “fair dealing” with “fair use”, the former being a UK statutory defined set of exceptions and the latter being a US system which is less prescriptive in the ways works can be used. Rights holders alleged that some businesses have abused the parody exception by incorrectly citing their use as “fair dealing”. Rights holders claimed that this resulted in lower revenues for copyright holders as lower fees were agreed to avoid the costly process of litigating. While respondents note that the IPO has provided guidance online, they argue that their experiences over the past 5 years indicates that either this information has not been understood or users are unaware of its existence. As a result, rights holders argue that the burden of correctly enforcing and improving understanding of the parody exception is falling on them. Respondents requested that clearer guidance on the use of fair dealing for parody and all other relevant exceptions be provided by the IPO to clarify its use for users and, more importantly, businesses.

#### *Amending UK IPO's guidance on the quotation exception*

Broadcasters reported that the quotation exception is an “invaluable alternative to the reporting current events exception which had become increasing outmoded because of the time limited nature of the exception”. They noted that the UK IPO's guidance on the exceptions has been invaluable in responding to queries about the use of copyright material. However, they noted that amending the heading “Criticism, review and reporting current events” to include a reference to quotation would be helpful to clarify that it is an exception in its own right.

#### *Review use of technological protection measures (TPMs) for TDM uses*

Overall, use of the text and data mining provision appears to be still be in its infancy as use is limited. While some respondents, who reported having used the exception, did not refer to any difficulties with providers, many Universities indicated that the technological protection measures used by publishers/providers have created unreasonable barriers to accessing the data. It was reported that some publishers/providers are only providing access through their application programming interfaces (APIs) or are imposing legal requirements on the user.

In one example given, a provider of legal databases insisted on the use of its own API for TDM, which was offered for more than £11,000 per month for a limited number of users - an offer which was too expensive to take up. In another example, a provider offered a TDM licence for free for a research project. However, the requirements imposed by that licence would have put the institution at risk of substantial legal damages. As a result, the licence was not pursued, and the research in question was abandoned.

### Extend text and data mining exception to commercial purposes

The IP Federation argued that it is necessary to amend the Copyright, Designs and Patents Act 1988 to allow for the reproduction of lawfully accessed works to facilitate TDM, for both commercial and non-commercial purposes. They stated that failure to do so will continue to have a hampering effect on AI development and commercialisation in the UK.

### Increase limit for extracts for the purposes of education and provide clarity if 5% applies to individuals or the whole institution

Some respondents indicated that the limit, of using no more than 5% as an extract, can limit the usefulness of the exception and requested that the limit be changed to 5% or one chapter. A subset of these respondents also indicated users can be confused between exceptions and licences, so alignment with proportions permitted in the CLA licence (which has increased from 5% to 10% since the 2014 changes) would assist user comprehension. Lastly, some stakeholders requested clarity around whether the 5% limit for extracts applied to individuals or the whole institution.

### Extend quotation exception to unpublished works

The IPO received responses explaining the benefits of using the quotation exception. For example, the exception enables curators to include extracts and quotes from works to illustrate points relevant to the exhibitions in question.

The responses indicated that it would be beneficial to extend the quotation exception to unpublished works as well, as a substantial amount of the content held in archives is unpublished. It is difficult to obtain permission to use this content as many unpublished works are very old and/or orphaned, or it is too cumbersome to trace rights holders. Respondents indicated that as most unpublished works were unlikely to be intended for commercial use, the quotation exception should be extended to include these. However, it is worth noting that extending the quotation exception in this way is not possible at present; the international consensus is that unpublished works should not be included in this type of exception, as rights holders in unpublished works chose not to make them available widely when creating them.

## **Conclusion and Next Steps**

The information gathered through this review demonstrated benefits to users of copyright content, such as educational institutions, libraries, museums, archives and broadcasters. Responses from rights holders were mixed, with some indicating a fall in revenue while others reported no noticeable impact. Most stakeholders spoke about the importance of the exceptions in enabling an enriched research and educational environment through access to a broader range of copyright content. Additionally, it was claimed that the exceptions have enabled new research as well as the creation of new content for cultural and entertainment purposes. The removal of administrative burdens was also a frequently cited benefit.

The call for evidence responses strongly suggested that the exceptions have been operating as intended, with benefits and costs to the expected areas. Two unintended impacts were identified by stakeholders' responses: one positive in the use of the quotation exception, and one negative in the use of the TDM exception in relation to the interaction with the technological protection measures regime. International commitments mean that the Government is unable to address the latter.

Although, the level of impact expected by the original IA has not been conclusively proven, this review has not identified any improvements in the assumptions which would change the original assessment. Based on the largely positive responses from the call for evidence that the original objectives remain valid, and evidence to suggest the exceptions are operating as intended, we find that it would therefore be appropriate for the exceptions to remain in their current form.

## **Annex A**

### **Research and private study**

The UK Copyright, Designs and Patents Act 1988 (CDPA) allowed researchers and students, under the principle of 'fair dealing', to copy some types of copyright works (literary, dramatic, musical and artistic) for research and private study. However, the inconsistent coverage of the previous research and private study exception was deemed to make UK research less effective, less efficient, and more constrained in its scope.

The 2014 copyright exception for research and private study aimed to allow:

- a. copying of all types of copyright works for non-commercial research purposes and private study
- b. 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.

Link - <http://www.legislation.gov.uk/ukxi/2014/1372/impacts>

### **Educational use**

The copyright exceptions for education prior to 2014 were limited in scope, restrictively defined by media and location, and did not meet educators' expectations of reasonable use of copyright materials in the digital age. For instance, use of extracts, permitted via face-to-face teaching, was not allowed via presentation technology, such as interactive whiteboards.

The policy objective was to modernise the existing copyright exceptions for education by broadening the coverage of content types, enabling the use of copyright content on interactive displays and by distance learners over secure networks.

Link – <http://www.legislation.gov.uk/ukxi/2014/1372/impacts/2014/155>

### **Text and data mining (TDM)**

Copyright law requires a licence for copying substantial parts of works of part, whole or collections of work. This may have inhibited the use of text and data analytics for research. The 2014 TDM exception was intended to remove the block on reuse of materials for research using these tools.

The aim of the 2014 TDM copyright exception was to permit copying where it is for the purpose of applying analytic technologies, in cases where access to articles and / or data has already been gained (for example, by subscription), and the works have been provided to the user. The research should also be non-commercial in nature.

Link - <http://www.legislation.gov.uk/ukxi/2014/1372/impacts/2014/156>

### **Public administration**

Public bodies hold vast amounts of information available for inspection by the public, including information submitted by third parties that may be essential to fully understand processes and decisions. This third-party information previously could not be shared online without obtaining permission or infringing copyright. This imposed a cost on public bodies, of providing physical copies and prevented publication of the data to the public, who may have to travel to the relevant body or put in individual requests for information.

The primary aim of this measure was to allow more information held by public bodies to be made easily accessible to the public. It would also mean that more materials, which the public has a right to access under the Freedom of Information Act 2000, could be made available online pro-actively.

Link - <http://www.legislation.gov.uk/ukia/2012/167>

## **Quotation**

Copyright law previously permitted the use of quotations or extracts, without requiring permission from copyright owners, if such use is "fair" and done for the purpose of criticism, review or reporting current events. The use of extracts, so quotations for illustration or analysis that most people would consider fair (for example, a lyric or a few bars of music in a book about the history of pop music) may have required copyright clearance. Widening, and thereby simplifying, the previous exception to cover fair dealing for any extract, would remove these costs and support free expression. This would provide greater opportunities for the freedom of expression, while reducing or removing the administrative and licensing costs associated with using extracts of existing copyright works in new works.

*Link - <http://www.legislation.gov.uk/ukxi/2014/2356/impacts/2014/275>*

## **Parody, caricature and pastiche**

Comedy and satire often involve imitation and use of the works of others, through parody, caricature and pastiche. While technology now gives people many more opportunities to express themselves in new ways, copyright law was deemed to unnecessarily restrict people's ability to parody the works of others, limiting freedom of expression and creativity. Comedy is economically important in the UK and an important part of our culture and public discourse.

The exception for the purpose of parody, caricature and pastiche was intended to remove unnecessary regulation and free up creators of parody, as well as support freedom of expression and economic growth in creative sectors.

*Link - <http://www.legislation.gov.uk/ukxi/2014/2356/impacts>*