



## Issue 15 – June 2014

Hello colleagues – I hope you are all well and looking forward to some sunshine and rest over the summer break.

There have been a number of developments in copyright legislation and licensing since the last newsletter and I am particularly pleased to tell you about the amended copyright exceptions which have now been laid before Parliament, and some of which came into effect on 01 June 2014.



## Some Background

In the report on Intellectual Property he submitted in 2012, Professor Ian Hargreaves commented that the exceptions to copyright in the Copyright Designs and Patent Act 1988 (as amended) (CDPA) did not particularly suit digital works and that under the European Copyright Directive, there were other exceptions that could be allowed and should be considered for inclusion in the CDPA. After consultation and technical review we now have The Copyright and Rights in Performances Regulations 2014 outlining changes to exceptions in the following areas:

- Personal Copies for Private Use
- Quotation and Parody
- Disability
- Research, Education, Libraries and Archives
- Public Administration

This newsletter will concentrate on the Education and disability aspects, but I'll also give an indication of what the impact of the other changes might be for your colleges.

## **Research, Education, Libraries and Archives**

These are the regulations having most impact on colleges. They are also the longest of the new regulations, introducing a number of changes updating current exceptions and perhaps displaying that this has been an area with the greatest need for reform!

As many of you know, I have long campaigned for colleges to make more use of the current exceptions to avoid continued and expensive use of collecting society's licences. Under the heading of 'Education,' there were clauses that had benefit for colleges.

### **Section 32 – Things done for purposes of instruction or examination**

This section included very useful exceptions for media studies students and for the purposes of examination. It was hampered by the restriction on the categories of copyright works that could be copied and there was, in recent days, the insurmountable restriction that copying, for certain purposes, was 'not done by means of a reprographic process.' Fine if you wanted to copy work out on a blackboard, but just the very mention of such a method dates me horribly!

### **Section 34 – Performing, playing or showing work in course of activities of educational establishment**

This, in my opinion, was one of the most underused exceptions in the CDPA – it allowed performance of literary, dramatic and musical works and the playing or showing of a sound recording, film or broadcast (note please, this did not cover the recording of a broadcast – that was covered by s35 which became known as the ERA clause)

### **Section 36A Lending of copies by educational establishments**

This is a very little used exception – it simply states "Copyright in a work is not infringed by the lending of copies of the work by an educational establishment" No definition of 'work,' 'copies,' 'lending'. No indication of how long the loan period is or who the works could be lent to.

In addition to the 'education' exceptions, there are two other sections that could be of considerable use to colleges. These exceptions, commonly described as 'fair dealing' are for 'Research and Private Study' (s29 of the CPDA), and 'criticism, review and news reporting' (s30 of the CPDA). I have never advocated wholesale adoption of them as a means of avoiding copyright, but I do feel that not sufficient use is made of them, and I'm happy to say that 'fair dealing' now figures even more prominently in the amended exceptions, particularly in the re-written and now much shorter, s32.

## **The Amendments**

As ever, with changes to legislation, there has to be a cautionary note.

As with the existing regulations relating to exceptions, there remains a distinct lack of definition of words, terms and phrases provided by the legislators.

Their preference is that the courts will determine definition through the cases brought before them. I sincerely hope that no member college ever is taken to court for an alleged infringement based on the exceptions under 'fair dealing,' but the lack of definition works both ways – as long as users don't get too greedy, there is a good chance that third party works can be used for teaching and learning without the need for either permission or a collective licence.

## **In summary, the principle changes and differences you will find are:**

### **Scope of the works covered**

Where the existing exceptions have only applied variously to literary, dramatic, musical and artistic works, the amended clauses now also include films, sound recordings and broadcasts – in other words, all categories of works as defined by the CDPA are now covered, in all exceptions. This is a major shift and will be of considerable benefit to colleges.

### **Digital and Analogue**

The existing exceptions also variously applied only to analogue works – the amendments not only now apply to all categories of work, they also apply to both analogue and digital platforms.

It was one of the stated aims of the Hargreaves Review, that the exceptions should encourage use of works on the Web. As ever, the note of caution – this does not give free access to all materials on the Web. Works on the web are still as much someone's copyright as they have always been – and depending on what uses you want to make of those works, you may still need permission or a licence. Now, however, if your copying can comply with 'fair dealing', you may have more opportunities to copy works that were previously denied to you.

One of the archaic provisions (and one which I suspect was largely ignored) of the current exceptions is that copying can be done, for teaching purposes, as long as it isn't done by 'a reprographic process'. So that effectively ruled out any form of technology and restricted copying to doing it by hand – not something that is practiced in our modern teaching and learning.

## Digital and Analogue - continued

The notion of 'fair dealing' which now pervades the amendments, deals with this outdated concept as well. It is now acceptable (and I know this happens already) to copy works in any medium – this includes interactive whiteboards – as long as the following conditions apply:

- The work must be used solely to illustrate a point
- The work must not be used for commercial purposes
- The use must be 'fair'
- The use must be accompanied by a 'sufficient acknowledgement'

Basically, and again, many of you have heard this from me before, it comes down to whether or not your use/copying of works would affect the primary sales of the work – ie, would your use/copying of the work, make a dent in the sales of the book, DVD, magazine, sound recording etc that you want to use?

No, I don't know the answer either – I don't know where the break point is. Certainly if you copy the whole book, DVD, CD etc and make multiples for distribution rather than buy in enough copies for the students to use, then we're in pirate country.

Having said that, let's have a look at the changes in the exceptions and see what we can make of them. Please bear in mind that the changes are designed to take account of all works whether analogue or digital.

### Section 29 – Research, private study and text and data analysis for non-commercial research

The current s29 of the Copyright Act restricts 'research and private study' to the categories of literary, dramatic, musical and artistic works. The amended section now allows research and private study for all categories of works, so this now brings films, sound recordings and broadcasts into the mix as well. Given that DVDs come under the category of 'films,' this opens up interesting possibilities for copying some sections of a DVD, as long as the copying constitutes 'fair dealing' – this is the actual wording –

*(1) Fair dealing with a performance or a recording of a performance for the purposes of research for a non-commercial purpose does not infringe the rights conferred by this Chapter.*

*(2) Fair dealing with a performance or recording of a performance for the purposes of private study does not infringe the rights conferred by this Chapter.*

As you can see, this may offer opportunities currently denied to users, but it will depend on definition. There is also now clause 29A that deals with what is commonly termed text and data 'mining' where there is heavy computational work on large amounts of data to determine trends, make forecasts etc. These procedures are used in banking, pharmaceuticals, engineering etc and where the analysis was previously tediously done by hand, it can now be done at speeds only restricted by the capacity of the computer.

## Section 32 – Illustration for instruction

I'll quote the complete section – it's not that long!!

- (1) *Fair dealing with a work for the sole purpose of illustration for instruction does not infringe copyright in the work provided that the dealing is –*
  - (a) *For a non-commercial purpose*
  - (b) *By a person giving or receiving instruction (or preparing for giving or receiving instruction) and*
  - (c) *Accompanied by a sufficient acknowledgement (unless this would be impossible for reasons of practicality or otherwise)*
- (2) *For the purposes of subsection (1), “giving or receiving instruction” includes setting examination questions, communicating the questions to pupils and answering the questions*
- (3) *To the extent that a term of a contract purports to prevent or restrict the doing of any act which, by virtue of this section, would not infringe copyright, that term is unenforceable”*

### So, where to begin?

- All the references to 'reprographic process' have gone, opening up all possibilities for methods of copying and display
- Restrictions to types of works have gone
- The previous restriction relating to copying sheet music has gone
- The examination allowances remain although it should be noted that were previously there was actually *carte blanche* (except sheet music) in the use of works, the use now has to comply with the rest of the clause in being 'fair'
- There are no specific definitions for 'illustration', 'instruction' and 'non-commercial'
- And we now have the introduction of the 'contract override' in subsection 3 – this has always been contentious with publishers maintaining that the terms and conditions of their licences were to be adhered to, even if the allowance for copying was less than that permitted in legislation. Now, the legislation allowances override any contractual terms and conditions.

Section 34 remains untouched so the playing, performing and showing of works in the course of activities of educational establishments under sub sections (1) and (2) are still available.

Section 35, also known as the ERA section, has some significant changes. The substance of the section remains as previously – recordings of broadcasts can be made by educational establishments as long as they are for non-commercial purposes and are accompanied by an acknowledgement. The clause goes on to say, and these parts have been amended, that the establishment can communicate these broadcasts to staff and students. This means that the broadcasts can be loaded on to a VLE, for example. The proviso is that the 'communication' is done by means of a secure network that requires a login system.

So far, so good – we then come to phrase that has been carried over from the original s35 – *“Acts which would otherwise be permitted by this section are not permitted if, or to the extent that, licences are available authorising the acts in question and the educational establishment responsible for those acts knew or ought to have been made aware of that fact”*

Fair enough – this is where ERA kicks in, but they are now using this exception to justify the introduction of a single licence to colleges. Previously, colleges were allowed, under licence, to record and play programmes in the college buildings under the terms of the original ERA licence. If a college wanted to load programmes on to a VLE for ‘communication,’ ERA offered the ERA+ licence, with a 50% surcharge on the basic licence.

Because the exception has now changed, ERA are offering this single licence and Colleges Scotland are in discussion with them, on our members behalf to negotiate a less complex licence which will also offer better value for money, since evidence shows that some colleges have cut back on their ERA recordings and have found other AV resources for use in their courses.

In my opinion, the fly in the ERA ointment is YouTube. I can’t quantify the use of YouTube in colleges, but anecdotally, it’s difficult to find one that doesn’t use this channel. Use of YouTube brings with it all sorts of risks, ifs, buts and maybes. One aspect is certain – if a college is using YouTube to show programmes, or programme clips that originate from ERA stakeholders such as BBC, ITV, C4, C5 etc, then the college still requires an ERA licence.

There will be more on this section of the Act as we see what interpretation is made of it and how we get on with negotiating with ERA.

Section 36 was previously entitled ‘Reprographic copying by educational establishments of passages from published works’ It is now called ‘Copying and use of extracts of works by educational establishments.’ Just as s35 became known as the ERA clause, so s36 is known as the CLA clause.

This is because the clause allows copying of materials unless there is a licence that colleges ought to know about – ie, CLA. However and here’s the challenge, the wording of the clause has changed considerably – again along the lines of ‘fair dealing.’

The clause starts off by saying (1) *“The copying of extracts of a relevant work by or on behalf of educational establishment does not infringe copyright of the work, provided that it’s non-commercial and carries an acknowledgement.”*

It goes on – *“copyright is not infringed where a copy of an extract made under subsection (1) is communicated by or on behalf of the educational establishment to its pupils (sic) or staff for the purposes of instruction for a non-commercial purpose.”* There is also the requirement about the secure network.

Interestingly, the only ‘extracts of works’ which are not included in this clause are ‘broadcasts’ – dealt with under s35 and ‘an artistic work which is not incorporated into another work.’ I take this principally to mean images and since there is no

specific clause relating to images, I will be referring any helpdesk enquirers to s32 – ‘Illustration for instruction.’

Now for the really interesting part of s36 – “(5) *not more than 5% of a work may be copied under this section by or on behalf of an educational establishment in any period of 12 months, and for these purposes a work which incorporates another work is to be treated as a single work.*” Just as I hope you’ve noticed that there is no mention in the new clause of ‘reprographic copying’ nor of ‘published works’, so in clause (5), there is no mention of record keeping.

Section 36 finishes off with the part about none of it being applicable if there’s a licence and the part about the contract over-ride. That’s all very well, but realistically, how much CLA copying is done in colleges these days? Enough to continue to justify the high costs of the licence, the slavish adherence in some colleges to a convoluted reporting mechanism and being bound by an unnecessarily complex licence? It is Colleges Scotland’s opinion that there is no longer such justification and again, we are working hard on a CLA licence that is fit for purpose and offers much better value for money.

## **The Copyright and Rights in Performances (Disability) Regulations 2014**

The changes in clauses 31A and 31B will be of considerable benefit to those in colleges who require an accessible copy of works due to a disability or impairment. Until the passing of this amendment, disability and impairment were confined to those staff and students who had a visual impairment. Now, the wording has been amended to:

*“31A Disabled persons: copies of works for personal use*

*(1) This section applies if—*

*(a) a disabled person has lawful possession or lawful use of a copy of the whole or part of a work, and*

*(b) the person’s disability prevents the person from enjoying the work to the same degree as a person who does not have that disability.*

*(2) The making of an accessible copy of the copy of the work referred to in subsection (1)(a) does not infringe copyright if—*

*(a) the copy is made by the disabled person or by a person acting on behalf of the disabled person,*

*(b) the copy is made for the disabled person’s personal use, and*

*(c) the same kind of accessible copies of the work are not commercially available on reasonable terms by or with the authority of the copyright owner.”*

Section 31B says the same but relates to accessible copies being made by authorised bodies – in our case, colleges.



## The salient points of the changes are:

- There are no categorisations on disability or impairment
- The person requiring the accessible copy must either own one or one must be owned by the authorised body which is going to make the accessible copy
- The person requiring the accessible copy is unable to use the original work because of their disability
- Accessible copies cannot be made either by or on behalf of the disabled person if a commercially accessible copy is available. (Those of you working in libraries and with disabled people will know that the market is not exactly flush with such commercially available accessible copies)
- The only charge that can be made in relation to the production of an accessible copy is the cost of making and supplying it
- I'm fully aware, that as with other aspects of copyright, colleges have been preparing accessible copies for those with a disability or impairment for quite some time and have kept under the radar. The amendments, at long last, legitimise this activity and there is now scope for further preparation of accessible copies throughout colleges. It should be noted, that this section does extend to students who have dyslexia.

There are also considerable changes to the activities of Libraries and Archives, and if my librarian and learning services colleagues will forgive me for the moment, I'll deal with these changes in the next Newsletter which will be with you very shortly.

## In Other Copyright News Relating to Colleges

Getty Images have opened their collections and made many millions of their images available for non-commercial use. Here, courtesy of Own-it.org ([www.own-it.org](http://www.own-it.org)) is a summary of the Getty deal:

- Some, but not all, Getty images are now available to embed on websites, blogs or social media platforms.
- Approximately 40 million out of the 150 million Getty images can be embedded (Getty has a searchable [library](#) for embeddable images).
- The images may not be taken out of the embedded viewer (which contains a Getty credit and a link to the licensing page).
- Use is restricted to editorial purposes only and commercial use (e.g. in advertising, promotions or merchandising) is not permitted.
- Authors should be OK to embed images into a blog where the content is purely editorial and 'relating to events that are newsworthy or of public interest.'
- Use of images next to advertising or on e-commerce sites, for example, will likely be in breach of the terms of use.
- Users should be prepared to take prompt action to remove images upon request from Getty.
- Getty may collect data related to use of the embedded images and reserves the right to place advertising in the embedded viewer.

For more see the Getty Images Site [Terms of Use](#).



## British Pathé

British Pathé, with funding from the Lottery, has also released their entire catalogue of resources for non-commercial use. Here is the press release:

*Newsreel archive British Pathé has uploaded its entire collection of 85,000 historic films, in high resolution, to its YouTube channel. This unprecedented release of vintage news reports and cinemagazines is part of a drive to make the archive more accessible to viewers all over the world.*

*“Our hope is that everyone, everywhere who has a computer will see these films and enjoy them,” says Alastair White, General Manager of British Pathé. “This archive is a treasure trove unrivalled in historical and cultural significance that should never be forgotten. Uploading the films to YouTube seemed like the best way to make sure of that.”*

*British Pathé was once a dominant feature of the British cinema experience, renowned for first-class reporting and an informative yet uniquely entertaining style. It is now considered to be the finest newsreel archive in existence. Spanning the years from **1896 to 1976**, the collection includes footage – not only from Britain, but from around the globe – of major events, famous faces, fashion trends, travel, sport and culture. The archive is particularly strong in its coverage of the First and Second World Wars.*

*Alastair White continues: “Whether you’re looking for coverage of the Royal Family, the Titanic, the destruction of the Hindenburg, or quirky stories about British pastimes, it’ll be there on our channel. You can lose yourself for hours.”*

*This project is being managed by German company Mediakraft, which has been responsible for numerous past YouTube successes. The company will be creating new content using British Pathé material, in English and in foreign languages.*

You can view and share films from this invaluable resource [here](#).

## Motion Picture Licensing Company (MPLC)

Has anyone received any communication recently from MPLC? If you have, will you please let me know – thanks

## Relevant Web sites for Copyright Education and Information

If you haven’t already come across this site – [www.copyrightuser.org](http://www.copyrightuser.org) I strongly suggest you take a few moments to view it. Produced by partners, Bournemouth University, Create, University of Glasgow and the Centre for Excellence in Media Practice, I find it an extremely helpful site – also helped by the fact that it is covered for further use by a Creative Commons licence – exceptional use of the licence and a lesson for many others who wish to share their materials.

Another web site, particularly for media studies students, is the World Intellectual Property Office (WIPO) site where the following article may well be of interest - [http://www.wipo.int/ip-outreach/en/ipday/2014/ip\\_and\\_film.html](http://www.wipo.int/ip-outreach/en/ipday/2014/ip_and_film.html)

## Copyright Webinars

Thanks to all those who participated in the first two webinars for College Development Network (CDN) on 03 and 17 June. A minimum of two more will be scheduled after the summer break – ‘Free lunch – myth or reality’, dealing with Open Educational Resources and ‘where do we go from here’, looking at future developments in copyright, including The Copyright Hub. Thanks to the feedback from the first two events, CDN are hoping to add to the copyright webinar programme with separate events on Creative Commons and use of images in a digital world. Watch out for more information.

## And Finally

Please remember that the newsletter is just one part of the service that I provide for member colleges in Scotland. I run a helpdesk for all copyright issues. Contact details are coming up. I’m also happy to come to your college to talk to staff and students about any aspect of copyright.

I am Alan Rae, the copyright consultant for all members of the Scottish college community, and I will be very pleased to hear from you with any comments, questions and suggestions you have.

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