

Response from IAML (UK&Irl) to the draft Statutory Instruments relating to the copyright exceptions for data analysis for non-commercial research, education, research, libraries and archives

About IAML (UK & Irl)

IAML (UK&Irl) is the UK and Ireland branch of the International Association of Music Libraries, Archives and Documentation Centres. It exists to represent and promote the interests of music librarians and libraries, music-related archives and music information providers throughout the United Kingdom and Ireland.

IAML (UK & Irl) is broadly encouraged by the draft legislation which supports a more balanced copyright regime. However there are some instances where we have concerns in relation to the wording, particularly where this results in the new legislation becoming more restrictive, which we do not believe was the intention of the government. We offer below some comments and would request that these are carefully considered to ensure that the objectives of the Hargreaves Review are fully achieved.

Exception for Data Analysis for Non-Commercial Research

IAML (UK & Irl) welcomes these proposed changes, which will benefit non-commercial research. However, the draft wording is less encompassing than was suggested in the government's *Modernising Copyright* publication. Annex E makes reference to "text and data mining" but the draft legislation only refers to "data analysis". In order to fulfil the government's intention of providing an exception for both text and data mining for non-commercial research, all instances of the words "data analysis" in s.29A and Paragraph 2C in Schedule 2 should be amended to "text and data analysis".

In the draft s.29A and Schedule 2, clarification is required regarding what constitutes "a copy", since inevitably derivative works will result from the data analysis.

We are pleased to note that no contract can over-ride this exception.

Exceptions for Education

IAML (UK&Irl) welcomes the broadening of fair dealing for the purpose of instruction beyond those defined as "educational establishments" in the Copyright Act, which will be of significant benefit to non-commercial teaching activities in the music community.

Section 32

We are pleased to note the broadening of fair dealing for the purpose of instruction to all kinds of copyright work, which will significantly facilitate the utilization of sound recordings in the course of musical instruction.

There is, however, a significant error in s.32(2) . The word "and" at the end of subsections (a) and (b) should be replaced by "or", otherwise all three conditions would need to apply simultaneously in order for the provision to apply, which we do not believe to be the intention of this paragraph.

Furthermore, IAML (UK & Irl) strongly disagrees with the incorporation of things done for the purposes of examination into the fair dealing provision applying to things done for the purposes of instruction. The current legislation states in s32(3): “Copyright is not infringed by anything done for the purposes of an examination by way of setting the questions, communicating the questions to the candidates or answering the questions”

Within the academic study of music, this is a particularly important exception relied on by teachers. There are various circumstances in which it is necessary to reproduce whole works in written music assessments. It is possible in some cases, e.g. reproducing a whole musical work which students would be required to analyse, this could potentially be considered fair dealing, either under s. 32 or the new quotation exception (assuming this is clarified to not be limited to excerpts, as expressed in our response to the first batch of exceptions). However in orchestration examinations, in addition to the examiner reproducing the work, the candidates, by arranging it for different instrumental forces, are creating an adaptation, which we presume would not be covered under the previously mentioned exceptions.

Thus the draft legislation in this way is more restrictive than the current law, and therefore **is not** an effective implementation of the government’s policy. IAML (UK & Irl) urges that the examination exception remains a separate sub-section from teaching, and recommends retaining the original wording of s.32 (3, 3A and 4) of the Act (which includes the specific exclusion of making a reprographic copy of a musical work for use by an examination candidate in performing the work).

Section 35

In relation to the use of broadcasts, the proposed legislation states in s.35(1A) that recipients may access the material off the premises by means of a secure electronic network, however the wording requires that the recording itself is made on the premises. This should be amended to clarify that the person doing the recording may also be off the premises, again undertaking the act by means of a secure electronic network.

Section 36

IAML (UK&Irl) welcomes the extension of s.36 to all kinds of copyright work.

Re. 36(1b) We welcome the ability to send electronic copies of materials via a secure network, however by limiting this to staff and students, this proposed wording would not permit educational establishments to provide access to external authorities e.g. external examiners, QAA or OFSTED to receive and assess learning materials created by staff. We recommend that wording is added to permit external individuals or bodies that perform a validation function to be included in this exception.

Re. 36(2) There is a general move in the proposed legislation to remove restrictions based on the form of works (e.g. in sections 32 and 37-40). It is therefore anomalous that standalone artistic works are excluded in this section. Furthermore this exclusion directly contradicts the paragraph relating to s.36 on p.41 of *Modernising Copyright*, which states “The government will therefore amend this exception so that it applies to all types of copyright work”. It also contradicts the commentary in the current document which states “the current Section 36 is amended so that it

applies to all types of relevant copyright work". This section is therefore not an effective implementation of the Government's policy.

Re.36(4) IAML (UK & Irl) welcomes the increase in the proportion of a work that can be copied from 1% per quarter to 5% per annum.

Re 36(5) This is one of a number of examples where the proposed legislation states that the exception doesn't apply if, or to the extent that, licences are available authorising the activity. However this does not take into account whether the terms of such licences are reasonable. In the case of Reproduction Rights Organizations such as CLA or NLA a mechanism exists to appeal against unfair terms via the Copyright Tribunal, but this doesn't apply in the case of licences offered by ebook or journal suppliers. It would be helpful if it could be explicitly states that the exception doesn't apply where "licences **on reasonable terms** are available..."

Exceptions for Research, Libraries and Archives

Section 29

IAML (UK & Irl) welcomes the expansion of fair dealing for non-commercial research and private study to include all types of copyright work and the fact that no contract can over-ride this exception.

Section 37

On page 1 of the technical consultation document the government states in paragraph 4:

"In line with its policy set out in 'Modernising Copyright', and consistent with the amendments to Section 29 on research and private study, the Government intends to amend Sections 37 to 40 and 43 of the Copyright Act, which relate to libraries and archives. These provisions will be amended to cover all types of copyright work, irrespective of the medium in which they are recorded."

We understand this statement to mean that the government's intention is that the provisions in the revised s.29 apply also to s.37. However, we do not believe that the draft legislation has achieved this because s.37 omits any mention of contracts not overriding exceptions. What this means in practice is that libraries would, by contract, be prevented from supplying copies of works to their patrons, yet the patrons would not be prevented from making their own copies in person. This situation is unsatisfactory in denying remote users full access to their library's collections, and preventing access to material which is not available for self-service copying.

The commentary on s37 makes reference to librarians and archivists, yet the proposed legislation only makes reference to librarians. Given the quantity of published materials and manuscripts of published works found in archives, we believe the wording of this section should be amended to specifically include archives as well as libraries.

Re. 37(1) The proposal refers to making copies of material "in such medium as the person may request". This might be interpreted as providing a mandate to libraries to provide the material in the requested medium, whereas there may be instances where the library is not equipped or prepared to do so. We would recommend that this is clarified by adding "and the library may offer".

Re. 37(3)(d) we welcome the fact that librarians can provide a copy to a library user on receipt of a declaration “in writing” and that this instruction can be received electronically. The fact that a signature is no longer required will greatly facilitate operational procedures.

Section 40

We welcome the simplification that will be achieved by revoking the Copyright (Librarians and Archivists) (Copying of Copyright Material) Regulations 1989 and incorporating the relevant sections into the Act itself. We note that a library not conducted for profit replaces the concept of a “prescribed” library. Under the old regulations, a non-prescribed library was one that was conducted for profit, OR was part of an organisation conducted for profit, whereas the new wording restricts it to a library conducted for profit, irrespective of whether the parent body is conducted for profit or not. We wonder whether this is a deliberate change?

Section 41

IAML (UK & Irl) welcomes the expansion of the previous clause in the Regulations so that librarians can copy and supply to other libraries all types of copyright work. However, we are concerned that there is no provision to prevent contractual override in this section. This means that libraries may be prevented from supplying copies to the users of other libraries (via those libraries), which will deny library users full access to the published repertoire which they are currently able to benefit from via the inter-library loan network.

Section 42

We again welcome that the provisions under this exception cover all types of copyright work. However, we also feel that the particular terms of the permission are in other ways unduly restrictive. The exception to preservation copying is limited to “items in the permanent collection”, which are wholly or primarily for reference only and cannot be loaned to the public. For many libraries this would only cover a tiny proportion of their holdings. Additionally, reference to “the copy” in s.42(1)(a) would appear to imply that only a single preservation copy can be made, whereas current technology inevitably requires that further back-up copies are made.

IAML (UK & Irl) believes that the proposed revisions do not offer a solution to the needs of those libraries, archives and museums that need to make preservation copies, and therefore urges that that this exception is made more wide-ranging, to include loanable material.

Section 43

IAML (UK & Irl) welcomes the expansion of provision to include all classes of unpublished work, and that – as with s.37 – the instruction can be received electronically, without requiring a signature.

Re. s.43A(1)(a) This section makes reference to a “publicly accessible library” , but does not define this term, which doesn’t appear anywhere else in the legislation. For consistency, it would be preferable if the wording were instead linked to the idea of a library not being conducted for profit, as in s.40.

Re. s.43A(2)(b)(iii) This section makes reference to “dedicated terminals”, with this term coming from Art. 5(3)(n) of the Information Society Directive 2001/29/EC. What is unclear is whether the

language in the SI is intended to mean that the terminals can ONLY be used for making works available to patrons, or whether such terminals could also offer other services e.g. internet access or word processing software. We recommend that the phrase “dedicated terminals” is properly defined.

S.43A(2)(c), in contrast to most of the other proposed new exceptions, states that a contract **can** over-ride this particular exception. We would urge the Government, should an opportunity occur, to seek amendment of the Directive so that this exception also cannot be over-ridden by contract.

We are also concerned that this section is currently limited to library users for the purpose of non-commercial research or private study, which is not a stipulation of the Directive. It would not be viable for a librarian to check on the motives of every library user wishing to use these terminals in order to verify that they are not doing commercial research. As the reader does not even acquire a copy of the work in this process, it is not clear to us why this stipulation has been made.

Sections 61 and 75

We agree that the removal of the requirement that organisations must be designated by the Secretary of State, and instead that the exception will apply for any body that is not established or conducted for profit will be less bureaucratic and facilitate the preservation of folk songs and broadcasts, which will be of great benefit to researchers.

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