Fordham 2015

1. Introduction

Good afternoon.

I am here to tell you about the copyright exceptions that were brought into force by the UK government last year.

The acts permitted in relation to copyright works, set out in Chapter Three of Part 1 of the Act, run to 45 Sections, and the parallel provisions, the permitted acts in relation to the rights in performances and recordings of performances, found in Schedule 2, run to 32 paragraphs. Of the exceptions in Chapter Three 26 Sections remain as before, 19 are new and 9 have been deleted. The proportions are similar for the exceptions to performers' rights.

The handouts display the full list of exceptions [see Schedule].

It seems to me there is a difficulty I should mention.

If one wants to discuss a change in the law, then one has an interest in answering the question – does it make a difference? And the following question is: how does one tell? And I think one tells by looking at case law; by doing research on the effects on behaviour; and by allowing time to pass.

Since there is no case law, no research has been done, and no time has passed, I take of necessity a different approach – an *ex ante* approach, attempting to describe why the UK government introduced the new exceptions.

2. Deregulation

Critiques of the UK copyright system (the Gowers and Hargreaves reports among others) claim that it is too complex and that what is needed is deregulation. It is important to recognise that these two complaints are not the same. I take as an example the new exception permitting the making of personal copies for private use
(Section 28B, Schedule 2 Paragraph 1B).

Subject to certain conditions an individual is now entitled to make a copy for private use of any copyright work other than a computer program that belongs to him (and the phrase "that belongs to him" is an imprecise version of the exact statutory language).

So – the starting point is that someone who wants to make a personal copy of a copyright work belonging to him must have in his possession a copy of the work that has been "lawfully acquired by him on a permanent basis". Examples of what is meant by the phrase "lawfully acquired on a permanent basis" include purchase, gift, or download which confers ownership and does **not** involve the acquisition of a copy via borrowing,

renting, streaming, broadcasting or the acquisition via a download of a copy on a temporary basis. The section also excludes copies that have been made in reliance on some other exception.

An individual who has acquired a copy of a copyright work satisfying the conditions set out above does not infringe copyright by making a personal copy so long as the personal copy satisfies two further conditions:

(1) a personal copy must be made for the individual's private use
and
(2) must not be made for ends which are directly or indirectly commercial

"Private use" includes private use facilitated by making a back-up copy, or for the purposes of format-shifting, or for the purposes of storage in the cloud.

Transferring a personal copy to someone else without the consent of the copyright owner, unless the transfer is on a private and temporary basis, is an infringement as is transferring the original copy which has been "lawfully acquired on a permanent basis" while retaining any personal copies, unless the copyright owner authorises such retention.

A personal copy that has been transferred without the copyright owner's consent is an infringing copy unless the transfer is on a private and temporary basis. Similarly with any personal copies retained after the transfer of the original copy.

The last element of this provision, which is common to all the new exceptions is that a term of a contract purporting to prevent or restrict the making of a copy which would be within the scope of the exception as just described would be unenforceable.

If this is deregulation, then I would argue deregulation entails complexity.

What is actually going on here?

The answer is that the UK is trying to tread a fine line between compliance with the Info-Soc Directive's provisions (specifically Article 5, but Article 5 read in the light of the relevant Recitals) and the political objective of narrowing the scope of the exclusive right of reproduction: in other words, ensuring that something that a rights owner could previously authorise is now not subject to authorisation.

As can be seen from the private copy exception, the fundamental requirement is that someone who wishes to qualify as a beneficiary of the exception has to have acquired a copy of the copyright work. In other words, at some point a transaction occurred, and there was the possibility that remuneration flowed back to the rightowner. The argument then is whether that hypothetical transaction can be regarded as having taken into account the possibility of the further uses. The other element of the argument is that the actual scope of the exception is strictly defined – hence the complexity.

It remains to be seen – a question for sociologists rather than lawyers – whether the change in the law alters behaviour.

I draw attention to the provision common to all the new exceptions denying rightsowners the possibility of contracting out. This places the financial loss squarely on the shoulders of rightsowners. Again, we are only going to discover after the event what the scale of such loss may be.

3. Austerity and deregulation

One of the recurrent claims of the coalition government has been the need for austerity. This has been translated in practice into budget cuts in what may broadly be described as social provision: less frequent collection of domestic garbage and poor maintenance of the public highway at one end of the spectrum, early closing or actual closure of public libraries at the other end.

One of the attractions of the move into an electronic environment by libraries is the possibility of reducing the storage and maintenance costs of physical items such as books. Fewer books in libraries is a social cost.

All the exceptions are aimed to make life easier for users. A small example is the relaxation of the requirement that the beneficiary of an exception should indicate the provenance of a copyright work: that is, should identify the owner of the copyright. This requirement has been watered down so that the requirement to acknowledge does not apply "where this [the acknowledgement] would be impossible for reasons of practicality or otherwise". This might be reasonable where the exception is claimed for research for a non-commercial purpose or for private study, but it seems much harder to justify in relation to the Section 30 exception which allows fair dealing for the purpose of criticism or review, as well as allowing quotation so long as the dealing is fair.

An exception transfers a cost from the user to the rightsowner. If the activity involved is socially beneficial – as education, public libraries, museums and archives all are – then one solution is to increase funding rather than reducing it. The same possibility applies with the costs of access to cultural material by the disabled.

As with so much of copyright, the need to strike a fair balance is a cause of complexity.

New exceptions introduced in 2014

1 Personal copies for private use (Section 28B, Schedule 2 Paragraph 1B)
2 Research and private study (Section 29, Schedule 2 Paragraph 1C)
3 Copying for text and data analysis for non-commercial research (Section 29A, Schedule 2 Paragraph 1D)
4 Criticism, review, quotation and news reporting (Section 30, Schedule 2 Paragraph 2, Subparagraphs 1ZA and 1B)

5 Caricature, parody or pastiche (Section 30A, Schedule 2 Paragraph 2A)
6 Disability (Sections 31A – 31F, Schedule 2 Paragraphs 3A-3E)
7 Education – illustration for instruction, recording of broadcasts, copying and use of extracts, lending by educational establishments (Sections32 – 36A, Schedule 2 Paragraphs 4, 6, 6ZA)
8 Libraries and archives – making works available through dedicated terminals; copying by librarians: supply of copies to other libraries; replacement copies; copying for members of the public – published and unpublished works (Section 40A – 43, Schedule 2 Paragraphs 6C – 6H)
9 Material open to public inspection (Section 47)
10 Material communicated to the Crown (Section 48)
11 Recordings of folksongs (Section 61, Schedule 2 Paragraph 14)
12 Recording of broadcasts for archival purposes (Section 75, Schedule 2 Paragraph 21)

This list is based on the unofficial consolidation of the principal Act – Copyright, Designs and Patents Act 1988 – which may be found at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/308729/cdpa1988-unofficial.pdf