

Intellectual Property Office Post-Implementation Review on 2014 Copyright Changes

Response of CREATE, University of Glasgow, UK Submitted on 10 April 2019

This response sets out the views of academics at CREATE, the Research Council funded centre for Copyright Law at the University of Glasgow (www.create.ac.uk): Elena Cooper, Marta Iljadica, Martin Kretschmer, Thomas Margoni and Bartolomeo Meletti. It follows on from CREATE's contribution to public consultations prior to the original implementation in 2014 by Martin Kretschmer, Ronan Deazley, Lilian Edwards, Kristofer Erickson, Burkhard Schafer and Daniel John Zizzo, published in the *European Intellectual Property Review* (August 2014, 36(9), pp.547-553) and as a CREATE Working Paper (2014/9) available for free download on the CREATE website (www.create.ac.uk/publications/). CREATE also submitted responses to the original implementation with the British and Irish Law Education Technology Association (BILETA), as part of the IPO Technical Review of Draft Legislation on Copyright Exceptions in summer 2013. They are also available for free download on the CREATE website (www.create.ac.uk/policy-responses).

CREATE is a leader in copyright research, with a strong interdisciplinary and empirical focus and therefore well placed to comment on the Consultation's enquiry into the appropriateness of the 2014 changes and whether the original intentions were achieved.

We endorse the comments made by CREATE in 2013 (jointly with BILETA) and in 2014 (referred to above), which addressed a broad range of issues including term of protection, libraries and archives, disabilities, text and data mining, user generated content, fair remuneration of authors/performers, respect for rights, parody and exceptions for education. In this document, we focus only on the three areas where CREATE's input has been specifically requested: research and private study, text and data-mining and educational use.

Generally, in reviewing the changes made to the exceptions to copyright in these three areas, we draw attention to the need for sound evidence for any claims that the incentives of creators are affected. This is particularly important in view of recommendation 5 of the *Hargreaves Review of Intellectual Property and Growth* (2011): 'Government should firmly resist over regulation of activities which do not prejudice the central objective of copyright, namely the provision of incentives for creators.'

Research and Private Study: s.29 CDPA 1988

Section 29 provides a defence to copyright infringement in respect of fair dealing for the purposes of research for a non-commercial purpose and fair dealing for the purposes of private study. In 2014, this was broadened in two key respects. First, the defence applies to all copyright works (rather than just authorial works i.e. literary, dramatic, musical and artistic works) (section 29(1)). Secondly, a new provision was added, that to the extent that a term of a contract purports to prevent or restrict the doing of any act which would not infringe copyright under section 29, that term is unenforceable (Section 29(4B)).

CREATe supports both of these changes: facilitating research and private study are goals that should be served by the copyright system, and rights-holders' interests are adequately protected by the requirement of sufficient acknowledgement in cases of research. Further, we consider that, particularly in cases of fair dealing for private study, many uses would go undetected by the rights-holder. Therefore, the 2014 changes are important to bring copyright law into line with practical realities.

Several CREATe projects have been enabled by the broadened fair dealing exception for the purposes of non-commercial research. These include *Display At Your Own Risk* (DAYOR): a research-led exhibition experiment featuring digital surrogates of public domain works of art produced by cultural heritage institutions of international repute. The project includes a Gallery Exhibition as well as an open source version of that exhibition intended for public use: <https://displayatyourownrisk.org/>. In order to use such digital surrogates for the purposes of the exhibition and in related publications, the authors of the resource – Dr Andrea Wallace and Prof Ronan Deazley – have relied mainly on the exception provided by section 29.

The changes to section 29 also, in part, enabled another CREATe project: the digitisation of the scrap-books left by Edwin Morgan, held by Glasgow University Library, see the 'Copyright Statement', www.digitisingmorgan.org. The project is discussed further here: www.create.ac.uk/edwin-morgan/.

Text and Data-Mining: s.29A CDPA 1988

The 2014 changes included the introduction of a new Section 29A, which permits the copying of a work for the purposes of 'computational analysis of anything recorded in the work', for the sole purpose of non-commercial research, where the person has lawful access to a copy of the work and the copy is accompanied by sufficient acknowledgement. Contractual terms which purport to prevent or restrict the making a copy which would otherwise be permitted by section 29A, are unenforceable.

CREATe supports the retention of this defence. As CREATe reported in 2014, in response to the original consultation, text and data-mining are acknowledged to have enormous potential and as the use of the copyright work does not involve the communication of an expression there are sound reasons for this not being copyright infringement.

Further, work conducted by OpenMinTeD (openminded.eu) and Dataset Licensing (<https://datasetlicensing.wordpress.com>), two projects funded respectively by the European Commission (H2020) and JISC, where CREATe has coordinated the legal research, has shown that researchers across the EU have looked at the UK defence with interest and as a source of inspiration. Feedback collected during workshops and conferences indicate how important this defence is to the scientific community and that it should be further expanded to cover activities not currently covered.

Educational uses: sections 32, 35 and 36 CDPA

Educational uses are protected by a number of provisions in the CDPA, concerning fair dealing for the purposes of illustration for instruction (section 32), educational anthologies (section 33), performances at educational establishments (section 34), recording/showing educational broadcasts (section 35), reprographic copying (section 36), and lending copies by an educational establishment (section 36A). These were changed by the 2014 implementation in a number of ways.

First, section 32 (illustration for instruction) is much simplified: it now applies in the same way to all copyright works (as compared to the previous more restrictive application in relation to sound recordings, films and broadcasts, as compared with authorial works), and also expressly applies to the preparation for giving or receiving instruction (as opposed to just the giving or receiving instruction itself). The section also states that contractual terms which purport to prevent or restrict the doing of an act which would not infringe copyright under section 32 are unenforceable.

The wider section 32 has allowed CREATE to develop cutting-edge educational resources as part of the Copyright User initiative: <https://www.copyrightuser.org/>
The most illustrative example is the award-winning resource The Game is On!, a series of short animated films accompanied by educational materials that provide a springboard for exploring the relationship between copyright, creativity, and the limits of lawful appropriation and reuse: <https://www.copyrightuser.org/educate/the-game-is-on/>
The resource consists of 6 short animated films; 6 annotated scripts exploring the creative process behind each episode; and 33 Case Files, supplementary educational materials aimed at suggesting points of discussion about copyright for teachers and students.

In producing the resource, the authors – Prof Ronan Deazley and Bartolomeo Meletti – have used appropriation as a creative technique. For example, across all six films, in just over 20 minutes, they have copied, borrowed from and been influenced by other people’s ideas and copyright works around 500 times (or, on average, approximately twice every five seconds). This creative reuse process is documented in the annotated scripts, which identify and acknowledge all the source material that has been lawfully used in creating the resource.

While section 32 has allowed some of these creative (re-)uses (especially those that introduce the Case Files), the exception the authors have mainly relied on is the quotation exception provided by section 30(1ZA). This new open-ended exception is not linked to any specific purpose: ‘Copyright in a work is not infringed by the use of a quotation from the work (whether for criticism or review **or otherwise**)’. This has enabled the authors of the resource to quote a wide range of different types of copyright works for artistic purposes, demonstrating in practice how the copyright regime enables creative possibilities.

The second change to educational uses in 2014 concerned section 35: recording/showing educational broadcasts (where there is no licensing scheme). This was expanded in 2014 also to cover communications received outside the premises of an educational establishment covered by a secure electronic network accessible only by the establishment’s staff and pupils

(section 35(2)). Previously, only communications within the premises of an educational establishment were covered.

Finally, section 36, which enables the copying by educational establishments of 5% of a work (other than a broadcast or an artistic work not incorporated in another work) for the purposes of instruction (where there is no licensing scheme), was also expanded in 2014: previously it only applied to 'reprographic copying of passages from published literary, dramatic and musical works'.

CREATe supports these changes as providing greater simplicity in an area in which clarity is important and facilitating the better operation of the law in the education sector.