



Intellectual Property Office
Concept House
Cardiff Road
Newport
South Wales
NP10 8QQ
United Kingdom
By post and by e-mail to Copyrightconsultation@ipo.gov.uk

July 17, 2013

Dear Sir / Madam,

**Technical review of draft legislation on copyright exceptions
Private Copy Exception**

Comments of BSA | The Software Alliance

BSA | The Software Alliance¹ welcomes the opportunity to respond to the Technical review of draft legislation on copyright exceptions published by the Intellectual Property Office (IPO) on 7 June 2013. In this regard, BSA has the following comments regarding the proposed Private Copying Exception.

The Private Copying Exception is being proposed by the IPO pursuant to Article 5(2)(b) of the Copyright Directive. The exception is one of a number of non-mandatory copyright exceptions provided for in the Copyright Directive. The Copyright Directive makes it quite clear, however, that these exceptions do not apply to copyright in computer programs. In particular –

¹ BSA | The Software Alliance (www.bsa.org) is the leading global advocate for the software industry. It is an association of world-class companies that invest billions of dollars annually to create software solutions that spark the economy and improve modern life. Through international government relations, intellectual property enforcement and educational activities, BSA expands the horizons of the digital world and builds trust and confidence in the new technologies driving it forward.

BSA's members include: Adobe, Apple, Autodesk, Bentley Systems, CA Technologies, CNC/Mastercam, Dell, IBM, Intel, Intuit, McAfee, Microsoft, Minitab, Oracle, Progress Software, PTC, Rosetta Stone, Siemens PLM, Symantec, TechSmith, and The MathWorks.

Recital (50) provides -

Such a harmonised legal protection does not affect the specific provisions on protection provided for by Directive 91/250/EEC... Articles 5 and 6 of that Directive exclusively determine exceptions to the exclusive rights applicable to computer programs.

Article 1(2) provides -

Except in the cases referred to in Article 11, this Directive shall leave intact and shall in no way affect existing Community provisions relating to:

(a) the legal protection of computer programs;

Directive 91/250/EEC (also referred to as the “Software Directive”) includes an exhaustive list of exceptions to copyright in relation to computer programs. These are set out in Article 5 of the Software Directive, and have been implemented into UK copyright law as part of the Copyright, Designs and Patents Act 1988 (“the Copyright Act”). **These exceptions are now contained in the Directive 2009/24/EC (“the Computer Programs Directive”) which repealed and replaced the Software Directive.**

There is therefore no scope for further exceptions to be introduced in relation to copyright that subsists in relation to computer programs.

It would nevertheless be helpful if the proposed Private Copy Exception formulation adopted similar wording as that in the current Section 28A of the Copyright Act, by expressly excluding computer software from its application. BSA would suggest the following additional wording –

“28B Private copying

- (1) Copyright is not infringed where an individual uses a copy of a copyright work, **other than a computer program or a database**, lawfully acquired by him to make a further copy of that work provided that:

Further, the proposed Private Copying Exception text includes the following provision –

“(4) To the extent that the term of any contract purports to restrict or prevent the doing of any act which would otherwise be permitted by this section, that term is unenforceable.”

BSA has commented previously on this issue. This “contract override” provision is misconceived and should be deleted. Contractual usage terms for copyright material – often implemented through technological usage rights – are the precise mechanism by which the options available to users can be made more varied, offered under different usage models, and made available at different price points. By adopting varying contract terms depending on a

consumer's requirements in respect of the material that they are being supplied with, copyright owners can offer, for example, different numbers of particular types of copies at different prices, monthly usage rights at a flat price, or temporary usage rights for free. Rather than overriding such useful competitive market offerings with mandatory rules for unlimited or a particular level or type of use, it would be more appropriate to respect and uphold agreed licensing terms, and leave exceptions to work as a reasonable default when the usage terms and conditions have not been defined by contract.

I would be happy to discuss these issues with you in person at your convenience.

Yours sincerely,

A handwritten signature in black ink, consisting of a series of vertical and diagonal strokes, appearing to be the name 'Thomas Boué'.

Thomas Boué
Director, Government Relations, EMEA
BSA | The Software Alliance