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From the Physical Secretary and Vice-President Professor JE Enderby CBE FRS

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Proposals to achieve compliance with European Community Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society ("the Directive")

I wish to express appreciation of the Government's basic approach during negotiations concerning the Directive on copyright. As noted in the current consultations on the amendments necessary to comply with the Directive, the Government's approach was always to seek to maintain existing exceptions as far as possible. I believe this to have been appropriate since current copyright legislation appears to strike the correct balance of interests and seems to be well understood by the scientific community.

The digital delivery of scientific and educational information offers opportunities and poses threats to both rightholders and users. While I appreciate the views of publishers and other rightholders, the exceptions are no threat because they are governed by the Berne Convention's three-step test. I am deeply concerned, however, that the UK's legislation to comply with the Directive addresses three issues more directly. They are:

first, the need to indeed maintain as far as possible "fair dealing" exceptions for journals and books delivered in the electronic medium, as they were in the print medium;

second, the need to ensure that such "fair dealing" exceptions are accessible in practice; and

third, that clarity is such that both rightholders and users can clearly recognise their rights and what actions would infringe the rights of the other party.



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Addressing the first concern, Article 5 of the Directive has set out exceptions but their applicability can be critically dependent on the understanding of "on-demand service". Thus Section 5.2 (8) of the consultation document states that Section XXX, a draft proposed by the Government to achieve the safeguards relating to Article 6.4, "does not apply- (a) to copyright works made available by on-demand services,". To maintain the balance of rights in the information society it is vital that the interpretation of "on-demand services" is clear and ensures that exceptions apply, in general, as widely as before – as stated by the Government. In particular we should make every effort to ensure that the progress of science and education, on which the information society in great part depends, is not limited by provisions primarily intended to protect the rights of the entertainment industry.

Essentially all electronic journals are provided under contract and are accessed by an electronic signal from a user. If users of such resources did not benefit from the exceptions there would be a huge imbalance in the rights of rightholders and users that would be to the detriment of science, creativity and society. It is clear from Recital 53 and the Government's stated intentions that materials like electronic books and journals should not be considered to be "interactive services" or "on-demand services". This should be true even if they were to incorporate a questionnaire. It should be made clear that the term "on-demand services" applies only to those supplied as time-limited works, like films or football matches.

The Society of College, National and University Libraries (SCONUL) has recently provided you with a form of words that is at the very least a good basis for a definition of "on-demand service". They are: "'On-demand service' means an interactive service for making available to the public by electronic transmission a work intended to be perceived within a predetermined timespan, the service operating in such a way that members of the public may at their individual request access the work from its commencement at a time they select or determine."

The second area of concern is whether users will be able to benefit from the exceptions without undue effort. It is hoped that voluntary agreements will allow fair dealing exceptions to be exercised both readily and promptly. It would be surprising, however, if such agreements were almost immediate and universally satisfactory. With the best will in the world on the part of rightholders, those undertaking distance learning may find it difficult to benefit from fair dealing exceptions. It is important for the information society that appropriate access is as easy as possible.

It may be possible to modify the draft wording in Section 5.2 of the consultation document to achieve greater appropriate use of exceptions. Examples of issues that could be addressed usefully are:

voluntary measures by rightholders must not just be adequate, but well publicised to potential users – a requirement on the Secretary of State for his or her decisions (Section 5.2 (3)) but not on rightholders;

in the event of a complaint, it would be useful if a time limit for review by the Secretary of State could be indicated in the Explanatory Notes; and

if the Secretary of State finds that a rightholder has failed to set up or carry through satisfactory voluntary measures, they will be in breach of a statutory duty, owed to the complainant (e.g. Section 5.2 (5)). It is an inappropriate burden on a complainant if they then have to seek remedy through the courts if that situation persists. Complainants should not be left unsupported if a rightholder fails to comply promptly with directions from the Secretary of State.

Addressing the third concern, the rules should be clear. It is obviously very difficult to modify complex existing legislation with a Statutory Instrument, but it is particularly difficult for readers when definitions are not fixed but are context-dependent. It needs to be made very clear if a definition is not necessarily transferable within the Statutory Instrument. It would thus be most useful if there could be comprehensive Explanatory Notes associated with the Statutory Instrument. To achieve appropriate access to rights, for example, it is necessary to ensure that rightholders and those who may benefit directly from exceptions recognise that any decision (e.g. to allow or disallow access to a fair dealing exception) would apply not just to a complainant, but to all those in the same class.

It is clearly a challenging task to implement the Copyright Directive in the UK in a way that will maximise the benefits for rightholders and users in the information society. It is likely that access to exceptions, which has been of benefit to society, will become more difficult where there is digital delivery. It is therefore important that every opportunity is taken to ensure that fair dealing exceptions can be used without delay or difficulty.

Yours sincerely

John Bradley