

Educational Exceptions in Copyright – “use them or lose them” By Alan Rae, Copyright Consultant, CDN

There is a selection of ways in which and learners and teachers can use materials that are subject to copyright. And it's perhaps as well to remember that all works, as long as they are original, expressed and fixed, are considered to be subject to copyright under UK law.

- Own the rights to the work – if you or your organisation has the rights to a work or works, you can do what you like with it
- Seek permission – never be frightened to ask, but be precise in your request – exact details of work, how many pages, who it's for etc. and give an assurance that the copies, if granted, will be fully acknowledged. You would ask for permission if the proposed use is very specific – your class, your course, your establishment etc. It is unlikely that permissions would be transferable to colleagues.
- Use a collective licence – CLA, NLA, PRS for Music, PPL, NLA Media Access
- Use the legislated exceptions – please use the legislated exceptions – this is what this article is about.
- Seek alternative, copyright free or cleared resources – CC, OER, iTunesU, Khan Academy, FlickrCC, YouTubeCC etc. Just another note of caution here – all these materials are still subject to copyright – they belong to someone, somewhere, but those creators have decided to allow others to use their works, free of charge, and sometimes with permissions to adapt and share – but Creative Commons (CC) is still a licensing scheme – not a free-for-all.

Prior to 2014, the use of exceptions was limited, and in some instances, not very helpful – s34(2) which allowed (and still does) the playing or showing of sound recordings, films and broadcasts for curricular purposes stood out from the others as being very useful. Over the past three years, the Intellectual Property Organisation (IPO) has been preparing amendments and additions to the exceptions, many of which relate specifically to education. Here is the IPO's rationale for making changes to the exceptions

To amend copyright exceptions for education, *so that copyright does not unduly restrict education and teaching, without undermining incentives to creators. This means widening the current exceptions, applying them to more types of creative works, and more kinds of technology. The aim is to make it easier to use copyright works in education, particularly with modern technology, in order to enrich and enhance the learning environment. This will also provide administrative and other savings to educational establishments, and reduce the risks associated with using copyright materials when delivering education”*

(The italics are the author's to indicate the salient points)

Prior to the amendments, there were undoubtedly a number of restrictions on the exceptions. The amendments now allow us more flexibility in our approach to the use of potential learning and teaching materials. The changes don't give us *carte blanche* to do as we like – it's not a Pirate's Charter, but in the author's opinion, they open up a very useful flexibility that was previously unobtainable.

All the amended and new exceptions are now in force. For the purposes of this relatively brief article, I would ask that you come to terms with the concept of "fair dealing" which applies to the new and amended exceptions. If a learner or teacher would like to use third party material that isn't already covered by ownership, permission or licence, then "fair dealing" may come into use, as long as the copying can fulfill the following criteria

- The copies of the work are for non-commercial purposes
- The work has been "made available to the public", i.e. published
- The copying is done by a person giving or receiving instruction (or preparing for giving or receiving instruction)
- There must be a sufficient acknowledgement, unless this would be impossible for reasons of practicality or otherwise.

Perhaps a diligent and "fair" use of the exceptions would help us think about moving away from the CLA licence, or at least reducing our exposure to it. Are book and reading lists still used to the same extent in colleges? Or are URLs more common? If the latter, please consider using the exception of s29 (Research, private study and text and data analysis for non-commercial research).

This exception allows staff and students to make single copies for their own purposes, as long as they qualify as research or private study for non-commercial research. I would suggest that this pretty much covers a lot of copying that occurs in colleges – if the work that a student requires has a URL, then just supply the link. The student can then choose to read from screen, save for later or print out a copy – none of which has to be covered by, for example, a CLA licence – perhaps worth thinking about.

The Exceptions

Here is a list of the most appropriate exceptions for use in Scottish colleges. You don't have to quote them in any way, you must only be able to justify their use if asked why you have done what you've done.

Section 29 – Research and Private Study

Prior to the amendments, research and private study could only be applied as an exception to literary, dramatic, musical or artistic works. The amendment while still requiring “fair dealing” now opens up all copyright works, so that sound recordings, films and broadcasts are all now available and complement a College's Collective Management Organisation licences such as those issued by CLA, ERA, NLA Media Access and the music licences, for example. The exception applies to the purposes of non-commercial research or study. “Non-commercial” is not defined. The only other requirement for the exception is the need for a sufficient acknowledgement, unless this would be impossible for reasons of practicality or otherwise. Again, there is no definition of “*practicality or otherwise*”

Section 30 – Criticism, Review, Quotation and News Reporting

Interestingly, there is no limit under this section, (with the exception of individual photographs) to the categories of works that are included. This is the exception that newspapers and reviewers use when commenting on new films, plays, music, books etc. The view is that if the copying is done for genuine criticism and review, then there are no limits to the amount that can be copied – as long as they are “fair” – again, no guidance to precise limits in the legislation. Equally, no specific guidance is given to say that it is only newspaper publishers, for example, that can call upon this exception – there's nothing to say that educational establishments couldn't use the exception.

The significant change to this exception is the inclusion of “quotation”. Again this is not defined. Any use of the exception has to be done under the rules of “fair dealing” – so, non-commercial and an acknowledgement. The challenge here is how much, either quantity or quality, of the original work is quoted. Is it one line, one paragraph, one page, one chapter? There is no guidance, no definitions and no interpretations – it's up to the user to determine, and be able to justify what use is “fair.”

Section 32 – Illustration for instruction.

Of all the amendments made in 2014, I think that this is likely to have the most impact. I quote it in full –

“(1) Fair dealing with a work for the sole purpose of illustration for instruction does not infringe copyright in the work provided that the dealing is –

- (a) For a non-commercial purpose
 - (b) By a person giving or receiving instruction (or preparing for giving or receiving instruction), and
 - (c) Accompanied by a sufficient acknowledgement (unless this would be impossible for reasons of practicality or otherwise)
- (2) For the purposes of subsection (1), “giving or receiving instruction” includes setting examination questions, communicating the questions to pupils/students and answering the questions
- (3) To the extent that a term of a contract purports to prevent or restrict the doing of any act, which, by virtue of this section, would not infringe copyright, that term is unenforceable

The exception is short and sweet and could be construed as being open to interpretation. According to this exception, all works, on all platforms (including the World Wide Web, could be used for “illustration for instruction”. There are no further definitions in the exception, other than that anything done under this exception must be done in the spirit of “fair dealing”.

I don’t see anything in this exception that would now prevent a learner or teacher from using tracks from a CD, DVD etc for their learning or teaching. Artistic works could also be used – there are no limits on the categories of works nor is there any mention of uses having to be recorded.

Another useful point to note is clause (3) that says that the exception over-rides any condition in a contract that curtails any action that is now allowed by the exception.

And just to finish up s32, there are no longer any restrictions on the methods of copying – previously, copying had to be done by “non-reprographic” processes, which make life very difficult – or used up a lot of chalk!

Section 34 – Performing, playing or showing work in course of activities of educational establishment *(This exception hasn’t been amended, but I’ve kept it in, since it still has considerable relevance and use)*

For the purposes of instruction, subsection 1 allows the “performance of literary, dramatic and musical works” in front of non-paying audiences of staff and students (parents are not included – as soon as they attend, everything changes)

Subsection 2 allows “the playing or showing of a sound recording, film or broadcast” before the staff/student audience for the “purposes of instruction”. This is the clause that could help a College financially – if the playing of music and sound recordings is only ever done for “the purposes of instruction” then the College would need neither a PRS nor PPL licence. As soon as you move away from the instruction, however, the need for those two licences appears – PRS for the playing of music, and PPL for the playing of sound recordings.

This clause is also the one that a College can use to avoid having to take out licences from either Filmbank or the Motion Picture Licensing Company (MPLC) – as long as the College shows movies only for educational purposes, and owns a copy of the movie, either on DVD or recorded under the terms of the ERA licence, then there is no need for either a licence from Filmbank or MPLC. These are both unnecessary licences, so please don't let yourselves be pushed into taking one – MPLC in particular have been very aggressive in their marketing which seemed to say to Colleges that the licence is compulsory.

Section 35 –Recording by Educational Establishments of Broadcasts

This is still effectively, the ERA clause. Without the ERA, educational establishments would be able to record, store and distribute any broadcasts they were able to source. Sub section of this exception, however, states –

“Acts which would otherwise be permitted by this section are not permitted if, or to the extent that, licences are available authorising the acts in question and the educational establishment responsible for those acts knew or ought to have been aware of that fact”

The good news is that you can still record, store and distribute broadcasts, but they must be those that are licensed by ERA and for which you must pay an ERA licence.

If you do come across any broadcasts that you can record and distribute and which you think will be of use to your learners, and which aren't covered by any of the ERA stakeholders, then you are allowed to do so, under the terms of this section, with no requirements for surveys or returns to anyone on the uses of the broadcasts.

Section 36 – Copying and Use of Extracts of Works by Educational Establishments

This clause was previously entitled “Reprographic copying by educational establishments of passages from published works”, so you can see that there is a significant change simply in the removal of the word “reprographic”, thereby making any form of copying legitimate – i.e. from any platform – the restriction of having to use a photocopier has been removed.

The exception may still be called the “CLA” clause (although like section 35 and ERA, there is no specific mention of the actual licensing agency) but I think there are some interesting changes that Colleges should be aware of.

The exception covers all works with the exception of broadcasts (see s35) and “an artistic work which is not incorporated into another work”. I think this is an attempt to try to prevent the use of images in particular, because the next restriction goes on to say:

“not more than 5% of a work may be copied under this section by or on behalf of an educational establishment in any period of 12 months, and for these purposes a work which incorporates another work is to be treated as a single work.”

However, if a lecturer or teacher would like to use, let's say, an image, and the image isn't in a text covered by the CLA licence, then I would suggest that you go back to

s32 – Illustration for the purpose of instruction, and consider the terms of that exception. I can't see anything in s32 that would restrict you to any category of work, nor any amount, nor the need for any recording of what you're doing – always, as long as you can justify that your “dealing” is “fair”.

Going back to s36, “a work which incorporates another work is to be treated as a single work”. Does that mean that I could copy (no more than 5%) part of a soundtrack from a DVD, or sections of the DVD, or images, sounds etc. from a CD? There is no requirement for any activity recording so that if you copy from a “work” to help your learners, is there anything to stop another lecturer somewhere in the same establishment using the same work for similar purposes?

Conclusion

In conclusion, and I have to remember that I am a consultant and I would ask you to remember that I am not qualified to give legal advice, I think there are opportunities in the exceptions for learners and teachers to make use of works that were previously denied or required written permission if their use fell outside the terms and conditions of a collective licence such as those available from CLA and ERA. In summary:

- All works are now available – print, CD, DVD, artistic, music, sound recordings
- All platforms can be used – analogue and digital
- Copying is no longer restricted to “reprographic” means
- There are no requirements for recording any copying activity
- Contract over-ride included
- In section 30, there is no stated limit on the quotation, other than “is no more than is required by the specific purpose for which it is used”
- The challenge is the definition of “fair dealing”

So, in my opinion, it comes down to the following

- Definition – and there are few specific definitions in the exceptions
- Interpretation – this could be subjective, but who's to say which interpretations are wrong and which are acceptable?
- Level of risk – what's your establishment's appetite for risk?
- Level of monitoring – there are no prescribed levels
- Level of education – are the amended exceptions going to be used any more/better than previously – will the right people know what to do/what not to do?

As previously stated, the amendments to the exceptions are not to be taken as the start of a copyright free-for-all. FE colleges, with all teachers and learners, must respect copyright – we are, after all, producing the next generation of creators and users of copyright works.

Under the exceptions, the “dealing” is to be “fair”, but underpinning them, there is always the point that - uses that would undermine sales of teaching materials will still need a licence.

Throughout my copyright life, I have often been asked for a simple principal which would answer all questions – that’s like asking what the answer is to life, the universe and everything is – we all know that the answer to that question is 42 (please read the “Hitchhiker’s Guide to the Galaxy” for further information), but as simply as I possibly can, here’s my single thought – “if you press the button to copy, or the mouse to scan, is anyone going to lose income from your actions?”

To follow on from the preceding information on exceptions, here is a fictitious case study for you to work through. This piece of work was originally developed as a question and answer part of a copyright workshop that I have delivered on a few occasions. I have since developed it further with additional notes and thoughts – and suggested answers to the questions posed in the scenario below.

The scenario – which you can easily adapt to any similar set of circumstances.

Hello – I’m working on a learning package for learners taking a module on personnel management and I plan to use the following resources in the module that I intend to load to my college’s VLE

- A recording of a song by Amy McDonald – “Troubled Soul” (the lyrics explore personal feelings and set a context for the module)
- A 3-minute excerpt from the movie “Apollo 13” – the clip where the line “Failure is not an option” is delivered
- An episode of “Countryfile”, broadcast by the BBC and showing how some farms, food distributors etc have developed innovative approaches to personnel management
- Three Powerpoint presentations, which I have already devised (and used) containing sound clips, movie clips and a number of images taken from various internet sources
- A series of “Peanuts” cartoon strips which highlight social interaction, relevant to the context of my module in a light-hearted, engaging fashion
- A YouTube clip of Prof Smith from Superduper University (USA) delivering an excellent keynote speech at a recent international conference on the way in which staff working on farms etc are managed
- Video clips from a variety of TV broadcasts and DVDs from the College library
- A clip from a Video Arts training film highlighting how badly a Personnel Department in a company deals with someone who is a persistent absentee to the detriment of their co-workers
- Clips from videos I have made during visits to assess students on placement in local and regional company personnel departments.

- And then there are the images that I've seen on a number of image library sites on the web – Getty, Corbis, etc – just thought I'd cut and paste.

There won't be any problems, will there?

And the answers to the scenario?

Please note that these are suggested answers only. In my opinion, the amended exceptions offer more flexibility than previously. They do not offer "carte blanche" and individual users have to use their best judgement that what they are planning to do conforms with the concept of "fair dealing" and appropriate risk management should also be in place. However, the government has quite clearly stated that the amended exceptions are there to help users for educational purposes and to remove barriers previously in place.

With care and judgement, the exceptions will undoubtedly make a difference. We will, over time and usage, get a better indication of how legal minds interpret the exceptions, but rather than wait and be disappointed, why not use them and gently push the boundaries outwards? So, back to the original questions, and my suggested answers

Hello – I'm working on a learning package for learners taking a module on personnel management and I plan to use the following resources in the module which I intend to load to my College's VLE

- A recording of a song by Amy McDonald – "Troubled Soul" (the lyrics explore personal feelings and set a context for the module) –

Answer - s32 and/or s30

- A 3-minute excerpt from the movie "Apollo 13" – the clip where the line "Failure is not an option" is delivered. S30 – is 3 minutes "fair" – is the extent of the quotation than is required for the specific purpose for which it is used?

Answer - If the establishment has an ERA licence and has recorded this movie, then there are no issues – any amount can be used. If the establishment has the DVD, I would suggest that 3 minutes is fair

- An episode of "Countryfile", broadcast by the BBC and showing how some farms, food distributors etc have developed innovative approaches to personnel management.

Answer - If the establishment has an ERA licence and has recorded this programme, then there are no issues – as much as needed can be used. If the establishment doesn't have the programme, it can contact British Universities Film and Video Council (BUFVC) using the Television and Radio Index for Learning and Teaching (TRILT)

- Three Powerpoint presentations, which I have already devised (and used) containing sound clips, movie clips and a number of images taken from various internet sources.

Answer - These will have to be checked and perhaps cleared for use depending on the content – but it is possible that s30 and s32 could be used to justify the inclusion of the content

- A series of “Peanuts” cartoon strips which highlight social interaction, relevant to the context of my module in a light-hearted, engaging fashion

Answer - could be available under your CLA licence if the strips are in a “Peanuts” book – otherwise permission will have to be asked for unless, in your judgement, s30 and s32 apply

- A YouTube clip of Prof Smith from Superduper University (USA) delivering an excellent keynote speech at a recent international conference on the way in which staff working on farms etc are managed

Answer - what’s to stop you? (Other than your establishment blocking YouTube!!)

- Video clips from a variety of TV broadcasts and DVDs from the College library.

Answer - ERA licence and/or s30 and s32. Also possible to use s36 “copying and use of extracts of works by educational establishments” This, along with any other copying under the exceptions, has to be considered “fair dealing” and must not be more than 5% of the work (your judgement on how this is measured)

- A clip from a Video Arts training film highlighting how badly a Personnel Department in a company deals with someone who is a persistent absentee to the detriment of their co-workers.

Answer - If you own the training film, then I see no reason why you couldn’t justify the use of a clip under s30 or s32. If it ever came to the push, I would suggest that s32 would be the better justification – if you were ever asked to justify this use. If you don’t own a copy of the film, then permission would have to be asked.

- Clips from videos I have made during visits to assess students on placement in local and regional company personnel departments.

Answer - Release forms from the students indicating that they were happy for their images etc to be used. May also be politic to ask the companies for a release as well if the videos were recorded on their premises.

- And then there are the images that I’ve seen on a number of image library sites on the web – Getty, Corbis, etc – just thought I’d cut and paste.

Answer - This is one of the most contentious areas in the exceptions. The legislation makes no distinction about types of works nor the platforms where they are based – there is also a contract override provision which states that copying may still go ahead, even if there is a term in the contract which would prevent the copying – as long as the copying you want to do isn’t infringing copyright under the terms of the relevant exception. If you are in any doubt

about the Getty, Corbis images etc, then there are many other free, copyright-cleared sites available such as Flickr CC and some of the Jisc collections

Final Note on exceptions

If you choose to make a copy, under the terms of any of the exceptions, you must make your own judgement (or contact Alan Rae at alan@copyrightscotland.co.uk who will be happy to give further advice) and the copying must be under “fair dealing” – which is open to your interpretation! You don’t have to quote any of the sections if you choose to use them for the justification of your copying – you would only be asked to give your reasoning for the copying if you were ever challenged about it. The only recognition you have to give, because it’s part of the fair dealing process, is to give an acknowledgement where practical.

Acknowledgement is extremely important in using third party materials, especially if the works are not being used under the terms and conditions of the major licensing agencies. In an ideal world, all copying would be done under a licence from an agency, permission from a creator to an individual user or establishment, or under one of the legal exceptions mentioned in this section.

When carried out under a legal exception, it is strongly advised that an acknowledgement is given – this doesn’t mean that a user can merrily copy multiple works and think that there will be no comeback from rights holders. What the acknowledgement does is recognise that the work, properly identified by title, date, page number (if applicable), creator’s name, publisher’s name etc. is being attributed by the user and not passed off as their own work. An acknowledgement also gives other users an indication of the provenance of the work for future reference.

For example, if someone wanted to copy a text which is excluded either by the author or publisher under the CLA licence, it is still possible to make a single copy, under either sections 29 or 30 of the Copyright Act, (the “fair dealing” clauses) as long as an acknowledgment is made. Interestingly, both clauses of the Act say that a “sufficient acknowledgement” is to be given, but there is no indication of what “sufficient” entails.

Please use the exceptions and also please ask the author if you have any doubts about what you, your colleagues or your students would like to do.

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