The final legislation enacting a new exception to copyright for private copying into UK law has been published and we believe it could still have a negative impact on the audio-visual industry in the UK. In particular, we believe the exception could lead to a drop in demand for licensed services such as UltraViolet and Disney Movies Anywhere that already enable consumers to access digital copies of their content from multiple devices including tablets, smart phones and laptop computers.

Further to this, and despite extensive consultation, there are also still areas where the published regulations appear to be incompatible with EU law and the UK’s obligations under the Berne Convention and later international treaties such as the TRIPS Agreement and article 10 of the WIPO Copyright Treaties. This note focusses on these potential legal incompatibilities and on the potential for consumer confusion arising from the exception.

The position of the film and TV industry is unique and markedly different from other sectors in terms of licensing arrangements and the expectations of consumers in terms of the desire for copying. We remain concerned that the potential impact on the film and TV industry as a result of the new exception has not been properly considered by Government in the course of the consultation, technical review and impact assessment.

There remain a number of questions that need addressing by Government regarding the detail of the final legislation. These are outlined below.

**Consumer confusion**

The Government has stated that the purpose of the law is to reduce consumer confusion and address situations where consumers were already making copies and thereby undermining respect for the law. We believe that the new exception will actually increase consumer confusion by introducing new concepts where it will be difficult for consumers to determine whether or not they are in compliance with the law.

Specifically, the new private copying exception carries the important caveat that rightholders can continue to apply technological anti-copying measures (TPMs) to products such as DVDs and downloads. It will remain illegal to circumvent such measures, even when they stand in the way of making the very private copies consumers are promised in the exception. Because this will be inevitably confusing to consumers, Government must do everything in its power to properly explain it. This is currently far from the case, particularly in light of the statement made in the consumer guidance notes published by the IPO that “The changes will mean that you will be able to copy a book or film you have purchased for one device onto another without infringing copyright.” The vast majority of films purchased legally in the UK are delivered either via DVDs or digital downloads which have TPMs applied and cannot therefore be copied under the exception, as implied in the IPO guidance notes.

Furthermore, while consumers have the right to appeal to the Secretary of State if they feel TPMs are unreasonably limiting their ability to exert their right under the exception, this process will also include important caveats such as the commercial availability of the product in question in a digital format. However, it is likely that many consumers will not be aware of the nature or limits of this appeal
process, and they will also need to understand why these conditions are a necessary and appropriate part of the appeal process.

We recommend that the Government / IPO amend the explanatory memorandum and consumer guidance notes to (i) clarify that right holders can continue to apply TPMs (ii) clarify that it remains illegal to circumvent TPMs which are routinely applied to film and TV products such as DVDs, and (iii) to explain more fully the basis on which an appeal can be denied.

Extension to the cloud

The exception will enable people to make copies of films or TV shows they have acquired when putting them into cloud storage services. While the exception now clarifies that only the individual who lawfully acquired the copy may legally access the relevant content from the cloud storage services – a welcome change from the draft legislation – the extension of the exception to cloud services remains potentially problematic. There are private copying exceptions in other EU countries but none makes a provision such as this.

Extension of the exception to cloud services still raises serious questions about its compatibility with EU law and indeed international law. This is because in reality cloud storage services may be involved in facilitating the making of copies for either direct or indirect commercial gain (subscription fees and/or advertising revenue), contrary to Articles 5(2)(b) and 5(5) of the EU Copyright Directive. This would be problematic because the ‘three-step-test’ - which has great significance under international law and is implemented in Article 5(5) of the EU Copyright Directive - expressly requires that exceptions (i) should be confined to “certain special cases.”, (ii) do not conflict with a normal exploitation of a work”, and; (iii) do not unreasonably prejudice the legitimate interests of the author.

Question: Can the Government confirm that the exception will not provide direct or indirect commercial benefit to cloud services and they should not therefore be able to make or facilitate the making of copies under the exception? Assuming the Government can so confirm, can they also advise how this limitation on the use of cloud services will be explained to consumers, and how it will be monitored and enforced?

Moreover, the new exception ignores how so called cyberlockers actually function in practice. By creating a potential “private copy” defence where rogue services could claim “we can’t tell which content stored here is covered by the exception”, the exception may inadvertently encourage rogue services to establish in the UK. Rightholders will not be in a position to confirm whether copies were lawfully uploaded into the cloud nor will they be able to confirm whether access was properly limited to the original owner.

This could seriously complicate rightholders’ ability to prove that such service providers authorise the infringing activities of their paying customers. Indeed, their practices, which will become even more difficult to police, will compete directly with new services licensed by those that actually invested in the making of content.

Question: How does the Government intend to ensure rogue cloud services are effectively policed in the UK in light of these complications that will result from the exception?

Treatment of downloads is unclear
The exception applies to all copies that are ‘lawfully acquired on a permanent basis’ and the Government has specifically provided that this will include permanent downloads. However, permanent downloads are delivered by on-demand services – just like temporary downloads. Article 6(4)(4) of the EU Copyright Directive provides that Member States are not in a position to enforce a private copying exception (and other exceptions) in the on-demand space, essentially excluding such content from the scope of such exceptions.

On-demand content in this context is defined under the Directive as content that is made available to members of the public on agreed contractual terms at a time and place individually chosen by them. Permanent downloads should still come under this definition of on-demand content and their specific inclusion in the scope of the exception is not only misleading but also appears to be incompatible with the Copyright Directive to the extent that Article 6(4)(4) is frustrated.

Question: Can the Government confirm that permanent downloads continue to fall under the definition of 'on-demand' content outlined in Article 6(4)(4) of the EU Copyright Directive, i.e. it is content that is made available to members of the public on agreed contractual terms at a time and place individually chosen by them?

Question: If this is the case, can the Government therefore confirm that all on-demand content including permanent downloads can continue to utilise technological protection measures and cannot be subject to the Secretary of State intervention mechanism.

The exception restricts contractual freedom

The exception still appears to create a conflict between the new ban on contractual overrides and the above mentioned Article 6(4)(4) provision which prevents enforcement of exceptions in the on-demand space. The ban on contractual overrides potentially renders Article 6(4)(4) unworkable since that EU-level provision is specifically tied to the existence of “agreed contractual terms”. It is unclear how the contractual override provision sits in relation to this Article of the EU Directive.

Question: Can the Government confirm its understanding that the contractual override provision in the new private copy regulation\(^1\) does not affect Article 6(4)(4) of the EU Copyright Directive\(^2\) and therefore should not apply to on-demand content?

Question: Has the Government notified the European Commission of the detail of the private copying exception or sought any advice from the Commission regarding the compatibility of the exception with EU law?

\(^1\)New article 28B(10)) of the Copyright Designs and Patents Act

\(^2\)As provided for in the private copying regulations under new section 296ZEA(7) of the Copyright Designs and Patents Act