Dear Sir/Madam,

Thank you for the reflection paper. Whilst there are a number of issues that I could comment on, I will confine my initial comments to the following 5 points.

(1) IMPORTANCE OF THE FAIR DEALING EXEMPTIONS

The Importance of the Fair Dealing Exemptions

The reflection paper notes, in section 5, the importance of closely examining the exemptions.

Could I request that close attention is given to the *fair dealing exemptions*, as these are likely to play a significant role in making the law workable?

The fair dealing exemptions are of particular relevance when considering on-line use such as on blogs and the like, where people need to comment on or review the work of others.

The fair dealing exemptions play an important role in ensuring a reasonable amount of freedom of expression. They also lift an administrative burden from consumers, commercial users, rights holders and others in that, if a use falls within the fair dealing exemptions, the burden of obtaining (and giving) rights clearance is avoided.

The fair dealing exemptions are also, for most people, a main line of defence. Consider, for example, fair dealing of copyright works when they are used in PowerPoint presentation or in comments on blogs. The exemptions that should allow harmless use of a work of this kind are the fair dealing exemptions. They are, therefore, a backbone defence.

Burdensome Restrictions in Fair Dealing Exemptions: Requirement to Identify the Author

Unfortunately, the fair dealing exemptions are heavily restrictive. For example, article 5(3)(c) and (d) of Directive 2001/29/EC purports to restrict some of the main fair dealing defences to situations where:

"...the source, including the author's name, is indicated..."

(UK law is obviously similar – see s.30 of the Copyright, Designs and Patents Act 1988 and see also the definition of "sufficient acknowledgement" in s. 178.)

Two things should be noted:

(1) Acknowledgment of the author's name is particularly onerous. As the reflection paper notes, a bewildering array of rights exist in relation to copyright works and these can often be owned by parties who are not the creators of the content. The requirement to acknowledge the author is unhelpfully restrictive.

(2) There are some instances where an acknowledgement of the source may be important, some where it is not important and some where it may actually be positively harmful to the source. But this is something that a Court can evaluate in weighing up whether the dealing was fair or not – it is unhelpful to saddle this important exemption (which is one of the backbone defences in ensuring freedom of expression) with the requirement that, in every case, an acknowledgement is made. This is particularly pertinent in considering on-line use of copyright material. Consider, as just one example, somebody informally commenting on a blog about a conversation that he had overheard. Assuming that the requirements for copyright protection (such as fixation and the like) are met, is it really right that he has no

defence to copyright infringement unless he indicates "the source, including the author's name"? And what if the person he quoted would not want to be publicly named?

It would be preferable if the legislation stated that the requirement to give a sufficient acknowledgement was, simply, one of the factors that the Court could take into account in determining if the use was fair – rather than purporting to be an inflexible requirement to apply in every case and that restricts the scope of this important exemption.

Burdensome Restrictions in Fair Dealing Exemptions: Unpublished Works

Further, the fair dealing exemptions are even more restrictive when unpublished works are considered. For example, articles 5(3)(c) and (d) of 2001/29/EC contain, respectively, requirements to the work in question having been "published" or "made available to the public". (See also s. 30(1A) of the UK's Copyright, Designs and Patents Act 1988.)

Consider, for example, an innocuous note written in 2009 that was not made available to the public. Suppose the author of the note lives for another 50 years and then dies. The copyright will not expire for 120 years and, in the meantime, the fair dealing defence arguably does not cover the discussion of the contents of the note for criticism or review.

(Note that this restriction cannot be justified simply by saying that the note might have been confidential. First, there are separate laws of confidentiality and it is hard to see why the law of copyright needs to deal with this situation (beyond the requirement that the dealing must be fair). Second, the wording of the restriction in articles 5(3)(c) and (d) is not expressed in terms of whether or not the material is confidential – they merely refer to whether the work has been made available to the public or not.)

Again, it would be preferable if the nature of the work (whether it was published or unpublished) was simply one factor in determining if the use was fair.

Other Fair Dealing Exemptions

The other fair dealing exemptions are also worth reviewing closely. As mentioned below, the incidental inclusion defence is, in the UK, unhelpfully narrow.

(2) CLASSIFICATION OF DIFFERENT STAKEHOLDERS

The reflection paper considers the position of consumers, commercial users and rightsholders.

However, it is important to remember that there are many organisations – churches, small charities, community groups etc, that the law often ends up treating as commercial entities but which simply do not have the resources to negotiate through the thicket of rights and problems that arise in relation to copyright.

I mention this as I am concerned that solutions that attempt to draw a neat distinction between (on the one hand) private, non-commercial use and (on the other hand) commercial use may end up imposing too harsh a burden on small, charitable organisations.

(3) REMEDIES IN CASES WHERE THE INFRINGEMENT IS TRIVIAL

One matter that affects all interested groups (be they consumers, commercial users, small charities, rightsholders etc) is that copyright is actionable even where there is no significant harm and carries with it the threat of an injunction.

It is not difficult to imagine situations where the problems and upheaval caused by an injunction far outweigh any damage caused by trivial infringements.

This is not necessarily even good for rights holders. Many rights holders create copyright works that themselves include other people's work. Consider, for example, a film which, for a short moment, depicts another party's copyright work. In the UK, the "incidental inclusion" defence (see s. 31 of the Copyright, Designs and Patents Act 1988) has been interpreted in a restrictive manner. If the fleeting appearance of the work is such as to fall foul of this narrow defence, then the filmmaker could have committed a technical infringement of copyright. An injunction could potentially block further screenings of the whole film even though the infringing material only appeared on screen for an instant.

Consideration should be given as to how to deal with this problem. Further, on-line use (which the reflection paper appears to have closely in mind) is exactly the sort of arena where trivial infringement of copyright can take place.

This is not, of course, to ignore the value of the injunction. If an infringer refuses to stop their infringing acts, it is obviously a valuable remedy. The concern remains, however, that one of the reasons that the law works at the moment is simply that parties often do not enforce technical or trivial breaches of copyright. However, when a party decides to take action over a technical or trivial breach, the effects can be chilling, as the threat of an injunction can loom large.

(4) DURATION OF COPYRIGHT

The issue of duration of copyright does need to be addressed.

When business people make contracts (even over, for example, valuable confidential information) they impose time limits that are reasonably foreseeable – e.g. 5-10 years. To have a right that extends for 70 years from the death of the author is wholly anomalous. Why should, for example, a brief e-mail written by a young man be protected for over a 100 years?

The requirements for obtaining copyright protection in a work are extremely low (much lower than, for example, the law of patents – which requires (for example) an inventive step over the prior art). The smallest comment posted in an on-line chatroom may therefore be a copyright work. Yet the law deems this creative effort worthy of protection for unworkably vast periods of time. The duration of copyright does, therefore, need to be looked at very seriously indeed.

(5) LICENSING AND COLLECTING SOCIETIES

It should be emphasised that licensing will not solve the problems with the current copyright legislation. The legislation has, as the reflection paper notes, created strong exclusive rights with unclear boundaries for exemptions and, further, has mandated certain rights for rights holders but merely permitted certain exemptions. In such circumstances, there is a duty on legislators to fix what has gone wrong.

I hope and pray that the Commission's work in this area may lead to a better copyright law.

Dominic Hughes.
(For the avoidance of doubt, the comments above are made on my own behalf and are not made on behalf of the Chambers to which I belong.)