Creators' Rights Alliance technical response to proposed changes to exceptions to copyright – tranche 1

17 July 2013

The Creators' Rights Alliance was pleased to hear Sean Dennehey of the Intellectual Property Office confirm at the Westminster Media Forum on 9 July that Viscount Younger will be taking account of comments on the proposed changes to exceptions to copyright that go beyond the very narrow scope set out by the IPO.

Nevertheless, for clarity we are submitting general comments on the policy separately from this technical response to the wording of the proposed Statutory Instruments, in which we will as far as possible remain within the restrictions imposed by the terms of the "technical consultation".

As you very likely know, the Creators' Rights Alliance is an affiliation of organisations representing the interests of over 100,000 original creators in a wide range of fields – including music, illustration, journalism, photography and writing. Most of the 100,000 creators we represent make their living by licensing copyright and performers' rights in their work.

So-called "fair use"

It is explicitly not part of the policy laid out in "Modernising Copyright" to import the US concept of so-called "fair use" into UK law. This is in principle welcome. The ill-defined natures of the proposed new and widened exceptions, however, have the effect of introducing such a scheme by the back door.

Particularly from the point of view of an individual creator, an ill-defined exception imposes legal uncertainty and enforcement costs. The practical effect is that a would-be infringer can proceed on an "await claim" basis, and only if the creator can find the up-front costs of a legal challenge will it be possible to determine whether the use was in fact "fair".

In fact, the proposals would in some respects leave creators in a worse legal position than they would be under US "fair use" doctrine because even the four vague criteria set out therein[1] are not available to guide the courts.

The CRA predicts that, were the proposed Statutory Instruments to be enacted as drafted, the courts would be burdened with a series of cases in which those minded to treat the changes to the law as "loopholes" would be challenged – very likely by unrepresented creators, with all the financial cost to the legal system and the risk to justice that this would entail. Parallel proposed changes to civil legal aid increase this risk.

Ill-defined exceptions thus harm the creative economy, whether by diverting resources from the creation of new works or by fostering acquiescence in diversion of income to enterprises that would probably be found illegal, were anyone to have the resources to obtain a ruling.

In this respect, three of the proposed Statutory Instruments treated here most certainly do not implement the government policy set out in "Modernising copyright" of prioritising growth.

1 17 United States Code § 107 - *Limitations on exclusive rights: Fair use* <http://www.law.cornell.edu/uscode/text/17/107> accessed 15/06/2013

Contract override

Without prejudice to our view that the contract override provisions of the proposed Statutory Instruments may not legitimately be implemented in the manner suggested, we offer an indicative amendment to each to assist in an eventual solution that does not have the side-effects, uncovered in consultation meetings, of invalidating contracts far beyond the scope envisaged in government policy.

The provisions as drafted also introduce confusion and uncertainty by referring to "any contract" when the intention of government policy is clearly to deal only with contracts governing end-users such as a major national library. Behind this end-user contract, of course, is a chain of others. The effect of the draft presented would appear, for example, to invalidate any clause in any contract in which a creator – an illustrator, for example - warrants to a publisher that their work is original and exclusive – since this would interfere, for example, with any exception permitting parody. Typically such a contract warranty would attract an additional fee - often several times the fee for non-exclusive use of the work. Would the publisher then be entitled to reclaim the difference in the event of a parody appearing and breaking exclusivity, since the warranty term would be voided?

Our indicative proposed amendment does not finally solve this issue, but would at least flag to the courts that Parliament, in passing the measure, did not intend such an effect.

New Exception for Private Copying

The Creators' Rights Alliance has general questions about the policy which it is proposed to implement, which we raise separately in our general response.

We welcome the announcement of a new Impact Assessment on the private copying exception: but the fact that this has not yet been published naturally introduces difficulties in providing a full assessment of the extent to which the proposals accurately implement stated government policy.

The proposed exception fails to make sufficiently clear:

- that the beneficiary of the exception must be a natural person;
- that lent, rented or borrowed copies may not be copied under the proposed exception;
- that "lending" of the copy made under the exception is not permitted – were it to be permitted, all manner of loopholes would be eagerly sought by so-called "file-sharing" services that make money selling advertising on the strength of presenting illegitimate copies of creators' work;
- that the exception should not apply to copies obtained under other exceptions, for example where a database technician has legitimate access to copies made for "data-mining"; and
- that if a personal copy is stored "in the cloud", it must be in a place accessible only to the beneficiary.

The final point is particularly important: without it, the proposed exception would encourage so-called "sharing" on a large scale, through the exchange or even sale of passwords to "cloud" storage services.

The Creators' Rights Alliance therefore supports the wording proposed by the Publishers' Association, which we reproduce below with permission:

(1) After section 28A insert:
“28B Private copying

(1) Copyright is not infringed by an individual where thatan individual uses a private copy of a copyright work lawfully acquired by him by authorisation to make a further private copy of that work provided that:

(a) the further copy is made exclusively for that individual’s own private use for ends that are neither directly nor indirectly commercial;

(b) the private copy from which the further private copy is made has been acquired and is held by the individual on a permanent basis (for example it is not a copy that is rented to the individual for a specified period or borrowed from a library);

(c) The provisions of the first and second subparagraphs shall not apply to works or other subject-matter made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them;

and

(d)[(c) the making of the further private copy does not involve the circumvention of effective technological measures applied to the copy from which it is made.]

(2) Copyright is infringed where an individual who has made a further copy of a copyright work pursuant to subsection (1):

(a) permanently transfers or provides access to such further the copy to another person; or

(b) permanently transfers the original copy from which the further copy it is made without destroying the further copy;

or

(c) the making of a further private copy involves the circumvention of effective technological measures applied to the copy from which it is made.

(3) Nothing in subsection (2) prevents an individual from storing a further private copy made pursuant to subsection (1) in an electronic storage facility accessed by means of the internet or similar means, where that facility is provided for and accessible for his sole private use.

(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 would be in breach of a term of any end-user contract, that term is unenforceable.”.

(2) In Schedule 2 to the Act, after paragraph 1A insert:
“Personal Private copying

1B.—(1) Where copyright in a copyright work is not infringed by the making of a copy of that work in the circumstances set out in section 28A, the making of such a copy does not infringe any rights in the work conferred by this Chapter.

New Exception for Parody

Nowhere in the previous consultations, nor in the impact assessments, are "pastiche" or "caricature" mentioned, that we can see. The proposal therefore does not meet stated policy.

Officials state that the definition of "parody" – or for that matter of "pastiche" or of "caricature" – will be a matter for the courts. Nowhere in the previous consultations, nor in the impact assessments, do we find mention of the likelihood that the proposed exception would, if enacted, be exploited by "chancers". To impose on creators (and other rightholders) the resulting legal uncertainty, and the cost burden of financing lawsuits to gain a definition of "parody", would be contrary to the conclusion – one might call it the "prime directive" – of the "Modernising copyright" document, which is to "ensure copyright is a force for growth across the economy".

We submit that it is essential to offer a definition of "parody" on the face of legislation, but find ourselves hampered by the same difficulty clearly encountered by the drafters: that any such definition in the sober argot of law is bound itself to descend into parody.

The Creators' Rights Alliance therefore supports the wording proposed by both PRS for Music and by the Publishers' Association. We have a further suggestion to ensure that any new exception meets the stated policy objective that "Existing protection for moral rights, including the right to object to derogatory treatment, will be maintained"[2] with the addition included below in red:

> **Parody**
> 1.—(1) After section 30A insert:
> **"30B ~~Caricature, p~~Parody ~~or pastiche~~**
>
> (1)Copyright in a copyright work is not infringed by any fair dealing with the work for the purposes and subject of ~~caricature,~~ parody ~~or pastiche~~, provided that~~.~~:
> (A) Uses that would normally be licensed or otherwise exploited, or unreasonably prejudice the legitimate interests of the rightholder, are not fair dealing.
> (B) Nothing in this Section is with prejudice to an author's moral rights.
> (C) The right of the author or performer to identified shall be presumed to have been asserted for the purposes of this Section; and
> (D~~C~~) Use of the work for purposes under this Section must be accompanied by sufficient acknowledgement
>
> (2) To the extent that ~~the term of a contract purports to restrict or prevent~~ the doing of any act which would otherwise be permitted under this section would be in breach of a term of any end-user contract, that term is~~-~~
> unenforceable.".

Our reason for suggesting a presumption of assertion of the moral right is that the government's stated position that copyright law should be clarified and that to impose on beneficiaries of any parody exception the requirement to ascertain whether it has in fact been asserted would be to introduce enormous complexity. As the Creators' Rights Alliance has reminded government in the course of previous consultations, ascertaining this may require locating consulting the original invoice for the licence fee for the first use of a work.

2 "Modernising copyright" p 4

New Exception for Quotation

The Creators' Rights Alliance strongly supports the proposal made in consultation meetings that the existing exception for criticism and review be retained unchanged. It works well.

If the government want to bring in a new exception for quotation, we suggest that it provide a draft, with an impact assessment and a detailed statement of rationale, and an adequate period for consultation on it.

In the event that this suggestion is not taken up, we draw your attention to the inconsistency between the proposed widened exception for quotation and the existing exception for the reporting of news and current affairs. In debate on the Copyright Designs and Patents Act 1988 Parliament recognised that the notion of "quoting" a photograph is generally incoherent, and photographs were therefore excluded from that exception.

One – probably the only – instance in which "quoting" an illustration or photograph may make sense is the reproduction of the cover of a reviewed book with a review of the book. That'd be a doubly-embedded image. Custom and practice, if not necessarily the letter of the law, holds this to be covered by the existing exception for criticism and review.

The Creators' Rights Alliance therefore proposes that in the event that the government decides to press on with a widened exception for quotation, the amendment below should be made to the Statutory Instrument.

Further, the inclusion of the phrase "such as" introduces uncertainty which is no part of the policy set out in "Modernising copyright". The phrase is drawn from the Information Society Directive and, as others have noted, is a directive to member state governments implementing this, not a template for law. Our wording below of tighter definition is a placeholder, because we are not convinced that a widened exception is necessary.

30A Quotation

(1) Copyright is not infringed in a copyright work by the use of a quotation from that work for purposes equivalent to~~such as~~ criticism or review provided that:

(a) the work has already been lawfully made available to the public;

(b) use of the quotation is accompanied by sufficient acknowledgement (where this is possible); and

(c) the use of the quotation is fair dealing with the work.

(2) Use of a quotation from a copyright work is not fair dealing unless:

(a) the use of the quotation is in accordance with fair practice; and

(b) the extent of the quotation is required by the specific purpose for which it is required.

(3) Use of an illustration or photograph under this Section is permitted only when it forms part of the cover or packaging of an object or work being criticised or reviewed, for the purposes of illustrating that review.

(4)~~(3)~~ 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 would be in breach of a term of any end-user contract, that term is unenforceable.".

In the event that the government decides to press on with a widened exception for quotation, it must specify what uses it has in mind and, again, allow an adequate period for consultation on the new wording.

Exception for public administration

The Creators' Rights Alliance is exhausted and has no comment on this.

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