



THE BRITISH PHOTOGRAPHIC COUNCIL

British Photographic Council
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c/o Redeye, the Photography Network
CFCCA
Market Buildings
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To:

The Lord Stevenson of Balcamara
House of Lords
London SW1A 0AA

28 July 2014

Dear Lord Stevenson

The Copyright and Rights in Performances (Personal Copies for Private Use) and (Quotation and Parody) Regulations 2014

We are writing to you concerning the above regulations due before the House of Lords on 29 July.

The British Photographic Council (BPC) represents over 20,000 photographers via 13 member organisations including trade associations, unions, institutes and networks. They are: Association of Photographers; British Institute of Professional Photography; British Press Photographers' Association; British Society of Underwater Photographers; Bureau of Freelance Photographers; Chartered Institute of Journalists; Editorial Photographers UK & Ireland; Master Photographers Association; National Association of Press Agencies; National Union of Journalists; Outdoor Writers and Photographers Guild; Pro-Imaging; and Redeye, the Photography Network. Many photographers are small or one-person businesses and will be impacted by these regulations.

The BPC supports concerns over the legality of these draft regulations that have been raised by various bodies such as the British Copyright Council, and our members including BAPLA, NUJ, AOP, BIPP, EPUK, BPPA and Redeye. We believe the Government would be acting ultra-vires if these regulations were to be implemented as drafted.

Private Copying

The British Copyright Council said in their letter of 31 March 2014: "The private copying exception does not include a fair compensation mechanism as required by EU law (Article

5(2)(b) Information Society Directive); the harm by private copying is neither minimal nor priced in. Additionally, the Government does not address the concerns on harm which have been put forward by a variety of rights holders during the Technical Review process”.

Since the BCC’s letter the position that fair compensation is required under the Information Society Directive has been supported in the CJEU case C 435/12 ACI Adam.

Both the above regulations contain subsections on the unenforceability of contractual overrides. The BCC said: “Several exceptions contain clauses which state the unenforceability of contractual overrides of exceptions; this is not covered by the Information Society Directive and cannot be introduced by secondary legislation under the ECA. In fact, the Information Society Directive expressly states that it is without prejudice to provisions concerning the law of contract (Article 9)”.

Many photographers that we represent will lose income from private copying, notably wedding and social photographers.

Quotation and Parody

The BCC also states that the Parody and Quotations exception falls outside the rights and exceptions provided in the Information Society Directive and therefore cannot be introduced by secondary legislation under the ECA.

In addition, and of particular concern to photographers, the Quotation exception goes beyond what is permitted under the Information Society Directive. The BCC said:

“The introduction of an unrestricted exception for quotation exceeds what is permitted under the Information Society Directive, which refers to quotations ‘for purposes such as criticism or review’; without these limitations to its purposes the exception is too broad to comply with the Directive. Additionally, Article 5(5) Information Society Directive provides that exceptions ‘shall only be applied in certain special cases’. Case law states that this means that exceptions must have a narrow scope. The exploitation of parts of copyright works is often as important as the exploitation of the whole of copyright works. An exception that covers **any** ‘quotation’ certainly does not have a narrow scope”.

Looking at the draft regulations, and at Section 30 of the CDPA, the exception on Quotation removes the requirement to acknowledge the source in quotations for criticism and review by inserting “unless this would be impossible for reasons of practicality or otherwise”. The same applies to the new section on quotation, but it seems the requirement for sufficient acknowledgement remains for reporting current events. It should be at least as important to acknowledge the source if quotation is going to be allowed more widely.

“Quotation” of Photographs

Currently photographs can be “quoted”, reproduced, for genuine criticism and review, but are excluded from the exception to copyright for reporting current events. This is a tried and tested definition that has worked. Introducing a more general right of quotation introduces ambiguity and uncertainty which will require further legal clarification in the courts, costing rights holders legal fees and lost revenue if the exception will allow greater use of photographs without permission or payment.

It could be interpreted from the new subsection (1ZA) on Quotation that photographs are not excluded (but are subject to fair dealing), yet photos are still excluded under remaining subsection (2) for reporting current events. So there is a lack of clarity. Will these two subsections be contradictory in relation to photos? Will the new subsection (1ZA) override the existing subsection (2)?

Or will the crucial question be whether the intended use/quotation of a photo is general, or is reporting current events, as well as whether use/quotation of a photo is fair dealing in those particular circumstances?

One of our member organizations, BAPLA, wrote to the JCSI on 01 July that the inclusion of allowing general quotation introduced ambiguity “because in the absence of definitive specific purposes for which Quotations may be made, there is no objective criterion against which the fair dealing test may be assessed”. This risked making the fair dealing test unworkable and places a burden on the courts to determine how the exception should be applied. The legal costs will fall on creators trying to protect their revenue from licensing their work, and create additional burdens in time and effort thus spent. These legal costs on creators and rights holders have not been factored into the impact assessments.

We are alarmed by the Government’s comments that Quotation may in some circumstances require the reproduction of a photograph. Unlike with text, it is not possible to quote just a small percentage of a photograph, a fact which is recognized by the current exclusion of photographs from the exception for reporting current events. Either the whole photo, or the substantial part of the photo would need to be reproduced. To allow this more generally under the exception for Quotation and Parody, that anyone can “quote” a whole photograph, will have a huge impact on the photographic industry, making subsequent sales of photographs and most picture libraries redundant.

It is unlikely that a “quotation” of the whole of a photograph (or illustration) under an exception would pass the three-step test in both the WIPO and WTO treaties on legislation for exceptions. The three-step test is that such exceptions must only be applied:

1. in certain special cases
2. which do not conflict with a normal exploitation of the work, and;
3. which do not unreasonably prejudice the legitimate interests of the rights holder.

Allowing a general exception for quotation would surely breach all three steps. The defence would be that ‘fair dealing’ will prevent the breach of 2 and 3 (though not the first step 1 as it would not be confined to “special cases”).

But ‘fair dealing’ has not been tested as regards general quotation of photographs, because up to now such general quotation has not been allowed (either for photos or anything else). And whereas quotation in relation to copyright has been defined for text, in terms of a small percentage of the whole work, it has not been so defined for photographs, and it is hard to see how it could be, as the definition of a quote is “a group of words taken from a text or speech and repeated by someone other than the original author or speaker”.

Impact Assessment for Quotation

The impact assessment for Quotation admits (page 2) that they have been unable to monetise the costs to copyright owners of non-literary works and they note concern about serious impacts on business models, in relation to AV works and sound recordings. They also admit (page 7) it is very difficult if not impossible to monetise the benefits to users and consumers.

The impact assessment admits (page 2) that the limits on ‘fair dealing’ in sectors other than literary works are less clear and so there may be risk and uncertainty until defined by case law.

The impact assessment goes into detail (page 5) on industry guidelines and practice for the number of words that can be quoted from a book or article without permission or payment. There are of course no such ‘quote levels’ that apply to photographs.

The impact assessment says (page 7) users and owners of copyright works will overlap, but that copyright owners are more likely than users to be established creators, and that the administration costs of clearing extracts for quotation may fall disproportionately on up-and-coming creators, and that the exception for quotation is expected to reduce barriers to entry (to the creative sector). The impact assessment seems to assume that up-and-coming creators will use more of others' work than established creators, but this does not apply to photographers.

The overall savings in administration are supposed to outweigh the lost licence revenue but the overall savings are very small (less than £500,000 annually) and the impact assessment admits there is risk and uncertainty for non-literary works with the scope of 'fair dealing'. The costs of such legal risk and uncertainty have not been included in the impact assessment, and such costs will fall on copyright holders and will almost certainly outweigh any savings, most likely by a substantial amount.

Impact Assessment for Parody

The impact assessment for Parody does not even monetise the costs or benefits to copyright owners or consumers. The impact assessment thinks the risks of unintended consequences will be limited by the application of the 'fair dealing' restriction (which will have legal costs not factored into the assessment). But the impact assessment does envisage parody based on works including pictures (page 3).

On page 4 of the impact assessment on Parody it says: "The concept of fair dealing is relatively well developed in UK law, but further restrictions or considerations can be explicitly included into the legislation if necessary in order to ensure that the allowed uses do not unfairly affect the legitimate rights of the original copyright owner."

So the exception for Quotation and Parody could have included further restrictions or considerations in the legislation for photographs, along the lines of the existing subsection (2).

On page 6 of the impact assessment on Parody it says: "The potential for any lost sales due to negative reputational effects are also likely to be limited as a creator's moral rights in copyright law to object to derogatory treatment of their work will be unaffected by this exception."

Their examples all looked at music videos, and they say the right to object to derogatory treatment will remain. But if a news photo, film clip or other news material is parodied then that is more likely to be damaging to the creator's reputation, and will place a burden on the creator in terms of legal costs.

It also says: "The right to attribution should also persist to the extent that is practical. This could comprise reference in the credits of videos, or any other suitable mechanism. Although there may be some occasions where attribution is either not practical or not desirable, we do not believe this will often arise, as the purpose of a parody relies on recognition of the work (and hence the creator) that is the source of the parody."

But in the case of journalistic work, being attributed as the source creator of a work that is parodied could be damaging to one's reputation, and even if one takes a case for derogatory treatment, the damage to one's reputation will already have occurred.

Conclusion

There is ambiguity and broadness in the exceptions that will require legal definitions that will be left to the UK courts to decide. There will be a financial impact for photographers both in loss of licensing revenue and in the cost of legal claims, and damage to the reputation of photographers particularly in the area of journalism and current affairs. There is a lack of a full

impact assessment for the section of the creative industry, photographers and photographic rights holders, who will be greatly affected by these proposals.

The business models of photographers, photo agencies and libraries depend on being able to license photos, equivalent to the licensing of “visual quotes”. If this exception for Quotation and Parody takes away that ability by giving consumers and users of photography the general right to “quote” photographs, then these business models fail.

Different sectors of the creative industries may require different considerations rather than a one size fits all approach, which will cause greater economic harm to the photography sector than any growth it might generate.

Such concerns are so important to the photography sector that these proposed exceptions to copyright should be subjected to the full scrutiny of Parliament via primary legislation, so we urge the House of Lords to reject these draft regulations.

Yours sincerely

A handwritten signature in black ink, appearing to read "Paul Herrmann". The signature is fluid and cursive, with a long horizontal stroke at the end.

Paul Herrmann
Chair, British Photographic Council