Client Alert

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Copyright: Europe Explores its Boundaries

Part 2: New UK Infringement Exceptions - The Ones That Got Away (and Came Back Again)

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In 2011 the Hargreaves Review[1] stated that in some respects UK copyright law had failed to "*keep up with technological and social change*", and recommended that the UK implement all of the copyright infringement exceptions available under the InfoSoc Directive (see text box). The Hargreaves Review also recommended that UK law should be clarified to ensure that exceptions to copyright infringement could not be overridden by contract.

During the next three years, these recommendations were developed, leading to the expectation that five statutory instruments, introducing the following amendments into UK copyright law, would come into force on 1 June 2014:

- Personal copies for private use (a new exception)
- Parody and quotation (two new exceptions addressed in one statutory instrument)
- Data analysis for non-commercial research (a new exception)
- Disability (an extension of the existing exception that related only to visual impairment)
- Public administration (an extension of the existing exception for public bodies to allow them to publish certain information)

What is the InfoSoc Directive?

EC Directive 2001/29 on the harmonization of certain aspects of copyright and related rights in the information society ("InfoSoc Directive") was introduced in 2001 to meet the challenge of the Internet, e-commerce, and digital technology. It introduced various exceptions to copyright infringement (although for the majority of these, member states could decide whether or not to include them in their national implementing legislation). The UK implemented the Directive into English law via The Copyright and Related Rights Regulations 2003 and elected not to include all the exceptions detailed in the Directive.

By early May 2014, this legislation was well developed and in the final stages of legislative approval. However, only weeks before 1 June, statutory instruments covering the exceptions for personal use, parody and quotation were all dramatically pulled from the legislative timetable. The other, relatively non-contentious, amendments to UK copyright law came into force on 6 June, and simultaneously the UK government issued a statement that it remained "*firmly committed*" to implementing the missing exceptions. Then, intriguingly, on 9 June, the escapee statutory instruments were re-published, unchanged, with a new coming-into-force date of 1 October 2014.

[1] "Digital Opportunity – A Review of Intellectual Property and Growth", an Independent Report by Professor Ian Hargreaves, May 2011.

So, have the exceptions that got away, come back for good? Or will there be further drama before October? We will keep you posted.

In the meantime, this Alert provides – for content owners and copyright users alike – a brief summary of the exceptions that "got away" and highlights some of the issues that may have led to this dramatic turn of events. References in this Alert to "the SIs" are, with respect to both of the "escapee" exceptions, to the latest draft SI in circulation as at 9 June 2014.

PERSONAL USE

In the UK, unlicensed copying is permitted only if the act of copying falls within a specific statutory infringement exception; unlike in the US, the UK has no general doctrine of "fair use". For example, while it is permissible in the UK to "time-shift" a broadcast TV show, the act of "format shifting" (e.g., transferring legitimately purchased recorded music from a CD to an MP3 device) is currently unlawful. The proposed personal use exception was expected to bring UK law closer to what was perceived to be common (technology-led) practice in this area.

The SI proposed that an individual would be allowed to make a copy of a work (other than a computer program) where that individual (i) has lawfully acquired the work on a permanent basis and (ii) is copying the work for private use and for purposes which are non-commercial.

Interesting features of the pulled exception included the following.

- **Temporary vs. permanent copies** – Any copies of works that have been borrowed, rented, broadcast, streamed, or obtained under any other technology which allows merely for temporary access to the copy is not "lawfully acquired" and would not benefit from the exception. Therefore, for example, copying of a time-shifted TV show would not be permitted.
- **"Personal use" and cloud services** – As well as permitting copies for "back up" and for "format-shifting", the proposed SI clearly envisaged cloud data storage, provided that the copy is accessible only by the individual and the storage provider. This narrow access seems designed to head off content owner concerns about P2P sites. However, interestingly, the SI also implies that transfer "on a private and temporary basis" may be permissible. This could be an issue to watch.
- **Technological protection measures (TPMs)** – the SI left it open to rights holders to apply TPMs to prevent or restrict private copying, and introduced a complaints procedure and remedy for individuals (and classes).
- **Fair compensation/levies** - The SI did not propose any form of levy linked to the personal copy exception. In many other EU member states, levies are applied (although the nature of those levies varies widely. For example, in terms of the media and equipment to which they apply).

  The payment of levies stems from the InfoSoc Directive, which states that member states may choose to implement the personal use exception subject to "fair compensation" for rights holders. However, the UK government has to date resisted any form of levy on the grounds that rights holders already anticipate personal copying and so factor "fair compensation" into their existing fees. Nevertheless, it is clear from the Report and Transcript published by the UK Parliamentary Committee responsible for scrutinising the draft

legislation, that this issue of compensation is a key concern. The Committee concludes "*…we flag up the possibility that the changes will have a greater economic impact on producers and creators than the Government has so far envisaged*".

It is worth noting that there is a Danish case (C-463/12) concerning "fair compensation" currently proceeding through the European Court of Justice. An opinion is expected soon. It may be that the UK will wait until a decision has been reached in this case before proceeding with the exception.

- **Contract override** – Any contract term seeking to prevent or restrict the making of a personal copy for private use will be unenforceable. This may lead to a need for licensors to review existing licence terms.

PARODY

The escapee parody exception had been championed in the interests of free speech (particularly in the context of comedy). However, despite this admirable intent, the challenge for future application of this exception is a lack of clear definition under English law.

The parody exception SI stated:

> *"Fair dealing with a work for the purposes of caricature, parody or pastiche does not infringe copyright in the work".*

As noted above, the UK has no doctrine of "fair use". Nevertheless, certain current UK exceptions to infringement (e.g., copying for research) are tied to a concept of "fair dealing"; this concept is not defined by statute and will always depend upon the court's view in the particular circumstances. For example, if use of a work acts as a substitute for the work, causing the owner to lose revenue, this is likely to point towards an act not being "fair dealing".

Social media platforms host multiple works that use audio visual materials in a manner that might seem to fall within a definition of parody. Nevertheless, in addition to an undefined concept of "fairness", there is little consistent UK guidance as to what constitutes parody. It remains to be seen how widely parody might be interpreted.[2] For example, under the SI, permitted parody might include both "target parody" (i.e., targeting the original work or author) and also "weapon parody" (i.e. using the original work to attack a third party). One question for social media platforms will be whether they are obliged to take down such works when challenged, and a question for rights holders will be whether they have strong arguments to require such take down.

Finally, as with the "personal use" exception, contract override would not have been permitted, and any term seeking to prevent or restrict copying for parody would be unenforceable.

[2] Although not authoritative in terms of the UK, a recent Belgian case brought before the ECJ may give some guidance on the definition of "parody" as envisaged by the InfoSoc Directive. In its response to a request for a preliminary ruling, the Advocat General concluded that a "parody" within the meaning of Article 5, paragraph 3, sub k) of the Directive "is a work which, with a burlesque intention, combines elements of previous work and clearly recognizable elements original enough to not reasonably be confused with the original work".

QUOTATION

UK law currently allows "fair dealing" in a work for the purpose of criticism or review provided that the work has already been made available to the public and that there is a "sufficient acknowledgment". A similar allowance is made for reporting current events.

The SI would have introduced a new exception (alongside the existing exceptions for criticism, review, and new reporting) for the use of "*a quotation…whether for criticism or review or otherwise*" provided that:

- the work has been made available to the public;
- there is fair dealing; and
- the extent of use is no more than is "required" in context.

This exception was, again, intended to widen UK law in line with the InfoSoc Directive, and again, as with the other "escapee" exceptions, contract override was not permitted.

From accompanying guidance, the UK government seems to consider this new exception to have little commercial effect; stated aims focus on the use of quotations in academic works, and it has been argued that the "fair dealing" proviso would be sufficient to inhibit revenue-damaging uses of works that had raised concerns for commercial film archives, news agencies, and publishers. However, there is no statutory definition of "quotation", nor is there clear guidance as to how extensive "a quotation" may be (could it be the entire work?). Therefore, if the relevant SI is eventually enacted as drafted, increased pressure seems likely to fall on the meaning of "fair dealing".

CONCLUSIONS

Copyright is a key weapon in the ongoing battle for digital revenues that flow from the Internet, mobile apps, and social media, and it is clear that these proposed exceptions play a role in that battle. It is also clear that any broadening of the exceptions has the potential to raise issues of material concern to rights holders, and this may go some way to explain the withdrawal of long-gestated legislation so close to its due date.

However, the exceptions that "got away" do broadly reflect law in force in other EU member states. So, now that the exceptions have re-emerged on the UK legislative slate, it will be interesting to see what happens next, or whether the SIs will come into force without further drama. Likewise, it will be interesting to see if the upcoming EU report following the EU consultation on the review of the EU copyright rules will have any impact on the UK government's plans in this area. Watch this space.

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