

Client Alert

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Copyright: Europe Explores Its Boundaries Part 4: New UK Infringement Exceptions – The Ones That Came Back Again

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INTRODUCTION

In June of this year, we sent out an alert about the anticipated new UK copyright infringement exceptions¹. These exceptions were to be introduced based on the recommendations of the Hargreaves Review. Surprisingly, some of the exceptions had been dramatically pulled from the legislative slate at the last minute. However, the UK government has now upheld its subsequent promise to re-publish the statutory instruments for the infringement exceptions for (1) personal use, (2) parodies and (3) quotations, with new legislation on all three subjects that came into force on 1 October 2014.

Almost in parallel, a European ruling and an Advocate General opinion have helped to prepare for the arrival of the two statutory instruments, with commentary on (i) the scope of parody and (ii) in relation to personal use, the impact of copyright levies.

THE NEW LEGISLATION

Two new regulations have come into force, amending the Copyright, Designs and Patents Act 1988 (the “**CDPA**”) to include new exceptions for copyright infringement. The first – the Copyright and Rights in Performances (Quotation and Parody) Regulations 2014 (the “**Quotation and Parody Regulations**”) – extends the provisions for quotations of copyright-protected works (having previously only been available for criticism and review), and creates a new provision for parodies. The second regulation – the Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014 (the “**Personal Copies Regulations**”) – concerns making copies of copyrighted works for personal use.

QUOTATION

From 1 October 2014, the free quotation of copyright protected works is no longer limited to reporting current events or to works of criticism or review. The Quotation and Parody Regulations now permit quotation for any purpose, provided that:

- the work quoted has been made publicly available;
- the use of the quotations constitutes “fair dealing” with the work;

¹ [Part 2: New UK infringement exceptions – The ones that got away \(and came back again\)](#), 12 June 2014.

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- the extent of a quotation is no more than is necessary for the purpose; and
- the quotation is accompanied by sufficient acknowledgment to the copyright owner (unless this is impossible)².

The UK Intellectual Property Office has stated that this amendment will help to save costs on copyright clearance, support free expression and align UK law with the rest of Europe. However, as anticipated in our previous alert, the Quotation and Parody Regulations do not provide a definition of “quotation”, or guidance as to how extensive a “quotation” is allowed to be. This may place undue pressure on the meaning of “fair dealing” as UK courts seek to define the scope of the exception.

PARODY

The new exception for parodies allows fair dealing with a work for the purposes of caricature, parody or pastiche³ and provides that fair dealing with a recording or performance⁴ for the purposes of parody does not infringe copyright conferred in the performance or recording. This change now means that the permission of the copyright holder will no longer have to be obtained, provided that the use of the original work is fair and proportionate. This is good news for British comedians and artists, it would seem, unless, of course, it is their work that is being parodied.

However, an EU court ruling on parodies in September 2014 has already placed some restrictions on the new legislation. In *Deckmyn v Vandersteen C-201/13*, the Court of Justice of the European Union (the “CJEU”) defined a parody as something that evokes an existing work while being noticeably different from it and constituting an expression of humour or mockery. The CJEU also stated that national courts must strike a balance between copyright owners’ interests and mimickers, and that copyright owners have a legitimate interest in disassociating their work from a parody, if the parody involves a discriminatory message.

This creates a whole new checklist for UK courts to consider, alongside the usual fair dealing test. Judges will have to also hold a view on whether the parody (i) strikes a fair balance, (ii) differs noticeably from the original work, and (iii) is sufficiently humorous. In particular, the last of these requirements may worry budding parodists, who could end up having to justify their comedy in front of a very different audience than first intended.

PERSONAL COPIES

The Personal Copies Regulations now allow consumers to make personal copies of content (other than computer programmes) they have bought, as long as (i) the copy is for their own private and non-commercial use, (ii) the copy is not an infringing copy, and (iii) the content has been lawfully acquired on a permanent basis⁵. The UK government’s hope is that this new exception will cause UK law to reflect common consumer practice more closely in this area.

² Inserted as section 30(1ZA) of the CDPA.

³ Inserted as section 30A of the CDPA.

⁴ Inserted as section 2A to Schedule 2 of the CDPA.

⁵ Inserted as section 28B of the CDPA.

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The personal use exception contains some interesting features:

- **Temporary vs. permanent copies** – Any copies of works that have been borrowed, rented, broadcast, streamed or obtained using any other technology, which allows for only temporary access to a copy are not “lawfully” acquired and would not benefit from the exception. For example, copying a show from a TV streaming service is not allowed.
- **Cloud services** – Copies can be made for “back up” and “format-shifting”, provided that the copy is accessible only to the individual and the data storage provider. This feature has been included, perhaps in an effort to assuage rights holders’ concerns about P2P sites.
- **Technological protection measures** – To ensure that copyright owners do not unduly prevent copying of content for personal use there is a procedure to submit complaints to the Secretary of State, in the event that a technological measure prevents a copyrighted work from being copied for personal use⁶.

It had been thought that there might be some concession made, such as copyright levies on storage media, to the “fair compensation” lobby that has complained that the personal use exception may cause financial detriment to rights holders. However, the UK government has given no indication that any such compensation system is to be introduced. It is worth noting that some EU countries already have such levies in place; however, the decision whether to introduce levies lies with each Member State. This determination was re-affirmed in a recent Advocate General opinion in *Copydan Båndkopi v Nokia C-463/12*. A final decision in the case has not yet been issued and we will consider the implications of the CJEU judgment on the UK position, once a definitive ruling has been made.

CONCLUSION

The personal use exception remains controversial and faces criticism from rights holders such as musicians, who could lose out on approximately £58 million in revenues a year, as a result. Further, the relationship between the personal use exception and temporary content apps such as Snapchat poses interesting questions, for users and companies alike.

There are no guidelines as to what constitutes a “quotation” and although there are guidelines as to what constitutes “parody” the inherently subjective nature of aspects of those terms allows room for disagreement.

The initial uncertainties about the limits of the two new exceptions may trouble rights holders, especially adding the concern that users will be emboldened to stretch boundaries. This in turn seems likely to lead to judicial intervention. So, whilst the new exceptions align the UK more closely with other parts of Europe, commercially these changes may result in some copyright owners being forced into selective, strategic litigation in an effort to protect their works.

⁶ Inserted as section 296ZEA of the CDPA.

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