

2 April 2014

Dear members of the Secondary Legislation Scrutiny Committee –

The Creators' Rights Alliance (CRA) wishes to express concerns about the bundle of Statutory Instruments extending exceptions copyright that have been presented to your Committee¹.

The CRA is an affiliation of organisations² 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 to “intermediaries” including publishers and broadcasters. They therefore have distinct interests from these “intermediaries”.

1. *Ultra vires*

The CRA shares the concerns that we understand the British Copyright Council is submitting to your Committee, pointing out that these Statutory Instruments as drafted are *ultra vires* since they purport to be implementing the EU Information Society Directive under the European Communities Act 1972. The CRA supports that submission.

In summary: each of the proposed widened exceptions to copyright goes beyond the provisions of the Information Society Directive. In particular:

- ⤴ the provision on quotation is extremely loosely defined (more on this below);
- ⤴ that on parody is, as it has long threatened to be, a parody of legislation;
- ⤴ that on education casts doubt on the long-standing and fully-functional licensing system in place; and, crucially –
- ⤴ the proposed exception for private copying fails to meet the explicit requirement in the Information Society Directive that such an exception be accompanied by ‘fair compensation’ to the creators of the works concerned.

We add to the BCC submission that even the proposed exception for the benefit of people with disabilities, which it would have been so easy for the Intellectual Property Office to have got right, goes beyond the Directive.

Article **5(3)c** of the Information Society Directive provides for exceptions:
‘...to the extent required by the specific disability’.

Indeed, the definitions clauses of the Draft Statutory Instrument do the opposite of this restriction on the exception to copyright, necessary to restrict bad-faith exploitation of it – instead widening the exception apparently without limit. For example the proposed **31F(4)** says:

‘An “accessible copy” of a copyright work means a version of the work which enables the fuller enjoyment of the work by disabled persons.’

(Our *emphasis* in both instances.)

¹ Appendix 1 lists these for the avoidance of doubt

² Appendix 2 below lists these.

The CRA is of course in favour of people with disabilities having full access to information, news, analysis and culture. Our concern is that the Statutory Instruments as drafted encourage bad-faith interpretations. In this instance we foresee the copying of works in forms claimed to 'enable the fuller enjoyment' for commercial purposes including gaining advertising revenue – in much the same way that in the early part of this century there was an outbreak of effectively pirate DVD disks purporting to be issued for the purposes of 'review and criticism'.

2. Interfering with the normal exploitation of the work

The EU Treaties are not, of course, the only measures to bind the UK, though the use of the European Communities Act makes them most relevant to your Committee's consideration.

Another relevant measure is the World Trade Organization TRIPS Agreement, which *inter alia* sets out the conditions under which signatory states may legislate exceptions to copyright. The most relevant of the 'three steps' specified in TRIPS is that exceptions shall not 'conflict with the normal exploitation of the work'.

The Creators' Rights Alliance submits that all the proposed widened exceptions precisely do 'conflict with the normal exploitation' of the works which they would permit to be used without permission or payment.

For example the Draft Statutory Instrument would amend Section 30(d)4 of the Copyright Designs and Patents Act 1988 to permit:

'use of a quotation from the work (whether for criticism or review *or otherwise*)'
(Again, our *emphasis*.)

This provision as drafted does far more than expressed Government policy. 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.

The exception as drafted would permit wholesale exploitation of extracts of copyright works without payment or permission. Envisage, please, a future service (a successor and competitor to Google News or Google Books perhaps?) that would monetise the mass presentation of extracts of works – perhaps by selling advertising alongside them, rather than charging in the traditional way. This would most certainly 'conflict with the normal exploitation of the work' since such extensive extracts may substitute for the legitimate acquisition of copies of the works.

Here, as throughout the Draft Statutory Instruments, the requirement to give due credit to the creator whose work is used is bizarrely qualified. It applies:

'(unless this would be impossible for reasons of practicality *or otherwise*)'
(Yet again, our *emphasis*.)

For what reason other than practicality is anything impossible? Are we to consult philosophers of the French school to ask whether identification is impossible *in theory*?

Identification – due credit and an accurate byline – is essential to creators of all kinds, but particularly for freelancers who depend on it to demonstrate their skills to prospective clients. Such a fudge therefore 'conflicts with the normal exploitation of the work'.

Identification is of course also an important consideration in public policy. It is essential that users of works know who were the creators. This is especially starkly clear in the case of journalism.

3. Burden of proof and interpretation

Beyond the effect of the ill-defined nature of these proposed changes putting them *ultra vires* to the European Communities Act is the financial effect on individual creators, were they to be legislated.

The costs of litigation to determine what Parliament might have meant by these Statutory Instruments will be in the hundreds of thousands in each of potentially a dozen or more cases.

Some of these cases may be brought by publishers and broadcasters in defence of the rights they have licensed from individual creators. Others will concern the special interests of an individual creator – perhaps against the well-funded interests of a publisher, broadcaster or internet service provider.

Were these Statutory Instruments to be passed as drafted, there would thus be an intolerable burden on the individual of limited means – which the majority of creators are. It would leave the looseness of the drafting you see to be interpreted by default in favour of those with the deepest pockets.

4. The appearance of disingenuity

Furthermore the CRA regrets that the Intellectual Property Office has given the appearance of being disingenuous in seeking to reassure creators in its Guidance Notes³ that only uses that are “fair dealing” will be permitted under the proposed Statutory Instruments when the whole point of the exercise is to change the *definition* of “fair dealing”.

For all these reasons, we hope that your Committee will give these matters very careful consideration.

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www.creatorsrights.org.uk

³ www.ipso.gov.uk/copyright-guidance-creatorsowners.pdf

Appendix 1: the Draft Statutory Instruments

As you know, the Government laid these on 27 March 2014:

- ⤴ [The Copyright and Rights in Performances \(Personal Copies for Private Use\) Regulations 2014](#)
- ⤴ [The Copyright and Rights in Performances \(Quotation and Parody\) Regulations 2014](#)
- ⤴ [The Copyright and Rights in Performances \(Disability\) Regulations 2014](#)
- ⤴ [The Copyright and Rights in Performances \(Research, Education, Libraries and Archives\) Regulations 2014](#)
- ⤴ [The Copyright \(Public Administration\) Regulations 2014](#)

Appendix 2: Creators' Rights Alliance member organisations

Member organisations:

- ⤴ [ABSW](#) (Association of British Science Writers)
- ⤴ [AOI](#) (Association of Illustrators)
- ⤴ [BAPLA](#) (British Association of Picture Libraries and Agencies)
- ⤴ [BASCA](#) (British Academy of Songwriters, Composers & Authors)
- ⤴ [CIOJ](#) (Chartered Institute of Journalists)
- ⤴ [GMG](#) (Garden Media Guild)
- ⤴ [ISM](#) (Incorporated Society of Musicians)
- ⤴ [MU](#) (Musicians Union)
- ⤴ [NUJ](#) (National Union of Journalists)
- ⤴ [PCAM](#) (Producers and Composers of Applied Music)
- ⤴ [PCO](#) (Professional Cartoonists' Organisation)
- ⤴ [OWPG](#) (Outdoor Writers and Photographers Guild)
- ⤴ [SOA](#) (Society of Authors)
- ⤴ [WGGB](#) (Writers Guild of Great Britain)

Associate members:

- ⤴ [ACID](#) (Anti Copying In Design)
- ⤴ [ALCS](#) (Authors' Licensing and Collecting Society)