

Response to first batch Draft Legislation to modernise copyright exceptions published for technical review

(See <http://www.ipo.gov.uk/types/hargreaves/hargreaves-copyright/hargreaves-copyright-techreview.htm>)

Background

This is a collaborative submission from a group of academics based in the UK with expertise in intellectual property and information technology law and related areas.

The preparation of this response has been funded by (1) British and Irish Law, Education and Technology Association (“BILETA”) <http://www.bileta.ac.uk/default.aspx> and (2) CREATE (Creativity, Regulation Enterprise and Technology) the RCUK Centre for Copyright and New Business Models in the Creative Economy <http://www.create.ac.uk/>

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This response has been approved by the Executive of BILETA (the British and Irish Law, Education and Technology Association <http://www.bileta.ac.uk/default.aspx>) and is therefore submitted on behalf of BILETA.

This response has been approved by the Management Committee of CREATE (<http://www.create.ac.uk>) and is therefore submitted on behalf of CREATE.

In addition, this response is submitted by the following individuals:

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New exception for parody

1. Adopting this exception will give people in the UK's creative industries greater freedom to use others' works for parody purposes. Drafting this as a fair dealing exception, as per paragraph (1) in the wording found at Annex B, is intended to allow creators to make minor uses of other people's copyright material for the purposes of parody, caricature or pastiche, without first asking for permission.
2. Paragraph (2) of the draft exception will mean that the benefits of the parody exception should not be undermined by restrictions re-imposed by other means, such as contractual terms.

Commentary on the legislation

3. Article 5(3) (k) of the Copyright Directive does not require fair dealing for the exception to apply. However, we have opted to limit the exception in this way. Our view is that the concept of fair dealing is well-established in UK copyright law and needs no further definition.

Q: By framing paragraph (1) as outlined below are we meeting the objective outlined above?

4. By making this a fair dealing exception authors of original work will be protected from abuse of this exception. We do not want this exception to be used as a defence for outright copying of an original work.

Q: Is this sufficiently clear?

Primary issues

The BILETA response to the IPO's Consultation on Copyright¹ supported the principle of a limited parody, pastiche or caricature exception (hereafter parody *etc*) to enable creative industries and individuals to create new works from existing works with or without the accrual of economic benefit to the parodist(s). This position was adopted on the premise that an intellectual and creative element is involved in the construction of same² and that damage to the economic rights of the author of a pre-existing work, or violation of personality rights of an individual (perceived or actual) would in general terms prove to be *de minimis*.³ In many cases it was argued that the pre-existing work could enjoy something of a revival or reach a new audience thus benefitting the original author financially and/or in terms of the publicity generated.

¹ December 2011 <http://www.ipo.gov.uk/consult-2011-copyright.pdf> DPS/I450/12-12

² *Glyn v Weston Feature Film Co*[1916] 1 Ch 261 see Younger J at 268-269

³ An action for defamation or passing off also remains an option in appropriate cases

The following observations/comments, some which deviate in some small way from the specific questions posed, are offered in accordance with the spirit of the review questions reproduced above which seek views as to whether adoption of the proposed exception and the drafting of same will meet the objective of ensuring greater freedom to use others' works for parodic *etc* purposes whilst adequately protecting the intellectual investment and capital of the original author.

Response to questions 1-4

Defining parody *etc*

The BILETA response to the IPO's Consultation on Copyright argued that the introduction of a parody *etc* exception would necessitate the definition of these terms but that this ought to be the province of the courts to determine rather than the legislature. BILETA's previous approach is in accord with the subsequent findings of the Mendis and Kretschmer⁴ post-consultation report to the IPO where it is stated *inter alia* that **recourse to a dictionary will, in most circumstance, enable a court to discern the ordinary everyday meaning to be given to these words.** We welcome the absence of any attempt to provide a statutory definition of these terms⁵ as this will allow organic development of these genres as new forms of technology and/or new forms of expressive art evolve. It is noted however that a recent Belgian reference to the Court of Justice⁶ may yield an EU definition of parody *etc* per Article 5(3) (k) of the Copyright Directive⁷ and further define the characteristics such a work must exhibit to be deemed an original work and non-injurious to a pre-existing work.

The draft wording of the proposed section 30B CDPA is entitled *Caricature, parody or pastiche*. This is in accord with the wording used in Article 5(3) (k) of the Copyright Directive. However, the attendant marginal note contains only the single word *Parody*. Perhaps the word *etc* could be added after *Parody* to follow the approach taken in drafting the marginal note for section 29 of the recently enacted Canadian Copyright Modernization Act 2012.⁸ In the interest of consistency we suggest that section 30B CDPA be amended as follows; *Parody, pastiche and caricature*. This change would see reversion to the ordering of the exceptions as detailed in question 81 of IPO's Consultation on Copyright. Likewise this ordering should be replicated in the proposed paragraph 2B in Schedule 2 CDPA.

The proposed section 30B CDPA fair dealing exception for parody *etc*

⁴ *The Treatment of Parodies under Copyright Law in Seven Jurisdictions A Comparative Review of the Underlying Principles Parody and Pastiche*. Study II. January 2013 ISBN: 978-1-908908-49-0
<http://www.ipo.gov.uk/ipresearch-parody-report2-150313.pdf>

⁵ C.f. Article 18b of the Dutch Copyright Act 1912, as amended where parody *etc* is permitted if it *normally sanctioned under rules of social custom* <http://www.ivir.nl/legislation/nl/copyrightact.html> See also Guibault L, *Darfurnica, Miffy and the right to parody!* 3 (2011) JIPITEC 236
http://www.ivir.nl/publications/guibault/JIPITEC_2011_3.pdf

⁶ *Deckmyn et Vrijheidsfonds* C- 201/13 See <http://www.ipo.gov.uk/pro-policy/policy-information/ecj/ecj-2013/ecj2013-c20113.htm>

⁷ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society Official Journal L 167 , 22/06/2001 P. 0010 - 0019

⁸ c.20

Lord Denning was perhaps stating the obvious when he opined that what constitutes fair dealing is a question of degree⁹ but it is clear that UK courts have had difficulty in the past when applying the fair dealing exception to parody *etc* and the view expressed by HM Government in paragraph 1 above that ‘*the concept of fair dealing is well-established in UK copyright law and needs no further definition*’ may prove somewhat optimistic. Section 16(3) of the Copyright, Designs and Patents Act 1988[CDPA] defines copyright infringement as the taking *as a whole or any substantial part* of a work. This is a basic and well understood principle of domestic [and international] copyright law. Whitford J observed in *Independent Television Productions Ltd v Time Out Ltd*¹⁰ that once it has been established that a whole or substantial part of a work has been taken fair dealing exceptions pled will be unlikely to find favour with a court. Whilst this stance is questioned by Bainbridge¹¹ who takes the view that to follow such reasoning would render a fair dealing defence redundant if a substantial part of a work had been taken (there being no need to invoke the defence in the first place if an insubstantial part had been taken) the proposed section 30B CDPA creates a novel fair dealing exception which is distinct and constructed differently from the concept of fair dealing currently underpinning section 29 CDPA (research and private study) and section 30(1) and (2) CDPA (criticism, review and news reporting).

Thus we are of the view that prior approaches to the issue of substantiality may only prove helpful rather than conclusive when assessing a parodic work. For example, Falconer J’s preference was for a [traditional] quantitative rather than qualitative approach¹² whereas Lord Denning took the view that the taking of a long ‘extract’ with a short comment being added may prove to be unfair whilst a short ‘extract’ with long comments may be fair with the rider that ‘*other considerations [may] come to mind also.*’¹³ The nature of parody *etc* perhaps illustrates such *other considerations* given the word ‘extract’ is hard to reconcile with the substance of what is being taken from an original work to create a new parodic one.

In any event, Article 2 of the Copyright Directive makes it clear that contemporary courts are required to establish if the elements reproduced are the expression of the *intellectual creation* of their author.¹⁴ *Painer v Standard Verlags GmbH* where portraits were produced from original photographs illustrates that the exceptions listed in Article 5 of the Copyright Directive will be met if what is taken reflects the author’s personality by “*expressing his creative abilities in the production of the work by making free and creative choices.*”¹⁵ The essence and nature of parody *etc* is on all fours with the context and reasoning in *Panier*. If courts are minded to follow this decision such an approach may lessen the difficulties identified in the following paragraph re the context in which a parodic *etc* work ought to be placed.

⁹ *Hubbard and Another v Vosper and Another* [1972] 2 QB 84 at 93

¹⁰ [1984] FSR 64 at 74 *cf.* Lord Reid in *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273 at 278 where the quality of the work taken proved pivotal

¹¹ Bainbridge D (2012) 9th Ed Intellectual Property Pearson: Harlow. at page 223

¹² *Schneppes Ltd and Others v Wellingtons Ltd* [1984] FSR 210 at 212

¹³ *Op. cit.* at page 94

¹⁴ Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] ECR I 6569 at paragraph 35 where the concept of reproduction in part and the requirement for a licence was also discussed

¹⁵ Case C-145/10 [2011] ECDR 6 at paragraph 89; ECDR 13; [2012] ECDR 6



The fair dealing exceptions in section 30(1) CDPA [criticism and review] and section 30(2) CDPA [news reporting] stipulate that if *sufficient acknowledgement* is given to identify the provenance of the prior work any dealing will be considered fair if an insubstantial portion of the work is taken.¹⁶ In practical terms, criticism or review requires a party, “*in order to comment upon a particular text or its creator, to draw from that text itself.*”¹⁷ Here acknowledgement is explicit.

Spence has suggested that few parodies could rely on the section 30(1) CDPA defence as they do not refer to, that is to say, target the original work.¹⁸ Rather they parody the author. However, such so-called weapon parodies could implicitly, for the purposes of current affairs at any rate, benefit from the section 30(2) CDPA defence if it is accepted that the audience of such a work recognises its source then if follows there has been sufficient acknowledgement (in a subliminal way) thereby obviating the need for some sort of formal or overt attribution being made on non-target cases. If this is so, the real issue in either instance is that of the substance of the original work taken.¹⁹

In their IPO commissioned post-Consultation on Copyright report *The Treatment of Parodies under Copyright Law in Seven Jurisdictions etc*²⁰ IPO Mendis and Kretschmer reprise the commonly accepted view that parodic *etc* treatment of a work “... *involves a taking of substance, since, if the object of parody cannot be recognised, the parody fails.*”²¹ It follows that the issue of substantiality [or insubstantiality] under the section 30B CDPA defence may prove more difficult to assess than a defence raised under section 30(1) or (2) CDPA as discussed above. As a consequence we consider that the concept of fair dealing may come to lack uniformity (as between these two provisions) and see both section 30B CDPA and section 30 CDPA *per se* resorted to in appropriate cases.

Given the potential for there to be an overlap between parody *etc* for the purposes of criticism, review and news reporting and the proposed parody *etc* exception courts will continue to be required to address the section 16(3) CDPA prohibition per a substantial taking on a case by case basis with the foregoing scenario, if argued, presaging judicial consideration of whether the concept of fair dealing can remain a uniform one.²² It is worth noting here that the supplementary explanatory memorandum detailing the 2006 amendments to the Australian Copyright Act 1968 recognised that the novel parody and satire exceptions therein would likely overlap with the reporting of news and criticism and review.²³

¹⁶ See section 178 CDPA which states that the definition of sufficient acknowledgement requires the identification of the work by its title or *other description* and the author

¹⁷ Spence M (1998) *Intellectual Property and the Problem of Parody* LQR 114 (Oct), 594 – 620 at 598

¹⁸ *Ibid.*

¹⁹ Arguably the moral right (moral rights are discussed anon in this response) to be identified as the author or director of a work per section 77 CPDA is not infringed.

²⁰ <http://www.ipso.gov.uk/ipresearch-parody-report2-150313.pdf>

²¹ *Op. cit.* at page 3 See also Deazley R *Taking forward the Gowers Review of Intellectual Property: Second Stage Consultation on Copyright Exceptions 31 March 2010* at page 3

http://www.ipforesightforum.ac.uk/documents/IPFF_Copyright%20Consultation_March%202010.pdf

²² Following the German approach to fair use (*Freie Benutzung*) Rutz suggests that infringement will occur if a parodic *etc* work lacks *sufficient inner distance from the copyrighted work* by posing the question has more than is necessary been taken to *conjure up the original work*. Rutz C. (2004) *Parody: a missed opportunity?* IPQ 284 at 299

²³ Mee B (2010) *Laughing Matters: Parody and Satire in Australian Copyright Law* 2010 JIL LawInfoSci 4;61 <http://www.austlii.edu.au/au/journals/JILawInfoSci/2010/4.html>



On the separate issue, that of the use of the whole of an original work, section 30B CDPA does not on the face of things disturb in any way this section 16(3) CDPA prohibition and in this respect we acknowledge that section 30B CDPA, as drafted, is sufficiently clear.

Paragraph (2) of the draft exception which seeks to ensure that the *benefits of the parody exception should not be undermined by restrictions re-imposed by other means, such as contractual terms* would perhaps benefit from the addition of the phrase *'or licensing condition'* after the words *'To the extent that a term of a contract'* for the sake of completeness.

Parody and other intellectual property rights

Parodic *etc* treatment of other intellectual property rights currently enshrined in statute have yet to be the subject of scrutiny or review by HM Government. Although it is outwith the remit of this technical review, we believe that consideration ought to be given at some level, most likely EU, to the creation of a parody *etc* exception for 'use' of a registered trade mark or infringement of a registered [EU] design to enable parity of treatment between registrable rights and derivative use of same in this context.

It is apposite to note that several commentators have highlighted a growing trend for the manufacture of so-called 'parody garments' where a word or words with the propensity to conjure up in the eye of the beholder a well-known brand name are applied to items such as t-shirts.²⁴ For example, for an item bearing the word Giraunchy think Givenchy. The decision in *Ate my Mind Inc v Mind Candy Ltd*²⁵ (aka *Lady Gaga v Lady Goo Goo*) where injunctive relief was granted to a well known vocal artiste on the ground that a parodic cartoon character 'performing' as a singer on the video sharing site, YouTube fell foul of section 10 (3) of the Trade Marks Act and as such constituted trade mark infringement underscores the potential for a parodic song to violate trade mark law even if fair dealing were to be determined under the auspices of section 30B CDPA.²⁶ The fair use doctrine employed in the American jurisdiction which includes an exception for parodic treatment of a registered trade mark provided the parody is not "*a designation of source for the person's own goods or services.*"²⁷ would provide a useful starting point for any future study in this respect.

²⁴ See for example, *Is parody not imitation the sincerest form of flattery for high fashion brands?* 3rd July 2013 <http://ipkitten.blogspot.co.uk/2013/07/is-parody-not-imitation-sincerest-form.html?showComment=1372889213042>

²⁵ [2011] EWHC 2741 (Ch)

²⁶ [This decision] "*may be particularly important for tribute acts or characters with names which are similar to the original acts...*" Alastair Shaw Hogan Lovells quoted in *The Guardian* 13 October 2011 <http://www.guardian.co.uk/music/2011/oct/13/lady-gaga-injunction-lady-goo-goo>

²⁷ 15 USCA. § 1125(c)(3)(A)(ii) See *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC* United States Court of Appeals for the Fourth Circuit 507 F.3d 252 (4th Cir. 2007) Louis, Niemeier J at paragraph B <http://www.law.berkeley.edu/files/louisvuitton.pdf>

Parody and moral rights

The impact of a parody *etc* exception on the moral rights enjoyed by an author/performer did not form part of HM Government's 2011 Consultation on Copyright which had as its focus the potential (negative) economic impact on original works *vis à vis* the benefits yielded by legislating for a parody *etc* exception.²⁸ Although concerns were expressed during the consultation regarding the potential infringement of moral rights HM Government responded by stating that no difficulties in the respect of moral rights have been reported in other jurisdictions with a parody *etc* exception, including EU Member States²⁹ HM Government has also emphasised that the creation of a parody *etc* exception will not alter an author's moral rights and that "*respect for moral rights could be a factor in whether an act is considered fair dealing.*"³⁰

Moral rights are a distinct and separate right from economic rights. Accordingly, we consider that the current position that fair dealing could be determined, in part, by an (presumably objective) assessment of *respect* for moral rights would create;

(i) unnecessary conflation between mutually exclusive provisions and introduce an element of German jurisprudence in to domestic law given the Germanic approach considers that if "*a parody infringes copyright it also infringes the author's moral rights.*"³¹

(ii) the likelihood of a parody *etc* specific test (whether quantitative, qualitative or an identified intellectual creation) per substantiality and be at further at odds with the statement made by H M Government in the preface to this technical review that "... *the concept of fair dealing is well-established in UK copyright law and needs no further definition.*"

The principal moral right with regard to parody *etc* is the right to object to derogatory treatment of a *work* or *performance*.³² Regarding works this right is qualified by the exceptions listed in section 81 CDPA. Of relevance here is the exception for the reporting of current events³³ and somewhat more enigmatically the exception in section 81(4) CDPA where it is stated that the right does not apply in relation to the publication in "*a newspaper, magazine or similar periodical*" or works "*made for the purposes of such publication or made available with the consent of the author for the purposes of such publication.*"³⁴ The construction of section 81(4) CDPA suggests that derogatory treatment for the purposes of criticism or review is lawful, although these words are not used.

As detailed above, section 30 CDPA details that fair dealing with a work for the purposes of criticism or review does not infringe copyright in a work if it is accompanied by a sufficient acknowledgement and the work has been made available to the public. Fair dealing with a work (other than a photograph) for the purpose of reporting current events does not infringe any copyright in the work provided it is accompanied by a sufficient acknowledgement. Taking together section 81(4) and section 30 CPDA and the proposed section 30B which states "*Copyright in a copyright work is not infringed by any fair*

²⁸ See the subsequent independent report commissioned by the IPO *Evaluating the Impact of Parody on the Exploitation of Copyright Works: An Empirical Study of Music Video Content on YouTube* Erickson K January 2013 <http://www.ipo.gov.uk/ipresearch-parody-report1-150313.pdf?debugdate=15.03.1>

²⁹ <http://www.ipo.gov.uk/response-2011-copyright-final.pdf> at page 30

³⁰ *Ibid.* at page 36

³¹ Page 26

³² Sections 77-85 and Section 205F Copyright, Designs and Patents Act 1988 c.48 (CDPA)

³³ Section 81(3) CDPA

³⁴ It is presumed these provisions would be interpreted as including works published on the internet



dealing with the work for the purposes of caricature, parody or pastiche.” the right to object to derogatory treatment of a performance in section 205F CDPA (performers rights) is qualified in section 205G, where, *inter alia*, it is stated that the right does not operate in relation to any performance given for the purposes of reporting current events. No mention of an exception for criticism or review is made and recourse to the amending instrument³⁵ sees no requirement for a criticism or review exception.

HM Government’s current position that the creation of a parody *etc* exception will not alter an author’s moral rights and that respect for moral rights could be a factor in whether an act is considered fair dealing ought to be viewed in light of the above.

Accordingly, we suggest that section 205G CDPA be amended to include an exception to the section 205F(b) CDPA right to object to derogatory treatment of performance “...played in public or communicated to the public, with any distortion, mutilation or other modification that is prejudicial to the reputation of the performer” for the purposes of criticism or review.

Review Question 5

This is a new exception; we intend to group it close to other fair dealing exceptions in the CDPA 1988.

Q: Is this a suitable place for it to be inserted?

Yes.

End of submission

³⁵ The Performances (Moral Rights, etc.) Regulations 2006 No 18