



# **Response to the technical review of draft legislation on copyright exceptions**

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**DACS submission 2013**

# Technical review of draft legislation on copyright exceptions

## Executive Summary

DACS recommends:

- defining the terms 'parody', 'caricature' and 'pastiche'.
- the existing moral rights regime should be strengthened to avoid adverse effects on creators due to additional exempt uses that risk jeopardising creators' reputations.
- the exception for parody, caricature and pastiche should be limited to non-commercial uses and that any subsequent dealing (in particular for commercial purposes) with the parodying work is an infringement.
- artistic works should be excluded from the exception for quotation and the existing fair dealing exception should be maintained as the quotation exception is clearly targeted at other forms of copyright protected works.
- that visual works be excluded from the private copying exception as it has been drafted without consideration of the impact on visual artists.

## Introduction

This response relates to the draft legislation for copyright exceptions for:

- Parody, caricature and pastiche
- Quotation
- Private copying
- Public administration

As a member of the British Copyright Council, and the Alliance for Intellectual Property, DACS' general concerns in relation to this technical consultation are covered in their responses. Therefore, we have focussed our response on specific areas of concern for visual artists.

As currently drafted, these proposed exceptions create a number of unintended consequences for visual artists and their ability to earn licensing income from their creative work.

In its 'Modernising Copyright' paper, the Government stated:

“To ensure that permitted acts have the maximum positive impact, the Government wishes them to be clearly established and readily usable, and to deal effectively with current and emerging technologies. It wants to shift some of the current uncertainty about whether something can be done lawfully into a question of whether a licence is needed or not.”<sup>1</sup>

Unfortunately, far from achieving this, these exceptions create a minefield of uncertainty which will result in additional costs to the individual rightsholders, users, and to the creative industries at large, without providing any further immediate clarity for users of copyright material.

It is clear that the legislation has been drafted with music, literary and film works in mind. However, visual artists’ practice has not been considered at all in the drafting of the exceptions, nor in the impact assessments or research undertaken in order to justify the exceptions.

The absence of definitions within the legislation creates a great deal of uncertainty. While case law does exist in respect to fair dealing, it does not exist in relation to these new purposes and the burden will fall to rightsholders to take cases to court in order to establish the extent of the exceptions. This is an unfair burden on individual creators whose incomes are already low, and which stand to be further diminished by these exceptions.

The authority under the Information Society Directive 2001/29/EC (“the Directive”) is limited to the reproduction right and the communication right. This is not reflected anywhere in the draft legislation which refers to copyright *per se*. This could result in the proposed exceptions having wider application than allowed by the Directive.

The inclusion of subsections forbidding contractual override in individual exceptions is of great concern to DACS in regards to existing licensing solutions. It is questionable whether this can be implemented through secondary legislation and whether Government can do this under the Directive. Furthermore, it is not clear in the current drafting of the exceptions what aspect of a given exception can be contracted over, leading to confusion for both users and industry.

It is well-established practice that DACS does not issue licences or require copyright users to license activities that are allowed by law; however to introduce widely drafted prohibitions on contracts dealing with the subject matter may significantly interfere with established licensing markets that are not intended by the law. For example, the Government stated that it is accepted that a use of a work for parody would not be considered to be fair if a licence for that particular use was available<sup>2</sup>; subsection (2) of the new parody exception could however be interpreted that any licensing of a work for the purposes of parody be prohibited.

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<sup>1</sup> Modernising Copyright: A modern, robust and flexible framework, page 3 (<http://www.ipo.gov.uk/response-2011-copyright-final.pdf>)

<sup>2</sup> “The requirement that any parody use of a work be ‘fair dealing’ is an additional restriction which ensures that the exception is not misused, and will preclude the copying of entire works where such taking would not be considered fair (for example if such works are already licensable for a fee).” Modernising Copyright: A modern, robust and flexible framework, page 31 (<http://www.ipo.gov.uk/response-2011-copyright-final.pdf>)

## Parody, caricature & pastiche

The drafted exception for parody, caricature and pastiche does not include any definition of the terms “caricature”, “parody” or “pastiche”. This is of concern to DACS and our members as it leaves it to rightsholders to bear the burden of taking cases to court in order to develop jurisprudence in order to establish the exact scope of the exception. This will be an expensive and lengthy process for individual creators and users alike. It is of concern to us that the impact assessments relating to these exceptions have not recognised the cost of this activity. The recent Belgian reference to the ECJ (*Deckmyn et Vrijheidsfonds*, Case C-201/13), may further confuse the issue, seeing that a European understanding of parody based on a Belgian dispute may find application in the UK, which has its own rich tradition of parody.

The commentary on the legislation states that fair dealing is “well-established” in UK copyright law and needs no further definition. However, fair dealing is not a well-established concept as such, but is dealt with on a case by case basis and developed through jurisprudence. As the law has so far not provided for a parody exception there is simply no established case law in this area, or guidance on what is perceived to be fair or not in the context of parody, so to argue that this is a well-established concept is certainly not true in the area of parody, caricature and pastiche.

Although there may be certain recurring factors when judges assess the fairness of a particular use, these factors may significantly differ where the use is different. For example, the emphasis in the assessment of fairness shifts significantly when assessing criticism and review, which is confirmed to be an essential element for freedom of speech and as such important for a well-functioning democracy, as opposed to private study and non-commercial research. To state therefore that a one-size-fits-all approach is appropriate is, in our opinion, highly questionable.

DACS feels strongly that this exception should be limited to non-commercial uses as fair dealing could apply to commercial and non-commercial exploitations. We propose that the legislation states the exploitation must be non-commercial and that any subsequent dealing (in particular for commercial purposes) with the parodying work is an infringement. The IPO’s draft private copying exception helpfully uses the phrase ‘for ends that are neither directly nor indirectly commercial’ which would be appropriate in this exception for parody, caricature and pastiche.

Section 30B(1) states that “copyright in a copyright work is not infringed by any fair dealing with the *work* for the purposes of caricature, parody or pastiche”. This could have a wider application than anticipated. For instance, it may extend to the use of a work to parody a person or idea or simply illustrate something funny. The exception should be limited to where the *work* is the subject of caricature, parody or pastiche.

This proposed exception also creates an impossible situation for visual artists wishing to assert their moral rights. Currently those wishing to parody a work, or

use a work to parody something else, are required to gain permission from the rightsholder. This gives the rightsholder (for visual works the rightsholder is in most circumstances the visual artist) the opportunity to object to a derogatory treatment of the work that would be prejudicial to their honour and reputation and undermine the integrity of the artistic work. The introduction of this exception will remove this opportunity for a creator to intervene, as is their right to do so.

By removing the need to seek permission, the point at which an artist has the opportunity to exercise their moral rights will not occur until after the event (i.e. once the infringement has taken place).

In addition, the current wording of the exception does not require sufficient acknowledgement which would aid the protection of the copyright owner in the original.

## Quotation, reporting current events & speeches

In our opinion this exception does not resolve the stated policy issues, rather it creates new problems for visual artists. The 'reframing' of the existing fair dealing exception for criticism and review as a quotation exception for purposes such as, but not limited to, criticism and review, undermines existing licensing activities, particularly in relation to newspapers and magazines, and will wipe out this source of licensing income for visual artists.

Consequently, in its current form, this draft exception substantially interferes with the legitimate interests of rightsholders and would therefore fall foul of the Berne Convention's three-step test, adopted by the Directive in Article 5 (5).

The existing exception for criticism and review relates to the criticism and review "of that or another work". The draft exception simply refers to the use of a quotation for purposes such as criticism and review and therefore could potentially be used in wider contexts than criticism and review of works. For instance, an artwork could be used to criticise anything from politics to an individual's style choice.

In addition, when translating the concept of a "quotation" to artistic works it is conceivable that the law stipulates that only a part of an artistic work should be used. This may be contrary to the artist's moral right of integrity. Existing case law in relation to the fair dealing of artistic works for criticism and review accepts that it may often be more appropriate to use the whole work – something visual artists are generally most likely to be in favour of, as they do not want their work cropped and mutilated. However, the introduction of the concept of quotation above the concept of fair dealing, which takes the amount of a work into account, seems to endorse the notion of mutilation of artistic works.

There is a concern that the exception could mean that in practice all uses of artworks in newspapers or other publication of a critical or reviewing nature are no longer licensable. This would also undermine the remaining Subsection 2 of Section 30 which excludes photographs from the realm of news reporting, because they may then, by default, fall within Subsection 1.

The drafting gives two specific criteria when assessing whether there is fair dealing ("fair practice" and a test relating to proportionality) taken from Article 5 (3)(d) of the Directive. It is unclear if these will be additional requirements to our current understanding of what is or is not fair dealing (e.g. are these additional requirements on which greater emphasis will be put or are they part of the fair dealing analysis?) and the concept of fair practice is also undefined.

It is also not clear if the exception may also cover appropriation art in its current version as it allows for the quotation of artworks for the critique or review of anything, which is extremely broad and therefore most likely to be used as an excuse for quoting substantially from existing copyright protected works in new artistic works. This wide scope of the exception is therefore also not in line with the three step test about dealing with certain special cases.

DACS proposes that artistic works are excluded from this exception for quotation as it is clearly targeted at other forms of copyright protected works.

DACS further proposes that the existing fair dealing exception for criticism and review is retained in its current form in respect of artistic works.

## Private copying

### Impact on visual artists

The exception drafted as Section 28A of the Copyright, Designs and Patents Act 1988 creates unintended consequences for visual artists which appear not to have been considered.

According to the draft exception, someone who owns a copy of an artistic work, like a postcard or digital version, would be allowed to, under this exception, copy the work into a different medium – this could mean making wallpaper, merchandise, poster copies, 3D printed sculpture – all of which would undermine established, licensed markets.

The concept of format shifting, when applied to visual works, goes beyond the mere enjoyment of the same work at a different time and place. It allows for the creation of a different product for which established licensing markets exist. This interferes with substantial and growing markets in the reproduction of artistic works on a range of media, resulting in a substantial loss of income for visual artists. Therefore such an exception fails the three-step test in that it prejudices the legitimate interests of the rightsholder in an established licensing market.

It is also important to keep in mind the impact such an exception could have on established retail business specialising in merchandise which features artistic works. Many public galleries and museums help fund their work through their retail operations. For example, in the last year, Tate Enterprises turned over £16.3 million from their publishing and retail operations<sup>3</sup> which would include merchandising which this new exception may make unviable.

### **Fair compensation**

The draft legislation does not fulfil the requirement under Article 5 (2)(b) of the Directive for fair compensation. The IPO has argued that consideration for fair compensation could be included in the price of the product itself (e.g. a CD) at the point of purchase. However, this argument does not work if an individual bought the product prior to this legislation coming into force and subsequently copies the works on the basis of this exception. It would also be possible for a copy to be lawfully acquired by relying on another exception and a purchase price therefore never applied.

The explanatory note refers to appropriate compensation to be paid at the point of sale however this does not take into account the different forms of exploitation for different categories of works. Artistic works are in general exploited differently to music and film and their distribution follows different routes.

It is unforeseeable that a licensee would be willing to pay an increased licence fee to the visual artist, or rightsholder, for potential private copying or format shifting by the consumer and end user – particularly when the consumer could use the copy to produce new products priced at a significantly different level to the original. For example, a licence to produce art posters could in no way be priced in such a way to assume potential format shifting to a mug, cushion or wallpaper by the end user. The cost of a licence to produce art posters is significantly lower than the cost of a licence to produce such bespoke merchandise.

The Government is assuming that a third-party producer will be happy to pay a higher licensing fee for their merchandise on the basis of the potential for private copying, rather than for actual copying. This contradicts the Government's long-held view against levies, whereby a similar price lift is applied to products on a blanket basis in order to remunerate rightsholders. The introduction of levies is, in fact, the mechanism most commonly used to compensate rightsholders for private copying and would ensure a return to rightsholders being paid by end users rather than by the intermediary producer and distributor of copies of artistic works.

### **Definitions**

As mentioned above, Subsection 1 of the drafted Section 28A uses the phrase "lawfully acquired". This does not strictly relate to a 'purchase' as described in the explanatory notes and could include something being "lawfully acquired" under an exception. For example, a user could legally acquire a copy of a copyright work under an exception for research and private study. As Section 28A is currently drafted, an individual could then make further copies. This

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<sup>3</sup> Tate Enterprises Limited, Directors Report and Financial Statements, Year ended 31 March 2013

unduly extends the scope of the exception, particularly as the argument used to justify the absence of fair compensation is that the appropriate compensation is being paid at the point of sale. Tighter drafting with additional wording which excluded lawful acquisition through another exception could prevent this.

The exception for private copying permitted by the Directive does only cover the reproduction right and does not extend to the communication and the making available right which means that the UK would be acting outside the scope of the Directive if this exception was extended in such a way.

### **Contract override**

The inclusion of a contract override clause in the draft exception undermines the established business practices of visual artists. For example, it is common practice for wedding photographers to restrict the making of additional copies of their works, which need to be purchased for an additional fee. Allowing for private copying of copies lawfully acquired without possible contractual limitation would mean this practice would no longer be possible and according to the argument of the Government, all potential private copying would need to be charged for at the point of sale. This would make the engagement of a wedding photographer prohibitively expensive and deprive the photographer and the client of any flexibility in controlling the price for the works. It would also unjustly prejudice customers who do not intend to use their wedding photographs in the form of computer backgrounds, key rings, profile pictures and calendars etc.

It is very apparent that this exception has been drafted without consideration of the impact on visual artists. Consequently, DACS recommends that visual works be excluded from this exception.

## **Public administration**

The draft legislation seems to reflect accurately the policy decision to introduce/expand the exception and does in our opinion not unduly restrict visual artists' rights. However, there is a notion that this could potentially circumvent orphan works regulations considering that it requires that the work is not commercially available, but it would still be restricted to the exercise of rights for the purposes for which the statutory requirement is imposed.

DACS  
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