

A Response to the Intellectual Property Office's Consultation on Copyright.

Open Rights Group. 21st March 2012.

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1. Introduction

We welcome the opportunity to respond to the Intellectual Property Office's consultation on copyright. We broadly supported the findings of the Professor Hargreaves' review. We believed that his recommendations added up to a kind of design manual that will help society reap cultural and economic rewards from new technology through greater creation and use of information, ideas and knowledgeⁱ. We were happy to see the government taking on board the recommendations and pursuing them through this consultation.

We broadly support the proposals made in the consultation. In this submission we highlight in particular our support for the broadening of copyright exceptions, especially those that promote freedom of expression such as a new exception for parody.

Support for the consultation process

Open Rights Group would also like to express its support for the open and transparent nature of this consultation process. The consultation events that ran through early 2012 were broadly attended. There were many opportunities for stakeholders to represent their interests and the request for responses to the consultation explicitly calls for evidence of the issues at hand.

This should help make sure that whatever decisions the government reaches about the balance of interests, the consultation process was a chance for those interests to have fair representation. The debate that has followed the publication of the report 'Digital Opportunity: a Review of IP and Growth' and that continued through the consultation process have been open and robust.

In a complex and somewhat controversial policy area, this suggests to us that the IPO is looking to effectively navigate through many differing opinions, whilst avoiding any bias, in order to secure an optimal policy outcome through a focus on evidence and the issues. We hope that this process can become a model for other departments' policy making on IP related issues.ⁱⁱ

An economic and social flourishing

Copyright is an economic instrument or mechanism for making sure creators are rewarded for their work whilst also ensuring society reaps the maximum benefits of their work. We believe that technology should help increase the creation of and access to information, culture and knowledge. But this requires copyright law that reflects the new opportunities for creative or economically useful activity afforded by new technology.

That should go hand in hand with strengthening creators' position by, for example, encouraging fair markets in which they hold a stronger stake, improving the visibility of the provenance of a work and instances of works' reuse, boosting mechanisms of redress and remuneration, and by significantly improving relationships between creators and collective licensing bodies.

We believe that the direction of travel of these reforms will help do this. Taken together, and with careful consideration of how to maintain or strengthen the legitimate control that creators retain over their works, these proposals represent a much needed shift in IP policy making that will ultimately encourage a cultural and economic flourishing.

Conversely, without this programme of reforms, we fear copyright will continue to lose credibility by continuing to inhibit society, through a kind of over-regulation, from making the most of new technology. When it prevents legitimate transformative reusesⁱⁱⁱ, such as parodies, or holds back researchers from analysing large amounts of data in the service of building and sharing knowledge^{iv}, copyright works like a veto over socially or economically useful activity.

2. Orphan works

“31% of books in the British Library are estimated to be orphan^v, 90% of still photographs in UK museums and up to 95% of newspaper content held in the British Library are orphaned^{vi}. 20-30% of material in archives is said to be orphan.^{vii viii}

There should be no reason archives and museums are prevented from carrying out their primary purpose because of copyright. But the evidence suggests that this is happening.

And we are convinced of the scale of the orphan works problem, and that this requires a bold solution.

We therefore broadly support the proposals in the consultation document. We believe it is possible to create a system that allows the preservation and also exploitation of orphan works in a way that does not undermine creators' rights. There would be three elements of such a system:

1. Ensuring diligent searches are properly respected, assessed on a case by case basis, against principles of extensiveness, reach and intended use.
2. Ensuring that there are no incentives or rewards for 'orphaning' works;
3. Sufficient remuneration for reventant authors – and establishing a market rate is a potentially workable idea.

Diligent search

On the one hand, diligent search should not be too onerous. Most works covered by such a scheme will be of marginal value. Many users – companies, or individuals, or institutions - may just be using them anyway. If users have to wait 6 months, for example, after putting in a request, that could in many cases be too long to be useful. On the other hand, we agree that it is important there be sufficient requirements to ensure that it is not possible for users to avoid a proper and full effort to establish authorship.

One way to help strike this balance would be for search requirements to be different for different content types and usage. For example, the requirements for the British Library using orphans for simply improving the public's access to cultural heritage, or for simple non-commercial reprint only, should be less onerous and shorter than an advertising agency using an image to front an advertising campaign.

Remuneration for creators

Regarding question 9, and commercial use, we are concerned that limiting use to non-commercial use may prohibit public-private digitisation schemes. This may ignore the reality of funding arrangements for digitisation – often these schemes are hybrid and will necessarily draw on private funding to make digitisation happen.

But there is also a need to ensure that such digitisation schemes that involve publicly funded institutions don't contain exclusivity agreements and restrictive clauses that unduly re-enclose

works through relationships between archive, museum or library and the provider of digitisation services. Accepting that authors' of orphan works are lost or unreachable, 'ownership' should not transfer back into private hands unduly through digitisation. This is an emerging concern that requires further examination.^{ix}

Furthermore, the proposals to ensure proper remuneration for reventant authors are extremely important. Were this to be an escrow account, handled potentially by collecting societies, this further emphasises the need for standards of transparency and accountability for collecting societies.

Changing the '2039 rule'

We would support the sort of change suggested in question 8 of the consultation, involving “limiting the term of copyright in unpublished and in anonymous and in pseudonymous literary, dramatic and musical works to the life of the author plus 70 years or to 70 years from the date of creation, rather than to 2039 at the earliest.”

One example of the problem comes from the field of music manuscript publishing. There are still many unpublished music manuscripts coming to light, from quite well-known early composers. Some early composers did not publish extensively. For example, J.J. Froberger died 1667. He published two pieces in his lifetime but wrote at least one hundred, and possibly hundreds. Some material was published later, yet it is suspected that there are still several 'lost' manuscripts.

A completely new and unknown manuscript was discovered and sold at Sotheby's London in 2006, purportedly for £600,000^x. This contained 18 previously unknown pieces and many others. One of the only people given access to the Sotheby's manuscript in 2006, before the auction, was Bob van Asperen, a US academic and a specialist in the Baroque^{xi}.

It is likely that the '2039 rule' contributes to restrictions in access to such valuable works that would delight musicians and scholars of the period. While many published pieces have now - owing largely to the work of enthusiastic volunteers - been put online^{xii} and can be downloaded and played by musicians both amateur and professional around the world, such unpublished works by UK composers are likely still covered by the 2039 rule. It would not seem to serve society or the economy for works by composers who died hundreds of years ago, sometimes before copyright laws even existed, to still be in this position. In such situations copyright denies enthusiasts, musicians and the broader public access to important items of shared heritage.

3. Extended collective licensing

One problem identified by the Hargreaves Review, by the Government in its response and by this consultation is the difficulty of securing licenses, with multiple agreements required, for example. The knock-on effect is a drag on the legal market for goods, and restrictions on the range of legal content consumers have available to them.

It's clear there is a problem of this nature. For example, in September last year we looked at availability through legal sources of a wide range of films. We found that a wealth of British cultural history was simply not available through legal providers. Only 43% of the top 50 British films could be bought or rented online. Similarly, only 58% of the BAFTA Best Film award winners since 1960 were available.

The situation looked worse if iTunes was discounted. Excluding iTunes, only 27% of the BAFTA award winners were available, with 29% of the best British films. Only 6% of the best 50 British films were on Film4 OD or Virgin Media, with 14% available through a LoveFilm subscription and 4% through pay per view on LoveFilm.^{xiii}

It is important to note that this was before the launch of Netflix in the UK, and services have continued to develop in the interim. These will no doubt improve availability. But for this to be the state of the legal market in late 2011 is a clear indication of a problem.

So we recognise the twin problems of archive and museums' struggles with orphan works, and market drags from challenging licensing environment in which it is hard to secure the licenses to get new services off the ground.

Extended collective licensing will likely serve consumers and citizens where it facilitates the growth in availability of legal content and services. It would also serve creators where it allows more legal content to find its way to market more quickly.

The proposal for extended collective licensing is one response to this kind of problem, allowing simpler points of contact for those wishing to attain licenses to use works. We also hope that the review being led by Richard Hooper into the Digital Copyright Exchange will lead to further reforms and ultimately healthier markets.

There are some challenges for extended collective licensing scheme that we would like to briefly note, related to the market effects and the nature of the opt-out provision.

1. The market effects of concentration of power

Greater collectivisation of rights is one response to the complexity of getting legal content to market. Open Rights Group believes that technology can help improve creators' position and power in the market, making it easier for musicians to connect with their fans, audience or licensees. The relationship between creator, intermediaries such as collecting societies and consumers is therefore critical.

Reviewing creators role in the digital age

We support creators' right to be identified, especially if their works are to be potentially licensed without their knowledge or explicit consent. In general we support moves to ensure creators' position is strengthened; moral rights should form part of this.

More broadly, we support further study on the role of creators in the digital age. This should include considerations of the strengths, weaknesses and vulnerabilities in cultural markets, and should help to disaggregate the interests of rights creators themselves from intermediaries who to date have been charged with being custodians of the rights.

We are concerned that one remaining blind spot in IP policy is a developed understanding of how creators themselves feel they have been affected by the digital age, taking full account of the impact of technology on how they work and make a living. We are interested in studies, for example, such as the study on music artists by the Future Music Coalition^{xiv}, which focuses on a broad range of issues, from structural shifts brought about by technology through to the services artists take advantage of most.

We would advocate time being spent on understanding these changes and how ultimately creators' hand can be strengthened in the digital age, in ways that take full advantage of the connectivity, transparency and accountability that technology offers.

Reconciling collective representation and power of artists

To enable extended collective licensing scheme, there would need to be a prior implementation of minimum standards for collecting societies. This is a critically important for any orphan works and extended collective licensing proposals to make sense. Such proposals would lead to significant power being handed to collecting societies including power over the creators they represent and over the market they operate in.

There has to be a domino effect of credibility and legitimacy, from establishing standards that collecting societies adhere to that in turn improves the relationship between these societies and the artists they represent.

Examining other market-based solutions

Technology could also facilitate a market for rights based on an improved and strengthened creators position that reduces a reliance on collectivised rights management, rather than enhancing it.

Ultimately, this comes down to the question of whether there are other ways of utilising technology to build better markets for content that both boost creators' power and availability for consumers. It is possible that technical and administrative services could emerge to help performers manage their relationship with the market, instead of being 'passengers' in intermediaries' businesses.

2. Concerns about opt-out and the impact on creators

It is critical that creators are able to opt out of any ECL scheme, and this should be easy to do and clear. For example, it could be possible for there to be web services with a defined automated

interface that works with Facebook, Google+ and so on, giving creators an automatic opt-out tool whenever any content is created. Any such mechanisms should be accompanied by simpler paper and phone-based routes, to ensure no creators are disenfranchised.

We agree that a collecting society should demonstrate that it has taken account of opt-outs. Exactly how should be up to the body concerned, driven by the needs of the creators themselves, as it will change with time, their market area and technology.

Safeguarding free software and alternative licensing projects

Regarding question 40, we are concerned about the impact of ECL schemes on three constituencies: software, free content groups and alternative licensed works. The extension of ECL schemes to these projects would cause them significant problems.

For example, if an ECL scheme were to encompass free software projects then there would be a need to protect the intended license through, for example, automated mass opting out for every change-set. Given the sheer volume of changes occurring on these projects, this would not only undermine the free software projects but pose problems for any opt-out process too.

Establishing ownership of, and identifying contributors to, collaborative Open Source, or Creative Commons licensed work will be difficult. But it would be retrograde to use mechanisms intended to help manage orphan works to undermine collective and grassroots creativity such as this. We would advise looking carefully at how to ensure that open source projects and creative commons licensing are not harmed by proposals for extended collective licensing.

Orphan works or extended collective license rules need to be able to take account of instances where a work includes a stated public licensing policy clear to all parties without need for contacting the author, whether they are unknown or not.

Privacy review

Where any opt-out scheme involves transparency in service of the creators who do opt-out, there may be privacy concerns. For example, were there to be a central orphan works and ECL data base that was available publicly to show which works have been licensed where, there would be issues relating to the details of who had licensed sensitive or controversial material for use.

We suggest that developments of ECL proposals include a privacy review, to ensure that the effects on licensees, users and opt-outs are fully taken into account.

4. Minimum standards for collecting societies

It is critical that collecting societies adhere to minimum standards, in order to ensure the markets in which they operate are fair, that they build greater trusting relationships with their users and to enable the development of other proposals for licensing reform. The governance of collecting societies is critical to the enabling of any extended collective licensing schemes and orphan works solutions and should be seen as a first, enabling step of licensing reforms.

In order to ensure that the collecting societies adhere to the wishes of the creators, and more importantly don't license things they should not, in ways they should not, we would encourage an approved code of conduct that guarantees greater transparency, accounting and clarity for their members and clear, consistent terms for users.

- Endeavour to improve accounting and transparency so that members can be sure of the remuneration they are due and why
- Fair and non-discriminatory licensing

We would support the criteria set out by Consumer Focus in their submissions last year to the Independent Review of IP and Growth, which should guarantee that collecting societies address issues of transparency, accountability and auditing and are pushed to address issues relating to concentrations of power over their markets.^{xv}

5. Exceptions

We continue to believe that implementing the full range of exceptions permitted under European legislation will lead to significant benefits to consumers and creators. They will permit countless socially and economically useful activities to take place without undermining the core value of a copyrighted work. So we strongly support the proposals made in the consultation for the implementation of a wide range of new exceptions that should guarantee greater beneficial uses and reuses of work.

For consumers: Private copying

Copyright badly needs an update to ensure that it reflects customers' reasonable expectations. A Consumer Focus survey that suggested 15% of consumers realised copying a CD that they had bought onto their MP3 player was illegal and that 9% thought it should be, helps to demonstrate the disconnect between law and practice.^{xvi} This should be seen as an effort to define the reasonable expectations consumers have about the use of a work they have paid for legally.

The evidence from the comparative study by Professor Martin Kretschmer suggests that a sufficiently narrowly framed exception could be introduced without the need for a levy systems.^{xvii}

Building and sharing knowledge

We believe the exceptions for text and data mining, for research and private study, preservation by libraries and archives, and 'use of works for education' represent a suite of exceptions that will help educators, researchers, and academics build on our knowledge heritage in new ways.

In particular, we believe text mining provides a clear example of how a simple reform to copyright law to make it adjust to what technology allows would bring significant economic and social benefits without undermining the legitimate interests of publishers. In their report 'Value and benefits of text mining', JISC found that:

“Legal uncertainty, inaccessible information silos, lack of information and lack of a critical mass are barriers to text mining within UKFHE. While the latter two can be addressed through campaigns to inform and raise awareness, the former two are unlikely to be resolved without changes to the current licensing system and global adoption of interoperability standards.”^{xviii}

It is crucial to listen to the perspective of academics and researchers in this respect, and to understand how their work is in practice regulated by copyright, and to make sure that the law comes to reflect their needs. This will ensure that they can get the most from material they have legal access to, and that society can ultimately reap the benefits of their work.

In this respect we would point to the claims of Mendeley CEO and co-founder Dr Victor Henning, CEO & Co-founder:

“We see enormous commercial potential in text mining, and especially in allowing third-party developers to build text mining tools on top of Mendeley’s infrastructure and data. Due to the uncertainties with UK legislation, we are currently exploring opportunities for

setting up text mining projects through our US subsidiary, on US-based cloud computing infrastructure. However, since most of our team and infrastructure is based in the UK, this introduces delays and overhead cost, and will potentially lead to Mendeley creating future jobs in the US rather than the UK”.^{xix}

Freedom of expression

The relationship between exceptions and freedom of expression is recognised by the Council of Europe in a 2009 report prepared by the Group of Specialists on Human Rights in the Information Society, in which they say that:

“The dimension of public interest [in copyright policy] extends to...(ensuring) optimum access to creative works and to stimulate a wide dissemination of knowledge and creativity. Limitations and exceptions (exemptions) are the mechanisms aimed at securing this access, thereby becoming key factors in achieving a balance between rightsholders’ interests and public interest under copyright system”^{xx}

We agree that people will only reap the benefits of the Internet as a tool that promotes freedom of expression if there are sufficient exceptions that permit legitimate engagement with cultural works. Such exceptions do not undermine creators' rights, or unduly take away earning power from them, but they do encourage people to reuse those works in new and useful ways.

The three proposals around exceptions for parody, use of works for quotation and reporting of current events, and for public administration and reporting, all fall under this theme. This is another kind of deregulatory reform that will remove unnecessary obstacles in the way of useful activity whilst ensuring that creators legitimate exploitation of their work is not compromised.

People should be encouraged not simply to consume information, but to engage with cultural works and to use them to say something about themselves, the world around them, and their place in it. This kind of participatory culture is within reach, but requires these reasonable tweaks in what is permitted reuse under copyright law.

Parody, caricature and pastiche

With regard to parody, the Council of Europe report mentioned above continues:

“States could be encouraged to assess and consider introducing, maintaining, strengthening and adapting to the digital environment those exemptions aimed at:

- protecting freedom of expression and the promotion of the free flow of information such as exceptions made for public speeches, quotations, media usage, reporting of current events and for the purpose of parody.”^{xxi}

We agree with this analysis, and believe that UK copyright law needs some minor reforms to enable people to take full advantage of new technology. In this way, creating a new exception for parody, caricature and pastiche will boost people's engagement with culture and their ability to exercise their rights to freedom of expression. In practice this means being able to play a more active, engaged role in cultural life.

Videos, music and text don't just entertain us, but are used to sell us products, influence our judgement and as a way to say something about the world. That means copyrighted works are strands of our cultural fabric, not just products to consume.

Technology has made it easier to make creative re-workings of these things. And this kind of creativity is woven into the experience of cultural life online. There are 23,000 Beyonce parody videos, around 4,000 Madonna parodies, and nearly 2,000 Adele parodies on YouTube. Many of these are not professionally produced but represent the endeavour of citizens responding to the cultural conversations happening around them.

For example, 'Lady Game Lyric' posted a video called 'Someone like Sonic and Amy'^{xxii} on YouTube in January 2012, in which she sings altered lyrics to Adele's 'Someone Like You'. She sings from the perspective of computer game characters Sonic the Hedgehog and Amy. It has received around 1,800 viewers, who saw Lady Game Lyric dressed as Sonic, and then Amy, singing heartfelt lyrics about the characters' problematic relationship. It's unlikely to be a commercial hit or have a commercial or artistic impact on the original. But however esoteric it may seem, it is undoubtedly significant to Lady Game Lyric and entertaining for those lucky enough to have come across it.

Why parodies need support

Parodies are legitimate transformative reuses of a work that bring a wide range of benefits. Parodies can:

- Help the parody creator learn creative skills. In a letter to the Business, Innovation and Skills Committee, for example, Rob Manuel, the editor of B3ta.com, a popular online creative community, wrote:

“B3ta.com is about grassroots creativity, encouraging people to pick up the tools of the internet and use them to make jokes, entertain each other and ultimately help people flower their creativity into new careers. Along the way we've played a part in the careers of generation of people who are the bright new talents in the UK's creative industry. Our alumni include Ben Wheatley, one of the most feted directors of recent years who has just had a hit film with Kill List, music producer Swede Mason who has taken his mash-ups into the top 40 and figures like Joel Veitch, Jonti Picking and Cyriak whose animations have become a mainstay of advertising.

In the ten years of B3ta we have had various problems with lawyers and copyright holders. Unfailingly business uses copyright to suppress criticism and humour, so we're very excited to note the "5.32 Other Copyright Exceptions" section of Professor Ian Hargreaves's Digital Opportunity report, specifically "an exception for parody and pastiche."

This would be enlightened policy making.”^{xxiii}

- Help teachers improve their teaching. Marshall Mateer, consultant for the National Education Network, for example, argues that a parody exception would also mean:

'legitimising a proven pedagogical approach and an engaging curriculum activity

embedded with good practices that would seamlessly transfer to the world of work and active citizenship.^{xxiv}

- Help campaigners work most effectively to hold organisations, insititutions or others to account. A coalition of campaign organisations, including Open Rights Group, Campaign Against the Arms Trade, and Greenpeace wrote to Baroness Wilcox as part of this consultation process to explain their position that copyright prevents them being as effective as possible:

“...copyright already limits our ability to hold organisations to account through our campaigning.

One of the most important ways that organisations and businesses communicate their brand, advertise their products, or sell their goods is through works that are subject to copyright. Organisations and institutions associate feelings and values with themselves or their products through images, text and sounds. These become strands of our cultural fabric. They shape and inform public opinion about an organisation, its business or policy and, where relevant, its products.

There are often important alternative stories about those organisations and businesses that need telling. Where there is a legitimate public interest in doing so, it should be acceptable to use the copyrighted works to point out hypocrisy, objectionable corporate behaviour or other issues relating to their social footprint.”

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Making such parodies can help people learn creative techniques, entertain their friends with a funny spoof for friends, help them express something about themselves, or make a point about the original work.

Not having to get permission or provide remuneration to the artist is critical to a well functioning parody exception. There can be no business model upon which holding organisations to account through parody should have to rely. Similarly, a parody artist should not have to get the permission of the subject of a joke ahead of the making of that joke. Teachers wanting to help children learn through the use of parody should not have to seek permission or a license. These are uses of a work that represent legitimate engagement with culture and knowledge, over which the original creators should not hold a veto.

Parody online is vulnerable

At the moment, the thousands of parody videos online whose creators have not sought permission from the rights holder are vulnerable to take down, sitting on the wrong side of the law. The most clear consequence of a lack of a parody exception in UK law is a number of take-downs of videos deemed to infringe copyright.

- Greenpeace wrote last year that their parody of Volkwagon's 'Star Wars' themed adverts, designed to highlight apparent lobbying by German car manufacturers against stronger CO2 emission laws in Europe, was taken down from YouTube, for copyright infringement just as their campaign gained momentum^{xxvi}.

- Comedy sketch writers 'Mother's Best Child' had their Olympics parody video, published as a commentary following the riots, removed after a couple of days having accumulated over 90,000 views, becoming the number 1 comedy video on YouTube.

The Olympics will draw on huge amounts of public money and affect many people's lives across East London and beyond. Whether the Olympics is good, bad or both, it is a hugely significant event whose impact should be open to a robust public debate. It will tell a story about the UK and the people in it. Some businesses are allowed to associate themselves with this story by trading on powerful Olympic images and branding. Those organisations will be trying to suggest to us that we eat, drink, wear or use their products and services.

For everyone else, genuine engagement with the meaning of the Olympics is over-regulated. Copyright is one tool that can be used, and is being used, to stifle efforts to engage with that story - to use the signs and symbols associated with the Olympics to say something different about what the occasion will mean for the people affected. As one of the creators of the parody told us:

“As comedy writers our first intention was to make people laugh. But the glaringly obvious hypocrisy in staging a billion pound event at a time of austerity and social unrest was a satirical gift.

I find it outrageous and more than slightly comical that an organisation this large can be so concerned with crushing something so small as a Mother's Best Child sketch. Does it surprise me that the creators of the London 2012 mascots don't have a sense of humour? Erm, no.”^{xxvii}

- Video artist 'Swede Mason' has, following repeated take downs of his work, found himself down to his last 'strike' on YouTube under their take down policy. This threatens to sever the connections he has built up with an audience of over 26,000 subscribers and taking with it nearly 12 million views. His videos have gathered huge audiences and been widely shared, creating new comic musical works that have taken significant thought, effort and skill. He also found that the TV production company behind Masterchef initially told him to take his runaway viral hit 'Masterchef Synesthesia' down off YouTube. As it increased in popularity exponentially, they offered to strike a deal with him to share the profits from the release of the song as a single – which subsequently reached the top 40.^{xxviii}
- Musician and video maker 'Eclectech' parodied the James Blunt's song "You're Beautiful" with a game that involved throwing tomatoes at a caricature of James Blunt, who was singing a song called “You're Gullible”^{xxix}. The creator of the video received legal threats, which led to the take down of the soundtrack. Visitors are now encouraged to play the tomato throwing game while the (now) mute figure mouths the song and the lyrics appear as subtitles.

Supporting peoples' instinct to engage

The 'number of take downs' is not the only, nor necessarily the most important, metric with which to measure the 'need' for a new exception for parody. The volume of parodies online should be a further spur to enact change to protect parodies through an exception, similar to the way that the prevalence of format shifting by consumers is a signal that further exceptions are required to match

new consumer expectations. It is time for copyright law to reflect how people exploit technology, to go with the grain of people's expectations rather than against them.

It is hard to understand what society, the economy or the creator of the original song gains from placing, in the eyes of UK law, videos such as 'Someone Like Sonic and Amy' on the wrong side of the law. This is activity we should be promoting not prohibiting.

When copyright puts creativity like this on the wrong side of the law, we think that copyright stops being something that simply incentivises people to create and rewards them for it, and works instead as a veto over culturally useful or interesting or entertaining activity. We think the law should encourage this kind of creativity instead, through this kind of a deregulatory move.

Fair dealing

We appreciate that there may be concerns about the 'passing off' of a work, claimed to be parody, as that of the original creator; of association with unwanted causes; and of undue reputational or economic damage.

We agree that introducing parody as a 'fair dealing' exception would help address many of these concerns. We also believe that these concerns, while understandable, are not well founded. The very nature of a parody as 'not the original' shields creators from these possible harms.

First, it is unclear that there is any economic evidence to substantiate these fears. For example, in a 2010 study for Consumer Focus, Rogers, Tomalin and Corrigan argue that 'there seems to be an absence of any economic evidence' of the above suggested affects.^{xxx}

Looking to the US and a now famous case, the US Supreme Court, in *Campbell v. Acuff – Rose Music, Inc*^{xxx}, ruled that 2Live Crew's parody of Roy Orbison's "Pretty Woman" did not impact the commercial success or viability of the original given its difference with original and its differing context and audience.

Furthermore, a parody exception is not something that could lead to an artists' creation being associated with an undesirable cause, for similar reasons: making a parody is not the same as 'passing off' a work as something made by somebody else. It is worth highlighting that a country with far greater history of promoting the moral rights of authors, France, has a long standing right to parody that has not undermined other moral or economic rights.^{xxxii}

“But people in the UK are already funny!”

We have heard many criticisms of proposals for a parody exception along the lines of: 'why do we need a new exception? The UK quite famously has an incredible history of comedy and humour'.

It makes little sense to suggest that the historic development of British citizens' sense of humour tells you something about the acceptable rules of reuse of copyrighted work. A parody exception is not justified because of a culture's lack of humour or jokes. Rather, the issue is whether one channel for the expression of people's sense of humour is being constrained through copyright laws over-regulating useful activity. We believe that there is clear evidence that it is, and that this has both cultural and economic consequences.

'Use of works for quotation and reporting current events' and 'use of works for public administration and reporting'

We also consider the widening of the exception for criticism and review to be something that would similarly promote freedom of expression. We believe this will help promote citizen journalism, open up more opportunities for academic commentary and promote a broader range of journalistic practices.

We see no reason not to reflect the breadth of the exception in the Copyright Directive. This would ensure that the mass participation and commentary that new technology affords will be encouraged and supported. We agree that maintaining the fair dealing and attribution requirements could be a suitable way to ensure that this happens without unduly harming the creators' legitimate interests. We think that any fair quotation should be permitted.

We also believe that it is imperative to make sure that copyright does not inhibit government transparency and openness, and would strongly encourage reform of exceptions that permits the publication of relevant documents online. This would support the current spirit of government transparency and ensure that the full range of tools to achieve openness in public administration, with consequent gains of public trust and accountability, are available.

- i <http://www.guardian.co.uk/commentisfree/2011/may/23/professor-hargreaves-intellectual-property-report>
- ii Open Rights Group set out an opinion on recent IP policy making in a recent blog post on February 14th 2012, <http://www.openrightsgroup.org/blog/2012/when-good-is-bad>
- iii See for example the letter written by campaigning organisations of their experiences of copyright and campaigning: <http://www.openrightsgroup.org/blog/2012/campaigners-we-need-right-to-parody>
- iv See for example the JISC report 'The value and benefits of text mining', March 2012, <http://www.jisc.ac.uk/media/documents/publications/reports/2012/value-text-mining.pdf>
- v Stratton, B. 2011. 'Seeking New Landscapes: A rights clearance study in the context of mass digitisation of 140 books published between 1870 and 2010'. British Library Publication. Available at: <http://pressandpolicy.bl.uk/imagelibrary/downloadMedia.ashx?MediaDetailsID=1197>
- vi Vuopala, A for the EU Commission. 2010. 'Assessment of the orphan works issue and costs for rights clearance'. Available at: http://ec.europa.eu/information_society/activities/digital_libraries/doc/reports_orphan/anna_report.pdf
- vii JISC, 2009, In from the cold: An assessment of the scope of 'Orphan Works' and its impact on the delivery of services to the public, p.35, Fig. 2.2. Available at http://sca.jiscinvolve.org/wp/files/2009/06/sca_colltrust_orphan_works_v1-final.pdf
- viii Quoted in 'Consultation on copyright', IPO 2011, <http://www.ipo.gov.uk/consult-2011-copyright.pdf>
- ix For more on the issues around digitisation, see <http://www.openrightsgroup.org/blog/2011/access-to-the-agreement-between-google-books-and-the-british-library>
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