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To the Joint Committee on Statutory Instruments, by email:  
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Dear George Mudie MP and Committee members –

The National Union of Journalists expresses its strong support of the submission made to you by the British Copyright Council (BCC), and wishes to make some brief additional points.

The NUJ represents 30,000 journalists, from reporters to photographers to cartoonists, most working for employers and clients in the UK and Ireland.

Of that membership, 9700 are freelance – meaning that under the Copyright, Designs and Patents Act 1988 (CDPA) they are the first owners of the copyright works they create and in general depend for a significant proportion of their income on remuneration for re-uses of that work – including remuneration for educational uses. Very many are rights-holders, offering the media that publish or broadcast their work the licence necessary for that purpose and retaining the right to issue licences for second and subsequent uses, translations, and so on.

The NUJ supports in its entirety the detailed submissions made to you by the British Copyright Council, following the government response to its first submission. For clarity we reiterate the main points:

- ⤴ **Unenforceability of contractual overrides:** During the evidence session on 6 May, IPO officials referred to Section 36 (4) CDPA as an example of unenforceability of contractual overrides under existing UK copyright law. This shows, as the BCC explains in detail, a thorough misunderstanding of the functioning of Section 36.
- ⤴ **Use of quotations for purposes other than criticism and review:** The NUJ disagrees with Government's assessment as regards the definition of the term "quotation", which is not supported by the European case-law on which the Government relies. We have further concerns about "quotation" of images, on which we expand below.
- ⤴ **Compatibility with Article 5(5) of the EU's Information Society Directive:** The claim in the government's response to the BCC that the fact that a quotation exception is provided for in Article 10 of the Berne Convention means that any quotation exception *automatically* passes the Three-Step Test is not correct. Indeed, the NUJ is surprised that this argument

could seriously be advanced. Its incorrectness is made clear by Article 10(2) of the WIPO Copyright Treaty.

- ⤴ **Use of Section 2(2) of the European Communities Act 1972:** The NUJ, like the BCC, does not accept, and remains very concerned by, the Government's argument that any measure, however significant its impact, can be implemented by SI if it is relevant to some treaty obligation. The right of live performance is not an incidental adjunct to the rights in the EU copyright *acquis*; it is a separate and important property right.
- ⤴ **Private copying exception:** The NUJ is of the view that there is no leeway for Government to introduce an exception for private copying without fair compensation under Article 5(2b) Information Society Directive. Since the BCC's letter of 31 March 2014, position has been further supported by the CJEU judgment in case C 435/12 ACI Adam.

### **'Quotation' of photographs and illustrations**

As the British Copyright Council observes, UK courts would ordinarily give the expression "quotation from the work (whether for criticism or review or otherwise)" its normal dictionary definition. 'Quotation' is defined by the Oxford English Dictionary as "a group of words taken from a text or speech and repeated by someone other than the original author or speaker". Consequentially "quotation" will be interpreted in a way that is wider than envisaged and more widely than allowed under the International and European legal instruments.

The Draft Statutory Instrument on Quotation and Parody, in its current form, therefore raises serious questions over what might be meant by "quotation" of a photograph, illustration or work of visual art.

The existing provision of CDPA 30(2) permitting "Fair dealing with a work (other than a photograph) for the purpose of reporting current events" is retained in the text of the Act: but when or whether the exclusion of photographs continues to apply is unclear.

In response to an earlier submission by the British Association of Picture Libraries and Agencies, the government quoted the Advocate General's conclusion in the European Court of Justice case ECJ case C-145/10 *Painer* that a "quotation" could be a "full quotation" of the work, so could apply to photographs:

"... it would seem possible that a full quotation can also be a quotation within the meaning of that provision. In the case of this type of work, a complete reproduction may be necessary in order to create the necessary material reference back to the work. If only parts of photos could be published under Article 5(3)(d) of the directive, this would significantly restrict the application of that provision to photos."

The NUJ observes that this in fact supports the notion that attribution ("material reference" in the Advocate General's terms) is *mandatory*; yet the Draft Statutory Instrument on Quotation and Parody, in its current form, leaves wide leeway for non-attribution where it "would be impossible for reasons of practicality or otherwise".

The NUJ therefore submits that the provisions on quotation must be re-worked to give some clarity

and avoid the situation in which the UK courts are forced to make up law and photographers and illustrators are presented with the severe financial burden of funding the court cases through which that would have to happen.

It is hard to foresee any circumstances in which “Quotation” of the whole of an illustration or photograph under an exception would pass the three-step test in both World Intellectual Property Organization (WIPO) and World Trade Organization (WTO) treaties for legislation of exceptions, which for ease of reference is that they must be applied:

- 1) In certain special cases;
- 2) Which do not conflict with a normal exploitation of the work, and;
- 3) Which do not unreasonably prejudice the legitimate interests of the rightholder.

Beyond the legal questions raised above and the burden of financing clarification which these ill-worded exceptions would impose is the prospect that an ill-worded exception could very seriously restrict the possibility of making a living as a professional illustrator or photojournalist – not least due to infringement taking place during the eight to ten years we would expect it to take for the meaning of the law to be clarified, appealed and, eventually, decided at the Supreme Court or in Strasbourg.

Regards,

John Toner

National Freelance Organiser  
and Servicing Officer, Copyright Committee

National Union of Journalists