

## **The Dichotomy between Document and Fiction : Do Personality Rights amount to Censorship?**

I am an intellectual property lawyer and for the last 20 years I have worked for the British Broadcasting Corporation in their central legal department. Before that I worked in a City law firm, dealing with a much wider range of products from pharmaceuticals to sports shoes, from make-up to motor cars. My clients were usually the rights owners and the evil counterfeiters, the copiers, were the bad guys. The BBC has given me a more balanced view.

The BBC is both a creator and user of intellectual property rights. So I advise the BBC on how to protect and exploit its rights, and on its agreements acquiring rights, and at the same time I advise programme makers how to make use of the exceptions to copyright.

Of course the vast majority of the content in BBC programmes is either created by the BBC or acquired and paid for. In 2010 the BBC spent £1.1 billion on rights payments out of a total programme spend of £2.4 billion. In that year we also spent £10 million on the administrative function of rights clearance – an indication of how time consuming that process can be. Every week about 200,000 items of music are cleared through our collective licensing agreements. And of course we sell our programmes and license our archives too. But the income from that is a tiny proportion of what we get from the licence fee. So our focus as a public service broadcaster is to make the best programmes we possibly can.

And the exceptions to copyright – ‘fair dealing’ in its various forms - can be vital to allow editorial freedom when copyright owners either won’t license their material or want to control how it is used. And yes, the exceptions can also save money, important when the BBC’s budgets are constantly being squeezed.

And I have to say my heart is really in this part of my work. For the last 15 years I have been lobbying the UK government as they have gone through a seemingly endless series of consultations on the reform of copyright law, campaigning on the need for further exceptions to copyright, in particular a parody exception. This is one of the optional exceptions in the European Copyright Directive, and it also exists under US and Australian law. The UK government, also lobbied hard by rights owners such as film companies who are against any copyright exception, maintained there was no need. But finally it has gone through, along with exceptions allowing quotation and private copying. These will come into force on 1<sup>st</sup> October, and cannot be overridden by copyright. Other new exceptions already implemented include the extension of the exception for educational use/research and private study to all copyright works including audio-visual ones.

In the UK we are lucky not to have any ‘personality rights’ as such. We are free to make documentaries about real people, as long as we aren’t defamatory about them (if they are still alive). In America the ‘publicity right’ is well developed and in California can even survive death. But it is limited to using the image in order to sell merchandise – for example Marilyn Monroe on a biscuit tin or Humphrey Bogart on Burberry’s Facebook

page (settled out of court). So biographical documentaries or dramas that we make can safely be shown in the USA.

Image rights have recently been established in Guernsey however. This is a money-making stunt by one of the tiny Channel Islands, not part of the United Kingdom (Scotland may soon be in the same position). Celebrities are being encouraged to register their images, and hopefully establish their assets in Guernsey with its favourable tax regime. The latest to do so is perhaps fittingly a Scottish footballer Allan McGregor. Here is his image (this is my only visual aid):



As in the USA, rights are focussed on commercial exploitation and there are exceptions:

A registered personality's image rights would not be infringed by, among other things:

- fair dealing for the purposes of news reporting or satire;
- fair dealing for any other purpose which does not unreasonably affect the legitimate interests of the personality or the proprietor of the registered personality;
- incidental inclusion of an image;

So we hope this won't be too much of a worry.

In the UK a claimant would have to rely on other causes of action such as passing off, trade mark infringement, data protection, or breach of confidence/privacy

**Passing off**, the nearest equivalent to unfair competition in Germany, involves a damaging misrepresentation. So use of a person's image in advertising suggesting endorsement can be actionable— eg Eddie Irvine and Talksport.

**Trade mark infringement** – usually a try-on. Individuals or corporations can register their names as trade marks but 'descriptive use' or factual use is allowed.

**Data protection** – the holding and processing of data relating to individuals (which can include photographs and films) is strictly regulated and requires consent, but documentary film that captures passers by is unlikely to be caught by the legislation.

The right to respect for **private and family life** exists under the Human Rights Act, and this can make it dangerous to use some images. The UK privacy cases focus on confidence and the wrongful disclosure of information that was previously private. In Naomi Campbell v Mirror Group Newspapers a successful claim concerned a photograph showing the model (in a public street) on her way to a drug rehab meeting. When the BBC shows photographs from Facebook of eg a murder victim we are careful not to show other people pictured at private events.

So I think we are lucky in the UK so far. It is not personality rights that cause us problems but copyright. In a feature film the BBC made about Francis Bacon called 'Love is the Devil', Bacon's estate would not license copyright in the paintings, so none could be shown. Paintings in a 'similar style' were briefly glimpsed. In 'Sylvia', a drama about the poet Sylvia Plath, her daughter Frieda Hughes was not happy about the film being made. The film could not be shown at all in France, because Frieda Hughes was portrayed in the film as a child and the producers were advised she would have to give permission. We had no permission to use Sylvia Plath's poems. But under the UK copyright exception of fair dealing for the purposes of criticism or review we were able to use short quotations from Sylvia Plath's poetry, and no complaint was made. This will be easier to do under the new 'quotation' exception that does not require any 'criticism or review' – sometimes rather difficult to achieve in a drama.

So what are the current copyright exceptions in the UK?

**Fair dealing for the purposes of news reporting (doesn't include photographs) and criticism or review.**

This usually means only using short extracts. The concept of fairness corresponds with the 'three step test' in the European Directive: (1) in certain special cases; (2) which do not result in a conflict with the normal exploitation of a work and (3) which do not unreasonably prejudice the legitimate interests of the author (or other right-holder).

**Incidental inclusion.**

Very useful in allowing copyright material that appears 'incidentally' in filming, either accidentally or deliberately as eg details of set designs. The BBC has an ongoing disagreement with the Metropolitan Police who say that use of their badges on uniforms or police cars in dramas requires a licence – we disagree.

**Reporting parliamentary and judicial proceedings, royal commissions and statutory inquiries.**

A broadly worded exception that can allow use of photographs or other relevant material.

**Buildings and works of art on public display.**

I am constantly telling BBC programme makers that they do not need to pay to film the Hollywood sign, or the 'Walk of Fame'. When they get a permit to film in the street they are told this by the Hollywood Chamber of Commerce – don't do it!

**Spoken word.**

This means interviewees cannot seek to rely on any underlying copyright in an interview willingly given, when they subsequently regret what they have said.

**Public interest.**

When all else fails, we can argue that use of a copyright work is in the public interest. An obvious example in news reporting would be the image of a suspected murderer on the run, or a rapist or paedophile where further victims are being encouraged to come forward.

And our new fair dealing exceptions:

**1. Quotation**

Copyright in a work is not infringed by the use of a quotation from the work (whether for criticism or review or otherwise) provided that:-

- The work has been made available to the public
- The use of the quotation is fair
- The extent of the quotation is no more than is required by the specific purpose for which it is used, and
- The quotation is accompanied by a sufficient acknowledgement (of title and author), unless this would be impossible for reasons of practicality or otherwise.

Any contract term purporting to override this exception would be unenforceable.

**2. Caricature, parody and pastiche**

Fair dealing with a work for the purposes of caricature, parody and pastiche does not infringe copyright in the work.

Any contract term purporting to override this exception would be unenforceable.

This exception applies also to performances.

There is no definition of ‘parody, caricature or pastiche’ in the exception, but the UK Intellectual Property Office have produced some draft guidelines which are encouragingly broad (and do not say a parody must be humorous):

“The words “caricature, parody or pastiche” have their ordinary dictionary meanings. In broad terms, parody imitates a work for humorous or satirical effect, commenting on the original work, its subject, author, style, or some other target. Pastiche is a musical or other composition made up of selections from various sources or one that imitates the style of another artist or period. A caricature

portrays its subject in a simplified or exaggerated way, which may be insulting or complimentary and may serve a political purpose or be solely for entertainment.’

To me the most exciting concept here is ‘pastiche’ and the idea of creating a new work by joining together a collection of material from other sources. In the BBC’s submissions to the UK government I cited ‘The Clock’ by the American artist Christian Marclay (which other speakers have mentioned). This is the 24 hour video made up of thousands of uncleared film clips that show clock faces or mention the time of day, forming a continuous sequence of scenes showing the correct time. Critically acclaimed and shown in art galleries across the country it nevertheless ran the risk of infringing copyright in the UK as there was no obvious ‘criticism or review’ of the works used. In an interview in ‘The Economist’ Marclay said: ‘Technically it’s illegal, but most would consider it fair use.’

This must have been persuasive because when introducing the new parody exception to the House of Lords our latest IP minister referred to ‘The Clock’ with approval, describing it as a ‘pastiche’ and noting that ‘galleries which exhibit the installation currently risk action for copyright infringement.’ She obviously believes the new exception will allow such works – so ‘recycled cinema’ has the endorsement of the noble Baroness Lucy Neville-Rolfe.

There is a recent judgement of the European Court in the Belgian case of Deckmyn v Vandersteen that has caused some concern, initially causing fears that parodies would have to abide by a European standard of humour. In this case a children’s cartoon book was parodied by the Flemish nationalist party Vlaams Belang. The original cover picture for a story called ‘The Compulsive Do-Gooder’ was changed to show the mayor of Ghent showering money on Islamic-looking immigrants. The original artist objected to this, not wanting his work to be associated with a political message he did not agree with. The judgement made clear it is up to national courts to decide but held:

‘The parody may be humorous or mocking but if it conveys a discriminatory message the rightholder may have a legitimate interest in ensuring their work is not associated with such a message.’

Does this mean that only people the Court approves of should be allowed to parody another’s work?

Note that there is **no need to acknowledge** – the idea is that if a work is being parodied it will already be well-known, as the point of a parody is to ‘evoke an existing work’.

But note also that **moral rights** are not affected – so the author of the parodied work will have the right to object to ‘derogatory treatment’.

In the UK this means ‘**distortion or mutilation**’ of the work or treatment that is **otherwise prejudicial to the honour or reputation** of the author or director. There must be proof of actual damage to reputation – it is not enough for the author simply to feel hurt or offended.

There have been very few cases asserting moral rights in the UK – again we are lucky in this. Only one has succeeded in showing ‘distortion’ where changes made to a photograph of a model removed a forest background and reversed and cropped the image. (Delves-Broughton v House of Harlot 2012) Only £50 damages were awarded in the Patents County Court, but this case worries me.

Many years ago I was talking to a BBC programme maker about the series ‘The Great War’, produced by the BBC in the 1960s and due to be repeated later this year. He said that when all the original footage of the battles was assembled the decision was made to reverse some of the film so that the British always appeared on the left and the Germans on the right. If you look carefully you will see a lot of left-handed soldiers. The rationale was purely to simplify the geography of the Western front – west left and east right. But film is more powerful than that. There is an established tradition, we are told by movie buffs, dating back to early Hollywood Westerns and also seen in the Lord of the Rings, that the good guys move from left to right and the bad guys from right to left.

So documentary film makers can imply moral judgements – and perhaps infringe moral rights – in ways they may not even be aware of.

I look forward to discussing this further.

Elizabeth Gibson  
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