

# COPYRIGHT COMMENT

## The IP Act 2014 and other changes to IP law explained



Nikki Powell

Haseltine Lake's **Nikki Powell** discusses the recent changes brought into law on 1 October 2014

**The Intellectual Property Act 2014 ("the Act"), and certain parts of the Enterprise and Regulatory Reform Act 2013 ("the ERA"), which came into force on 1 October 2014, have brought in a host of key changes and updates to patent, design and copyright law in the UK.**

The Department for Business, Innovation and Skills has estimated that the strengthening of protection for the UK design industry alone will be worth more than £15bn to the UK economy. It is not clear how this figure was arrived at, so whether it will be accurate remains to be seen.

### Copyright

The 1 October 2014 has also seen some long-overdue modernisation of copyright law – in the form of statutory instruments bringing into force aspects of the ERA.

### Home copying

The Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014 finally make so-called 'home copying' lawful. Not many people appreciate that, up until 1 October 2014, it was always illegal to copy a CD you own onto your mobile phone, for your own use.

Anyone who lived through the 1980s, and remembers high speed dubbing and the blank tape, will appreciate that the technology to make a further copy of a cassette, and of its successor formats, has been around for many years. You could be forgiven for assuming, based on the availability of such technology, that the law would have permitted these activities.

In practice, copyright infringement by a 'home copier' is virtually impossible to detect, and successful litigation brought against one home copier would likely have next to no deterrent effect on another. So, one just does not see cases where proceedings are brought against home copiers. The courts have been aware of the issue since at least 1988, when the House of Lords considered the point in *CBS v Amstrad*<sup>1</sup> and noted in its judgment that parliament could legalise home copying. Now, just 26 years later, it has. The use must be personal and non-commercial and personal copies cannot be retained if the "original" copy from which the personal copy was made, is transferred to another person.

### Quotation and parody

Two other important new exemptions have been brought in by the Copyright and Rights in Performances (Quotation and Parody) Regulations 2014. First (in new section 30A of the Copyright, Designs and Patents Act 1988), use of limited amounts of copyright material for parody, caricature or pastiche is now permitted. This is excellent news for creators of so called 'mash-ups' – where existing material is re-edited and presented in a humorous way – such as Liberal Democrat leader Nick Clegg's tuition fees 'apology', and parody songs such as the *Newport State of Mind* version of the Jay Z and Alicia Keys' record *New York State of Mind*. Previously, if the creator had not asked permission from the copyright owner of the original material, they could well have found themselves on the wrong end of an infringement action.

The Copyright Directive cites the two

essential characteristics of parody: "to provoke an existing work while being noticeably different from it and... to constitute an expression of humour or mockery". In short, this means if such a case were to be taken to court, it would be up to the judge to decide whether or not the material is funny.

In the recent case of *Deckmyn and Anor v Vandersteen*,<sup>2</sup> the Court of Justice of the European Union ("CJEU") held that 'parody' as an exception to copyright infringement must be interpreted autonomously throughout the EU. This case was about a cartoon featuring the mayor of Ghent, Belgium. The CJEU held that the parody exception must strike a fair balance between the interests and rights of the rightsholders, and the freedom of expression of the user of the copyright work relying on the exception. This approach seems to be stepping out of the realm of copyright law and into issues of privacy and consideration of the conflict between Article 8 of the European Convention on Human Rights (right to a private life) and Article 10 (freedom of expression). It will certainly be interesting to watch how the case law develops in this area.

Secondly, section 30 of the CDPA has been amended to add 'quotation' to review. This means that quotation (for criticism, review or otherwise) from a work which has been made available to the public, and where the use is fair dealing, will be allowed to the extent that the quotation is no more than is required by the purpose for which it is being used.

### Fair dealing

'Fair dealing' is the common theme in these new exceptions, but there is no definition of it

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in the new regulations (or indeed in the CDPA). The UK Intellectual Property Office ("UK IPO"), in its guidance, has said that the question to be answered is "how would a fair-minded and honest person have dealt with the work?" In practice, this will always be a matter of fact and degree in each case.

## Designs

### New criminal offence

One of the most significant changes brought in by the Act, is a new criminal offence covering copying of a registered design. The UK IPO has said that this is intended only to cover those who have blatantly copied. The new offence brings the position of registered designs into line with copyright and trademarks, so that brand owners' weapons against infringers have been further strengthened. Now, anyone producing or selling articles which have been intentionally or knowingly copied from a registered design (a 'fake' Louis Vuitton handbag for example) can be fined, sent to prison for up to 10 years, or both. This ought, as such, to have a degree of a deterrent effect.

### Changes to first owner

Ownership of designs is another important area that has been overhauled by the Act and will impact upon designers and those who commission designs. Previously, unregistered design right ("UDR") in an article belonged to the commissioner of the design, not the designer – this has now been reversed. This brings design law into line with copyright law as well as other legal systems across the EU. Commissioners of designs should ensure that appropriate contractual obligations are in place, whereby the designer assigns his or her rights to the commissioner.

### New infringement defence

A 'good faith' defence to infringement has been introduced, covering third parties who in good faith use a design that is subsequently registered by another. This new defence will allow that third party to continue using a design according to any preparations they have made, with the comfort of knowing that no one will be able to stop them later, thereby jeopardising their investment. This brings the Registered Designs Act 1949 ("RDA") into line with the Community Design Regulation, which contains an identical measure covering prior use rights.

### New definition of UDR

The Act has made some small but important amendments to the definition of UDR, with the intention of reducing uncertainty about scope of protection and restrictions on the protection of trivial or ostensibly immaterial

features. It has removed the phrase "any aspect" from the "shape or configuration" of a design, and therefore from coming within that scope, by amending the relevant provision of the Copyright Designs and Patents Act 1988 (CDPA).

### Some other changes

The word "commonplace" – used in relation to geographical coverage – in the CDPA was also thought to be uncertain. The Act attempts to remove that confusion by extending this to "commonplace in any qualifying country." (Notably, the definition of qualifying country remains exactly the same as before in the CDPA – and includes the UK and EU member states.)

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In addition, there are new exemptions covering UDR infringement in respect of private acts, experiments and teaching. This means that the defences for UDR infringement now mirror those in the RDA.

Another important development is that the UK IPO has been empowered to provide non-binding opinions on design ownership and infringement.

## Patents

### New UPC

In the long term, the most significant change in the law relates to the introduction of a new Unified Patent Court ("UPC") for Europe.<sup>3</sup> The UPC Agreement can now be brought into effect in the UK by order of the Secretary of State – a significant step towards ratification of the UPC by the UK government. Once the UPC and the new European unitary patent are up and running, there will eventually be a single patent for all of Europe and a single Europe-wide court deciding on infringement

and validity, and awarding remedies, on a pan-European basis.

### Patent notices

There is no longer a requirement to provide patent numbers on patented products, so long as there is a website address on the product, and on that website a list of the patent numbers. Previously, marking an article with the word 'patent' or something similar was not treated as sufficient to put an infringer on notice and thereby deprive him of an innocence defence (that is, limiting the patent proprietor's ability to recover damages) unless the patent number was also given. While this updates the notice regime, patentees will need to ensure that the domain name remains properly registered, as well as that the information on the website is kept up to date.

### UK IPO opinions service expanded

In another development, the UK IPO's Patent Opinions Service has been revised. This has been expanded to cover all potential grounds of invalidity. Prior to the Act, its opinion could only be sought in relation to novelty and inventive step. While these opinions remain non-binding, in cases where the patent is clearly invalid the UK IPO itself can start a revocation action (before, the person seeking the opinion had to do this themselves). This is likely to increase the popularity of the opinions service, and ought to mean that fewer invalid patents remain on the register.

### Comment

In conclusion, many of these changes are important and will be of significance for rightsholders and prospective infringers alike. The overarching theme is one of bringing the different IP rights into line with one another, and also into line with the position in the rest of Europe. The most striking example of this is the appearance on the horizon of the new unitary patent and UPC.

These updates also serve as a reminder that intellectual property law is often not as innovative as the innovations that it is there to protect. It is most encouraging that parliament is gradually focusing more of its attention on the importance of modernising IP law and bringing it into line with the practical realities of the 21st century.

### Footnotes

1. Decision handed down 12 May 1988 by the UK House of Lords. <http://bit.ly/1Cw5RNY>
2. Case C-201/31, CJEU 3 September 2014.
3. See further 'Practical matters of the UPC' by Nikki Powell (p.36) and 'Update on the unitary patent' by Michelle Claydon (p.41) in *Intellectual Property Magazine's* April 2014 issue.