

Public Bill Committee

INTELLECTUAL PROPERTY BILL

WRITTEN EVIDENCE

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Written evidence submitted by the National Union of Journalists (IP 01)

The National Union of Journalists is the voice for journalism and for journalists in the UK and Ireland, working at home and abroad in all sectors of the media as freelancers, casuals and staff in newspapers, news agencies, broadcasting, magazines, online, book publishing, in public relations and as photographers.

- The NUJ welcomes the proposal to bring design into line with copyright protection, provided that statute ensures freelance designers will be the first owners of copyright, that assignment of copyright will still be possible, and the issue of unfair contracts will remain.
 - Action is needed to outlaw this practice, whether this be through the IP Bill or as an addition to the unfair contracts legislation.
 - Our concern in relation to exceptions is that the government is being pressed to move towards the US system of “fair use”, and away from the UK system of “fair dealing”. The UK version is more equitable, whereas “fair use” benefits corporations at the expenses of creators.
 - Re performance rights, we do not believe the minister requires a new power.
1. The union represents more than 30,000 members working in the UK and Ireland. An increasing proportion of NUJ members—currently rising towards a third—are freelancers, who make their living by licensing copyright in their work. Most of these are rights holders, offering 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.
 2. Only a small number of NUJ members will benefit from either the unregistered or the registered design right but providing that a freelance designer is the first owner of their work, regardless of who commissions it, the union welcomes the attempt to bring them closer to copyright in the bill.
 3. The design right may still be assigned, which raises the issue of unfair contracts being imposed on freelance authors, performers and designers. Those drafting contracts will naturally obtain everything they can and contracts are frequently “offered” by a powerful commissioner to a sole trader on a “take-it-or-leave-it” basis.
 4. The NUJ is determined that action is required to level the playing field for negotiation of contracts concerning creators’ rights, whether between a creator and an intermediary such as a publisher or broadcaster; or between a consumer and an intermediary such as a publisher, broadcaster or online service provider.
 5. The NUJ is concerned at the approach taken in the Bill to exceptions to creators’ rights. The advantage of the UK’s “fair dealing” approach to exceptions is that the conditions under which a work may be used without permission or payment are relatively clear. This spares creators—very many of whom are sole traders—a significant burden of legal costs in determining whether the dealing has been fair.
 6. The government is under pressure from overseas internet corporations to move toward the US approach, misleadingly labelled “fair use”, under which a corporation with deep pockets may make use of a creator’s work on the assumption that they cannot afford a legal challenge.
 7. The NUJ believes that a new wording should be developed that comes closer to the “3-step test” in which international law sets out how exceptions must apply—a) in special cases; b) they must not conflict with a normal exploitation of the work or other subject-matter; c) they should not unreasonably prejudice the legitimate interests of the rights-holder.
 8. The bill would allow the minister to make regulations to allow implementation of international law relating to performance rights. The NUJ is not sure why the minister requires a new power, rather than implementing the European implementation of, for example, the Beijing Treaty.
 9. The issue of moral rights. Citizens have a right to information that has not been intentionally distorted. The CDPA 1988 gives authors an integrity right ie the right that a piece of work should not be altered in a derogatory way. Genuine cropping takes place every day, and we are not arguing against the practice in itself. But a picture should not be cropped in a way that alters the context and leads the viewer of the image to a conclusion that the full picture would not support. This article on the way a picture of Mark Duggan was used illustrates this point: <http://tompride.wordpress.com/2014/01/16/photo-of-mark-duggan-at-daughters-funeral-cropped-to-paint-him-as-a-gangster/>

Written evidence submitted by Universities UK (IP 02)

INTELLECTUAL PROPERTY BILL: 2ND READING (HOUSE OF LORDS)

Summary

Universities UK supports **Clause 20** of the Intellectual Property Bill which provides a qualified exemption from Freedom of Information requests for pre-publication research. We also support **Clause 4** which allows for acts for the purposes of experimentation and teaching not to infringe design rights. This briefing gives our reasons.

Clause 20: Freedom of information: exemption for research

1. Universities UK **supports** the provisions in Clause 20 of the Bill, which amends the Freedom of Information Act 2000 (FOIA) to create a new, qualified, exemption for pre-publication research.
2. The Clause makes clear that the exemption requires that disclosure of the information would be prejudicial to the interests of the research programme, an institution or individual undertaking it, or an individual participating in it.
3. Exemptions with similar effects exist in the Freedom of Information Act (Scotland), and in Irish and US legislation.

Why an exemption is necessary

4. Universities are defined as ‘public authorities’ under the FOIA. However, they are also autonomous bodies which operate in a highly competitive environment, competing domestically and internationally for research grants, external funding, publication in major journals, prizes and reputation.
5. Although increasing access to research information and data has an important positive function in advancing knowledge and understanding, this has to be balanced with the right of researchers to benefit from their own work and further their own careers. For this reason, Universities UK strongly supports moves to increase access to research information and data through data sharing plans, open access repositories and other initiatives. However, we believe that the manner and timing of publication should, within reason, rest with the originators of the research.
6. Premature publication through Freedom of Information Requests of information and data from research programmes could:
 - a) **Harm the quality and reputation of UK research:** There is a risk that misleading information may enter the public domain before it has been cleaned, checked, and subjected to analysis and peer review. Researchers may be challenged on their approach or findings before they have had a chance to address any flaws in their work. In relation to health-related research, individuals might misdiagnose or medicate themselves on the basis of misleading information gaining currency supported by incomplete research. This could damage the UK’s reputation for quality research.
 - b) **Undermine the competitive position of UK research:** University research is fundamental to the UK’s global competitiveness. The UK ranks second only to the United States by a variety of measures of research quality. It is also a highly competitive field. Premature disclosure of research information will enable international competitors to profit from work undertaken in UK universities before the originators have had a fair opportunity to protect their ideas or secure grants for future research. This will act as a disincentive to original research.

It may be difficult or impossible to secure publication opportunities in reputable journals if findings are already in the public domain. Publication record influences university income via the Research Excellence Framework, as well as universities’ ability to secure future grants and commercial contracts, and attract academic staff and students. This harms universities’ competitive interests, if not necessarily their commercial ones. We do not believe that the current ‘commercial interest’ exemption covers such circumstances.

- c) **Discourage research partnerships with commercial and charitable bodies:** Universities work with commercial and charitable bodies on research projects. We know that the potential for the results of such research to be released to competitors under the FOIA is a barrier to such contract arrangements, and believe that as the risk becomes increasingly clear to companies, they will take research contracts elsewhere—to international competitors, or non-university research partners. This is not in the best interests of the UK economy, or consistent with other government policy initiatives to encourage collaboration between universities and industry.

Research at an early stage may have *potential* but not actual commercial value—for example by identifying areas for further research which could yield commercially valuable results. Again, current guidance does not explain how the commercial interest exemption might be engaged by such cases.

Why existing exemptions are inadequate

7. Universities UK believes that the current Freedom of Information Act, while applying to universities, was not designed with universities or autonomous research institutions in mind. Existing exemptions in that Act were designed without reference to the university context, and are not always sufficient.

Where existing exemptions can be used, the lack of reference to the university context means that universities have to put a disproportionate amount of time, money and effort into arguing the case for the application of particular exemptions.

Clause 4: Exceptions to Infringement of Design Rights

8. Universities UK also **supports** the provisions of Clause 4, which create an exception to design rights which allow for acts done for the purpose of teaching and experimentation not to infringe design rights in relation to unregistered designs. It would allow a teacher to reproduce protected design features without infringing design rights subsisting in an unregistered design. This extends an exception already in place for UK registered design.

January 2014

Written evidence submitted by Dr Dimitris Xenos (IP 03)

I am writing regarding the Intellectual Property Bill (HC Bill 102) which is currently examined by the House of Commons.

I would like to draw your attention to Part 2, Section 17 of the IP Bill entitled “Unified Patent Court” which aims to give effect to the European Unified Patent Court (UPC) Agreement, signed in Brussels in February 2013.

The UPC concerns a new supranational judicial institution which will become the highest legal authority for the setting of patent standards and the adjudication of patent disputes in Europe.

The UPC Agreement was discussed by the European Scrutiny Committee (see “The Unified Patent Court: help or hindrance?”, 65th Report of Session 2010–12) concluding that “the draft agreement on the Unified Patent Court is likely to hinder, rather than help, the enforcement of patents within the European Union. This will particularly be so for SMEs, the main intended beneficiaries.”

Serious concerns have also been raised about the lack of a reliable impact assessment study at both national and European levels.

I have undertaken a detailed study on the subject which is entitled “The European Unified Patent Court: Assessment and Implications of the Federalisation of the Patent System in Europe”. This study is an academic article published in August 2013 by SCRIPTed—Journal of Law, Technology & Society, Volume 10(2), 246–277 of the University of Edinburgh. It is available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2324123

January 2014

Written evidence submitted by Jane Lambert (IP 04)

SUMMARY

1. I welcome most of the provisions of the Intellectual Property Bill but I respectfully invite the House not to impose criminal sanctions for registered design infringement. I believe that this will greatly increase the volumes of applications for the invalidation of registered and registered designs to the Courts, Intellectual Property Office and OHIM (EU designs and trade marks registry) and possibly other threats actions and other litigation. I fear it will cause injustice in that it is likely to be used against departing employees and subcontractors. It will increase pressure for criminal sanctions for unregistered design right and patent infringement which would dampen innovation in the UK. Such protection is not mandated by TRIPS, IP convention or other treaty to which HMG is party and most other common law countries including the USA are unlikely to impose such sanctions. It is also unnecessary since the cost of enforcement of IP rights has been reduced by the reforms to CPR Part 63 in 2010.

QUALIFICATIONS

2. I was called to the Bar in 1977 and have practised at the IP Bar for over 30 years. I was legal advisor to VISA International between 1983 and 1984. In 1997 I set up NIPC which was the first specialist IP set outside London. I have done considerable pro bono work for small and medium enterprises through setting up and chairing inventors clubs in Leeds, Liverpool and Sheffield, IP clinics in London and the North of England and through my blogs and newsletters. I have published several books and articles on IP enforcement including a guide for SME in 2010.

POSITION

3. While I welcome most of the provisions of the Bill I am concerned at the proposed clause 13 for the following reasons which I set out in an article on the Bill that I published on 28 May 2013:

“Criminalizing Registered Design Infringements

A much less sensible provision and one which I hope that Parliament will reject is clause 13 which would introduce a new offence of copying a registered design punishable with a maximum penalty of 10 years imprisonment and an unlimited fine. In my very first post to this blog **“Porridge for Patent Infringement”** 22 Aug 2005 and many subsequent posts I warned of the dangers of extending the criminal law from bootlegging, counterfeiting and piracy to patent and registered design infringement.

Let me give you just one reason why this proposal is barmy. Questions such as whether a design is new and has individual character are regarded as sufficiently difficult to remove them from the general jurisdiction of the Chancery Division and assign them to the specialist judges of the Patents Court (see **CPR 63.2**). Those questions, which are thought rightly or wrongly to be too difficult for all but a handful of judges, will be put routinely to juries and lay magistrates since it would be a defence under s.35AZ (4) to show reasonable relief that the registration of the design was invalid. The litigation in California between Samsung and Apple shows the folly of entrusting difficult questions of IP law to juries (see **“Apple v Samsung—Yet more Revelations”** 31 Aug 2012). In the Apple case the foreman of the jury is said to have known something about patent law. Our juries and indeed lay justices are drawn from all parts of society. There is no educational or even IQ qualification for serving on a jury or serving as a magistrate.

There is an international obligation under **art 61** of TRIPS to “provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale” but there is no obligation to extend it to any other IP right. If this proposal comes into law it will give succour to those who has been campaigning for criminal sanctions for patent infringement for years.

This dangerous proposal is no doubt the result of persistent lobbying by ginger groups of manufacturers and designers who make the very reasonable point that enforcement in the Patents and Patents County Courts was notoriously expensive. That was certainly the case before 1 Oct 2010 but it is no longer true now (see **“New Patent County Court Rules”** 31 Oct 2010). If any changes to the law are needed the extension of the jurisdiction of the small claims track of the Patents County Court to registered and registered Community design cases would be much more sensible.”

4. I also respectfully endorse the objections presented by:

- (1) Sir Robin Jacob and other leading academic lawyers in their memorandum to the IPO
- (2) the Intellectual Property Bar Association; and
- (3) the IP Federation.

January 2014
