

Copyright consists of human rights, moral rights and property rights. Exceptions to these rights should not be made by secondary legislation, but must have the full force of Parliamentary scrutiny, debate and amendment brought to bear upon them.

Does the fact that a provision exists within EU law exempt that provision from Parliamentary scrutiny, when it is being enacted in UK law?

"...copyright is the legal expression of intellectual property rights, and is not a regulation." - John Whittingdale OBE MP, Chairman, DCMS Select Committee¹

The role of government begins and ends with protecting the rights of creators, rather than protecting any company or interest group's business model. - Helen Burrows and Kitty Ussher, Risky Business, page 90²

HUMAN RIGHTS

1. Authors' Moral Rights and Copyright are human rights, guaranteed by and enshrined in international, EU and UK laws including:

- The Universal Declaration of Human Rights, Article 27³;
- The International Covenant on Economic, Social and Cultural Rights, Article 15⁴;
- The Charter of Fundamental Rights of the European Union, Article 17⁵;
- Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Article 1⁶;
- The European Convention on Human Rights, Article 1 of the First Protocol⁷; and
- Article 1 of the First Protocol of the Human Rights Act 1998⁸.

2. **Human Rights obligations transcend economic policy:** *Reminds all Governments of the primacy of human rights obligations over economic policies and agreements; - United Nations Sub-Commission on Human Rights resolution 2000/7⁹*

3. All existing UK legislation must as far as possible be read and given effect in a way which is compatible with human rights¹⁰.

¹ <http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm120611/debtext/120611-0002.htm#1206111400001>

² http://www.demos.co.uk/files/Risky_business_-_web.pdf?1320841913

³ <http://www.un.org/en/documents/udhr/index.shtml#a27>

⁴ <http://www2.ohchr.org/english/law/cescr.htm#art15>

⁵ http://www.europarl.europa.eu/charter/pdf/text_en.pdf

⁶ <http://conventions.coe.int/Treaty/en/Treaties/Html/009.htm>

⁷ <http://www.hri.org/docs/ECHR50.html#P1>

⁸ <http://www.legislation.gov.uk/ukpga/1998/42/schedule/1/part/II/chapter/1>

⁹ <http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/c462b62cf8a07b13c12569700046704e?Opendocument>

¹⁰ <http://www.legislation.gov.uk/ukpga/1998/42/section/3>

4. The Human Rights Act 1998 restrains the Government from introducing legislation that is not compliant with human rights legislation.

5. Any exception to a human right must be limited, in the 'general interest'¹¹, and proportionate¹².

6. For an exception to be proportionate it must be established that:

- (i) the legislative objective is sufficiently important to justify limiting a fundamental right;
- (ii) the measures designed to meet the legislative objective are rationally connected to it; and
- (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."¹³.

COPYRIGHT

7. Copyright consists of human rights, moral rights, property rights and economic rights.

8. As well as being conferred by the human rights laws, charters and treaties mentioned above, Copyright and Moral Rights are granted automatically and without formality to authors by international, EU and UK laws including:

- The Berne Convention for the Protection of Literary and Artistic Works¹⁴
- WTO TRIPS¹⁵
- The EU Copyright Directive 2001/29/EC¹⁶
- The Copyright, Designs and Patents Act 1988¹⁷.

9. Any exceptions to copyright must pass the Three-Step Test¹⁸ incorporated into the Berne Convention Article 9 and WTO TRIPS Article 13:

(1) Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.

(2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works

- (i) in certain special cases,
- (ii) provided that such reproduction does not conflict with a normal exploitation of the work and
- (iii) does not unreasonably prejudice the legitimate interests of the author.

10. The fundamental purpose of copyright is not, as some assert¹⁹, to incentivise the creator for the public good, or to 'promote innovation'. It is to protect the creator's human, moral, property and economic rights²⁰.

¹¹ <http://www.legislation.gov.uk/ukpga/1998/42/schedule/1/part/II/chapter/1>

¹² <http://regulatorylaw.co.uk/Proportionality.html>

¹³ <http://regulatorylaw.co.uk/Proportionality.html>

¹⁴ <http://www.wipo.int/treaties/en/ip/berne/>

¹⁵ http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm

¹⁶ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML>

¹⁷ <http://www.legislation.gov.uk/ukpga/1988/48/contents>

¹⁸ http://en.wikipedia.org/wiki/Three-step_test

¹⁹ <http://www.ipo.gov.uk/ipresponse-international.pdf>

²⁰ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML>

11. It is in this form, and for this purpose, that Authors' Moral Rights and Copyright are established as universal, fundamental human rights and intellectual property rights by the treaties mentioned above, and which oblige their signatories to implement their provisions in domestic law.
12. **It follows that any proposed change to exceptions to copyright fundamentally alters the citizen's human and property rights.** Provisions within the European Communities Act 1972²¹ notwithstanding, changes to rights of such a fundamental nature must be subject to the full force of Parliamentary scrutiny and amendment.

THE ENTERPRISE & REGULATORY REFORM BILL 2012-13 CLAUSE 56

13. *'Clause 56: Power to change exceptions: copyright and rights in performances –Chapter 3 of Part 1 of the GDPA deals with 'permitted acts', that is, those acts which can be performed without the consent of the copyright owner. For example, criticism, review and news reporting or anthologies for educational use. Clause 56 creates a power for the Secretary of State to add or remove from this list of copyright exceptions by means of secondary legislation.*

The Law Society considers that copyright exceptions are a sufficiently important issue, with ramifications across many sectors and industries, that changes to them should be subject to the full scrutiny of the primary legislative process. The Society therefore opposes the inclusion of this Clause.²²

14. The Intellectual Property Office claims that the purpose of Clause 56 is extremely narrow and specific²³: *'to enable the Government to preserve the level of penalties which are set out in the substantive copyright legislation', the problem being 'currently, when section 2(2)²⁴ of the European Communities Act 1972 is used to amend the exceptions to copyright and performance rights, this can cause difficulties as its use may require a downwards adjustment of criminal penalties in copyright legislation.'*
15. This would appear to mean that if existing copyright exceptions are narrowed, extending the number of people caught by a criminal offence, and if the Government amended them by secondary regulation using provisions within the European Communities Act 1972, the new penalties would be limited to a maximum of two years when existing penalties may be higher, and Clause 56 is intended to avoid the reduction of existing penalties in this way.
16. Based on the IPO's explanation, **it is not actually clear how Clause 56 as currently drafted would deal with this problem.** The IPO could be referring to the introduction of penalties for online offences under the 2003 Copyright and Related Rights Regulations²⁵, but it is not clear what this has to do with exceptions to copyright. If an offence is dependent on infringement of copyright taking place or being authorised, and an act ceases to be an infringement of copyright because of a wider exception, it is not clear how this could still be an offence at all. It would be most peculiar to have an act which is not a civil infringement but is a criminal offence, where the basis of the offence is infringement of copyright.

QUESTIONS

Stop43 would be grateful if the Scrutiny Committee would seek satisfactory answers to the following questions, and if no satisfactory answer is forthcoming, then change the text of the Clause or remove it completely:

²¹ <http://www.legislation.gov.uk/ukpga/1972/68/contents>

²² <http://www.lawsociety.org.uk/search?query=briefing&searchname=search1>

²³ <http://www.ipo.gov.uk/press-release-20120525.htm>

²⁴ <http://www.legislation.gov.uk/ukpga/1972/68/section/4>

²⁵ <http://www.legislation.gov.uk/uksi/2003/2498/contents/made>

17. There is no foreseeable need to change copyright exceptions to comply with EU law - all directives have been implemented, and no new EU copyright exceptions are proposed - so why is Clause 56 needed at all?
18. If the purpose of Clause 56 is to maintain criminal sanction levels if copyright exceptions are amended, why does the text of Clause 56 not specifically refer to that, and limit itself to that purpose and no other?
19. Why is an overarching Ministerial power to change copyright exceptions needed, rather than simply a power to adjust criminal penalties, given that the latter is the stated aim of the clause?
20. Are we to believe that the IPO wishes to see enacted a law of very broad scope merely so that it can tinker with penalties for criminal breach of copyright, or does it have some other purpose or goal in mind?
21. Does the Government intend to introduce further Clauses into this Bill, implementing more of the recommendations made by Professor Ian Hargreaves in his recent Review of Intellectual Property and Growth²⁶?
22. At what point did the UK Government cede such power and sovereignty to Brussels that the default legislative position became that of assuming that any and all provisions within EU law can *and should* be enacted in the UK by secondary legislation, bypassing Parliamentary scrutiny and debate, and leaving MPs with the power only to accept or reject entire legislative texts at face value, with no amendment?
23. We are told that copyright law must be changed so as to afford 'legal certainty' to those wishing to use intellectual property belonging to others, usually without the prior permission of or payment to its owners. What about the legal certainty of those whose businesses are built upon intellectual property ownership, and who could find ownership and control of their property removed from them without warning?

ABOUT STOP43

Stop43 is a self-funded group of professional freelance and micro-business image creators, between them members of [Artists' Bill of Rights](#), [The Association of Illustrators](#), [The Association of Photographers](#), [The British Institute of Professional Photography](#), [The British Press Photographers' Association](#), [Copyright Action](#), [EPUK](#), [The National Union of Journalists](#), and [Pro-Imaging](#): professionals who were sufficiently concerned and motivated by the threat that [Digital Economy Bill Clause 43](#) posed to our livelihoods that we took [direct action](#). We had [the support of the 16,000 members of the ten organisations listed on our website](#), and that of **thousands of photographers**, as proven by their direct lobbying action that resulted in Clause 43 being removed from the Digital Economy Bill. Since then, professional illustrators and members of the cultural heritage sector who understand and support our position have joined us and contributed to this submission. **Stop43 have a mandate to lobby for our [8 tenets](#) from the 2,100+ members of our Facebook Group.**

²⁶ <http://www.ipo.gov.uk/ipreview-finalreport.pdf>