

TV/Film

Can I 'fair deal' under proposed changes to UK copyright law?

Summary

The existing 'fair dealing' rules will continue to apply. The US-style system of 'fair use', which may allow copyright material to be reproduced for reporting or comment purposes has been rejected.

Business impact

Clearance of any third-party material will remain essential for TV producers, broadcasters and filmmakers to avoid potential infringement claims.

This is good news for rights holders e.g. archive houses and ensures that the UK's more limited system of 'fair dealing' in copyright material for the purposes of criticism, review and news reporting remains in place – making use of copyright material without permission for largely commercial purposes (unless it falls within fair dealing) will continue to be an infringement.

Legal detail

The Hargreaves Report ('Report') was the latest government-sponsored review of UK intellectual property law, following in the footsteps of the largely unimplemented Gowers Report in December 2006.

Largely driven by recent concern over whether or not the UK IP system was fit for purpose in a digital age and the advent of the fiercely-debated Digital Economy Act, the Report's main conclusion was that current copyright law is outdated, too focused on protecting the rights of creators and may be inhibiting the growth of the UK's 'knowledge economy'.

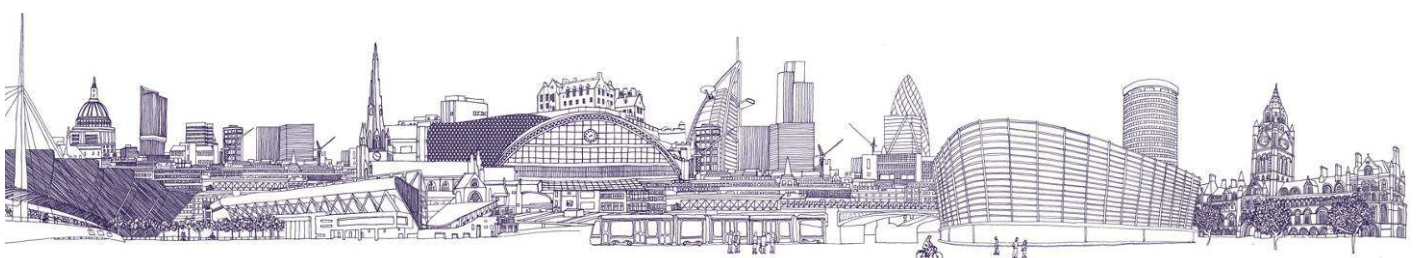
It made a number of recommendations, including:

- The establishment of an online digital rights exchange to simplify the licensing process.
- The appointment of a 'Copyright Tsar'.
- The development of a new system for dealing with 'Orphan Works' where an author is unknown.
- The introduction of rights covering parody and format shifting (legalising the copying of music files from CD to MP3 players).

Importantly, the Report rejected calls for a new 'fair use' system based on US copyright law, where copyright material can be used without a licence for the purposes of commentary, criticism, news reporting, research, teaching, library archiving and scholarship subject to a four-part 'balancing' test involving an examination of the purpose of the use, the nature of the copied work, the amount of the original work used and the effect that any use would have on it.

Fair use under UK law provides a far narrower series of exemptions when copyright owners cannot restrain the use of extracts from their work. Our concept of 'fair dealing' is narrower than its US counterpart, allowing the use of material protected by copyright for the purposes of criticism, review, reporting of current affairs or for education and research/private study. Any such use must be limited and must include an acknowledgement with details of the author. Most importantly, the amount of the original work taken must be no more than strictly necessary to either criticise or report on it.

The UK system is far more straightforward and not dependent on context, making it far easier for content users to reach an informed opinion on risk and allowing the use of material protected by copyright to inform public opinion and debate. Our existing framework is fit for purpose and creates certainty in uncertain times for the copyright industry.



Other areas, however, such as format shifting and parody, are in need of reform to keep pace with the digital age and on 3 August 2011, Vince Cable MP announced plans to implement the Report's recommendations. Consultation into the proposals will now get underway.

References

www.ipo.gov.uk/ipreview-finalreport.pdf

BBC pulls new drama over rights issue

Summary

The BBC's new adaptation of the classic novel 'Room at the top' was pulled from their schedules days before broadcast after receiving details of a previously unknown claim of ownership of the drama's broadcasting rights from an unnamed producer.

Business impact

This case highlights the need for appropriate due diligence and clearance of any and all rights in existing content before production gets underway and the effect which failing to do so can have on further exploitation of the content. It is also best to get a warranty that rights have not been previously granted to another party in any assignment or exclusive licence. This applies to drama, TV formats, exclusive rights to talent, locations and stories.

Legal detail

The new adaptation of the 1950's novel starred 'Silk' star Maxine Peake and was expected to be a major part of BBC Four's summer schedule, with a critically-acclaimed 1959 version having previously won an Oscar for actress Simone Signoret.

The novel was written by John Braine, who died in 1986. His widow had approved the new adaptation, but an unnamed producer stepped in days before transmission to claim ownership of the screen rights to the story. Rather than risk a dispute, the BBC chose to replace the broadcast with a repeat of an 18th century drama and confirmed that 'Room at the top' would not be shown until the rights issues were settled.

Any one piece of content can contain and give rise to many copyright 'works' and in new content based on older material it is important to bear in mind that the use of

different 'works' may have been granted or even assigned to different parties - for example, reprint rights to a novel may be granted to a publisher, rights to adapt a play to a theatre producer and rights to create a film or TV version to a studio or broadcaster. As new formats are introduced, this audit trail becomes more and more important, as does the importance of working on a 'clean' piece of content which can then be exploited without fear of reprisal.

Dependent upon the deal that was reached with the previous producer, the BBC could have faced several claims and easily seen their profits from the project swallowed up by legal fees. The due diligence process when working on any adaptation, or on any content, would normally involve obtaining an assurance from those looking to grant rights in that content (such as making a new adaptation) that they have the ability to do so - this protects the producer, allowing them to fall back on this assurance and offload any liability in this kind of situation through a claim against the 'owner' of the original work being adapted.



Media disputes

Defamation

The Defamation Bill – libel law for the 21st century?

Summary

The Defamation Bill ('Bill') was published earlier this year, containing proposals for significant reform although some commentators have already argued that the changes don't go far enough.

Business impact

The Bill proposes the scrapping of the current system's 'multiple publication rule', meaning that online content would only give rise to a defamation claim for up to one year after it was first published. A business will still remain able to sue for defamation in the same way as an individual, preserving their ability to proactively manage their corporate reputation where necessary. However, the introduction of a requirement of 'substantial harm' caused by the content in question may make it harder to bring weaker claims and lead to many being proactively 'managed' out of court.

Legal detail

The UK's notoriously 'claimant-friendly' defamation law has been a target for reform for some years now, and the introduction of the draft Bill is a clear indication that changes proposed by the previous Labour government are still very much a priority for the coalition.

The key changes proposed by the Bill are:

A new requirement for claimants to show that a statement has caused them 'substantial harm'

The current position is that harm to the claimant is presumed in libel cases, leading to the risk that many trials can produce an award of a very small or 'nominal' sum in damages but still produce a huge amount of legal costs – the statement may be technically 'defamatory' in that it can be shown to affect the claimant's reputation in the eyes of the man in the street, but the damages awarded as a result could only be in the region of a few thousand pounds, as seen in the first ever award for damages as a result of claims made on Twitter for £3,000 against a costs award of £50,000. This new hurdle should lead to weaker cases being more easily weeded out of court lists, which has happened much more frequently over the last few years in some notable cases.

However, the Bill contains no guidance on what kind of evidence will need to be adduced to show 'substantial harm' – if companies sue, will this mean that they will now have to show a sharp drop in profits as a result of the statement in question? Businesses may find it much harder to protect their reputations without detailed forensic evidence. If the Bill makes it into law, a little detail may go a long way towards avoiding a lengthy exercise in getting to some hard and fast rules over when it's actually worth suing or even threatening to do so.

A new defence of 'responsible publication on matters of public interest'

A statement may be found to be defamatory but there may be a very good reason for 'publishing' it, usually on the grounds of informing public debate on a major issue. The new defence would set out in legislation the criteria for running it, clarifying what has for years been a complicated and very specific defence which is only usually relied upon by journalists.

The new proposals would see the court adopt a more 'flexible' approach and would allow other third parties to make use of it, such as Simon Singh, who recently faced a lengthy trial over his criticism of chiropractic methods after a claim from the British Chiropractic Association. Although Singh won, the new proposals may well mean that similar cases would be fewer and far between and that anyone seeking to challenge current theory could do so without the threat of a libel claim. The defence is still fairly complex and will need further clarification, especially when dealing with issues of context.

A new defence of 'truth'

The long-standing defence of 'justification' essentially means that if a comment is **true**, then it can't be defamatory. The Bill replaces a complex defence based on decades of case law with a clearer definition – it will now be a defence to show that the imputation conveyed by the statement is 'substantially true'. Existing cases will still be used as guidance, but the issue should be far easier to deal with. Even then, deciding what the actual allegation is may still be a complex and expensive task where its wording is unclear or ambiguous.

A new defence of 'honest opinion'

Replacing 'fair comment', and following the landmark 2010 case of *Spiller -v- Joseph*, the new defence would protect statements of opinion (rather than fact) made on a matter of public interest where an honest person could have come to the same conclusion on the basis of the available facts when the statement was made.

Older cases suggested that the statement in question would usually need to include the facts upon which the opinion it contained was based, although this may not now be the case. To be absolutely sure of being able to rely on this new defence, including a summary of the facts upon which an opinion is based will usually be very advisable.

Privilege

Certain situations are already recognised as being so important to the public interest that suing on the basis of any statement made during them is prohibited on the basis of 'absolute privilege', such as parliamentary or court proceedings.

The Bill proposes to extend the remit of absolute privilege to include fair and accurate reports of privileged proceedings. Other situations where the maker of a defamatory statement can be shown to have a duty or interest in making it to recipients who have similar duties or interests to receive it will be extended to include, amongst others, scientific and academic conferences and reports of meetings of UK companies and fair and accurate reports of press conferences.

A 'single publication rule'

Under the current law, each time a defamatory statement is 'published', it allows a claimant to sue in separate proceedings. In internet libel cases, each hit on a website constitutes a separate publication, meaning that archive material on a site can lead to a libel claim way after the expiry of the usual one-year limitation period.

The Bill proposes changing the rule to ensure that allegedly defamatory material can only be sued on for a year after the date upon which it was first published, no matter how long it stays on a site. However, if the material is then re-published by a different site or in a different medium, a claimant will be able to sue even if limitation has expired, as well as if it has been published in a more prominent way after first making its way onto a site – on a homepage rather than a news page buried under several links.

This is a change designed to suit the internet and social media age, but the Bill contains no guidance on situations where older material gains a second life and new exposure through social networks such as Facebook or Twitter, failing to deal with the issue of who would be responsible for the newfound attention. Tweets may link to older material, but may be taken as re-publications in a different medium.

Libel tourism

Recent cases have seen trivial cases brought in the UK court by foreign claimants to take advantage of higher damages and costs awards more readily struck out, but the Bill requires a court to be satisfied that in cases involving claimants outside the EU, the UK is clearly the most appropriate place in which a case should be heard.

For example, if an article generates 100,000 hits on a US website and 2,000 on a UK website, the chances are that it won't be heard here. This is a very sensible move towards considering the global picture in libel claims, but questions remain over how much of a problem libel tourism actually is.



Removal of an automatic right to trial by jury

Libel cases tend to be lengthy and expensive due to the availability of a jury trial; the only civil claim in the UK which allows for it. As much as the use of juries may be the only way to obtain a fair ruling on what is defamatory in the eyes of the man in the street, the fact remains that most of the key decisions on points of law and fact in libel cases are made by judges. The new rules would see jury trials becoming an option only 'where necessary in the interests of justice'.

The Bill answers several very important questions but raises a whole set of new ones. No provisions are made to limit costs in libel cases – even if the Jackson Review leads to the abolition of 'no-win, no-fee' cases where lawyers can recover success fees of up to 100% of their costs if successful. Libel claims will remain expensive to the point where less-wealthy claimants simply won't be able to afford them. The hotly contested issue of whether businesses should be able to sue for defamation in the first place has been ignored, probably to allay the fears of corporate claimants, even if they will now need to show 'substantial harm' before doing so.

Even though it has not become law just yet, the Bill is a very clear indicator of the likely future of defamation law in the UK.

References

www.justice.gov.uk/consultations/draft-defamation-bill.htm

TV compliance

'Top Gear' review of electric car leads it into hot water

Summary

Manufacturers of an electric car have alleged defamation and malicious falsehood following claims that the BBC faked a scene on 'Top Gear'.

Business impact

Producers should ensure that scripts on review shows are not pre-written so that all reviews and tests on-screen are truthful and justifiable. Broadcasters should ensure internal systems help to prevent repeats and DVD release (where necessary) following complaints/claims received after the TV premiere.

Legal detail

Nearly two years after the Tesla Roadster was reviewed on 'Top Gear', Tesla have alleged defamation and malicious falsehood. Tesla decided to take action after the programme featured on repeats and 'Top Gear' DVD after they had specifically asked for the programme not to be broadcast again. Tesla claim the repeated publishing of the untruth was damaging their reputation and the reputation of other manufacturers of electric vehicles.

Specifically, Tesla claim the 'Top Gear' review misrepresented that the roadster was undrivable because:

- It ran out of charge and had to be pushed from the track to the garage.
- It managed a maximum of 55 miles before it needed recharging.
- The brakes were locked, rendering the roadster unusable.
- The motor over heated and as a result was immobilised.

Tesla claim the breakdowns were staged and the statements made about the roadster were untrue. Tesla claim this has been detrimental to Tesla's reputation because the show is viewed by millions of people and many understand 'Top Gear' to be a factual.



The team

John Burns
Partner
dt: +44 (0) 161 836 7923
m: +44 (0) 7909 910 816
JBurns@gateleyuk.com

Lisa Logan
Partner
dt: +44 (0) 207 653 1647
m: +44 (0) 7843 385 705
LLogan@gateleyuk.com

Colin Mattis
Partner
dt: +44 (0) 207 653 1615
m: +44 (0) 7921 490 183
CMattis@gateleyuk.com

Simon Pigden
Partner
dt: +44 (0) 121 234 0153
m: +44 (0) 7721 939 794
SPigden@gateleyuk.com

Nick Smith
Partner
dt: +44 (0) 207 653 1665
m: +44 (0) 7795 630 702
NSmith@gateleyuk.com

Jill Tomasin
Partner
dt: +44 (0) 115 983 8224
m: +44 (0) 7831 130 911
JTomasin@gateleyuk.com

Sarah Davies
Senior Associate
dt: +44 (0) 207 653 1673
m: +44 (0) 7702 201 935
SDavies@gateleyuk.com

Rizwana Ishaq
Senior Associate
dt: +44 (0) 161 836 7845
m: +44 (0) 7920 218 189
RIshaq@gateleyuk.com

Jenny Colver
Solicitor
dt: +44 (0) 116 285 9050
m: +44 (0) 7718 559 680
JColver@gateleyuk.com

Claire Herbert
Solicitor
dt: +44 (0) 116 285 9043
CHerbert@gateleyuk.com

Steve Kuncewicz
Solicitor
dt: +44 (0) 161 836 7931
m: +44 (0) 7979 648 924
SKuncewicz@gateleyuk.com