

BAPLA Response to Government's UK Review 2014 Copyright Changes – April 2019

About BAPLA

BAPLA members provide a 'vital economic link' for many professional photographers, supporting their ability to derive income and reinvest in their creativity.

Founded in 1975, [BAPLA](#) is the UK trade association for picture libraries and agencies representing members of a unique area of the creative industry. We have a broad and diverse membership of image rights holders and purveyors, from sole traders to major news, stock and production agencies, as well as SMEs, archives and cultural heritage institutions. Our members are the main source of licensed images you see every day in print and digital media, and as such have contributed to the UK and European economy for over 40 years.

The images sector has always been about growth and innovation, adopting new technologies as they arise in order to meet with customer demands.

BAPLA has consistently championed the recognition of marketplace value of photography. Our image licensing market is the second largest global market in the world¹. During that time BAPLA members have invested heavily in technological innovation allowing them to move from analogue to digital, digitising millions of images of great historical and artistic value in order to offer access to digital copies. Significant investment is made on an ongoing basis in accurate keywording and adding metadata, allowing for seamless customer experience on the one hand, and full remuneration of the creators on the other.

BAPLA members generate revenue for, and manage the interests of over 120,000 creators and rights holders, encompassing a breadth of experienced and new young image-makers across Europe. Licensing online is the significant driver of the image industry.

Response to the 2014 Copyright Review

Summary

BAPLA welcomes the opportunity to comment on the Government's review on the impact of the 2014 changes to copyright legislation.

We propose to comment on the following exceptions, which BAPLA members considered as key from the perspective of their businesses:

- Research and private study, archiving, public administration;
- Text and data mining;
- Education;
- Quotation, parody, caricature, and pastiche;
- Orphan Works; and
- Extended Collective Licensing

It is important to note that BAPLA's membership covers a multitude of different types of picture libraries and agencies, which includes a range of cultural heritage organisations, and therefore the impact of the 2014 legislative changes to copyright law are experienced in different ways, nevertheless one element identical across BAPLA's membership is that no-one has been able to

¹ GSIM Report 2012 - <http://www.stockimagemarket.uni-hd.de/downloads/>

fully quantify the economic costs that these provisions have made. Rather than waiting to see their revenue decrease, many have since proactively adapted their business models to concentrate on core areas that focus on other forms, or areas, of licensing based on client market needs rather than to make up for any possible shortfalls. Having said that, delving deeper into the impact of specific exceptions on BAPLA's membership, following a survey undertaken for this review, reveals a more nuanced composite picture.

Reflecting on the impact of the 2014 revisions to UK copyright law, and the predicted substantial economic benefit at the time, it is paramount that Government carries out a fully comprehensive post-implementation review of the economic impact of the changes on the industries, whether directly, or indirectly affecting these exceptions. The Government plans to conduct 'de minimis' post-implementation review for the majority of the exceptions listed, as it estimates the impact of the exceptions was less than £5 million or because it could not quantify the impact at the time. This is concerning.

We strongly believe that there ought to be a thorough and comprehensive review of the perceived or reported impact versus the economic benefit predicted 5 years ago. There should also be a review of the resources undertaken by both Government and all stakeholders involved in the process in order to enact the changes. As members of the British Copyright Council and Alliance for IP, we support their requests for a comprehensive review of the impact assessments reflecting on the inaccurate economic assumptions applied initially with the Hargreaves Review of £7.9bn per year, followed by the Government's downgraded impact assessment (which estimated benefits of between £500m and £790m per year). Given the extensive contributions BAPLA and its members made to the initial 2011 Hargreaves Review, lasting several years before and after the legislation was amended we believe, as part of the Government's own impact assessments, that an economic record of the number of meetings, consultations, and other resources (e.g. no. of representatives attending Government consultation meetings) undertaken by stakeholders involved should be included in the calculations, and used to compare the initiate recommended economic estimates. BAPLA notes that since the Hargreaves Review, the IPO has sought to adopt more stringent guidelines when seeking to guide policy, which is welcomed.

Based on BAPLA's broad church membership, we are fully acquainted with the fact that a certain number of users of the exceptions principally include cultural heritage organisations, such as museums, archives, galleries and libraries, particularly for archival and preservation use (Question 1); research and private study, and public administration (Question 2), for which the exceptions are very narrow. The impact on the use of quotations or extracts of copyright works for parody, caricature and pastiche (Question 2); and extended collective licensing and orphan works (Question 3) otherwise varies across the membership, again reflecting our diversity.

BAPLA's Survey Comments

To obtain a cross-section of opinion from our membership, BAPLA undertook a short survey (April 2019) to cover the impact of the expanded exceptions. As a result approximately half of our respondents originate from cultural heritage organisations, with the rest representing a standard mix of picture libraries, agencies and other archives. The survey provides an assortment of experiences by members, some affected more than others, highlighting the delicate balance which can easily tilt in one direction affecting a whole stream of income.

One clear outcome from the results was that approximately 45% of members were not easily able to quantify the impact on a range of services they provide. With the exceptions covering 'fair dealing', whilst many could not identify a clear impact, several quoted a misinterpretation of 'fair dealing' as a reason 'not' to license images; in relation to the Education exception over 60% noted

that there had been a reduction from direct licensing for educational purposes; and most notably over 70% of cultural heritage institutions felt they had not benefited from the EU Orphan Work exception, with 60% having not used the Orphan Work scheme to date.

We have outlined a summary of survey responses to the Exceptions, based on the following order:

1. Research and private study, archiving, public administration

1.1 The scope of these exceptions is very narrow, but it is clear cultural heritage members have made use of the Archiving exception, which includes preservation, as well as the Research and Private Study exception, combining both in order to expand accessibility to their collections for visitors, whether on site or online.

1.2 These exceptions provide cultural heritage members with the opportunity to photograph and digitise works in their collections and make them available in a variety of formats, including 'dedicated terminals' for research purposes. The Archiving exception is highlighted as enabling essential preservation assurances, particularly for sensitive photographic materials, to ensure the posterity of original works, ranging from "*photographs (digital or traditional, colour or black and white), x-rays, installation shots, time-lapse photographs, infrared reflectography, digital backups, master copies stored off-site, written records and descriptions, working maquettes, exhibitable facsimiles, digital surrogates*".

2. Text and Data Mining

2.1 Overall, our members were not aware of any major impact on the Text and Data Mining exception. This might be due to the fact that they do not utilise the exception for their own purposes, in addition over 70% respondents do not monitor this type of activity.

2.2 Several members reported anomalous text and data mining activity of their own websites, based on the abnormally high traffic activity, with one member quoting "*averaging approx. 2,000-3,000 data extractions in a 12 hour period*", and another assuming the activity was for commercial gain due to the nature of the activity recorded. Importantly, text and data mining may only be conducted for non-commercial purposes (e.g. by universities or non-commercial research organisations).

2.3 20% reported losing licensing revenue as a result of the exception. 45% were not sure if the exception was having an impact, and of those the common theme was that it was difficult to quantify, although members had noticed an overall decline in licensing and an increase in infringements.

3. Education

3.1 An education exception replaced the previous exception introducing important changes. These allowed for broad use of copyright material for the purpose of in-school and distance learning, instruction and examination. A number of BAPLA members are members of visual art CMOs - DACS and PICSEL, who in turn annually collect rights revenue from the CLA and ERA. The majority (80%) had not used the Education exception. Of those that had, the purpose was for 'illustration for instruction' (S.32) enabling them to use them specifically for education purposes within the institutions.

3.2 Three key factors indicate that members have noticed an appreciable difference since this exception was introduced. 50% of respondents had noticed a change in the take up of educational licences since 2014, with 60% reporting a reduction in revenue from direct licensing for educational purposes; and in addition, and 40% reported an impact on royalties received through CMOs in respect of educational licences.

4. Quotation, and Caricature, Parody and Pastiche

4.1 These exceptions allow the use of a copyright work for the above purposes without a licence, provided that the use is 'fair dealing' (which in most cases indicates that the use must be non-

commercial or ought not to compete with the exploitation by the rightholder). However, in practice that is not always the case, particularly for commercial uses.

4.2 The Quotation exception in particular has been useful for some cultural heritage organisations, but within a narrow context and usually for ‘illustrative purposes’, of either artworks or literary works (with the latter adhering to the Publishers’ Association guidelines).

4.3 Whilst only 23% respondents for the Quotation exception and 15% respondents for the Parody exception reported impact on their organisations, we cannot know the full scale of the misuse or misinterpretation of a ‘fair dealing’ justification, in part because cases brought before the IPEC are not reported, and many are settled. We would request that this type of information is made available in order to reflect the true picture of the types of cases raised, without the need to release full details of raised cases.

4.4 Several comments highlight responses from clients to members on reasons not to license content, for example:

- Quotation exception: members report a few incidences where images (and video footage) have been used in TV programmes without licences for reporting on current affairs. The reason given is that the user has interpreted ‘fair dealing’ to mean they are exempt from obtaining a licence, resulting in a loss of revenue because of their interpretation of the quotation exception.
- Parody exception: again, the interpretation of ‘fair dealing’ has been misinterpreted to mean “*free to use*” in all circumstances. So, where a parody meme uses an image without permission or licence from a photo library for the commercial promotion of a brand, the reason given is that it is ‘fair dealing’.

4.5 One particular example that goes beyond ‘fair dealing’ is the commercial exploitation of the ‘Distracted Boyfriend’ meme. During the summer of 2017, the Distracted Boyfriend meme reigned supreme on Twitter. The stock photographer, Antonio Guillem, was initially unaware of its popularity, nor what a meme was, acknowledging copyright infringement of his photo was extensive. He had not earned any income from the shared posts that were retweeted well over 100,000 times as they were non-commercial uses. However, some postings have been published in a commercial context to promote various brands, interpreting the use as ‘fair dealing’².

4.6 We would request that some detailed guidance from the IPO (such as a Copyright Notice), explaining that relying on a general ‘fair dealing’ interpretation is not a possible justification (as it is with ‘*fair use*’ in the US) and that the relevant criteria for a specific exception would need to be demonstrated in order to avoid copyright infringement.

4.7 In addition, our industry remains concerned about the possible extent of the Quotation exception being used in relation to the ‘*framing*’ of images. ‘Framing’ is a term to describe a technical action that keeps a user on a third-party website or platform when looking at images (otherwise known as the ‘Value Block’ for images)³. By placing a ‘frame’ around an image the ‘host’ avoids the need to seek permission from the publisher or rightholder, or the need to ‘obtain a licence’. Not only is the original source’s referral traffic affected, but also the need to visit the original source. The displaying or ‘framing’ of images without requiring consent of copyright owners makes it impossible for visual rights holders to redress the economic damage inflicted.

5. Orphan Works

The introduction of the Orphan Works exception promoted “*giving wider access to at least 91 million culturally valuable creative works*”⁴. We hope to see this evidenced in the Government’s review.

² Commercial brand use on Twitter: <https://twitter.com/penguinrandom/status/902624800442646528/photo/1>.

³ <https://bapla.org.uk/ow-social-media-catches-photographers-in-the-value-gap/>

⁴ <https://www.gov.uk/government/news/uk-opens-access-to-91-million-orphan-works>

5.1 From BAPLA's survey, 71% of cultural institutions responded to say they had so far not used this exception. Several cultural heritage representatives highlight that the Orphan Works exception misses out 'standalone artworks' affecting the use of the exception, others mention taking a more risk-based approach.

5.2 As for the process of diligent searches, a number of respondents comment on receiving diligent search requests via BAPLA's notification system, "*BAPLA's Orphan Works notification works well - so if a user undertakes a diligent search & contacts BAPLA we receive details via email & can respond if it's applicable.*" The overall impression was that improvements could be made in order to assist applications, such as making it easier to use and regularly checking applicants understanding and full compliance with the process, including their conduct with diligent searches.

5.3 We also asked members to comment on the cost of dealing with diligent searches. The majority (63%) suggested that the costs were less than £1,000, with 38% selecting more than £1,000 in expenses.

5.4 A quick review of the Government scheme, records shows 899 results in total to date - with 652 categorised as still visual art, (mostly photographs) of which (checking records) BAPLA received 58 diligent search requests, since 2015.

BAPLA further spot-checked two of the licences granted:

1. Giacometti sculpture Homme, Femme, Enfant (wood and metal, 1931)⁵
 - Email received on 03.08.2018 via BAPLA office to members, IPO OW Scheme licence granted 08.01.2019
2. Photograph from the 1978 production of Betrayal at the National Theatre with Daniel Massey and Penelope Wilton by Arnold Weissberger ([US citizen - L. Anorld Weissberger](#))⁶
 - No email received

5.5 Under the current system BAPLA is contacted by users wanting to identify whether a visual work is an 'Orphan', where rightholders cannot be identified & traced for permissions. Based on the figures obtained, approx. 9% of visual art diligent searches contact BAPLA. As a first step it would be essential to identifying deficiencies with users experience, and understand the process users undertake, to improve on the advice given to applicants so that for example this figure increases. In addition, checking how users trace overseas rights holders (including estates) either in the UK or the national territory, during the diligent search process is equally imperative.

5.6 BAPLA's key recommendation would be to tighten up on the advice given to users on 'diligent search' and undertake to spot check the application validity.

6 Extended Collective Licensing (ECL)

6.1 Since ECL was first muted by the UK Government, BAPLA has taken a keen interest in following and commenting on the introduction of Extended Collective Licensing, particularly as the breadth of its membership includes those rightholders who are not members of any collective management organisation (CMO), as well as those who collect secondary rights revenue. We are clear on the understanding that the UK ECL regulations will provide a licence for extended rights covering all rights holders whether they are members of a collecting society or not.

6.2 BAPLA members represent the largest significant number of image rights holders claiming secondary rights revenue from visual arts collective management organisations, such as DACS and PICSEL. We are supportive of the role of CMOs in deriving income in areas of market failure – i.e. where it would be uneconomic or impossible for authors and rights holders to only directly collect revenues themselves. BAPLA also supports the existence of a choice for rights holders to claim

⁵ <https://orphanworkslicensing.service.gov.uk/view-register/details?owlsNumber=OWLS000159-1&workCategory=Still%20visual%20art&filter=0>

⁶ <https://orphanworkslicensing.service.gov.uk/view-register/details?owlsNumber=OWLS000104-5&workCategory=Still%20visual%20art&filter=0>

secondary rights revenue, and respects the right of each visual arts CMO as a member of the CLA. It is with this in mind that BAPLA supported the CLA's application for an ECL to cover the existing licences, with the following caveats.

6.3 Whilst BAPLA supports the CLA's future application for an ECL, the application should not set precedence for a "one size fits all" approach for other ECL applications. Our members depend upon direct licensing to support their UK and international businesses, and in turn this revenue supports image owners, the continuing digitisation of their analogue work, and correspondingly growth, reinvestment and innovation.

6.4 Therefore BAPLA recommends that each ECL application should be based on its own merit as a safeguard. Renewals or modifications of a granted application should also be thoroughly scrutinised to ensure that it meets with the criteria originally granted, so that rights holders are not adversely affected.

6.5 As for further safeguards, whenever there is an ECL application including images, we would hope that BAPLA is consulted on the requirement of that application, both to ensure a represented level of rights holders (including both members and non-members of CMOs) are reached, and to ensure each application does not interfere or replace the direct licensing market, but rather compliments and supports it.

We hope the information provided here contributes to the overall account of the impact the 2014 Copyright revisions have had. BAPLA members have long adapted their business models to manage fluctuations, however legislative changes can have adverse or unfavourable economic impact on commercial businesses, which is expressed by the shrinking of a market. For the Image Sector already challenged by the significant 'value gap' online, it becomes essential to mitigate that risk by involvement in regular consultation. BAPLA looks forward to continuing to work with Government, and in particular the IPO, to ensure both a constructive review of the exceptions introduced in 2014, and to offer assistance on any guidance or feedback required. We believe it is essential to keep communication channels open between Government and rightholder representatives such as BAPLA, particularly on copyright legislation.

If you have any questions about the responses given, please feel free to get in touch.

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<http://www.bapla.org.uk>