

Access rights and conservation – rough justice from the Cairngorms Capercaillie Project

Description

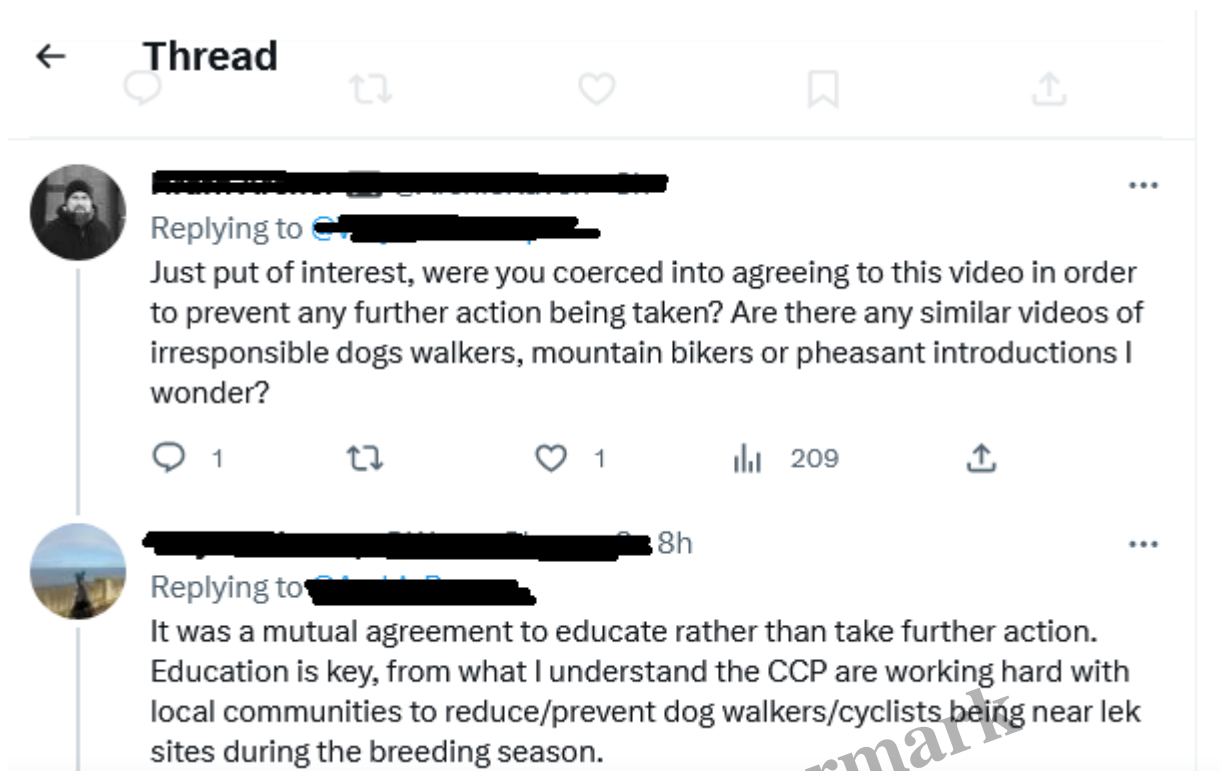


These birders were found and recorded near lek sites over the Easter weekend, spoken to by Rangers and the Police were involved. They're no...

If you have not seen it and care about either conservation or outdoor recreation you should watch this video which was added to the Cairngorms Capercaillie Project facebook page on 11th April ([see here](#)). In it, two birders who had come from England to view capercaillie, confess the error of their ways after being spoken to by the Capercaillie Project and the police and vow “never ever to look for a capercaillie from March up to pretty much September”.

What's wrong about the video

Why would anyone “spoken to by Rangers and the Police” agree to be filmed (a few thousand people have viewed the video to date), an action that could potentially destroy their reputations and put them at risk of verbal abuse or worse? The apparent answer was on twitter:



It looks from this as though the two appear to have judged the risks associated with being filmed as being less than that of the police taking “further action”, though whether they were told this by the police or rangers is unclear.

While it is now fairly standard for people accused of driving offences to be offered the option of attending a training course (being educated) instead of being given penalty points, if the choice was between being filmed and being issued penalty points that would have significant implications for civil liberties. In filming the men, therefore, and referring to the police intervention it seems to me the Capercaillie Project are on very dangerous/legally questionable ground, which risks subverting basic legal protections and replacing these with something that resembles a show trial.

The need to respect legal processes and civil liberties would not prevent the Capercaillie Project – or anyone else for that matter – issuing videos which feature members of the public calling on others to follow their example. In fact, one of the best ways for example of influence the public is to get people with similar interests talking to each other. It is a good idea to get birders who want to get that capercaillie “tick” but might not be aware of the potential consequences to talk to other birders.

This, however, needs to be on an entirely voluntary basis and certainly not following police involvement. The Capercaillie Project’s reference to the police not only reveals the unsavoury way in which this video came about, it suggests that they are keen not just to educate other birders but intimidate them too, with the implication if the “voluntary” advice is not followed, charges might follow.

The law and capercaillie

If the two men were threatened with further action, that action was most likely being charged under the Wildlife and Countryside Act 1981, as happened to a birder last year ([see here](#)). The Act makes it an offence intentionally or recklessly to disturb the nest or young of a Schedule 1 species:

- (5) Subject to the provisions of this Part, if any person intentionally ^{F16}or recklessly]—
- (a) disturbs any wild bird included in Schedule 1 while it is building a nest or is in, on or near a nest containing eggs or young; or
 - (b) disturbs dependent young of such a bird,
- he shall be guilty of an offence^{F17}....

Capercaillie were not originally on Schedule 1 but were added in 2001, after a voluntary ban on shooting them in the 1990s. Soon afterwards were granted further protection by the Nature Conservation (Scotland) Act 2004. This added a provision that “any person who intentionally or recklessly disturbs any wild bird included in Schedule 1 which leks while it is doing so shall be guilty of an offence”.

The key word in the law is “disturb”. The offence is to disturb a Schedule 1 bird and not, for example, to watch one. That is made clear in the Scottish Outdoor Access Code (SOAC):

“Watching and recording wildlife is a popular activity and falls within access rights.....Take extra care not to disturb the wildlife you are watching” (Page 115).

Even where a person or group of people hurry through the pinewoods looking for a capercaillie lek, nest or young, in a way that is likely to cause disturbance, that does not mean disturbance has taken place. There have to be capercaillie present for a start and then there needs to be some proof they have actually been disturbed (e.g. adult birds disperse from a lek, a hen leaves the nest, young scatter).

Then there is the qualification in the law, the disturbance has to be “intentional” or “reckless”. A birder searching for capercaillie is acting intentionally and, even though the person might not be intending to disturb the bird only to watch it, it might well be that the courts would regard any disturbance resulting from that as intentional. But where a person has gone out for recreation, has no interest in capercaillie and accidentally comes across a lek, nest or young, it is difficult to see how any disturbance could be regarded as intentional.

There is, however, a grey area in the law where a person is alerted during the course of their recreation that there are capercaillie in the area AND they could cause disturbance. If that person then chooses to carry on with that activity should any disturbance that results from that be caused be regarded as intentional? The answer is likely to be “it depends”. If a person ignores a sign that says there is a lek on the path, continues along it and causes disturbance, the courts might well regard any disturbance as intentional. But what if the sign tells people there are capercaillie or black grouse in a large area of forest, like Kinveachy say or Rothiemurchus, where the chances of any individual coming across a capercaillie or black grouse, let alone disturbing them is very low? If that individual then has the misfortune to disturb capercaillie or black grouse, should the courts regard that as accidental or intentional?

The Scottish Outdoor Access Code (SOAC) and capercaillie

The legal rights of access introduced by the Land Reform Act in 2003 were built around the fact that other laws that had been developed to control irresponsible behaviour in the countryside and were regarded as fit for purpose. Throughout SOAC, the statutory guide about how to exercise and manage those rights responsibly, there are references to the Wildlife and Countryside Act and its provisions. It clearly states that access rights do not extend to “being on or crossing land for the purpose of doing anything which is an offence, such as theft, breach of the peace, nuisance, poaching, allowing a dog to worry livestock, dropping litter, polluting water or disturbing certain wild birds, animals and plants.”

SOAC also provides guidance on some of the “grey” areas of the law and what is the responsible thing to do based on further agreements between organisations representing land managers, conservation interests and outdoor recreational interests. While neither capercaillie nor leks are mentioned explicitly, it does contain advice/interpretation of the law relevant to the Capercaillie Project’s video for example:

Scottish Outdoor Access Code, 2005

RESPONSIBLE BEHAVIOUR BY THE PUBLIC

> **FORESTS AND WOODS**

You can exercise access rights in forests and woods. If you are cycling or horse riding, keeping to suitable paths and tracks can help to minimise any damage. If you have a dog with you, keep it under close control or on a short lead during the spring (April to July) so that breeding birds are not disturbed. Livestock might be present in some forests and woods so take care if you come across any animals. Be careful not to trample young trees.

RESPONSIBLE BEHAVIOUR BY LAND MANAGERS

Assess the level and nature of public use of the forest or wood, and develop a plan to help manage for access on busy sites. Where possible, provide paths and other facilities, including interpretation, to help people to exercise access rights responsibly.

The capercaillie project – pushing the boundaries of the law?

Until recently most of these questions about the precise meaning and extent of the law in respect of what might constitute recreational disturbance to capercaillie were non-issues but, as their population has continued to fall, the pressure on the project to show it was doing something to save them has

increased. Moreover, in raising awareness about the plight of the capercaillie, the Capercaillie Project and the Cairngorms National Park Authority had also made more people want to see them. The conservation paradox is that the best way for the public to value something, is to experience it, but that can then create new pressures which may need to be managed. In the case of capercaillie, specific issues were created with birders, who wanted to see the bird before it became extinct in Scotland again and gravitated towards the area around Carrbridge where conservation activity was most publicised.

Hence the CCTV cameras – the two birders were “recorded” – and “dawn patrols”:



Besides the specific concerns highlighted in this post about how the Capercaillie Project has dealt with the two birders who were “caught”, there are questions about whether this approach to birders was the right one. In the 1950s the RSPB deal very successfully with the conservation paradox as it applied to the osprey that had returned to Scotland by building the viewing hide at Boat of Garten: this enabled hundreds of thousands of people to enjoy the osprey without disturbing them.

Currently, over on Deeside the CNPA are not applying the ‘Lek it be’ mantra and, as part of the Cairngorms Nature Festival have promoted a visit to a black grouse lek this weekend for the sum of £10 ([see here](#)). This provides further evidence that watching a lek, in itself, is not illegal. Black grouse leks are, of course, easier to view from a distance than capercaillie leks because they take place in more open areas but alternatively creating a place in the forest where keen birders could see live video footage of leks could satisfy some of the desire to see capercaillie and get that “tick”. The Capercaillie Project does not appear to have done anything to help birders or the public do that.

Instead they appear to be trying to stop any visits by birders. While keeping “capercaillie free from disturbance whilst they’re breeding” is not quite the same thing as keeping their leks and nests or young free from disturbance, as stated in the law, the “advice” from the repentant birders in the video goes well beyond that:

“Changed my mind now from going to have a look on paths on which we are permitted, to now not even coming in the breeding season or around breeding season”.

The birders then mention keeping away until the month of September. This conflicts with the guidance in SOAC on dogs (April till July) and the more recent guidance the Capercaillie Project cites on its own website:

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Rather than “do not seek capercaillie away from the path”, the message from the Capercaillie Project video to birders is keep away entirely.

Whether or not the Capercaillie Project patrols were instructed to advise other people out for a walk, run or cycle at dawn to keep away from paths is unclear, but the message in the video has serious implications for access rights in general.

One wonders too what is most likely to cause most disturbance, 20 people out on patrol or the occasional early bird out for a walk?!

What needs to happen?

The funding for the Capercaillie Project runs out next month and it is not clear whether the Cairngorms National Park Authority or anyone else is going to have the resources to run dawn patrols let alone publish videos of repentant birders. Many of the issues raised in this post could, therefore, just disappear along with the Capercaillie Project.

The contents of the video and its publication, however, have implications for access rights which could resurface. It should therefore be considered by the Cairngorms National Park Authority, initially through the Cairngorms Local Outdoor Access Forum and then through engagement with national recreational organisations, to review what lessons could be learned. Both capercaillie and people deserve no less.

I will consider the reasons for the decline in the capercaillie population and other actions being taken to tackle this, including the implications for outdoor recreation, in a further post

Category

1. Access rights
2. Cairngorms

Tags

1. access rights
2. CNPA
3. conservation
4. outdoor recreation

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