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By email: ros.lynch@ipo.gov.uk

Dear Ros

The British Copyright Council discussed earlier this week the European Union copyright package and the potential impact on UK right holders of the amendments under discussion in the Council working groups. Our members are particularly concerned about two aspects of the proposed amendments to the Directive on copyright in the Digital Single Market and the scope of the country of origin principle in the Regulation on online transmissions as recently approved by the Council. We hope the IPO will address these concerns as summarised below.

1. Directive on copyright

a) Article 13 — 'use of protected content by information service providers'

The BCC has observed with significant concern the development of amendments to Article 13 under the Estonian Presidency, culminating in a Presidency text of 16 November that caused widespread doubt among users and right holders as to its workability and compatibility with existing copyright law. The BCC therefore welcomes the questions set out in the Bulgarian Presidency paper of 16 January, as it provides an opportunity to return the debate to the fundamental principles that must underpin any solution.

These principles, as rightly identified by the Commission in its proposals, are that right holders must have the ability to enforce their rights when their works are used by online platforms. In the case of platforms that host works uploaded by their users or a third party, this is only possible if it is definitively clarified these platforms are both undertaking restricted acts and are liable for

them; they can't misappropriate the protection from liability provided in the hosting defence.

Importantly, these two clarifications are interdependent. It is not the case, as was often suggested in the Estonian Presidency texts, of a choice of either clarifying the restricted acts or the limitations in the hosting defence.

We understand there are varing views on how these interdependent issues should be clarified, for example whether to apply clarifications via the communication to the public right or the terms of the hosting defence. BCC members themselves may have competing views on these questions, depending upon the nature and scope of their rights. However, we note there is broad acknowledgement that any solution which depends upon Recitals, rather than the Article itself, will ultimately fail to provide a meaningful outcome.

We hope that with a renewed focus on these underlying principles of the solution we can work closely with you throughout the Bulgarian Presidency to explore practical and appropriate solutions.

b) Article 4 – education exception

Regarding the exception for educational institutions, we have a concern that Article 6.1 provides that no contractual overrides are permitted concerning the scope of the exceptions set out in Article 4.1. This specific cross-reference to Article 4.1 fails to acknowledge the important qualifying licence override provisions acknowledged in Article 4.2 and consequently may put into question the status and enforceability of established licensing systems, such as those operating in the UK linked to s 35 and s 36 CPDA. Should the no contractual override provisions remain in Article 6.1, it is vital that the Directive is clear that the provision does not affect contractual reliance upon the terms of licensing schemes properly applied under Article 4.2.

Any uncertainty in this area will be extremely detrimental for the sector and we urge the IPO to ensure that UK licensing arrangements are safeguarded.

2. Regulation on online transmissions

The BCC understands that this regulation will soon be discussed in trilogue. Given the concerns that we have expressed in previous correspondence, we welcome the proposal put forward in the report by the Legal Affairs Committee of the European Parliament to limit Article 2 to news and current affairs. We note the restriction in the latest proposal put forward by the Estonian Presidency applying the country of origin principle only to works that are owned, co-produced or commissioned by broadcasting organisations.

While this would in theory constitute an improvement to the original Commission proposal (narrower in scope), it creates a two-tier structure for copyright clearances that will be complex to apply and potentially act as a discrimination for clearance of rights in programmes for which the usual national copyright clearance rules will continue to apply.

In practice many creators, performers and right holders may be unable to assess if, and to what extent, works are owned, co-produced or commissioned by broadcasting organisations that are often based in different EU member states. They will therefore not have an easy way to know whether their rights are cleared on a country of origin or national law basis.

If the complete removal of Article 2 remains politically unrealistic, we hope that the IPO will support the scope proposed by the Legal Affairs Committee, since the underlying rights clearance issues linked to news reports are relatively less complex than the full range of programming that may fall under the “owned, co-produced of commissioned” banner.

If you require any further information on the issues raised above, please do not hesitate to contact me.

Kind regards

Elisabeth Ribbans

Director of Policy & Public Affairs

British Copyright Council