12th May 2014

Mr George Mudie, MP
Chairman
Joint Committee on Statutory Instruments
Houses of Parliament
London SW1A 0AA

Email to: jcsi@parliament.uk
whiteja@parliament UK

Dear Mr Mudie,

Draft Statutory Instruments on Exceptions to Copyright – response to Government's comments published through the Secondary Legislation Scrutiny Committee on 8th May 2014

The British Copyright Council is grateful that the Committee is to analyse in more detail the Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014 and the Copyright and Rights in Performances (Quotation and Parody) Regulations 2014 during its next session.

In particular it is hoped that the Committee will note that the Statutory Instrument relating to personal copies for private use continues to raise considerable concerns as to its compliance with mandatory European law, a point which we outlined in our initial submission to the Committee of 31st March 2014. Following that letter, these concerns have been confirmed in the recent decision of the Court of Justice of the European Union in Case C 435/12 ACI Adam.

With reference to The Copyright and Rights in Performances (Quotation and Parody) Regulations) 2014, whilst the Government has provided comments on the earlier submission made by the BCC and BAPLA, the British Copyright Council does not accept that the response given answers the legal questions legitimately raised, for the reasons set out in this letter.

Our detailed response is given below at points 1. to 5. but the following is a brief summary of those points:-

- **Unenforceability of contractual overrides:** During the evidence session on 6th May, IPO officials referred to Section 36 (4) CDPA as an example of unenforceability of contractual overrides under existing UK copyright law. For the reasons explained below, this is an incorrect and unhelpful comparison.
- **Use of quotations for purposes other than criticism and review:** The BCC disagrees with Government's assessment as regards the definition of the term 'quotation', which is not supported by the European case-law on which the Government relies.
- **Compatibility with Article 5(5) of the Directive:** The fact that a quotation exception is provided for in Article 10 of the Berne Convention does not mean that any quotation exception automatically passes the Three-Step Test. This is made clear by Article 10(2) of the WIPO Copyright Treaty.
- **Use of Section 2(2) of the European Communities Act 1972:** The Government's argument that any measure, however significant its impact, can be implemented by SI

if it is relevant to some treaty obligation appears to raise significant legal questions. The right of live public performance is not an incidental adjunct to the rights in the EU copyright acquis; it is a separate and important property right.

- **Private copying exception:** The legal grounds for Government to introduce an exception for private copying without fair compensation under Article 5(2b) Information Society Directive are not supported by recent CJEU decisions. Since our letter of 31 March 2014, the BCC position has been further supported by the CJEU judgment in case C 435/12 ACI Adam.

1. Unenforceability of contractual overrides

During the evidence session on 6th May to the Secondary Legislation Scrutiny Committee in the House of Lords, IPO officials referred to s.36(4) CDPA as an example of unenforceability of contractual overrides under existing UK copyright law. In our view this is an inaccurate and unhelpful comparison. If anything, the use of this example demonstrates the opposite. That is, s.36(4) CDPA only specifies that the terms of any licence covering reprographic copying offered to educational establishments must at least allow the amount of copying that the section would otherwise authorise, and allows the licensor to set all other terms of the licence, including a licence fee.

The aim of this section therefore is to encourage contracts which will override the statutory exception and not the other way around. Such contracts, administered by The Copyright Licensing Agency Ltd., have been in operation for the benefit of all parties involved, right holders as well as educational establishments, for over 30 years.

In other words, the provisions of this section introduce an exception to copyright to permit photocopying by schools but, critically, also provide that copying is not authorised "if or to the extent that licences are available authorising the copying in question" (section 36 (3)). This provision is often referred to as an exception subject to licence.

The following paragraph (4) then provides that the "terms of a licence granted to an educational establishment authorising the reprographic copying for the purposes of instruction of passages from published works are of no effect so far as they purport to restrict the proportion of the work which may be copied…".

So, the contract override provisions with which the IPO sought to make comparison are highly limited and apply directly and specifically to the terms of contracts of the licence working alongside the exception. Moreover, the licensing conditions may only apply specifically to reproduction and off-line uses (and therefore not to other exclusive rights, such as distribution and making available to the public).

This is a fundamentally different proposition to that being proposed in the Statutory Instruments, which seek to impose contract override provisions on any and all contracts. The scope is therefore significantly wider than that in section 36 and cannot accurately be said to bear comparison to it at all.

Furthermore, in her response to Baroness Morris at Q12 Ms Heyes said "It [the contract override provision] will not be retrospective". However, in the notes published by the IPO accompanying the exceptions "Guidance for creators and copyright owners" it is stated that: "Where a licence granted under the old law gives wider permissions than the new law the licence will be unaffected. However, where the new law permits more than the licence, the licence holder will be able to rely on the new law. The licence will still be valid, but a licensee

cannot be made to comply with any term in so far as it seeks to restrict something that the new law allows. E.g. if an individual purchases a work on terms which prevent the copying of the work for any purpose, it will not be a breach of the licence if the purchaser makes a personal copy."

The only feasible interpretation of this Guidance appears to be that for any existing licence certain terms will no longer be enforceable. This is the direct opposite of the provisions not applying retrospectively: clearly, the IPO guidance envisages precisely that they will apply not just to future licences but to past and present ones as well.

It is hoped that these inconsistencies will be considered further by the Committee.

2. Use of quotations for purposes other than criticism and review

The Government refers to the WIPO Guide to the Berne Convention of 1971 and the Advocate General's opinion in Case C 145/10 Painer to argue that the word 'quotation' in the UK exception clearly has a narrow meaning. The BCC is not convinced that this will reflect the practical approach of UK courts to the words that are proposed in the draft Regulations.

The WIPO Guide and the AG's opinion are not binding on the UK courts. UK courts would ordinarily give the expression 'quotation from the work (whether for criticism or review or otherwise)' its normal dictionary definition. 'Quotation' is defined by the *Oxford English Dictionary* Third Edition (2008) as 'a passage quoted from a book, speech, or other source; (in modern use *esp.*) a frequently quoted passage of this nature.' or 'a short musical passage or visual image taken from one piece of music or work of art and used in another'. Consequentially "quotation" will be interpreted in a way that is wider than envisaged and more widely than allowed under the International and European legal instruments.

Additionally, Advocate General Trstenjak stated in Case C 145/10 that the Directive's reference to 'criticism or review' makes it clear that 'quotation' within the meaning of the Directive must include 'a material reference back to the work'. By contrast, the UK exception's wording 'criticism or review or otherwise' does not contain this significant condition. Therefore, the language of the UK exception has a breadth that the Directive's wording does not, so goes beyond the scope of the exception provided for in EU law.

Again Case C 145/10 makes it clear that under Article 5(3)d of the Information Society Directive, the quotation must be for specific purposes such as criticism and review. It is, therefore, the BCC's view that Government's argument that criticism and review are just examples, is not valid in this context. The focus is on "specific purposes". A general exception cannot, by definition, be for specific purposes.

3. Compatibility with Article 5(5) of the Directive

The Government argues that the fact that a quotation exception is provided for in Article 10 of the Berne Convention means that <u>any</u> quotation exception automatically passes the Three-Step Test. That does not follow. Any exception, whether it is for quotation or otherwise, must still pass the Three-Step Test in practice. This is made clear by Article 10(2) of the WIPO Copyright Treaty: 'Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.'

4. Use of Section 2(2) of the European Communities Act 1972

The European Communities Act permits 'Treaties' to be implemented via secondary legislation and that includes 'any other treaty entered into by the EU'. However, if, as the Government contests, that means that any measure that is relevant to some treaty obligation (including limits on rights, such as copyright exceptions) can legitimately be implemented via secondary legislation, and that would entitle the Government to introduce many broad measures via secondary legislation. For example, human rights obligations and limitations thereto are the subject of treaties to which the EU is a signatory. If secondary legislation were used to implement significant limitations to the rights to private life, freedom of religion, freedom of expression or freedom of assembly, would that be an acceptable use of the powers? Using secondary legislation to make significant incursions on important property rights, where there is no relevant EU law is not therefore appropriate..

Directive 2006/115/EC does not cover the author's right of live public performance of the protected work, nor does the Information Society Directive. The right of live public performance is not an incidental adjunct to the rights in the EU copyright acquis. It is a separate and important property right, guaranteed by Article 11(1) of the Berne Convention and Article 9(1) of the TRIPs Agreement.

Furthermore, we note that the Information Society Directive neither mandates, nor more importantly even permits, contractual override, in stark contrast to the Computer Program Directive and Database Directive, both of which expressly mandate it for certain of the exceptions for which they provide. Thus the ECA does not provide a valid basis for introducing such wide-ranging changes via secondary legislation.

5. Private copying exception

Since our letter of 31st March 2014, the Court of Justice of the European Union has published its judgment in case C 435/12 ACI Adam de facto stating that there is no discretion for member states in implementing the exceptions provided under Article 5 (2) and (3) Information Society Directive.

Para 22 states that: "As regards the scope of those exceptions and limitations, it must be pointed out that, according to the settled case-law of the Court, the provisions of a directive which derogate from a general principle established by that directive must be interpreted strictly (Case C-5/08 Infopaq International EU:C:2009:465, paragraph 56 and the case-law cited)."

followed by:-

Para 23: "It follows that the different exceptions and limitations provided for in Article 5(2) of Directive 2001/29 must be interpreted strictly." The strict interpretation of exceptions across the European Union is established Case law of the European Court of Justice, c.f. also Case C 510/10 DR, TV2 Danmark A/S v NCB Nordisk Copyright Bureau.

Para 33 of this decision states that "Secondly, it must be borne in mind that, according to settled case-law, the need for a uniform application of European Union law and the principle of equality require that the terms of a provision of European Union law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the European Union."

As far as the CJEU refers in its decisions to the discretion of member states, this only relates to the administration of the levy system, e.g. who pays the compensation, the form, detailed arrangements and possible level of compensation (c.f. amongst others Case C-521/11 Amazon v Austro-Mechana, para 20) and not whether there is fair compensation.

The British Copyright Council concludes, therefore that there is no leeway for Government to introduce an exception for private copying without fair compensation under Article 5 (2b) Information Society Directive and hopes that the Committee will consider the case law referred to in preparing its report.

Yours sincerely,

Janet Ibbotson
Chief Executive Officer

c.c. Jane White, Lords Clerk, Private Bill Office