

17<sup>th</sup> June 2014

Maria Martin-Prat  
Head of Unit Copyright  
SPA2 – Pavilion  
Rue de Spa 2  
1000 Brussels  
Belgium.

Maria.Martin-Prat@ec.europa.eu

Dear Maria,

## **Developments on exceptions to copyright in the UK**

The British Copyright Council represents those who create, hold interests or manage rights in literary, dramatic, musical and artistic works, performances, films, sound recordings, broadcasts and other material in which there are rights of copyright and related rights.

Our members include professional associations, industry bodies and trade unions which together represent hundreds of thousands of authors, creators, performers, publishers and producers (see member list appended). These right holders include many individual freelancers, sole traders and SMEs as well as larger corporations within the creative and cultural industries. Our members also include collecting societies which represent right holders and which enable access to works of creativity.

**The British Copyright Council has raised a number of concerns about recent developments in the UK as regards provision for a new copyright exception linked to private copying, which it believes are of such significance that we wish to draw them to the attention of the Commission. This letter adds comment on concerns relating to the UK approach to fair compensation for private copying.**

**As the Commission will be aware, the UK Government intends to introduce an exception for private copying without fair compensation. The implementing provisions as currently set out in a draft of The Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014, conflict with Article 5 (2)(b) of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society. In addition to the infringement of mandatory European copyright laws, we are concerned that developments in the UK will have an effect on the White Paper on changes to European Copyright rules which we believe that the Commission is to publish shortly. The proposed UK Regulations will damage any harmonisation of this part of the Copyright Acquis.**

**We would be grateful to hear the Commission's assessment of the proposed UK exception, in particular whether it could be considered a correct implementation of Directive 2001/29/EC.**

The BCC has raised some important concerns with the UK Intellectual Property Office and, more recently, with the respective Parliamentary Committees about the legal deficiencies of the draft Regulations<sup>1</sup>.

Despite the concerns of right holders and the Parliamentary supervisory bodies, the Government has re-tabled the proposed Regulations as originally drafted, without amending the legislation, with a view to seeking approval for implementation from 1<sup>st</sup> October 2014.

<sup>1</sup> <http://www.britishcopyright.org/page/528/draft-statutory-instruments-on-exceptions-to-copyright-ultra-vires/> and

We understand that the Joint Committee on Statutory Instruments intends to discuss the subject again on 25<sup>th</sup> June 2014. Procedurally, we are concerned about the speed with which UK Government is pushing the Statutory Instrument through the parliamentary process without any change to the legislative part (and only minor changes to the Explanatory Memorandum).

#### **I. No discretion for member states as to whether to provide fair compensation.**

The Court of Justice of the European Union in case C 435/12 ACI Adam repeats the established principle that there is no discretion for Member States in implementing the exceptions provided under Article 5 (2) and (3) of Directive 2001/29/EC. (e.g. amongst others Case C-510/10 DR, TV2 Danmark A/S v NCB Nordisk Copyright Bureau). More recently, Case C-360/13 (PRCA v NLA) stated in Para 23 that conditions for exceptions (in this case Article 5 (1)) of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society) must be interpreted strictly, because they constitute a derogation from the general rule established by that Directive that the copyright holder must authorise any reproduction of his protected work.

#### **II. Harm**

The UK Government has given an unsatisfactory explanation as to why fair compensation is not required:

- (a) they argue that the UK private copying exception is narrower than other EU private copying exceptions (this is not the case as it expressly includes electronic storage services);
- (b) they claim that the harm is minimal and compensation can be 'priced in' (this is not supported by evidence).

In several decisions the Court of Justice of the European Union (e.g. Para 44 [Padawan v SGAE Case C-467/08](#)) states that there is a presumption of harm and consequentially the burden of proof is on Government to establish that there is no harm; the UK Government failed to provide any such evidence. It is certainly inadequate for Government to rely on consumer education as a means of limiting the private copying exception in view of the shortcomings of the legislation as suggested by the IPO<sup>2</sup>. Furthermore, figures exist demonstrating the harm to creators and performers, in lost income from private copying of music.<sup>3</sup> Something which is clearly recognised elsewhere in Europe by the fact that where private copying provisions exist, provision is made for fair compensation of rights holders.

The UK Government has not fully considered or addressed the economic impact of the proposed exceptions, despite the burden of proof being on them.

We would be grateful to hear whether the Commission considers the proposed UK exception to be a correct implementation of Directive 2001/29/EC. If the Commission considers that it is not a correct implementation, we would be interested to know what action the Commission intends to take.

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<sup>2</sup> <http://www.parliament.uk/documents/lords-committees/Secondary-Legislation-Scrutiny-Committee/Uncorrected-Oral-Evidence-Transcript-6-May-2014.pdf>

<sup>3</sup> [http://www.ukmusic.org/assets/general/SLSC\\_Copyright\\_Exceptions\\_Submission\\_April\\_2014.pdf](http://www.ukmusic.org/assets/general/SLSC_Copyright_Exceptions_Submission_April_2014.pdf)

The British Copyright Council would be happy to assist in providing the Commission with further background, should this be helpful.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Janet Ibbotson', written over a light grey rectangular background.

Janet Ibbotson  
Chief Executive Officer

c.c. Marco Giorello, Deputy Head of Unit Copyright, [Marco.Giorello@ec.europa.eu](mailto:Marco.Giorello@ec.europa.eu)