



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

11 April 2014

Dear Mr Mudie

The Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014 (the “Regulations”)

I write further to my letter of 1 April 2014, and my colleague Tom Kiehl’s subsequent conversation with Liz Booth in which he was advised that any additional submissions that UK Music and its members would like to make to you on this matter should be sent to you by close of play on Wednesday, 9 April 2014. I appreciate that this letter is being sent slightly later than that deadline, but I also wanted to take this opportunity to comment on the judgment of *ACI Adam BV and Others v Stichting Thuiskopie and Stichting Onderhandelingen Thuiskopie vergoeding* (Case C-435/12) which was published yesterday (rather than sending a further, separate letter on that judgment).

Please note that in this letter I adopt the definitions used in my letter of 1 April 2014.

1. The UK music industry

- 1.1 To begin, I would like to emphasise the importance of the UK music industry. In December 2013, UK Music published an in depth study which showed that the contribution of the core music industry to the UK economy was £3.5 billion

UK Music
British Music House

26 Berners Street
London, W1 3LR

T. 020 7306 4446
F. 020 7306 4449
E. contact@ukmusic.org

www.ukmusic.org

in GVA.¹ This comprised £1.6 billion from musicians, composers and songwriters; £634 million from recorded music; £662 million from live music; £402 million from music publishing; £151 million from music representatives; and £80 million from music producers and recording studios. The value of exports was £1.4 billion. The industry sustains 101,680 full time jobs.

- 1.2 Music is also of economic importance to related sectors such as tourism: UK Music carried out further research last year which demonstrated 6.5 million music tourists attended a festival or gig, generating £2.2 billion spending in the process.² In addition to its economic value, music is of enormous cultural importance to the people of the UK.
- 1.3 It is perhaps also worth re-iterating that the UK music industry accepts the introduction of a private copying exception as long as it is implemented in a way that is consistent with the Copyright Directive, and which protects rights-holders.

2. Private copying – the requirement for fair compensation

Existing CJEU case law

- 2.1 As explained in my previous letter, the Copyright Directive enables member states to introduce a PCE provided that “*fair compensation*” is provided to rights-holders in relation to the harm arising to them from the private copying in question, unless such harm is proven to be “*minimal*”.
- 2.2 Also as set out in that letter, the CJEU in the case of *Padawan* established that private copying must be regarded as likely to cause harm to the rights-holders, and in the case of *Stichting de Thuiskopie* established that member states “***must guarantee...the effective recovery of the fair compensation intended to compensate the authors harmed for the prejudice sustained***” (emphasis added).
- 2.3 Accordingly, member states have an obligation to guarantee that fair compensation is paid to rights-holders in respect of the possible harm that will arise from private copying relating to the introduction of a PCE unless it is established that any harm will be minimal. We consider that the Government has failed to meet that obligation and in particular to establish that harm to the British musicians, songwriters and composers will be minimal, as is set out in more detail in section 3 below.

ACI Adam BV

- 2.4 A number of the principles relating to the introduction of a private copying exception in member states that have been established in previous CJEU case

¹ <http://www.ukmusic.org/research/economic-research/>

² <http://www.ukmusic.org/research/wish-you-were-here-2013/>

law were confirmed in the judgment in *ACI Adam BV* which was published yesterday.

- 2.5 The judgment emphasises that the provisions of Article 5(2)(b) of the Copyright Directive “*must be interpreted strictly*” (see paragraph 23). It goes on to state that pursuant to Article 5(2)(b), “*Member States which decide to introduce the private copying exception into their national law are required to provide for the payment of ‘fair compensation’ to rightholders*” (see paragraph 48), and that the purpose of fair compensation is to “*compensate authors for private copies made of their protected works without their authorisation*” (see paragraph 50).
- 2.6 The CJEU also stresses that the concept of fair compensation is an “*essential element*” of the Copyright Directive (see paragraph 49) and that if member states “*are free to determine [its] limits in an inconsistent and unharmonised manner...[this] would be incompatible with the objective of...harmonising certain aspects of the Law on copyright and related rights in the information society, and ensuring competition in the internal market is not distorted as a result of Member States’ different legislation*” (see paragraph 49). In addition, the point is made that while member states may have the option of introducing the various exceptions contained in Article 5 of the Copyright Directive, “*once they have made the choice of introducing a certain exception, it must be applied coherently, so that it cannot undermine the objectives which [the Copyright Directive] pursues with the aim of ensuring the proper functioning of the internal market*” (see paragraph 34).
- 2.7 Taken together, this makes clear that the governments of member states **must** apply the concept of fair compensation and ultimately, what constitutes “harm”, very strictly in order to minimise the damage to the objective of harmonisation. It cannot be right that the Government is allowed to rely on an unproven assertion that only minimal harm will be caused by the introduction of the PCE in the UK and to deviate from the approach taken by other member states (where there are copyright levies in place to compensate for such harm).

3. The Government’s case

- 3.1 The Government appears to be proceeding on the basis of the Intellectual Property Office’s revised Impact Assessment which was published on 27 March 2014 (the “**Impact Assessment**”) in which it is concluded that the harm suffered to rights-holders will be minimal. The basis for this conclusion is without evidence or substance.
- 3.2 In particular, as I noted in my letter of 1 April 2014, the Impact Assessment states (see page 15) as follows:

“[rights-holders] ought to be able to benefit from the additional value that consumers derive from private copying as it will be priced into the market through increased pricing or sales”

- 3.3 By this, we understand the Impact Assessment to be suggesting that consumers will be willing to pay more for CDs for which private copying is permitted under the PCE and this additional amount fully offsets any harm which may be occasioned to rights-holders by the PCE. There is absolutely no attempt to quantify the additional amounts consumers may be prepared to pay, the harm which may be occasioned to rights-holders or how the two compare. For these reasons, the Government's case appears to be no more than that rights-holders may obtain some (unspecified and unquantified) benefits as well as suffer harm from the PCE. That is a wholly inadequate analysis of harm.

4. UK Music's evidence of harm

- 4.1 As I stated in my letter of 1 April 2014, UK Music has commissioned a detailed consumer survey (looking at consumer willingness to pay for CDs depending on the type and extent of copying they can undertake in respect of those CDs) as part of its own efforts to estimate the harm that will be caused to rights-holders and other stakeholders in the music industry as a result of the private copying that will be permitted under the PCE³. Economic experts, Compass Lexecon, have been engaged to analyse the results of that survey and are in the process of preparing a report on harm based on that analysis.
- 4.2 Compass Lexecon are continuing to analyse the survey data, and we plan to send you and the House of Lords Secondary Legislation Scrutiny Committee a summary of their findings once that analysis is complete.
- 4.3 It is, however, worth noting that Compass Lexecon's initial findings are that the harm to the UK music industry arising from the PCE will not be minimal (and indeed, is likely to be significant).

5. Conclusion

- 5.1 What is striking about the Government's case is the total lack of analysis and evidence supporting its contention that only minimal harm will be suffered as a result of the introduction of the PCE. In fact, this is little more than a bare assertion.
- 5.2 The initial findings of Compass Lexecon suggest that very significant harm will be suffered by rights-holders following the introduction of the PCE and indicates that the harm will be very considerably above the threshold of minimal harm which would require the Government to establish a system of compensation for rights-holders.
- 5.3 In addition, the case law of the CJEU continually confirms the need for (i) fair compensation to rights-holders where a private copying exception is allowed, and (ii) a consistency of approach between member states. The

³ Note that the survey focuses on the purchase and copying of CDs only, and does not deal with digital downloads.

Government's proposed approach is plainly not consistent with the provisions of the Copyright Directive or the line taken by other member states.

In the light of the above, I respectfully request that the Joint Committee considers carefully the Government's justification of the introduction of the PCE with no compensation scheme for rights-holders, as in our view, to implement the current proposals would clearly be *ultra vires*.

Yours sincerely

A handwritten signature in black ink that reads "Jo Dipple". The signature is written in a cursive, slightly slanted style.

Jo Dipple
Chief Executive Officer, UK Music

Copied by email to:

Lord Goodlad, Chair, the House of Lords Secondary Legislation Scrutiny Committee

Dr Ros Lynch, Director, Copyright and IP Enforcement Director of the Intellectual Property Office

Members of the Joint Committee on Statutory Instruments and House of Lords Secondary Legislation Scrutiny Committee