

6 December 2016

## **Intellectual Property Office Call for Views**

### **Modernising the European Copyright Framework**

1. UK Music is the umbrella body representing the collective interests of the UK's commercial music industry, from songwriters and composers to artists and musicians, studio producers, music managers, music publishers, major and independent record labels, music licensing companies and the live music sector.
2. UK Music exists to represent the UK's commercial music sector, to drive economic growth and promote the benefits of music to British society. A full list of UK Music members can be found in the annex.
3. The music industry is worth £4.1 billion to the economy and generated exports of £2.2 billion in 2015. The industry now employs 119,020 people. Based on UK Music's annual Measuring Music report, the value of music the sector has grown by 17% over the past four years, out-performing much of the rest of the UK economy.<sup>1</sup> Music has an impact on other parts of the economy. For example, in 2015 music tourism to UK concerts and festivals generated £3.7 billion for the UK economy. There was a 16% increase in the number of overseas music tourists visiting the UK.<sup>2</sup>

### **General**

4. UK Music welcomes the opportunity to provide the Intellectual Property Office with views on the copyright legislation proposed by the European Commission as part of its Digital Single Market programme.
5. The copyright legislative proposals, published by the European Commission on 14<sup>th</sup> September 2016, represent both an opportunity to secure a better functioning digital market and question the balance of the exceptions. Given these proposals are now subject to consideration and approval by the European Council and Parliament, we welcome this opportunity and your commitment to regular dialogue with the industry on the copyright framework of our largest export market. The measures will continue to develop and are subject to amendment and revision over what may be a two year process.
6. Our comments at this stage relate to clarifications of the proposals. European law remains very important to our members now and after the withdrawal from the European Union. Until the withdrawal from the European Union, following the completion of the Article 50

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<sup>1</sup> <http://www.ukmusic.org/research/measuring-music-2016/>

<sup>2</sup> [http://www.ukmusic.org/assets/general/Wish\\_You\\_Were\\_Here\\_2016\\_Final.pdf](http://www.ukmusic.org/assets/general/Wish_You_Were_Here_2016_Final.pdf)

procedure, the UK is a full member of the European Union. We welcome statements in the recent Public Bill Committee Stage of the Digital Economy Bill that indicate the UK Government intends to remain an active participant in discussions around the Digital Single Market. Beyond Brexit, UK Music has argued for the UK Government to maintain a strong level of protection for copyright, providing certainty for UK creators, performers and rights holders.<sup>3</sup>

### **Draft Copyright Directive**<sup>4</sup>

#### **Exception for the sole purpose of illustration in educational establishments**

7. This is the new mandatory exception most relevant for UK Music members. As currently expressed it specifically makes the exception subject to the availability of licences. In the UK, a licensing based system for sheet music, Print Music Licensing Ltd (PMLL), operates effectively and for the benefit of right holders and educational establishments.<sup>5</sup> It is essential that this practical and flexible system continues to operate based on licensing, predominantly by collective management organisations. PMLL has been proven flexible and able to cater for the needs of all stakeholders. Similarly, the Educational Recording Agency, of which many UK Music members are members, operates a successful licensing scheme for the use of broadcasts in educational establishments, for the benefit of right holders and users. We particularly welcome the clear recognition of the licensing systems in Recital 17.
8. However, clarification is required on the accompanying Recital 16 which seems to go beyond the intended scope of the relevant Article which generally describes the exempted activity as one done “for the sole purpose of illustration”. We suggest that this important qualification is reflected in the corresponding Recital to enable a clear and congruous interpretation and application of the exception.

#### **Out-of-commerce works**

9. It is the choice of the relevant Collective Management Organisations and ultimately their right holder members whether to extend their licensing activities. The wording of Article 7 Paragraph 1 would benefit from clarification that it is Collective Management Organisations that may extend collective management to non-members. The decisive role of right holders’ choice in collective management has been reaffirmed in Article 5 Collective Rights Management Directive.<sup>6</sup> This could be done by an amendment to Recital 24. We welcome the clear definition of out-of-commerce works.

#### **Access and Availability of AV works on VOD platforms**

10. The recital that corresponds to Article 10 is very clearly intended to address concerns about the licensing of audiovisual works to video-on-demand platforms. This is not, however, as clearly defined in the Article, which could easily be interpreted as applying to all underlying rights, such as the rights in the script or in the music. This could be expressed by way of a clarifying amendment to Article 10 stating that “this Article does not apply to the underlying works contained in audio-visual works”.

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<sup>3</sup> <http://www.ukmusic.org/policy/industrial-strategy-for-the-creative-industries-2016/>

<sup>4</sup> <https://ec.europa.eu/digital-single-market/en/news/proposal-directive-european-parliament-and-council-copyright-digital-single-market>

<sup>5</sup> <http://www.printmusiclicensing.co.uk/>

<sup>6</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32014L0026&from=EN>

## Claims for Fair Compensation

11. The issue of fair compensation is not directly applicable in the United Kingdom in the absence of a reprographic or private copying exception accompanied by fair compensation.
12. Our member organisations receive monies from countries in which fair compensation systems operate either via reciprocal arrangements between collective management organisations or by virtue of sub publishing arrangements. We welcome Article 12 as an acknowledgement of the role of publishers as rightholders under the European copyright framework.
13. We note however that Article 12 is limited to the specific situation of fair compensation whilst publishers should be considered rightholders by transfer or license more generally. This is reflected for instance, in the Rental and Lending Right Directive<sup>7</sup>, Article 3 (3). We ask that the position of publishers as rightholders is expressly acknowledged in the European Copyright Acquis.
14. Furthermore, we understand that our European colleagues are concerned about the optional nature of this provision and we support their arguments to render this Article mandatory in the countries in which such fair compensation mechanisms exist.

## Certain uses of protected content by online services

15. UK Music strongly supports Article 13 and Recital 38. Some online platforms provide access to commercially produced music and are able to avoid or pay licences that are drastically below value. In 2015 YouTube increased its music rights payments by 11% on the previous year despite total streams growing by 132%. Equivalent per stream rates fell from \$0.0020 to \$0.0010.<sup>8</sup> Addressing this “value gap” is extremely important for the music industry and the wider UK creative industries. We urge the UK Government to strongly support the Commission’s proposals in order to achieve this.
16. Article 13 and Recital 38 importantly recognise the role of information society service providers in relation to copyright protected content. The Commission’s proposal is consistent with Article 15 e-Commerce Directive.
17. More specifically, Article 13 should lead to more information society service providers engaging in genuine commercial discussions on the remuneration of right holders and cooperating to apply effective technical measures which are appropriate and proportionate. We welcome the explanation in Recital 39 on the importance of content recognition technologies, as well as the transparency required for the technologies used and the data collected. Such technologies are key for the functioning of the market including both established enterprises and start ups and are widely available in the market at low costs. Technical measures do not create privacy concerns given that they are not directed at individual users.
18. Regarding Recital 38, we note that legitimate businesses providing digital services, as well as right holders, would benefit from a clarification of European legislation. The draft Directive does not interfere with the general purpose behind the safe harbour protection for service providers, i.e. where they play a genuinely passive role storing content they should maintain their exemption from liability as originally envisaged by the legislator.

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<sup>7</sup> <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32006L0115>

<sup>8</sup> <http://www.ukmusic.org/research/measuring-music-2016/> p. 11 - 12

19. In our experience platforms for user uploaded content generally play an active role and benefit commercially from the distribution of illegitimate content. Mere cloud lockers which are purely passive would still benefit from safe harbour provisions.

### **Fair remuneration in contracts of authors and performers**

20. We strongly welcome Article 14 relating to transparency obligations. This Article acknowledges the importance of information for creators and performers on the exploitation of their works.
21. To make Article 14 clearer, measurable and beneficial to as many creators and performers as possible, clarification on wording such as “proportionate”, “disproportionate”, “effective”, “appropriate level of transparency”, and “significant” should be considered.
22. Creators and performers are the foundation of the music industry. Businesses that invest in music are essential to the success of the sector. Whilst there is agreement amongst UK Music on the need for creators and performers to be fairly remunerated and their works properly valued, there are two opinions amongst the membership as to whether Article 15 provides an appropriate mechanism to achieve this.
23. Representatives of creators and performers support Article 15 and believe it would address concerns that there is a lack of a mechanism to adjust existing contracts. They argue that it would be helpful to have clear definitions on terms such as “disproportionately” and “relevant”. They also argue that if Article 15 is to serve real purpose then “request” should be amended to “claim”.
24. Representatives of businesses that invest in music believe that Article 15 would create uncertainty in investments, undermine agreements negotiated by collective bargaining and interfere with the freedom to contract. They also believe it could result in negative unintended consequences that harm those that the measure is intended to support.
25. We refer the Intellectual Property Office to the detailed remarks contained within the submissions of all our individual member organisations in relation to Article 15.
26. There is some uncertainty regarding the relationship between Article 14 and Article 15. We seek clarification that the two articles are not interdependent i.e. that Article 15 could be invoked (or submitted to dispute resolution under Article 16) without first invoking Article 14, and vice versa.

### **Regulation on online broadcasting transmissions and retransmissions<sup>9</sup>**

27. UK Music notes the proposed Regulation on online broadcasting transmissions and retransmissions. We believe the arguments put forward by the music industry during the consultation in 2015 have not been duly considered.<sup>10</sup> As our members have pointed out in their contributions to that consultation, there is no objective economic evidence that an extension of the principles in the Satellite and Cable Directive 1993 to cable retransmissions and online ancillary services would have a positive impact on the clearance of rights.

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<sup>9</sup> <https://ec.europa.eu/digital-single-market/en/news/proposal-regulation-laying-down-rules-exercise-copyright-and-related-rights-applicable-certain>

<sup>10</sup> [http://www.ukmusic.org/assets/general/SatCab\\_UKMusic\\_FINAL\\_Nov2016.pdf](http://www.ukmusic.org/assets/general/SatCab_UKMusic_FINAL_Nov2016.pdf)

28. The Satellite and Cable Directive principles which combine compulsory collective licensing with a country of origin principle are in direct contravention of several key pro-competitive and commercial principles. Their extension into the online market constitutes a serious risk to the successful evolution of pan European licensing solutions which is already happening in practice based on the existing copyright regime. The Satellite and Cable Directive has not encouraged pan European licensing as has been acknowledged in the European Commission's Green Paper on the Online Distribution of audio-visual works. This is in stark contrast with the highly developed market for pan European licensing for digital services developed outside the application of the Satellite and Cable Directive.
29. A recommendation on the scope of broadcast-related online activities and principles on how they should be licensed was agreed between the European Broadcasting Union (EBU), the European Composer and Songwriter Alliance (ECSA), International Confederation of Music Publishers (ICMP) and the European Authors' Society (GESAC) in 2014. We fail to see the need for legislative intervention.
30. Our main interest, should the Regulation be taken forward, is further clarification in the Regulation to avoid unwarranted forum shopping (termed as "establishment shopping" in the Impact Assessment) by broadcasters and ensure important safeguards such as country of destination pricing and the option of contractual overrides. Whilst we welcome the safeguards in Article 2 (2) we suggest that the wording needs to be strengthened to spell out clearly the conditions for the administration of the online broadcasting transmissions and retransmissions to prevent forumshopping and "a race to the bottom" for the value of music. Our member, the Music Publishers Association is submitting more detailed comments on the proposed Regulation.

### **Proposed Directive and Regulation implementing the Marrakesh Treaty<sup>11</sup>**

31. We welcome the timely implementation of the Marrakesh Treaty for visually impaired people by the proposed Directive and Regulation. Sound recordings are by their nature accessible so the implementation only concerns musical works which our music publishers make accessible for visually impaired people. We suggest introducing the concept of commercially availability as envisaged in Article 4 (4) Marrakesh Treaty to incentivise music publishers to produce accessible format copies which is more cost effective than authorised entities having to undertake this complex technological process. We understand that a visually impaired person requires lawful access to the work in the first place before benefitting from the exception. Maybe this would be clarified in the proposals.

### **Annex**

UK Music's membership comprises of:-

- AIM – Association of Independent Music - representing over 850 small and medium sized independent music companies.
- BASCA - British Academy of Songwriters, Composers and Authors – BASCA is the membership association for music writers and exists to support and protect the

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<sup>11</sup> <https://ec.europa.eu/digital-single-market/en/news/proposed-regulation-cross-border-exchange-between-union-and-third-countries-accessible-format> <https://ec.europa.eu/digital-single-market/en/news/proposal-directive-permitted-uses-works-and-other-subject-matter-protected-copyright-and>

professional interests of songwriters, lyricists and composers of all genres of music and to celebrate and encourage excellence in British music writing.

- BPI - the trade body of the recorded music industry representing 3 major record labels and over 300 independent record labels.
- FAC – The Featured Artists Coalition – the voice of the featured recording artists.
- MMF - Music Managers Forum - representing 425 managers throughout the music industry.
- MPG - Music Producers Guild - representing and promoting the interests of all those involved in the production of recorded music – including producers, engineers, mixers, remixers, programmers and mastering engineers.
- MPA - Music Publishers Association - with 260 major and independent music publishers in membership, representing close to 4,000 catalogues across all genres of music.
- Musicians' Union representing 30,000 musicians.
- PPL is the music licensing company which works on behalf of over 90,000 record companies and performers to license recorded music played in public (at pubs, nightclubs, restaurants, shops, offices and many other business types) and broadcast (TV and radio) in the UK.
- *PRS for Music* is responsible for the collective licensing of rights in the musical works of 114,000 composers, songwriters and publishers and an international repertoire of 10 million songs.
- UK Live Music Group, representing the main trade associations and representative bodies of the live music sector

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