



**Enterprise and Regulatory Reform Bill**  
**House of Lords Second Reading Briefing**  
**Wednesday 14<sup>th</sup> November 2012**

UK Music welcomes the progress made in improving the copyright provisions contained within the Enterprise and Regulatory Reform Bill yet seeks further amendment to the Bill during the House of Lords stages.

UK Music is supportive of the introduction of orphan works licensing and is keen to work with the Government to establish a workable system. We believe that additional safeguards are necessary for extended collective licensing. We support the principle of codes of practice for collecting societies but would like the relationship between statutory regulation and the existing voluntary self-regulation to be more clearly defined.

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## **1. About UK Music**

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.

UK Music exists to represent the UK's commercial music sector in order to help drive economic growth and to promote the benefits of music on British society. The members of UK Music are in annex 3 of this briefing.

## **2. Background**

Part 6 and schedule 21 of the Enterprise and Regulatory Reform Bill propose changes to copyright law.

Intellectual property is the economic framework which underpins music and other producers of creative content. Copyright is the currency of that framework. It provides an incentive to industry to invest in new creative content. Licensing of copyright is the mechanism that provides musicians, artists, songwriters and composers with security and an ability to make money out of their work. Music organisations are licensing creators' works.

In the UK there are more than 70 licensed digital music services to choose from, more than any country in the world. These range from free-to-access platforms like Spotify, We7 and YouTube and download stores like iTunes, Bleep, 7digital and Amazon to a range of innovative apps and other music-based services.

## **3. Hargreaves Review of Intellectual Property and Growth and the Enterprise and Regulatory Reform Bill**

The Enterprise and Regulatory Reform Bill was introduced to the House of Commons whilst the Government was engaged in a dialogue with the creative content sector on controversial proposals, which emanate from the Hargreaves Review of Intellectual Property and Growth (commissioned by Government in November 2010 and published in May 2011), to introduce a number of changes to UK copyright law. This dialogue, particularly on exceptions to copyright, is still ongoing as the Bill now enters its scrutiny phase in the House of Lords.

A Government policy statement was made on 2<sup>nd</sup> July, mid-way through the House of Commons Public Bill scrutiny phase of the Bill, which highlighted that certain aspects of the Hargreaves recommendations (most notably on orphan works, extended collective licensing and codes of practice for collecting societies) will be implemented via the Enterprise and Regulatory Reform Bill. Enabling clauses on the issues were subsequently tabled to the Bill by Government at the tail-end of committee and received a very limited degree of scrutiny during the Committee stage in the House of Commons.

For further information on the forthcoming Government announcement on copyright exceptions please refer to annex 1 of this paper.

#### **4. How does the Enterprise and Regulatory Reform Bill change the law relating to copyright?**

Copyright in the Enterprise and Regulatory Reform Bill is amended by clauses 65 to 69 and schedule 21.

**The copyright provisions contained within Clause 66 and 68 and Schedule 21 are of most interest to UK Music and its members during the House of Lords stages on the Enterprise and Regulatory Reform Bill.**

As explained in the explanatory notes that accompanied the Bill, these clauses change copyright law in the following respects:-

**Clause 66** - Creates a power to amend exceptions for copyright and rights in performances without affecting the existing criminal penalties regime.

**Clause 68 and Schedule 21** - Makes a series of amendments to the Copyright, Designs and Patents Act 1988 (the "1988 Act") to allow (through regulations) for the introduction of systems for the licensing of "orphan works", and the authorisation of voluntary extended collective licensing (ECL) schemes, and contains equivalent provisions in respect of performers' rights.

Also, clause 68 inserts a new Schedule into the 1988 Act (schedule 21 in this Bill) which confers a series of very broad powers on the Secretary of State to regulate licensing bodies (collecting societies). These include the power to require a licensing body to adopt a code of practice, to impose a statutory code of practice under certain circumstances, to impose financial sanctions for non-compliance and to recover the cost of regulatory measures from licensing bodies.

#### **5. Clause 66 to the Enterprise and Regulatory Reform Bill**

**UK Music seeks the preservation of clause 66 as currently presented to the House of Lords during the scrutiny of the Enterprise and Regulatory Reform Bill.**

As originally drafted, clause 66<sup>1</sup> to the Enterprise and Regulatory Reform Bill presented widespread concern amongst the creative content sector as a whole.

This concern was based on a notion that the clause gave Parliament an ability to make changes to copyright exceptions that go beyond the areas of law harmonised at an EU level without full parliamentary scrutiny. The Government's stated purpose for this clause was to maintain the UK level for criminal penalties for rights infringement when amending harmonised exceptions to copyright, yet this was not reflected in the original draft of the legislation. More details for why clause 66 presented issues in the House of Commons can be found in annex 2 of this briefing.

During the House of Commons Report Stage, the Government brought forward amendments to the clause which addressed the concerns raised by UK Music and other organisations including the Publishers Association, Alliance for Intellectual Property, Premier League, PACT, Creators' Rights Alliance, British Copyright Council and *PRS for Music*. These amendments from Government were welcomed and gave certainty about the intention behind the clause.

By limiting the activities which this clause can be used for to match the European Communities Act, disapplying the part of that Act which limits penalties, we are now confident that as a result of the House of Commons Report Stage the Government have met their objective of maintaining the UK level for criminal penalties for rights infringement when amending harmonised exceptions to copyright.

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<sup>1</sup> In the House of Commons this clause was numbered 56 at 2<sup>nd</sup> Reading and Committee Stage and 57 at Report Stage and 3<sup>rd</sup> Reading.

## **6. Clause 68 and Schedule 21 to the Enterprise and Regulatory Reform Bill**

**UK Music will be seeking amendments to clause 68 and schedule 21 during the House of Lords stages of the Enterprise and Regulatory Reform Bill so that the broad powers contained within the enabling provisions achieve the safeguards which are necessary in order to future-proof orphan works, extended collective licensing and codes of conduct for collecting societies.**

Clause 68 and Schedule 21 concern the three areas of the Hargreaves Review that the Government is legislating for in this Bill – orphan works, extended collective licensing and codes of practice for collecting societies. Clause 68 and Schedule 21 is enabling legislation in these three aspects.

UK Music appreciates the nature and scope of enabling legislation is such that the Government needs a degree of discretion when paving the way for future regulations yet we believe the scope of the clause and schedule at present is too broad. Despite the fact some regulations are currently being drafted and subject to consultation, the Bill's provisions can be used at any time and so it is important to future proof the legislation now. We feel there are certain areas which must be covered by regulations, and we believe this will be possible to achieve without specifying what the regulations would actually say on those topics. The amendments that we will be seeking in the House of Lords will be about greater clarity and not going into greater detail.

### Orphan Works

Orphan works are works for which the copyright owner cannot be located. Under current copyright law it is generally not possible to make use of these works without infringing copyright as it is impossible to obtain permission to copy them. The effect of this is to lock away considerable volumes of copyright material.

Changing the law so that it is possible to use these works is clearly in the public interest, so that people can benefit from and enjoy these works.

The most important questions are how the licensing system is to operate. The system needs to adequately protect the interests of the orphan works' copyright owners and it needs to be efficient and cost-effective. It is vital that the operation of the licensing system is planned in a pragmatic way, that thinks through the needs of different licensees of orphan works.

One of the ways of ensuring the efficiency of the system is to make the best use of the existing licensing systems of collecting societies. Collecting societies are in a position to process complex usage data and allocate fees for such licensees as broadcasters. UK Music is keen that the Government fully explores the way collecting societies participate in the licensing process.

### Extended Collective Licensing

Extended collective licensing (ECL) is a system whereby a collecting society can extend its licences to include the works of non-members. Non-members will be able to opt out of the licence if they choose.

Some members of UK Music are of the view that ECL is undesirable and unnecessary. Others are not completely opposed. Nevertheless, all members see the following safeguards as crucial in any ECL system if it is introduced.

Extended collective licences must only be permitted in certain strictly controlled circumstances. For example, the collecting society that grants them must be representative of rights owners in the field, licences must be granted on a scheme-by-scheme basis and the mechanics of opting out should be clearly prescribed.

Although the Government's policy documents and verbal assurances have indicated that such strict conditions will be imposed, they have not been placed on the face of the Bill. This is alarming for rights owners, as they therefore do not have a cast-iron future-proof assurance that the power in the Bill will not, at some indefinite point, be used in a way that results in secondary legislation unfairly interfering with their exclusive rights, which are the preserve of primary legislation.

At the same time, ECL is widely being considered in other jurisdictions, some of which have underperforming collective-management systems. It is therefore extremely important that the UK sets the highest possible precedent in the international community for a rigorous and responsible approach to ECL.

#### Codes of Practice for Collecting Societies

UK Music has two collecting society members (*PRS for Music* and PPL). Both take good governance and good customer service extremely seriously and have previously put in place codes of practice covering certain aspects of their operations. Both are, in November 2012, launching expanded codes of practice covering all of their licensees and members (having consulted on these earlier this year).

This is part of a wider self-regulatory initiative by collecting societies across the creative industries. All parties want self-regulation to work. UK Music welcomes the Government's policy to support self-regulation in the first instance.

It is important to remember collecting societies are commonly private limited companies, owned and controlled by their rights holder members, and operating on a not-for-profit basis.

It is against that backdrop that the provisions of Clause 68, and Schedule 21 to the Enterprise and Regulatory Reform Bill should be considered.

UK Music acknowledges that the Bill's powers are intended as a backstop, but understands that, if they are enacted, regulations would then be prepared. Whilst it is hoped that there will be meaningful consultation on any such regulations, it is of real concern that there are so few parameters set out in the primary legislation in terms of crucial areas that any such regulations must address.

In particular, to give proper effect to the stated intention of these being backstop powers, it could and should be clarified that the majority of the powers in Schedule 21 are only exercisable in a scenario where it has been adjudged, through a fair, robust and transparent process, that there has been an unremedied failure of self-regulation.

The Bill also provides for sanctions for failure to abide by a code. These sanctions include financial penalties that may be imposed on directors and other personnel. We are concerned that the regulation of collecting societies should impose financial penalties on individuals according to principles that are less specific than the transparent rules of UK company law.

UK Music believes that greater clarity in the drafting of Schedule 21 would help to ensure that it meets the stated aim of fostering successful self-regulation, rather than running the risk of moving the goalposts or creating a duality of regimes, which could be highly cost-inefficient for collecting societies (which in turn harms their members) and highly confusing for rights users and rights holders alike.

## **7. Contact at UK Music**

UK Music has prepared amendments to the Enterprise and Regulatory Reform Bill for members of the House of Lords to consider tabling at Committee Stage.

If you require any further information on the Enterprise and Regulatory Reform Bill, please contact Tom Kiehl at Director of Government and Public Affairs at UK Music on [tom.kiehl@ukmusic.org](mailto:tom.kiehl@ukmusic.org) , landline: 020 7306 4465, mobile: 07720 496 555.

### ***Annex 1 – Forthcoming Government announcement on copyright exceptions***

Exceptions to copyright allow for copyrighted works to be used without a licence from a copyright owner. The Hargreaves Review made a number of recommendations concerning the need for exceptions to copyright. Such recommendations affecting the music industry included a private copying (or format shifting) exception as well as making use of copyright works without a licence for performances of parody. The Government subsequently endorsed the recommendations of the Hargreaves Review in August 2011.

The Hargreaves recommendations were subject to a consultation from Government in March 2012. Whilst awaiting a formal response from Government to this consultation, UK Music were taken by surprise that provisions relating to copyright were contained within the Enterprise and Regulatory Reform Bill when it was first introduced to Parliament following Queens Speech in May 2012. This caused confusion and concern amongst the creative content sector which was needless.

The policy statement of the 2<sup>nd</sup> July was silent on other aspects of the Hargreaves recommendations (including private copying and parody exceptions). UK Music is expecting a statement from Government on the other aspects of the Hargreaves agenda by the end of 2012.

### ***Annex 2 – Why Clause 66 was an issue during the House of Commons stages of the Bill***

UK Music supported the Government's stated purpose. Without any measure at all, amending harmonised exceptions to copyright would mean the level of criminal penalties for rights infringement in the UK would fall from 10 years to 2 years imprisonment by virtue of the European Communities Act 1972.

However, it was felt by both UK Music and the wider creative content sector that the original clause was drafted in such a way as to be too broad and gave the Secretary of State a Henry VIII power, ie it is a provision that enables amendment of primary legislation using secondary legislation.

In particular for music, the clause could have been used to introduce exceptions to the right of public performance in musical works, an important right which is protected in international law under the Berne Convention (Article 11) and TRIPS (Article 9), via a statutory instrument instead of primary legislation. This would have meant any proposed changes in this area would be subject to limited Parliamentary oversight on a take it or leave it basis as opposed to rigorous line-by-line scrutiny.

### ***Annex 3 – UK Music Membership***

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 – with over 2,000 members, BASCA is the professional association for music writers and exists to support and protect the artistic, professional, commercial and copyright interests of songwriters, lyricists and composers of all genres of music and to celebrate and encourage excellence in British music writing
- The BPI representing over 440 record company members
- 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, re-mixers, 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, on behalf of 50,000 performers and 6,500 record companies, licences the use of recorded music in the UK
- PRS for Music is responsible for the collective licensing of rights in the musical works of 92,000 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