



George Mudie MP
Chair
Joint Committee on Statutory Instruments
House of Commons
London
SW1A 0AA

13th May 2014

Dear Mr Mudie,

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

I have previously sent correspondence to you on 1st and 11th April 2014 in connection with the Regulations. I also copied you in on correspondence with the House of Lords Secondary Legislation Scrutiny Committee (the “**SLSC**”) dated 30th April 2014 which enclosed a summary report (the “**Summary Report**”) of survey evidence commissioned by UK Music that identified significant harm to the music industry as a result of the Regulations being introduced.

I understand that the Regulations are still under the consideration of the Joint Committee on Statutory Instruments (the “**JCSI**”) which you Chair. The SLSC has now reported on the Regulations in the document entitled “41st Report of Session 2013-14” (the “**SLSC Report**”).

I am writing to you now with reference to the SLSC Report and to highlight the serious flaws in the Minister’s fundamental argument to the SLSC for the justification of a private copying exception via the Regulations which does not include provision for fair compensation. The Minister argues that the proposed exception is “*narrow*” and that therefore the UK can ignore the requirements of Directive 2001/29/EC (the “**Copyright Directive**”) and the relevant case law of the Court of Justice of the European Union (the “**CJEU**”). Further, the Minister alleges that the harm that may be suffered would be “*minimal*”.

Both of these arguments are flawed. The exception that will be introduced by the Regulations is not narrow. As I explain further below, that argument is particularly undermined by the inclusion of cloud technology within the scope of the Regulations currently before the JCSI (which widens the proposed UK private copying exception), in contrast to the fact it is an uncommon feature of the private copying exceptions that have been implemented in other Member States.

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Similarly, I would like to draw the JCSI's attention to a document produced by Government (the "**Government's Response**") and published alongside the SLSC Report in response to the Summary Report which underlines the Government is making an error on the issue of harm.

Harm, Compensation and the Regulations

UK Music and its members accept the introduction of a private copying exception but consider that the Regulations cannot be introduced fairly or lawfully without a proper compensation scheme also being implemented.

As a matter of law, the harm which is to be compensated is the harm arising in respect of the private copying which is to be legitimised by the legislation. So if there is widespread private copying already which is causing harm to rights-holders (which there is), the introduction of a private copying exception triggers the requirement for rights-holders to be fairly compensated in respect of all the private copying legitimised by the legislation (not merely "new" private copying arising from any changes in consumer behaviour following the legislation).

The reasons for this are that the provisions of the Copyright Directive and relevant case law of the CJEU make clear that there should be a high level of protection of copyright in Member States, and that those adversely affected should receive an appropriate award for the exploitation of their works.

Moreover, the legislative regime set out in the Copyright Directive in respect of private copying recognises that there may not be adequate and cost effective legal or technical means of rights holders fully enforcing their rights to prevent private copying. Rights-holders are losing out significantly by such copying in respect of additional sales and licences. However, the current legal and technical framework does not make it possible in reality for this copying to be prevented.

The Copyright Directive allows for this copying to be made lawful provided that proper compensation is paid to rights-holders. The purpose is not simply to despair of the existing unlawful private copying and ignore it, but to regularise it and provide compensation for it. We consider that that is a very sensible approach and is what happens in other Member States.

In particular, if Member States introduce legislation which makes it possible for individuals to exploit those works without having to make payments to rights-holders directly, rights-holders must receive compensation for that exploitation in another way (unless the harm suffered by those rights-holders will be minimal). We consider that the potential future loss to the UK industry of £58 million per year as a result of the introduction of the Regulations (as suggested by the Summary Report) demonstrates significant harm.

Moreover, the adequacy of cost effective means of rights-holders to enforce their rights to prevent private copying simply reflects the current legal and technological framework. It may be that in future other means could be established which would allow rights holders to enforce their rights more fully and prevent private copying. However, the introduction of the Regulations would render this impossible. That is again why harm and what the appropriate compensation is must be assessed having regard to the full extent of all underlying private copying.

Government's criticism of the Summary Report

In the Government's Response, various high-level criticisms are made of the Summary Report, based on its perception of certain research assumptions used. We reject these criticisms and request that the JCSI keeps in mind that the Summary Report stands in stark contrast to the complete failure of the Government to undertake any proper evidential analysis of the harm caused by the private copying that will be legitimised by the Regulations.

Taking each of the specific criticisms in turn:

- ***Whether private copying is fully restricted***
 Government criticises the Summary Report for assuming that private copying is fully restricted. This criticism reveals their fundamental misunderstanding. As noted above, rights-holders are entitled to compensation in respect of all private copying which is legitimised by the Regulations, not simply that which arises from changes in behaviour following the Regulations. For that reason, in terms of calculating the correct measure of harm, rights-holders are entitled to assume that private copying is fully restricted. The Summary Report proceeds on this basis.
- ***Whether personal copying of CDs would be licensed if the private copying exception did not exist***
 Government cites the Summary Report as assuming that, absent the exception, private copying would be licensed. Government criticises this on the basis that no such licences are currently available. At present, it is generally not possible for rights-holders to extract licence fees to any significant extent because it is not possible for them fully to enforce their rights to prevent private copying. Licensing that does not currently take place could become possible in the future. However, the introduction of the Regulations will remove the option for rights-holders to licence private copying.
- ***Whether 'unlimited copying' should be prominent in the choices offered***
 The Government criticises the survey underpinning the Summary Report for its reference to “unlimited copying”, which it says does not reflect the narrow nature of the exception proposed in the Regulations. However, again the Government has misunderstood. The reference in the survey relates to consumers being able to make an unlimited number of private copies, not copies in a way that extends beyond making copies for private use. (The Government’s proposed exception is also far from narrow, as demonstrated elsewhere in this letter.)
- ***Whether all consumers would have the same willingness to pay more for CDs with no copy restrictions***
 The Government criticises the Summary Report’s conclusions about willingness to pay. However, the Summary Report established a willingness to pay on the part of consumers based on the findings of the survey. The economic choice modelling techniques that were used by Compass Lexecon allowed them to estimate the demand for a product with different attributes at different possible price points. This allowed Compass Lexecon to establish a demand curve, from which the harm was calculated.

Finally, we note the claim in the Government’s Response that the Summary Report does not provide any of the questions asked to survey participants, the options and scenarios presented, or a full methodology. A Summary Report must, of necessity, provide only limited information, especially when the underlying economic analysis is complex. However, a document setting out further details regarding the methodology used and the survey itself was subsequently provided to officials at the department on 6th May 2014. A copy of this is enclosed for your Committee’s information.

Scope of Regulations

In evidence given to the SLSC on 6th May Lord Younger stated that the Government was “*proposing a much narrower system*” than in the rest of Europe and attempted to justify the lack of compensation scheme on the basis that the Regulations allow individuals to make copies only for themselves, and not for third parties. He also said that the private copying exception as implemented by the Regulations in the UK would be “*the narrowest of all the countries that [he]*”

*know[s] of*¹ (emphasis added). It appears, however, that this statement was made without a proper assessment being done of the position in other Member States. For example, it is not clear whether the Government has properly assessed the extent of the exceptions in Estonia, Finland, Greece, Hungary, Italy, Latvia, Lithuania, Portugal, Slovakia or Slovenia.

In fact, a number of other Member States have implemented private copying exceptions pursuant to the Copyright Directive that do not go further than those proposed by the UK Government², and yet have also introduced fair compensation schemes in the form of levies.

It is also relevant to note that when a parliamentary question was raised regarding the information held by the Department for Business, Innovation and Skills in relation to those Member States that had introduced wider copying exceptions than those being proposed by the Government³, rather than answering the question directly, the respondent merely referred to a report which only appears to identify the few countries with broader exceptions that allow the sharing of copies with friends and/or family⁴. Further, a letter written by Ed Vaizey MP, Parliamentary Under-Secretary of State for Culture, Communications and Creative Industries, dated 10 March 2014 stated that “*it is not possible for the UK Government to have a comprehensive knowledge of the laws of all 28 EU states*” and was only able to identify a handful of countries with exceptions that permitted sharing. A copy of that letter is enclosed.

The Government’s incomplete knowledge about how private copying exceptions have been implemented in other Member States further indicates the lack of work that has been done to ensure that the Regulations are introduced in a way which is compliant with EU law.

Moreover, the Government’s extension of the private copying to cloud copies is believed to be the first occasion where this has been explicitly provided for in the legislation of a Member State pursuant to the Copyright Directive and, given the breadth of possibilities that are opened by having lawful private copies in the cloud, it appears difficult for the Government to retain its description of the exception as “narrow”. The apparent unprecedented nature of such an exception runs contrary to the Minister’s claim that the exception is “*the narrowest of all the countries that [he] know[s] of*”.

The SLSC Report

UK Music notes that the SLSC Report highlights a number of concerns regarding the introduction of the Regulations. Specifically, the SLSC Report flags the possibility that:

“the changes [proposed] will have a greater economic impact on producers and creators than the Government have so far envisaged” and that the SLSC “see the changes proposed in the Regulations as undoubtedly significant, for example...in their negative potential, conversely, for rights-holders in the music sector and elsewhere”.

The SLSC Report continues that the SLSC is “*not persuaded*” that the changes will be “*relatively minor*” as Lord Younger claimed when he was giving evidence, and has suggested that the “*proposed change could fairly be seen to benefit the consumer at the expense of the producer*” noting that “*the prospect of such an outcome surely reinforced the case for considering compensation*”.

¹ http://www.parliament.uk/documents/lords-committees/Secondary-Legislation-Scrutiny-Committee/BIS_Revised_Transcript.pdf

² http://www.wipo.int/export/sites/www/freepublications/en/copyright/1037/wipo_pub_1037_2013.pdf

³ 172656 (see <http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm131028/text/131028w0002.htm>)

⁴ http://www.ivir.nl/publications/guibault/InfoSoc_Study_2007.pdf

Conclusion

For the reasons stated above, it appears clear that the Government is proceeding on a fundamentally mistaken basis in respect of the Regulations. We ask that the JCSI continues to thoroughly examine the Regulations unless and until the Government sets out proper proposals for a fair compensation scheme for rights holders.

We should also state that we are ready at any time to meet with Government and discuss the parameters and feasibility of such a compensation scheme.

I hope this is clear and helpful. If we can assist you further, please let me know.

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, House of Lords Secondary Legislation Scrutiny Committee