



Dr Ros Lynch
Director
Copyright & IP Enforcement Directorate
Intellectual Property Office
4 Abbey Orchard Street
London SW1P 4HT

23 March 2015

Dear Ros

We understand that the European Council of Ministers will discuss reform of copyright rules at European level. In preparation for the discussions in March under the aegis of the Latvian Presidency we put forward some considerations from the music industry which we hope the UK ministerial delegation present can consider during the European discussions.

The UK music industry contributed £3.8 billion to the economy in 2013. This represents a year-on-year growth of 9%. Underpinning this success is copyright, which not only ensures that our rightsholders, creators and performers are paid but also that UK talent and skills are investible. Growth in the industry and wider creative economy is supported by the licensing of these rights which in turn enables those with a stake to acquire value.

Music creates value for many internet businesses. There has been a transfer of value from the UK creative sector to the multi-national internet industry, based on uncertainties of –

- (1) the rights involved in online transmissions and applicable exceptions under the Information Society Directive, and
- (2) the limitations of liability under the E-Commerce Directive.

“Transfer of Value” and clarification of liability of online intermediaries

The protection provided for under certain provisions in the E-Commerce Directive and their counterpart, the safe harbour provisions in the DMCA, has been used by many online service providers in circumstances that we do not believe were envisaged (and in many cases in circumstances that we do not believe were intended) by the legislation when it was drafted. The result of these uses and abuses of protections has been parasitic growth in which the digital sector grew at the expense of rightsholders, creators and performers. This problem needs to be addressed in several ways.

I. Clarification of which services benefit from the E-Commerce Directive’s defences

The hosting defence provided for under of the E-Commerce Directive applies to ‘information society services’ of a mere technical, automatic and passive nature that consist of storage of information – the defence protects such services from liability for illegal activity of their users.

UK Music
4th floor
49 Whitehall
London, SW1A 2BX

T. 020 3713 8444
info@ukmusic.org
www.ukmusic.org

Different European courts have taken different approaches as to whether services that are available generally to members of the public that offer a broad range of content uploaded by users (both professional and amateur) as an entertainment package are active or passive and therefore whether they benefit from a limitation on their liability for acts restricted by copyright. Where the defence has been argued to apply to sites enabling access to user-uploaded copyright content, the consequence is that the sites have been able to profit from giving access to content, doggedly avoiding taking responsibility for it. They either operate without a licence from rightsholders or remain underlicensed, because the uncertainty in the law has reduced the value of the licence. Rightsholders and creators are often faced with the prospect of receiving no remuneration and have been left with the unpalatable option of either starting legal proceedings or playing an endless and dispiriting game of ‘whack-a-mole’ by attempting to have the infringing content taken down (only to see it pop up again immediately afterwards). These illegal services not only deprive creators and rightsholders of the opportunity to properly participate in the value created by their content for the services in question but also compete unfairly with legal licensed services, driving down value across the market.

It is necessary to clarify, as part of a specific copyright initiative (and not as a broader amendment to the E-Commerce Directive), that such services are outside the scope of the hosting defence.

II. More proactive approach from Internet Intermediaries

Where Articles 14 and 15 of the E-Commerce Directive apply, the protected services have a duty of care as developed by the Court of Justice in Case C-324/09 *L’Oreal v eBay*. Clear parameters of such a duty of care should be established to ensure a fair commercial environment for rightsholders and services alike.

III. The liability of internet intermediaries validly benefitting from Article 14 E-Commerce Directive needs to extend to works which have been notified and taken down but subsequently re-uploaded

The effectiveness of Notice and Takedown systems is reduced given their alleged limitation to the specific link. It is clear that even when rightsholders engage in issuing notice and takedown on an industrial scale, material taken down invariably re-appears. It needs to be clarified that the notification of a work triggers actual knowledge regarding the work itself and not only the specific copy of the work uploaded. Technology is available to assist the process and is best applied at the level of the Internet Service Providers. Any such measures are fundamental for the progress of a legitimate market contributing to the UK and European economy.

IV. “Communication to the public” definition

The “new public” has been introduced in recent decisions of the Court of Justice of the EU when interpreting Article 3 of the Information Society Directive – the communication to the public right. The concept of “new public” brings with it the potential for considerable uncertainty and unintended consequences for rightsholders if a retransmission of a licensed communication to the public may potentially not require a licence, even if the retransmitting service is building its business on serving up this copyright content.

This is particularly troubling for the licensing and distribution of music. Music is mostly distributed without DRM and many initial transmissions are to a global audience. Assuming the initial transmission is licensed, it would not be unusual for the valuation placed on the relevant licence to have taken into account the consumption of the relevant content by the recipients of the transmission. The licensee carrying out the initial transmission cannot necessarily know, be

expected to report on or capture the value of future retransmissions by third-party services. Requiring that licensee to take out a licence that provided for adequate compensation for all potential transmissions is likely to place a significant burden on the licensee. Leaving further transmissions out of the scope of the licence in circumstances where retransmissions cannot be licensed would clearly and directly cause huge prejudice to the interests of rightsholders.

We seek a clarification that a communication to an audience is still a copyright act, even if it is a communication to the same audience.

In addition we note that internet transmissions also include the act of reproduction of a musical work and sound recording at the level of the service provider and the user.

Further copyright issues

I. Exceptions

We understand that discussions at European Union level refer to the idea to make the optional exceptions provided in the Information Society Directive mandatory. We welcome the commitment shown by the Minister Baroness Neville-Rolfe, in her recent speech on the digital single market, where she stressed the importance of evidence:-

“So we want to see clearer rules across Europe, and targeted changes based on the best available evidence to ensure we have a copyright framework that supports economic growth, protects our creators, rewards creativity and responds to consumer needs.”¹

We look to the Government to maintain this position with a view not to interfere with functioning markets.

II. EU cross-border application of website-blocking orders based on Article 8(3) Information Society Directive

The enforcement by civil measures is becoming increasingly important in the digital world and in particular regarding blocking orders against internet access providers available in the UK under Section 97A CDPA (implementing Art 8(3) Information Society Directive).

The principles of Section 97A CDPA have now been firmly established in various court cases since 2010 (most notably in the initial cases of *Twentieth Century Fox Film Corp and others v British Telecommunications plc and others* [2011] EWHC 1981 (Ch) and *Dramatico Entertainment Ltd and others v British Sky Broadcasting Ltd and others* [2012] EWHC 268 (Ch)).

We recommend monitoring the implementation of Art 8(3) Information Society Directive throughout the European Union to ensure compliance with this provision.

It should be clarified that the injunctive relief provided in Article 8(3) Information Society Directive can apply cross border to promote a legitimate Digital Single Market.

III. Territoriality

We acknowledge that arguments on territoriality and portability of services will form part of the agenda in Europe. This should be done on an evidence-based approach. We ask policymakers to avoid measures that will act as a disruption to commercial business.

¹ <https://www.gov.uk/government/speeches/vision-for-a-digital-single-market>

IV. Exhaustion

Current European legislation does not allow digital exhaustion of copyright works other than software. Recital 29 Information Society Directive expressly states that the question of exhaustion does not arise in the case of services and on-line services in particular.

In case discussions come up concerning a change of the rules on digital exhaustion, we urge the UK Government to strongly resist any such moves. In contrast to analogue exhaustion this means that there are not only indefinite numbers of copies but also there is not any degradation in quality. A further digital copy is a perfect substitute for the initial copy. Given that these copies are indistinguishable to the initial copy the existence of such copies will also negatively impact on enforcement activities. We note the position of the District Court of South New York which concluded that the first sale defence does not permit sales of digital music files on the website of a second-hand market for digital music.² We encourage an evidence-based approach on this issue.

V. Moral rights regime

One significant area which is not harmonised in the EU Copyright Acquis is the area of moral rights (other than international recognition of the moral rights in Article 6*bis* Berne Convention). Should the Information Society Directive be re-opened the discussion on moral rights has to be included.

Yours sincerely,



Jo Dipple, CEO
UK Music

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 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
- 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 artists.

² US District Court Southern District NY Capitol v ReDigi No. 12 Civ. 95 (RJS)
Judge Richard J Sullivan

- 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 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 100,000 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