

17th June 2014

Maria Martin-Prat
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Dear Maria,

Developments on exceptions to copyright in the UK

The British Copyright Council represents those who create, hold interests or manage rights in literary, dramatic, musical and artistic works, performances, films, sound recordings, broadcasts and other material in which there are rights of copyright and related rights.

Our members include professional associations, industry bodies and trade unions which together represent hundreds of thousands of authors, creators, performers, publishers and producers (see member list appended). These right holders include many individual freelancers, sole traders and SMEs as well as larger corporations within the creative and cultural industries. Our members also include collecting societies which represent right holders and which enable access to works of creativity.

The British Copyright Council has raised a number of concerns about recent developments in the UK as regards new exceptions to copyright, which the Council wishes to draw to the attention of the Commission¹. This additional letter highlights some urgent issues which have arisen following recent implementation of three Statutory Instruments from 1 June 2014, which change the scope of application of copyright exceptions within the UK².

Our main concern is that the approach of the UK Government jeopardises the uniform application of European rules against the background of Commission initiatives relating to European Copyright rules in the White Paper, which we understand that the Commission is to publish shortly. The approach chosen by the UK Government also conflicts with the established jurisdiction of the Court of Justice of the European Union on interpretation of European law.

We would urge the Commission to discuss the effect of the recent changes implemented in the UK and the expected further changes in the scope of copyright exceptions with the UK Government to explore grounds for the apparent conflicts.

¹ <http://www.britishcopyright.org/page/528/draft-statutory-instruments-on-exceptions-to-copyright-ultra-vires/> and <http://www.britishcopyright.org/page/538/draft-statutory-instruments-on-exceptions-to-copyright-not-compliant-with-eu-law/>

² <http://www.legislation.gov.uk/ukdsi/2014/9780111112694>
<http://www.legislation.gov.uk/ukdsi/2014/9780111112755>
<http://www.legislation.gov.uk/ukdsi/2014/9780111112731>

I. Unenforceability of contractual override

The legislation on unenforceability of contractual override which is part of all but one of the already adopted Statutory Instruments and two outstanding draft SIs, is highly problematic.

UK Government argues that the unenforceability of contractual override does not apply to all agreed contractual terms in Article 6 (4) (4) of the Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, but only to those that prevent (or purport to prevent) the use permitted under the relevant exception. The application of unenforceability of contractual override and the protection of technological protection measures is uncertain and requires clarification on the face of the legislation.

The BCC is very concerned about the retrospective application of the unenforceability of contractual override on existing contracts. The terms of a contract are fundamental to the contract and should not be changed by law *ex post facto*.

Freedom of contract is a fundamental principle of EU law (Article 16 of the Charter of Fundamental Rights) and it is the BCC's view that Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society does not provide the legal basis from which to derogate from that principle.

We would ask the Commission whether it considers the contract override provision, as proposed by the UK Government, to be a lawful limitation on the freedom to conduct a business.

II. Use of quotations for purposes other than criticism and review

The BCC remains very concerned that there are no limitations on the term 'quotation' in the new exception and that this is not supported by Directive 2001/29/EC. Para 119 Case C 145/10 (*Eva-Maria Painer v Standard Verlags GmbH et alia*) makes it clear that under Article 5(3d) of Directive 2001/29/EC, the quotation must be for specific purposes such as criticism and review. It is, therefore, the BCC's view that the UK Government's argument that criticism and review are "just examples" is not valid in this context. The focus is on "specific purposes". A general exception cannot, by definition, be for specific purposes. Such a broad definition is certainly not limited to certain specific cases as required by Art 5 (5) of Directive 2001/29/EC.

We would be grateful to hear whether the Commission considers the proposed UK exception to be a correct implementation of Directive 2001/29/EC. If the Commission considers that it is not a correct implementation, we would be interested to know what action the Commission intends to take.

Yours sincerely,



Janet Ibbotson
Chief Executive Officer

c.c. Marco Giorello, Deputy Head of Unit Copyright, Marco.Giorello@ec.europa.eu