

31st March 2014

The Rt Hon the Lord Goodlad KCMG
Chairman
Secondary Legislation Scrutiny Committee
House of Lords
London SW1A 0PW

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Dear Lord Goodlad,

Draft Statutory Instruments on Exceptions to Copyright – ultra vires

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. These rightholders include many individual freelancers, sole traders and SMEs as well as larger corporations within the creative and cultural industries. Our members also include collective management organisations which represent rightholders and which enable access to works of creativity. More information on the British Copyright Council can be found on our website at www.britishcopyright.org.

The Government laid five draft SIs on exceptions to copyright on 27th March 2014 for adoption in affirmative procedure and commencement on 1st June 2014. Some of the exceptions as worded exceed the enabling powers of section 2(2) of the European Communities Act 1972 ('the ECA'): quotation and parody; certain educational exceptions; unenforceability of contractual overrides of exceptions. Some SIs also directly conflict with Directive 2001/29/EC ('the Information Society Directive'): private copying exception without fair compensation; quotation exception.

The British Copyright Council has taken the unusual step of writing to the Secondary Legislation Scrutiny Committee because we take the view that the wording of these SIs fails to meet the specific requirements of EU law in a number of ways.

Ultra vires

The Regulations are stated to be made in exercise of the powers conferred on the Secretary of State by section 2(2) of the ECA. It is our view that the Regulations fail to implement European law correctly in several significant ways. Therefore we would ask the Committee to consider whether there has been an appropriate use of these powers and that the following provisions in the Regulations are ultra vires:–

a) Private-copying exception, Section 28B CDPA

The private copying exception does not include a fair compensation mechanism as required by EU law (Article 5(2)(b) Information Society Directive); the harm by private copying is neither minimal nor priced in. Additionally, the Government does not address the concerns on harm which have been put forward by a variety of rightholders during the Technical Review process. Government has an obligation to consider harm in this context given that established case law of the Court of Justice of the European Union ('CJEU') stipulates a presumption of harm (amongst others para 44 of the CJEU judgment *Padawan v SGAE* (Case C-467/08), which provides "44 Copying by natural persons acting in a private capacity must be regarded as an act likely to cause harm to the author of the work concerned.")

Pertinent questions on private copying are currently being considered by the CJEU (Case C-435/12 *ACI Adam* on legitimacy of the source of the private copy and Case C-463/12 *Copydan Båndkopi* on the imposition of levies on specific devices). We suggest that the introduction of a new exception should, at the very least, be paused while we wait for and have time to consider these decisions which are expected shortly.

b) Rights covered by exceptions

The parody, education and quotation exceptions as currently drafted are not limited to the rights and exceptions provided for in the Information Society Directive (i.e. reproduction, communication to the public and distribution rights); these exceptions consequentially cannot be introduced under the enabling provision of the ECA. Whilst the ECA refers to 'matters arising out of or related to any such obligation or rights or their coming into force', this enabling power does not cover the application of exceptions to rights that are not harmonised at European level, such as the live performance right. Exceptions to rights that are not included in the European Copyright acquis are not related matters under the ECA; they are entirely new matters.

c) Unenforceability of contractual overrides of exceptions

Several exceptions contain clauses which state the unenforceability of contractual overrides of exceptions; this is not covered by the Information Society Directive and cannot be introduced by secondary legislation under the ECA. In fact, the Information Society Directive expressly states that it is without prejudice to provisions concerning the law of contract (Article 9). Recital 45 states that exceptions should not prevent the definition of contractual relations designed to ensure fair compensation for the rightholders insofar as permitted by national law. Legal provision of unenforceability of contractual overrides of exceptions thus requires primary legislation under national law. Use of the words "purports to restrict" in this context raises particular concerns.

d) Quotation

In addition to being outside the enabling provision of section 2(2) of the ECA, the quotation exception fails to implement Article 5(3)(d) Information Society Directive correctly. The introduction of an unrestricted exception for quotation exceeds what is permitted under the Information Society Directive, which refers to quotations 'for purposes such as criticism or review'; without these limitations to its purposes the exception is too broad to comply with the Directive. Additionally, Article 5(5) Information Society Directive provides that exceptions 'shall only be applied in certain special cases'. Case law states that this means that exceptions must

have a narrow scope. The exploitation of parts of copyright works is often as important as the exploitation of the whole of copyright works. An exception that covers **any** 'quotation' certainly does not have a narrow scope.

We have highlighted only those headline issues that are of concern to all our members. I understand that several of our members have a range of more specific points they wish to raise and that they will be in touch with you directly about these.

We would be grateful if you could give this matter your consideration.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Janet Ibbotson', written over a light grey rectangular background.

Janet Ibbotson
Chief Executive Officer

c.c. All Members of the Secondary Legislation Scrutiny Committee, House of Lords