Creators' Rights Alliance general comments on proposed changes to exceptions to copyright – tranche 1

17 July 2013

Dear Viscount Younger,

The Creators' Rights Alliance was pleased to hear Sean Dennehey of the Intellectual Property Office confirm at the Westminster Media Forum on 9 July that you will be taking account of comments on the proposed changes to exceptions to copyright that go beyond the very narrow scope set out by the IPO. As you know, this specifies that we must comment only on the extent to which the proposed Statutory Instruments implement the policy stated in the "Modernising Copyright" document, not on the wisdom of that policy.

Nevertheless, for clarity we are submitting our general comments on the policy separately from our technical responses to the wording of the proposed Statutory Instruments.

As you also very likely also know, the Creators' Rights Alliance is an affiliation of organisations representing the interests of over 100,000 original creators in a wide range of fields – including music, illustration, journalism, photography and writing. Most of the 100,000 creators we represent make their living by licensing copyright and performers' rights in their work.

New Exception for Private Copying

The Creators' Rights Alliance believes that the current proposal breaches European law, which specifies that an exception for private copying may be enacted only with "fair compensation" for rightholders in Article 5(2)b of the "InfoSoc Directive" [1]. Recital 35 does not provide a fig-leaf: no credible evaluation has been produced of the "possible harm to the rightholders resulting from the act in question".

We note the overriding declaration in Recital 44 that:

> Such exceptions and limitations may not be applied in a way which prejudices the legitimate interests of the rightholder or which conflicts with the normal exploitation of his work or other subject-matter.

For the avoidance of doubt: the Creators' Rights Alliance does not oppose the introduction of an exception permitting private copying. We would regard officials' arguments that the required compensation may be set at zero as an exercise in sophistry, were that not to be a slur on the actual Sophists[2].

We trust that others with more resources will be presenting detailed rebuttals of the alleged economic arguments presented.

Were the government to persist with this argument, it would be seen as intervening in the continuing European debate about the *nature* and *calculation* of the required fair compensation, in a

1 Directive 2001/29/EC Article 5(2)b <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:NOT> accessed 10/07/2013

2 We recommend Plato, *Gorgias* <http://classics.mit.edu/Plato/gorgias.html> accessed 11/07/2013

manner calculated to serve the interests of powerful Californian corporations that, notoriously, pay neglible tax in the EU.

We particularly have in mind António Vittorino's recent *Recommendations resulting from the mediation on private copying and reprography levies* which concluded, *inter alia*, that:

> Some stakeholders have put forward ideas to replace the current hardware based levy systems with other forms of fair compensation. It seems to me, however, that the alternatives that were put forward have not been sufficiently worked out in detail yet, and therefore do not justify the "phasing out" of hardware based levies in the immediate future; s uch a "big-bang" does not seem advisable. Some of these alternatives may also not be in conformity with the applicable legal framework. In particular, I think that the link between the persons causing the harm and benefitting from the exception and the persons financing a system of fair compensation should not be severed. [3]

We recommend that the UK government take a pause on the matter of private copying and seek a co-ordinated response that builds the single European market in creative works which could do so much to assist the UK's creative economy. To press ahead would be to engender large-scale legal uncertainty for businesses, given the likelihood of such a measure being deemed illegitimate by the European Court of Justice, and would hence deter investment. The alternative or cynical view that this policy is predicated on an assumption that the UK will leave the EU would of course imply *megaton-scale* legal uncertainty for businesses.

The Creators' Rights Alliance has further questions about the proposed implementation of the exception, which we raise in our technical response.

New Exception for Parody

As we have frequently observed, there is no shortage of parody in the UK. Nor is there a parody gap with our international competitors.

We concede that the proposed legislation would increase the supply of parody in the UK – adding one item, namely itself. We do not believe that such a recursive exercise, subject throughout to Crown Copyright, is of any assistance to the UK's creative economy.

We raise questions about the proposed implementation in our technical response.

New Exception for Quotation

We raise questions about the incoherence of the proposed implementation with existing law – particularly the matter of "quotation" of illustrations and photographs – in our technical response.

Contract override

We regret that so much legal uncertainty for business – including the one-person businesses of the freelance creators we represent – is being created over a policy commitment which will do little, if anything, to solve the perceived problem. As we have pointed in consultations, the contracts that certain parties object to are largely governed by the law of the State of California, or of Delaware, or of the Kingdom of the Netherlands.

Further, as we have also observed, it seems perverse to regulate contracts in the interests of a

3 *Recommendations resulting from the mediation on private copying and reprography levies*: <http://ec.europa.eu/internal_market/copyright/docs/levy_reform/130131_levies-vitorino-recommendations_en.pdf> accessed 11/07/2013

body such as the British Library, on the grounds that it is perceived as not being powerful enough to negotiate fairly with an organisation such as academic publishers (or the Adobe Corporation, if reports of the data set used in the Library's "study" of contracts it is subject to are to be believed) and instead being forced to accept "take-it-or-leave-it" contracts.

We refer of course to the issue of individual creators being presented with "take-it-or-leave-it" contracts by the intermediaries that distribute our work. As you know, we shall be pursuing this issue further. We are also supportive of those who wish to regulate the contracts presented to all individual citizens, including creators, by online services from Facebook to Microsoft's SkyDrive.

We further share the view that it is not legitimate to amend the law of contract through secondary legislation in the manner proposed. This matter is not covered by the Information Society Directive, nor any other of which we are aware, and thus cannot be legislated under the powers granted by the European Communities Act 1972.

The move toward so-called "fair use"

We have welcomed, and redouble our welcome for, the government's acknowledgement that it cannot introduce the so-called "fair use" doctrine from US law into the legislation of the UK.

However, we see in the vague definition of the proposed new and extended exceptions to copyright a move in the direction of the US approach. Only the wealthy benefit from this, because each case is a matter for a court decision and so only the wealthy can afford to find out whether a particular use is covered. We refer you again to the study commissioned by the British Copyright Council which showed that the cost of litigating a fair use case was likely to be US$1M or equivalent.

We note further that Professor Lawrence Lessig, the great proponent of weakening copyright, observes in his book *Remix*[4] that so-called "fair use" doctrine acts against the interests of the small-scale infringer, just as it acts against the interests of the small-scale creator.

> ...when copyright law is meant to regulate Sony and your fifteen- year-old, a system that imagines that a gaggle of lawyers will review every use is criminally inadequate. If the law is going to regulate your kid, it must do so in a way your kid can understand.
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> Fair use could do its work better if Congress followed in part the practice of European copyright systems. Specifically, Congress could specify certain uses that were beyond the scope of copyright law. [*Ibid*, p267]

We hope that even at this late stage the government may consider that the creative economy offers the best hope the UK has for the economic growth that it so sorely needs, and that there is no creative economy unless creators can make a living while dedicating themselves to producing professional work, full-time. Too much of the Hargreaves review has treated creative works as though they were a natural resource in the ground waiting to be mined – an approach which serves only the interest of the few powerful non-taxpayer corporations that wish to do just that.

Mike Holderness
Chair, Creators' Rights Alliance
Headland House, 308 Gray's Inn Road
London WC1X 8DP
www.creatorsrights.org.uk

4 Lessig makes *Remix* available online under a Creative Commons licence at <www.scribd.com/doc/47089238/Remix> - accessed 11/07/2013. Somewhere out there are copies that are easier to download without assigning one's soul to the Facebook Corporation to sign in to Scribd.com.