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Mr George Mudie MP
Chairman
Joint Committee on Statutory Instruments
House of Parliament
LONDON
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Faculty of Law

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Dear Mr Mudie

Draft Statutory Instruments on Exceptions to Copyright

We, the undersigned professors of intellectual property, write to convey our regret that the progress of these important instruments has been delayed, and hope to offer the Committee some further help in resolving its concerns. We have seen the letter from the British Copyright Council (BCC) dated May 12 2014 and wish to respond to the legal questions raised at points 2-5 of that letter. We assume that the first point raised by the BCC, which relates to contractual overrides, is now moot, as Parliament has already recognised the legitimacy of such overrides in two of the three statutory instruments passed in the last session (SI 2014/1372 and 1384).

Draft Copyright and Rights in Performances (Parody and Quotation) Regulations 2014

First, the BCC objects (at point 2) that the “quotation” exception is not limited to purposes of criticism or review. However, Article 5(3)(c) of the Information Society Directive permits exceptions or limitations as regards “quotations for purposes such as criticism or review” as long as “their use is in accordance with fair practice, and to the extent required by the specific purpose.” Given the presence of the phrase “such as” in the Directive there is no basis to the BCC objection as Article 5(3)(c) clearly offers “criticism or review” as examples of “purposes.” Moreover, the Government rightly observes that a quotation exception which is not limited by purpose is mandatory under Article 10(1) of the Berne Convention which states:

“It shall be permissible to make quotations from a work.... Provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose.”

Any concerns with the possible breadth of the exception seem already accommodated by two of the four conditions on its applicability, namely, that uses will only be exempt if they involve “fair dealing” and if the quotation is “no more than is required for the specific purpose for which it is used”. Given the reference to “purpose” in the latter condition, in

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applying the provision, the courts will have to consider the precise purpose for which the alleged infringer is using the material. And fairness cannot be assessed without reference to purpose. As a result, criticism or review would be presumptively permissible, but use as a quotation for some other purposes is less likely to pass muster: for example, even if the compiling of a sound recording completely from small segments of existing recordings were to be regarded as use as a quotation, we do not think that any court would regard that as fair. The uses there might be limited to the purpose of the user, but would not be “fair dealing.”

Second, the BCC argues that the quotation exception is in conflict with the three-step test in Article 5(5) of the Directive and Article 10 of the WIPO Copyright Treaty (WCT) (point 3). As regards Article 5(5), the interpretation of that provision already offered by the ECJ deprives the BCC point of any merit. The ECJ has stated that national tribunals are to consider the three-step test when applying exceptions to facts. See Case C-435/10, *ACI Adam BV* (10 April 2014) (ECJ, Fourth Chamber), [24]–[25]; Case C-145/10, *Painer*, [AG148]; Case C-201/13, *Deckmyn*, (AG Opinion, 22 May 2014), [AG29]. However broad the exception, the UK courts would therefore have to apply the exception in a manner which ensured it did not conflict with the normal exploitation of the work or prejudice the legitimate interests of the rightholders.

The objection based on Article 10 of the WCT seems to be that if the purpose of quotation is left potentially open, the exception is not limited to “special cases” (the first part of the three step test). However, as the BCC well knows, the United States, Israel, Singapore and a number of other countries have open-ended exceptions and are not regarded as being in violation of the first part of the three-step test. This exception comes nowhere near an open-ended “fair use” exception, and is limited by purpose – indeed although the proposed legislation uses the language “use of a quotation”, we think that it is implicit in this that the use must be *as a quotation*. (Had the legislation permitted “use of a part”, this would not be the case.) Any use that is “of a quotation” and meets the conditions so as to fall within the exception as drafted, would pass the three-step test.

Third, the BCC suggests (in point 4) that neither the parody nor the quotation exception, as drafted, can be introduced using the European Communities Act 1972 because the exception also applies to the “live public performance” right granted by CDPA s 19, which has not been harmonized at an EU level. This argument has even less merit than those considered thus far.

The 1972 Act permits the use of delegated legislation to implement (a) “any Community obligation” and (b) “for the purpose of dealing with matters arising out of or related to any such obligation”. The breadth of this power was considered by the Court of Appeal in *Oakley v. Animal* [2005], the Court holding that the transitional regulations in issue fell within the first branch of section 2(2)(a). Jacob LJ stated that section 2(2)(a) covers ‘all forms of implementation – whether by way of choice of explicit options or by way of supply of detail.’ The Court left open the meaning and scope of section 2(2)(b). However, Waller LJ at [39] stated that they “enable further measures to be taken which naturally arise from or closely relate to the primary purpose being achieved.” Jacob LJ at [80] said that “Whether a particular statutory instrument falls within those words must depend on what it purports to do and the overall context.” Floyd J applied these criteria in *ITV Broadcasting v. TV CatchUp* [2011] EWHC 1874(Pat), where objection was made to extending a right required to be recognised for authorial work to the rights that are conferred on broadcasting organisations. Floyd J held this fell precisely within the section 2(2)(b) power. See in particular his reasoning at [77].

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We have no doubt that parallel reasoning justifies the application of the exceptions adopted in the statutory instrument to rights in live performances. To make good the point, imagine a situation in which a musical work is parodied in a live performance which is recorded and televised with the permission of the performers. In this wholly realistic scenario, the recording indirectly reproduces the musical work within Art 2 of the Information Society Directive, while the broadcasting involves communication to the public within Article 3. Can it make sense for a legislature to be able to implement a parody exception for reproduction and communication by statutory instrument (under ECA s 2(2)(a)) but not also to be able to cover live public performance (even though that right has not been harmonized at EU level)? The answer must be that this is precisely the sort of “matter arising out of or related to” an obligation that section 2(2)(b) envisages.

Although the BCC does not raise this, we think it worth drawing the attention of the Joint Committee to the opinion of Advocate General Cruz Villalón in Case 201/13 *Deckmyn*. Rightholders have complained that the language of “parody, caricature and pastiche” is unduly broad. However, in *Deckmyn*, the Advocate General confirms that these concepts are autonomous concepts of European law. As such, the Government is clearly right not to attempt any further definition of these concepts. Moreover, it should be observed that the Advocate-General has indicated that the definition of ‘parody’ contains its own structural and functional limitations: structurally, a parody involves addition of original material to an imitation of an existing work (with at least the consequence that the two works cannot be confused); while functionally, a parody requires a ‘burlesque intention’. In due course, the ECJ will provide similar guidance on “pastiche” and “caricature”.

Even without the further guidance from the Advocate-General, we want to remind the Committee that the proposed legislation adds a further constraint that is not in the Directive: that the dealing be “fair” for the purpose of parody, caricature and pastiche. In applying the concept of “fair dealing” the UK courts have traditionally considered factors that in broad terms correspond to the second and third steps of the “three-step test”. This further curtails the breadth of the exception.

Draft Copyright and Rights in Performances (Personal Copying for Private Use) Regulations 2014

Finally, the BCC (at point 5) reiterates its view that the exception for personal copying is non-compliant with Article 5(2)(b) because is not accompanied by some form of compensation by way of a levy. It claims that Case C-435/12 *ACI Adam* supports its view. The Government has stated that there is no need for such compensation.

We agree with the Government that in the light of the narrow scope of the exception envisaged, and the terms of the Information Society Directive and case-law of the Court, there is no clear requirement to pay compensation. We note in particular the following specific points:

- (a) The terms of the proposed exception are significantly narrower than the exception permitted under Article 5(2)(b). That provision encompasses any “reproduction on any medium made by a natural person for private use and that are for ends that are neither directly nor indirectly commercial.” It could thus cover copying from the Internet. In

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contrast the proposed exception would be narrower in that it would only apply where (i) the person has lawfully acquired an initial copy ('the individual's own copy'); (ii) they hold the initial copy on a permanent basis (rather than on loan). The exception then is very much targeted at situations where a person has purchased their own copy and wishes to "format shift" so as to have a copy on a different device. It would not cover, for example, printing material from the Internet without permission, as there is no lawfully owned "initial copy". Moreover, the proposed exception is limited to "personal" not "private" use. Thus it would not permit copying for the family. Indeed, if a copy for personal use was to be transferred to another family member, an infringement would occur and that copy would become an infringing copy. Whatever one may think about the desirability of such a limited exception, there is no doubting it is significantly more limited than what is permitted under the Directive.

(b) The decision in *ACI Adam* was indeed an important one. It clarified that the "private use" exception cannot be applied by Member States to exempt from liability copies made from illegal sources, and thus that compensation need not, and indeed must not, be calculated to compensate for such activity. As such, the ECJ confirmed the correctness of the Government's decision to limit the proposed legislation to the situation where the material that is copied was lawfully acquired (though this would only be one example of a legal source). However, we cannot see anything in the decision that supports the view that compensation must be paid in every case of private copying from a legal source. Paragraphs [22], [23], and [33] to which the BCC refers merely form part of the Court's reasoning towards this conclusion, and says nothing about whether compensation must always be paid

(c) Indeed, such a view would conflict with Recital 35 of the Information Society Directive, 2001/29. This states

"In certain cases of exceptions or limitations, rightholders should receive fair compensation to compensate them adequately for the use made of their protected works or other subject matter. When determining the form, detailed arrangements and possible level of such fair compensation, account should be taken of the particular circumstances of each case. When evaluating these circumstances, a valuable criterion would be the possible harm to the rightholders resulting from the act in question. In cases where rightholders have already received payment in some other form, for instance as part of a licence fee, no specific or separate payment may be due... In certain situations where the prejudice to the rightholder would be minimal, no obligation for payment may arise."

The Directive clearly envisages that some exceptions under Article 5(2)(b) might not require corresponding levy schemes. Indeed, there are no compensation provisions in CDPA, s 70 (recording broadcasts for purposes of time-shifting). The proposition (at point 5 of the BCC letter) that Member States are not free to decide whether to grant compensation is self-evidently incorrect.

(d) The proposed exception seems sufficiently narrowly drawn to avoid the obligation to pay. The Court of Justice has (albeit not consistently) referred to the key criterion as being "harm" and identified the relevant harm as that caused by the introduction of the exception: Case C-467/08. *Padawan*, [38], [42] (ECJ, 3rd Ch); Case C-457/11, *VG Wort*, [37], [49] (ECJ, 4th Ch). It is not obvious that any "harm" is caused by

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introducing the exception which merely legitimises what occurs at present (practices to which the record industry indicated some years ago that it does not object).

- (e) Given that the case-law is not consistent, it might be that a broader concept of “harm” is adopted which focusses on harm caused by private use (which is ‘legitimised’ rather than ‘caused’ by the introduction of the exception). However, there seems no reason to believe that the harm from personal copying is significant. To make good such a claim, it would be necessary to estimate the losses where people would buy multiple copies of the same film, sound recording or other work, so that they could watch or play them on different devices. As far as we are aware, there is no evidence that such behaviour would occur. If it is possible to imagine such a scenario, we believe that law-abiding citizens would simply take a single copy of the work to different locations.
- (f) It is right to acknowledge that there is some uncertainty surrounding this issue. However, that uncertainty does not justify inaction. We think it is important that a personal copying exception is introduced as a matter of urgency. Copyright law is brought into disrepute in so far as it renders illegal acts that honest citizens carry out on a daily basis. Those who think that copyright is important, as all of us do, deeply regret that the law has been out of step with public expectations for so long.

Please do not hesitate to contact us, should you require any further assistance on this matter.

Yours sincerely,

Professor Tanya Aplin (KCL),
Professor Lionel Bently (Cambridge),
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cc.

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