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# Private copying exception – Now you see it, now you don't!

## *The Queen on the application of (1) British Academy of Songwriters, Composers and Authors (2) Musicians' Union (3) UK Music 2009 Limited v Secretary of State for Business, Innovation and Skills* [1]

SPEED READ

The High Court has quashed the Personal Copies for Private Use Regulations (the Regulations)[2] which amended the Copyright, Designs and Patents Act 1988 (the Act) to introduce section 28B, with prospective effect. This follows its decision last month to uphold a judicial review challenging the Government's introduction of this new statutory provision which had the effect of creating an exception to copyright based upon personal, private use. The High Court held that the Government's decision, that the "harm" to copyright holders due to the legalisation of personal copying was *de minimis* and hence that no compensation was necessary, was based on inadequate evidence and flawed.

The High Court has however declined to make an order for a reference to the Court of Justice of the European Union (the CJEU) on the meaning of the concept of "harm" in the current litigation, but left the door open for a reference to be made in the future.

The Government will now need to consider whether, and in what form, any further factual evidence is gathered and whether a new private copying exception should be introduced. In so doing the Government's position that a levy on products and devices that facilitate personal copying is not necessary may have to be re-visited.

In the meantime as a result of the quashing of the Regulations, the making of copies of a work for private use are no longer acts exempted by copyright unless the making of copies falls within a different exemption such as time-shifting.

[1] [2015] EWHC 1723 (Admin); [2015] EWHC 2041 (Admin).

[2] Copyright and Rights in Performance (Personal Copies for Private Use) Regulations 2014 (SI 2014/2361) which came into force on 1st October 2014.

# Background

Prior to the introduction of the new section 28B of the Act, the UK was one of only a handful of EU Member States that had not introduced a private copying exception to copyright. EU Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (the Information Society Directive) gave Member States a discretion to do so, but on the condition that if the permitted use caused more than *de minimis* harm to the copyright holder then compensation had to be payable. 21 of the 28 EU Member States had introduced private copying exceptions coupled with compensation schemes funded through levies. In Malta and Cyprus the harm resulting from private copying was treated as *de minimis*.

Following a lengthy and wide-ranging consultation process that started in 2010, the UK Government concluded that there was no need for a compensation scheme. It concluded that the value of the copying that would occur under the new private use exception had been and would in the future be "built into" the initial price of the copyright work (the "pricing-in principle"), and hence there was no, or *de minimis*, harm to rightholders for which a compensation scheme would be required.

# The Challenge

A number of claimants representing segments of the music industry[3] (the Claimants) challenged this decision, essentially on five grounds: (a) the Government had misunderstood the meaning of "harm" for the purposes of the Information Society Directive (b) the pricing-in principle was irrational and inapplicable (c) the evidence relied on to justify the conclusion about harm was manifestly inadequate (d) the Government had unlawfully predetermined the outcome of the consultation and (e) the introduction of section 28B constituted unlawful State aid within the meaning of Article 107 of the Treaty on the Functioning of the European Union (the TFEU) which should have been notified to the Commission.

**The meaning of "harm" under the Information Society Directive**

The Government took lost sales as the metric in order to determine the existence of any "harm" to rightholders. This was on the basis that the endemic copying currently carried out by users did not in any material degree thwart duplicate sales which might otherwise have been made by the purchaser had copyright law been rigorously enforced in the UK ("the lost sales test"). The Claimants argued that the measure of their loss or "harm" was the total licence fee that might have been charged upon the hypothesis that every violation of copyright deprived the rightholder of some value ("the licensing test"). They adduced evidence that in a counterfactual world of viable enforcement, consumers would be willing to pay £9 more for a CD which would permit them to make unlimited licensed copies. They calculated the loss in revenue between 2006 - 2012 as £2.4 billion.

Green J held that since "harm" was not a defined notion under EU law, Member States had a discretion when

deciding which particular test to apply to identify harm. Viewed overall, the Government's choice of a lost sales test for computing harm was within the Government's discretion and on the facts was a perfectly rational option for the Government to adopt.

**The pricing-in principle**

The Claimants argued that across the music, film and books market content suppliers had no real ability to price discriminate and therefore the theory of pricing-in was economically inapplicable. The Government argued that the adoption of the pricing-in principle was squarely within the margin of appreciation afforded to decision makers in this context.

Even applying a relatively intensive standard of review, having reviewed the various academic literature on this subject, Green J held that the Government was entitled to adopt the pricing-in theory.

**Reliance upon manifestly inadequate evidence**

The Government had asked itself the correct question: i.e. whether there was evidence to support the conclusion that introduction of the copyright exception would cause minimal or zero harm. However, the independent report commissioned by and relied on by the Government was clearly incomplete as an exercise designed to answer the *de minimis* question. In particular there was no analysis as to whether such pricing-in that was identified was complete or whether it left some harm unaccounted for. It raised more questions than it answered. In the absence of a thorough quantitative and qualitative analysis, the decision was founded on inadequate evidence and on this basis was unlawful.

**Pre-determination**

The Government had stated an express intention at the outset of the consultation to implement the exception without introducing a levy or similar mechanism. However, it was entitled to hold a strong predisposition and this was not inimical to a fair consultation. It had set out various options at the start of the consultation and there was no evidence of actual predetermination. This ground of challenge was therefore dismissed.

**State aid**

The Incorporated Society of Musicians Limited intervened and argued that the effect of section 28B in the absence of a compensation mechanism amounted to unlawful State aid contrary to Article 107(1) of the TFEU. The issue was whether there had been an aid "through state resources". It was argued that substantial benefits had been conferred on technology firms (in the order of £258m over ten years), in particular to cloud storage providers (CSPs), from the removal of the requirement upon them to pay rightholders for licences. It was argued that this aid, being granted by means of secondary legislation, was attributable to the State and granted "through" State resources, since the lack of levy constituted foregone potential revenues.

Green J dismissed these arguments: applying the CJEU's judgement in *Netherlands (Emissions Trading Scheme)*, there was no "clear and concrete risk" to the Government's budget and therefore no revenue or resource foregone to the State. In the absence of a clear and direct nexus of a relatively formal character between the advantage conferred and the foregoing of revenue, the alleged advantage in this case came nowhere near meeting the requisite test to show that any aid was "through State resources".

[3] British Academy of Songwriters, Composers and Authors (BASCA), Musicians' Union (MU) and UK Music.

# The final judgement[4]

A remedies hearing took place on 3 July 2015: the Claimants sought a quashing order in respect of the Regulations introducing the section 28B amendment to the Act, and a declaration regarding the respective rights and obligations of the parties. The Court was also asked to consider whether a reference should be made to the CJEU in relation to the meaning of the concept of "harm".

**Order quashing the Regulations with prospective effect (*ex nunc*)**

Both the Claimants and the Government submitted that the Regulations should be quashed. The Claimants recognised that a quashing order was the natural consequence of a finding that the Regulations were unlawful, and both parties recognised the importance of avoiding the legal uncertainty that would arise if the Regulations were left in place while further, potentially lengthy, policy decisions are made.

The Court agreed and quashed the Regulations in their entirety. On the basis that it considered it had the power to impose a temporal limitation upon a quashing order it quashed the Regulations with prospective effect (*ex nunc*). The Court however refused to quash the Regulations with retrospective effect (*ex tunc*). The Court held that it would be "unattractive" as well as confusing to consumers, to unravel the past and make the private copies of musical and other copyright works without consent since 1 October 2014 an infringement of copyright, in circumstances where this activity was purportedly authorised by the Regulations.

**No reference to the CJEU on the concept of "harm"**

The Court acknowledged that as a result of the Regulations having been quashed there was no dispute between the parties before the English Court, about which the CJEU could give a relevant ruling. It was inappropriate for courts to send questions to the CJEU simply because they are interesting or important.

The Court nevertheless recognised that as the meaning of "harm" was not *acte claire*, it would probably be subject to a reference to the CJEU in the future. It was therefore "pragmatic common sense" to enable such an application to return to court in a cost effective manner, i.e. without the need for new proceedings to be commenced. Whilst refusing to make a reference at the present stage, the Court introduced a liberty to apply into the final Order.

[4] *The Queen on the application of (1) British Academy of Songwriters, Composers and Authors (2) Musicians' Union (3) UK Music 2009 Limited v Secretary of State for Business, Innovation and Skills* [2015] EWHC 2041 (Admin).

# Commentary

The Government's attempt to introduce a "personal copies for private use" exception on this occasion has foundered due to an inadequate evidential basis. But the Court has not ruled out that the Government may be able to "plug the gaps" in the evidence in due course. There is nothing to prevent the Government re-introducing the exception if and when it receives cogent evidence supporting the view that the pricing-in principle means there is no or minimal harm to rightholders. In the absence of such evidence the Government will have to consider introducing a compensation scheme. The creative industries generally favour a levy based on the

sales of recordable media and devices (blank CDs, DVDs, iPods, tablets, laptops, mobile phones etc.). There have also been discussions in other EU Member States, and recently the EU Parliament, about the possibility of the introduction of levies in relation to cloud storage facilities;[5] to date no such levies exist. The Spanish alternative of providing fair compensation to rightholders through annual public grants via the State budget[6] has been challenged by a number of collecting societies and is currently the subject of a reference to the CJEU.[7]

[5] Following the report on private copying levies (2013/2114 (INI)) to the European Parliament (EP) by Francoise Castex of 17 February 2014, the EP adopted a non-legislative Resolution on private copying levies, and included: "*Calls on the Commission to assess the impact on the private copying system of the use of cloud computing technology for the private recording and storage of protected works, so as to determine whether these private copies of protected works should be taken into account by the private copying compensation mechanisms and, if so, how this should be done*".
[6] Royal Decree 1657/2012, of 7 December 2012.
[7] The Spanish Supreme Court referred two questions to the CJEU asking whether fair compensation for private copying secured through annual public grants via the State budget is compliant with Article 5(2)(b) of the Information Society Directive. Case C-470/14: EGEDA *and others.*

# Commercial implications of the judgement

This judgement will have ramifications for firms offering products and services based on the copying and storage of digital content. Whilst rightholders do not in general enforce their copyright against consumers for reasonable acts of private copying[8] this may not extend to the seeking of licence fees from these new technology firms, such as, for example CSPs.[9] The introduction of the private copying exception by the Regulations was aimed at encouraging the development of new cloud business services amongst others, as well as growth benefits arising from preventing blocking of the market due to refusal to licence, or licence bundling. Consumers were deemed to benefit from greater certainty. The quashing of the Regulations may affect the growth of these products and services in the UK. It also arguably puts their providers at a disadvantage when compared to international competitors based in markets where such private copying is lawful (such as the United States, Australia, Canada, and most European countries).[10] It may well accelerate the uptake of competing business models that are moving away from the owning of content, to paid streaming services.

[8] Impact Assessment No BIS 1055, "Copyright Exception for Private Copying", pg. 3 footnote 3.
[9] Although evidence suggests that cloud storage was already licensed prior to the Regulations with cloud storage licenses usually bundled with cloud content licences (which were not affected by the private copying exception).
[10] Impact Assessment No BIS 1055, "Copyright Exception for Private Copying", pg. 3.

# Key contacts

If you require advice on any of the matters raised in this document, please call any of our partners or your usual contact at Allen & Overy.


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