# Kluwer Copyright Blog

## UK Private Copying Exception ruled illegal

Theo Savvides (Bristows) · Thursday, June 25th, 2015

*In October 2014 the government introduced a series of changes to the UK's copyright regime. One change, key to the objective of making copyright law better suited to the digital age, was the introduction of a private copying exception. That exception is now in jeopardy following a successful challenge by the music industry. For the exception to survive ,the government will either have to introduce some form of compensation scheme, or produce evidence which supports its initial conclusion that private copying will cause no more than de minimis harm to copyright owners.*

**Background**

On 1 October 2014, a number of changes were made to the UK copyright regime in the form of new exceptions to copyright infringement. These exceptions implemented some of the optional exceptions available to EU member states which are set out in Article 5 of the Infosoc Directive. The Infosoc Directive provides for the implementation of these exceptions without also establishing a means of "fair compensation" to rights holders provided that the prejudice caused to rights holders is no more than minimal.

One of the October 2014 changes was the introduction of Section 28B of the CDPA, which allows individuals to make digital copies of works such as music, e-books and films for private use. These copies can be in different formats to the original, and can be stored digitally in the cloud. In short, the exception saw copyright law catch up with how most individuals already treated their copyright protected content in the 21st century.

In other Member States, private copying exceptions have tended to be coupled with schemes to compensate rights holders, such as levies charged on blank media (CDs, DVDs, USB sticks, etc) and copying equipment (MP3 players, printers, PCs, etc). However, private copying exceptions elsewhere in the EU also frequently go further than the exception introduced in the UK by section 28B, for example permitting copying for family and friends.

Importantly, the private copying exception was introduced into UK law without providing a means of "fair compensation" to rights holders. It was this decision which was the subject of judicial review.

**Challenge to the UK's private copying exception**

The Government's justification for introducing the private copying exception without a compensation scheme for rights holders was that the value of any copying that would occur under the new exception had been, and would continue to be, built into the price which rights holders charged for their content. As a result, there was no "harm" to rights holders for which compensation was required. This concept is referred to as 'pricing-in'.

The British Academy of Songwriters, Composers and Authors, the Musicians' Union, and UK Music (an umbrella group which represents the collective interests of the UK commercial music industry) sought judicial review of the Government's decision to introduce private copying without a concomitant compensation scheme. They challenged the assumptions adopted by the Government, and also challenged the inferences and conclusions drawn from the evidence collected, and the procedure adopted in the public consultation. It was the challenge to the evidence collected by the Government in relation to 'pricing-in' which succeeded, with the Court finding that the decision adopted by the Government was *"nowhere near to being justified by the evidence"* that they had accepted and endorsed. The Government's decision to introduce section 28B was therefore unlawful.

**The future of private copying in the UK**

The Court's decision is not, necessarily, the end of the private copying exception. The Judge left the door open for submissions on whether there should be a reference to the Court of Justice of the European Union on any issue of law he had decided. It is not known whether the Government will push for a reference at this time.

Otherwise, it seems likely that the Government will now re-investigate the issue of 'pricing-in' in order to address the evidential gap exposed by the Court. If the Government obtains more satisfactory evidence that the harm caused by private copying will be no more than minimal, then Section 28B could survive without the need for a compensation scheme. Given the flaws in the evidence exposed by this judgment, however, any such evidence is likely to be analysed forensically by rights holders.

The alternative options available to the Government are much less appealing. It could, theoretically, admit defeat and repeal section 28B, or introduce a scheme to compensate rights holders through a levy on blank media, copying devices and cloud storage. Neither of these are likely to be particularly popular given the Government's belief that consumers will not want to pay for an activity which they strongly believe is (or ought to be) legal. One final option, but perhaps the least likely, is that the Government will relent and introduce a compensation scheme, but also extend the private copying exception beyond personal use so that it covers copying for family and friends.

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