

# Call for Evidence to Review 2014 Copyright Changes

## Music Publishers Association Response

The Music Publishers Association welcomes the post-implementation review of the 2014 copyright changes, in particular assessing whether they have achieved their respective objectives in relation to the economic Impact Assessments associated with the legislation changing copyright. The economic evidence provided at the time was selective and, at best, casual. The significant amount of evidence provided by the music sector was disregarded as “lobbysomics”. We also note that the evidence provided in the Impact Assessments associated with the legislation is very random and in the absence of reliable evidence relies heavily on the initial economic analysis presented in document EE of the Review Intellectual Property and Growth (the “Hargreaves” review).

**This post-implementation review presents the ideal opportunity to provide the solid economic evidence that Professor Hargreaves himself and his economic advisor rightly identified as the essential justification for policy change. We recognise their difficulties in predicting developments; a post implementation review will assist assessing the situation ex post facto.**

The Music Publishers Association is a founding member of UK Music and we share their concerns on the suggested de minimis approach and comment specifically on the fair dealing exception for parody, caricature and pastiche.

#### **I. Scope of the review.**

The call for evidence argues that the impact of the changes has been estimated to create an impact of less than £5 million or could not quantify the impact at the time (defined as the net cost to business per year) and a full post-implementation review would thus not be proportionate. This is inappropriate and inaccurate, and a comprehensive review is required, both substantially and procedurally.

- **Inappropriate.** Given the deficiencies of the economic evidence associated with the changes to copyright, if such was provided at all, it is inappropriate to limit the post-implementation review in any way. The economic concerns of music publishers were intentionally cast aside in favour of a biased approach to the 2014 changes to copyright. The Impact Assessment BIS 1057 associated with the fair dealing exception for parody states blatantly: *“Respondents to the consultation have claimed that synchronisation rights for parody works already make up around £11m of income for UK music publishers per annum but these are costs for parodists so a parody exception would result in a transfer and would not affect Gross Value Added.”* A remarkable policy declaration to transfer value from music publishers to undefined “parodists”.
- **Inaccurate.** We challenge the claim that Government only has to consider the net costs to business when assessing whether the impact was less than £5 million or could not be quantified at the time. The post-implementation review offers the opportunity to monitor and evaluate whether the regulation has met the intended objectives of the legislation according to the principles of best practice on post-

implementation reviews published by BEIS. These principles expressly refer to the success criteria when assessing whether the Regulations are working.

If the success criteria have not been met, appropriate government intervention is required. To the contrary, the Impact Assessment associated with the fair dealing exception on parody expressly refers to the development of an evaluation strategy and post-implementation review given that the economic impact could not be established. This Post-Implementation Review was announced to “*detail the benefits associated with the introduction of the copyright reforms and will include input from external stakeholders.*”

We are at the disposal of Government to assist with the evaluation strategy for the exceptions on parody and quotation specifically.

## **II. Objective.**

The objective of the 2014 changes to copyright were not to impose costs on business but to “*make our copyright system better suited to the digital age.*”

In order to assess whether the 2014 changes have achieved their original objectives they have to be measured against these objectives, i.e. whether they have led to considerable economic benefits adding hundreds of millions pounds to the UK economy as was submitted by Professor Hargreaves and his advisor. His economic evidence was the basis of further Impact Assessments and thus key for the introduction of the changes to copyright as far as it was not possible “*to fully monetise the benefits beyond the initial assumptions made in the Hargreaves Report ...*”

## **III. Evidence.**

We agree with the arguments put forward by UK Music and the British Copyright Council, adding our specific experience on the fair dealing exception for parody and quotation.

### **1. Exception - Parody, caricature and pastiche.**

- **Benefits.** The Government’s economic Impact Assessment suggested that these measures (in particular the (now quashed) Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014 and the Copyright and Rights in Performances (Quotation and Parody) Regulations 2014) could contribute over £250m to the UK economy over 10 years as a “conservative estimate.” The measures were said to be likely to benefit innovation, competition, research, education and respect for the law. Economic gains were likely to come mainly from cost savings through reducing complexities of the copyright system, and from new business creation. (Explanatory Memorandum accompanying the exceptions; para 10.2).

We expect government and the beneficiaries (i.e. entertainers and comedians, the producers of comedy and entertainment shows, and broadcasters) to provide verifiable and peer-reviewed economic data to demonstrate the benefits as outlined in the explanatory memorandum. The benchmark has to be the direct and administrative benefits for the beneficiaries and the public.

The Music Publishers Association contributed to the original submission by UK Music commenting on the justification, and outlining the expected impact of a fair dealing exception for parody (c.f. paras 126-150 of the UK Music submission).

- **Cost to business.** We welcomed the statement in the Explanatory Memorandum that “(t)he changes are designed not to undermine business to business licensing.” The Music Publishers Association has attempted to collect evidence on the impact of the exceptions since their coming into force but it has been impossible to collect evidence about the economic impact on music publishers of the fair dealing exception for the purposes of parody, caricature and pastiche.

Commercial users have referred to this exception in licensing negotiations with music publishers but it is impossible to attribute the costs of in-house legal teams to such discussions. Equally, none of the disputes over the scope of the parody exception have reached the status of a Court decision because all parties want to avoid the costs of litigation; but they invariably led to lower licensing fees for the use of music.

To provide further context of the problems in assessing the costs to our business it is worth repeating that a song embodies two separate copyright elements under the CDPA, the lyrics (a *literary work*) and the music (a *musical work*).

- **Lyrics.** The parody exception undoubtedly envisages (at least) the use of the lyrics without a licence and thus transfers directly value from music publisher to parodist. Assuming the “originality” requirement is satisfied then any such parody would attract its own separate and distinct literary copyright; this would generally be owned by the parodist (without consideration of the owner of the original owner of the copyright in the lyrics).
  - **Music.** However whilst it is clearly possible to parody a lyric there are few (if any) circumstances where using a substantial part of the musical work would constitute a parody in the normal sense. In practice, this prompts the question how to calculate a reasonable licensing fee for the use of the music which does not qualify under the parody exception when a song is parodied. In our experience the separate copyright in the musical work is generally ignored leading to lost income for music publishers and composers. It is not possible to quantify the negative i.e. we cannot put a number on the occasions in which a synchronisation licence for the musical work in a parody has not been sought.
- **Case study** (to illustrate the way the parody exception impacts on the music publishing sector). Our members have encountered problems with the use of lyrics in advertising. In one example lyrics from some of our member’s most successful and iconic artists were featured heavily in an extensive billboard and TV campaign. The advertiser argued that the use was covered by the parody exception and, with neither party wishing to litigate, a compromise was reached at a lower than average fee. The advertiser subsequently requested further billboard uses for another song as part of the same campaign. Our member advised them that it would be best to choose an alternative title due to the fact that, in our experience, the writers in question were likely to deny the request. The advertiser decided to proceed with the song regardless of the

fact that the writers would have been likely to decline the use, claiming the parody exception.

Again, with neither party wishing to litigate, the advertiser agreed to pay a small license fee and a small charitable donation after the fact. For these uses, our member's fees were 20-30% of what they would have otherwise expected to receive and their writers were denied the ability to approve the use of their works to promote a third party's brand.

We note that we are generally unable to monitor all uses of our songs and will typically not be aware of many uses where we have not been approached for a licence so it is impossible even with the most comprehensive of internal reviews to determine the full extent to which the copyright exceptions have resulted in lost income. We have, however, had instances of licensees approaching our members, and having been provided with a quote on the standard terms, the licensees (including major established players and regular licensees) have sought to rely on the copyright exceptions to proceed with the use without a licence or threaten to do so to secure substantially reduced rates.

## 2. Exceptions - other

**Quotation.** We note the above comments on evidence for parody exception apply mutatis mutandis to the exceptions for quotation.

- **Case study Quotation.** One of our members reports: "In one instance, we were approached regarding the extensive use of lyrics in a novel written by one of the world's most successful authors and published by one of the world's leading publishing houses. The book featured a character who was a big fan of a rock band, and lyrics from songs written by that band featured heavily both throughout the story and chapter headings, creating a very clear link between our songwriters, their songs and the story. The publisher claimed that licences were not required for each of these uses due to the quotation exception but offered consideration at a level far below the value we would place on such uses. We sought to negotiate terms but the publisher threatened to publish regardless. As a result we accepted licensing fees far lower than those we would have ordinarily charged for the extensive use and the very large number of units involved in the print run – as low as 0.5% of what our standard rates would yield. Having established this position, a later book by the same author and published by the same publisher which featured our lyrics was licensed at around 6% of our standard fee."

**Education.** We provide efficient and well-established licensing schemes which all stakeholders welcome. This is a good example how music publishers have addressed the commercial issues identified by Professor Hargreaves in a pragmatic way.

- **Case Study Education. Printed Music Licensing Ltd (PMLL),** part of the Music Publishers Association (MPA) group companies, licenses the copying of printed music to schools throughout the UK. In the licensing negotiations with schools enabling them to make copies of printed music publications and to arrange the musical works embodied in printed music publications, the 2014 changes to copyright are regularly

mentioned by licensees. In the absence of clear, verifiable and peer-reviewed evidence we are not in a position to provide data on the impact of these changes other than providing anecdotal reference to licensees referring to the exceptions.

### **Copyright Directive**

We note that, depending on the timing of Brexit, and the possible scenario of the adoption of parts of the Directive being a policy decision, the lack of evidence to support any upside from these exceptions will be relevant when the Government is considering which elements it might elect to implement from the Copyright Directive.

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### **About the MPA:**

The Music Publishers Association (“MPA”) is the trade association for music publishers in the UK, with over 200 members, representing nearly 4,000 catalogues covering every genre of music. Our members include all three of the UK’s “major” music publishers, independent pop publishers, classical publishers, production music publishers and also printed music publishers.

We estimate that our members represent around 95% of publishing activity in the UK. The vast majority of our member companies are small or medium sized enterprises. Many of our member companies are multi-disciplinary music companies, operating not just as music publishers but as record labels, managers, promoters, producers, manufacturers, distributors and retailers.

The MPA is the owner of the Mechanical Copyright Protection Society (MCPS) and of Printed Music Licensing Limited (PMLL), which licenses the copying of sheet music in schools. [www.mpaonline.org.uk](http://www.mpaonline.org.uk)