UK MUSIC INDUSTRY WINS HIGH COURT COPYRIGHT CASE AGAINST UK GOVERNMENT

SUMMARY OF JUDGMENT OF MR JUSTICE GREEN DATED 19 JUNE 2015

CASE No: CO/5444/2014

A. INTRODUCTION

On 19 June 2015, High Court judge Mr Justice Green ("the Judge") ruled against the UK Government ("HMG") in a judicial review claim (the "Claim") brought by the (1) British Academy of Songwriters, Composers and Authors (2) the Musicians' Union and (3) UK Music (the "Claimants").

The Claimants brought the Claim against HMG's decision to introduce a private copying exception ("PCE") into UK copyright law, arguing that it was unlawful because it caused more than minimal harm to rightholders and, despite that harm, failed to provide fair compensation to rightholders as required by the EU Copyright Directive (the "Directive").

The PCE came into force in October 2014. The Claim was issued against HMG in November 2014 and the Claimants sought a declaration that, in the absence of a fair compensation mechanism, the PCE was unlawful and should be quashed. The Incorporated Society of Musicians ("ISM") subsequently obtained the High Court's permission to participate in the Claim as an intervener, in support of the Claimants' position.

B. THE JUDGMENT

There were five main issues in dispute between the parties. The judge agreed with the Claimants' crucial argument that HMG's decision-making in relation to the PCE was based on wholly inadequate evidence. He reinforced the importance of a solid, evidence-based approach to HMG's policy making and declared that the PCE is unlawful. The Judge considered that HMG's decision (that the harm suffered by rightholders would be minimal, and therefore that no compensation was required) was nowhere near to being justified by the evidence that HMG had obtained and relied upon. The PCE is likely to be quashed as a result of this decision.

The parties' cases on the five main issues, and the Judge's findings in relation to them, were as follows:

(1) Inadequacy of evidence

The Judge held, in the Claimants' favour, that HMG's decision was not justified by the evidence that it relied upon. Although the conclusion that HMG needed to establish was that the harm caused by the PCE was minimal or zero, HMG's actual conclusion was only that harm would be obviated "*to some extent*". The Judge found that much of the evidence relied upon was inadequate and that HMG should have carried out further investigations – but that it failed to do so.

(2) The meaning of 'harm'

HMG's case was that 'harm' caused by private copying is the lost duplicate sales of copyright works that, without the PCE in place, may have been made to the consumer had copyright law been rigorously enforced (the so-called 'lost sales' test). In contrast, the Claimants' case was that harm is to be measured as the additional amount that rightholders would be able to recover (whether by duplicate sales or otherwise) had the unauthorised private copying which was legitimised by the PCE not taken place.

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Although the Judge concluded that harm is an "*autonomous concept of EU law which is unrelated to national law*", he also found that EU Member States have a degree of discretion to choose the test by which they will calculate harm, subject to EU law constraints and European Court supervision. In applying this discretion, the Judge concluded that, in the circumstances of the UK PCE, it was lawful for HMG to have adopted the lost sales test (even if other tests might also have been lawful, including potentially the Claimants' approach). However, the Judge said that if he was wrong about the discretion to choose a test for harm, then HMG's decision to introduce the PCE was based on an error of law. The Judge accepted that this issue was significant and was one that was not reasonably clear and free from doubt, and therefore he invited further arguments from the parties as to whether the question of what was harm should be referred to the Court of Justice of the European Union for clarification.

(3) Whether 'Pricing in' was irrational/inapplicable

HMG's case was that when consumers purchase, for example, a CD, they attribute value to the practical ability to make copies of it (something which would have been illegal before the PCE came into force, and legal following the PCE coming into force), which was reflected in the price they were willing to pay. The reasoning continued that therefore the music industry would have been and should be able to 'price in' to the overall cost of the product the value to the consumer of such copying.

The Claimants' case was that HMG was wrong to have concluded that pricing in had sufficient effect to mean that the relevant harm was minimal (although the Claimants' case appears to have been mischaracterised in the Judgment as being that pricing in was not applicable at all).

The Judgment concludes that HMG acted lawfully by applying the pricing in principle, particularly since there was mixed economic literature regarding its applicability to private copying exceptions. The Judge doubted that rightholders should be compensated for the inability to price discriminate between different consumers who attribute different utility to a product (and therefore to maximise revenue to the rightholders). The Judge found that this was not the case in normal markets for durable goods (like chairs or lawnmowers), where it was often not possible to *"extract the very last gram of value"* and did not see why it should therefore be the case for intellectual property works.

However, as noted below, the Judge went on to find that HMG did not have sufficient evidence on which to conclude that pricing in meant that harm to rightsholders was only minimal.

(4) Predetermination by HMG

The Judge did not agree with the Claimants' submission that HMG had unlawfully predetermined the outcome of the PCE consultation exercise. The Judge held that HMG was entitled to have a strong predisposition towards not wanting to implement a levy scheme as part of introducing a PCE, and that having a predisposition was different to making a predetermination.

(5) State aid to the technology sector

The ISM had argued that the effect of the introduction of the PCE without compensation amounted to unlawful financial aid by HMG to the technology sector (given that, in its impact assessment published before introducing the PCE, HMG had estimated that the PCE would provide a benefit to UK technology firms of £258 million over ten years). The Judge held that this argument failed because the requirement that aid must be granted "*through state resources*" was not met.

C. NEXT STEPS

The Judge has asked the parties to return for a subsequent Court hearing in July 2015 to decide upon what action flows from his judgment, including whether the PCE should be quashed.

19 June 2015