PRS for Music's response to the 2014 copyright changes: post-implementation reviews Call for Evidence

About PRS for Music

PRS for Music is a collective management organisation representing over 135,000 songwriters, composers and publishers across the world. Through our network of reciprocal agreements with other collecting societies, we license the rights of over 25 million works from 2 million rightsholders to organisations which play, perform or make available music. As a membership organisation, we ensure creators are paid whenever their music is played, performed or reproduced, championing the importance of copyright to protect and support the music industry; the income of our members is entirely dependent on copyright law.

Summary of response

PRS for Music welcomes the opportunity to provide evidence to the IPO's post-implementation review of the 2014 copyright changes.

The 2011 Hargreaves Report claimed that the economic benefits of widespread reform of UK copyright law, including the introduction of new, and amendment to existing, copyright exceptions would be between £4bn and £26bn. In the Government's own impact assessment, the possible benefits were downgraded to between £500 million and £790 million. These estimates were underpinned by the assumption that broader exceptions, which "simplified access to copyright works", would encourage innovation and drive new technologies opening the market for new business models.

In our response to the March 2012 *Consultation on Modernising Copyright*, we stressed that licensing solutions offer the most reliable and flexible means for users to obtain the rights they require. Licensing provides greater certainty for users, while at the same time providing the essential remuneration for rightsholders. In the period since the exceptions were introduced, *PRS for Music* has continued to diversify the range of licences available to meet the changing demands of users not just in the UK, but the EU and increasingly around the world.

While licensing provides certainty, the exceptions operate on principles that are often subjective or too open to abuse by those users simply trying to avoid obtaining a licence. The ways in which these problems are undermining the rights of creators is set out in the specific sections. We also provide evidence that rather than incentivising greater innovation, technological development and market growth, the 2014 exceptions regime has primarily created barriers and inefficiencies in the lawful assertion of rights.

Our response focuses on the practical effects of the 2014 exceptions, however we also remain firmly of the view that the economic and public value benefits that were used to justify the market intervention remain unproven and therefore we continue to contend the exceptions amount to unjustifiable barriers to the rights of creators.

Orphan Works Exception

The delicate balance between the perceived benefits of unlocking access to works where the rightsholders genuinely cannot be identified and the obvious harm of third-party licensing without authorisation is entirely dependent upon the effective enforcement of the 'diligent search' requirement. Where this is incorrectly or ineffectively enforced, the orphan works scheme acts entirely to the detriment of rightsholders.

The orphan works register lists fifteen licences that have been granted for sound recordings under the scheme. It is not possible to determine whether the rights for the underlying musical works have also been granted, although we have neither record of having licensed the corresponding musical works nor of having been approached to obtain a licence.

A simple search of the *PRS for Music* works database shows that we represent and hold rightsholders information for five of those 15 works:

- *Don't Worry*; which was licensed for use in a TV advertisement and used on online;
- *The Vamp* was licensed for a range of uses including online and on stage;
- *Tanets Shamana, By My Side* and *Only You* were licensed for use "in a sound/music production that is available as an audio-only product e.g. CD (up to 5600 copies)".

We also note that a basic search by performer or title of the PPL database similarly yields details of the relevant rightsholders and identifiers in some of these cases.

It is obviously a serious concern that musical works may have been erroneously licensed as orphan works, in each case for commercial use, while clearly within the PRS repertoire. We can only assume this to be a failure of the diligent search requirement, although clearly there are problems with the system in specifically identifying which rights are being licensed. As *PRS for Music* represents the significant majority of musical works in the UK, it follows, we believe, that any diligent search process relating to musical works should require documented evidence that *PRS for Music* does not represent those rights.

It is very difficult for us to quantify the economic impact of the orphan works exception, even in the cases we refer to in the foregoing paragraphs, as our ability to agree licences and monitor usage has been superseded by the issue of the licence.

Parody Exception

In our experience, the operation of the parody exception has generated confusion and misunderstanding, which have created barriers to licensing as a consequence. This confusion most often materialises in two ways: first, the belief that the use of the parody exception creates an absolute right, for example the right to perform musical works with altered lyrics in any circumstances, and second, that 'fair dealing' is directly comparable to the general 'fair use' defence in US copyright law.

PRS for Music has dealt with many instances where this confusion has resulted in users either refusing to pay royalties or refusing to obtain a licence. Below, we set out two

recent examples; we were ultimately able to resolve the issues in each instance, but significant time and effort by PRS for Music was required to enforce our rights amidst the confusion around the correct application of the parody exception.

i. In 2017, a London theatre refused to pay royalties for their 2016/17 panto claiming no royalties were due. Investigation showed that PRS-controlled works, many from high-profile catalogues, had been used with new lyrics written for the purpose of the panto by the performing company. Lengthy correspondence with the theatre revealed that the company understood the parody exception as essentially giving them the right to alter lyrics and perform parodies with no obligation to the composer. Despite further explanation of the principle of fair use, they refused to accept that the limitations in the exception meant that it did not extend to a ticketed pantomime which ran for several weeks. Only after significant effort were *PRS for Music* and the relevant publishers able to assert the right to approve the works in the 2017/18 season panto.

ii. In 2018, an established regional theatre booked a spoof of a very successful US musical. While the show was principally a parody of the musical, it also included several works from other musicals with altered lyrics. Following investigation, it became apparent that as the show has operated under fair use in the USA, the theatre and the touring company automatically assumed it was exempt in the UK under fair dealing. While the venue quickly accepted the misunderstanding, it meant that licences had to be agreed with the publishers very quickly, only a few days before the show opened.

In both instances, and in many other cases we have dealt with, there was a complete lack of understanding of the correct application of the parody exception. It is increasingly apparent that many users have little knowledge of the differences between fair use and fair dealings and their application.

We note that in 2014 the IPO produced guidance for consumers on the application of the copyright exceptions, including parody. It is evident from our experiences over the past 5 years that either this information has not been understood or users are unaware of its existence. As a result, the burden of correctly enforcing and improving understanding of the parody exception is falling on rightsholders.

Conclusion

In our conclusion to the IPO's 2012 *Consultation on Modernising Copyright*, we raised our concerns that the new exceptions regime could result in a reduction in opportunities to licence new and existing exploitations of our members' works. We also questioned whether the exceptions, as an alternative to licensing, would drive innovation and technological growth; the practical application of the exceptions over the past five years has proven the exceptions not only create a barrier to licensing but result in a significant cost to rightsholder arising from the policing of their correct application. Therefore, we urge the IPO to review not only the original policy objectives but the impact of their practical application when considering whether the 2014 exceptions meet their original objectives.