[GB] Legislation to introduce copyright exception law with no accompanying levy scheme deemed unlawful

IRIS 2015-8:1/17

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In a judgment dated the 19 June 2015, the High Court set aside section 28B of the Copyright, Designs and Patents Act 1988, introduced with effect from 1 October 2014 by Copyright and rights in Performance (Personal Copies for Private Use) Regulations 2014, which allowed an exception to copyright laws based upon private use (see IRIS 2014-10/19).

Section 28B allowed for any person who had legitimately acquired copyrighted material to copy that work, including onto other formats, provided it was for legitimate non-commercial use. Section 28B arose from the government using a discretion under Directive 2001/29 of the European Parliament and the Council on the 22 May 2001 concerning the harmonisation of copyright and related rights allowing Member States to introduce exceptions to copyright in defined cases; such as Article 5(2)(b) of the Directive whereby a purchaser of content wished to copy it for private use. Section 28B introduced an exception for copying for private use but did not widen the ambit to allowing an exempted copy of a work to be given to a friend or family member.

Just prior to the implementation of Section 28B, a report commissioned by the European Commission and published by economic consultants CRA, and entitled "Assessing the economic impact of adopting certain limitations and exceptions to the copyright and related rights in the EU- analysis of specific policy options" highlighted that countries that had introduced a private use exception also introduced a levy scheme charged on, for instance, blank CD discs, MP3 players and printers as a means of compensating copyright owners for loss of revenue from the private use exception.

The UK government when considering the implementation of section 28B considered such a levy too bureaucratic and the private use exception would not be accompanied by a levy scheme. The government considered any loss to copyright owners by having no levy scheme would be minimal, and did not warrant establishing such a scheme; and also went against the ethos of having an exception to copyright law. As a consequence, a court action was brought against the UK Government by various bodies acting as the claimants in the proceedings representing the interests of the music industry.

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The court had to consider, using a process called judicial review, the reasonableness of the UK government's decision not to accompany the copyright exception law with a levy scheme. The claimants contended that the evidence upon which the government had made its decision not to have a levy scheme was flawed and incorrect and thus rendering the proposed law unlawful.

The court had six factors to consider: first, whether there had been sufficient consultation prior to implementing Article 5(2)(b). Second, whether the government minister had given enough appreciation to the harm caused by implementing a copyright exception rule without a levy scheme and that this was against the spirit of Article 5(2)(b). Third, the government claimed there was no need for a levy as copyright owners already priced in private use into the selling price of copyrighted material. The claimants asserted there was no evidence to support this assertion. Fourth, the government concluded that the absence of a levy would cause no or very little (de minimis) harm, and the claimants stated that available evidence did not support that assertion. Fifth, whether the government had pre-determined the outcome. It was argued that whatever the evidence, they were determined to have a copyright exception law with no levy scheme. And sixth, was the introduction of a no-levy scheme some form of state aid under Article 107 the Treaty on the Functioning of the European Union (TFEU) and should it be reported to the European Commission?

Mr. Justice Green, considering the evidence and legal submissions of all the parties, found in favour of the government for items (2), (3), (5) and (6) above. However, the judge determined in favour of the claimants considering that the government evidence for making its decision was inadequate and some of the conclusions drawn by the government were not reasonable inferences, but speculation. As such, the judge found in favour on point (4) for the claimant questioning the legality of section 28B.

According to the judge, the government had three choices: (a) reinvestigate the matter and see if they can address the evidential gap before implementation of 28B, (b) if the evidential gap cannot be closed to justify the original decision then repeal section 28B or introduce a compensation scheme, or (c) not try and address the evidential gap and just introduce a compensation or levy scheme.

In a subsequent hearing before Mr. Justice Green on the 3 July 2015, and in response to government representations, the judge ordered that the Regulation would be quashed with prospective effect and not retrospectively. Also, at this stage the judge would not make any order for a reference to the EU Court of Justice. However, the parties were given liberty to apply to the High Court on the matte.

R (on the application of British Academy of Songwriters, Composers and Authors Musicians' Union & Ors) v Secretary of State for Business,

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Innovation and Skills [2015] EWHC 1723 (Admin) (19 June 2015)

http://www.bailii.org/ew/cases/EWHC/Admin/2015/1723.html

R (on the application of British Academy of Songwriters, Composers and Authors Musicians' Union & Ors) v Secretary of State for Business, Innovation and Skills & Anor [2015] EWHC 2041 (Admin) (17 July 2015)

http://www.bailii.org/ew/cases/EWHC/Admin/2015/2041.html

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