

protecting
and promoting
authors' rights



Strategic Advisory Board for Intellectual Property (SABIP)

Strategic Priorities for Copyright

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Introduction

The Authors' Licensing and Collecting Society Limited ('ALCS') is the UK collecting society for writers of all genres of literary and dramatic copyright works including fiction, journalism, plays, poetry, academic texts, TV and radio scripts and story-lines, dramatisations, translations, abridgements and adaptations.

Established in 1977 and wholly owned and governed by the writers it represents (of whom there are currently over 66,000), ALCS is a not-for-profit, non-union organisation. The Society's governing body, the Board of Directors, is composed of elected writers. Since its foundation, ALCS has paid writers over £200 million in fees and today it continues to identify and develop new sources of income for writers.

ALCS welcomes the work programme that SABIP is undertaking as a timely and useful exercise. In recent times we have seen a host of reviews, in the UK and internationally, re-examining copyright principles in light of technological and social changes. Increasingly the responses to these reviews have revealed a number of apparently entrenched positions. SABIP's work can add significant value to these discussions by providing new evidence and data to move them forward constructively.

This brief paper provides some observations on the scope of the proposed research programme by reference to the six areas of focus highlighted in the paper.

The role of copyright in stimulating creativity and innovation

The SABIP literature review under this heading (and perhaps others) may well pick up some research that ALCS commissioned in 2007¹ analysing authors' earnings.

The key findings included the following:

- The typical income for a professional writer is one third below the national average wage;

¹ Authors' earnings from copyright and non-copyright sources: A survey of 25,000 UK and German writers. Research by the Centre for Intellectual Property Policy & Management, Bournemouth University (December 2007)

- The earnings of a typical writer are deteriorating in real terms;
- 60% of people who saw themselves as professional writers from the 25-34 age-group earn an average of £5,000 per annum;
- Less than 15% of authors surveyed had received payments for online uses of their works.

The paper asks if the UK copyright system assists creators in earning ‘appropriate’ rewards. To an extent the question of appropriateness touches on issues beyond the reach of the copyright system, such as the subjective decisions of markets, and an individual’s negotiating power. On that basis we would like to see the scope of this question expanded to further consider the extent to which the copyright system enables creators to secure *fair* rewards.

We are increasingly seeing digital trends whereby works are ‘traded’ on-line in a way that reflects neither the economic nor moral rights of their creator. This devalues the concept of creativity itself, which in turn threatens the flow of innovative content entering the market. In such an environment, it is questionable whether the creative industries can maintain their significant contribution to the UK economy. Ultimately, this may lead to a reduction in the diversity and quality of available content and diminishing returns for the business models that rely on it. In short, a situation in which everyone loses, it would seem.

It would be very interesting to see, within SABIP’s comparative analysis, the different mechanisms (implemented or merely proposed) that the various copyright systems have considered in dealing with the question of *fair* rewards.

Ownership and coverage of copyright

We welcome the suggestion that SABIP will include moral rights within its comparative analysis.

There are many initiatives underway to develop internationally accepted models for identifying works in the digital environment. Increasingly, these build upon existing standards - such as the ISBN, primarily designed to identify a work - and aim to link individual creations back to a named individual, irrespective of the context in which they appear. Ultimately, these standards will benefit those seeking to use specific works as part of large digitisation programmes or individual on-line access permissions, as well as enabling organisations like ALCS that rely on good quality data identifying authors, to make transparent and fair payment allocations for on-line uses.

A separate issue touching on moral rights is the suggestion in recent copyright reviews that UK exceptions should be expanded to allow for parody and 'transformative' use.

To an extent, both developments recognise the ease with which copyright works may be copied, distributed and adapted in a digital use environment. Given that the UK moral rights set out in the 1988 Act were designed and developed primarily around the mechanics of the analogue content environment, it would be useful if SABIP could analyse the extent to which the terms set out in Chapter IV of the Act are appropriate and relevant.

In the context of economic rights, the paper queries the value of a system that seeks to offer protection only to works that have an 'economic value'. The paper rightly acknowledges the potential issues that such a step may give rise to in the context of existing international copyright principles. Before making further comment, it would be useful to understand more about the evidence advanced in favour of such a radical step.

Rights Management Techniques and Technologies

The paper queries whether the tools for managing content will remain adequate in the context of digital use. To a certain extent, this may be answered by a review of how current licensing operations are developing to address digital use and what impediments, if any, may exist within this process.

Through its involvement in the collective licensing activities of the Copyright Licensing Agency (CLA) and the Educational Recording Agency (ERA), ALCS provides the necessary rights clearances/licence on behalf of tens of thousands of writers and their hundreds of thousands of individual works. These licensing bodies acquire complementary mandates from other rightsholders, such as publishers, performers, broadcasters, etc. to provide a one-stop rights clearance facility. Licensing is available on a sector by sector basis so that, for example, an educational authority can obtain a licence for all of its schools or a business sector, through its representative body, can agree terms for all the companies in its area of trade. These schemes offer a simple, straightforward copyright compliance solution for vast numbers of individuals, providing access to the content they need to further their learning and promote industry.

In recent years both the CLA and ERA schemes have successfully extended the reach of their licences to meet the changing needs of their licensees, providing new means for accessing, using and transferring digital content.

Increasingly educational licensing schemes are evolving to permit copying and access to learning materials within on-line networks: for example, through making

works available through Virtual Learning Environments. Through consultations with licensees, CLA and ERA manage to offer access across new platforms at a fair price that recognises the balance between the individual, non-commercial uses envisaged by exceptions and uses for which creators have a legitimate interest in receiving remuneration.

When considering the use of DRM in the context of licensing it is always important to separate out the different functions of technical protection measures and rights management tools. As stated earlier, ALCS is involved in the design and development of various UK and international initiatives aimed at proving better quality data linking works and parts of works to individual creators and other rightsholders. The aim being to improve the access terms to the benefit of everyone from the original creator to the end-user.

The relation between copyright and contract

The paper notes concerns that creators may lose out in the negotiation over contractual terms. ALCS operates to secure fair remuneration for writers in respect of certain activities that essentially involve a 're-use' of works, in situations that are not dealt with directly through contractual arrangements with the publishers or producers of the content. Historically, such re-uses have been driven by the emergence of new technologies; for example, the advent of reprographic copying devices inspired the establishment of the CLA scheme.

The advent of digitalisation and the growth of Internet based technologies have completely changed the environment in which creativity may be accessed, placing more control hands in the hands of individual users. To an extent this has upset the balance between the individual creator, the commercial body distributing their work and the end user.

The UCL research commissioned by SABIP confirmed this point, noting: "If the digital revolution has shown us anything it is that consumers have grown accustomed to increasing levels of personal control – over when, how, and where they consume types of content – and thus the products of the consumer electronics industries are central, if sometimes forgotten part of the copyright eco-sphere."

Returning to our earlier point, in terms of fairness, a copyright system should attempt to balance and reflect the investment and withdrawals made by various parties. Digital technologies permit extensive re-use of creator's works, outside the terms of formal contractual relationships. Users benefit, as do those whose products and services facilitate access to content. Currently, creators appear to be slipping from view in this picture and it would be interesting to see what information

SABIP could gather in terms of models from other systems aimed at rebalancing this kind of trend.

On a more specific point, a model for balancing exclusive and remuneration rights already exists in the 1988 Act in the context of rental, but this has proved largely ineffective to date. The Annex to this paper sets out a brief note on this particular point. As the business models for rental download services evolve and develop the importance of this right to creators increases. We believe that under this heading SABIP could usefully research and review the impact of amending this right in the UK to reflect the underlying intent of the European Directive.

Simplification of the copyright framework

The paper suggests that there may be a perceived lack of clarity over where the boundaries of existing copyright exceptions lie. The current exceptions are, by design, not prescriptive. For example, it would be unwise to attempt to fix the amount of a work an individual could copy under fair dealing rules as this quantitative approach fails to address the value underlying the entire content of a protected work. Instead, they rely on key reference points regarding the context of the permitted use - personal, educational, non-commercial, etc. applied on a flexible basis governed by the core principles of the Three Step Test.

In terms of the areas of UK licensing in which ALCS has direct involvement - the CLA/ ERA schemes referred to earlier - we would suggest that these schemes are highly effective in removing difficulties users may have in defining the boundaries of exceptions. They provide a vast repertoire of individual works under a single licence; furthermore, the statutory structure underpinning these schemes, through the application of waiver and indemnity provisions, offer licensees and individual users certainty of compliance.

As to new areas (as yet unregulated by statute) that may be narrowly defined, unclear or confusing, we think that SABIP may have a role to play in moving on the debate in two areas - orphan works and private use.

Orphan works

The current copyright policy debate has, at various levels, identified issues in relation to the use of orphan works. Although various estimates have been put forward as to the scope of this issue, there seems to be a lack of robust data to support these. It may be that SABIP can commission some useful work in this area. At the same time, it would also be interesting to see an analysis of the various options in use or development, for coping with the orphan works issue, including the model that has been developed by the British Copyright Council.

Private Use

It seems reasonable to suggest that:

- a) demand for portable content storage and playback devices - whether for music, TV/film or books - will remain and, in some sectors, grow;
- b) the content on these devices will arrive from a variety of sources;
- c) the means to identify illegal content (to isolate or restrict its availability) will, at least in the foreseeable future, never be entirely effective.

'Format-shifting' proposals arising from the Gowers Review identify the need for a new, carefully prescribed exception; the UK-IPO Consultation Document on this point acknowledged that the reality may be more complex, "most rational utility-maximising consumers would be expected to copy beyond the bounds of the proposed format shifting exception (for example to make copies for family and friends)".

Even prior to implementation, this seems to be a confused message in an important area. To add further context to the current debate, it would be useful if SABIP research could frame the full range of options that copyright systems have identified for dealing with private use.

Attitudes and Behaviours in the Digital Economy: Implications for IP

The UCL CIBER report has identified some striking trends and we found their presentation at the SABIP stakeholder event on the 1st May interesting and alarming in equal measure.

We agree that an analysis of the fairness or otherwise of the system is a sound basis for taking the work under this heading forward. However, in view of the conclusions of the CIBER Report regarding consumer attitudes to the present legal framework, it may be worth extending the scope of this review to investigate consumer attitudes on fairness in relation to the actual content and those that create it, and how, if at all, these attitudes overlap or diverge.

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Annex

Right to Equitable Remuneration for Rental

Background

This brief note addresses the unsatisfactory working of the unwaivable right to equitable remuneration for rental, established under Article 4 of the EC Rental & Lending Directive.

Essentially Article 4 provides authors and performers with an unwaivable right to equitable remuneration for rental, in cases where they have transferred their exclusive rental right to a film / sound recording producer.

The architects of the Directive described Article 4 as one of its 'main achievements' explaining that it was designed, *"to counterbalance the disadvantages typically encountered by authors and performers in negotiations with producers."*²

Although the Directive permitted Member States to choose the party against whom the remuneration would be claimed, the draftsmen commented that to best fulfil the aim of Article 4, rental outlets would be the most appropriate debtors.

Unfortunately, UK implementation opted to make the person to whom the rental right was transferred liable for payment. In the majority of film production cases, through industry practice or statutory presumption (s.93A CDPA), the right will transfer to the film producer.

Practical problems

To avoid this further level of liability and administration, producers have tended to 'buy-out' the remuneration right through the terms of the commissioning contract.

Production companies, as legal entities, may only exist for the duration of the project concerned.

It is the distribution outlets, rather than producers, that are the party receiving the greatest commercial benefit from the exploitation of the rental right.

² *The EC Directive on Rental and Lending Rights and on Piracy*, Reinbothe & von Lewinski, Sweet & Maxwell, 1993.

To licence the distribution outlets directly, one needs to establish that the rental right itself has been transferred in each case (s.93B (3) CDPA).

Implementation beyond the UK

Following the Directive, the CDPA permits collecting societies to exercise this right on behalf of their members. A decade after the adoption of the Directive, no workable collective schemes have been established in the UK. ALCS does however receive fees from other European territories in respect of equitable remuneration for the rental of UK works.

Future action/ options

Ultimately, the Act provides for a reference to the Tribunal to determine the level of equitable remuneration payments (including back-payments) due to authors and performers.

A more effective and proactive step would seem to be make use of the discretion provided for in the Directive to amend the current provisions in the CDPA, notably by changing s.93B(3) to make clear that the party liable for paying equitable remuneration should be commercial rental outlets.