



Government Review of Intellectual Property and Growth:

A briefing by the Authors' Licensing & Collecting Society for the All Party Writers Group

Background

In November 2010 the Government commissioned a review of the UK's intellectual property (IP) system as part of its programme to identify the necessary stimulants for future economic growth. The review team gathered evidence from various sectors during the spring – the Authors' Licensing & Collecting Society's (ALCS) submission can be found at www.alcs.co.uk (Lobbying and Submissions page) – and published their findings in May in the form of a report entitled: *Digital Opportunity*.

The report has a strong focus on copyright but also deals with patents and designs and broader issues with relevance to all IP rights, such as enforcement and accessibility of information. Recognising the proliferation of IP reviews in recent years, the Government has indicated that there will be no further such reviews during the current Parliament. The report also stresses that future IP policy will be developed on an evidence-based approach founded on economic research, rejecting an approach it identifies as “lobbynomics”. The authors of the report estimate that successful implementation of the measures it contains could add 0.3 – 0.6% to annual GDP growth (around £750m per annum). The Government is expected to publish its response to the report before the Parliamentary Summer Recess.

This brief note summarises the areas in the report that are likely to be of greatest relevance to the writing community.

Licensing

Digital Copyright Exchange

One of the headline initiatives announced in the report is the plan to co-ordinate the creation of a Digital Copyright Exchange. In essence this would involve a network of linked databases accessible to creators, rightsholders and users of copyright content. Underlying this system would be an interoperable system of common data standards and formats identifying works, owners,

licensing bodies etc. The Exchange proposal responds to complaints highlighted in the report suggesting that the complexity of navigating the rights-clearance process is a barrier to innovation and growth, notably for new tech 'start-up' companies. The long-term aim is to create the "best licensing system in the world" by opening the Exchange up to content-providers from outside the UK. Joining the Exchange would be on a voluntary basis but the report highlights a number of incentives to participate, including increased damages in respect of infringement of works on the Exchange and allowing creators to withdraw from future publishing contracts if publishers fail to include the creator's work(s) on the Exchange.

A "highly respected industry figure" will be appointed to oversee the establishment of the Exchange, which is scheduled to take place by the end of 2012. Set-up funding may be provided from the reserves held by the Intellectual Property Office (IPO); longer-term the Exchange may be managed either by the IPO or Ofcom.

Clarification will be sought from IPO as to the detail of this project and review how these proposals fit with existing partnerships for licensing and data management.

Digital Libraries

The report highlights the copyright implications associated with digitisation projects for large-scale collections of archive material, such as those held by the British Library and BBC. In cases where the necessary permission to include works in such projects cannot be secured through the Exchange, the report envisages the adoption of the 'extended collective licensing model', used elsewhere in Europe. In effect this extends the licence granted by a licensing body for certain works to include copyright owners of the same class of works who are not members of that body, provided that the body represents the majority of copyright owners for that sector and subject to the right of non-members to withdraw from the scheme.

In cases where such digitisation projects include copyright works whose rightsowners cannot be found after a diligent search ('orphan works'), the report supports the model put forward by the British Copyright Council (BCC) whereby the licensing body relevant to that type of work would be empowered to grant the necessary licence. The report suggests that the fee charged for using orphan works would, in most cases, be nominal and envisages a system whereby such unclaimed fees are used by the licensing body for social and cultural purposes and/or as a contribution to the running costs of the Exchange. For requests to use individual orphan works, a Government-authorized agency - possibly the Exchange itself - would be used.

Clearly any modification of current copyright principles that creates new rules for a particular designation of works needs to be examined carefully. One of the key elements of a workable system for orphan works is a robust system of diligent searches, to avoid any prejudice to authors or rightsowners. To better understand the processes and challenges involved in due diligence, ALCS has been working with the Wellcome Library on their project to digitise a historic collection of titles on the history of genetics.

Copyright Exceptions

The report identifies two broad problems with the operation of the current copyright exceptions regime: (i) its failure to remove barriers to innovation and (ii) a discrepancy between the law and the 'reasonable expectations and behaviour of most people', in light of new digital services.

When the review was first launched there was a strong focus on the US 'Fair Use' system and how this might free up UK companies to create innovative new digital products and services. Along with many other respondents to the call for evidence ALCS cautioned against such an approach pointing out the potential for negative impacts on established, productive licensing arrangements, particularly in the education sector. The report notes the legal and political impediments to imposing a 'Fair Use' regime in the UK, and instead outlines a series of new exceptions to achieve specific goals.

Personal Use

The EC Copyright Directive permits Member States to enact exceptions for non-commercial acts of private copying provided that rightsholders receive fair compensation. The majority of EU Member States achieve this through the imposition of statutory compensation schemes; through its network of international agreements ALCS collects fees for UK writers from such schemes. The Directive suggests that the harm suffered by rightsholders from private copying is a useful criterion in determining the extent of such remuneration schemes. In our submission to the review we argued that a more progressive analysis would focus on the added value for consumers of private copying rights, given the enormous flexibility offered by digital devices and services. The report sees little evidence of harm but great public benefit from a new private copying exception. This would allow consumers to make copies (e.g. a film from a DVD onto a PC) for themselves and their immediate family. The report suggests that if rightsholders wish to seek compensation in respect of these new private copying rights they should increase the price of the products accordingly.

As part of the review process the IPO commissioned a comparative study of the existing European copyright compensation schemes; the report is due to be published at the end of May. We also expect further communications from the European Commission on this point when they publish their IPR Strategy. The detail of these proposals will be discussed with the IPO and the impact of new UK rights and any possible knock-on effects for the existing European schemes assessed.

Parody

The Directive also permits exceptions to allow works to be used for the purpose of parody. The report recommends the adoption of such an exception in the UK, citing the need to permit the lawful creation of video parody on sites such as YouTube to encourage "literacy in multimedia expression in ways that are increasingly essential to the skills base of the economy". As with the new private copying right interpretation of scope is key and it will be important that creators are not unfairly disadvantaged, not least in respect of their moral rights in works subject to parody.

'Data mining'

Modern research techniques involve sophisticated processes for extracting key pieces of information from large content resources e.g. a research faculty using text analytical software to

scan and retrieve the key content from a database of academic journals. Such processes require copying works in their entirety to permit the searching processes. Currently this goes beyond the allowances under UK copyright law covering 'fair dealing' for research purposes and the report therefore proposes a new exception to permit this kind of 'data-mining' for non-commercial purposes. The report also states that the UK will press for a new EU exception permitting data-mining for commercial purposes.

Again we will need to better understand the scope and terms of the proposed measures. From an author's perspective, given the pre-eminence of peer recognition over remuneration in the world of academic publishing, it will be important to consider the impact of mining discrete pieces out of larger works in the context of attribution and integrity rights, particularly if text may be subsequently used out of its original context.

'Gowers exceptions'

Following the Gowers Review of IP the IPO has made progress in identifying the terms of extensions to the scope of existing copyright exceptions. These include extending non-commercial fair dealing research to cover films and sound recordings and extending the rights of libraries to copy works for preservation purposes. When looking in more detail at the method for implementing these plans, it will be important to ensure that they do not diminish the value of existing licensing schemes, particularly in the context of educational access.

Finally, the report states that the law should be changed to ensure that copyright exceptions may not be overridden by contractual terms.

Collective Management Organisations

To promote greater uniformity in the way that they operate the report proposes that collective management organisations adopt codes of practice to be approved by the IPO/ competition authorities. Highlighting possible models for this the report refers to the draft code prepared for the BCC, on which ALCS has worked with colleagues from other UK collective management organisations. We are expecting a European Directive later this year which will also set out guiding principles in this area.

International Agenda

The report also looks beyond the UK framework, suggesting plans to lead the formation of IP policy internationally, these include:

- The promotion of cross-border EU-wide licensing based around the Digital Copyright Exchange model;
- A new mechanism in EU copyright law providing a 'built-in adaptability' to future technologies;
- The appointment of IP attachés for emerging economies, such as China and India.

Enforcement and Awareness of Rights

The report refers to various surveys into the impact of piracy but suggest that none of these are statistically robust, citing a number of differing outcomes. In attempting to analyse the impact of piracy on (i) economic growth and (ii) the incentive to create and produce new material, the report finds that the current available data is inconclusive. The collated materials point to a worst case scenario in which IP crime equated to around 0.1%-0.5% of overall economic activity; figures referred to in the report as “neither negligible nor overwhelming”.

The report also suggests that awareness and education initiatives are part of the solution but will not be sufficiently effective in isolation, foreseeing a combined approach involving enforcement, education and accessible licensing models. The report suggests that recording the effectiveness of enforcement and education schemes was at an ‘exploratory stage’, noting too few rights awareness campaigns focussed on capturing results and feedback. These elements have been built into ‘Copy Write!’, the project ALCS is running in conjunction with the National Schools Partnership to encourage students to think about what copyright means to them, the creative world, and the society they live in.

IPO Review

The report recommends an enhanced mandate for the IPO with new powers to investigate, report and make recommendations to lead the development of policy based on robust evidence and taking account of the impact of IP on innovation and growth. These new powers will be subject Parliamentary scrutiny. The IPO will also be given a new statutory function to publish ‘formal positions’ to clarify certain issues around copyright, notably in relation to the application of exceptions.

In terms of the creation of a robust evidence-base, we are working with the Economic Unit at the IPO on their project to value copyright works (and the process of producing them) across the various creative sectors, providing high-level data indicating the value of secondary copyright markets and the importance of the remuneration they generate for writers.

Next Steps

Many of the report’s recommendations provide only a generalised outline of the practical implications of implementation. Over the coming weeks and months meeting will be held with industry colleagues and Government officials to engage with the process of shaping the detail of the measures described in the report.