

Copyright and Contract Stakeholder Workshop 3rd March 2010:

Report of Proceedings

Introduction

Building on an event held by Bournemouth University, SABIP held a stakeholder workshop on the relationship between copyright and contract law on the 3rd March 2010, facilitated by Laurie Kaye (Laurence Kaye Solicitors). The workshop brought together interested parties from diverse fields (such as collecting societies, journalism, broadcasting, information technology, consumer groups, libraries, publishing, illustration and the music and film industries, as well as academics) in a neutral forum, in order for SABIP to gain a valuable insight into a wide spectrum of experiences and views on copyright.

The workshop began with a presentation of the findings of a new literature review on the topic produced by a consortium led by Bournemouth University. Interested parties were then divided into three groups focussing on the following areas:

- Fairness
- Copyright, Contract and Exceptions
- Contract as Enabler

A table detailing the issues and questions discussed is included at Annex 1.

This report of proceedings highlights the key points emerging from these discussions.

Fairness

- Delegates identified the need for all-round fairness:
 1. Fairness should be considered at the time of entering into a contract. It is when entering into a contract that issues of bargaining power may prove critical. From an investor's perspective, the contract needs to reflect the uncertainty and risk inherent in supporting new works.
 2. Some delegates thought that there should be space for reassessing the terms of a contract once the commercial value of the copyright material has been established. Others thought that this was a matter to be dealt with by the parties at the time of negotiating the contract.
 3. All parties should be ensured equal and fair access to the means of enforcing their contracts, including through the courts.
 4. There was recognition that different issues arise in the case of individually negotiated contracts and those which result from collective bargaining.

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- It was felt that there was a role for representative bodies in supporting fairness by setting out norms and providing advice on issues of copyright and contract. Some delegates proposed that there could be a body (statutory or otherwise) to oversee contractual behaviour and highlight best practice; however other delegates felt this could constitute excessive statutory intervention.
- Model contracts (or model clauses) could play a useful role in the benchmarking of copyright contracting, including addressing the lack of expertise in copyright contracts on both sides. However, it was considered that this could have implications for competition and market structure. Furthermore, model contracts may not be flexible enough to cater for different sectors, or the preferences of different artists.
- Consideration was given to whether moral rights should be entrenched in UK legislation and whether they could be made unwaivable. It was accepted that moral rights in the UK are frequently waived in comparison to other countries, such as France. Evidence on whether these rights are actually applied and enforced in those countries is needed before this option is explored. Furthermore, the moral rights protection afforded to an author of a published work of fiction may not be appropriate for everything that can be protected by copyright. Any comparative analysis should consider the range of works covered by moral rights legislation in the UK and other countries. Some delegates suggested that any comparative analysis should take account of the extent to which contracts provide authors with contractual means to protect them from any derogatory treatment of their works.
- Some delegates supported rights reversion as good “fair” practice – rights should revert to the author after a relatively short period of time (before copyright expired) so authors have the ability to relicense rights. This could be implemented voluntarily in industry working practices, or may warrant statutory intervention. The tabling of the Digital Economy Bill raised the concern among some stakeholders that clients might insist freelancers assign their rights to extended licensing, thereby forfeiting the option to opt out of any potential extended licensing schemes.
- Consumers are also able to express an objection to perceived unfairness in their behaviour. Participants observed, for example, that consumers circumvent TPMs when they are of the opinion that they have “bought the product” and should be able to use it as they wish. .

Copyright, Contract and Exceptions

- It was widely agreed that some contracts are used to override exceptions whereas others extend them. For example, within the music industry, some

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licences allow for “format-shifting” and private copying where the law does not.

- Inconsistencies in the treatment of exceptions were seen by many delegates as a source of complexity. There are high transaction costs involved in clearing large numbers of contracts from different parties with differing treatment of exceptions. This is compounded when negotiating contracts EU-wide, which effectively means trying to negotiate in 27 states, each with different treatment of exceptions.
- There was some discussion as to whether some exceptions should be treated as imperative, while contracts should be allowed to modify (as opposed to override) other exceptions. However, some delegates pointed out that treating some exceptions as imperative (e.g. those applying to libraries) would raise expectations from other groups, unless clear criteria could be established. This raised the question of whether exceptions could be categorised. Some (but not all) stakeholders were able to identify an “order” of exceptions in terms of whether they should be able to be modified: human rights could be placed at the top of a scale of exceptions, with more mechanical exceptions coming lower down the scale. Some delegates proposed that SABIP commission research into the case for placing copyright exceptions into different categories, and the practicability of this.
- Some participants suggested that SABIP and/or the IPO should collaborate with the European Commission on its study into the effects of contract, exceptions and TPMs on consumer access to digital content, focussing on how national differences impact on consumer choice. It was suggested that consumers may benefit from contracts which provide less access at reduced cost.
- Once again, model contracts and/or clauses were seen as a possible solution to these issues. Finally, it is important when considering these issues to distinguish between genuinely negotiated contracts and imposed contracts.

Contract as Enabler

- It was suggested that contracts can reduce complexity by providing precision and increased certainty where the copyright system is general, and possibly unclear. Sales contracts with end consumers are, however, problematic. For example, some participants cited an occasional lack of pre-contractual information in digital contracts on issues such as whether or not the user was paying for the right to stream content just once, or to “own” a copy in perpetuity. Once again, model contracts or model terms were highlighted as possibly being able to help to simplify copyright contracting. More generally, consumer complexity highlights the need to generate a common

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understanding of the contract at point of sale through shorter and clearer contracts for consumers – a “traffic light” system was suggested as a possible model.

- Technology and business models evolve faster than legislation. Some delegates noted that it might be appropriate to build into the system the capacity for some level of adjustment whilst new forms of delivery (such as on-line music platforms) were becoming established and “settling down”.
- There may be a role for Government in facilitating and enabling the development of solutions. One approach could be for a body such as SABIP to look into testing tools with the potential to improve the process of copyright contracting or increase its efficiency (such as machine-readable Digital Rights Management for online content). However, this raised the question of who would bear the costs of developing these solutions.
- Participants at the workshop observed that UK copyright law is routinely being flouted because it is seen as redundant. For this reason the UK should move towards encouraging a social contract in respect of copyright, by developing consumer understanding through a social policy approach. There is now an opportunity to raise consumer consciousness of the importance of intellectual property rights.

Conclusion/Summary

Contracts generate complexity, but can also reduce complexity and risk for parties:

- Contracts can clarify permitted uses where copyright law is unclear
- Contracts can extend rights where copyright is restrictive (e.g. with regard to format-shifting).
- Contracts enable publishers to invest in content when the risks are high and financial returns unclear.

On the other hand, contracts within copyright suffer from problems. These include issues around the following:

- Fairness issues exist throughout the contracting process – in negotiation, review and enforcement
- Contracts are sometimes used to override or limit exceptions
- Negotiating contracts around a variety of exceptions (especially in an international context) involves high transaction costs.

Potential solutions were also discussed:

- Model contracts/terms may provide one workable solution to address these issues.

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- Representative bodies can also play a part in setting norms and providing advice on issues of copyright and contract.
- Stakeholders have successfully worked together to find workable solutions – publishers and users worked together to provide access to audio books for the visually impaired.
- There may be a role for Government in facilitating and enabling the development of solutions, for example through testing tools such as Automated Content Access Protocol (ACAP). Policy intervention generates uncertainty for industry and should only be considered with care.

Finally, many delegates acknowledged that many digital end users would not adhere to terms and conditions. This does not obviate the need for contracts, which are still seen as a necessary safeguard in the marketplace; however it highlights the need for a social policy approach to develop consumer understanding and generate a social contract in respect of copyright.

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Annex 1

Topic	Issues	Questions
Fairness	<p>Issues related to bargaining:</p> <ul style="list-style-type: none"> - Collective bargaining and 1-to-1 bargaining - Contracts between creators and publishers/producers <p>Issues related to contract terms including moral rights waivers</p>	<p>Which of the creative sectors are most affected and how? Whether, why and how bargaining power issues should be dealt with differently in the creative sectors than elsewhere in the economy? What industry solutions, developments, ideas, experiments etc. exist to address these issues? Are solutions, ideas etc available and applicable to all industries? Is there a need for a unique approach to regulation of uneven bargaining power in the creative sectors? Is there a case for strengthening copyright law in relation to contract law as it applies to contracts within the creative industries? If so, what are the options and what are the pros and cons of these options? Taking existing policy initiatives and market solutions into account, are there any clear areas that have emerged that are in clear need of statutory intervention?</p>
Contract as enabler	<p>DRM (creative commons, permissions, tagging, etc) to enable author to assert rights</p> <p>Contracts as solutions to clearance issues</p> <p>Contracts to increase user freedom</p>	<p>In what circumstances can contracts allow greater consumer freedom of use of copyright content? What contractual or licensing practices exist to reduce complexities created by the copyright system? What barriers exist to the implementation of enabling contractual practices? Are solutions available or applicable to all sectors? What are the ways in which DRM (e.g. in the form for machine readable permissions) enable the transformation of rights clearances and management? What steps need to be taken to drive this transformation? What can the UK learn from other countries? Is there a role for policy-makers in facilitating the development of contracts as enablers?</p>

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Topic	Issues	Questions
<p>Copyright, contracts and exceptions</p>	<p>Issues related to copyright exceptions being overridden in contracts</p> <p>Issues related to TPMs and exceptions</p>	<p>To what extent do parties use contract law to vary copyright exceptions? Conversely, to what extent do contracts accommodate exceptions? Which of the creative sectors are most affected and how? What impact, if any, does this have in practice on specific user groups (educators)?</p> <p>What workarounds exist to avoid these issues? Which exceptions, if any, should trump contract law? What can the UK learn from other countries? Is there a case for strengthening copyright law in relation to contract law in respect of copyright exceptions? If so, what would be the options for strengthening copyright law in relation to contract law and what are the pros and cons of these options? What would the impact be on established principles of freedom of contract, and the ability to contract around rights, if copyright law was changed so that certain exceptions trump contract law? Taking existing policy initiatives and market solutions into account, are there any clear areas that have emerged that are in clear need of statutory intervention?</p>