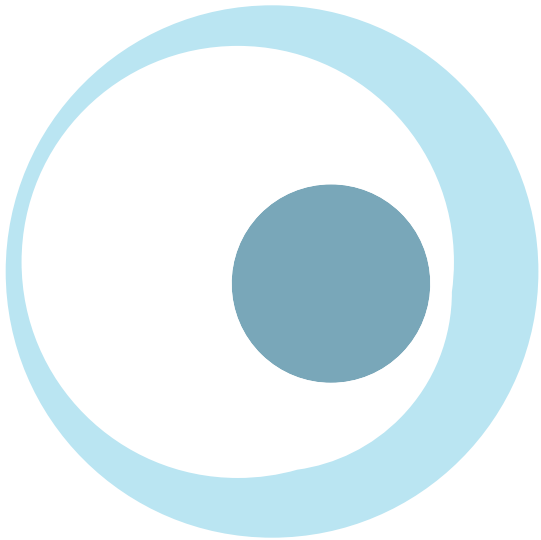


STRATEGIC
ADVISORY BOARD
FOR
INTELLECTUAL PROPERTY
POLICY

Strategic Priorities For Copyright



I. Introduction

In December 2008, David Lammy, Minister of State for Higher Education and Intellectual Property, launched a debate about the role of copyright in the digital age. He commented, "It is vital that we have a system that supports creativity, investment and jobs and which inspires the confidence of businesses and users". As part of that ministerial review the Intellectual Property Office launched a consultative process, including workshops and consumer events, to seek a range of views. They also published an issues paper to provide an initial focus for debate entitled © *The Future: Developing a Copyright Agenda for the 21st Century*¹.

The Strategic Advisory Board for Intellectual Property (SABIP) was established in June 2008 as a follow-up to the Gowers Review of Intellectual Property (IP). Its terms of reference require it to provide a strategic overview of IP policy as an independent input into government policy-making. To this end, the Minister has invited SABIP to provide complementary advice to the work of the Intellectual Property Office in this debate on copyright.

SABIP and the Intellectual Property Office will work together closely to ensure that the work being carried out is indeed complementary. Among other things, this will involve taking account of the issues identified through each other's work and in the interim² and final *Digital Britain Reports*.

1 <http://www.ipo.gov.uk/c-policy-consultation.pdf>

2 http://www.culture.gov.uk/images/publications/digital_britain_interimreportjan09.pdf

This paper marks the start of SABIP's contribution to this process³. The following areas have been identified as of strategic importance to the UK:

- 1) The role of the copyright system in fostering creativity and innovation;
- 2) Issues concerning the ownership and coverage of copyright;
- 3) Rights management techniques and technologies;
- 4) The relationship between copyright and contract law;
- 5) Possible simplification of the copyright framework;
- 6) The implications of changing attitudes and practices among consumers.

SABIP will consider research currently being undertaken in these fields. Its work programme will then seek to fill the research gaps, where feasible, focusing on issues of long-term strategic relevance that are likely to affect the future role and coverage of the copyright framework.

In each of these subject areas, SABIP plans to initiate the development of a programme of research and/or evidence gathering, supported by surveys of the existing literature and complemented by discussions with, among others, copyright creators, creative industry businesses, other practitioners, professional users and end users/consumers. This approach is designed to stimulate fresh thinking and to provide evidence-based advice to government in due course. It has been designed to take account of, but not be constrained by, the existing international obligations to which the UK subscribes.

³ SABIP has drawn on the advice of a newly created Copyright Expert Panel (CEP) but the views expressed are those of SABIP itself.

This paper is *not* a formal consultation document, but SABIP will welcome comments on the scope of its work programme. As an advisory body with a mandate to concentrate on longer-term strategic policy, SABIP poses here some fundamental questions about the copyright system and the principles upon which it is based. Its work programme will examine the strengths, potential flexibility, and possible shortcomings of the current system before making its policy recommendations. Its eventual advice will take into account the extent to which new business models and new forms of creativity could be successfully developed or expressed within the existing copyright system or whether more significant reforms of the framework might need to be considered.

SABIP looks forward to engaging with stakeholders and deepening the evidence base on these critical economic and social issues.

II. Background: The Copyright System

Put at its most simple, “Copyright is a legal term describing rights given to creators for their literary and artistic works. [...]”

[T]he kinds of works covered by copyright include: literary works such as novels, poems, plays, reference works, newspapers and computer programmes; databases; films, musical compositions and choreography; artistic works such as paintings, drawings, photographs and sculpture; architecture; and advertisements, maps and technical drawings”⁴. Sound recordings should also be added to this list⁵.

The concept of copyright goes back, in the UK, some 300 years. In essence it embraces two distinct aspects of the creator’s rights. The economic rights provide the means through which creators and producers may obtain an economic benefit for creating and distributing their work. The personal or “moral” rights in copyright protect the artistic integrity and “personality” of the creator. More specifically, the two most prominent justifications which have been advanced for granting such creators’ rights through copyright are:

- i. **Incentive/reward arguments.** In this view, the aim of copyright is to provide an incentive to create literary and artistic works, films, sound recordings and other materials, by enabling creators to seek their reward via the market. Such an incentive is considered necessary because many creative works are costly to produce, but easy to copy. In the absence of a mechanism stimulating production, it is held that the level of creative output would be less than socially desirable. In addition, copyright is held to offer incentives for intermediaries to disseminate the created work by making it available to users. Here, copyright is

4 <http://www.wipo.int/about-ip/en/copyright.html>

5 *Sound recordings are not included in the WIPO definition because, under the international treaties administered by WIPO, sound recordings are treated separately as the subject matter of “related rights” rather than copyright.*

the mechanism by which the creator's rights are made available to an individual or organisation with an interest in ensuring that the work is developed and exploited: in the absence of an exclusive right to exploit the created work, there could be insufficient incentive to invest in production and distribution.

- ii. Personality arguments/moral rights.** According to this view, the purpose of copyright is to give legal recognition to the close psychological connection between a work and its creator. No-one should be able to use the work without recognising and getting permission from its author/creator, nor should they be able to modify the work in any significant way without the creator's agreement. Most legal systems, including the British copyright system, give effect to these arguments through the recognition of the "inalienable moral rights" of authors and other creators.

There is a widely held view that the United Kingdom's copyright regime has historically been built on the "incentive" argument above. Indeed the first copyright statute, the so called "Statute of Anne" (1710), was entitled an "Act for the Encouragement of Learning". In contrast many continental regimes, such as those of France and Germany, are founded on the "moral right" argument above. However, each national copyright regime now recognises and reflects aspects of both types of approach.

While most countries have their own national copyright law, globally they operate within an international framework established by a number of copyright agreements. These include multilateral treaties such as the Berne and Rome Conventions, the WTO TRIPS Agreement and the WIPO Internet Treaties. Under these treaties, international co-operation has been developed using the principle of "national treatment" or, in some circumstances, "reciprocity". In effect, this means that UK copyright law will protect, for example, a US copyright work which is published or made available in the UK, provided

certain basic qualifying conditions have been met (including treaty membership). There are also a series of 7 EU directives harmonising member states' laws, notably the Information Society Directive (which was implemented into UK law in 2003). These international and regional instruments establish certain parameters and limits on the ability to make changes to national copyright laws.

Furthermore, modern web-based technologies have a global reach and are not bound by national frontiers. The management of rights on an international basis where, for example, permissions are needed to use music in a pan-European service is an emerging area requiring attention.

When a copyright work appears on a website, available for download without territorial restriction, the applicable law may be either that of the country where the server is located, or where the work is uploaded, or where the download takes place. The case for harmonisation and/or more mutual recognition across national laws seems to have become pressing. As the Minister said in announcing the Intellectual Property Office Review, "The future of content is global. The future of copyright must also be global."

The impact of the internet and digital technologies has been on national, regional and international copyright agendas for some time. For example, in Europe a process of legislative review and change started with a European Commission Green Paper published in 1988 entitled *Copyright and the Challenge of Technology*⁶. This observed that "a very small number of purchased original recordings could serve to generate many thousands of perfect "clone" copies". Since then, there have been a number of other legal developments, including those referred to above. They have, to a greater or lesser extent, addressed the impact of digital technologies.

6 http://ec.europa.eu/internal_market/copyright/docs/docs/com-88-172.en.pdf

III. Objectives for Policy

There are numerous stakeholders with an interest in the nature of copyright policy: creators and performers, publishers, broadcasters and other intermediaries and end users. We would also need to consider the wider public interest. Several bodies, including the Intellectual Property Office, WIPO and UNESCO, have offered their views as to the objectives of copyright policy, spanning as they do a mix of social and economic goals. These objectives may be summarised for various stakeholder groups as follows:

Creators

- Recognise and protect the work of creators.
- Provide, through financial and other benefits, incentives and rewards for creative and innovative work.

Intermediaries

- Encourage investment in the diffusion of new works and development of new business models.
- Prevent unauthorised copying and distribution.

Users

- Facilitate wide dissemination of creative works in order to enhance access to, and enjoyment of, culture, knowledge and entertainment.
- Deliver benefits to consumers through wider choice, higher quality, greater innovation and stronger supplier competition.

Public Interest

- Support investment and employment in the creative industries.

-
- Generate economic growth through innovation.
 - Contribute to the social, economic and cultural development of nations and understanding of their diversity.

Such multiple objectives are unlikely to be fully satisfied by any single policy or policy instrument. However, before outlining some of the key issues that this complexity raises, it is important to set copyright within the context of the digital revolution.

IV. A paradigm shift?

As the interim *Digital Britain* report makes clear, there is now compelling evidence that we are experiencing a paradigm shift in the way in which we create, consume, diffuse, adapt and share information, creative works, knowledge and entertainment. This has developed in several ways:

- First, the digital revolution has made widely available the ability to create, copy and distribute high quality digital content – including professionally produced material – often at markedly lower cost.
- Secondly, it has led to the involvement of the individual consumer at each step of the process, including acting as copier and distributor of materials to the public on a wide scale, not just as end user as in the past.
- Thirdly, the ease with which unlicensed copying and distribution can now take place means there may be greater difficulty on the part of rights holders in securing appropriate revenue from their work.

These developments have placed a spotlight on the copyright system and its place in our future social and economic development. They challenge past approaches and prompt calls for an examination of the way copyright is regulated and managed, together with the policies, legal instruments, technologies, institutions and behaviours that govern or influence it.

This is not solely a theoretical issue. Rather, it seems to lie at the heart of creative activity and the industries that support it and diffuse its output. Will copyright, either in its present form or with adaptations, allow the development of business models that will be effective and sustainable in the new global, digital environment? However the copyright system develops, it will

necessarily need to command confidence as being fair to all stakeholder interests.

The provisional conclusion in the interim *Digital Britain* report is that the overall aim of policy in this rapidly changing digital world should be a copyright framework that:

- Is both effective and enforceable, nationally and across borders;
- Allows for innovation in platforms, devices and applications that make use of content;
- Responds to consumers' desires to access content in the time and manner they wish, at a price they are willing to pay, and to use it as they wish.

In considering the future of the copyright framework itself, a central question is therefore:

Does the paradigm shift towards a digital economy necessitate an equally fundamental adaptation of the copyright framework or its component parts? Alternatively, can innovation within the existing framework bring about effective adaptation in a more incremental way?

V. Issues

In order to offer an informed contribution to the current debate on copyright, SABIP has identified a series of issues which it plans to examine in some depth. These are as follows:

1. **The role of copyright in stimulating creativity and innovation**

As already noted, a central purpose of copyright is the stimulation of creative activity. Whether the copyright system has contributed significantly to the achievement of an adequate level of creative activity and output of the “right” sort, and has rewarded such activity appropriately, is always a matter of debate. The contribution of copyright to the innovative process - the diffusion of creative work – is a further issue to be examined. In this latter connection, innovation is often a vital contributor to productivity and economic growth.

It is desirable for the copyright framework to support and not obstruct innovation in the creative industries more widely, and to enable consumers to reap the benefits of technological innovation. At the same time, technological innovation does not exist in a vacuum and should function in the context of societal policy goals. However, in recent years the situation has changed significantly due to the adoption of new technologies for the production, dissemination and use of created works. Long-standing business models have become somewhat less applicable. New activity (creation, copying, diffusion) is occurring on both a commercial and non-commercial basis. The division between consumers and producers is increasingly being blurred through digital co-creation. The impact of these developments on the need for, and role of, copyright, and the protection it offers to different types of creativity will need to be considered.

SABIP will investigate how different types of copyright law⁷ enhance or reduce creative output. Does the system assist creators in earning appropriate rewards, notwithstanding the apparently widespread illegal and unpaid-for dissemination of products? SABIP will analyse differences in returns to stakeholders within national copyright frameworks of varying approaches and will further explore the implications of technologies of mass copying and distribution on these returns. Is the existing system equipped to respond appropriately to the effects of the new technologies?

⁷ *For example emphasis on legal as opposed to moral rights; registration as opposed to non-registration; strength and costs of enforcement.*

2. **Ownership and coverage of copyright**

Copyright is currently used in several ways. It helps to provide financial incentives for creative work and to establish the “moral rights” of the creator in that output. It is also the basis on which businesses undertake to invest in the mass-production and dissemination of these creative works, so contributing to their diffusion for a wider public and social benefit. Without the assurance that a business producing a particular work is protected from the direct competition of another business producer of the same work, it is argued that the risks involved in investing in production and distribution of the material in question would not be incurred and so the output would be lost.

While subject to international variation, the definition of works which attract copyright is very wide and includes much material which is not of commercial value, and arguably may not require copyright protection. Might there then be advantage in reworking the coverage of copyright to separate the moral rights of creators of all types of material from the economic/commercial rights and to limit the latter only to those outputs that do have an economic value? What are the potential benefits and disadvantages of taking such a step? How might such an approach, if agreed to be desirable, be implemented?

SABIP will undertake research into alternative approaches to copyright coverage which distinguish between economic and moral rights and their potential advantages and disadvantages. SABIP may, for example, conduct comparative studies of copyright legislation in other countries where the respective emphasis on moral and economic rights differs from that in the UK. Notwithstanding the difficulties of effecting change within the context of the relevant internationally binding treaties and agreements, SABIP will also consider the likely economic and social impact of potential changes in the law.

3. **Rights management techniques and technologies**

Rights management addresses the way in which a copyright owner uses the copyright system. For those seeking an economic return from their creativity, effective management of their copyright is particularly important. Even where creators do not seek financial reward, rights management is still required to establish the way in which their work may be shared and used.

Rights may be managed on a bilateral basis, e.g. where an author contracts with a publisher for the production of the created material in book form; a recording artist enters into a contract with a recording company; or a TV broadcaster signs up users to a paid-for subscription service.

In other cases, rights management may be organised on a multilateral or collective basis, where an intermediary organisation exploits rights on behalf of the copyright owners. Thus, in the publishing industry the Copyright Licensing Agency and the Authors' Licensing and Collecting Society grant licences to others to copy (including by scanning) copyright material belonging to authors and publishers. For example, in the music industry, the Mechanical Copyright Protection Society (MCPS) and the Performing Right Society (PRS) administer the rights to royalties of composers, writers and publishers.

As cultural objects/products increasingly take digital form, the tools for managing the copyright in those objects change dramatically. In the physical world, the business of licensing content could be managed effectively by the communication of documents between people and, in cases of compliance failure, through the courts. In the digital world, the tools for management of content have changed in their technological nature. The question remains as to whether these tools will remain effective in the context of changing technologies for creation and diffusion.

To realise fully the potential of web-enabled content as a financial, creative and educational resource, standards and technologies are being adopted so that machine-readable information – metadata – about ownership, permissions and, if relevant, payment terms, can be associated with the content. These technical tools and metadata have to be capable of working across different technical platforms and devices.

Tools such as 'Creative Commons'⁸ and 'ACAP'⁹ are essentially ways that information about the use of works can be expressed in ways that machines – search engines, browsers, websites, etc. - can read and (where appropriate) be displayed to users. For example, Creative Commons can be used to change copyright terms from "All Rights Reserved" to "Some Rights Reserved".

Such Digital Rights Management (DRM) tools are available to implement the varying terms and conditions on which copyright content is made available to users. Through DRM, a wider range of options can be offered, including different levels and durations of use at different prices. DRM tools may help streamline the procedures for agreeing on terms, licensing, billing, and royalty payments. These should be distinguished from the use of Technical Protection Measures (TPMs) which are designed, e.g. through encryption, to enforce those permissions. TPMs are used to limit access to and/or copying of works. Whether or not digital content is subject to TPMs is a matter of choice for the content owner. However there has been some concern that they may prevent users from benefitting from the exceptions given to them under copyright law. One question is whether the approach adopted by the EU in its Information Society Directive and implemented into UK law has resolved this issue satisfactorily.

⁸ *Creative Commons is a non-profit organisation which provides free licences and other legal tools that enable creators to mark their works with the degree of copyright protection they desire.* <http://creativecommons.org>

⁹ *Automated Content Access Protocol.* <http://the-acap.org>

SABIP will review the effects on the various parties (creators, publishers and other providers, professional and other users) of the adoption of Digital Rights Management (DRM) Tools. In doing this, SABIP will explore sectoral differences and the effect of external deterrents or any barriers on take-up. SABIP will seek to identify the patterns of use of DRM tools, their individual benefits and weaknesses and their overall implications for various stakeholders.

4. **The relation between copyright and contract.**

Permissions to use copyright materials are granted in various forms of contract and licence, which are therefore essential to bringing copyright works into use and enhancing their general availability.

As a general rule, the creator of the work owns the copyright in it. This also applies to commissioned work, unless the contract makes alternative provision. However, in the UK if a work is created in the course of an employment, unless there is provision to the contrary, the employer is the owner of the copyright. In many instances the development and diffusion of the created work is dependent upon the creator assigning or licensing the economic rights to an "agent", such as a publisher or producer, or to one or more users. As described earlier, this may be on a bilateral or multilateral basis or through a collective arrangement.

Where a created work is assigned or licensed, this is by way of a contract, which may not contain the same provisions and protections as would apply under copyright law. In some cases, a contract will permit more than copyright does on its own. In others, additional constraints may be imposed. This raises questions as to the balance of bargaining power, including concerns that creators may lose out in the negotiation over contract terms. Some other European countries seem to offer stronger protection of the creator's economic interest and moral rights than holds in the UK. This raises the question of whether it would be appropriate to reinforce the bargaining position of an individual creator by an extension of Unfair Contract Terms legislation.

The growth of digital technologies and the internet have also encouraged increasing use of standard form contracts. Here, the concern is that such contracts may remove some of the existing user freedoms, such as the copying of material for the purpose of criticism, research or private study. These are granted as exceptions under copyright law. Some other European countries do not allow the removal of these freedoms by private contract. The various forms of technology used for DRM and TPM, as noted in the previous section, may constitute further similar constraints on the user's ability to benefit from the exceptions under copyright law.

SABIP will examine the relative effects of copyright law, contract law and DRM/TPM technologies on incentives, distribution of financial rewards and the protection of user freedoms. Do standard form contracts limit or hinder user freedoms in particular creative sectors? SABIP's research programme may also explore evidence around claims that creators lose out in the negotiation over contract terms. SABIP will compare how legal models used elsewhere offer protection to creators' economic interests and moral rights. In the light of this analysis it will consider whether there is a case for amendment to the balance of UK copyright law in its relation with contract law and how such a change could be implemented.

5. **Simplification of the copyright framework**

When enacted, the Copyright Design and Patents Act 1988 contained over 300 sections and 8 schedules. Of these, the provisions concerning copyright amounted to 179 sections. Since then many additional provisions have been added, primarily by statutory instruments.

The fact that copyright law covers many different types of creative output suggests that it may need some tailoring to meet the needs of the various sectors to which it applies. Moreover, detailed rules may provide more specificity than generalised standards. Such specificity can be helpful to both copyright holders and users.

Nonetheless, the complexity of current UK copyright law appears to have a number of drawbacks. Some of the complexity arises from the retention of narrowly defined provisions that have subsequently become virtually meaningless. Some of the boundaries of copyright exceptions are now unclear, and their operation can cause confusion (including the impact of contractual overrides discussed earlier).

Such complexity may mean that the law is not easily accessible to either creators or users and can make its application and enforcement appear to be the preserve of specialist lawyers. If it is hard to explain user rights to the public in straightforward terms, then it is likely to be harder to secure their willing compliance. Complexity will also tend to raise the costs of effective enforcement at any given level of general compliance. It goes without saying that any effective copyright system must encourage willing compliance, and thus be enforceable and cost-effective for rights holders of all kinds to use its provisions.

The question is whether there is a case for copyright law to be consolidated in one place. Further rationalisation and simplification of the structure of copyright and copyright law could well be desirable, whether or not accompanied by some of the other structural changes which might be recommended as a result of the work programme set out in this paper.

SABIP will investigate the perceived and/or actual drawbacks of current copyright law in terms of its complexity. For example, which provisions are narrowly defined and therefore not relevant or comprehensible or which boundaries of exceptions are unclear or confusing? What impact does this complexity have on willing compliance by users?

SABIP will consider what, if any, specific steps would beneficially simplify the law and rationalise the provisions of the 1988 Act regarding copyright, in order that it be widely accessible and comprehensible, as well as being appropriately enforceable by those whose legitimate interests are undermined by breaches of copyright.

6. Attitudes & Behaviours in the Digital Economy: Implications for IP

Since a system of enforcement is unlikely to be successful unless it is applying rules that are understood and accepted by most people, SABIP has already commissioned a study to build its understanding of attitudinal and behavioural characteristics connected with the increasing use of the Internet and related technologies and services by key consumer groups. It aims to assess whether these characteristics have significance for medium and long-term copyright policy and regulation. This study will involve the gathering of evidence on how well the principles behind a copyright framework are understood by users/consumers.

This may help to clarify whether there is a need for better education to make copyright law more transparent and so a more generally accepted part of business and consumer life. SABIP believes it is important to recognise that, as with any system of rules, an effective copyright framework needs to be understood and seen in a positive light by all those affected by it. An emphasis on rights and responsibilities, rather than on prohibitions, may help develop understanding and hence reduce the apparent level of frustration with the current system.

SABIP will: continue to explore the relationship between the general understanding of the copyright framework and compliance with the copyright framework; the extent to which this framework is felt to be “fair”; effective means of education as to copyright rights and responsibilities; and the effectiveness of current or prospective enforcement techniques. For example, SABIP will investigate whether new types of content producer are aware of the copyright protections available to them, and whether they are able to deploy the system effectively.

The first phase of this project, a literature review, is due to be completed in April 2009. The findings of the review will be presented at a stakeholder workshop that will contribute to the development of a large-scale consumer survey into attitudes and behaviours in the digital economy and their implications for Intellectual Property.

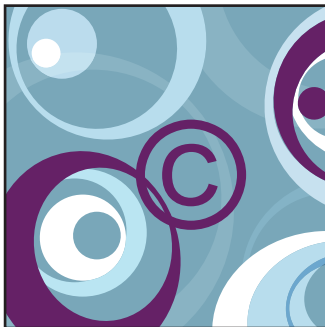
VI. Next Steps

The series of projects outlined above on the copyright framework comprise an ambitious but manageable portfolio of work for SABIP for the period ahead. SABIP envisages delivering its first evidence-based policy recommendations from this work programme within the next 12 months. A number of other potential topics have been excluded at this stage, either because appropriate work is in hand elsewhere in SABIP's work programme or beyond, or because the Board felt that the issue in question did not belong to the longer term strategic matters on which SABIP is required to focus. For instance, SABIP is exploring a number of issues related to IP enforcement in a parallel work programme entitled 'Current Social, Economic and Business Issues in the Enforcement of the UK's Intellectual Property System.'

Although this is not a consultation paper, SABIP would welcome comments from all interested parties on the scope of the work programme set out above, including views on apparent omissions. The Board and its Expert Panel will be developing plans for undertaking this work programme over the coming months. This process is intended to include both face-to-face discussions and opportunities for written presentations on each of the specific areas outlined in this paper. Any comments should be sent to info@sabip.org.uk most usefully by the end of May 2009.

March 2009





Strategic Advisory Board for Intellectual Property (SABIP)
Room 1.3 Harmsworth House
13-15 Bouverie Street
London EC4Y 8DP
T: 020 7596 6535
W: www.sabip.org.uk

When you no longer need this booklet, please recycle it.

Revised: Mar 09