

## **Action on Authors' Rights**

### **Submission to the Independent Review of Intellectual Property and Growth**

*Action on Authors' Rights is a network of authors and agents campaigning from the grass-roots in support of authors' rights*

The internet is a flexible, cost-effective, international, very widely accessible instant publishing medium. No-formality copyright and related rights, established on the principles laid down in the Berne Convention,<sup>1</sup> provide a flexible, cost-effective, virtually universal, instantly available, well-established and reasonably well understood basis for securing to creators their ownership in their works, on and off the internet. We believe that the existing copyright framework remains fit for purpose in the digital age.

We have observed that the Terms of Reference of the Review and the Call for Evidence that it has issued are riddled with assumptions that tend to a contrary view. These assumptions are unsupported and untested and we believe that they are dangerously mistaken.

Publishing in the UK is the largest media sector, and the biggest creative industry. ... The value of UK book exports is higher than the export turnover of any other creative industry – Publishers Association (PA), 'Publishing Touches Everyone', 2009<sup>2</sup>

Without the original creative work of authors, publishers and booksellers would have nothing to sell. It is authors who produce the value on which the entire publishing industry depends. If the industry is to grow, as it has done, can, and should, it is essential that the IP framework should continue to protect the rights that sustain the work of freelance authors and illustrators.

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<sup>1</sup> Berne Convention for the Protection of Literary and Artistic Works  
[[http://www.wipo.int/treaties/en/ip/berne/trtdocs\\_wo001.html](http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html)]

<sup>2</sup> Publishers Association, 'Publishing Touches Everyone', 2009  
[[http://www.publishers.org.uk/index.php?option=com\\_docman&task=doc\\_download&gid=198&Itemid=](http://www.publishers.org.uk/index.php?option=com_docman&task=doc_download&gid=198&Itemid=)]

## Copyright

### 1. 'Fair use'

'Fair use' has been mentioned repeatedly in connection with this Review.<sup>3</sup> UK copyright law recognises certain permitted acts as 'fair dealing'. This approach has the important merits of being specific, clear and workable. A well-recognised problem with the US 'fair use' law is that there are huge areas of uncertainty over the rules, and apparently no guarantee in any particular case that the use of a copyright work will be upheld as fair by the courts.<sup>4</sup> This strikes us as grossly unfair on copyright users and copyright holders alike. We note that there are many more copyright lawsuits in the US than in the UK.<sup>5</sup> We suspect that such a system favours those with deep pockets and expensive lawyers. We believe it would be highly detrimental to justice and the creative economy to replace the clarity of the UK law on 'fair dealing' with the uncertainty inherent in the US model of 'fair use'.

### 2. Copyright registration

We applaud the creation of the WATCH (Writers and their Copyright Holders) Project run by the Universities of Reading and Texas.<sup>6</sup> This voluntary database of copyright owners, their literary agents and executors seems likely to prove extremely useful to copyright users and holders alike. We hope that it will continue to be properly resourced.

We do not believe that ownership of copyright and/or full access to legal remedies for infringement should be made dependent on any kind of registration or other formality.

In recent years there have sometimes been recommendations for the introduction of compulsory copyright registration.<sup>7</sup> In an age when, thanks to modern technology, a large section of the population publishes material online on a regular basis, sometimes even several times a day, it would seem odd to make a strict issue of an inflexible system originally devised for the age of print, at a time when commercial publishing was restricted to a select group of London businessmen (the Stationers Company).

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<sup>3</sup> David Cameron, 'East End tech city speech', *Number10.gov.uk: the official site of the Prime Minister's Office*, 4 November 2010 [<http://www.number10.gov.uk/news/speeches-and-transcripts/2010/11/east-end-tech-city-speech-56602>]; Terms of reference: Review of Intellectual Property and Growth

[<http://www.ipso.gov.uk/ipreview/ipreview-terms.htm>]; 'Review of Intellectual Property and Growth: Call for Evidence' [<http://www.ipso.gov.uk/ipreview/ipreview-c4e/ipreview-c4e-copyright.htm>]

<sup>4</sup> Stanford University Libraries, *Copyright and Fair Use*, 'Disagreements Over Fair Use: When Are You Likely to Get Sued?' [[http://fairuse.stanford.edu/Copyright\\_and\\_Fair\\_Use\\_Overview/chapter9/9-d.html](http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/chapter9/9-d.html)]

<sup>5</sup> Henry Lydiate, 'Using other artists work: Appropriation Art and Fair Uses', *Artlaw* (2009) [<http://www.artquest.org.uk/artlaw/copyright/using-other-artists-work/appropriation-art-and-fair-uses.htm>]

<sup>6</sup> WATCH Project, University of Reading [<http://www.reading.ac.uk/library/about-us/projects/lib-watch.aspx>]

<sup>7</sup> See for instance 'Comité des Sages', *The New Renaissance*, 10 January 2011

[[http://ec.europa.eu/information\\_society/activities/digital\\_libraries/doc/refgroup/final\\_report\\_cds.pdf](http://ec.europa.eu/information_society/activities/digital_libraries/doc/refgroup/final_report_cds.pdf)]

On a practical note, it is known that the US Copyright Office has a massive processing backlog. Reportedly it is now 22 months to register using the hard copy procedure and 6 months to register online.<sup>8</sup>

### **3. Moral rights**

A survey conducted by the Strategic Advisory Board on Intellectual Property Policy (SABIP) and reported in © *the way ahead* found that many authors called for the strengthening of moral rights and their alignment with the European model.

In discussions with stakeholders, many less high profile authors were concerned about the issue of moral rights. In particular, that these moral rights can be waived and that the right of attribution requires assertion. This was deemed to indicate that the moral rights system in the UK needed strengthening and was fundamentally misaligned with moral rights in continental Europe.<sup>9</sup>

We hope that the Review will take note of this demand, and we would like to add our own voices to it.

On one particular point: there has been much agitation in recent years about so-called 'orphan' works (less emotively, works with unlocated copyright-owners). A non-waivable right for creators to be identified as the authors of their works would be of obvious use in making it much less likely in future that works will lose, or be stripped, of that important identifying connection. As such it would be of great value to copyright users and copyright owners.

As regard the right to object to derogatory treatment: © *the way ahead* noted that 'Moral rights can have economic significance, for instance, by protecting reputation'.<sup>10</sup> Reputation is of immense economic importance to all individuals and all businesses. It is observable that in the age of the internet reputation is rather easily tarnished, and repaired (if at all) only with difficulty. The right to object to derogatory treatment of a work is an important protection against damage to an author's reputation.

So is an author's fundamental right to control who uses his or her work, in what context, and for what purpose.

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<sup>8</sup> Michael Weinberg et al, 'A Copyright Office for the 21st Century' (Public Knowledge), 3 December 2010 [<http://www.publicknowledge.org/copyright-office-21st-century>]

<sup>9</sup> © *the way ahead: A Copyright Strategy for the Digital Age* (Intellectual Property Office), 2009, p. 27; see also p. 20 [<http://www.ipso.gov.uk/c-strategy-digitalage.pdf>]

<sup>10</sup> *ibid*, p. 16, fn27

#### **4. Reversion of rights**

In the trade sector of publishing, it is usual for authors to retain copyright in their works and license specific rights to publishers. Standard contracts contain provisions for rights to revert to the author when a work goes out of print. They are then available for relicensing by the author. For many authors, reprint editions under new licenses are an important contribution to their income.

Out of print clauses in older contracts generally specify that the rights revert if the sales fall below a certain level and the publisher declines or neglects to put in hand a reprint. Sometimes this is automatic, but sometimes reversion must be triggered by a request from the author or confirmation from the publisher. Some authors are prompt in reverting works, but some wait until they receive an inquiry from another publisher about a possible reprint. This may be years after the work went out of print. By that time the original publisher may have gone out of business. In some cases there is now no possibility of completing the formalities required by the original contract. In others, the remaining rights may have been purchased by another publisher as part of the assets. They may even have been sold on to yet another publisher. These things are not always easy to ascertain, though the FOB (Firms Out of Business) database (companion to the WATCH database mentioned above) may prove helpful in certain cases.<sup>11</sup>

Such situations have the potential to create a kind of partly 'orphaned' work. In practice, it is not unknown for authors to proceed as though the work had been formally reverted, as it should have been. However, it would better secure the rights of authors and protect the continued value in such works (and facilitate making them available to the public) if legislation were passed in support of the assumption that where rights should have reverted to the author, they may be deemed to have done so.

There is also the related problem that many UK publishers have become notorious for neglecting to answer reversion requests from authors. Nowadays many agents are ensuring that contracts contain a clause that provides for an automatic reversion if sales fall below an agreed level.

This, however, does not solve the problem of works licensed under older contracts that expressly require a confirmation of reversion from the publisher. There have been cases where authors, desperate to revert their books, and unable to obtain confirmation from the

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<sup>11</sup> FOB (Firms Out of Business), University of Reading and Harry Ransom Center, University of Texas at Austin [<http://tyler.hrc.utexas.edu/fob.cfm>]

publisher, have notified them that unless they respond within a reasonable time limit, they will regard their rights as reverted and proceed accordingly. However, it is our information that this is not legally watertight. Again, what seems to be required is legislation that provides for rights to revert to the author where they should have done under the contract but where the author has been obstructed in his or her attempt to complete the required formalities.

We note that there was a similar situation some years ago where publishers were neglecting to answer requests from the Royal National Institute of Blind People (RNIB) for Braille rights. As a result, the visually impaired successfully lobbied for an addition to the list of permitted acts, allowing them to have braille copies made of works in their legitimate ownership that would otherwise be inaccessible to them.

## **5. 'Orphan' works**

Freelance authors view with deep concern any proposals that would weaken the copyright protection of out-of-print works.

It is not always well understood by the public at large that the rights to an author's out-of-print backlist are a valued asset. Their value is uncertain (few things in an author's life are certain) but may prove to be considerable. Winning an award; obtaining a TV or movie deal; bringing out a new book in a series; writing in a genre that comes into vogue, or on a theme that becomes topical; all these things and more can provide opportunities for relicensing an author's out-of-print backlist. Payments for permissions – for anthology use, for example, or the publication or broadcasting of extracts – can be a useful source of income. Some authors are also selling remaindered copies of their books or self-published digital or print-on-demand editions of their reverted works over the web.

Books and other print publications are among the less likely creative products to become 'orphaned'. Virtually all published written works carry the names of author and publisher and the publisher's address. Meanwhile, since the development of the web, it has never been easier to trace authors, authors' representatives, publishers, and, where relevant, business takeovers.

No evidence has been produced that publishers seeking to reprint, editors seeking to anthologise, or authors wishing to make adaptations experience significant difficulties in tracing rights-owners of out-of-print written works, and there is plenty of anecdotal evidence to the contrary. Moreover, the Authors' Licensing and Collecting Society (ALCS) reports a

very high degree of success in identifying and contacting authors of out-of-print works for the purpose of paying fees for photocopy revenues.<sup>12</sup>

We believe that any 'orphan works' legislation should incorporate at least the following safeguards of the legitimate interests of authors and other creators:

- stringent diligent search requirements, of a kind generally likely to be effective in tracing the copyright holder(s)
- licensing through a recognised collecting society, specializing in rights of the relevant kind of artistic expression, and run by creators for creators
- strengthened moral rights (see section 3 above)
- provision for sums to be held for the copyright owner
- a stipulation that if the missing rights-holder(s) turn up, the work should be removed from the 'orphan works' register.
- provision for terminating or varying a licence at the request of the rights holder, should they turn up

Certain kinds of exploitation may injure the value of a work and/or damage the author's reputation. Authors should not find themselves bound without their consent into a contract that has, or may have, this effect.

We are not sure what duty of care collecting societies may have in law to persons who are not their members. If they are going to license works by persons who are not members of their organisation, it may need to be explicitly laid down that they owe a duty of care to those persons, and not solely to their existing membership.

## **6. Permissions**

The Call for Evidence asks, 'What evidence is there that the necessity / complexity / cost of obtaining permissions from existing rights holders constrains economic growth?'

We are confident that maintaining our control over the licensing and use of our works is indispensable to the economic growth and health of our own individual businesses and the industries that depend on our creative products.

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<sup>12</sup> Declaration of Owen Atkinson, CEO of ALCS, attached to the Plaintiffs' Memorandum in Support of Motion for Final Approval in *The Authors Guild et al, v. Google Inc*, 11 February 2010, pp. 3–4 [[http://thepublicindex.org/docs/amended\\_settlement/owen\\_atkinson\\_declaration.pdf](http://thepublicindex.org/docs/amended_settlement/owen_atkinson_declaration.pdf)]; see also evidence to the Gowers Review, p. 37 [[http://www.hm-treasury.gov.uk/d/authors\\_licensing\\_and\\_collecting\\_society\\_limited\\_385\\_341kb.pdf](http://www.hm-treasury.gov.uk/d/authors_licensing_and_collecting_society_limited_385_341kb.pdf)]

The framing of this question raises the spectre of compulsory collective licensing. A provision that would have enabled the introduction of 'extended collective licensing' was struck from the Digital Economy Bill on the insistence of the parties that have since formed the coalition government.<sup>13</sup>

Extended licensing was intended to be applied to works whose copyright-owners are traceable, as well as to 'orphan' works. It would have given the Secretary of State powers to authorise a licensing body to license works for use even in cases where the author was not a member of that body and had not delegated any authority to it to act as his or her agent.

There were indications that one of the intentions behind the extended licensing provisions as drafted was to circumvent the 'diligent search' requirement in the case of 'orphan' works.<sup>14</sup> This is entirely unacceptable.

Extended collective licensing should not be used as an excuse to reduce the obligation on users to trace right holders, [or] to seek permission from the right holders concerned – British Copyright Council, response to 'Creative Content in the European Digital Single Market', December 2009<sup>15</sup>

One of the principal lobbyists for extended licensing has been the BBC. An extended licensing scheme would assist it in putting its archives of programmes online without its having to track down each individual rights-owner. However, industry representatives consider that there are no grounds for believing that orphan works are a problem in the area of TV drama, comedy and feature films, and that extended licensing would compromise the legitimate interests of authors and other creators in negotiating a fair system of payments.

Under collective licensing, fees are paid at a flat rate and terms of use are identical in every case; yet not all rights are of equal value, even where they pertain to works of a similar kind. It is essential that creators are rewarded in a way that takes into account the demand for their work. Moreover, authors and other creators working in television depend on income from

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<sup>13</sup> Charles Arthur, 'Digital economy bill rushed through wash-up in late night session', *Guardian*, 8 April 2010 [<http://www.guardian.co.uk/technology/2010/apr/08/digital-economy-bill-passes-third-reading>]; *The Register*, Andrew Orłowski, 'Mandybill set to survive: Photographers rejoice, pirates mourn', 7 April 2010 [[http://www.theregister.co.uk/2010/04/07/mandybill\\_washup/](http://www.theregister.co.uk/2010/04/07/mandybill_washup/)]; Chris Cheesman, 'Digital Economy Bill: Photographers claim victory as Clause 43 axed', *Amateur Photographer*, 8 April 2010 [[http://www.amateurphotographer.co.uk/news/Digital\\_Economy\\_Bill\\_Phottographers\\_claim\\_victory\\_as\\_Clause\\_43\\_axed\\_update\\_2\\_news\\_296713.html](http://www.amateurphotographer.co.uk/news/Digital_Economy_Bill_Phottographers_claim_victory_as_Clause_43_axed_update_2_news_296713.html)]

<sup>14</sup> Copyright Action: 'IPO meeting stalemate', posted 26/02/10 [<http://copyrightaction.com/ipo-meeting-stalemate>]

<sup>15</sup> British Copyright Council, 'Creative Content in a European Digital Single Market: Challenges for the Future – Response', p. 2 [[http://www.britishcopyright.org/pdfs/policy/2010\\_004.pdf](http://www.britishcopyright.org/pdfs/policy/2010_004.pdf)]

repeats and other commercial uses. If this revenue stream is undermined, creative talent will no longer be able to afford to work in the UK.

There is a danger ... that without thorough study of potential new business models the demands of public access as regards, for example, the BBC's archive, will trample too heavily on either artistic integrity or the rights of creators to be rewarded for their work and their consequent ability to produce new work. – Personal Managers Association (PMA), evidence to the Gowers Review<sup>16</sup>

Under extended licensing, authors would be co-opted into schemes without their explicit consent, and in many cases without their knowledge. Any system under which publishing rights were licensed over the heads of the authors would conflict with the moral rights legislation in the Copyright, Designs and Patents Bill 1988: in particular, with the right of authors to object to distortion, mutilation or other derogatory treatment of their work.

When the proposal came under fire last year, the government gave assurances to the press that opting out would be a simple process.<sup>17</sup> Nonetheless, it remains the case that extended licensing removes from licensees (typically, well-resourced publishers or media companies) the burden of finding and negotiating with the author, and instead places on authors the burden of finding out that schemes exist and opting out of them (or claiming their share of revenue). This is, let's be clear, a major point of the plan to introduce extended licensing: transferring the transaction costs from the licensee to the creator.

The right holder to whom it is crucial that her works are not exploited under an E[xtended] C[ollective] L[icensing scheme] has to establish mechanisms for monitoring the market and bear the costs associated with such efforts of monitoring – Thomas Riis and Jens Schovsbo, 'Extended Collective Licenses and the Nordic Experience'<sup>18</sup>

Collective copyright licensing was originally developed for use in special cases. Typically, these are cases involving secondary uses, as in the photocopying of already published material, or the broadcasting of recorded music. In such cases, collective licensing may suit

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<sup>16</sup> PMA, evidence to the Gowers Review, [p. 4]

[[http://www.hm-treasury.gov.uk/d/personal\\_managers\\_association\\_352\\_55kb.pdf](http://www.hm-treasury.gov.uk/d/personal_managers_association_352_55kb.pdf)]

<sup>17</sup> Benedicte Page, 'Easy to opt out of collective licensing says government', *The Bookseller*, 23 March, 2010 [<http://www.thebookseller.com/news/114922-digital-economy-bill-government-says-opting-out-of-collective-licensing.html>]

<sup>18</sup> Thomas Riis and Jens Schovsbo, 'Extended Collective Licenses and the Nordic Experience - It's a Hybrid but is It a Volvo or a Lemon?', *Columbia Journal of Law and the Arts*, Vol. 33, Issue IV, p. 12 [[http://papers.ssrn.com/sol3/Delivery.cfm/SSRN\\_ID1537788\\_code110134.pdf?abstractid=1535230&mirid=1](http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID1537788_code110134.pdf?abstractid=1535230&mirid=1)]

the convenience of rights-owners and licensees, who are relieved from the burden of individually negotiating numerous small payments with multiple parties.

Extended collective licensing, in which licensing bodies are empowered by legislation to license works whose rights belong to persons whom they do not represent, developed in the Nordic countries, where it has mainly been applied in much the same cases as voluntary collective licensing elsewhere: chiefly reprographics and broadcasting.

The broader cultural background may ... be said to be small homogenous societies built on a high degree of trust and transparency. – Thomas Riis and Jens Schovsbo, 'Extended Collective Licenses and the Nordic Experience' (January 2010)<sup>19</sup>

The system [of extended collective licensing] is best suited for countries where rights holders are well organized. – World Intellectual Property Organization (WIPO) and International Federation of Reproduction Rights Organisations (IFRRO), April 2005<sup>20</sup>

The Nordic countries that developed extended licensing have small populations. The largest is Sweden, with a population of nine million. Their languages are not world languages, as English is. Very many works by authors from other English-speaking countries are published or distributed in the UK. Even defenders of the extended licensing system recognise that it is unfair to foreign rights-owners.

It may be very difficult for foreign right holders to find out that their works are being used under an E[xtended] C[ollective] L[icensing scheme] and consequently they cannot claim remuneration (or opt out of the ECL for that matter) – Thomas Riis and Jens Schovsbo, 'Extended Collective Licenses and the Nordic Experience'<sup>21</sup>

There are some resemblances between extended collective licensing schemes and the scheme proposed in the Google Book Settlement agreement, under which Google would market digitised editions of previously published books, but authors and other rights-holders would have the right to remove books from sale. Payments would be channelled through a registry; only registered rights-holders would receive payment for the exploitation of their works, or be permitted to control the uses made of them. The settlement has been heavily criticised, not least by the US Department of Justice.

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<sup>19</sup> 'Extended Collective Licenses and the Nordic Experience', p. 24

[[http://papers.ssrn.com/sol3/Delivery.cfm/SSRN\\_ID1537788\\_code110134.pdf?abstractid=1535230&mirid=1](http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID1537788_code110134.pdf?abstractid=1535230&mirid=1)]

<sup>20</sup> 'Joint document on collective management in reprography', p. 18

[[http://www.ifrro.org/upload/documents/wipo\\_ifrro\\_collective\\_management.pdf](http://www.ifrro.org/upload/documents/wipo_ifrro_collective_management.pdf)]

<sup>21</sup> 'Extended Collective Licenses and the Nordic Experience', p. 19

[[http://papers.ssrn.com/sol3/Delivery.cfm/SSRN\\_ID1537788\\_code110134.pdf?abstractid=1535230&mirid=1](http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID1537788_code110134.pdf?abstractid=1535230&mirid=1)]

[The settlement] essentially ... turn[s] copyright law on its head because it eviscerates the requirement of prior approval from the copyright holder. ... It is the right to control one's work that creates the incentive to produce it. – William Cavanaugh, Deputy Assistant Attorney General, US Department of Justice, at the Fairness Hearing for the Google Book Settlement<sup>22</sup>

Most professional authors, authors' agents and intellectual property lawyers who have looked closely into the settlement agreement have been appalled by it. A large number of well-known UK authors took the opportunity to opt out of the settlement before the deadline on 28 January.<sup>23</sup> It was a matter of great concern and anger to UK authors that the Labour government refused to take up the challenge of defending our rights.<sup>24</sup>

There were rumours last year that Google was one of the parties lobbying for compulsory collective licensing, and indications that one of the extended licensing schemes envisaged was a UK Google Books-style operation. There are many problems with the Google Book Settlement, but one of the biggest is that the project would corner, and stifle, an important emerging market for digital books. The settlement is now awaiting judgement in a New York court; there is no knowing how matters will turn out, but many commentators think it unlikely that it will go through in its present form, given the opposition expressed by the Department of Justice. The DoJ has called, at a minimum, for the default opt-in arrangement to be dropped, and for authors to be given a choice whether or not to opt in. It would be sad, to say the least, if the UK were to adopt a version of a flawed system devised across the Atlantic that the US, following careful scrutiny, found to be unwise and unacceptable.

The right to issue a work in a digital edition, including any reissue of a work that has been published in print, has to be regarded as a primary right, like the right to publish a work as a printed book. In a world in which digital publishing is widely expected to overtake the market in printed copies, it cannot be viewed in any other light. The right to license photocopying is an example of a secondary right. Existing collective licensing schemes in the UK apply to secondary rights. Any proposal to apply extended collective licensing to primary rights (such as book digitization) is a matter of special concern.

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<sup>22</sup> The Authors Guild et al, v. Google Inc, 18 February, 2010, p. 124

[[http://thepublicindex.org/docs/case\\_order/fairness-hearing-transcript.pdf](http://thepublicindex.org/docs/case_order/fairness-hearing-transcript.pdf)]

<sup>23</sup> Benedicte Page, 'Usborne, Phaidon, Sheil Land and leading authors say no to Google', *The Bookseller*, 22 February 2010 [<http://www.thebookseller.com/news/113012-usborme-phaidon-sheil-land-and-leading-authors-say-no-to-google.html>]; Alison Flood, 'Thousands of authors opt out of Google book settlement', *The Guardian*, 23 February 2010 [<http://www.guardian.co.uk/books/2010/feb/23/authors-opt-out-google-book-settlement>]

<sup>24</sup> Benedicte Page, 'Government slammed by authors over Google', *The Bookseller*, 4 February, 2010 [<http://www.thebookseller.com/news/111639-government-slammed-by-authors-over-google.html>]

The purpose of collective management of copyright is never to substitute for the primary sales market – Caroline Morgan, Copyright Agency Limited, Australia, 'Collective Management of Copyright and Neighbouring Rights'<sup>25</sup>

There are very sound reasons why primary rights are licensed on the basis of contracts that are negotiated on an individual basis between the author and the publisher (or other licensee):

- This allows the author to make the best agreement he or she can for the exploitation of the work, based on the known or likely demand.
- It gives the author control over where the work will appear, and in what form and context, which are matters in which every author has a legitimate interest.

Collective licensing run on a mass basis for fixed-rate fees will not remunerate freelance authors at a level that will sustain high-quality work, nor reward the most popular authors on a basis proportionate to the revenue earned by their work. If primary rights were licensed collectively, instead of on a work-by-work basis, many of the authors who currently make all or part of their living by writing would be unable to continue doing so.

Collective licensing schemes issue licenses on a non-exclusive basis. Primary rights, however, are typically licensed on an exclusive basis. This guarantees best return to the licensee on the resources invested in developing and exploiting the work, and the author, in turn, is remunerated appropriately.

This is another very important reason why extended collective licensing is not an appropriate way to license primary rights, including digitization rights. The licensing body has no way of knowing what exclusive agreements may be in force, or in process of negotiation. The rights-owner has no necessary knowledge of the licenses issued by the licensing body. If an extended licensing scheme is instituted in respect of primary rights, this will break the system of licensing rights on an exclusive basis and compromise the normal exploitation of published works.

Unless applied very narrowly and in very limited, specific circumstances, extended licensing may place the UK in breach of its obligations under the Berne Convention. Signatories to the Berne Convention guarantee that 'the enjoyment and the exercise' by foreign authors of the protected rights 'shall not be subject to any formality'.<sup>26</sup>

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<sup>25</sup> Caroline Morgan, Copyright Agency Limited, Australia, 'Collective Management of Copyright and Neighbouring Rights', National Workshop for Copyright Awareness and Production, Ulaanbaatar, Mongolia, October 2006 [[http://www.accu.or.jp/appreb/10copyr/pdf\\_ws0610/c2\\_06.pdf](http://www.accu.or.jp/appreb/10copyr/pdf_ws0610/c2_06.pdf)]

<sup>26</sup> Berne Convention, Article 5.2 [[http://www.wipo.int/treaties/en/ip/berne/trtdocs\\_wo001.html#P109\\_16834](http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html#P109_16834)]

The purpose of ... article [5.2 of the Berne Convention] is to avoid constraining the rights holder to check the exercise of his rights in each country. Since extended collective management is country based ... it means that the rights holder has to actually check each country, with potential linguistic problems and – even small – variations in procedures, to keep control of the exercise of his rights ... This is hardly simple, even with the help of modern communication media. Furthermore, given the nature of the problem addressed, the formality prohibition is necessarily intended to apply to any type of national formality, however instituted – Bernard Lang, 'Orphan Works and the Google Book Search Settlement – an International Perspective'<sup>27</sup>

One of the fears of UK authors, and authors world-wide, is that extended collective licensing and similar schemes will be brought in separately on a broad basis by countries across the world, imposing impossible administrative burdens.

If this were to happen, the international copyright regime would have ceased to function to protect authors' rights. The consequences would be disastrous – not least for the UK's creative industries.

## **7. Derivative and transformative works**

The Call for Evidence asks, 'Is there evidence to suggest that the current framework impacts the production and delivery of goods and services which consumers want?' and instances 'derivative and transformative works'.

Derivative works would include adaptations and translations. The right to authorize adaptations is secured to authors under the Copyright Act. Adaptation and translation rights are very valuable to many authors. Any move to remove or weaken authors' control of these rights would impact adversely on authors' incomes.

## **Enforcement of rights**

### **1. Copyright small claims procedure.**

At present there appears to be no effective legal remedy for low-value copyright infringement cases. The National Union of Journalists (NUJ) drew attention to this problem in their submission to the Gowers review.<sup>28</sup> In 2008–9 Lord Justice Jackson conducted a review of

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<sup>27</sup> Bernard Lang, Institut National de Recherche en Informatique et en Automatique (INRIA), 'Orphan Works and the Google Book Search Settlement – an International Perspective', September 17, 2009, p. 6 [<http://pauillac.inria.fr/~lang/ecrits/liste/orphan-gbs.pdf>]

<sup>28</sup> National Union of Journalists response to the Gowers Review: section headed 'Access to justice' [<http://www.londonfreelance.org/ar/gowers.html#court>]

civil litigation costs. At his request SABIP conducted a survey among freelancers and small and medium-sized businesses in 2009. They found 'overwhelming support' for both fast track and small claims court procedures for IP cases. In his final report Lord Jackson recommended that the procedures of the Patents County Court should be reformed to include both a fast track and a small claims track.<sup>29</sup> The fast track procedure was introduced in October 2010.<sup>30</sup> The recommendation for a small claims court procedure for IP claims with a value of less than £5,000 has not so far been implemented.

It is quite common for freelance authors to experience copyright infringements. Typical perpetrators are careless, indifferent, or in some cases ignorant publishers, broadcasters, editors or, indeed, authors. In most cases the value of any claim would be less than £5,000; perhaps typically it would be several hundred pounds, as Lord Jackson suggests by the examples he gives. While such sums may appear small, they are substantial enough to most freelance creators. In urging the need for a small claims procedure Lord Jackson spoke of an 'unmet need for justice'. We think he was right, and his recommendation for a small claims IP procedure should be implemented forthwith.

## **2. Use of mediation**

An agent member has confirmed that out-of-court dispute resolution clauses are standard boilerplate in UK publishers' contracts and have been for many years. The Publishers' Association (PA) offers an Informal Disputes Settlement Scheme. There is also recourse to arbitration under the Arbitration Act 1996.

Another member of our group with relevant experience has suggested that it might be helpful if the government were to ask the Chartered Institute of Arbitrators to supply a list of arbitrators (perhaps about a dozen) capable of resolving intellectual property disputes quickly and with a minimum of expense.

It has been reported that in the US arbitration procedures have fallen into some disrepute because of the alleged activities of certain private arbitration services.<sup>31</sup> We trust that the

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<sup>29</sup> Lord Justice Sir Rupert Jackson, *Review of Civil Litigation Costs: Final Report*, December 2009, pp. 11–12, 249–250, 255–256, 257 [<http://www.judiciary.gov.uk/Resources/JCO/Documents/jackson-final-report-140110.pdf>]; see also *Intellectual Property Enforcement in Smaller UK Firms: A report for the Strategic Advisory Board for Intellectual Property Policy (SABIP)*, October 2010 [<http://www.ipo.gov.uk/ipresearch-ipenforcement-201010.pdf>]

<sup>30</sup> 'The Patents County Court': section 'Proposals for Reform' and following sections, *Judiciary of England and Wales* [<http://www.judiciary.gov.uk/you-and-the-judiciary/going-to-court/county-court/patents-county-court#headingAnchor4>]

<sup>31</sup> Todd Murray, 'National Arbitration Forum sued by Minnesota Attorney General', 15 July 2009 [<http://toddmurraylaw.com/national-arbitration-forum-sued-by-minnesota-attorney-general/>]; Pam Martens, 'Judicial Apartheid', *Counterpunch*, 20 July 2009 [<http://www.counterpunch.org/martens07202009.html>]

safeguards that protect users of arbitration services in the UK will continue to be kept in force.

### **3. The issues raised by so-called 'piracy' or 'file-sharing'**

#### **i) 'Technological protection measures'**

It is the opinion of those of us who are technologically fairly savvy that no form of Digital Rights Management or other 'technological protection measure' is going to deter a determined copyright infringer. Uncrackable 'technological protection' does not exist, and never will. Computers are designed, inter alia, for making copies. That is exactly what makes the web such a powerful publishing medium, and any answers to the resulting problems of unauthorised copying will have to be sought in quite different directions.

#### **ii) The importance of education**

It is clear from anecdotal evidence that large numbers of people, perhaps especially those under thirty, have downloaded material that they knew to be infringing, and many have uploaded in-copyright material that they have copied 'for sharing'. There is a widespread subculture within which the 'sharing' of songs, books and other material is viewed as harmless and praised as a meritorious act. In this atmosphere prosecutions achieve little or nothing beyond creating martyrs and entrenching a sense of righteousness. It is, however, the case that challenging these assumptions calmly and with rational arguments can provoke a thoughtful response. What is needed is a shift in cultural attitudes, and education and the provision of information are the likeliest means to bring this about.

Most if not all 'file-sharers' are also publishing self-generated material on a regular basis on the web, on Facebook pages, personal blogs, wikis, and so forth. Some of them dream of careers in writing. This is the first generation to have grown up with ready access to a publishing medium. They should be encouraged to appreciate the value of their own creativity, and the importance to them personally of managing their rights over their works: including their right to share them on terms of their own choosing, and also their options for taking action in the event of unauthorised copying, plagiarism, and other infringing acts.

#### **iii) Pirate websites**

In 1967 the government took steps to close down the pirate radio stations broadcasting from offshore. Legislation was passed making it a criminal offence to buy broadcast advertising on

these stations.<sup>32</sup> This speedily choked them of income. Most of them ceased broadcasting. Radio Caroline managed a sporadic existence for many years, but it never had the income or the dominance over youth culture that it and the other stations had enjoyed in the mid-sixties. It is well known that a number of websites make a business out of facilitating 'file-sharing'. Their income comes mainly from web-advertising, and some of them gross very large sums of money by this means. None of it is returned to the creators. The advertisers and the advertising brokers are legitimate businesses. Some of them are very well known: Google has several times been challenged over serving advertisements to sites that offer infringing material.<sup>33</sup> In the US there have been moves both private and public to end the sale of advertising to websites that act as repositories of unlicensed IP.<sup>34</sup> This seems a good model for the UK to investigate; more equitable and more likely to have a real impact than prosecuting or otherwise penalising confused young people and their families.

Gillian Spraggs

for Action on Authors' Rights

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info@authorsrights.org.uk | www.authorsrights.org.uk | blog.authorsrights.org.uk

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<sup>32</sup> Marine, &c, Broadcasting (Offences) Act 1967 5(3)(e); see also 6(1), 6(2) [http://www.legislation.gov.uk/ukpga/1967/41/contents/enacted]

<sup>33</sup> Ellen Seidler, 'Who profits from online piracy?', *Profits from Pirates*, 9 June 2010 [http://popupirates.wordpress.com/]; Patrick Ross, 'Google Ads on Rogue Sites', *The Copyright Alliance Blog*, 30 September 2010 [http://blog.copyrightalliance.org/2010/09/google-ads-on-rogue-sites/]; Andrew Orłowski, 'Hollywood ruling sends piracy chill through Google', *The Register*, 1 November 2010 [http://www.theregister.co.uk/2010/11/01/google\_adsense\_piracy/]; Marcus Yam, 'Google Accused of Helping Pirates', *DailyTech*, 14 February 2007 [http://www.dailytech.com/Google+Accused+of+Helping+Pirates/article6104.htm]; Colleen Doran, 'The "real" victims of online piracy', *The Hill*, 17 November 2010 [http://thehill.com/blogs/congress-blog/politics/129741-the-qrealq-victims-of-online-piracy]

<sup>34</sup> Eriq Gardner, 'Studios Win Settlement Against Accused Pirate Helper', *Hollywood Reporter*, 20 October 2010 [http://www.hollywoodreporter.com/blogs/thr-esq/studios-win-settlement-against-accused-31592]; 'LEAHY Leads Bipartisan Introduction Of Bill To Combat ONLINE INFRINGEMENT', *infoTech Spotlight*, 20 September 2010 [http://it.tmcnet.com/news/2010/09/20/5017704.htm]; A Bill to combat online infringement, p. 24 [http://www.gpo.gov/fdsys/pkg/BILLS-111s3804rs/pdf/BILLS-111s3804rs.pdf]