



**Developing a Copyright Agenda for the 21st
Century**

**A report on the IPO stakeholder event 4th March
2009**

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1 Introduction

This document provides a top level summary of the issues to emerge from the IPO stakeholder event on Wednesday 4th March. The structure of the document follows the format of the day and looks at the ideas which came out of each discussion.

This event provided an opportunity for stakeholders to come together and discuss a range of issues in a semi-structured way. Attendance at the event was mixed, and not all viewpoints were represented in each group. These discussion groups were also deliberately mixed to ensure that as far as possible participants had the opportunity to hear and debate a range of different viewpoints.

Many of the issues discussed are controversial and the aim of the event was not to seek a consensus opinion, but rather to allow different issues to be surfaced and to capture the opinions that were expressed by participants. The views recorded in this report are therefore those of individuals who attended this event and unless specifically stated do not represent the consensus opinion of all participants. This report summarises the discussions at the event to provide a broad overview of some of the key issues that were discussed.

The event was attended by 30 participants from a range of different sectors including music, artistic/ performance professions, film and broadcast, user/ consumer groups, literary, technology and software, new media/ advertising and academic and legal. The table below provides a breakdown of respondents by industry and stakeholder type. Participants were in small mixed table groups and the day consisted of facilitated table discussions, presentations and plenary sessions.

Industry breakdown	No	Stakeholder type	No
Academic/ Legal	2	Collecting Societies/ Umbrella Orgs	6
Artistic/ Performers	5	Commercial Rights Holders	7
Film/ Broadcast	2	Creator/ Performers	6
Libraries/ Archives/ Museums	4	Intermediary	4
Literary	3	User/ Consumer	5
Music	4	Other	2
New Media/ Advertising	2		
Technology/ Software	5		
Other	3		
Total	30	Total	30

2 Key themes

During the course of the day a number of themes emerged from the discussion although it should be noted that these were not necessarily points of consensus.

Among these were as follows:

- It was felt that the principles of copyright are fit for purpose and the model of exclusive rights should remain

- Challenges currently facing the industry were seen largely a matter requiring the development of new business models
- The interests of creators were not seen to be adequately protected, as creators frequently assign commercial and moral rights to works
- This was felt to call into question the operation of moral rights and participants saw a need to redress the imbalance of power in contractual negotiations
- Better education and awareness around copyright , it was felt, would boost the position of creators vis a vis commercial organisations
- Participants also felt this would increase the level of respect for the system and help combat piracy.
- There was a perceived lack of enforcement in the current which was seen to perpetuate a sense of entitlement to free content on line which exists

3 Initial reactions

During the first discussion of the day, participants were asked for their initial thoughts and reactions to the issues paper, © The Future: An Agenda for Copyright in the 21st Century.

There was general consensus that the principles of copyright are fundamentally sound. It was felt by some that things tend to go wrong as a result of government interference and that, while government has a role to play in enforcement, it should not interfere in licensing. The complexity of licensing rather than copyright itself was seen as creating issues but this was felt to be a matter for business models to address. A role was identified for technologies such as ACAP (automated content access protocol) in reducing this complexity.

The need for better education and awareness about copyright was raised as it was felt the focus should be on educating people about how works and rights should be used, rather than on changing the laws.

All groups were keen to understand why another debate on copyright was being run in light of the Gowers Review and Digital Britain. One participant felt that if the Government was moving on from Gowers then it should be honest about this and publically acknowledge it. One participant commented that conducting a blue sky thinking exercise on copyright created uncertainty for industry which was seen to be unhelpful, particularly in the current economic climate.

There was some discussion about the extent to which the copyright debate is too confrontational with participants challenging whether this was in fact the case. It was felt by some that copyright is no more confrontational than other policy areas and the IPO was seen to have a responsibility not to promote antagonism.

The issue of whether copyright should distinguish between different types of works was raised. One participant asked how far this might go, querying whether we should be looking at distinguishing between a book and a letter, for example. Others felt this was inadvisable on the grounds that this would lead to a situation where some works are copyrightable but others are not.

A plea was made by one participant representing creators for IPO to think globally.

In terms of the Issues Paper itself, a number of specific comments were raised. It was felt by some that there was insufficient reference to creators in the paper. The omission of manufacturers was also highlighted. It was felt that the paper makes the assumption that creators always assign their rights but it was noted that this is not the case across all creative professions. The field of publishing for example was cited where works are often licensed to publishers rather than assigned. In this vein, the dichotomy between commercial and creator interests was also questioned. Finally, one participant queried the description of copyright as a “system”, pointing out that it is in fact a “right”.

4 What is driving the need for debate?

The next discussion was aimed at understanding why the need for a debate has arisen and what the consequences of leaving the changes unchecked would be. Following a presentation from the IPO, the session explored the following questions:

- Who has copyright affected in the past?
- Who has benefited and lost out?
- What are the key drivers for changes?
- Left unchecked where will these changes take us?

4.1. Who has benefitted?

The consumer was felt to be the main beneficiary of copyright as a result of the rich content it stimulates. The correlation between strong copyright regimes and strong cultural life was particularly highlighted. Copyright was seen to affect the price and availability of work which can both create and limit access.

Investors and creators were viewed as being the most important parts of the value chain and there was a perceived need to ensure they are adequately rewarded. Copyright was seen to underpin the return for those investing in copyright and 'commercial rights holders' were viewed as having had the strongest voice in the past. It was noted that owners of copyright are not always individuals as, particularly in the music and film industries, it tends to be owned by corporate bodies such as companies. The creator was seen to benefit from copyright only when there is competition for their work as this strengthens their bargaining position.

4.2. Who has lost out?

Aside from the scenario where a creator's works are in great demand, there was a strong feeling amongst participants that the rights of creators are not being adequately protected. There was a feeling that creators often sign away their rights to large organisations rather than licensing them which in many cases would be a better arrangement for them. One participant noted that creators could end up assigning their "rights in this universe and any other universe subsequently discovered." This was seen as particularly the case in certain areas for example, digital media was described as the "wild west" where, if creators refuse to sign over their rights they will not be able to work. The photography profession was also cited as being an area where changes might be needed.

Debate took place over the nature and validity of moral rights. The fact that moral rights can be assigned led participants to question the validity of the current arrangements. It was felt that currently, there is very little creators can do when their moral rights are being infringed. The example used was that of 'songs used by a political organisation with which a creator does not agree'. Counter to this, however, it was argued that, particularly for collaborative works, the situation would be very difficult to manage if everyone had a say over how the work was used in the future.

Therefore some felt that the government needs to do more in order to protect the rights of artists both in terms of boosting their bargaining position in contractual negotiations and protecting their moral rights. It was also felt that education had a role to play in educating people about the choice they have in exercising their rights over the work they create.

The prevalence of piracy in the current context was felt to be causing rights holders to lose out. This applied both to casual piracy amongst users and infringement of rights within the industries. The technology sector was seen as an area where this problem was particularly acute and was described as one where it is acceptable to steal. The difficulty of enforcing rights in the face of low level piracy was seen as a challenge especially as a result of the negative press coverage which would surround a large company singling out individual infringers.

Users were seen to be suffering as a result of the lack of clarity surrounding permissions. It was felt that users and consumers do not currently understand what they can and cannot do with works. They also do not always understand the effort that goes into creating a work – an important issue for building respect and encouraging compliance. It was also noted that a perception sometimes exists amongst users that if you have to pay for something on line then you are losing out.

The issue of digital distribution was raised in terms of analogue works. It was considered difficult to migrate works online as a result of the difficulty of rights clearance. This led to the question of whether there is a case for assumed digital consent for works which were copyrighted before digitalisation came into being.

4.3. What are the drivers for change?

Technology

Technology was viewed as the primary catalyst that has driven the need for change in the creative industries. The borderless nature of the internet was seen to have opened up a global market place and digital technologies were felt to have given rise to format shifting on an unprecedented scale. Furthermore, the ease with which creators can go direct to market as a result of the internet was felt to be reducing the number of players in the middle of the value chain. One participant raised the interesting question of whether the only role of copyright was to enable the economic exploitation of new technologies.

Social and cultural

Socio-cultural drivers were seen as being closely linked to the technological changes that have taken place, which were felt to have caused a blurring of the boundaries between private and public space.

It was felt that there was a sense of entitlement in society whereby people feel they should be able to use works on the internet as they wish. This feeling was seen as reinforced by the fact that piracy is not socially condemned. This was perceived to be in part due to the intangibility of digital products for example, as people fail to

make the connection between downloading something illegally from the internet and shoplifting.

There was a perceived lack of enforcement in the digital world that was also seen as a driver for change as it was felt that this reinforces the social norms around illegal activities. Infringement was not seen as enforceable at the individual level and enforcement was seen as difficult for small companies.

This phenomenon was seen as particularly an issue amongst younger people who were described as the “no-one-sees-what-they-are-doing” generation. In the absence of any constraints on the activity of this group, participants felt there was a need for greater education and awareness.

The sheer volume of creative content that is now being produced was another factor seen to be driving the need for change.

Political

Concern was raised about the Government reacting to pressure from different groups and making a knee jerk decisions in response to technological changes.

The complexity of copyright law was viewed by some as presenting a challenge. The current situation was seen as too complicated to understand which can mean that people give up trying. A need was perceived for simplification in order that people understand the basics such as fair dealing for criticism for example.

4.4. Left unchecked, where will these changes take us?

Participants predictions about where the status quo would take us if left unchecked ranged from total “meltdown” to some British companies going out of business as a result of reduced incentive to invest in creativity. Others thought that the market will adapt and develop new business models although it was felt that people would suffer along the way.

5 Access

This section outlines the main issues to have emerged from the discussion on access. The purpose of this session was to explore the issue of access from a range of different perspectives, in order to establish:

- What kind of access is helpful and required for different groups?
- What would be the impacts of greater or lesser restrictions on use of work?
- What is the value of access for the individual and wider society?

To do this each table was presented with two pen portraits from a selection of student, journalist, producer, researcher, publisher or composer. They were then asked to discuss the following questions from the perspective of the individual:

- What access do they need?
- How is this access important in this area?
- What would be the impact of restricting access to other works?
- What impact on this area would providing greater access to its work to others have?
- How would this access benefit others?
- Is there a need to consider a system of access which is based on the proposed use of the work?

5.1. Key themes from the pen portrait discussions

Defining access

There was discussion about how access should be defined. One table felt that there should be a distinction drawn between access to works so that you can read, listen and be inspired which should be encouraged, and availability of works for use and incorporation into your own work which, it was felt, should be subject to some restriction. It was also felt that preservation which does not allow wider use should be distinct from access which does permit wider use. A question was raised about sampling in the digital age and the extent to which this is akin to using a word or a phrase from someone else's work in the pre-digital world. A point was also made about the idea of people "needing" access as it was argued that it is a "want" rather than a need. This was challenged by another participant who felt that there is need on both sides in that the creator "needs" the user to "need" their work in order to make money.

Greater or lesser access to works

Discussing the relative merits of having greater or lesser access to works, participants felt that providing greater access stimulates creativity as other people's work provides inspiration for creators. Greater access was also seen to increase distribution and make it easier for the creator and intermediaries e.g. the broadcaster, for example, to exploit the rights. One participant felt that nobody benefits from the ring fencing of works. It was also argued that widening access to work would reduce the reward for the creator as a result of the ubiquity of their work. Conversely, it was

felt that restricting access to works would reduce diversity and creativity and would be met with public dissatisfaction who expect to be able to access works easily.

Pricing and compensation

Some participants felt that there should be equal access to works and that work should be available at a fair, affordable price. Consistency was also considered an important. This already happens in some areas and those from the photographic industry cited this as one which has price guidelines in order to ensure some consistency.

At the other end of the spectrum, the broadcast industry was highlighted as one where pricing is a particular problem. Currently, it was explained, the fees to use music in a broadcast are “additive and linear” in that if you have five different media and want to use the same piece across all five channels then the fees for each are simply added up. This was not seen as a satisfactory arrangement. Repeat fees for online broadcasts were also raised as an issue.

Counter to this, however, there was concern about there being downward pressure on the fees being paid to creators as people are reluctant to pay separate permissions for digital use. There was a strong feeling that creators should be receiving fair reward, although the difficulty in establishing what constitutes “fair” compensation was acknowledged, and the practice of assigning rights was seen as one of the obstacles to this. Assigning rights was seen by some as acceptable practice but only if creators are receiving ‘just rewards’. Some felt there was a need to legislate to protect the interests of creators against large corporates.

Clearance

In order to address problems around rights clearance a need was identified for a mechanism by which rights holders can be quickly identified and permissions obtained. The current process of clearing rights was seen as overly complex particularly around the use of clips in broadcasting which was seen as more of a problem than the use of music in broadcasts. The difficulties encountered when putting work with clips embedded in it onto on-demand services, were seen as prohibitive and it was felt that a system of integrated digital media consent was necessary.

Orphan works

Orphan works arose as a topic for discussion. Some felt that the system in existence whereby there is a pool of money held by collecting societies in order to pay for orphan works when the rights owner surfaces worked well and questioned why libraries and archives feel they cannot work without a change in this area. One participant, however, felt that orphan works were particularly problematic when dealing with derivative works. A view was raised that licensing bodies should be able to licence unpublished works.

Moral rights

A point was raised about the ability of creators to be able to control the work they create in the digital world. Specifically, it was felt that the creator should have a choice in whether their work is uploaded to the internet or not.

There was also a debate about the tension between the right to control your work and issues of privacy, as this raised some ethical dilemmas. An example highlighting the difficulties here was of a photographer who takes a family portrait. Someone in the family dies and the photographer sells his portrait to the newspaper against the wishes of the family.

Education

Given the greater extent to which people are forced to interact with copyright in the digital age, it was felt that there was a need for much better and more comprehensive copyright education. One participant posited that intellectual property modules should be included in higher education.

5.2. Should access be linked to use?

It was felt by most participants that trying to link access to the proposed use of a work would be fraught with difficulty because statutory systems can never keep pace with technological change and the way in which people use work. Enforcement of such a system would also be very difficult. A specific example used was how one would deal with a piece of work that started out as something non-commercial and was later commercialised. Furthermore, the distinction between commercial and non-commercial was viewed as a grey area as there is a fine line between reading a work and deriving inspiration and using someone else's work in your own.

It was felt by some that access should always be at the discretion of the rights holder and that Creative Commons was already seen as providing an framework for this.

Participants did not generally approve of the idea of there being a distinction between amateurs and professionals when assigning copyright.

6 Incentivisation

The aim of the final discussion session was to establish what aspects of the copyright system are working well in relation to the incentives needed by businesses and creators, and where there are issues that need to be addressed. Each table was given a map of players within a particular industry which were grouped into users and consumers, creators, investors and producers, distributors and other, and discussed the following questions:

- Are there any players missing from the map?
- What are the incentives for each player to be involved?
- How is the system currently working?
- Could it work any better? If so, how?
- Will the current definition of what is in and what is out of copyright work going forward?

On the question of who was missing from the map, one group felt that producers should be aligned with creators rather than investors as they make a contribution to the creative work. It was also noted that Government should have been included on the maps. Participants also pointed out that some players fall into multiple categories. Libraries were taken as an example, as they are users, consumers, and distributors.

6.1. Incentives to create, consume, invest and innovate

The incentives for creators were seen as being wider than those for other groups in that while creators are incentivised by economic reward to an extent, there are a number of other drivers. This is evidenced by the fact that many creators do not earn a living from copyright income. Other benefits identified as important to creators included creating something for the benefit of society, creating a legacy, enjoyment of the creative process and critical acclaim and recognition. Recognition was seen as particularly important as creators often get ancillary work off the back of a publication, for example.

Investors were seen to be primarily motivated by economic reward although it was argued that those who invest in creativity are not like those investing in other products as they tend to have an artistic or cultural leaning and are likely to care about the products in which they invest. For distributors, however, pure economic reward was viewed as the primary driver.

Participants felt that the incentives for users and consumers included inspiration and pleasure and for those who use works to create mash-ups, for example, the incentive is about “participating in a constantly refreshed community” as in the digital world, the work is created and then shared. For commercial users such as pubs and bars, the use of music was seen to enrich their offer and therefore attract more customers.

6.2. Areas for improvement

Copyright was seen by one participant as underpinning investment in creative industries, although there were a number of areas that people felt there was a need to address.

Lack of enforcement was as important issue that participants felt needed attention. Piracy was seen to be affecting the reward of creators and investors in the commercial world and at the level of the individual. At the commercial level it was felt that certain digital players are making money out of rights without rewarding creators. New aggregators such as search engines were highlighted as taking value out of the value chain without injecting anything back.

At the individual level, while some felt piracy was reducing creator reward, others felt that there was likely to be a conversion from illegal activity to legal activity once a product has been tried. The example of Monty Python was raised as they made all their videos available online for free but linked this in to advertisements directing people towards Amazon where the videos could be bought legitimately. This coincided with an increase in sales.

Consumer understanding and a widespread expectation of free content was another area where the system was seen to be falling down. It was felt that young people do not understand that some works have to be paid for and that the free content business models that have emerged have contributed to this.

The imbalance of economic power and the supremacy of contract law were felt by some to be unjust and to be causing creators to lose out. This was linked into the inability of creators to enforce their moral rights, as discussed earlier in the day.

Finally, the complexity of rights clearance was seen as a sticking point. One participant felt that hardware vendors as a result of having so many rights to clear in order to legitimately use works bear the brunt of the tension between users and producers.

6.3. Potential solutions

A range of suggestions was made as to how rights clearance could be improved. In general, there was a perceived need for an easier clearance system to be put in place and some suggested an automated system although a question was raised about whether this would limit the control of the creator over their works. Others felt a database of rights allocations would be of great help. Digital watermarks were viewed as another potential solution as it was felt that this would allow people to obtain permissions more quickly. In response to the challenge of clearing rights for multiple digital media, a system of digital consent which cuts across all types of digital work was also proposed.

In order to overcome the problem of low level piracy, it was perceived that there was a need for better education. Ordinary people, it was felt, need to better understand the system. ISPs were also seen by some to have a role to play in informing their users about copyright law although this was a contested issue. The introduction of levies on hardware was proposed by some as an additional solution although this was strongly challenged, with some arguing that manufacturers operate on small margins, much of which is reinvested in R&D. The introduction of a tax on manufactures would therefore disincentivise innovation.

Current mechanisms for redress against rights infringements were seen as inadequate and the copyright tribunal was described as time consuming and costly. As an alternative, it was felt that mediation services should be available in order to resolve disputes quickly.

Finally, it was argued that as a result of the changing nature of the delivery chain, downstream revenues are not being fed back to the creators. Quit clauses were identified as one potential solution to this problem.

6.4. Realm of copyright

The solutions to the current challenges facing the creative industries were seen largely as a matter for industry not Government and it was felt that business models needed to adapt to accommodate changes. Examples of where this is currently happening such as Napster were raised. This was highlighted as a site which started off illegitimately and became a legitimate online subscription business. It was argued that those organisations that start out illegitimately are actually the most innovative and it was also posited that industry peer pressure soon stops illegitimate behaviour.

That said, it was felt that this should not be allowed to be a threat to copyright as a provider of fundamental ownership right for all creative work. It was strongly argued that copyright has a continuing role in bringing funds back into the industry. A case was also made for moral rights to be changed so that they cannot be over-ridden by contract law, in order to boost the position of creators.

There was some discussion about whether the existence of copyright should be contingent on the quality of work. While many participants felt that this should not be the case as quality was too subjective a concept to judge effectively, one participant felt that it might be worth considering whether an element of originality should be incorporated into copyright.

7 Final plenary

The final session involved discussion session IPO officials during which a number of points were raised.

A general principle that was proposed was that copyright law should be upheld and that efforts should be made to ensure that the law is respected. Currently illegal usage is happening for which creators are not being rewarded.

A question which caused controversy was of whether there was a need for a system of equitable remuneration. Opposition to this principle was raised as it was argued that equitable remuneration comes from countries which are importers of content. As Britain is an exporter, it was felt that such a system would negatively impact the creative industries.

Levies were seen as the “thin end of the equitable remuneration wedge” and caused considerable debate. On one hand it was felt that levies were a solution to the problem of private copying on which it was seen as impossible to get a fair licensing system in place as exclusive rights are very difficult to enforce vis-à-vis the individual. Furthermore, it was argued in the context of mobile phones, that providers of such hardware are able to sell more phones as a result of the music that can be downloaded onto them and should therefore be injecting value back into the system.

Counter to this, however, it was argued that taxing equipment disadvantages the consumer since much equipment of this kind has a short shelf life meaning the consumer would pay an additional levy with every new purchase even where no new content was accessed. It was posited that this would disincentivise consumers to buy technological goods thus leading to a decline in innovation within the sector. It was also argued that providing a mechanism for doing something illegal should not mean you are then responsible for tracking the behaviour of users. The question of whether a car company making a car that can go above the speed limit should have to monitor the speed of its users and issue speeding tickets, by way of analogy.

The need for an effective mechanism of bringing rights holders and those wanting access together was raised although a question was posed about whether this would impact the creator or rights holder’s ability to set price. The need for creators to assert their moral rights was raised as important.

There was a desire to see a conclusion on the format shifting debate and participants were keen that Gowers’ recommendations in this area were implemented. There was a perceived lack of will on the part of Government to make this anything other than an exception. It was highlighted that the Gowers Review does not rule out payment for format shifting.

Finally, the difficulty in extracting money from other European countries where there is no reciprocal agreement was highlighted, and it was felt that greater international harmonisation would be productive.