

Reform of UK Copyright Law - The Government's Consultation Paper: December 2011

Author: Stephen Edwards, Partner, London

Author: Gregor J.Pryor, Partner, London

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The Government is pressing forward with plans to implement key proposals made in the Hargreaves Review. On 14 December it published a consultation document on five of those recommendations, together with impact assessments on each of them.

The closing date for responses to the 114 questions posed in the consultation document is 21 March 2012. The Government plans to make its formal proposals for legislation or other action in a White Paper in Spring 2012.

The consultation does not deal with the most radical of the Hargreaves recommendations, the creation of a Digital Copyright Exchange where ownership of rights could be advertised and rights could be licensed through automated systems fit for purpose in the digital era. Richard Hooper CBE, the former Deputy Chairman of Ofcom, has been asked to lead the work on the feasibility of this and to report back in Summer 2012. The Government sees this being taken forward as an industry-led project.

1. Orphan Works

The Government has recognised the significant problems facing potential users of orphan works. In particular, the consultation document highlights the problems faced by archive-holding organisations such as the BBC and the British Library. The Government agrees with the Hargreaves Review that the current regime has led to commercial opportunities being missed and cultural content being lost through deterioration and an inability to create digital archive copies.

The Government intends its solution to minimise any potential market distortion between orphan and non-orphan works by ensuring that they are treated as similarly as possible. It hopes to achieve this by establishing clearance procedures and ensuring that adequate safeguards are in place.

The Government proposes to allow the use of orphan works after an intended user has carried out a diligent search to attempt to establish the identity and location of a rights holder and has obtained a licence from an authorising body such as the Copyright Tribunal or a collecting society. The authorising body would also maintain an orphan works registry which would detail all works that had been declared

orphan after a diligent search. It is thought that such a system will lead to an increase in royalties payable to rights holders and an increase in the chance of rights holders being reunited with their works.

For reventant rights holders (those rights holders who appear after their orphan works have been used), the Government is considering two methods of remuneration. The first would be for authorising bodies to require intended users to provide an upfront payment at market rates to be held in escrow until a reventant rights holder comes forward. The second is to require agreement that payment at market rates will be made if the rights holder appears. There are pros and cons to both methods, and the Government has specifically requested feedback in this regard.

2. Extended Collective Licensing

To deal with mass usage of works, where the administrative costs of making individual rights clearances would be prohibitive, the Government proposes to facilitate voluntary extended collective licensing (ECL). This would allow authorised collecting societies to license such usage as a 'one-stop-shop' on behalf of all rights holders in a particular sector, except for those who choose to opt out.

A collecting society would have to apply for authorisation to operate an ECL scheme in their particular sector, which would be subject to the society meeting certain criteria. Where an ECL scheme was used for the mass clearance of collections of works which may include orphan works and out-of-commerce works, the collecting society would be expected to search for the missing rights holders and to distribute appropriate remuneration. The Government seeks views on this from collecting societies, rights holders and organisations that need to use large bundles of copyright works.

3. Codes of Conduct for Collecting Societies

The Government proposes to publish minimum standards - on fairness, transparency and good governance - which it would like to see included in voluntary codes of conduct for collecting societies. Minimum standards would act as a check on the enhanced powers of collecting societies that would be created if the proposals on orphan works and extended collective licensing are taken forward.

Currently, collecting societies are privately run entities, and the prices and terms and conditions of licences are regulated on an ad hoc basis by the Copyright Tribunal. It is the Government's view that clarity and transparency of their copyright licensing systems would be good for members, licensees, and collecting societies themselves, as clear and more accessible information would show how licence prices are set, inefficiencies would be reduced and societies would be able to operate competitively on a level playing field.

The Government would like to see the following covered in the minimum standards:

- obligations to rights holders;
- obligations to licensees;
- control of the conduct of employees and agents;
- information and transparency;
- monitoring and reporting requirements;
- complaints handling;
- an ombudsman; and
- provision for review of the code.

The Government also plans to introduce a backstop power that would allow for a statutory code to be implemented if the voluntary system does not prove effective. The Government seeks views on the minimum standards and scope of a code, and on whether there should be penalties for non-compliance.

4. Exceptions to Copyright

Copyright legislation seeks to balance the rights of creators and the interests of users of copyright works. One way in which the legislation achieves this is by creating specific exceptions to copyright which allow certain uses of copyright works without the permission of the works' owners.

The Government wants to encourage economic growth by expanding these copyright exceptions where this has a social and/or an economic benefit, but without undermining incentives to creators.

Any expansion of the exceptions would have to be compatible with European and international law. The UK courts have expressed a wish to see the wording of the UK exceptions being amended to reflect the wording of those permitted under the EU Information Society Directive.

The key proposals are:

- A new private copying exception that would permit an individual to copy creative content that s/he owns to other devices, media and platforms for private non-commercial use.
- An extension to the current copyright exceptions relating to the preservation of cultural material by libraries and archives, so that (1) the exception would apply to audiovisual works and sound recordings as well as literary, dramatic and musical works; and (2) museums and galleries would also benefit from the exception.

- An extension to the research and private study exception so that (1) people would be able to copy a wide range of works; (2) the exception would apply to sound recordings, films and broadcasts as well as other works; and (3) more uses within educational establishments will be permitted.
- A new exception allowing whole works to be copied for the purpose of data mining.
- A new "fair dealing" exception for parody, caricature and pastiche, with the Government's preferred approach being to leave the definition of those terms to the courts.
- An expansion of the exceptions that apply to educational establishments, including (1) increasing the proportion of a copyright work that can be copied; (2) enabling distance learners to access educational materials; and (3) widening the definition of an educational establishment.
- An expansion of the exceptions that benefit people with disabilities (but only to the extent that commercially accessible copies are not available).
- An update and expansion of the exceptions to copyright that permit extracts of copyright works to be used for criticism, review and news reporting. The Government seeks views on whether further specific exceptions of the 'right to quote' should be added, rather than a general right to do so with a non-exhaustive list of specific examples.
- An amendment to the exception for public administration and reporting to permit the publication of relevant documents online.
- An amendment to clarify the scope and operation of the 'incidental inclusion' exception. Crucially, as recommended by Hargreaves, contractual restrictions on copyright exceptions would become unenforceable.

5. Copyright Notices

Copyright law is complex and there is confusion about the boundaries of copyright infringement. The application of existing law to new technology and digital exploitation of copyright works presents challenges to businesses in the UK. Some smaller businesses do not necessarily have the resources to seek legal advice on copyright issues. This leads either to unintentional infringement or to opportunities being lost due to fear of infringing.

The Government recognises the potential benefits of greater clarity in the application of copyright law, and it plans to introduce a statutory obligation on the Intellectual Property Office ('IPO') to publish formal opinions on UK copyright law and its application. It is proposed that the IPO will issue general notices on areas where there is manifest confusion or misunderstanding, by way of a "Copyright Notice Service".

This will work in a similar way to the Practice Notes and Directions setting out procedural aspects on patents, trade marks and designs which are currently issued by the IPO. The proposed copyright notices would provide an authoritative source of copyright clarification which the Courts would take into account.

Action point

The 114 specific questions to which the Government seeks answers in the Consultation are challenging. Consistent with the Hargreaves recommendation that copyright law reform should be evidence-led, many of the questions require respondents to back up their responses with facts and figures. This is an important moment for those seeking to influence the reform process to state their case.

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