

The Future: developing a copyright agenda for the 21st Century

Response by Consumer Focus to the Intellectual Property Office consultation

1. Introduction

Consumer Focus is a new statutory body that champions the needs of consumers across England, Wales and Scotland and, for postal services, Northern Ireland. We operate across the whole of the economy, persuading government, businesses and public services to put consumers at the heart of what they do. We work at the European level too, to make sure consumers' needs are heard in Brussels. The new organisation was created through the merger of the National Consumer Councils, energywatch and Postwatch on 1 October 2008.

Consumer Focus welcomes the opportunity to input into the Government's thinking on developing a copyright agenda for the 21st century. We want to see an intellectual property (IP) regime that encourages innovation by providing a fair return to creators and investors whilst imposing the minimum necessary constraints on competition and consumers. The current copyright rules do not deliver this. They permit companies to extract long-term excess profits from consumers, place excessive restrictions on competition, inhibit innovation by preventing other creators (including consumers) from building on past innovation, and impose unreasonable and unrealistic restraints on consumers' post-purchase activities.

The Gowers review marked an important step forward in the debate on IP policy with its recognition of the need to balance the public and consumer interest in access with the rights holders' interest in reward, and its analytical and evidence based approach. We have been dismayed by the lack of progress on implementing some of the consumer facing recommendations and by recent government statements¹ that give the impression that the Government is returning to the pre-Gowers approach to IP policy making in which rights holders interests dominate and economic evidence is paid scant regard. The way the issues are approached in this consultation paper appears to reinforce that bias. We hope that the Government's forthcoming discussion paper genuinely builds on the Gowers approach.

¹ Andy Burnham's speech to the UK Music Creator's Conference, London, 11 Dec 2008, http://www.culture.gov.uk/reference_library/minister_speeches/5685.aspx

We have structured our submission around three key themes: achieving balance, efficiency and simplicity, and proportionate enforcement. Our views and recommendations under each answer the key questions addressed in the consultation.

2. Achieving balance between public and rights holders interests

“The very essence of IP rights entails a trade-off. On the one hand, IP rights provide economic incentives to innovate, but on the other, the exclusive rights that they confer to achieve this allow monopoly prices and associated welfare losses and prevent access by other innovators.....It is therefore crucial to have the right balance in the system.”²

Copyright law exists to encourage creativity and innovation for the benefit of society as a whole. To do this it needs to achieve balance through the recognition of both the interests of creators and the interests of consumers. Consumers have an interest in ensuring that innovation is encouraged, and that creators and innovators receive a fair return for their work. However, consumers also have an interest in competitive markets; copyright confers monopoly privileges, which restrict competition and impose costs on consumers. In addition, consumers clearly have an interest in maintain autonomy and privacy in their consumption choices, free from unreasonable and intrusive restrictions. It is our view that this balance of interests is not being achieved; private monopoly rights have been over extended at the expense of the consumer and public interest.

Furthermore, the current copyright system is out of date and out of step with the creative world unleashed by the web 2.0 and the social networks, which enable consumers to be also creators; they not just remix and manipulate existing content (which may be protected by copyright), but also generate their own. So the consumer and public interest is also about health of cultural exchange and promotion of ‘creative commons’. So far the experience has been of industry developing innovative technological tools to enable these exchanges on the one hand, while actively trying to return to the old status quo and shutting innovation down on the other. Sometimes companies engage in both activities, for example, the same company selling technologies for copying and distribution on the internet while digitally engineering works to stop them being copied.

Copyright term

The period of protection for copyright has been increased again and again, allowing not merely creators (or the companies that have bought their rights) to receive rewards, but also their descendants. Copyright in artistic works (including literary, dramatic and musical works) now lasts until 70 years after the death of the author, while films’ copyright lasts for 70 years after the death of the last surviving major contributor to their artistic character (director, composer, screenwriter). Broadcasts are protected for 50 years, while their published editions are protected for 25 years. Sound recordings are currently protected for 50 years from publication and European Commission

² The Gower Review of Intellectual Property, HMSO, December 2006

proposals to extend this to 95 years are currently before the European Parliament and the Council. It is already clear that if the directive to extend term for sound recordings is passed the audiovisual sector will be pressing for extension of term for broadcasts³.

These terms of protection, and the differences between them, do not appear to be based on any sound economic rationale. Indeed it is difficult to see how such long terms, especially those that go beyond the life of the creator, can possibly be justified by the need to encourage creativity and innovation. Most companies and artists gain the majority of their likely return relatively quickly, and while there are some sales gained from back catalogue, most companies' business models suggest that the actual timeframe calculated for economic return is relatively short. This over protection of rights is not in the public or consumer interest.

The consultation paper asks a number of questions about whether the current copyright system provides the right incentives to sustain investment and support creativity. It is our view that copyright protection is far too long already, and any extension is not going to benefit the majority of artists and performers. The music industry invokes the existing 95 year copyright term in the US as an argument; however the US system and law is very different from the one in the EU (for example it has a 'fair use' principle) and cannot be used as a comparison and reason for 'harmonisation'. If there are issues relating to incentives, or rewarding better artists and performers, then extending copyright term is not the solution.

The government should:

- Oppose vigorously the European Commission's proposal to increase copyright term for sound recordings to 95 years and call for the withdrawal of the draft Copyright Directive;
- Encourage the European Commission to conduct a study of the costs and benefits of reducing periods of protection in EU law for new works to the minimum required under international treaties;
- Encourage the commencement of negotiations at the World Intellectual Property Organisation (WIPO) for the recognition of a maximum copyright term, so that countries are not able to persist in the current "arms-race" approach to extending copyright term.

Fair use – exceptions and limitations

The consultation paper asks whether our current system of copyright exceptions is too complex. However, it fails to ask the more fundamental question about whether the current system provides the right balance between public and rights holders' interests. Exceptions to, and limitations on, copyright holders' exclusive rights are an important mechanism for achieving balance in copyright law; they are the way in which public and consumer fair use rights are expressed. In the UK these are much more limited than required by EU copyright law. In particular, there is no private copying exception which means that anyone copying purchased CDs or downloads to play on a different music player is infringing copyright. The UK's minimalist approach to exceptions has resulted in law

³ Report on the proposal for a directive of the European Parliament and of the Council amending Directive 2006/116/EC of the European Parliament and of the Council on the term of protection of copyright and related rights, Committee on Legal Affairs, 18 February 2009.

that is imbalanced in favour of rights holders and out of step with social norms and technological developments. It places unreasonable and unrealistic constraints on consumers' use of products they have purchased. Such legislation cannot command public respect and so brings the law, and the legislative process, into disrepute.

The Gowers review identified a number of areas where exceptions could and should be extended within the framework of European and international copyright law, including the three step test. These included exceptions for educational establishments, research and private study, libraries and archives, parody, as well as private copying/format shifting. The government consultation on implementing these recommendations finished in April 2008 but legislative proposals have not yet been brought forward.

In addition to these limited proposals, a thorough review of whether current exceptions and limitations provide a reasonable balance between the public and rights holders' interests is needed. International standardisation of rights, but not exceptions, has produced a distorted copyright system. Such a review should consider whether some exclusive rights should be replaced by rights to equitable remuneration. It should also address complexity and should consider whether the language of exclusive rights on the one hand and exceptions on the other, is appropriate. An opportunity presents itself in the proposal put forward by Brazil, Chile, Nicaragua and Uruguay that the WIPO Standing Committee on Copyright and Related Rights undertake a work programme on limitations and exceptions for copyright including to establish agreements on the minimum standards needed to protect the public interest.

The government should:

- introduce the exceptions proposed by Gowers without further delay;
- lend its endorsement to the Max Planck/Queen Mary developed statement on the interpretation of the 3-step test in Article 9(2) of the Berne convention and Article 13 of the WTO TRIPS agreement⁴;
- actively support work in WIPO aimed at establishing minimum standards for limitations and exceptions and including the proposal to draft a treaty on exceptions and limitations for the visually impaired.

Balance between creators and intermediaries/publishers

The consultation paper asks whether creative artists are sufficiently rewarded and protected through the current copyright system. Whilst this is not our main focus, concerns have been raised with us about the unfair distribution of benefits between artists and intermediaries/publishers by representatives of creative communities. Consumer perceptions about unfairness undermine the legitimacy of copyright law. This issue was also raised, but not addressed, by the European Commission in the impact assessment accompanying its proposal for an extension of copyright term for sound recordings.

⁴ http://www.ip.mpg.de/shared/data/pdf/extranet/declaration_three_step_test_final_english.pdf

“Performers usually transfer their most economically significant exclusive rights to record companies via contract. In most cases, individual performers have little bargaining power....Consequently, it is difficult for performers to negotiate which type of contract or which level of remuneration they will obtain.”⁵

The question arises as to whether the imbalance between the bargaining power, and so remuneration, between artist and intermediaries/publishers is best addressed by copyright or contract law. Currently we do not have a view on the best way of achieving a better balance but we think it is a matter that needs to be urgently investigated.

- The government should press the European Commission to examine further the problem of the unfair distribution of benefits between artists and intermediaries and possible copyright and contract law solutions.

3. Efficiency and simplicity

The consultation paper also asks questions about the complexity of the current system for licensing and clearance of rights. It is clearly important that any system of rights is clear, simple and efficient to use, but the evidence suggests that the system is complex, burdensome and little understood by consumers. This is making it difficult to launch the innovative business models that are needed in the digital age. In addition there is the acute problem of orphan works, where the rights holder cannot be identified. This means that works are not exploited, denying consumers access and rights holders potential remuneration for the benefit of nobody. Both problems are having a chilling effect on the market and need to be urgently addressed.

The European Commission has conducted an analysis of the operation of the reciprocal agreements between national collecting societies in relation to performing rights promoted by the International Confederation of Societies of Authors and Composers (CISAC). The Commission concluded that these agreements are, in part as a result of technological developments, anti-competitive and not in the consumer interest. In July 2008 the Commission issued an important decision, the CISAC decision, prohibiting 24 European collecting societies from restricting competition by limiting their ability to offer their services to authors and commercial users outside their domestic territory. However, the decision allows collecting societies to maintain a system of bi-lateral agreements and to keep their right to set levels of royalty payments due within their domestic territory. We welcome this review, and the decision which should operate (i) to permit authors and rights holders to choose the most efficient society to administer their rights and (ii) to facilitate Europe-wide licensing to the benefit of commercial users and consumers. However, we remain concerned as to how the societies will set royalty rates and whether there will be adequate oversight at either national or Community level.

⁵ Commission staff working document: impact assessment on the legal and economic situation of performers and record producers in the European Union, April 2008

The problem of access to orphan works is particularly acute for older works; it is more difficult to find out if a work is protected or in the public domain, and to locate owners as records become lost or difficult to access, companies change names, or go out of business, and there is no recent history of exploiting the works commercially. The consultation paper raises the issue of registration of copyright and we see merit in considering this further as it could significantly reduce problems of rights clearance. There seems to us to be a clear case for requiring registration where the copyright term goes beyond the minimum required by the WIPO treaties. Indeed registration, particularly for older works, within the international minima would also be desirable. Registration and deposit for all works protected by technical protection measures (TPMs) should also be considered. In addition to addressing registration, action is needed on immunity from liability for a user who has made bona fide efforts to locate the copyright holder but has been unable to do so. There have been discussions at European level aimed at finding solutions to the orphan works problem for some time but no discernable progress has been made.

The government should:

- Press the European Commission to set up a mechanism to monitor rights clearance in the EU market following the CISAC decision and in the light of its findings consider whether further measures to improve the efficiency of rights clearance are needed;
- Undertake a study on ways in which registration could be achieved in the UK;
- Press the European Commission to come forward with concrete proposals to ameliorate the problem of orphan works as a matter of urgency.

4. Proportionate enforcement

The consultation paper asks whether the system of copyright enforcement works in the digital age. However, this question needs to be set within the context of whether the current system of copyright law works in the digital age. If rights are unrealistic and unreasonable, and widely seen to be so, enforcement is likely to be unworkable. Developments in digital technology have led to major changes in the way we consume a wide variety of goods and services, including copyright-protected goods. They have also been hugely disruptive to established ways of doing business in the pre-digital world. Unfortunately these problems have been seen as enforcement problems rather than technological change problems. Consumers have been placed in the same category as criminal counterfeiting organisations operating for profit and branded as pirates and thieves.

Some of the measures that have been proposed to deal with consumers' infringing activities have been extremely draconian and totally disproportionate. They have included calling for the imposition of criminal sanctions through the conflation of consumer copyright infringement with organised criminal infringement, and proposals for consumers to be cut off from their broadband and so a wide range of services provided by other sectors of the economy. This not only will not solve the problem, but result in negative impacts on other businesses as well as retrograde stifling of innovation and creativity.

In considering IP enforcement proposals at national, European or international levels the government needs to:

- Reform the law so that it is fit for the digital age and capable of commanding public respect;
- Clearly distinguish individual consumer infringement from criminal organisations operating for profit and ensure that criminal sanctions for IP infringement are restricted to organised crime;
- Ensure that any action is proportionate and does not have a negative impact on other legitimate service providers.

5. Conclusion

Developing a copyright agenda for the 21st century should be about achieving the right balance between the interests of all stakeholders, and encouraging and supporting innovation and creativity within the current cultural and technological environment. If that means there is a need to dismantle outdated institutions and business models and reform outright certain areas of the system the government should be bold enough to grasp the nettle and do so.

As the UK government itself has limited ability to act, given that copyright issues are directed internationally and at EU level, the first imperative is to implement the sensible recommendations in the Gowers Review on exceptions.

The government should also, as a matter of urgency, strongly intervene at the EU level and use all its influence to prevent unreasonable proposals such as the copyright term extension for sound recordings and to encourage more balanced and evidence based policy making.

In the longer term we need a wholesale review of the international copyright system, starting with the WIPO agreements and the proposals currently tabled within it by other countries to achieve minimum 'fair use' standards.

Consumer Focus

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