

Response to the Consultation on ‘The Review of the EU Copyright Rules’

http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/index_en.htm

Background

This is a collaborative submission from a group of academics based in the UK with expertise in intellectual property law and information technology law.

The preparation of this response has been funded by British and Irish Law, Education and Technology Association (“BILETA”) <http://www.bileta.ac.uk/default.aspx>

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This response has been approved by the Executive of BILETA (the British and Irish Law, Education and Technology Association) <http://www.bileta.ac.uk/default.aspx> and is therefore submitted on behalf of BILETA.

In addition, this response is submitted by the following individuals:

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II. Rights and functioning of the Single Market

Linking and browsing

Q11. Should the provision of a hyperlink leading to a work or other subject matter protected under copyright, either in general or under specific circumstances, be subject to the authorisation of the rightholder?

NO.

Hyperlinks should not be subject to copyright because to do so can limit access to copyright works which may otherwise be available. This is because some right holders will require Errors and Omissions insurance style policies and the current fair dealing provisions in the UK do not provide sufficient protection to guard against unwarranted infringement actions. For example, if an author produces a text with a hyperlink reference in it, this will need to be deleted, reducing page traffic for a right holder (who may otherwise wish to be linked to) as well as inducing free speech concerns.

Registration of works and other subject matter – is it a good idea?

Q16. What would be the possible advantages of such a system?

There are two key reasons for supporting such a system. Firstly, as noted in this Consultation, it enables end users to identify who the content right holders may be and to be able to arrange for licensing if it is to be required. Secondly, a system of registration may become necessary, in practice, for the operation of digital copyright exchanges, such as the Copyright Hub in the UK. In providing such a basis, this may provide a means for digital technology to be actively involved in the regulation of copyright content

[See Griffin J., The Digital Copyright Exchange: Threats and Opportunities, 27 *International Review of Computers, Law and Technology* 5 (2013)].

Q17. What would be the possible disadvantages of such a system?

There is potential that in the environment today, searches may become common place for insurance purposes (i.e. Errors & Omissions insurance as outlined in the response to Q11). This may increase costs. More worryingly, increased use of a registration system within Copyright Hubs may lead to the situation where right holders are asserting copyright over works and registering them solely for the purpose of obtaining royalties using the Copyright Hub system. The Copyright Hub was suggested under the Hargreaves Review in 2011 and has since been the subject of two follow up reports by Richard Hooper. Currently discussions are under way as to how to take the proposal further towards implementation.

It should also be borne in mind that a registration system could fall foul of international obligations. There is no registration system operational under the Berne Convention, for example. If such a registration system were to become operational, and if that system were to be, in effect, necessary to obtain a ‘usual’ level of remuneration, then it is possible that the registration system could fall foul of that international law.

Q18. What incentives for registration by rightholders could be envisaged?

If it becomes successful, the Copyright Hub will probably become the incentive with the increased royalties that are likely to accrue. This is because, as outlined in Q17, right holders can receive remuneration through the Copyright Hub, and the network effect of technology is likely to mean an increased take up, the more the Hub is utilised.

Even if the Copyright Hub itself does not become successful, it is possible that other alternatives being put forward in the market place will take the place of the Hub. The operation of any such hub is dependent upon a system of registration in order to track content – and this is already protected through Copyright Management Information devices under Article 7 of the EU Copyright Directive and in the UK s.296ZG CDPA 1988.

Other incentives could include additional rights to bring infringement actions (registration of a copyright can, for instance, be required under the US system in order to be able to bring an action. See <http://www.copyright.gov/help/faq/faq-general.html>. Additional damages could be made available as part of having registered a copyright work. However, as outlined immediately above, the proposed Copyright Hub is likely to provide sufficient incentive for a voluntary system of registration.

How to improve the use and interoperability of identifiers

Q19. What should be the role of the EU in promoting the adoption of identifiers in the content sector, and in promoting the development and interoperability of rights ownership and permissions databases?

Much of this protection is provided for already in Art 7 of the EU CD which states:

“Article 7

Obligations concerning rights-management information

1. Member States shall provide for adequate legal protection against any person knowingly performing without authority any of the following acts:

(a) the removal or alteration of any electronic rights-management information;

(b) the distribution, importation for distribution, broadcasting, communication or making available to the public of works or other

subject-matter protected under this Directive or under Chapter III of Directive 96/9/EC from which electronic rights-management information has been removed or altered without authority,

if such person knows, or has reasonable grounds to know, that by so doing he is inducing, enabling, facilitating or concealing an infringement of any copyright or any rights related to copyright as provided by law, or of the sui generis right provided for in Chapter III of Directive 96/9/EC.

2. For the purposes of this Directive, the expression "rights-management information" means any information provided by rightholders which identifies the work or other subject-matter referred to in this Directive or covered by the sui generis right provided for in Chapter III of Directive 96/9/EC, the author or any other rightholder, or information about the terms and conditions of use of the work or other subject-matter, and any numbers or codes that represent such information.

The first subparagraph shall apply when any of these items of information is associated with a copy of, or appears in connection with the communication to the public of, a work or other subject matter referred to in this Directive or covered by the sui generis right provided for in Chapter III of Directive 96/9/EC”.

Whilst the provision does not explicitly provide for the protection of “identifiers” as this question may refer to, it is quite possible that they will fall under Article 7. Currently, digital watermarks can be protected through Article 7 – and these watermarks can incorporate other information which could include executable program code or more simply the location of the content on a user’s computer. Note that such information also is often tied with Digital Rights Management systems as well, and as such, an additional layer of protection might be deemed unnecessary. The Copyright Hub, discussed in the previous questions, is also likely to utilise Copyright Management Information as identifiers.

However, identifying information is likely to become increasingly complex – Netflix, for example, uses complex analysis of such information in order to be able to assess what future movies to make available and which projects to fund. The future of the content industry is increasingly shifting towards using information of content as a vital part of the “value” of copyright works rather than the sale or licensing of them.

Private companies are developing means to create databases containing this information – so, any entry into “identifiers” by the EU needs to bear in mind that this may lead to the EU distorting the market for undertakings involved in developing those “identifiers.”

Term of protection – is it appropriate?

Q20. Are the current terms of copyright protection still appropriate in the digital environment?

NO.

There has been much discussion on the issue of the duration of protection (see, for example, Kilbey, ‘Copyright Duration? Too long!’ 25 *European Intellectual Property Review* 105 (2003)). However, if there is a move towards registration systems as suggested in this Consultation or from the proposed Copyright Hub (see responses above) this is likely to lead to increased litigation over copyright. This is because such registration systems go hand in hand with increased use of digital watermarking technologies which can be used to locate content that has not been licensed, and because it may lead to a “norm” that delivered content be licensed when re-used (rather than the license occurring in order to avoid copyright infringement claims over copyrighted elements).

III. Limitations and exceptions in the Single Market

Q21. Are there problems arising from the fact that most limitations and exceptions provided in the EU copyright directives are optional for the Member States?

NO.

Each member state has its own means of copyright balance. Traditionally private copying has not been permitted in the UK although at present there are on-going proposed reforms, in relation to private copying in the UK. . However, private copying contributes to striking the correct balance in UK copyright law, in that copyright is rarely enforced in such a situation. That is not to say that such an exception would not be welcome, but that there are differences in operation between Member States.

Q22. Should some/all of the exceptions be made mandatory and, if so, is there a need for a higher level of harmonisation of such exceptions?

NO.

It should be for each Member State (MS) to decide whether to implement the exceptions given the different legal cultures within the MS. It is not necessary for there to be harmonisation of all exceptions over the MS, because as outlined in Q21, the operation of such exceptions will vary between MS based on their own domestic situations. A choice between exceptions, as has been utilised in the Information Society Directive, is more desirable for this reason.

Q23. Should any new limitations and exceptions be added to or removed from the existing catalogue? Please explain by referring to specific cases.

There should be a better rule making procedure under Art 6 EUCD enabling individuals to circumvent DRM controls. The relevant part of Article 6:

“4. Notwithstanding the legal protection provided for in paragraph 1, in the absence of voluntary measures taken by rightholders, including agreements between rightholders and other parties concerned, Member States shall take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation provided for in national law in accordance with Article 5(2)(a), (2)(c), (2)(d), (2)(e), (3)(a), (3)(b) or (3)(e) the means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation and where that beneficiary has legal access to the protected work or subject-matter concerned.”

In the UK, the implementation of this is in s.296ZE CDPA 1988:

296ZE Remedy where effective technological measures prevent permitted acts

(1) In this section—

“*permitted act*” means an act which may be done in relation to copyright works, notwithstanding the subsistence of copyright, by virtue of a provision of this Act listed in [Part 1 of Schedule 5A](#);

“*voluntary measure or agreement*” means—

(a) any measure taken voluntarily by a copyright owner, his exclusive licensee or a person issuing copies of, or communicating to the public, a work other than a computer program, or

(b) any agreement between a copyright owner, his exclusive licensee or a person issuing copies of, or communicating to the public, a work other than a computer program and another party, the effect of which is to enable a person to carry out a permitted act.

(2) Where the application of any effective technological measure to a copyright work other than a computer program *prevents a person from carrying out a permitted act in relation to that work then that person or a person being a representative of a class of persons prevented from carrying out a permitted act may issue a notice of complaint to the Secretary of State (emphasis added).*

(3) Following receipt of a notice of complaint, the Secretary of State may give to the owner of that copyright work or an exclusive licensee such directions as appear to the Secretary of State to be requisite or expedient for the purpose of—

- (a) establishing whether any voluntary measure or agreement relevant to the copyright work the subject of the complaint subsists; or
- (b) (where it is established there is no subsisting voluntary measure or agreement) ensuring that the owner or exclusive licensee of that copyright work makes available to the complainant the means of carrying out the permitted act the subject of the complaint to the extent necessary to so benefit from that permitted act.

(4) The Secretary of State may also give directions—

- (a) as to the form and manner in which a notice of complaint in subsection (2) may be delivered to him;
- (b) as to the form and manner in which evidence of any voluntary measure or agreement may be delivered to him; and
- (c) generally as to the procedure to be followed in relation to a complaint made under this section;

and shall publish directions given under this subsection in such manner as in his opinion will secure adequate publicity for them.

(5) It shall be the duty of any person to whom a direction is given under subsection (3)(a) or (b) to give effect to that direction.

...

(9) This section does not apply to copyright works made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them.

(10) This section applies only where a complainant has lawful access to the protected copyright work, or where the complainant is a representative of a class of persons, where the class of persons have lawful access to the work.

...

Section 296ZE has been criticised by the independent UK Gowers Review for being ineffective (The Gowers Review, 2006, p.71). In this particular area too much flexibility in execution was provided by the Directive, and there are too many variances between MS in terms of implementation, and this will hinder cross market harmonisation.

Q24. Independently from the questions above, is there a need to provide for a greater degree of flexibility in the EU regulatory framework for limitations and exceptions?

NO.

The current system is sufficiently flexible for Member States.

Q26. Does the territoriality of limitations and exceptions, in your experience, constitute a problem?

NO.

It is for Member States to decide their own exceptions due to differing legal cultures. If all limitations and exceptions were harmonised, this might adversely affect particular Member States – for instance, over private copying where differences exist between the UK and other Member States (Q21), or in assessing “fair compensation” (Q27).

Q27. In the event that limitations and exceptions established at national level were to have cross-border effect, how should the question of “fair compensation” be addressed, when such compensation is part of the exception? (e.g. who pays whom, where?)

Fair compensation, as for instance addressed within the recent Orphan Works Directive, should be amenable to different legal cultures within different Member States. The meaning of this term varies considerably from the UK to Germany to various other jurisdictions, for instance thereby creating inconsistency. Therefore regard should be had to this in future reforms.

[See, Favale, M., Homberg, F., Kretschmer, M., Mendis, D. and Secchi, D., *Copyright, and the Regulation of Orphan Works: A comparative review of seven jurisdictions and a rights clearance simulation* (London: Intellectual Property Office; 2013), pp. 1-100].

User-generated content

Q58. (a) [In particular if you are an end user/consumer:] Have you experienced problems when trying to use pre-existing works or other subject matter to disseminate new content on the Internet, including across borders?

YES.

Depending on the type of work/subject matter, it can be difficult to *access* and *use* pre-existing work to create new content to be disseminated on the Internet. For example, to access and use academic articles generated by Universities to create new content can be difficult unless a valid licence is in place and the person has access to the licence. In such cases, and where the traditional publishing model dominates the dissemination, *access and use* proves to be more of an issue as opposed to dissemination on the Internet which crosses borders. The latter (i.e. dissemination) can be achieved fairly easily through various platforms ranging from websites (personal; organisational) through to social media sites.

NO.

On the other hand, it can be fairly easy to access and use pre-existing works or other existing subject matter to create new content for dissemination on the Internet. This is particularly true in the case of user-generated content (UGC). Platforms such as *YouTube* make available a large amount of copyright content which can be freely accessed.

To put it into context, a Commissioned Study (by the UK Intellectual Property Office) carried out by the Centre for Intellectual Property Policy and Management (CIPPM) at Bournemouth University in 2013 can be cited.

[See, Erickson K., Kretschmer M., & Mendis D., *Copyright and the Economic Effects of Parody: An Empirical Study of Music Videos on the YouTube Platform and an Assessment of the Regulatory Options* [London: Intellectual Property Office; 2013], pp. 1-38].

The Study reviewed a sample of 8,299 user-generated music video parodies relating to the top-100 charting music singles in the UK for the year. Through this Study, it revealed that on average “there are 24 user-generated parodies available for each original video of a charting single” showing UGC to be a significant consumer activity. It also revealed the ease of access to pre-existing works to disseminate new content on the Internet, including across borders.

Q59. (a) [In particular if you are an end user/consumer or a right holder:] Have you experienced problems when trying to ensure that the work you have created (on the basis of pre-existing works) is properly identified for online use? Are proprietary systems sufficient in this context?

YES.

In the field of academia (and being a right holder in this field), work that is created on the basis of pre-existing works is generally identified and referenced in the online world. At the same time, it must be pointed out that the type of work that is accessed and used in this field is relevant to a particular group of people as opposed to the wider and larger masses. The problems occur in the use of popular media and in the use of online platforms such as YouTube, Vimeo for

example, to create new content. In such cases, there is lack of acknowledgement of the original creator which can lead to infringement of copyright and piracy.

The existing proprietary systems do not address issues thrown up by UGC. For example, whilst some Member States of the EU have adopted exceptions to deal with parody – which relies on pre-existing work, there are a number of other Member States which do not have such a provision. UK is currently moving forward in introducing a parody exception.

However, a UGC-focused provision (similar to Canada) will be more useful as more people engage in such activities. Also the existing laws are silent on whether the use of pre-existing work to create new content is for commercial or non-commercial use. This is something which needs clarification along with the clarification that user-generated content should not have an adverse effect on the market of existing work / original which again is not addressed clearly in the current laws of the Member States.

Clearly the UGC must acknowledge the original work and must not harm the personality rights of the creator of the original work.

[See, Mendis D., & Kretschmer M., *The Treatment of Parodies under Copyright Law in Seven Jurisdictions: A Comparative Review of the Underlying Principles* [London: Intellectual Property Office; 2013], pp. 1-92].

Q60. (a) [In particular if you are an end user/consumer or a right holder:] Have you experienced problems when trying to be remunerated for the use of the work you have created (on the basis of pre-existing works)?

In the UK, collecting societies such as the Authors Licensing and Collecting Society (ALCS); Design and Artists Copyright Society (DACS); Performing Rights Society (PRS) for Music; and the Copyright Licensing Agency (CLA), amongst others, exist to remunerate various types of works. Whilst, in general, these collecting societies do remunerate rightholders, there are issues relating to remuneration particularly when it relates to artistic works, online works and in the use of photocopied works.

For example, a Study carried out in 2011 illustrated that “visual artists have precarious careers, with typical earnings well below the UK national median wage of £21,320. In 2009/10, the typical photographer earned £15,000 (median), the typical illustrator earned £15,723 (median) while the typical fine artist earned only £10,000 (median)”. It reflects the risky nature of working lives in cultural occupations.

[See Kretschmer M., Singh S., Bently L., Cooper E., *Copyright in Contracts and Earnings of Visual Creators: A Survey of 5,800 British Designers, Fine Artists, Illustrators and Photographers* [DACS; 2011].

Where the rightholder does not depend on cultural/creative work for their living, the situation, remains similar. In the academic world, questions remain in relation to the remuneration of rightholders. Whilst the system has been developed extensively, from the mid-2000 to the present times, the problems have not gone away completely. The issue was also highlighted in 2009 when a research monograph highlighted the discrepancies which exist in the collection of licence fee from educational establishments and its ultimate distribution to right holders within those establishments.

[See, Mendis D., *Universities and Copyright Collecting Societies* [The Hague: T.M.C. Asser Press; 2009].

Finally, remuneration remains a grey area in relation to the remuneration of online works which have been created on the basis of pre-existing works. Having said that, a Study published in 2013 showed that in the case of parody works, the relative size of the audience for parody versions of a work does not appear to adversely affect the performance of the original in the marketplace and in turn the remuneration through the VEVO advertising revenue on platforms such as YouTube.

[See Erickson K., *Evaluating the Impact of Parody on the Exploitation of Copyright Works: An Empirical Study of Music Video Content on YouTube* [London; Intellectual Property Office; 2013] p. 22 of 48].

Q61. If there are problems, how would they best be solved?

The problems arise from copyright exceptions which are not clearly defined and from existing laws which do not address “interactions of private citizens, often via social networking sites, which (*sic*) encourages literacy in multimedia expression in ways that are increasingly essential to the skills base of the economy” [*Digital Opportunity: A Review of Intellectual Property and Growth: An Independent Report by Professor Ian Hargreaves* (London: Intellectual Property Office; 2011) para 5.35 p. 50].

Problems have also arisen from more recent stringent laws, such as the ‘three-strikes’ law which have proved to drive end users to piracy rather than deter them away from it.

The problem will be best addressed by the introduction of a clearly defined exception on UGC. It can complement existing exceptions which deal with parody, pastiche and caricature in Member States.

Q62. If your view is that a legislative solution is needed, what would be its main elements? Which activities should be covered and under what conditions?

A legislative solution along the lines of Canada’s *Copyright Modernisation Act 2012* (2012 Act) is suggested. The 2012 Act introduced a new section 29 which recognised works of (education), parody or satire under the existing ‘fair dealing’ exception, which was further elaborated at

section 29.21 for ‘non-commercial user-generated content’. This section is also known as the ‘mash-up’ exception and has been clearly designed to deal with UGC.

The Centre for Intellectual Property Policy and Management’s (CIPPM’s) Commissioned Study into parody included the review of 7 jurisdictions – from the EU, USA, Canada and Australia. A number of lessons were learnt from this Study, particularly in relation to the elements which UGC should reflect. The findings from this 2013 Study, relevant to this question are set out below.

[See, Mendis D., & Kretschmer M., *The Treatment of Parodies under Copyright Law in Seven Jurisdictions: A Comparative Review of the Underlying Principles* [London: Intellectual Property Office; 2013], p. 47 of 92.

The provision addressing UGC should state that the work:

Must be non-commercial;

Must not have an adverse effect on the market for the original;

Must not use more of the original than necessary;

Must add some significant new creation;

Must not harm the personality rights of the creator of the original work;

Must be sanctioned under the rules of social custom; and

Must acknowledge source of original work.

IV. Private Copying and Reprography

Q64. In your view, is there a need to clarify at the EU level the scope and application of the private copying and reprography exceptions in the digital environment?

NO.

The UK is a good example of the current situation. The traditional copyright balance has not permitted private copying, in the sense that there has been no exception for it. However, in reality cases were not brought by right holders – perhaps because they could not observe the infringements that were occurring in individual’s homes. However, the rise of the Internet could change that balance, since such copying could be identified. This is particularly so if private reproduction takes place on any Internet connected device.

Whilst the UK has its own traditions in this regard, this change in technological circumstance may mean there is a need for reform. Currently, this appears to be the position of the UK Government as of 2014. Whether or not this needs EU level action is debateable.

Q65. Should digital copies made by end users for private purposes in the context of a service that has been licensed by rightholders, and where the harm to the rightholder is minimal, be subject to private copying levies?

NO.

It depends on the tradition within MS. In the UK, this would not be a common approach as it would be in other MS countries.

[See, Kretschmer M., *Private Copying and Fair Compensation: An empirical study of copyright levies in Europe* [London: Intellectual Property Office; 2011].

Q66. How would changes in levies with respect to the application to online services (e.g. services based on cloud computing allowing, for instance, users to have copies on different devices) impact the development and functioning of new business models on the one hand and rightholders' revenue on the other?

The main issue with such services is the manner in which secondary liability, authorisation and/or inducement doctrines of infringement may be applied against them. With respect, the issue of levies could become largely dependent upon this question and so that issue needs to be dealt with first. In the UK, for instance, there is discussion of introducing private use: this as a permitted act which would affect the issue of levies (see <http://www.ipo.gov.uk/techreview-private-copying.pdf>). However, assuming they are liable (or if a law is passed to say that they are) then yes, it could have a significant negative impact on smaller players. The degree to which this occurs will probably be dependent on “back room” systems operating under the Copyright Hub, and the cost of utilising that Hub.

VI. Respect for Rights

Q76. In particular, is the current legal framework clear enough to allow for sufficient involvement of intermediaries (such as Internet service providers, advertising brokers, payment service providers, domain name registrars, etc.) in inhibiting online copyright infringements with a commercial purpose? If not, what measures would be useful to foster the cooperation of intermediaries?

We need clarity as to what is meant by “commercial purpose” – will this be done through a system of observing internet connections? When, for example, will a remix that is posted on to the Internet constitute “commercial purpose”? Alternately, when there have been sufficient sales of a work? This is important to resolve before proceeding further since this could influence the copyright balance with regard to the defences and permitted acts.

Q77. Should the EU pursue the establishment of a single EU Copyright Title, as a means of establishing a consistent framework for rights and exceptions to copyright across the EU, as well as a single framework for enforcement?

YES – if binding – so long as the content of the Title accords with the other responses we have provided in this document.

NO – if not binding – if a non-binding version is incorporated this will lead to confusion as to what the exact law is within Member States –for instance, the degree to which domestic law will be read in conformity with the Title (e.g. as interpreted by national courts within domestic case law).

Q78. Should this be the next step in the development of copyright in the EU? Does the current level of difference among the Member State legislation mean that this is a longer term project?

It could be, but any system which is purely voluntary, as has been mooted in Q77, would be one which could lead to considerable confusion and uncertainty.

VIII. Other issues

Q79. Are there any other important matters related to the EU legal framework for copyright? Please explain and indicate how such matters should be addressed.

Currently there is need for harmonisation on the issue of Copyright Hubs. The UK is progressing in this area, alongside private business, but a degree of standardisation at EU level, beyond that of mere protocols concerning identification information, is required if the market is to remain fully functional over the whole EU. [[See Griffin J., *The Digital Copyright Exchange: Threats and Opportunities*, 27 *International Review of Computers, Law and Technology* 5 (2013)].

End of submission