



Copyright the Future:
Developing a Copyright Agenda for the
21st Century

Introduction

The Authors' Licensing and Collecting Society Limited ('ALCS') is the UK rights management society for writers of all genres of literary and dramatic copyright works including fiction, journalism, plays, poetry, academic texts, TV and radio scripts and story-lines, dramatisations, translations, abridgements and adaptations.

Established in 1977 and wholly owned and governed by the writers it represents (of whom there are currently over 66,000), ALCS is a not-for-profit, non-union organisation. Since its foundation, ALCS has paid writers over £170 million in fees and today it continues to identify and develop new sources of income for writers.

ALCS is grateful for the opportunity to contribute to this consultation and would be pleased to provide further information or assistance as required.

Executive summary

1. In setting out its terms the review paper poses many of its questions by reference to the 'current copyright system'. We would argue that the underlying copyright system is sufficiently flexible to cope with a changing environment. Factors not directly related to the legal framework, such as technological advances and changing social attitudes, are closer to the heart of the issues under discussion.
2. Accessing content in a copyright compliant manner is not necessarily the overly complex process the review paper suggests. Through collective licensing ALCS enables access to thousands of writers' works across various commercial and non-commercial sectors.
3. The paper notes the difficulties creators face in the digital age in 'authenticating' their works and controlling how they are used. We suggest that these issues may be addressed through a long-overdue review of the current statutory moral rights regime.
4. Legal enforcement measures are not necessarily the most pragmatic or proportionate response to the long-tail of 'low-level' unauthorised use of creators' works in the on-line environment. Where such activity benefits users and commercial intermediaries, appropriate compensatory measures should be explored to include creators within this value chain.
5. In applying protection it is not appropriate for copyright to attempt to distinguish between the output of 'professional' and 'amateur' creators.

Responses to specific questions

1. Does the current system provide the right balance between commercial certainty and the rights of creators and creative artists?

This question addresses two relationships: that between a creator and the commercial entity that publishes/distributes their work, and that between the work itself and the commercial market in which it exists.

The balance within the first relationship relies upon the bargaining power exercised by an individual, supported by their agents and the industry standards set by representative bodies, such as the NUJ, Society of Authors and Writers' Guild of Great Britain. ALCS operates to secure fair remuneration for writers in respect of uses of works that are not dealt with directly through contractual arrangements with the publishers or producers of their works. We shall therefore leave colleagues more directly involved in this market to comment further in this area.

The advent of digitalisation and the growth of Internet based technologies have completely changed the environment in which creativity may be accessed, and this has upset the balance within the second relationship described above. Having secured fair terms with the producer of their work regarding its formal distribution, creators now face competition in terms of the unlawful use of their work through unauthorised uploads to websites and other file-sharing activities.

Such activities provide value to those accessing the content while at the same time delivering a level of 'commercial certainty' to those facilitating these services. The exclusion of the creator from this process creates a series of imbalances; respect for legal rights diminishes, as does the notion that the content itself has value. A system that fails to recognise and reward the value of creativity, risks a reduction in the quality and quantity of new creative output. Over time such a reduction diminishes the value of the creative industries, a core sector of the economy. We expand on this point in our answer to question 8.

2. Are creative artists sufficiently rewarded/protected through their existing rights?

As stated above the existence of rights is not necessarily the sole criterion in determining whether creators achieve sufficient rewards.

What is clear is that creators play an important role in our cultural life. The figures quoted in the Foreword to the review paper reveal the value to the economy of the creative industries. These industries rely on creative and innovative individuals, such as writers, to drive and sustain their success.

On the other side of this success story is the challenging environment creators face in ensuring their work is both acknowledged and rewarded. Recent independent research on writers earnings funded by ALCS¹ suggests that the level of rewards available in this sector represent a real threat to the future viability of content creation in this core area of the Creative Industries. The research also highlighted the cyclical way in which writers receive income, with royalties from past works and fees from secondary licensing schemes supporting the often speculative process of developing new projects. The key findings were as follows:

- The typical income for a professional writer is one third below the national average wage;
- The earnings of a typical writer are deteriorating in real terms;
- 60% of people who saw themselves as professional writers from the 25-34 age-group earn an average of £5,000 per annum;
- Less than 15% of authors surveyed have received payments for online uses of their works.

Of course there are incentives other than money that stimulate the desire to create - copyright is not designed to guarantee anyone a certain fee for a work; rather to offer the creator of a work the choice as to how it is exploited and on what terms.

We therefore do not feel that the existing rights (provided by the copyright system) determine the *sufficiency* (or otherwise) of reward for creative artists. The combination of rapid technological change, partnership gaps between creators and some commercial intermediaries and ambivalent social attitudes to copyright are closer to the heart of the problems many creators currently face in securing a fair reward for the use of their work. It is these issues that the present review should focus on rather than looking to rewrite the copyright system.

On a more specific level, there are elements within the existing rights regime that are designed to provide reward for creative artists but which, for various reasons, fail to achieve this aim. Fair remuneration for the rental and lending of writers' works are areas of particular concern to ALCS in this regard. We would be happy to discuss these issues in more detail with the DIUS.

As regards protecting creators through their existing rights, while the current enforcement framework is evolving to cope with the digital environment, in practical terms, it is designed for addressing activities taking place on an organised, commercial scale. (See comments under question 4).

Leaving aside a creator's economic rights, the question of sufficiency of protection raises interesting issues in relation to their moral rights. The UK statutory moral rights regime includes fundamental deficiencies that the current review might usefully address.

¹ Authors' earnings from copyright and non-copyright sources: A survey of 25,000 UK and German writers. Research by the Centre for Intellectual Property Policy & Management, Bournemouth University (December 2007)

These largely relate to the exceptions, limitations and qualifications set out in Chapter IV of the Act, including the provisions allowing for a complete waiver of these rights. The comments in the paper preceding this question suggest that creators may seek more control of 'reputational rights' - strengthening the terms of application of the 'Integrity Right' in the current legislation would help in this regard.

3. Is our current system too complex, in particular in relation to the licensing of rights, rights clearance and copyright exceptions?

The fine balance between access and reward is neatly encapsulated in the review paper, "The copyright system should maximise the availability of creative works to the public, ensuring that creative endeavour is rewarded while users can enjoy what has been created, on fair and reasonable terms." Achieving this balance requires different approaches to exceptions and licensing.

Exceptions

Broadly speaking exceptions to copyright seek to permit the use of works in special cases, in response to a particular social need or public interest. The Berne Three Step Test recognises this limiting principle. The Gowers Review and subsequent EC Green Paper have opened up a discussion of current areas subject to exceptions, such as education, personal use and private study both in terms of how they relate to individuals, but also institutions that facilitate these activities.

The paper suggests that there is a perceived lack of clarity over where the boundaries of many existing copyright exceptions lie. The current exceptions are, by design, not prescriptive. For example, it would be unwise to attempt to fix the amount of a work an individual could copy under fair dealing rules as this quantitative approach fails to address the value underlying the entire content of a protected work.

Instead the current exceptions rely on key reference points regarding the context of the permitted use - personal, educational, non-commercial, etc. applied on a flexible basis governed by the core principles of the Three Step Test.

In reviewing the current framework both the Gowers Review and the EC Green Paper examine potential new areas for copyright exceptions, which are also alluded to in this paper. It has been suggested that copyright exceptions may be introduced to allow the re-use of works on-line to create new works and markets. Even in a 'blue skies' review such as this it is important to keep sight of the core principles upon which copyright is based; these suggest that exceptions apply to use in certain necessary circumstances. Separate from this are the commercial implications of 'new markets for content', referred to in the review paper, that may arise where an individual uses an existing work to create another. In the interests of fairness and balance such

allowances should involve the creator and owner of the rights - through a licensing process - not be subject to a copyright exception.

Licensing

The paper suggests that 'clearance can be a long and complicated process with limited scope for action where the terms offered are not appropriate.' In terms of the areas of licensing that ALCS has direct involvement with we would suggest that the opposite is true.

Through its involvement in the collective licensing activities of the Copyright Licensing Agency (CLA) and the Educational Recording Agency (ERA), ALCS provides the necessary rights clearances/ licence on behalf of tens of thousands of writers and their hundreds of thousands of individual works. Reciprocal agreements between ALCS and equivalent bodies overseas add further works to this repertoire.

These licensing bodies acquire complementary mandates from other rightsholders, such as publishers, performers, broadcasters etc. to provide a one-stop rights clearance facility. Licensing is available on a sector by sector basis so that, for example, an educational authority can obtain a licence for all of its schools; a business sector, through its representative body, can agree terms for all the companies in its area of trade. These schemes offer a simple, straightforward copyright compliance solution for vast numbers of individuals, providing access to the content they need to further their learning and promote industry. Rightsholders secure a fair return for this use. This system exemplifies the balance described in the quotation from the paper set out above.

In recent years both the CLA and ERA schemes have successfully extended the reach of their licences to meet the changing needs of their licensees, providing new means for accessing, using and transferring digital content.

Increasingly these licensing schemes are evolving to permit copying and access to learning materials within on-line networks, for example through making works available through Virtual Learning Environments. Through consultations with licensees CLA and ERA manage to offer access across new platforms at a fair price that recognises the balance between the individual, non-commercial uses envisaged by exceptions and uses for which creators have a legitimate interest in receiving remuneration.

In this context it is not true to say that there is 'limited scope' for action to challenge inappropriate licensing terms. The Copyright Tribunal exists to provide the users of licensing schemes with a means for referring terms they believe to be too limited or unfair. By contrast the licensing bodies trying to secure a fair price for the creators and other rightsholders they represent do not enjoy an equal right to approach the Tribunal. In its report on the operation of the Tribunal, the House of Commons Innovation, Universities, Science and Skills Committee supported a re-balancing of the system, back in June 2008, but this has yet to be implemented.

4. Does the legal enforcement framework work in the digital age?

The digital age has created a situation in which a large proportion of unlawful on-line activity occurs at a relatively low level, while the available legal sanctions - court orders, lawsuits, injunctions - require resources and a level of commitment that is more suited to larger-scale infringements. This places redress for aggregated, individual infringements beyond the reach of most individual creators.

One solution to this may be to provide collective bodies with a statutory authority to pursue infringements on their behalf, in accordance with Article 4 of the Intellectual Property Enforcement Directive. However while such collective actions may be suited to more organised or institutional infringers, they may not be able to address the long-tail of everyday uses that cumulatively result in significant loss of potential income for individual creators. Even when approached by a well-resourced representative body, policing infringements at this level may still prove impractical. The drive towards the universal availability of broadband services, capable of delivering streamlined access to copyright content, suggests that this kind of use will increase.

Furthermore attempts to seek redress from those facilitating services present difficulties in establishing the liability of parties who argue that they merely offer a legitimate service that others are choosing to abuse.

This is a familiar quandary. In the analogue age certain infringements were 'below the radar' and therefore not considered worth pursuing through enforcement. But the freedom and flexibility of the digital age greatly increases this bottom line of activity and its potential to prejudice the interest of creators.

We are encouraged that the interim *Digital Britain* report suggests a level of government support for industry-led industry enforcement initiatives. However we do feel that the ubiquity of low-level unauthorised use limits the reach of enforcement measures, requiring another level of thinking. (We explore this point further in our response to question 8).

5. Does the current copyright system provide the right incentives to sustain investment and support creativity?

The copyright system underpins mechanisms that can result in the reward of creators for the primary and secondary uses of their work. We do not feel it is the role of the copyright *system* to provide the right incentive to sustain and support creativity; this variable is largely influenced by external factors.

A perception that works on-line are 'free' to access, share or modify is likely to devalue the concept of creativity itself, which in turn threatens the supply and quantity of creative content entering the market. As stated earlier the roots of this problem do not lie in the copyright system itself.

Primary and secondary licence income from legitimate use and re-use of copyrighted material can and does subsidise the creation of new and innovative creative works, across all media. We would be happy to provide anonymised case studies supporting this. Undermining this income stream will have an impact on the number of writers who can sustain a long-term career, and could also have an adverse effect on diversity, for example with writers from a lower-income background being particularly adversely affected.

6. Is this true for both creative artists and commercial rights holders?

Yes, to the extent that commercial rightsholders rely upon the supply of creative material.

7. Is this true for physical and online exploitation?

Creators' works have always been susceptible to abuse, but the on-line environment extends considerably the scope of this kind of activity.

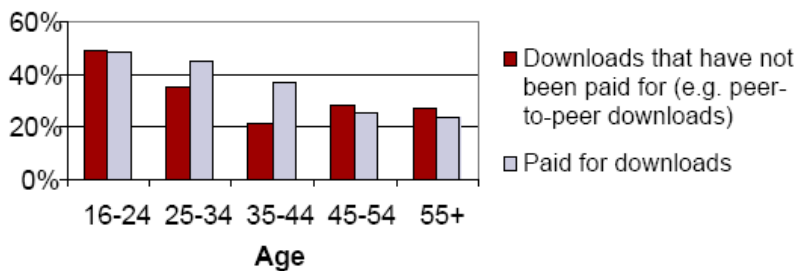
8. Are those who gain value from content paying for it (on fair and reasonable terms)?

Writers receive income from various sources. A book written by an ALCS member may be sold (as a hard copy or e-book), borrowed from a public library, photocopied or scanned. In such cases, writers receive remuneration through their publishing contracts, PLR or from the CLA licensing scheme. In each case the link between the content and the recognition of its value by the user is clear.

The Internet has created the means to access a writer's work without authority or payment, but the value in the work has not diminished. For example, a significant part of the value of a film lies in its script. An individual will enjoy the talent and hard work that went into producing that script whether they downloaded the film from LOVEFiLM or piratebay. In either case the viewer gains value, but only the former has paid for it, thereby enabling the creator to receive a reward acknowledging that value.

In 2008 ALCS commissioned an independent survey examining behaviours and attitudes in relation to the impact of technology on the use of creative works.² The survey confirmed that while levels of ownership of multi-media devices is high, the technology is used by all age groups to access content in a way that does not include creators in the value chain.

² Independent Research conducted by Tickbox for ALCS, February 2008 (Total surveyed: 1,223)



Clearly there are various ways in which this kind of use can be limited: enforcement, education, the increased availability of legal offers, technological protection.

Enforcement

In looking at potential solutions the *Digital Britain* interim report acknowledges that “Counter-piracy measures and effective rights enforcement are an important element, but only one element and insufficient on their own.”

The report sets out plans to introduce legislation to require ISPs to notify alleged infringers subject to reasonable levels of proof from rightsholders, and to collect anonymised information on serious repeat offenders. As the onus of collecting evidence and pursuing infringements falls upon rightsholders, it seems likely that the focus of this activity will be targeted at a certain level; for rightsholders, there are clear resource and reputational arguments against pursuing ‘lower-level’ infringers.

The Minister for Intellectual Property recently indicated his view that society has come to accept this low-level activity and that enforcement at this level was not an appropriate response to the problem.

Education

Education about copyright, but more importantly about the connection between creativity and value, clearly also has a role to play. This is important not just for learning to respect the works of others, but also understanding the value in one’s own creations. Like enforcement, education campaigns - however compelling or creative - will not reach everyone engaged in the unauthorised use of creative works on-line, particularly those who have grown up with the enabling technology.

Clearly there are well-established systems, expectations and behavior patterns that underpin this kind of activity and these will not change or disappear overnight.

Licensed content

This last point applies equally to legal offers. The availability of licensed content does not necessarily compete directly with well-established unauthorised distribution channels. Research produced for the MCPS/PRS Music Alliance in 2008 revealed that around 2.5 million downloads of Radiohead's 'In Rainbows' album were made from file-sharing websites between 10 October to 3 November 2007, despite the availability of free, authorised downloads on the band's web-site.

If loyalty to access through unauthorised sources is sufficiently engrained in the culture of on-line content consumption, this represents a significant constraint on the effectiveness of using alternative licensed options designed to attract users away from such activity.

Filtering Technology

Technical solutions, such as ACAP, may in time provide a more direct solution, but they can only operate effectively once accepted by the whole on-line community. The interim *Digital Britain* report notes that such initiatives, "have yet to command the assent, let alone active support, of all the necessary players along the internet value-chain". On a more basic level, technological protection measures are, inevitably, open to decryption.

This is not to suggest that the above are not worthwhile components of a potential solution, just that cumulatively they are not, in the short to medium term at least, likely to address the full extent of unauthorised activity. A satisfactory, long-term solution may yet be reached; in the meantime creators are unfairly disadvantaged and lose potential income with every passing day.

The value gained from 'free' content access is not limited to end users.

The fact that 'free' content is available on-line does not of itself drive demand for Internet access, but it is clearly something that many people have come to accept as an added element of value. The *Digital Britain* report notes, "Internet content is perceived to be free, if monetised it is through advertising." If the government's plans for universal broadband access are realised, an ever increasing population will be subscribing to Internet services, with added value not just for the service providers but also those looking to sell and promote products and services on-line.

Some of this value enjoyed by on-line service providers and distributors will be returned to creators, through licensing arrangements. Some will not. As stated earlier the value enjoyed by the user is the same, irrespective of whether a creator is remunerated or not. The same may be said for the value accrued by on-line service providers and distributors.

The danger with this model is that it serves the distributor and customer well, but neglects the supplier. If the on-line environment perpetuates a value system that fails to recognise the source of creative content, the quality and quantity of supply is threatened.

The review paper emphasises the importance of rewarding and celebrating creative endeavour. It also envisages the UK taking the lead in a debate with wider international significance. Through this review and its subsequent Discussion Paper we would like to see positive steps taken to support the position of UK creators. We would be happy to discuss in more detail the form such support could take, but suggest that the following elements may provide useful guiding *principles*:

- o **Discretionary legislative powers** enabling the Secretary of State to grant Orders establishing **fair compensation** remuneration schemes;

- o To provide compensation (as a minimum) for the **creators** of copyright works for the **unauthorised use** of their works;

- o To apply in cases where no other licensing/ compensation schemes exist;

- o Such schemes to be financed by the parties involved in the **commercial** supply/ provision of the means to copy and distribute copyright works;

- o With these parties paying variable rates commensurate with the potential for **lost revenue** attributed to each means of copying (based on a **fair and proportionate** formula, to be agreed);

- o The resulting fees to be distributed by mandated agencies, using the **existing infrastructures** for apportionment and distribution;

- o The right of creators to receive such fees should be **inalienable and unwaivable**.

9. What action, if any, is needed to address issues related to authentication?

We agree that the ease with which copies of works can be made (and transferred) in the digital age increases the need for robust systems for creators and potential users to identify the source of works. There are many initiatives underway to develop internationally accepted standards for identifying works. Increasingly these build upon existing standards - such as the ISBN, primarily designed to identify a work - and aim to link individual creations, irrespective of the context in which they appear - back to a named individual.

As a collecting society ALCS relies on the quality of data identifying authors to enable it to make transparent and fair payment allocations. The ease with which digital works may be copied, shared or adapted argues for a robust system requiring the attribution of creators to their works. Earlier in this paper we referred to the insufficient protection afforded to UK creators in terms of

their moral rights. A review of these provisions would be timely to ensure that all creators can benefit fully from the current international initiatives aimed at improving and standardising the quality of available data for copyright content.

10. In considering the rights of creative artists and other rights holders is there a case for differentiation? 11. If so, how might we avoid introducing a further complication in an already complicated world?

This review paper seems to suggest that the copyright system could offer varying levels of protection by reference to the intended market for a work. International copyright law provides well-established rules concerning the necessary standard for copyright protection to arise. There is a danger that introducing complicated, subjective concepts, such as the intention of the creator of a work, may cause unnecessary confusion in light of these existing rules.

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