

Gowers Review – response to call for evidence

Introductory comments

I General questions

The Introduction of the Review’s Call for Evidence states that “[p]ast legislative reform has resulted in a highly complex system” (Call for Evidence, 1) and goes on to suggest that “[t]here may be options to improve the transparency of the system”.

So far as copyright is concerned, and this response will concern itself exclusively with copyright, there are three causal factors which can be identified as having contributed to the present complexity of UK legislation. These are:

- Technological change
- Increased levels of protection
- Harmonisation

In the last century there were three major pieces of copyright legislation: the Acts of 1911, 1956 and 1988. The Copyright Designs & Patents Act of 1988 (CDPA 1988) has undergone major amendment in the 18 years since its enactment in compliance with the United Kingdom’s obligations to incorporate EC Directives in the field of copyright and related rights (91/250/EEC, 92/100/EEC, 93/83/EEC, 93/98/EEC, 96/9/EC, 2001/29/EC and 2004/48/EC) into its domestic law.

Existing legislation is complex in a number of different ways:

- (a) because protection has become “thicker”.
 - (i) more acts are “restricted” (in other words, require the authorisation of the owner of copyright). For example, the “making available” right which originates in the WIPO treaties of 1996 and is expressed in Article 3 of Directive 2001/29/EC is now incorporated by the Copyright and Related Rights Regulations 2002 into CDPA 1988 (see for example section 20(2)(b) “the making available to the public of the work ... in such a way that members of the public may access it ...”)
 - (ii) in addition to the new rights, rightholders may avail themselves of technical protection measures and rights management information, and the WIPO treaties mandate (as does Directive 2001/29/EC and UK law) that these so-called “flanking measures” must also be protected.
- (b) because categories of beneficiaries who were outside the scope of copyright legislation have been given extensive rights. Performers are the most notable example. In UK law, performers were outside the scope of copyright protection until the CDPA 1988. In the last 18 years, as a result of EC Directives, performers have acquired, among other rights, a right to equitable remuneration in respect of the broadcast use of sound recordings of their performances, a making

available right and a reproduction right. As a result of the WIPO Performers and Phonograms Treaty 1996 performers are entitled to moral rights in respect of their audio performances.

- (c) because periods of protection vary depending on when an author died or when a sound recording was made.
- (d) because the process of harmonisation has to take account of existing legislative norms in all the Member States. The principal justification offered by the European Commission for the extension of the term of protection for authors (ie in the Continental European understanding of the term, meaning human creators as distinguished from those entitled to related rights) was that Germany already provided a 70 year post mortem term. In an Utopia, instead of harmonisation there would be a single European copyright law.

Almost without exception the General Questions (How IP is awarded? How IP is used? How IP is licensed and exchanged? How IP is challenged and enforced?) are addressing issues which are relevant in the field of patents and trademarks and have little relevance to copyright. “Industrial property rights” – that is, patents and trademarks – depend to a large extent on systems of registration and compliance with formalities. The Berne Convention, in respect of works of authorship, specifically rules out compliance with any formality as a condition for protection (Article 5(2) Paris revision 1971). [There is no equivalent to Article 5(2) of Berne in the Rome Convention of 1961 which is the international instrument for the protection of performers, phonogram producers and broadcasters, so in principle systems of registration would be permissible for the subject matter protected by Rome.]

It is also worth saying that the nexus between the protection afforded in respect of industrial property and the economic incentives to exploit the patents and trademarks thus obtained is very much more obvious and direct. In UK copyright law someone who writes a private letter to a friend or takes a snapshot of her family is entitled to the same protection for lifetime plus 70 years as the author of this year’s Man Booker novel. The justification for copyright protection does not (cannot) rest on the same basis as that of industrial property.

Specific issues

1 Term of protection on sound recordings and performers’ rights

- (a) Sound recordings

It is misleading to say that the current term of protection is 50 years. Under the 1956 Act the term of protection was perpetual in respect of unpublished sound recordings (section 12[3]). The CDPA 1988 put an end to perpetual copyrights not only for sound recordings but also for unpublished films and works of authorship. The present position is that sound recordings are protected for a minimum of 50 years from the end of the year in which they are made but may be protected for up to a further 50 years if released later than the year in which they were made. For example, Cliff Richard’s recording of Lawdy Miss Clawdy recorded in 1958 was first released in

June 1997. Had the recording been released in 1958, protection would have expired in 2008. However, in the event, the recording will continue to be protected for a further 50 years from the date of release.

Is there any objective test for determining whether the term of protection for any given class, such as sound recordings, is sufficiently long?

A number of arguments for longer terms of protection are advanced.

If the owners of (some of) the rights are still exploiting their rights at the time protection would otherwise expire, that is seen – certainly by those rightsowners – as a reason for extending protection. The converse of the argument would seem to be that subject matter should not be allowed to fall into the public domain until all commercial benefit from the rights has been extracted. However, this also means that a very large proportion of protected subject matter must have little or no commercial value, although still subject to copyright.

Another argument, cited by the Review, is that periods of protection are longer in other countries. It is difficult to make meaningful comparisons of the effects and benefits of longer period of protection in other countries. It is true that if the United Kingdom has a shorter period of protection than the United States then under US law, sound recordings of UK origin will only be protected in the US for the period that they would be protected under UK law. However, as shown by the example of *Lawdy Miss Clawdy*, it is already possible for a UK sound recording to benefit from a period of protection that is longer than the present US term of protection. It should also be remembered that the substantive rights provided for US sound recordings are not the same as those provided in the UK. Free to air broadcasters in the US do not pay for the use of commercial sound recordings and although the US has acceded to the WIPO Performers and Phonogram Producers treaty, it has entered a reservation to exclude the obligation under Article 15 to make such payments.

The experience of implementing the EC Directive extending the term of protection suggests that such extensions inevitably add very considerably to the system complexity which the Review wishes to diminish. It is also clear that there is nowadays a much more vocal group claiming to speak for consumer interests than when the CDPA 1988 was enacted. So far as this group is concerned any extension of rights is to be deplored.

If any extension were to be decided upon, I would be in favour of providing for **short renewable terms** (say 5 years for each term and a maximum of 15 years) which would attract a fee and require registration.

2. Orphan works

The CDPA 1988 already has certain provisions designed to facilitate use in circumstances where the identity of a rightsowner cannot be ascertained by reasonable inquiry. See for example section 190(1) and section 13B. As noted, the CDPA 1988 also abolished perpetual copyright in unpublished works.

The US Copyright Office report on orphan works suggests that elements in the problem which the report describes are specific to US legislation: for example, the availability of statutory damages and the apparent lack of statutory presumptions as to ownership of the kind found in CDPA 1988 section 104. The major category of works identified in the report as problematic seem to be unpublished photographs held by museums and other archival bodies. It will be interesting to see whether evidence to the Review indicates a similar problem in the UK.

Orphaned works

Special consideration should be given to whether material which has been acquired by (for example) a film maker or a broadcaster for use in a film or broadcast should be included within any orphan works provision. The issue in such cases would be that the maker of the film or the broadcaster has itself been in possession of the necessary information when producing the film or broadcast. The work has been orphaned because the information has not been kept up to date or has been lost.

Other issues

Repeat broadcast (CDPA 1988 section 14[5])

The concept of a repeat broadcast is meaningless. This is because, as explained in the current text of the WIPO Draft Basic Proposal of a possible broadcasters' treaty, a broadcast is a transmission and hence unrepeatable.

Tom Rivers
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