



Arts Council England's submission to the Gowers review of intellectual property

Introduction

Arts Council England is the national development agency for the arts in England, investing £1.7 billion between 2005 and 2008. We welcome this opportunity to set out our views on the future shape of intellectual property law.

As the development agency for the arts and for artists, the Arts Council has to consider two aspects of intellectual property rights:

- rewarding the artist for their creation
- ensuring that work reaches the widest possible audience

A successful creative economy needs to ensure there is an appropriate balance between the needs and rights of audiences and other artists and due reward for artists, authors and other creative people generating work. As we outline below, at times these concerns also overlap.

The Gowers Review is timely and provides the opportunity to restate the balance between the public interest in accessing works and private concerns about safeguarding rights in light of new technologies and new models of production and distribution. In this submission, we examine the barriers that artists face in accessing legal advice and also seek to address some of the specific issues raised in the call for evidence. In each case, we believe that safeguarding rights for the user must be balanced with enhanced access to the law for the creator.

1 Accessing the law

We believe there is a role for the public sector in relation to enabling innovation, not least by reducing barriers that artists may face in accessing the law. Many creative practices and strategies fall outside the narrow protection of copyright law. Some creative work also runs the risk of breaking the law, as legal systems often do not take account of the network and distributed nature of contemporary art. Low cost legal advice may not be available to artists to ensure that they use licences and contracts as well as they should. Currently, very little attention has been paid to the needs of artists, smaller media players and the requirements of emerging forms of creative practice.

In practice, artists can be quite pragmatic about copyright law: sometimes licensing the copyright in their works to other distributors; sometimes appropriating other peoples' work to generate something new; and sometimes giving their work away free for others to reuse. There are also new creative pressures on content producers caused by the focus on secondary exploitation rights and their potential revenues.

Copyright law has been developed mainly in relation to large-scale creative industries for which the law works quite well. Copyright law works less well for micro-businesses and sole traders. There is no single model for the way that artists use IP law: in some cases it supports their work, in others, a plethora of rights impedes expression and adds costs to creative productions.

The challenge with new systems of digital rights management will be to ensure that they are flexible and responsive enough to enhance rather than inhibit creativity. New solutions need to be found to make sure this happens. A 'one size fits all' response will not work. As fluid models of distribution emerge in response to technological innovation, so sophisticated rights management solutions need to

be found to support today's creative artists. Government has a role to play in making sure that competition and innovation are encouraged appropriately.

Artists are pragmatic. The key issue for them is how to make a living and support their practice. There is an obvious need for greater support for artists in terms of legal provision and in terms of educating artists about their rights and opportunities with respect to copyright and this is borne out in survey data which can be found in the Appendix of this submission. It is clear that the complexity and, crucially, the perception of complexity in terms of cost and time are key factors in determining how artists and creative people exercise their IP rights.

Strengthening advice and guidance for creators and researchers

Arts Council England is currently carrying out early work to explore the establishment of enhanced legal advice and guidance support structures for artists and independent creators/small companies working in the arts and creative industries in England. This work is also identifying a code of best practice with respect to artists and the law.

We would welcome endorsement by the Gowers Review of the need for further public investment in enhanced support structures. This could be by means of regional or national agencies, drawing on legal expertise, at low cost for small-scale creators. Such support would be of value beyond the specialist arts sector. Endorsement by the Gowers Review would build interest and engagement amongst a broad group of stakeholders for the feasibility work that needs to be undertaken in this area.

2 Copyright exceptions – fair use/fair dealing

At present, artists and researchers use the exception for fair use and fair dealing to access copyrighted works for non-profit, educational and creative uses. Arts Council England is concerned that contract law, for example through the use of digital rights management (DRM), will increasingly overtake copyright exceptions for fair use and fair dealing and that this could have a detrimental impact on artists and researchers.

We would encourage the Gowers Review to consider how best to safeguard fair use/fair dealing by artists and researchers and to restate the principle for the digital age. One way this could be done is through a standard right of access for non-profit, educational and creative uses. We recognise the need to balance such a right with measures to address the potential for its misuse.

We would encourage the Gowers Review to consider the option of the codification of fair use/fair dealing. The United States Copyright Act 1976 sets out limitations on exclusive rights for fair use. Such a codification of uses and circumstances would go a long way to clarify the principle of fair use/fair dealing for artists and researchers who wish to access works for non-profit, educational and creative uses.

We recommend that the task of upholding the principle of fair use/fair dealing exception for non-profit, educational and creative use – and the public value this implies – should be lodged with a specific body, possibly the British Library. The gain here would be clarification, a sense of where to go when advice is sought and a repository of interests and concerns pertinent to the wider public interest in particular rather than subject to lobbying from particular interest groups.

With regard to the EU Copyright Directive, **we recommend that the review consider the scope for Britain taking advantage of the available exemption for fair use/fair dealing online relating to areas of parody, comedy and pastiche.** These are particularly strong creative areas in the UK.

3 Using orphan works

We would like to see the number of orphan works minimised through measures that help copyright owners to successfully use the rights to which they are entitled. But this should not mean that so-called orphan works are off-limits to artists and the wider public for use.

We note British Library's estimate that 40% of works are orphan works and further note that any increase in the length of copyright terms is likely to lead to an increase in this proportion.

We recommend a flexible solution to the use of orphan works. We would encourage the review to consider the self-regulation model whereby individuals and organisations would be permitted to use orphan works for non-profit purposes provided they had undertaken reasonable efforts in seeking out the copyright owner.

In this model, were the holder to come forward, payment would only be made where the user wished to continue to use the work. The model, which has been used in the United States, would open up to artists, creative people and the public a incredible range of orphan works that are currently unavailable to them for use in this way without placing too onerous a burden on copyright holders.

4 Other issues

Given the potential widespread economic and creative impact of reform in the area of intellectual property, Arts Council England would highlight the need for a consultative and evidence-based approach as the most constructive way to proceed. In addition, we would urge the Gowers Review to take account of the work of the Department for Culture, Media and Sport's Creative Economy programme, not least its Competition and Intellectual Property working group, which has been seeking to identify those factors that affect creative and economic well-being.

Appendix

Summary of survey evidence

These notes summarise the reports of three surveys under the following headings, which relate to the Gowers Review call for evidence.

- How IP is licensed and exchanged
- How IP is challenged and enforced
- Copyright exceptions – fair use/fair dealing
- Copyright – orphan works

These notes have been compiled using information from the following reports:

- **Own-it** An online and telephone survey conducted by Own-it, an agency providing free advice on IP to creative industry practitioners in London. Own-it is based at the University for the Arts London. Arts Council England had direct input into the questions set out by the survey. The Own-it survey was conceived specifically in relation to the questions set by the Gowers Review.
- **Open Business** A draft report of an online survey and telephone interviews conducted by the Open Business project into the use of Creative Commons copyright licensing systems in business contexts. Open Business is based at the Young Foundation in London. Arts Council England was consulted in relation to the remit of the survey. This survey is part of ongoing work and was not conducted in relation to the Gowers Review questions.
- **Artquest** An independent assessment report on a one-year national pilot delivering free 360-degree legal advice to artists. Enquiries are not restricted to IP. The service is conducted by Artquest, a regularly funded organisation of Arts Council England, London, and based at the University for the Arts London. This report examines the effectiveness of the Artquest 'Q&A' service and makes recommendations for future provision.

All three reports set out to achieve different objectives. Only one report was intended to research answers for the Gowers Review, and Own-it will be submitting their report to the review.

1 How IP is licensed and exchanged

All three reports cover the practical difficulties and administrative costs relating to administering copyright law. The need for low- or no-cost legal advice is a persistent theme. However, the demand is different depending on the art form. The overwhelming majority of Artquest's users request information about copyright and contract. Own-it has seen high demand for IP specific advice and, along with Open Business, indicates the need for more signposting and IP education.

1.1 Own-it

Own-it users reports a number of problems in terms of complexity and costs of the system:

The overall IP system in the UK was found to be too complicated by over a half of individuals and businesses operating in the creative business. However, a greater number of respondents had disruption and difficulties when managing IP rights.

The administration of copyright and the risk of litigation were issues that had a restrictive impact on the creativity of a significant number of particulars and businesses.

A large majority (86.9%) of respondents thought that the government and the public sector had a responsibility to provide accessible and low cost IP advice. Up to 59.2% thought that an independent agency like Own-It would be the way forward.

In terms of the level of complexity of the current system of IP rights, 44.3% of people found it too complex, whilst 37.7% thought that it was not too complex. When registering IP rights, almost half of Own It users found both the cost of it (44.3%) and the legal work that it takes (42.6%) as the main obstacles to complete registration. Other important barriers argued were issues on administration (29.5%), time (31.1%) and not knowing which rights were available (31.1%). 18% of people also mentioned the difficulty of knowing how to obtain rights.

Own-it also reports a significant amount of creative re-use in contemporary practice – 44% of respondents - which is directly relevant to issue of licensing (as well as to the issues around fair dealing/use – see below):

In terms of using someone else's work, almost half of respondents (44.3%) admitted to having creatively re-used other people's work and they declared a high level of difficulty when negotiating licences to use IP rights. 72.5% of people rated 4 or 5 on a scale of 1-5 of difficulty.

Respondents found cost and time to be the most significant problems in relation to such reuse.

Over 90% of respondents who had found barriers in using other people's IP, argued two or more reasons for this, the cost involved (52.9%) and the time it takes to negotiate these rights (44.1%) being the main obstacles. Other reasons argued were issues of legal work (41%), administration (38%) and lack of knowledge of how to obtain a licence (38%) and where to get advice (23.5%).

1.2 Open Business

Open Business is researching the use of Creative Commons licences in relation to new models of online business. There are currently 88,000 UK-specific Creative Commons licences in use. As an online copyright licensing system, it is often presented as a way of clarifying the rights of owners and, more particularly the end users of online material.

The project reports a growth in collaborative creative practice:

Collaborative producers meet with surprising regularity, aiming to meet once a week or more. These physical meetings are supported through email communication, the creation of Wikis and file sharing. Although very few actually share a studio space, weekends and evenings present opportunities for face-to-face collaboration, discussion and field trips that our participants tend to value.

Generally, Creative Commons licences are perceived to further such practice, cutting down on the need for direct legal intervention.

“Because I believe people will build on my work if they want to anyway and I don't want that to be illegal, I use the non-commercial license for things that I feel could be used to fund my practice and allow me to create more”

The primary reason for using a Creative Commons licence is practical

When asked why they use Creative Commons and presented with five choices ranging from economic, political, practical, trendy or other reasons 50% say that it is practical, the other 50% give other reasons.

The users are predominantly young and male and often hostile to current copyright law.

...copyright is interpreted by respondents as “too strict” and they see it in its current form as outdated. While it is not surprising that users of Creative Commons licences are antagonistic towards copyright it is noteworthy that many seem to feel that copyright goes against their understanding of the purpose of their work. They intend to use CC because it “keeps their work free”.

1.3 Artquest

The Artquest report highlights a general lack of knowledge among users with respect to basic legal concepts and also where to locate appropriate information and the cost of that information.

The report notes that there is a growing awareness of legal issues in relation to art practice.

a rapidly growing awareness amongst artists (especially younger artists) that the law could affect their practice. It was felt that a good proportion of the advice the team provided was not fire fighting urgent legal problems but pre-empting potential issues i.e. facilitating and enabling the user to deal with potential legal issues prior to or whilst making a work.

Though the project offered advice on all legal issues, copyright and contract vastly outnumber other enquires.

44% of all enquiries contained an element of copyright issue and 39% of all enquiries contained an element of contract issue – the two most frequently asked issues.

The assessors conducted telephone interviews with Arts Council staff in regional offices to identify growing trends in practice and future demand.

Six out of nine regions (66%) stated that new trends in practice were raising related legal issues predominantly in the area of intellectual property and copyright.

Services users identified cost as a key issue:

When asked just over a third of users interviewed agreed they might be prepared to pay for the Q&A service because they felt it was valuable. However most interviewees expressed little enthusiasm to do so and would only consider paying a nominal amount. They also suggested that many first time users would be cautious of paying for advice, with no knowledge of the quality of the response they might receive.

In response to this question most users stated the fact that the service was free was of critical importance to them because of their own low income. It was usually the main reason for using the service. 80% of users interviewed were not interested in a subscription service, as enquirers felt they had no way of gauging how often they would use it, in order to justify the expenditure.

The development of pro bono legal support for artist is a key recommendation of the report.

It is strongly recommended that a pro bono pool of solicitors and barristers be established as a priority. Although data indicates the need for pro bono is relatively small, when it is needed, the need is urgent. Furthermore, the pro bono database would enable Q&A to provide a more complete service to users by handing over litigious cases to an individual who can help with the next stage.

2 How IP is challenged and enforced

2.1 Own-it

The Own-it report highlights a number of issues relating to problems of enforcement and litigation.

These relate to cost and time entailed in enforcement.

The IP system in the UK often discouraged the survey respondents from enforcing their rights when having work copied, mainly because of the cost, time and amount of legal work that it involves. The system also denoted problems in relation to accessing clear, unified and cheap advice.

In terms of registering IP rights, respondents repeatedly found the system expensive, complicated and time consuming. Cheaper rates and a more straightforward registration process were common demands.

In the case of having work illegally copied, a very high percentage of respondents (73.8%) had not legally challenged the infringer. A mixture of reasons were given to justify this attitude, the cost of taking legal action being the main one, (argued by 54% of respondents) legal work (35%), time (32.4%), not knowing what their rights were (29.7%) and where to get advice (27%) were also important reasons why practitioners did not enforce their rights.

Own-it also identified the 'chilling effect' on creativity and business posed by the threat of litigation.

The administration of copyright and the risk of litigation were issues that had a restrictive impact on the creativity of a significant number of particulars and businesses.

The administration of copyright and the risk of litigation were issues that had had a restrictive impact on a significant number of creative individuals and businesses. Up to 41% of the respondents to the survey confessed to having been affected by these issues when creating work. Only 21.3% of them declared that the fear of litigation or being sued had not had a negative effect on their creativity.

Own-it respondents also raised the problem of clearing rights as an obstacle in their own creative practice.

In terms of using someone else's work, almost half of respondents (44.3%) admitted to having creatively re-used other people's work and they declared a high level of difficulty when negotiating licences to use IP rights. 72.5% of people rated 4 or 5 on a scale of 1-5 of difficulty. Over 90% of respondents who had found barriers in using other people's IP, argued two or more reasons for this, the cost involved (52.9%) and the time it takes to negotiate these rights (44.1%) being the main obstacles. Other reasons argued were issues of legal work (41%), administration (38%) and lack of knowledge of how to obtain a licence (38%) and where to get advice (23.5%).

While respondents encountered few problems licensing from collecting societies, over half had a problem securing royalties from publishers and collecting societies.

In terms of public performances of music and sound recordings, 76.5% of Own-It members were concerned about these issues, had never encountered problems with the licensing system and paying royalties to collecting societies. In spite of this, over half of them (51.2 %) had had problems with receiving payments/royalties from collecting societies, publishers or other licences of their IP.

A small number suggested simplifications to the current system.

11.5% of Own-It respondents suggested solutions to making the royalty and licensing system simpler. Simplifying the system, having one body dealing with all rights and applying a Creative Commons like system, were mentioned in the recommendations

2.2 Artquest

The Artquest report indicates that a lack of knowledge of 'basic legal concepts' and of where to go for advice as well as financial considerations are key challenges in both access and enforcement of IP.

The assessors recommend supplementing the existing provision of the pilot with additional pro bono legal advice.

It is strongly recommended that a pro bono pool of solicitors and barristers be established as a priority. Although data indicates the need for pro bono is relatively small, when it is needed, the need is urgent. Furthermore, the pro bono database would enable Q&A to provide a more complete service to users by handing over litigious cases to an individual who can help with the next stage.

3 Copyright exceptions – fair use/fair dealing

The Own-it and Open Business reports touch on these issues.

3.1 Own-it

A respondent to the Own-it survey suggests that the notion of harmonising copyright has been misused – effectively lengthening terms, to the benefit of rights aggregators, while ignoring areas such as fair dealing, where the UK consumers and copyright re-users would benefit from harmonisation with the US.

“...Harmonisation of copyright laws is a fallacious argument put forward by the lobbyists for an extension term. The current trend in ‘harmonisation’ of copyright laws has consistently served to increase copyright protection for right holders, whereas no converse moves to harmonise exceptions to copyright laws has been implemented. The UK may seek to justify an extension of term as bringing the country closer to the US regime, yet the legislative differences in relation to fair dealing remain significant.”

Own-it also reports a significant amount of creative re-use in contemporary practice – 44% of respondents - which is directly relevant to issues fair dealing/use (and to issues of licensing – see above).

In terms of using someone else’s work, almost half of respondents (44.3%) admitted to having creatively re-used other people’s work and they declared a high level of difficulty when negotiating licences to use IP rights. 72.5% of people rated 4 or 5 on a scale of 1-5 of difficulty.

Respondents found cost and time to be the most significant problems in relation to such reuse.

Over 90% of respondents who had found barriers in using other people's IP, argued two or more reasons for this, the cost involved (52.9%) and the time it takes to negotiate these rights (44.1%) being the main obstacles. Other reasons argued were issues of legal work (41%), administration (38%) and lack of knowledge of how to obtain a licence (38%) and where to get advice (23.5%).

3.2 Open Business

Open Business respondents made a number of comments about the nature of copyright, reflecting the balance in copyright between the creator and the consumer or creative re-user of copyright protected material. While these were not directly related to the fair dealing questions set out in the Gowers Review, they are relevant, since they express concern at the lack of access rights and a perceived imbalance in current law in favour of rights owners.

For example:

“Copyright is a way of protecting my ideas and work but also a breach of my creative freedom.”

“A system of restriction that grants some useful protection but has been bastardised into having a negative effect on creativity and innovation in advanced capitalist societies.”

“Copyright laws are too strict and unfair most of the times. I understand that artists/producers need to protect their work, but there should be more freedom.”

“On the positive side, a vehicle for attribution, but for the most part a barrier and a worry both when taking photographs and incorporating other works into my digital art.”

4 Copyright – orphan works

The issue of orphan works is not widely recognised in the creative community as yet. Open Business respondents were not asked about orphan works. However, it should be noted that Creative Commons licensing came into being in response to questions created by the growing number of orphan works and the increasingly litigious nature of contemporary society. The owner of a Creative Commons work is relatively easy to contact, and the license itself clearly signposts the rights of the user and indicates where any permissions may be required.

4.1 Own-it

Own-it reports that identifying of orphan works is a problem in creative businesses and have pointed to the need for a centralised database and/or metadata tags for online materials.

Over a half of respondents to the survey did not find it easy to identify copyright holders. A central online database of copyright holders was the most popular suggestion to solve this problem. Negotiating licences to use IP rights was mainly found difficult, and registering those rights was frequently found to be expensive, time consuming and complex.

When asked about copyright, over half (56.7%) of the participants who had tried to identify copyright holders to obtain permission had difficulties in doing this. A variety of solutions were mentioned to solve this problem, embedding metadata in images and applying a copyright number to images, among others. However, the most popular suggestion was the creation of an online central database where everyone could quickly and easily identify copyright holders, proposed by 68% of users making recommendations.

“Have a central database that is editable through log-in accounts where people can submit/ or register their work and that the public can have access to this information in order to find copyright owners easier.”