

GOWERS REVIEW OF INTELLECTUAL PROPERTY

CALL FOR EVIDENCE

SPECIFIC ISSUES: COPYRIGHT

• Current term of protection on sound recordings and performers' rights

Background: The Review will fulfil the Government's commitment to examine whether the current 50 year term of protection on sound recordings and performers' rights in sound recordings is appropriate, in the light of its extension to 95 years in a number of other jurisdictions.

(a) What are your views on this issue?

An extension of term would not be appropriate. The arguments put forward by the recording industry and performers are fundamentally flawed.

The recording industry argue that they use the revenue generated from existing works the subject of sound recording and performers rights to fund the substantial investments they make in bringing new artists to the public. There is no doubt that they do spend substantial sums on finding and promoting new artists. Some at least of the revenue they spend in this way is generated from works which will cease to be protected because the 50 year term will soon expire. However there are several reasons why an extension of term is not appropriate:

- the recording industry has already had nearly 50 years (in the case of works in which such rights are about to expire) to obtain the benefit of exploiting those works; the evidence shows, amongst other things based on the substantial size and global scope, that they have benefited very substantially from exploitation of such works;**
- during that period the market for works (including works recorded nearly 50 years ago) has expanded enormously. Indeed it is hard to imagine that anyone could have foreseen 50 years ago the revenue that exploitation of recordings made at that time could have brought in. The digital revolution, even in the face of piracy, is a windfall for such companies in relation to relevant works of outstanding proportions;**

- during the last 50 years, based on the model the recording industry promote – that they invest in development of new talent – one would have expected that they would have developed substantial new talent which would replace or at least compete effectively with older works, and therefore support further investments now. Indeed, the very fact that the industry y so strongly press for an extension suggests that actually the it is failing to generate sufficiently effective and strong talent to replace older works;
- the existence of substantial portfolios of works in which there are subsisting rights, as are held by large recording companies, means that those companies can invest heavily in marketing and promotion of works, and there is evidence that promotion can be at least as important as inherent talent and creativity. The existence of these portfolios represents a significant barrier to competition by those seeking to enter the market but which cannot afford substantial marketing budgets.
- in these circumstances, and having regard to the apparent reliance of the industry on old works, it appears that the structure of the industry is actually inhibiting the development and growth of new talent. It certainly cannot be suggested on the evidence that it will enhance the prospects of development of new talent, and there is a reasonable argument that the reverse is true – that if the industry could not rely on old works, they would be forced to find new talent in order to secure revenues in the face of competition from freer marketing of older works.
- in any event, the recording industry is basing its arguments on one model – that of large investment in talent and promotion. What they are seeking is preservation and extension of this model in the face of a changing environment. This is not on the evidence of other industries a sensible sustainable basis for generating innovation, which suggest that businesses which embrace new business models in the face of changing environments are more likely to grow and flourish.
- if is inconceivable that businesses seriously base investment decisions on prospective income in 50 or more years time. This is as long as the term regarded as justifying a current value for real property where the market and

environment are much more stable and predictable. In an industry where technology and tastes are changing rapidly it seems highly improbable that investment decisions are based to any material extent on prospects for such future income, certainly at the time of investing in the creation of a work.

The performers argue that they should be entitled to rely on such royalties as pensions. This is an extraordinary proposition. They have already had 50 years of benefit from such earnings in which to save for pensions (with a predictable term even if not a predictable revenue). This compares with most people who have considerably greater uncertainty in funding their pensions.

There is already concern about the political image of intellectual property rights and the potential to prevent users making what they regard as fair use of copyright or other protected works which they buy. Such an extension is not justified and could adversely affect the political arguments.

(b) Is there evidence to show the impact that a change in term would have on investment, creativity, and consumer interests?

Yes. As noted above, the very fact that the recording industry promote it so strongly shows that the existing arrangements are not bringing in new talent to replace old talent. An extension would at least extend or probably exacerbate that.

(c) Are you aware of the impact that different lengths of term have had on investment, creativity, and consumer interests in other countries?

The increase in term in the USA has led complaints from record companies of imports into those countries of unprotected works. For the same reasons as discussed above, this shows that the existing protection has not led to investment in works which replace older works effectively. While investment in such countries continues, there is no evidence that it results in really competitive new creativity.

It is also evidence that consumers seek works which otherwise are unprotected, and at least their legitimate short term expectation of the ability to purchase without payment of royalties or under industry control has been defeated.

In addition, such “free recordings” have the potential to provide a basis for substantial development of lawful internet exchange of recordings; removal of such recordings from the “free market” will reduce this opportunity.

- (d) Are there alternative arrangements that could accompany an extension of term (e.g. licence of right for any extended term)?

There is no justification for alternative arrangements

- (e) If term were to be extended, should it be extended retrospectively (for existing works) or solely for new creations?

It should not be extended retrospectively. This would be a windfall primarily for the recording industry. Even if it were extended and the rights were to revert in the performers, it is not justified. It would be a straight windfall for performers.

• Copyright exceptions - fair use / fair dealing

Background: There are a number of exceptions to copyright that allow limited use of copyright works without the permission of the copyright holder.

- (a) What are your views on the current exceptions in copyright law?

The exceptions cover a number of areas which are important, such as private use, some research, reporting of current events, and educational exceptions, and these are valuable in securing respect for rights (by ensuring that user expectations are in many cases not overridden by rights), or that areas where essentially no harm is done to the owner are not inhibited by fear of rights.

However, the scope and interpretation in the UK is relatively narrow, and highly idiosyncratic, so that the exceptions do not apply in some cases where they would be expected to or are subject to tight and inappropriate rules. For example, the exceptions in relation to private use are widely misunderstood and are not sufficiently wide to cover publicly perceived fair use; and the exceptions in relation to teaching and the setting and taking of examinations have limitations

which mean that individual circumstances often need to be examined, and in many cases the latter are of little value because they do not apply if examination papers are sold – which almost invariably they are in order to provide test papers for subsequent students.

(b) Could more be done to clarify the various exceptions?

Yes. A more coherent and less idiosyncratic structure could be put in place. There is also a growing perception that intellectual property is becoming publicly unpopular, while from a government perspective being a vital building block of the UK economy. It is fundamentally important that users' legitimate expectations correspond broadly with the scope of the law, so that respect for intellectual property rights is preserved, and this should be reflected in fair use provisions. This point is repeated in relation to the use of systems such as DRM and intellectual property controls to restrict the free flow of information which has a significant danger both to competitiveness and in creating a counterculture to intellectual property.

(c) Are there other areas where copyright exceptions should apply?

Yes: Rules around use of electronic information need to be developed to provide a much more practical code. Both to make clear what is appropriate and to ensure that “owners” of information cannot create dominant positions by use of intellectual property and related rights to prevent fair dissemination.

Also, as noted later, it would be helpful to have exceptions in relation to de minimis use (not least because technically such use is a criminal offence with potentially very serious consequences). Examples of difficulties encountered are use of orphan works or works where a copyright owner cannot be identified for de minimis activity.

(d) Are the current exceptions adequate or in need of updating to reflect technological change? For example copyright law in the UK does not currently have a private “fair use” exception. Such an exception might allow individuals to copy music CDs onto their PC and MP3 player for their personal use. Should UK law include a statutory exception for “fair use”?

See above

(e) How would you see content owners being compensated for such use?

This depends on the exception. In relation to private use, the content owners have been compensated usually by the initial purchase, and should not usually be able to control the extent of such private use. In relation to orphan works and the like, a public licensing scheme by which “protective” royalties could be paid would be beneficial.

In each case a scheme needs to reflect the commercial impact on the owner having regard to the nature of the activity.

(f) To what extent has technological change presented difficulties in use of copyrighted material in the field of education?

There are three aspects to this:

- **technological change has opened up opportunities in the educational field which would not otherwise have been possible. Some of the problems in use (such as copying works from the internet) arise from this opening up. This has led to more areas of difficulty in the education field in using expected resources and the breadth of resources to be used which impose unforeseen costs on institutions. For example, consent may be required for use of material where previously the form in which it was used would not have required consent; and whereas books would be shared, now each student expects access. Of course distribution costs have reduced which should mean that overall access costs have also decreased. It is not clear whether this is in fact the case in all areas;**
- **the medium on which works are fixed is now frequently electronic, and this means that some exceptions which would have applied do not apply in practice;**
- **education must reflect the new media, which means that “copying” in the new media is a part of education (for example generating projects based on internet based material as for example for media studies courses)**

(g) Are there issues concerning the archiving of material covered by copyright?

Yes

• **Copyright – digital rights management**

Background: Increasingly digital media content is distributed with digital rights management (DRM) technologies that can enable rights-holders to track usage and prevent unlicensed copying by technological means. However concerns have been raised about interoperability and that such technologies may impair the content consumer's legal rights. For example they may be unable to take into account exceptions to copyright, the ultimate expiry of copyright term, or the future evolution of technology. They may therefore undermine legitimate rights to access digital content, now and in the future. (NB: We are aware of all formal submissions that have been made to the All Party Parliamentary Internet Group on this issue.)

(a) Do you have a view on how the use of digital rights management technologies should be regulated?

There is a need to ensure that DRM and related areas – including prohibition on circumvention of copy protection and equivalent provisions in the US Digital Millennium Copyright Act and copyright infringement provisions for example in relation to software and data, are not used to restrict the free flow of information or legitimate use of products.

This is a complex area in which both the politics of intellectual property and the encouragement of innovation and competition overlap, and cannot be answered in a short paragraph.

However, it is clear that at least complete transparency should be afforded (in the sense that a user must be given express and meaningful notice of restrictions which would encroach on reasonable expectations, and rights should not be enforceable where this is not the case. Of course this is not enough, as enforcement of rights will often not be necessary where the technological framework (such as DRM) is such that the user cannot exercise those rights.

As in *British Leyland v Armstrong* (in relation to fair use of spare parts) there may be an argument for ensuring that where there are technological limits, commercial

providers of systems for circumventing those limits to legitimate users must be permitted. There is an alternative of using competition or regulatory authorities, but they have not shown great nimbleness in addressing these sorts of issues.

There is also almost certainly a place for competition authorities and a need to establish an understanding of a regime which properly balances the legitimate interests of rights holders, users and the public benefit which allows for definition of abuse, identification of it, and elimination of it. In this respect, rights holders will say that their legitimate expectation is to control any reproduction of their works, and users will say that their legitimate expectation is that they should be free to make any use of a product they have purchased, as they would with a pen or other product they purchase, but only of course a limited right in relation to a book – so that they can read it when they like and pass it on to others, but not make copies of it. There is still a long way to go on this.

- **Copyright – orphan works**

- (a) Have you experienced any difficulties in identifying the owners of copyright content when seeking permission to use that content?
- (b) Do you have any suggestions on how this problem could be overcome?

- **Copyright - licensing of public performances**

- (a) Have you encountered problems with the system of licensing and paying royalties to collecting societies for public performance of music and/or sound recordings?

Yes. The enforcement costs are too great.

- (b) Could the system be clarified or simplified, and if so how do you see this working?