

To whom it may concern:

I would like to beg your indulgence in considering the views of a non British subject and non-EU citizen or resident. However, given the implications for Canada of certain features of the British intellectual property regime, and the implications for Britain of certain failings of ours, particularly respecting copyright, I trust you will give me a fair and open hearing.

Comments on Introduction

I would first like to challenge or comment on some of the statements made in the introduction to your call to evidence.

The creative industries alone accounted for 7.8 per cent of Gross Value Added (GVA) in the UK in 2003 and grew by an average of 6 per cent per annum between 1997 and 2003.

If you accept the proposition that “creative industries” – whatever they are – are dependent on IP protection for their business model – and this is by no means self-evident or even true at all in many cases – the fact that these industries are experience such robust and prolonged growth is strongly suggestive that the IP system as it exists offers those industries sufficient protection, and that knee-jerk changes, in the name of “reform”, may in fact be tinkering with legal mechanisms that are not broken.

Intellectual Property protects the value of the knowledge that resides within goods and services.

Intellectual property does not protect knowledge. IP protects economic and related rights in respect of specific subject matters, not knowledge *qua* knowledge. And, to the extent that IP protects things, it can also overprotect, inhibit, and suppress things. Calls for greater protection can and should never be automatically adopted without giving equal and commensurate attention to the inhibiting and dampening cultural, scientific, social, and economic impacts of broader, deeper, or longer IP “protection.” Just because copyright, patent, or trade mark rights are good things, does not mean it logically follows that more copyright, patent, or trade mark rights are even better.

Finally, it must ensure that IP owners can enforce their rights through both technical and legal means.

The intellectual property regime must provide for the enforcement of rights through law, not through technology. The law itself must, in order to maintain its flexibility in a rapidly changing technological environment, be technology-neutral. Around a hundred years ago, the makers of perforated rolls pressured various governments to amend their national copyright legislation to protect their specific technology. Perforated rolls are long gone; the flexible provisions of copyright law, the ones of general application, live on.

There may be options to improve the transparency of the system and increase business awareness of IP, making the system easier to navigate.

It is not just business awareness of IP which needs to be improved; so does public awareness. And the public must not only be aware of their obligations or limits under IP law; the public must have full, fair, and honest information about what is permitted under IP law, and what the metes and bounds of IP protection are. The UK Copyright Act, like that of Canada and many other countries, is in desperate need of being made more accessible in its language and structure. When nation IP statutes become more convoluted than national tax codes, something has gone horribly wrong.

[The widespread use of the Internet...] has enabled widespread copyright infringement,

It has also enabled widespread non-infringing uses of copyright works, and widespread use and re-use of the public domain. In your transmittal letter, you make reference to globalization; this includes the globalization of access to information, knowledge, culture, technology, and science. This is a good thing; it is, in fact, a transformative period in human history, and IP law must be carefully crafted to allow this transformation to take place, not to stifle it. I will return to this theme.

Comments on Limitations of Review Scope

I would like to comment on the exclusion of Crown copyright from your scope.

The United Kingdom has a lesson to teach Canada in the abolition of the former “perpetual” term of copyright in unpublished crown works. However, I still feel there is room for improvement in this regard. If Commonwealth countries are not going to move towards the US-style abolition of government copyright (at least at the federal level) altogether, both the scope and duration should be curtailed. This is especially so for unpublished works of the UK government, given their historical importance to many countries outside the UK, through Colonial and Dominion relationships with countries and other territories around the world. Serious consideration should be given to harmonizing the term of Crown copyright, if Crown copyright is to be retained, so that there is no distinction between published and unpublished Crown works. Personal privacy and state secrets legislation can protect other interests associated with government documents; however given their public nature, truly public documents should enter the public domain, around the world, sooner rather than later.

I will also take up the issue of trademarks further into my comments.

Comments on General Questions

2. How IP is used.

(a) What types of IP does your organisation use and why?

My organisation – that is, myself alone – uses more of “Intellectual non-Property” than Intellectual Property. That is, I use material which is beneath or beyond the scope, breadth, or length of IP protection, specifically copyright. I make economic use of material that constitutes insubstantial parts of works; for purposes that fall outside

the definition of infringement; and especially, of works in which copyright no longer subsists through efflux of time. I use this material, InP if you will, because it is important to me that we learn about our collective past and not allow important facts or lessons to be forgotten. And I use it because it is free – in both senses of the English word¹ – to use it.

A great deal of cultural activity, including commercial cultural activity, is dependent not on copyright protection, but rather on the exact opposite: on the lack of copyright. Publishers re-issue classic works; performers perform classical music; writers borrow in extensor passages from earlier writers; publishers use public domain images; creators of all kinds rely on the “incidental inclusion” exemptions in their national copyright laws.

Sound, policy-based limitations to the scope, breadth, and length of IP protection are just as important to cultural industries as IP protection itself. Copyright is a good thing; but it does not logically or inevitably follow that more copyright is a better thing or that all the copyright in the world is the best thing of all.

As you consider a wide variety of viewpoints, on a wide variety of issues, over the course of your review, do not fail to consider this point: that as economically important intellectual property protection is, clear, reasonable, and generous (to the public) limitations to intellectual property are, economically and otherwise, just as important.

(e) To what extent does the term of IP rights at the margin affect investment decisions?

Significantly. I take forgotten, obscure works and generate additional cultural and economic value with them. The longer the term of copyright, the less I am able to do this. Long terms of copyright suppress more cultural and economic activity than they induce. The movement towards longer copyright terms must be arrested.

4. How IP is challenged and enforced

(g) To what extent is the risk of litigation a factor in your organisations’ investments in innovation?

The only way I can be guaranteed to avoid litigation is to be safe in the knowledge that the materials I work with are in the public domain. This requires a well-defined legal framework for determining a work’s public-domain status, and a reasonably short copyright term. Around the margins of a “clean” definition of the public domain, there must be generous and liberal provisions for the use of works whose copyright status or copyright ownership cannot, upon the facts, be determined through reasonably diligent inquiry.

Current term of protection on sound recordings and performers’ rights

¹[1] “Free” as in “free speech” and as in “free beer”. Other languages, such as French, make clear the distinction that is somewhat muddled in English (“*libre*” vs. “*gratuit*”).

I am against any extension of protection of these rights. Overlong protection serves no economic purpose other than further enriching already-successful copyright properties which have retained economic value right to the end of their copyright term. There is no sound argument which can be made for extending the term to 95 years, that cannot also be made for extending it to 10,000 years. Further extending the term will only exacerbate the already terrible problem of “orphan works”.

Copyright is a bargain between the creator and the public. The creators cannot keep demanding changes to the goal line. The bargain must be kept. There should be no extension, let alone a retroactive one. The fact that the demand for an extension comes as recordings from the 1950s and 1960s, when popular music exploded in the popular culture, are about to start falling into the public domain, is not a coincidence. However, fairness demands that the creators, and especially the owners of copyrights in these works, be treated no differently than those who came before, and whose works are already in the public domain.

Copyright is not perpetual. Nor should it be. A line must be drawn against copyright maximalism and the movement to incrementally increase the term of copyright towards perpetuity.

Copyright exceptions

There are not enough of them.

The law of the United Kingdom, and of all other countries, should incorporate a statutory exception for fair use. This would bring copyright law into line with reasonable expectations of consumers and users. It would also send a signal to copyright owners that copyright is not absolute, nor should it be, and that not every use of a copyrighted work demands payment, nor should it.

With respect to archiving, sound cultural policy demands that people and institutions not only be allowed, but indeed encouraged, to collect, keep, copy, preserve, and conserve cultural works, for the purposes of research, the advancement of knowledge, and the interests of posterity. The law should provide for, and encourage, the copying of works for preservation and research, the migration of electronic and digital media to avoid losses to obsolescence and decay, the preservation of internet content which is so often ephemeral, the copying of manuscript works and their deposition in multiple institutions, and other activities which serve the interests of culture, knowledge, and posterity. No copyright owner should expect payment in respect of these types of activities which serve the public interest.

Orphan works

I have frequently experienced difficulties in identifying the ownership of copyrighted works. And it does not take long for a work to become an “orphan”. I have failed to track the copyright ownership of works by a Canadian author who died in the U.S. in 1962, and of an English author who died in 1986, just six years before I started trying, unsuccessfully, to find his heirs or assigns in respect of his copyrights.

The approach taken recently by the United States Copyright Office is a step in the right direction. Under no circumstances should the U.K. emulate the Canadian model of “unlocatable” licenses, which is bureaucratic, cumbersome, and results in economically inefficient and unfair payments from users to persons who have no connection whatsoever with the work being used.

The U.K. also, unfortunately, has a serious orphan works problem in respect of unpublished works, which I deal with below.

Trade marks

The U.K. should set an example for the world by expressly providing, through its copyright and trademark law, that the use of a work which is in the public domain, within the meaning of copyright law, does not dilute a trademark which is derived from that work or an element of that work. That is, it must not be possible to parlay copyright protection into a trademark protection in respect of wares which happen also to be the type of work originally protected by copyright. Trademarks must not become a de facto perpetual copyright.

Other Issues

Peter Pan: The U.K.’s “Peter Pan” provision causes substantial international confusion, especially in the life+50 countries which make up most of the world. The special status of Barrie’s *Peter Pan* is offensive to principles of equality, and should be repealed. The economic interests of Great Ormond Street Hospital Children’s Charity should be otherwise provided for by Parliament, not in the Copyright Act.

Unpublished works: The U.K.’s “transitional” term in respect of unpublished works is causing significant problems for researchers, publishers, and others, especially those outside the U.K. who cannot reasonably attend British archives in person. Rather than re-invent the wheel, I will reproduce a portion of my submission to the EU Digital Libraries consultation, i2010, from earlier this year, the full text of which is available on-line.²[2]

Finally, there is one other particular class of orphan works in respect of which urgent and immediate action is required. These works are unpublished works in the United Kingdom, although the problem I am about to describe may exist in other EU countries.

In the UK, as in other common-law countries, copyright in unpublished works subsisted at common law in perpetuity. By the late 20th century, most countries recognized that the legitimate interests of authors, historians, and others were not well-served by this perpetual copyright, and it was abolished by statutory amendments. In the United States, the public domain in unpublished works came into existence on January 1, 2003, and grows annually under the life+70 rule. In Canada, the public domain in unpublished works came into existence on January 1, 2004, but owing to an egregious flaw in our legislation, will not resume growth until January 1, 2049.

²[2]

http://europa.eu.int/information_society/activities/digital_libraries/consultation/replies/consult_results/mclean_a30138.pdf

In the United Kingdom, however, while the perpetual term in unpublished works has been abolished, the so-called “transitional term” does not expire until January 1, 2039. The continued subsistence of copyright in unpublished works, *no matter how old they are*, is a continuing source of frustration to researchers in other countries and territories, notably the Commonwealth and the United States, who wish to gain access to materials, held in British archives, concerning their own countries’ history.

I have personally been denied access to photocopies of 18th-century materials pertaining to Canada, which happen to be held in a British repository, because under British law copyright still subsists. No one can identify the owner of copyright in this material, simply because after such an elapse of time, no such owner exists. I may never live to see the day when this material enters the public domain. It also presents a risk that vital historical information, which only exists in a single archival copy, may be lost forever through flood, fire, vandalism, or clerical error. This is profoundly unwise cultural policy on the part of the United Kingdom.

This flaw in British copyright law amounts to little more than a vestige of cultural imperialism. It makes it impossible for researchers in other countries to repatriate their own countries’ cultural heritage, which for linguistic and geopolitical reasons, has ended up in British institutions.

While I appreciate the extraordinary work which British archives, libraries, and museums have done in preserving the documentary heritage of the many corners of the globe where British interests have touched in the past several centuries, this legislative obstacle to the sharing and safeguarding of knowledge and cultural material must be abolished. The United Kingdom has a moral obligation to eliminate all legislative barriers to the dissemination of that extraordinary portion of original sources on human history which is held in institutions within its borders. The same is true of any other European country in which perpetual copyright in unpublished works still subsists, or in which a so-called “transitional period” has not yet run its course.

The United Kingdom, and any other country to which this criticism applies, must undertake the following: to immediately abolish any discrepancy in the term of copyright which is based solely on a distinction between the published and unpublished nature of the work; to immediately abolish the subsistence of copyright in any works which are over a certain age (I would suggest 125 years) unless the copyright would subsist under the life+ term for a published work by the same author or authors; and to immediately shorten the transitional term of cultural heritage. copyright in unpublished works to the life+ term which subsists for published works, or for a further five years, whichever period is longer. There must be a public domain in British archives before January 1, 2039. The United Kingdom owes this debt of cultural gratitude to its former possessions throughout the world; a debt which can be repaid by removing legal impediments to the copying and dissemination, through digital or other means, of this important cultural heritage.

I thank you for considering the points I raise above, and look forward to reading the submissions made available by other participants, and to your final report on these matters.