

Consultation on copyright following the Hargreaves Review

Introduction

The Federation represents IP intensive companies in the United Kingdom - a list of members is attached. Our member companies range from large multi-national companies to smaller SMEs, and are extensively involved with IP in Europe and internationally. Not only do our companies own considerable numbers of IP rights, both in Europe and elsewhere, but they are affected by the activities and IP rights of competitors. They may be either plaintiffs or defendants in IP related court actions, here and elsewhere.

The consultation

On 14 December 2011, Baroness Wilcox, the Minister for Intellectual Property, launched a Government consultation seeking views on the Government's proposals for implementing a number of the recommendations, relating to Copyright, which it accepted in its response to the Hargreaves Review of IP and Growth. The [consultation](#) is open until 21 March 2012.

Private copying exception

Our sister association Intellect is submitting a response addressing the questions on the private copy exception (format shifting):

Question 67

Do you agree that a private copying exception should not permit copying of content that the copier does not own?

Question 68

Should the private copying exception allow copying of legally-owned content for use within a domestic circle, such as a family or household? What would be the costs and benefits of such an exception?

Question 69

Should a private copying exception be limited so that it only allows copying of legally-owned content for personal use? Would an exception limited in this way cause minimal harm to copyright owners, or would further restrictions be required? What would be the costs and benefits of such an exception?

Question 70

Should a private copying exception be explicitly limited so that it only applies when harm caused by copying is minimal? Is this sufficient limitation by itself, or should it be applied in combination with other measures? What are the costs and benefits of this option?

Question 71

Should the current mechanism allowing beneficiaries of exceptions to access works protected by technological measures be extended to cover a private copying exception? What would be the costs and benefits of doing this?

The IP Federation endorses Intellect's response to these questions. Points that they make include the following:

- A private copying exception should only permit copying of content that the copier (or his or her household) has legitimately acquired.
- The private copying exception should fundamentally apply only to individual consumers for personal private use, so that the owner would be able to make the work accessible in another format for playback on a device in his or her legal possession.
- The exception should not be place specific, to reflect the fact that devices may be portable or mobile (so taken out of the home) or located in a different place (e.g. in the car or even in a second home).
- The scope of the private copying exception must be narrow and limited to legally-acquired content for personal or household use.
- The private copying exception should, on the one hand, be drawn as broadly as possible to embrace all those acts of format shifting that most reasonable people believe already are, or should be, permissible.
- On the other hand, it is imperative the exception remains narrow and sufficiently limited so that it causes no more than minimal harm to rights holders (remaining compliant with the Three Step Test) and as such does not give rise to a requirement for payment of compensation in accordance with the EU Copyright Directive 2001/29/EC.
- The current mechanisms which allow beneficiaries of exceptions to access works protected by technological measures are cumbersome and rarely used, suggesting there is no overwhelming public need or interest in extending the scope of the existing mechanisms to cover the private copying exception.

Parody, caricature and pastiche

The consultation includes the following questions:

Question 78

Do you agree that a parody exception could create new opportunities for economic growth?

Question 79

What is the value of the market for parody works in the UK and globally?

Question 80

How might a parody exception impact on creators of original works and creators of parodies? What would be the costs and benefits of such an exception?

At paragraphs 7.100 to 7.114 of the consultation document, the issue of parody, caricature, and pastiche is discussed. The context is clearly that of a copyright work such as a play being parodied for comedic or satirical effect, in the case of a play typically as a sketch. The Federation makes no comment on whether or not such parodies should be facilitated by a change of law; but it does appreciate that an issue of freedom of speech is involved.

The Federation's members include the owners of very valuable brands. The Federation's concern is that a new exception in UK law for caricature, parody, and pastiche might (inadvertently, in the context of the consultation) permit third parties to free-ride on the copyright work of brand owners

and impair their brands by inappropriate associations. There is no issue of free speech in such cases, and without copyright protection the brand owner may well have no cause of action.

Thus in the case of *Schweppes Ltd and others v. Wellingtons Ltd* [1984] FSR 210, Falconer J found on summary judgement that a parody of a Schweppes tonic water label used in the packaging of bubble bath was an infringement of copyright, there being, according to the headnote, "no defence to [infringement] based upon alteration of the work by parody". The two products bearing the labels so differed that Schweppes evidently did not feel that an action for registered trade mark infringement or passing off would have succeeded. In general, in circumstances like this, under the present law, an action for copyright infringement is clearly the best, and very likely the only, course for the brand owner.

We urge that no change of the law should have the effect that, on facts similar to those in *Schweppes v. Wellingtons*, a different decision might be made by the court.

Protecting copyright exceptions from override by contract

Our sister association Intellect is also submitting a response addressing the question on contract override:

Question 103

What are the advantages and disadvantages of allowing copyright exceptions to be overridden by contracts? Can you provide evidence of the costs or benefits of introducing a contract-override clause of the type described above?

Again, the IP Federation endorses Intellect's response to this question. Points that they make include the following:

- It would be harmful to the licensing model generally - and to everyone in the value chain - if rights owners were not able to license acts of private copying for the benefit of consumers.
- The international and cross-border ramifications of any proposed UK law also need to be taken onto account.
- It must remain possible to include within a commercial licence all uses embraced within the private copying exception, which as a matter of policy should not be accorded 'imperative' status.

Conclusion

The IP Federation supports the Government's objective of improving the copyright system as a contributor to growth. It is important to balance the interests of rights holders with those of companies who might wish to achieve strong, sustainable and balanced growth through the development and launch of products on the UK and worldwide markets.

IP Federation
20 March 2012

IP Federation members 2012

The IP Federation represents the views of UK industry in both IPR policy and practice matters within the EU, the UK and internationally. Its membership comprises the innovative and influential companies listed below. Its Council also includes representatives of the CBI, and its meetings are attended by IP specialists from three leading law firms. It is listed on the joint Transparency Register of the European Parliament and the Commission with identity No. 83549331760-12.

AGCO Ltd
ARM Ltd
AstraZeneca plc
Babcock International Ltd
BAE Systems plc
BP p.l.c.
British Telecommunications plc
British-American Tobacco Co Ltd
BTG plc
Caterpillar U.K. Ltd
Delphi Corp.
Dyson Technology Ltd
Eli Lilly & Co Ltd
ExxonMobil Chemical Europe Inc
Ford of Europe
Fujitsu Services Ltd
GE Healthcare
GKN plc
GlaxoSmithKline plc
Hewlett-Packard Ltd
IBM UK Ltd
Infineum UK Ltd
Merck Sharp & Dohme Ltd
Microsoft Limited
Nokia UK Ltd
Nucletron Ltd
Pfizer Ltd
Philips Electronics UK Ltd
Pilkington Group Ltd
Procter & Gamble Ltd
Rolls-Royce plc
Shell International Ltd
Smith & Nephew
Syngenta Ltd
The Linde Group
UCB Pharma plc
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