



Copyright Update

Copyright is relevant to many different kinds of commercial activity. During 2013 there has been a steady flow of industry initiatives, government initiatives at UK and European level, and developments in case law. The EU agenda has been delayed, so the UK has taken the opportunity to make its own progress in areas where the EU may yet legislate, working on the basis that it will make any necessary amendments as and when EU Directives are transposed into UK law. Most of the developments are concerned with adapting copyright law to cope with the effects, and advantages, of digital technology.

UK developments

“Modernising Copyright” – copyright exceptions

At the very end of 2012 the UK government published “Modernising Copyright” - a set of further proposals derived from the consultations conducted during 2012 (and described in last year’s “Trends and Events” article). The objective remained to strengthen and develop the copyright framework and to improve public attitudes towards copyright by making it more appropriate to digital media (for instance by permitting format shifting).

The document summarised the responses to the 2012 consultation (which were published without attribution in June 2012) and committed to propose legislation amending the scope of permitted acts across a range of areas: private copying, education, reporting, parody, non-commercial research and study, non-commercial data analytics, archiving, public administration, and for people with disabilities. During June and July 2013, draft secondary legislation was finally published for consultation on all these areas.

In August the IP Federation submitted comments on the private copying exceptions by endorsing a paper prepared by Intellect (now techUK), which sought to ensure that the new provisions will not undermine the commercial value in copyright material, including with respect to the use of technical measures to protect against copying.

Copyright Notices

In its “Modernising Copyright” report the UK Intellectual Property Office (IPO) committed to introduce a procedure for issuing Copyright Notices, which clarify aspects of copyright where confusion can arise. The service duly commenced on 30 July.

“Supporting the Creative Economy”

In September, after the consultation periods for copyright exceptions had closed, the Commons Committee on Culture Media and Sport published a two-volume report entitled “Supporting the Creative Economy”. This strongly supported rightholders’ interests and the creative industries, focused on enforcement, and expressed strong concerns about the online environment. It also took the view that the Hargreaves report lacked sufficient evidential basis, and so opposed the introduction of the proposed new copying exceptions without further evidence. Intellect prepared a response which supported what it saw as the more balanced approach taken by the IPO on such issues. The final draft secondary legislation on copyright exceptions has yet to be published.

The Copyright Licensing Steering Group

The IPO followed through the recommendations of the Hargreaves report concerning copyright licensing by commissioning an independent report by Richard Hooper and Ros Lynch, “Copyright works - streamlining copyright licensing for the digital age”, which it

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published in July 2012. The Copyright Licensing Steering Group (CLSG) was then established with funding from the creative industries to facilitate voluntary implementation of that report's recommendations.

In September 2013 the CLSG published its progress report ("Streamlining Copyright for the Digital Age: a report by the Creative Industries"). The central recommendation has been the development of a Copyright Hub to act as a primary resource for those seeking licences and copyright clearance. A pilot Hub¹ has been operating since July 2013; the Hub will be developed during 2014 to offer "federated" searches across multiple databases, and scope for creators to voluntarily register their rights.

Industry working groups set up to implement the recommendations in the report are making good progress. The recommendations include: cooperation between the music collecting societies (UK and European) to develop joint-licence offerings, the use of standard format identifiers for audio-visual material, licensee-aggregation where possible, and a code of practice on the use of metadata for images. There are also parallel proposals from the music industry to establish more accessible licensing mechanisms - including a global repertoire database which is to be located in London and Berlin.

Further funding of this initiative to September 2014 has been confirmed by the creative industries.

Orphan works

In April the Enterprise and Regulatory Reform Act 2013 (ERR Act 2013) received Royal Assent. The Act is intended to simplify legal issues for SMEs across a hotchpotch of regulatory areas, including copyright. Amongst other things it enables the development of a legislative scheme to enable licensing of "orphan" works, i.e. those for which the owner cannot be identified.

This created a great deal of nervousness amongst photographers in particular, who often have difficulty ensuring their work is not copied online when its attribution is lost or deleted. The "blogosphere" became very active on the subject (and on extended collective licensing - see below), with the IPO team blogging responses. The IPO has issued various blogs and a "facts and myths" notice. We await draft legislation.

Collecting Societies

The ERR Act 2013 enables legislation to require collecting societies to adopt a code of practice; draft Regulations were published in September for consultation. It also enables legislation allowing collecting societies to offer licences which extend beyond their members' rights ("extended collective licensing", which has been used successfully in Nordic countries for decades). Draft secondary legislation has yet to be published.

Industrially-produced artistic works

The ERR Act 2013 will also repeal section 52 of the Copyright, Designs and Patents Act 1988, which sets a 25-year term of copyright protection for artistic works which are industrially-produced. This primarily affects "classic" modern designs for items such as furniture, lighting and jewellery. The term of protection will in future be the life of the creator plus 70 years, as for other copyright works.

A call for evidence on transitional provisions and timing was run in October to November. The government intends to publish draft secondary legislation, and a revised economic impact assessment, in 2014.

¹ www.copyrighthub.co.uk

Sound recordings extension

In November, pursuant to Directive 2011/77/EU, the Copyright and Duration of Rights in Performances Regulations extended the term of protection for sound recordings, and performers rights in them, from 50 to 70 years. Good news for ageing rock stars!

ISPs and internet blocking

Content proprietors acting against peer-to-peer file sharing have seen repeated success in obtaining UK court orders obliging ISPs to block access to the “torrent” websites which enable this behaviour, using section 97A of the Copyright, Designs and Patents Act 1988. In February a group of record labels obtained a court order requiring the six principal UK ISPs to block various sites. In November a group of film proprietors obtained an order blocking a further 21 sites. The law on this area now appears well settled.

Internet use

The UK Newspaper Licensing Agency (NLA) and Meltwater have been in dispute since 2010. Meltwater’s software searches for keywords in online material and aggregates the results to provide a digital “news clippings” service. The question is whether this causes a copyright infringement when Meltwater’s customer operates the service, such that the customer needs an NLA licence. So far Meltwater has lost; however, on appeal the UK Supreme Court referred a series of questions to the Court of Justice of the European Union (CJEU) which go to the heart of internet use (Case C-360/13).

In effect, the referred questions ask whether the creation of temporary electronic copies by a computer when a user views a web page amounts to a use which is exempt under Article 5(1) of the Copyright Directive (2001/29/EC). The referral was made in June; as yet the CJEU has not provided an Advocate General’s Opinion, nor its Judgment, but this is plainly a key policy question for all kinds of internet use.

European developments

The context for copyright developments in Europe is set by the European Commission’s Digital Agenda for Europe, launched in May 2010. One of seven agenda initiatives is to update the EU’s copyright framework. Further context is provided by the intellectual property strategy published in May 2011 as “A Single Market for Intellectual Property Rights”, and by the Digital Single Market initiative managed by DG CONNECT.

In late December 2012 the Commission published its Communication on Content in the Digital Single Market, which proposed stakeholder discussions on licensing in parallel with the work on the copyright framework; this became the “Licences for Europe” forum, which we report on below.

During 2013 work on the copyright framework has been progressing through market studies and impact assessments, and a decision will be made next year whether to propose draft legislation. The current assessment is that “some adjustments may be envisaged in order to facilitate the availability of online services both within and across borders” - in other words practical changes are likely to be introduced.

To date there has been the Orphan Works Directive (2012/28/EU), and the Directive on Collective Rights Management is currently being negotiated, although it is unlikely to be transposed in the UK before 2016.

There are many active Commission work streams at present. A study on copyright exceptions is due for publication. There has been major on-going work on the use of copyright levies on hardware, which we report on in more detail below. There is an economic impact assessment in hand, and studies continue in the areas of online content transmission, on the contractual structures for digital distribution (as to which see the UsedSoft CJEU referral below), on remuneration for copyright owners, and on text and data mining practices.

The failure of the “Licences for Europe” forum to achieve as much progress as was hoped for (see below) has led to speculation that in 2014 the Commission may seek to review relevant Directives in order to go directly to legal issues.

Proposed EU consultation

A written public consultation on copyright in Europe is expected to be announced by the Commission in late 2013 or early 2014. It will address issues identified in the IP strategy “A Single Market for Intellectual Property Rights”.

In preparation for this, in July 2013 the IPO issued a call for views (“Copyright in Europe - call for views”) and ran two roundtable sessions; some other Member States did likewise. In October the IPO summarised the key themes and points of view (which varied widely) identified in the discussions. Intellect attended, and provided a written response which the Federation endorsed. The IPO is currently reviewing the written responses.

“Licences for Europe”

At the beginning of 2013 the European Commission instituted its Licences for Europe forum, which was intended to address cross-border access, user-generated content, audio-visual heritage materials, and text and data mining for scientific research. However, participants became dissatisfied with the way in which the forum proceeded, and some withdrew. The forum has now closed with a set of pledges from the cultural sector, which are far from presenting practical, short-term solutions to licensing problems in Europe. None of these pledges were co-signed by copyright users, digital or internet industries, consumer groups, researchers, etc. Commission Vice-President Kroes made clear that she does not think the achievements of the process are enough and she recommends a legislative solution, involving a review of the InfoSoc Directive. Commissioner Barnier announced that a final decision on a review process will be taken in spring 2013. That will be at the very end of this term’s Commission, so essentially passing the baton to the next Commission.

Copyright levies

In 2011 the IPO published commissioned research² which identified the nature, extent and impact of copyright and reprographic levies in the EU. Twenty-two Member States operate levies, which vary widely but account for payments of over 500 million euros per annum. Kretschmer concluded that “the system as a whole is deeply irrational.” Disputes over levy payments have resulted in several CJEU references.

During 2012, and as part of the EU IP strategy, former Commissioner Antonio Vitorino ran a mediation process involving a wide array of stakeholders to try to find ways to improve the current systems and so reduce the incidence of disputes.

The Vitorino report was published in January 2013, and concluded that the current national way of imposing/administering levies is a source of friction with Internal Market principles. The report looks in detail at the arguments put forward for many different aspects of the various systems, which were explored in written contributions, meetings with the parties involved, and finally multi-party meetings. Vitorino’s report emphasises the value of licensed digital services. He calls for clarification that private copying of licensed copies should not trigger a levy, on the basis that they cause no harm to the rightholder, i.e. consumers should not pay twice for licensed content. The report notes that change is taking place in the mechanisms for delivering content, and that alternative approaches to hardware levies are being developed; however, it does not go so far as to recommend phasing out hardware levies in the immediate future. What the report does is to suggest a set of broad practical principles that could usefully be adopted. These are set out as core recommendations. Key recommendations are that a common theory of harm and common procedural methods for calculating levies should be developed, and that the levy should be visible to the end consumer and paid (once only) in the country of destination.

² “Private Copying and Fair Compensation: An empirical study of copyright levies in Europe” by Professor Martin Kretschmer.

DIGITALEUROPE welcomed the report, seeing it as an important opportunity for the EU to chart a path away from device-based levies towards alternative and fairer compensation solutions fit for the digital era, and called for a comprehensive public debate. In April the IP Federation wrote to Lord Younger, the Under-Secretary of State for IP in the Department for Business, Innovation and Skills, endorsing an Intellect letter, urging the government to seek inclusion of the Vitorino report as a topic before the EU Competitiveness Council (which was achieved - see below), and to keep the reform of levy systems high on the EU agenda.

In May there was an exchange of views on the Vitorino report at the Competitiveness Council, but there have been no material developments since then, either at EU or Member State level.

In October 2013, responding to the IPO call for views on "Copyright in Europe", the Federation endorsed Intellect's submission, urging the UK government to use its influence to push for follow-up to Vitorino, and specifically to make its voice heard in calling for the European Commission to take a lead in encouraging Member States that do have a national levy system to implement the Vitorino Recommendations. This would be a first step on the way to renewal, where device-based levy systems are replaced with alternative, fairer, nationally-based compensation models, within a permissive EU framework where Member States are at liberty to choose what form of alternative to implement. In this way specific solutions would not need to be mandated by EU legislation.

The European Parliament is also interested in the topic. In October 2013 a hearing in the European Parliament turned out, unsurprisingly, to be relatively pro-levies as French MEP Castex, the rapporteur on this dossier, is known to be close to rightholders and has been tasked by the French government to push back on the Vitorino Recommendations. MEP Castex went on to write a draft 'own-initiative' report for the European Parliament which seeks to entrench the levy system. Industry groups, including DIGITALEUROPE, are currently calling on the Legal Affairs Committee (JURI) to reject the report, which is due to be voted on in JURI in December 2013.

The European Commission is still undecided how to follow-up on the Vitorino report, claiming it will depend on whether Member States call for further action. It seems extremely unlikely that the current Commissioner (whose mandate expires in 2014) will launch legislative proposals for his successor to take up. More likely this Commission will provide a summary of the work done so far, with possible courses of action suggested or provided, for instance in the form of a White Paper rather than a Communication.

Nick Cunningham, 25 November 2013