

UK Intellectual Property Office response to DG INFSO/DG MARKT paper *Creative Content in a European Digital Single Market: Challenges for the Future*

Nature of this response

This response is from the [UK's Intellectual Property Office](#) (IPO), the UK government agency responsible for intellectual property. It sets out some thoughts and observations from the IPO on the issues raised, and reflects informal discussions with some stakeholders. It sets out UK government policy where the government has taken a position on the issues concerned. Many of these positions are set out in the UK government's recent copyright strategy [@ the way ahead: a copyright strategy for the digital age](#) (October 2009), referred to here as "the UK's copyright strategy".

The numbering of sections below matches those of the reflection document.

1. Introduction

IPO welcomes the reflection document ("the paper") and its focus on creating in Europe a modern, pro-competitive and consumer-friendly legal framework for a genuine single market for creative content online, including its emphasis on

- fair remuneration for creators and rightholders
- encouraging the development of attractive, legal products and services
- promoting a level playing field for new business models and innovation

In any future iteration of the paper, it will be important to justify or re-express a number of the statements made in its introduction. For example, while the aim of copyright is to encourage authors' creation of works and making those works available widely, creativity has its fundamental basis in individual creators and their inspiration rather than in copyright. Discussion around the availability of high-quality creative content being a driver in the take-up of new technologies would be improved by an indication of whether it represents hypothesis or established fact. Similarly, it would be useful to acknowledge sources for the view that "illegal downloads on a large scale can jeopardise the development of an economically viable single market for digital content".

Stakeholders who indicated their views to IPO noted the importance of European-level action on creative content online linking the internal market and information society perspectives to cultural, competition and consumer perspectives and to wider innovation policy.

5.1 Possible actions: consumer access

Extended collective licensing

The UK Government is in the process of introducing legislation to allow extended collective licensing and the licensing of orphan works in the UK, as part of the [Digital Economy Bill](#). The UK's approach is consistent with the principles set out in the paper.

Exceptions to copyright

As set out in the UK's copyright strategy, "the Government would look favourably on movement by the EU towards options that benefit consumers. A broad exception to copyright for non-commercial use would be one possibility." In this context, the suggestion in footnote 46 of the reflection document that "serious consideration should be given to measures facilitating non-commercial re-use of copyrighted content for artistic purposes" is welcome. Given that online use of content (for example in "mash-ups" of existing music and images) is inherently open to multiple viewers, a question to be considered would be whether any exception should consider not only rights over reproduction but also communication to the public via the internet.

The UK's copyright strategy also signalled that the UK Government "would look favourably on moves towards a pan-European approach to copyright exceptions for the digital age." Certainty for consumers is not the only goal; exceptions need to be fair to all parties including the diverse groups of consumers and users as well as rightholders and creators. It may be that any calls for narrower private copying exceptions (which appear not to be shared by groups representing UK consumer interests) reflect concerns about the price of exceptions through levy schemes rather than a wish for narrower exceptions *per se*.

A point made to IPO by stakeholders in the context of exceptions was that "fair compensation" was an ambiguous term and did not always provide clarity about what level of remuneration would be required or precisely who might be the beneficiary, for example as between original creator or assigned copyright owner. The UK Government believes it is for each Member State to determine, in its own territory, the most appropriate criteria for assuring adherence to the Community concept of "fair compensation" within the limits imposed by Directive 2001/29/EC and other Community law.

There may be value in any future policy-making process in distinguishing between "public interest" exceptions, where it is argued there is a need for firmness and clear boundaries, and "consumer" exceptions, which may need to be more flexible and take into account broader consumer and cross-border trade policies and licensing practices.

5.2 Possible actions: commercial users' access

A streamlined pan-European and/or multi-territory licensing process

While access with legal certainty on fair terms to diverse creative content will not of itself create a wider range of more attractive and innovative online services, it would certainly contribute to their creation. Moves towards the creation of appropriately governed and streamlined pan-European and/or multi-territory licensing processes could therefore be valuable¹; the results of the Commission's study on multi-territory licensing in early 2010 may help establish a case for action. Aggregate returns to

¹ However, it should be noted that a number of UK rightholders have concerns about any possible imposition of multi-territory licensing on a "one size fits all" basis.

rightholders may be increased by exploiting on a territorial or single platform basis; the Commission should take account of this in assessing the impact of any proposed changes.

Easier access to works by commercial users should help to stimulate innovation around those works, while rights holders would benefit from licensing material to innovative products and services. The UK Government would therefore like to see examination by the Commission of the case for a pre-commercial use exception to copyright, as set out in the UK's copyright strategy².

Rights ownership and licence information

Better available information on rights ownership and licensing would be welcome. This might best be taken from information held by collective management organisations (CMOs), particularly as the introduction of orphan works and/or extended collective licensing arrangements in individual Member States or across the EU would imply many CMOs holding a wide database of works and authors. As the UK's copyright strategy notes, the potential value of such systems of voluntary copyright registration in enabling rightholders to assert their rights and obtain remuneration merits further examination.

It can be argued that costs associated with developing rights ownership and licence information systems, being to the ultimate benefit of rightholders, should be borne by rightholders and their representatives rather than Member States or the EU.

Harmonisation of copyright laws

IPO notes the suggestion by some stakeholders of a need for more profound harmonisation of copyright laws, including the perception of some that the lack of an EU copyright title in parallel with national titles appears incongruous given the existence of EU-wide trademarks and progress towards an EU Patent. Clarification of some of the thinking behind the paper would be welcomed. For example, what might 'restoring the balance between rights and exceptions' mean in practice for exceptions and any associated fair compensation for rightholders? What benefits to EU competitiveness (for example with the US and other countries with "fair use" systems) might be expected from any such rebalancing? Would it be envisioned that this would or could be retroactive?

Experience in developing an EU patent could assist in assessing the range of issues around, for example, language and legal systems that would need to be taken into account in any development of an EU copyright title.

Alternative forms of remuneration

Any proposal to introduce compensation to rightholders by ISPs for reproduction or dissemination of copyright works undertaken by their customers would have to address a range of concerns such as possible chilling effects on businesses' willingness to supply information services (with the implicit risk of impairing progress

² [© the way ahead: a copyright strategy for the digital age](#), p49, para 20.

towards digital inclusion and internationally-competitive European digital infrastructure) and the risk of being seen to legitimise file-sharing and other forms of online copyright infringement, to the potential detriment of legitimate services. Investigation of alternative forms and sources of remuneration might most productively focus on measures that would encourage rather than discourage innovation.

5.3 Protection of rightholders

Extended or mandatory collective management

It could be, and may well be argued by some respondents, that mandatory collective management for all categories of works would be in breach of the Berne Convention, which specifies the categories of works which can be subject to mandatory collective management.

As noted in the reflection document, an additional unwaivable right to equitable remuneration raises the issue of the additional complexity it would introduce. Responding to concerns around the position of creators in their negotiations with their production companies, the UK Government instead plans to “draw together a group to develop model contracts or contract clauses that strike a fair balance between the rights of creators and publishers”³.

Governance and transparency of CMOs

The UK Government is in the process of introducing legislation that contains back-stop powers to allow the regulation of collecting societies (i.e. CMOs) in the UK, as part of the [Digital Economy Bill](#). These powers are intended to be used to regulate those CMOs whose own systems of self-regulation are insufficient; the IPO is encouraging CMOs to self-regulate as far as possible. Creating trust in the operation of CMOs is particularly important if CMOs are to be allowed to extend their repertoires to orphan works and/or through extended collective licensing; rights holders, particularly absent rights holders, must be able to have confidence in the integrity and fairness of those acting on their behalf.

6. Conclusions

IPO welcomes the paper’s conclusions and would welcome the opportunity to pursue further discussions on the issues raised.

³ [© the way ahead: a copyright strategy for the digital age](#), p48, para 14.