



**THE STRATEGIC ADVISORY BOARD FOR
INTELLECTUAL PROPERTY POLICY**

STRATEGIC PRIORITIES FOR COPYRIGHT

CLA SUBMISSION

CLA Response to the Strategic Advisory Board for Intellectual Property Policy (SABIP) Review

1. Introduction

- 1.1 There have been many recent initiatives in the UK reviewing different aspects of copyright: the IPO consultation on developing a Copyright Agenda for the 21st Century, the Digital Britain Interim report and the final report just published, the Gowers report, the IPO consultation paper on its implementation and the IPO consultation on copyright exceptions (following the EU Green Paper). The IPO also conducted a review of the Copyright Tribunal in 2006 and there is a further IPO consultation on the Copyright Tribunal currently underway.
- 1.2 The SABIP paper is intended to develop the themes explored in the Digital Britain report and the work of the IPO in the debate it has launched on developing a Copyright Agenda for the 21st century. This flood of papers, consultations and reviews had not until this week resulted in any action to address urgent problems (such as Internet infringement and piracy and the role of ISPs). With the publication of the Digital Britain final report SABIP and the IPO now have an opportunity not only to move the debate forward, but to also promote and promulgate some solutions.
- 1.3 The British Copyright Council recently provided a list of key copyright issues as research subjects for SABIP including:
- Internet issues, Piracy and ISPs
 - Review of Public Lending Right and full implementation of Artist's Resale Right
 - the importance of educating young people on the social, moral and economic reasons for the existence of copyright
 - practical solutions to the 'orphan works' issue and why copyright registration is neither desirable nor necessary.

To this list might be added the reform of the Copyright Tribunal and the creation of a Representative Action for associations representing rightholders. Of these, the Digital Britain final report contains proposals on online infringement and ISPs, PLR and orphan works. The current IPO consultation on the Copyright Tribunal only partially addresses the areas that require reform.

2. CLA

- 2.1 CLA plays an important role in enabling access to information through its licences which cover the copying of extracts from books, journals, magazines and other publications. CLA's licences originally covered photocopying only but over the last 6 years have been extended to allow

users to scan extracts from hard copy publications to create a digital copy. Increasingly CLA licences also cover some digital publications whether acquired on-line or otherwise. CLA's licensing activities are intended to complement, but not compete with, the primary sales of publishers whilst providing an easy and cost-effective solution for consumers and other users who wish to obtain lawful access to content.

- 2.2 CLA is a not for profit company, limited by guarantee. It was founded in 1983 by the Authors' Licensing Collecting Society Limited and the Publishers Licensing Society Limited who themselves represent, directly or indirectly, authors and publishers of most of the books, journals, magazines and other periodicals published in the UK. Artistic works such as photographs, illustrations and drawings appearing within those works are covered by virtue of an agency agreement between CLA and the Design & Artists Copyright Society Ltd. A network of repertoire exchange agreements with similar organisations throughout the world means that CLA's collective licences also cover a large number of overseas publications.
- 2.3 CLA issues licences to organisations in all sectors of the economy. Virtually all the UK's schools, colleges and universities are licensed by CLA as are most government departments, the NHS and a large number of commercial organisations such as law firms, pharmaceutical companies and thousands of other businesses. CLA also issues licences to Press Cuttings Agencies, the British Library and other information providers enabling them to keep their clients up-to-date on important news and developments relevant to their businesses. CLA licensing activities have returned over £450m to authors, artists and creators.

3. Executive Summary

- 3.1 CLA does not believe that the framework of copyright legislation is fundamentally broken or that it is not fit for purpose. Important areas, such as enforcement and education, particularly to deal with the issues arising out of the use of the Internet and the role of ISPs in the digital age, need to be addressed, although concrete proposals to address these have emerged from the raft of consultations and reports over the last few years including, now, the Digital Britain report.
- 3.2 The various reviews and consultations mentioned in the Introduction covered different ground, but common themes have been repeatedly articulated in submissions made by CLA and other organisations on behalf of the creative industries:

Copyright law: whilst this is basically sound, the enforcement mechanisms in the digital age are inadequate and require a degree of change and government support;

Copyright exceptions: they do not need to be widened, but should be clearly and formally expressed to be subject to the Berne 3 Step Test;

Copyright registration: a requirement for this would not solve anything and would only serve to complicate and risking unfairness to those who – for whatever reason – failed to register;

Copyright Tribunal: is in need of reform;

Voluntary licensing: primary licensing by publishers and creators supported by voluntary collective licensing is more than adequate to meet user demands.

3.3 Voluntary Licensing presents a quicker and fairer ‘fix’ than legislation. Specific issues of difficulty can be dealt with through the provision of tailored licensing solutions, e.g.

- CLA’s educational licences have already been extended to deal with distance learning (ahead of any implementation of the Gowers Review proposals which have been repeated by the Digital Britain final report);
- CLA licences for those suffering from visual and other disabilities impairing access to content have been launched;
- Proposals have been made for an orphan works licence which have fed into the Digital Britain report.

3.4 The introduction of the 3 Step Test formally into UK law would not only fulfil the UK’s EU and international treaty obligations, but would ensure a just recompense to creators and producers. This would help to stimulate the creative economy and deal with the perception that exists amongst users that copyright exceptions are unclear; voluntary collective licensing schemes provide, in cases where they exist, an answer to doubts about the legality of a particular act.

4. Issues raised in SABIP Paper

4.1 Role of copyright and stimulating creativity and innovation.

4.1.1 For copyright to stimulate creativity and innovation, it is vital that it can be effectively and inexpensively enforced to achieve this aim. While CLA does not believe that the huge technological advances in the last 2 decades create any need to make fundamental changes to the system for the creation of copyright, there is a need to achieve a flexible enforcement system that can cope with the new kinds of copyright infringement that the new technologies facilitate. This was addressed in CLA’s conclusion to its response to the Gowers review (Appendix 1) at page 15.

4.1.2 As the SABIP paper notes there is indeed new activity involved in the creation and distribution of copyright at different levels and indeed some of it is split between commercial and non-commercial activity. But this growth of activity demonstrates that copyright itself has not acted as a disincentive to creation; the problem lies more in the difficulties of enforcement of copyright

in a changing climate where it is perceived by large groups of users as being outmoded, irrelevant and unfair. This is having an increasingly serious effect on the creative industries; most notably at the moment in the music industry, but where the same challenges are likely to be faced by all other sectors of the creative industries. What is needed is a clear education campaign aimed both at users and intermediaries to restore the good name of copyright and promoting its benefits to society. This campaign needs to be fully embraced by government and by all parties involved in the chain of creation, production, and distribution of content, particularly ISPs, who need to be prepared to support copyright with action: again the need for an effective enforcement system is the key issue.

- 4.1.3 Collective licensing remains relevant in the digital age to ensure that creators and producers are appropriately rewarded for their efforts. Two of the major issues (admittedly somewhat outside of the current focus of the SABIP review) are the need to reform the Copyright Tribunal to produce a cost-effective and balanced system of determining disputes that is open to all parties and the need for collecting societies to be granted a representative action to enforce copyright on behalf of their rightsholders. These issues are addressed at greater length in the CLA submissions on the reform of the Copyright Tribunal (Appendix 2) and the IPO consultation on the UK implementation of the EU Enforcement Directive (Appendix 3).
- 4.1.4 SABIP is to analyse different national copyright frameworks and the effect on returns to stakeholders with particular reference to the technologies of mass copying. It may well consider the “levy system” employed in various EU Member states. These are unpopular with users who resent having to pay what is seen as a copyright tax regardless of whether or not they use the equipment for what would otherwise be infringing acts.
- 4.1.5 Whilst they have the merit of providing a mechanism to remunerate private copying, levies mean that the return to rightsholders for the use of their work is subject to external political and economic factors so the rate is not necessarily linked to the cost of production or any consideration for what is a “fair reward”. There is a loss of control by rightsholders for the use of their works as well as of the amount to be charged for that use; there is also a loss of respect for copyright by users who believe that, having paid for the equipment, including what they see as the copyright tax, they are entitled to copy what they want, in whatever quantity they want, as many times as they want.
- 4.1.6 Voluntary collective licensing, properly supported by an efficient enforcement system, and a fair regime of regulation, can overcome many of these problems. It allows users access and delivers a fair return to rightsholders whilst allowing them to determine when they wish to exploit their rights on an individual basis and when they choose to have them dealt with collectively.

4.2 Ownership and Coverage of Copyright

4.2.1 In this section the SABIP paper questions whether there are two types of copyright; those with commercial value deserving of copyright protection and non-commercial works that would presumably have a lesser protection or, conceivably, no protection at all. The 'non-commercial copyright' would be equated with an author's moral rights entitled only to the right of recognition, and the right to object to derogatory treatment of their works and to false attribution.

4.2.2 But moral and economic rights of creators are not two completely separate and distinct rights but are rather just different aspects of the same basic entitlement necessarily flowing from the creation of a new work. CLA therefore disagrees that only those works having a "commercial value" (a highly subjective judgement in itself) should be worthy of copyright protection. Apart from the practical difficulties that this would introduce into a system that has broadly stood the test of time, there is a fundamental principle involved, akin to a human right, that a creator of a work (or their assigns) has the exclusive right to prevent, or to allow on such terms as they choose, the use and copying of their works regardless of whether they perceive themselves to be engaged in a commercial or for-profit activity. This lies at the heart of all international copyright law and treaties from the Berne Convention onwards. The pitfalls of introducing a copyright registration system –presumably for works of a 'commercial' nature were discussed in CLA submissions on the IPO paper – Developing a Copyright Agenda for the 21st Century at page 11 (Appendix 4).

4.2.3 If rightsholders wish to make their works available for free, or at least to make certain uses of those works available for free, they can do so within the current framework by a way of a grant of permission (whether an individual or a collective one) or to use such tools as ACAP or the creative commons licence. There may be a scope for voluntary licensing to develop similar models to the creative commons for non-commercial uses to run alongside fee charging licences. CLA's licence for visually impaired users (currently being extended now to include those whose reading or use of materials may be impaired by other disabilities) is a good example of allowing rightsholders to choose to grant uses on a no-fee basis in appropriate cases.

4.3 Rights Management techniques and technologies

4.3.1 The SABIP paper recognises that Digital Rights Management ("DRM") initiatives such as ACAP are developing interoperable standards so that machine-readable information about copyright ownership, licensing permissions and payment terms can be linked to digital content and can be automatically 'read' by other computers (e.g. search engines and websites). The ARROW project (conceived as part of the EU i2010 Digital Library initiative) is designed to link ownership

information to works or parts of works to assist in the process of seeking permissions to use that content. These initiatives involve a mechanical expression of underlying permissions from rightsholders to users enabling access to content. These permissions may be granted by individual licences for rightsholders or collectively through licences issued on behalf of rightsholders by collecting societies.

4.3.2 The use of DRM in these and other initiatives should all be seen as positive advances assisting in the creation and use of content and the information and knowledge it contains rather than as a deterrent or a barrier to access: it cannot be stressed too often that all publishers and creators want their works to be read, viewed or listened to otherwise they would not have created the work in the first place. These DRM tools assist in the 'take up' of digital content and really the only issue is about the use of technological protection measures ("TPMs") to enforce the copyright terms and conditions contained in the licence expressed in the DRM.

4.3.3 There has been a continuing debate about the impact of TPMs on the use of copyright exceptions, but little hard evidence as to their practical effects and little debate about the principles underlying this. Copyright exceptions were originally conceived not as a positive right for users to exercise, but as a shield against a claim for copyright infringement. These were created in an analogue world where the contractual relationship between the copyright owner and the user was in the physical sale of a tangible product and where it was difficult, certainly at individual rightsholder level, to cater for permissions to use the content in the product sold in different ways. In the digital world products can only be sold by means of a licence (whether in an individual or a collective one) and where the licence terms can more easily deal with the range of uses that might be desired.

4.3.4 In many cases the issue of the impact of TPMs on copyright exceptions is irrelevant as the copyright exceptions may not apply in the first place. For instance the exceptions in s. 36 of the CDPA 1988 for educational establishments to copy small extracts of any works do not apply to the extent that a licence authorising the copying in question is available. By creating a digital product and offering it for sale, the copyright owner is necessarily providing a licence for its copying and it would be wrong for an educational establishment to demand to exercise its "rights" to avoid it having to acquire a licence in the first place. Equally if an educational institution had purchased a limited use licence (e.g. limited as to time or to the number of students who can access the product) it must be wrong for it then to seek to use some of the copyright exceptions to argue for a greater use than that for which it has paid.

4.3.5 Consistent with our argument that the Berne 3 Step Test should be formally incorporated into UK law as a test for all copyright exceptions, the answer to the TPM issue could be found in the fact that all exceptions should be subject to displacement by an available licence which provides access (which ought to be the main concern) as opposed to free access.

4.3.5 It would be useful for SABIP to consider any worked examples of where users, lawfully in possession of a digital product, find that TPMs prevented them using the content in ways that would be legal, i.e. consistent with EU and UK law and the Berne 3 Step Test. It might be that there are only a few specific examples of difficulty that need to be catered for (e.g. as with copies for visually-impaired persons) rather than providing a generalised exception or disapplication of TPMs that could have a much wider unintended effect.

4.4 Relation between copyright and contract

4.4.1 CLA represents both creators (in the form of authors and artists) and publishers and it is therefore inappropriate for it to comment beyond noting that the division of licence fees from CLA licences is a decision made in agreement between associations representing those authors, artists and publishers.

4.5 Simplification of copyright framework

4.5.1 CLA agrees that copyright is a complex area, although the basic premise that authors and their assigns should be paid a fair amount for their effort, is a simple message that ought to be capable of being widely understood and accepted. Necessarily the huge technological changes over the last quarter century have introduced new questions and new problems. But, in all the consultations, papers and reviews, the evidence suggests that the basic framework is sound operating as it does from first principles that the copyright owner should have certain exclusive rights over decisions relating to the reproduction, distribution and communication of their work. An argument has been made that the extent of copyright exceptions in the digital age is unclear which we have dealt with earlier and does not of itself seem to justify a wholesale reform of the copyright legislation.

4.5.2 As to the possible consolidation of copyright law, the flow of EU Directives implemented in the UK by means of separate statutory instruments has necessarily complicated the picture. But it is questionable whether much would be gained by attempting to combine these different instruments in one act. The updating and codification of company law is a good example of how an exercise designed to simplify and rationalise law in one area can have the opposite effect. Work does need to be done in specific areas (enforcement, Copyright Tribunal), but otherwise the effort should be put in towards educating users and intermediaries in the copyright chain on copyright and on its economic, moral and social justification.

4.6 Attitudes and behaviours in the digital economy: implications for IP

4.6.1 CLA feels that the work SABIP intends to do in this area to explore the general understanding of copyright and the perceptions as to whether or not it is fair is extremely important and would wish to contribute to that work.

Appendix 1	CLA Response to Gowers Review
Appendix 2	CLA Submission on Reform of Copyright Tribunal
Appendix 3	CLA Submission on UK Implementation of EU Enforcement Directive
Appendix 4	CLA Response to the IPO Consultation on Developing a Copyright Agenda for the 21st Century

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