

**Copyright – The Future  
Developing a Copyright Agenda for the 21<sup>st</sup> Century**

**Submission by The Copyright Licensing Agency Limited to the UK  
Intellectual Property Office Paper**

**Contents List**

1. Introduction .....	2
2. Executive Summary .....	4
3. General .....	5
4. Responses to Specific Questions.....	9
4.1 Recognising Creative Input .....	9
4.2 Access to Works.....	9
4.3 Incentivising Investment and Creativity .....	10
4.4 Authenticating and Protecting Works.....	11

## 1. Introduction

- 1.1 CLA welcomes the launch by the IPO of a debate about the future of copyright as set out in its paper on the Copyright Agenda for the 21<sup>st</sup> Century (the “IPO Paper”). It demonstrates the continuing government interest in the health of the creative industries. Various other consultations (the Gowers Review and the recently published Digital Britain report) have recognised that the creative industries are a large and growing part of the UK economy. Indeed in the current economic circumstances with the pressures on the financial services and manufacturing sectors, it might well be thought that the creative industries will be vital to the economic recovery. The term “knowledge economy” is often used, demonstrating just how vital are the creative industries that create and disseminate that knowledge to the UK economy. The Digital Britain report rightly emphasises the need to develop Britain’s digital capacity and skills. But a digital infrastructure without content is meaningless.
- 1.2 The publishing industry is a significant part of the creative industries (contributing £5bn of turnover) to the UK economy and digital delivery and consumption is forming an increasingly important partner to traditional print media. But this is not to say that the analogue world of print publishing is not also of significant importance. Apart from the fact that many digital products either commence or finish life in hard copy (paper) format, the creation and dissemination of knowledge, information and entertainment in hard copy works is still a vitally important part of the UK economic and educational landscape.
- 1.3 CLA plays an important role in the publishing industry acting on behalf of authors, artists and publishers in licensing the copying of their content by photocopying and other reprographic means, by scanning and, increasingly, digital access. CLA’s licensing activities complement, but do not compete with, the primary sales of these industries and yet provide an effective solution for consumers and other users who wish to obtain lawful access to content at a reasonable price.
- 1.4 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, etc. 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 cover the overwhelming majority of UK publications as well as a large number of titles from overseas.

- 1.5 CLA issues licences to organisations in all sectors of the economy. Virtually all the UK's schools, colleges and universities are licensed by CLA to enable them to copy extracts from books, journals and periodicals. Similarly a large number of commercial organisations such as law firms, pharmaceutical companies and many other businesses are licensed as are most government departments, the NHS and the British Library. CLA also issues licences to Press Cuttings Agencies and other information providers enabling them to keep their clients up-to-date on important news and developments relevant to their businesses.
- 1.6 CLA confirms that this submission may be published by the Intellectual Property Office.

## **2. Executive Summary**

- 2.1 The current system for the creation of copyright is simple, has stood the test of time and requires no amendment (see 4.4 and Qs 9, 10 and 11, p. 14).
- 2.2 Copyright exceptions should be clarified by the formal incorporation into UK law of the Berne 3 Step Test, ensuring that the UK complies with its EU and International Treaty obligations, ensuring fair reward for the creative efforts for authors, artists and their publishers, as well as providing certainty for users (see 3.2, p. 5 and Q3, pp. 11 and 12).
- 2.3 The system for enforcement of copyright is in need of repair. This is true for both print and digital media, but of course the problem is most acute in the digital world (see 3.3, p. 7 and Q4, p. 12). A Representative Action should be introduced.
- 2.4 Licensing solutions, both individual licences direct from the rightsholder and collective licences from licensing bodies like CLA, are flexible and responsive to user demands and can, and indeed have, provided workable solutions to meet reasonable user demands (see 3.5, p. 9 and Q3, p. 11).

### **3. General**

#### **3.1 Copyright Law Review**

There have been several UK and EU consultations on copyright, its administration and enforcement. In addition to the interim Digital Britain report and the Gowers Review, there have been consultations and reviews notably on the Copyright Tribunal, the Enforcement Directive, the Management of Copyright in the Internal Market, and the recent IPO consultation and the EU Green Paper on Copyright Exceptions. There has been, in some areas, a fair measure of agreement on where action needs to be taken and sometimes even on what that action is. It is disappointing to note though that such action has not been forthcoming so that, for instance, as yet none of the Gowers recommendations have been implemented. The reform of the Copyright Tribunal discussed in an earlier IPO paper has not been taken forward and the difficulties surrounding the implementation of the Enforcement Directive to provide a “effective proportionate and dissuasive” enforcement and sanctions regime as required by the EU Enforcement Directive, have also not been taken forward. It is to be hoped that the debate being opened by this paper and publication of the final Digital Britain report will lead to action where it is required.

#### **3.2 Exceptions**

3.2.1 The IPO Paper mentions that there is a perceived lack of clarity over the boundaries of copyright law, in particular copyright exceptions, and states that many consumers (both private and business) are often unaware of these boundaries. CLA believes that often there is no such lack of clarity or lack of awareness; it may simply be easier on occasions for both private and business consumers to ignore copyright law. This is partly to do with a result of the lack and effective system of enforcement (see 3.3 below), or a mistaken belief that it is too difficult to negotiate permissions where in fact a collective licence can be simply and cheaply acquired.

3.2.2 But we agree that too often the description of the exceptions allows scope for arguments that they should apply to those for whom it was not intended. It might be remembered that the 1988 Copyright and Designs Patent Act (the “1988 Act”) provided an exception for fair dealing for “research and private study” and which, until the final stages of the bill, had read “scientific” research and private study. It took some 15 years, and a European Directive, for the UK law to be changed to make this “non-commercial research” during which time many businesses and professions pretended that wholesale copying by them in pursuit of their “for profit” activities ought

to be for free; in other words unjustly at the expense of creators and producers of content.

3.2.3 We understand the difficulty of framing exceptions to hit only the intended target and believe the simpler solution would be for the Government to introduce, as it has been repeatedly urged by CLA and other bodies, a general qualification for exceptions that it must meet with the UK's EU and International Treaty obligations regarding the well-known Berne 3 Step Test. This requires that any exception:-

1. be limited to search special cases;
2. does not conflict with the normal exploitation of the works; and
3. does not unreasonably prejudice the legitimate interests of the rightsholders.

The above test was established by the Berne Convention 1886 for the protection of literary and artistic works, to which the UK is party. It also features in the TRIPS Agreement, the WIPO Copyright Treaty and is a requirement of the EU Copyright Directive.

3.2.4 The Government's view has been that the way the exceptions have been framed mean that they necessarily comply with this 3 Step Test. But the fact that there is argument and debate about the extent of the law (as the IPO Paper and the Digital Britain paper recognise) demonstrates the problem with this approach. CLA disagrees that the exceptions, as drafted, do comply with the Berne 3 Step Test; if the Berne 3 Step Test were formally incorporated into UK law as a benchmark against which exceptions were tested, it would ensure that the UK was meeting its European and International Treaty obligations as well as providing a much needed clarity to the extent of exceptions as sought by the IPO Paper.

3.2.5 Any uncertainty over the extent of exceptions which leads to an interpretation that a licence is unnecessary because of the existence of those exceptions must inevitably mean that the Berne 3 Step Test – in particular the requirement not to conflict with the normal exploitation of a work – is not met. The 3 Step Test, along with voluntary licensing solutions supervised by a (reformed) Copyright Tribunal, provides the answer.

### 3.3 Enforcement

3.3.1 The Digital Britain report recognises the difficulty that rightsholders have in enforcing their rights in the civil system. There has been much debate about IP crime (and rightly so), but there are very real difficulties when looking at copyright infringements

amounting to a civil, but not a criminal, offence. This too is touched on in the Digital Britain report with a reference to peer-to-peer file sharing and illegal up or downloading, but it is a wider problem than that. Businesses, and even some public bodies and local authorities, as well as other organisations, routinely photocopy or scan material protected by copyright which could, and should, be legitimised by taking out an appropriate licence (either an individual or a collective one).

3.3.2 The many obstacles that are placed in the path of rightsholders seeking to enforce their rights were noted in CLA's submissions to the Gowers Review and on the UK implementation of the EU Enforcement Directive. The key points are:-

- the cost and expense of actions in the name of multiple rightsholders.
- proof of the subsistence of copyright in a given work (the presumption should, on the contrary, be that copyright does subsist).
- proof of absence of a licence (again the presumption should be reversed).
- proof of the ownership of copyright in the multiple works infringed.
- the lack of an exemplary damages award (i.e. a deterrent award) as opposed to a purely compensatory award.
- the difficulty of proving damage for multiple but unquantifiable, acts of infringement, each of low value when viewed in isolation.

3.3.3 Many of these problems would be overcome by the establishment of a Representative Action (available to Intellectual Property Rights Management Bodies as envisaged by the EU Enforcement Directive) which might be seen as a corollary of the collective blanket licensing schemes that are so necessary to allow users access without the need for frequent individual clearances. This approach is supported in the Report of the Civil Justice Council to the Ministry of Justice (December 2008) which recommended that there should be a generic collective action allowing a wide range of collective claims by representative parties.

#### 3.4 Copyright Tribunal

The IPO Paper states that “we must further ensure that the mechanisms for mediation and adjudication, or other forms of civil redress are accessible and are able to provide support for the copyright system”. In one important area, namely the operation of the Copyright Tribunal, this is manifestly not the case. The IPO's own report (mentioned above) recommended that reform was necessary, a view supported by the House of Commons Innovation, Universities and Skills Committee; but none has so far been forthcoming. The Copyright Tribunal has jurisdiction over licensing schemes to ensure that licences are on fair and reasonable terms. The IPO Paper states that users should be able to negotiate fair and reasonable terms of

access, but it does not recognise that while users actually have some fallback to a judicial Tribunal to achieve this on their behalf, access to this important forum is denied to rightsholders who have no right to launch a claim at the Copyright Tribunal, thus denying them this form of “civil redress”.

### 3.5 Benefits of Voluntary Collective Licensing

Collective licensing provides certainty to users and often carry benefits that may not necessarily be obtained through statutory exceptions (ignoring any impact of those exceptions on the health of the creative industries). CLA’s collective licences have delivered solutions:-

- for individuals suffering from visual impairment and where its licences have been extended to cover those encountering difficulty in accessing material because of other disabilities (thus going beyond the provisions and requirements of the Visually Impaired Persons Act 2002).
- to the problem of copying of foreign works through its network of reciprocal repertoire exchange agreements with similar bodies abroad. CLA has been able to introduce into the UK a vast repertoire of international works. Over the last 18 months, these have been upgraded to include the right to scan (and sometimes to access digital works) from a significant number of overseas countries including the United States, Canada, Australia, Spain, South Africa and with many more similar agreements in the pipeline.
- for all sectors, including education, by developing licences which allow scanning of extracts from the vast majority of UK and many overseas works. This also delivers access for distance learners, as envisaged in the Gowers Report, well before any statutory implementation of any exception to provide for this.
- by introducing comprehensive digital licences including digital repertoire in addition to scanning for businesses, public bodies and pharmaceutical companies and in addition has introduced new licences for law firms and press cutting agencies.

CLA has also made proposals for a voluntary licensing solution for orphan works and is a member of the ARROW Project established to seek solutions to the problem of orphan and/or out of print works pursuant to the EC’s i2010 Digital Library Project.

## 4. Responses to Specific Questions

### 4.1 Recognising Creative Input

**Question 1: Does the current system provide the right balance between commercial certainty and the rights of creators and creative artists?**

**CLA Response:** CLA represents both creators (in the form of authors and artists) as well as publishers and so it would be inappropriate for it to comment.

**Question 2: Are creative artists sufficiently rewarded/protected through their existing rights?**

**CLA Response:** As above. But please note the division of licence fees derived from CLA licences is in the proportions agreed on behalf of the associations representing those authors, artists and creators.

### 4.2 Access to Works

**Question 3: Is our current system too complex, in particular in relation to licensing of rights, rights clearance and copyright exceptions?**

**CLA Response:** The IPO Paper notes again in this context the perceived lack of clarity regarding the boundaries of copyright exceptions which we addressed at 3.2 above. If the Berne 3 Step Test were to be formally incorporated into UK law as a qualifier for exceptions this would introduce both greater certainty as well as fairness in ensuring remuneration for creators and producers. The Whitford Committee Report of 1986 (which led ultimately to the 1988 Act) recommended that statutory exceptions should not apply where a collective licensing solution existed. The Government of the day declined to follow this recommendation which we think has led, in part, to the current uncertainty.

The supposed “complexity” is largely a figment given that it is never been easier for consumers (whether private or business users) to acquire content quickly and simply through licences often available digitally. For the activities covered by collective licensing the system is really quite simple. Most of CLA’s licences are of the “blanket” kind providing a vast repertoire of works which can be copied during the licence period for a simple upfront annual payment thus obviating the need for costly and administratively complex individual real time clearances. Some of the benefits of CLA’s licensing schemes were listed in 3.5 above.

The IPO Paper mentions that “questions are also being raised about the balance of interest in relation to the onward licensing of rights by licensing bodies”. As explained above, CLA

revenues are paid out in accordance with agreements negotiated between organisations representing authors, artists and publishers. CLA itself is a joint venture between associations representing creators and publishers (see 1.4, p. 3 for details on CLA's structure).

**Question 4: Does the legal enforcement framework work in the digital age?**

**CLA Response:** This was covered in 3.3 above. In short:-

- There needs to be a Representative Action to allow groups of rightsholders to launch actions. The investment of time and money in pursuing an infringer should not unfairly be laid at the door of one rightsholder and this could overcome the unnecessary administrative and technical difficulties of proving ownership of copyright where many works may be being copied. Allowing the class of owners whose works are being copied to launch a Representative Action simplifies the case allowing the court and the parties to focus on its merits as opposed to technical or procedural aspects. It reduces costs to the benefit not just of rightsholders, but also to the judicial system whilst being fair to law-abiding users who otherwise find they have to compete on an unfair playing field with those prepared to play fast and loose with the copyright and enforcement system.
- The IPO Paper questions in particular whether SMEs have the right tools to enable them to take the appropriate action. CLA believes that even large organisations face these barriers, but agrees it is particularly acute for SMEs. But the IPO Paper does not mention individual authors and artists who, apart from the financial and technical difficulties of mounting any action, may well find it counter-productive if they are seeking to sue what is in effect their customer; again the answer is a representative action by the appropriate Intellectual Property Rights Management body as envisaged by the EU Enforcement Directive.

4.3 Incentivising Investment and Creativity

**Question 5: Does the current copyright system provide the right incentives to sustain investment and support creativity?**

**CLA Response:** Copyright law has proved itself remarkably adaptable coping with new technologies, particularly in the second half of the 20<sup>th</sup> Century. The basic protection it offers is appropriate, with the difficulties lying in the "stretching" of exceptions leading to a supposed doubt as to application which could be clarified by the application of the Berne 3 Step Test. We think some changes to the enforcement mechanism for Intellectual Property Rights are necessary and, in the area of collective licensing, reform of the Copyright Tribunal is required.

**Question 6: Is this true for both creative artists and commercial rightsholders?**

**CLA Response:** Other than noting that creative artists and indeed authors are often “commercial” in the sense that they wish to be paid for their work, this is not an area which it is appropriate for CLA to comment upon.

**Question 7: Is this true for physical and online exploitation?**

**CLA Response:** Whilst piracy and infringement remains a problem in the print world, it is of course a huge issue in the digital arena. Illegal online use – one should say theft – of digital content protected by copyright ranging from outright piracy to peer-to-peer file sharing presents a huge problem for the creative industries historically, particularly, for music and the audio visual sectors, but increasingly for publishing as digital publishing and E-book readers develop and become more common place.

**Question 8: Are those who gain value from content paying for it (on fair and reasonable terms)?**

**CLA Response:** It is clear that those who illegally access, download or share content (whether print or digital) are not paying for it, let alone on fair and reasonable terms. Those who do not take out the necessary licences (whether offered individually by the rightsholder or collectively by voluntary licensing organisations on their behalf) are stealing and their use is in effect being subsidised either by the rightsholder or by other legitimate users who are paying for it. For collective licensing, the Copyright Tribunal exists to ensure that users are not asked to pay on unfair or unreasonable terms, but, as noted above, the difficulties lie in terms of rightsholders being able to enforce their licence terms or to have access to an appropriately constructed Copyright Tribunal that has regard equally to the interest of rightsholders as well as to consumers.

4.4 Authenticating and Protecting Works

**Question 9: What action, if any, is needed to address issues related to authentication?**

**CLA Response:** CLA agrees that in the digital age identical or near perfect copies of original works are easy to make. It is unclear to what extent this represents a genuine problem to users acting in good faith. Direct purchase, whether by subscription or one time acquisition, is simple and straight forward and where the bona fides of the vendor are readily identifiable. For secondary markets, again the authenticity of providers of collective licences is generally self-evident. Without knowing the arguments and seeing the evidence for the statement that authenticity is providing users with a problem, it is hard to prescribe a solution. The spectre of registration raised by the IPO Paper may well be a “solution” where the supposed cure is worse than the disease. The absence of formality in the creation of copyright – the lack of any registration requirement – is fundamental to copyright both in the UK and throughout the

rest of the world. It is the foundation on which the Berne Convention is built and has featured in treaty obligations including WIPO, Trips and the EU Directive. Any attempt to introduce some quality threshold or a commercial/non-commercial criterion would be misconceived in principle and impossible to implement in practice. It would be severely counter-productive to the maintenance and development of a healthy creative industries economy.

**Question 10: In considering rights for creative artists and other rightsholders, is there a case for differentiation?**

**CLA Response:** It is difficult to see how and why creative artists and other rightsholders should be differentiated in terms of the authentication of their product.

**Question 11: If so, how might we avoid introducing a further complication in an already complicated world?**

**CLA Response:** As will be apparent from the foregoing, CLA believes that the current system which does not present a registration barrier to the creation of copyright is the most simple and cost effective system and that any attempt to move to a registration system or to establish quality and/or commercial criteria would not only introduce unnecessary complexity, but would be positively dangerous and counter-productive.

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