

UK Intellectual Property Office, Call for Evidence

2014 copyright changes: post-implementation reviews

Response from the British Copyright Council

Introduction

The British Copyright Council (BCC) represents those who create, hold interests or manage rights in literary, dramatic, musical and artistic works, performances, films, sound recordings, broadcasts and other material in which there are rights of copyright and related rights.

Our members include professional associations, industry bodies and trade unions which together represent hundreds of thousands of authors, creators, performers, publishers and producers. These right holders include many individual freelancers, sole traders and SMEs as well as larger corporations within the creative and cultural industries. Our members also include collecting societies which represent right holders and which provide licensed access to works of creativity. A list of our members can be found online [here](#) and attached at Annex 1.

The BCC welcomes this opportunity to comment and looks forward to the results of the post-implementation review on the impact of the 2014 changes to copyright legislation.

Scope of post-implementation review

Five years after the changes to copyright exceptions were introduced, Government should be in a position to assess whether they have generated the economic benefits envisaged by the impact assessment accompanying the legislation and the conclusions of document EE of the 2011 [Review of Intellectual Property and Growth](#) by Professor Ian Hargreaves.

The Hargreaves Review estimated that the benefit to the UK economy of the proposed changes to copyright law would be up to £7.9bn a year. These figures were considerably downgraded by the Government's own impact assessment, which estimated benefits of between £0.5 and £0.79bn. At the time the BCC queried the likely accuracy of even these significantly lower numbers, not least because the Government pointed out that it lacked information to monetise various of the proposed changes. Gaps in that evidence and the underlying assumptions on which the proposals had originally been made, mean a comprehensive review of the impact assessments is required.

Given the concerns originally expressed by the BCC and many organisations in the creative sector, it is paramount that Government carries out a comprehensive post-implementation review of the economic impact of the changes on the industries that directly or indirectly rely on such exceptions.

With independent economic evidence, Government will be able to assess whether the legislation:

- has achieved its original objectives;
- has objectives that remain appropriate;
- is still required and remains the best option for achieving those objectives; and
- could be achieved in another way that involves less onerous regulatory provision to reduce the burden on business and/or increase overall societal welfare.

The creative sector is a key economic and cultural contributor to the United Kingdom; as a net exporter it will be of increasing importance both in terms of economic influence and soft power after the UK's withdrawal from the European Union. A strong and well-defined copyright framework is not only vital for the UK economy, it also is the basis on which individual creators and performers can earn a living.

Where exceptions to copyright may be necessary, we support a nuanced approach by which new or amended exceptions are carefully tailored and based on sound evidence and reasoning.

The BCC contributed extensively to the discussions leading up to the 2014 copyright changes, in particular raising serious concerns about the inadequate economic evidence on which they were predicated. While politics and business have moved on, it remains our position that where legislative change is purported to be based on an economic rationale, the methodology and evidence must be robust. (If the motivation is ideological, the case must be presented candidly on those grounds and debated as such.)

In the case of the 2014 changes to copyright exceptions, substantial future economic benefits were forecast. We are confident, as explained below, that sufficient objective data are now available to allow an independent post-implementation review to determine the extent to which those promised benefits have materialised. We are concerned, nonetheless, that procedural limitations — ie, the “de minimis” approach to assessing certain impacts as described in the call for evidence — will prevent Government from being able to conduct the comprehensive review required. In particular, where impacts could not be monetised in advance of the changes, the BCC suggests it is even more important to conduct a thorough post-implementation review.

Evidence/ general

Beneficiaries

By their very nature, copyright exceptions benefit users such as galleries, libraries, archives, museums and archives (Question 1); institutions using the exception for research and private study, text and data mining, educational use; use of quotations or extracts of copyright works for parody, caricature and pastiche (Question 2); and for extended collective licensing and orphan works (Question 3). These beneficiaries should be able to provide the required evidence. In specific areas, such as orphan works, Government as the operator of the relevant licensing scheme is best placed to supply the data.

Right holders

It is extremely difficult for right holders — who are not the beneficiaries of the new exceptions — to calculate the impact of their introduction. Firstly, there is no way of knowing how many licences have not been sought due to these exceptions¹. As mentioned above, when users assess that a use may not fall fully within an exception, licences have continued to be sought in many cases, and so there has been no change to the pre-2014 status quo.

We are, however, aware of instances in which the new exceptions have been cited by users in rejecting licensing requests, not least because of a lack of clarity around the exceptions. Individual BCC members will provide illustrative cases in their own submissions; however, because issues are largely addressed in private commercial negotiations and settlements, hard numbers may not be available.

To the best of our knowledge² there have not been any judicial decisions regarding the scope of the new exceptions, in particular for quotation or for parody, caricature, and pastiche. Given the uncertainties, the individual sums in issue, and the costs of legal proceedings, such disputes have been settled outside court with non-disclosure provisions attached and thus, once again, cannot be referred to as evidence in the context of this consultation.

Secondly, BCC members were prepared for the copyright changes, thereby ameliorating their impact on business practice. Right holders have since adapted and evolved to absorb the loss, for example by concentrating on new business models and licensing, rather than chasing multiple low-level infringements. Indeed, the nature of online licensing has changed enormously in the past five years, due to the ways in which copyright material is made available online, and right holders have focused on where business is happening, rather than on trying to account for where it is not.

In addition, when exceptions are applied with licensing options (such as those linked to s35 and s36 CDPA), users tend to take out blanket licences from CMOs to cover non-commercial educational uses, thus making irrelevant a detailed analysis of whether a particular use may have fallen within an exception. The user knows a licence is in place to cover relevant educational use and therefore has no further concern.

A final point concerns the provisions in s296ZE CDPA, which were highlighted as a safeguard for users prevented from accessing works for use within an exception due to technical protection measures (TPMs). These fallback measures allow users to apply to the Secretary of State for an order forcing owners to permit access — but the reality is that the provisions have not been needed because other routes have been available.

¹ This is true for all the new exceptions and particularly so in the case of the text and data mining exception, for which there was previously no specific licensing with which to make a comparison.

² In this context, we note that decisions by the IPEC small claims track are not currently published, hampering knowledge of the extent to which any “fair dealing” cases have been filed. The BCC would support more data being made available to improve understanding of how the exceptions are working.

Specific: Orphan works

Individual BCC members will submit responses on specific areas of relevance to their activities, but one area of common concern relates to orphan works. Our members in different creative sectors have identified a number of works granted licences through the Orphan Works Licensing Scheme (OWLS), for which right holder information was in fact readily available. The apparent lack of compliance with diligent search requirements causes a clear loss of income for creators and other right holders.

As far back as 2008, the BCC supported a proposal that offered a solution to the licensing of orphan works, which built on the already existing successful system of collective licensing in the UK. The present system was instead adopted but it is vital that ease of use is married with a rigour that maintains the confidence of users and right holders alike.

With the use of the OWLS reasonably expected to increase if there is a no-deal Brexit, and potentially at the end of the transitional period in the event of a deal — when the orphan works exception will no longer be available for UK cultural heritage institutions — we ask Government to ensure applicants follow the scheme's own guidance and that documentary evidence of a diligent search is routinely provided. We also suggest that the scheme provides additional tools and signposting to assist users in making accurate and cost-efficient searches. These steps are important to maintaining trust in the system.

With regard to the economic evidence for the existing scheme, we are concerned that Government intends to carry out only a limited post-implementation review; there is no impact assessment associated with The Copyright and Rights in Performances (Licensing of Orphan Works) Regulations 2014. We expect that Government, which operates the OWLS, will have easy access to relevant data.

I hope the above is helpful but please don't hesitate to contact me if the BCC can be of further assistance in the process.

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British Copyright Council

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Annex 1

British Copyright Council members — March 2019

Artists' Collecting Society (ACS)	DACS
Association of Authors' Agents	Directors UK
Association of Illustrators (AOI)	Educational Recording Agency Ltd (ERA)
Association of Learned and Professional Society Publishers (ALPSP)	Incorporated Society of Musicians (ISM)
Association of Photographers Ltd (AOP)	Ivors Academy
Authors' Licensing and Collecting Society (ALCS)	MPA Group of Companies
BECTU/Prospect	Musicians' Union
BPI (British Recorded Music Industry) Ltd	National Union of Journalists (NUJ)
British Association of Picture Libraries and Agencies (BAPLA)	PPL
British Equity Collecting Society Ltd (BECS)	Professional Publishers Association (PPA)
British Institute of Professional Photography (BIPP)	PRS for Music (PRS)
Chartered Institute of Journalists (CIOJ)	Publishers' Licensing Services (PLS)
	Royal Photographic Society (RPS)
	The Society of Authors
	The Writers' Guild of Great Britain