

06.12.2016	IPO Call for Views: Modernising the European Copyright Framework
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Organisation and main services	<p>The 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.</p> <p>Our members include professional associations, industry bodies and trade unions which together represent hundreds of thousands of authors, creators, performers, publishers and producers. These include many individual freelancers, sole traders and SMEs as well as larger corporations within the creative and cultural industries. While many of these create works and performances professionally and make decisions relating to both commercial and non-commercial use of those works and performances, they also access works in an individual private capacity. Some of our member organisations also represent amateur creators and performers. Our members also include collective rights management organisations which represent right-holders and which enable access to works of creativity.</p> <p>A list of BCC members can be found at http://www.britishcopyright.org/bcc-members/member-list.</p>
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Confidential response	This response is not confidential.
Digital Single Market Strategy – relevant for the UK	<p>The UK's world-leading creative industries continue to grow in importance within the economy as a whole. Copyright law underpins these industries.</p> <p>British right-holders depend on a robust copyright framework, with a high level of transparency supporting authorised use and wish to guard against that protection being weakened. In order for the UK's copyright framework to thrive and so to continue to make a positive impact on the UK economy, the copyright framework must not be weakened.</p> <p>The last few years have seen far-reaching review and debate of copyright legislation both domestically and as part of developing the current European <i>acquis</i>. Our creative industries have been able to grow on the strength of the European <i>acquis</i>. The European Union is also an important market for our creative industries. BCC members therefore believe it is important for UK copyright law to be consistent with future EU copyright law. For all these reasons, the EU's Digital Single Market Strategy remains a significant initiative for UK right-holders and it is one which the BCC would wish to see reflected within UK legislation.</p>

It is essential that UK Government and UK right-holders continue to play an influential role in the process of formulating and then developing the proposals within the European Commission, Parliament and Council. While supportive of the package of Digital Single Market proposals, the British Copyright Council believes that certain measures require clarification, adjustment and alignment with market conditions. It is essential that the UK continues to influence this package of proposals and that adjustments and amendments are made to those proposals in the next two years. The BCC welcomes recent assurances by UK Government and from IPO that it will play an active part in the discussion on Digital Single Market related issues including copyright and that it still has a voice at European level. We also welcome the assurance that the Government is aware of the importance of the issues which the Digital Single Market proposals are attempting to address and remains committed to supporting them and to preserving the proper recognition of copyright and related rights as drivers for creativity, innovation and the economy as a whole, whether the UK remains subject to the *aquis* or not as a result of the outcome of Brexit negotiations.

The BCC is aware that some of the new directives and regulations under consideration are due to be implemented before Brexit but others are unlikely to be adopted until after the UK leaves the European Union, or if adopted before this only with required transition periods that will expire after the UK leaves the European Union. UK legislation on digital single market issues must reflect those of Europe as far as is possible to avoid distortions in what is recognised as the “digital marketplace”. Concerns arise over how future legislation in the UK might provide for implementation, or transposition of the proposals which are currently under consideration at EU level under the UK’s new constitutional model. The BCC believes that it is important for this issue to be addressed, alongside the importance of retaining existing copyright rules contained within EU Regulations, in order to provide stability for industry during the Brexit process, when copyright and other intellectual property issues are addressed in any Great Repeal Bill.

The BCC has previously welcomed the IPO Guide to Evidence for Policy. In preparing its responses the BCC consults with its membership and collates comments that aim to meet the evidence criteria. For detailed evidence linked to the statements made, the BCC refers IPO to submissions and responses made by individual members. The BCC has previously responded to a call for views in the context of the stakeholder consultations on the review of the EU copyright rules carried out by the European Commission between 5 December 2013 and 5 March 2014:-

http://www.britishcopyright.org/files/1514/1313/1958/BCCCopyright_in_Europe.pdf

http://www.britishcopyright.org/files/5414/1313/2996/BCCResponseEUReview_of_copyright_rules_1.pdf

The British Copyright Council looks forward to the enforcement proposals expected in January 2017, which are essential to any proposals on copyright reform.

Proposal for a Directive on copyright in the Digital Single Market

The BCC welcomes the proposal for a directive and emphasises again that UK legislation in this area should be harmonised with that of the EU as far as is possible. The BCC submitted initial views on the Digital Market Strategy on 19 August 2015. The principles set out in that response remain relevant to consideration of the detailed proposals now published.

Before turning to the specific provisions of the draft directive, we draw attention to the absence of any provision which would prevent users using one exception, from relying on another exception. Each exception addresses particular circumstances and should stand independently of any other exception. Access to a work under one exception should not permit access for another purpose under a different exception. This needs to be expressly provided for within the operative articles of the directive.

**Article 1
Subject matter
and scope**

No comment.

**Article 2
Definitions**

The BCC has concerns over some of the definitions used in Article 2. These cover potentially ambiguous wording within the definitions of “research organisation” and what amounts to a “press publication”.

The BCC would question the intended scope of what is meant by “any other organisation” in order to meet the criteria otherwise set out in the definition of the “research organisation”. “Organisations “ may cover groups of people who work together in an organised way for a common social purpose. It is unclear how the use of the word addresses important differences between

- (i) research undertaken in an individual capacity, and
- (ii) research undertaken for what is the equivalent of a corporate/administrative entity.

This difference is important when considering who may be regarded as having “lawful access” to works for undertaking scientific research.

The BCC submits that the definition in Article 2 should expressly exclude organisations which Recital 11 states should not be considered as research organisations.

It should be made clear that “lawful access” means access by means of purchase or subscription or otherwise with the consent of the right-holder and that specifically it does not include access under another exception.

In *Article 2 (4)*, the definition of “press publication” seems difficult to reconcile with the style of online publications. The definition seems to aim to apply to “individual items” within a periodical or regularly updated publication. However, when items are published online, the way in which such articles are presented does not map the layout of traditional print publications. This needs further clarification.

**Article 3 Text
and Data
Mining**

Overall this article is formulated as BCC members had anticipated and to an extent echoes the UK’s existing exception. However, the BCC notes the Commission’s Option 3 preference for limiting the exception by beneficiary and not by purpose. This has resulted in an Article 2.1 definition which includes “any other organisation” and this is problematic for the reasons stated in our commentary on Article 2 above.

The focus on beneficiaries rather than purpose also leaves the way open for the exception to be used for commercial purposes. This would not satisfy the Berne three-step test. The Government was careful to limit the UK exception to use for non-commercial purposes. The BCC urges the Government to press for Article 3 to be similarly limited and to ensure that the exception is not applied in such a way that it permits text and data mining by organisations with an interest in exploitation, particularly commercial exploitation, without a licence from the right holder.

While noting that the European Commission has recognised the need to regulate access (Article 3.3 and Recital 12), the BCC asks UK Government to consult relevant right-holders on whether CDPA s.296ZE on Technical Protection Measures provides sufficient cover to allow right-holders to achieve the welcome objective laid out in Article 3.3.

Finally, Article 3 should provide for any copy made under the exception to be securely stored and to be deleted once the mining has been completed.

Article 4 Use of works and other subject-matter in digital and cross-border teaching activities

The BCC has no major issues with this exception.

The BCC welcomes the positive support given in Article 4.2 to the principle that permits licensing in place of an exception. The formulation of the Article and accompanying Recital 17 ensures that the well-established and well-functioning license-based systems already provided for in UK legislation can continue to operate and provide important revenue to right-holders for the use of their content in educational establishments.

The BCC is concerned that the new provisions will not extend permitted levels of use when current exceptions under national laws limit the scope of a particular exception limited to the use of extracts of works. This would be consistent with the licences available in the UK for text, including any images embedded within the publication. However, other exceptions, such as that applicable to recording of broadcasts by or for educational establishments may be more widely drawn.

The BCC notes that the proposed exception makes provision for Member States to provide for fair compensation of right-holders but it is helpful that this is not prescriptive and should recognise and work alongside the licensing options available under current licensing options available under national laws applicable within the United Kingdom (Article 4.4).

However, the way in which the text now links two separate provisions supporting voluntary copyright exception provisions within Directive 2001/29/EC must be appreciated when addressing the mandatory effect of the new proposals¹. Linking the Article 4 provisions to uses linked to an “educational establishment” is important to help ensure that the new provisions link to the way in which some

¹ Article 5.2 (c) “Member States may provide for exceptions and limitations to the reproduction right provided for in Article 2 – in respect of specific acts of reproduction made by ...educational establishments .. which are not for direct or indirect commercial advantage”.

Article 5.3 (a) “Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 ... use for the sole purpose of illustration for teaching or scientific research”

Member States (including the UK) provide for exceptions and limitations otherwise relevant for non-commercial uses for the benefit of educational establishments being subject to licensing options².

However, given the exception is now to be made mandatory, the significance of Article 4 (2), qualifying the application of the exception “to the extent that adequate licences authorising the acts in question --- are easily available on the market”, will be important to reflect how well-established licensing schemes adopted by educational establishments within the United Kingdom, currently work in practice.

Access to the copied works should be limited to the students or pupils directly involved in the particular teaching activities of the educational establishments where the work is used within the limits set out in Article 4.1 (a).

Where existing limits on uses apply to exceptions recognised under national laws linked to use “for the sole purpose of illustration for instruction/teaching”, these limits should continue to be recognised as relevant to the justification of the non-commercial purpose to be achieved. For example, the current fair dealing exception in the UK under s 32 CDPA 1988 (as amended by S.I. 2014 No 1372).

**Article 5
Preservation of
cultural
heritage**

Under UK law (CDPA s.42 (2)), the exception is limited by the fact that copies should not be available for purchase. That is not the case with the European Commission’s proposal. The BCC stresses that the exception should be limited to preservation by cultural institutions and should, in no way, deal with making available or communication to the public. Subject to provisions relating to out-of-commerce works (see our comments on those below) and the existence of appropriate licensing schemes, it is not appropriate to construe an exception linking, for example, making copies for preservation under the new Article and then using these copies to remotely e- lend (unduly applying the CJEU judgment in **Case C-174/15, Vereniging Openbare Bibliotheken v Stichting Leenrecht**)

**Article 6
Common
provisions**

No comment.

**Article 7 Use of
out-of-
commerce
works by
cultural
heritage
institutions**

The BCC takes the view that, as it currently stands, the definition of “out-of-commerce” in Article 2.2 is unsatisfactory. For example, while finding ways of making the extensive film and television archives held by the BFI and in the BBC Archive available to the public, is supported by Directors UK, right-holders represented by the Association of Illustrators do not want their right to benefit from the exploitation of their work to be weakened by the fact that their artwork, or the earlier commercial exploitation of that artwork e.g. on a poster, may be available in a national collection as an out-of-commerce work, when they may aim to republish the work themselves through “customary channels of commerce”. A similar problem is noted by The Royal Photographic Society in relation to “out of commerce” photographs held in archives and which are in demand for new and “in commerce” publications. There are similar problems for authors and for owners of rights in sound recordings. So the definition is unsatisfactory with clear sectoral differences in terms of what “out of commerce” actually means for different categories of author and work.

² Educational Establishments” being defined for the purposes of CDPA provisions in s 174 CDPA 1988.

In the case of licensing text based works, it is acknowledged that principles for licensing out-of-commerce works were carefully negotiated and agreed between right-holder organisations and library organisations and recorded in a Memorandum of Understanding signed in Brussels in September 2011. To the extent that Article 7 is consistent with those principles and the safeguards provided for right-holders we support this. We would urge the Government to ensure that all aspects of that MOU are properly incorporated into Article 7.

BCC members are sympathetic to the desire to make out-of-commerce works available but a “one size fits all” solution will require careful and pragmatic cooperation between stakeholders if it is to be a success, and there are some types of copyright work where a “one size fits all” solution is unlikely to work.

With regard to the role of collective management organisations in licensing the use of out-of-commerce works to cultural heritage institutions, the BCC is concerned that any mandatory provision could be problematic. We think that it would be helpful to clarify that it is for the collective management organisations and their members to decide whether a licence should be extended to include non-member right-holders. The collective rights management organisation would then need to apply to operate an extended collective licence and comply fully with relevant regulations before any licence is offered for the use of out-of-commerce works.

It may also be the case that prioritising collective licensing over other forms of licensing presents a conflict with provisions in the Collective Rights Management Directive.

While cultural heritage institutions have an obligation to make their collections accessible to the public, care should be taken to ensure that this provision is not used by such institutions to extend their activities, to the extent that they become publishers.

Article 8 Cross-border uses

No comment.

Article 9 Stakeholder dialogue

No comment

Article 10 Negotiation mechanism

While the BCC represents only underlying right-holders in audiovisual works and so is unable to comment in detail on access to and availability of such works on video-on-demand platforms, we would like to see a clarification that Article 10 does not relate to underlying rights in audiovisual works.

The BCC also questions how the negotiation mechanism would be put in place and who would offer it. For the UK, the BCC does not think that the IPO Mediation Service is appropriate. There may also be aspects of such a mechanism that could be deemed anti-competitive.

Article 11 Protection of press publications concerning

The BCC does not wish to see interference in the balance of rights between right-holders.

It is important that the definition of “press publication” is carefully reviewed to ensure that the related

digital uses

right envisaged by Article 11 can properly apply to the defined works as they are published in both online digital and non-digital formats.

The provisions in Article 11.2 indicating that the new right in no way affect any rights provided in Union law to authors and other right-holders, in respect of the works and other subject-matter incorporated in a press publication, are important and must be respected.

The views of BCC members diverge on the need for an extra right for press publishers: some feel that press publishers are already protected adequately by copyright and by the database right. Others believe that more direct recognition of the endeavours and investment that enables the “ensemble” of creative works and contributions making up the “publications” relevant to Article 11 is increasingly important.

For more on this point, the BCC refers IPO to the views expressed in submissions by individual BCC members.

Article 12 Claims to fair compensation

While the exceptions which are the object of this Article have not been implemented into UK law UK right-holders receive a share of the revenue from countries where compensation systems operate. The BCC, therefore, supports the provision which provides further re-assurance that publishers are recognised as right-holders across the European Union.

Article 12 has been introduced to enable Member States to introduce legislation to fix an omission in legislation that was first highlighted in the decision a year ago of the Court of Justice of the EU in the *Hewlett-Packard v Reprobel* case and was followed by the German Federal Court of Justice in the case of *Vogel v VG Wort* earlier this year. This provision should be expedited, if at all possible, if publishers in Europe are to avoid bankruptcy due to monies previously paid out to them being reclaimed and we would urge the Government to support any proposal from the Council of Europe to fast track Article 12.

Article 13 Use of protected content by information society providers storing and giving access to large amounts of works and other subject-matter uploaded by their users

The BCC supports this provision which does not affect the E-Commerce Directive provisions on safe harbour for service providers, where they play a passive role in storing content.

It will, however, go some way towards addressing the issue of service providers who play an active role in the distribution of content and who benefit commercially from providing access to unauthorised and infringing content.

Further work is needed to ensure that effective content-recognition technologies are identified and applied, including measures to prevent the stripping of metadata.

While the BCC welcomes cooperation with information service providers, right-holders have, with little success, attempted to cooperate with service providers on many occasions previously. Nothing in Article 13.3 should weaken or prevent the main intention of this article.

As UK Government is aware, BCC members are very concerned about issues around content identification. Any exception for text and data mining must also take those concerns into account.

**Article 14
Transparency
obligation**

BCC members welcome the recognition that Article 14 gives to the need for transparency in the value chain and for fair remuneration to all who participate in that chain, particularly as it applies to the relationship between content providers and internet service providers.

BCC members also welcome the recognition that greater transparency, if proportionate and taking into account specificities of each sector, will provide creators and performers of all types with information they need about all forms of exploitation of their works and feel that it will encourage the development of a baseline for establishing best practice in the future.

With regard to Article 14.3, the obligation to provide transparency in the value chain particularly applies to creators and performers who are, in the main, lower paid contributors. Such contributors are not in a position to have to prove significant added value and should not have to do so.

Article 14 is not interdependent with Article 15 but legislators have chosen to link them by stating that to trigger Article 14, it is necessary to satisfy Article 15. This should not be necessary.

**Article 15
Contract
adjustment
mechanism**

BCC members support fair contracts and fair remuneration of creators and performers.

Those BCC members who represent creators feel Article 15 is a step in the right direction and would like to see it implemented. Creators and performers are not always in a position to renegotiate existing contracts at present and may want the opportunity to revisit unfair terms, particularly in older contracts that did not provide sufficiently for new technologies. However, those BCC members who invest in and exploit works need certainty and to be able to rely on contracts that enable them to recoup their investment and re-invest in new talent and are concerned that this would destabilise established business models.

For more on this point, the BCC refers IPO to the views expressed in submissions by our individual members.

**Article 16
Dispute
resolution
mechanism**

The BCC suggests that further investigation is needed into the types of disputes and the wide range of contracts in operation in the Creative Industries before any mechanism is put in place.

Articles 17 to 23

No comment.

**Proposal for a
Regulation
laying down
rules on the
exercise of
copyright and
related rights
applicable to
certain online
transmissions**

The Regulation does not adequately address the distribution of broadcasts via “direct injection”. Direct injection is the process of broadcasters sending closed signals to platforms and is probably the usual way in which most broadcasts are distributed. The CJEU has ruled that such transmissions do not constitute a communication to the public under the Copyright Directive. The Regulation represents a good opportunity to clarify the law regarding such transmissions.

BCC members are also concerned to see that rights clearance structures are developed in a way that

of broadcasting organisations and retransmissions

distinguishes:-

(a) what rights have been cleared by a broadcaster to cover both a broadcast and any retransmission of the broadcast agreed and approved by the broadcaster up front (i.e. so that the value of the clearance payment recognises the value of both the broadcast and the identified re-transmissions);

from

(b) re-transmission rights in underlying programmes and contributors which have not been cleared and paid for as above;

either because the broadcaster has not agreed to and cleared the re-transmission (so collective clearances are required under agreements between the re-transmitting service provider and collecting societies); or because the re-transmission is completely unauthorised (and so all rights owners in works included in the original broadcast need to be in a position to reserve their rights against the unauthorised "re-transmitter".

These important distinctions need to be preserved under any new Regulations which otherwise may evolve the cable re-transmission arrangements protected within the Satellite and Cable Directive.

Proposal for a Directive on permitted uses of works and other subject-matters protected by copyright and related rights for the benefit of persons who are blind, visually impaired or print disabled

The BCC strongly supports this proposal for a directive which tracks closely the wording and intent of the Marrakesh Treaty, which it will implement.

The main area in which the proposed implementation differs from the Treaty relates to the commercial availability of accessible format copies (Article 4 (4) Marrakesh Treaty). Under current UK law the exception does not apply if accessible format copies of books are commercially available "on reasonable terms"; this works well and we would challenge the part of the proposed directive that precludes member states from referring to commercial availability.

We would urge that the exception should only benefit those with lawful access to a work. This is an important provision in the Marrakesh Treaty and would be consistent with the basis on which other exceptions can be relied upon.
