

BRITISH COPYRIGHT COUNCIL

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Richard Hooper
DCE Feasibility Study
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By e-mail: HooperSecretariat@ipo.gov.uk

Dear Richard,

As the British Copyright Council's representatives said when we met in December, we very much welcome the open and evidence based two-phase approach which you and your colleagues in the DCE Secretariat are taking to the Feasibility Study.

The British Copyright Council recognises that your consultation is seeking hard evidence for or against the main hypothesis outlined. As such, the Council is confident that individual members can provide you with evidence on practical, technical and legal matters that will apply to copyright licensing and to markets in each of the sectors and for each of the categories of copyright works that they represent. You already have our initial briefing note which we believe is still relevant to the consultation. In addition to this we have some further points we wish to make.

1. While supporting some form of voluntary DCE, we disagree strongly with that part of Professor Hargreaves's hypothesis which describes copyright licensing as "not fit for purpose for the digital age". We leave it to individual members of the BCC to provide more detailed comments on licensing. However, there are crucial differences between the copyright works that are being licensed and the processes through which licensing occurs that must be recognised. Our members own, represent and participate in the full range of sectors within the creative industries and license many services. However, a one stop shop for all the different types of licences that may be required to cover all the different combinations of copyright works (photographs, films and sound recordings, etc.) that are the bedrock for growth is not realistic.
2. We welcome a Digital Copyright Exchange that genuinely supports the licensing process without affecting the value of rights. If a Digital Copyright Exchange contributes to efficiency within the creative industries more and more of those involved in the ownership, licensing and administration of rights will adopt and use it voluntarily.
3. When we met, we appreciated your recognition that transaction costs were distinct from the costs of rights and that pricing should not be confused with "problems" linked to the copyright licensing system (Call for Evidence, page 2, point 1. on Copyright Licensing). Interference with pricing is not and cannot be a function of the structure of any DCE. Rights owners must continue to have a right to consent to use of their work on voluntary terms. As far as transaction costs are concerned, we support initiatives which could help to reduce these, as they will be of benefit to right owners and users.

4. It follows that, while rights owners recognise exceptions to copyright, those exceptions are special cases. The British Copyright Council is concerned that there may be suggestions in the wider Copyright Consultation, and perhaps in the role of any future DCE, that exceptions could be extended to remove rights owners from an ability to negotiate prices and consents for use of their work within new business models. This is contrary to the accepted approach of the three step test. The proper way to consider the validity of an exception must be to respect obligations under the Berne Convention and the three parts of the three-step test. Special cases are meant to be just that.
5. While the list of media types (Call for Evidence, page 4, list of Media Types) is useful in preparing an analysis of the market, it is essential that any analysis of the copyright licensing system itself recognises the definitions of rights in copyright works and rights in performances as set out in the Copyright Designs and Patents Act 1988 as amended. These will be the basic building blocks for right owners when attaching identifiers and tracking use within any DCE. Indeed, they are already the building blocks of existing databases used by collecting societies and others for the management and licensing of rights. Superimposing general descriptions of media types on these existing structures could cause conflicts with reference back to “grass roots” rights owners and identifiers used to track works that may be embedded within other works for the purposes of licensing. An example might be the way in which an ISAN number might be allocated to an episode of a television series. However, when the episode is exploited in ways that trigger secondary payments to rights owners of works embedded within the programme, the identifiers used to pick up on the work of an individual performer or a piece of music or a commercial sound recording or a script or screen play included within the programme, will act as keys for processing of payments to rights owners through collecting societies such as ALCS, British Equity Collecting Society, PRS for Music and PPL.
6. We recognise that part of the purpose of databases within any DCE is to provide portals that will simplify access to required licences for end users i.e. consumers. However, copyright licensing arrangements are often made between right owners and other commercial right users. That is copyright permissions are a Business to Business arrangement and licences are granted from one rights owner to another. As with all other forms of contract and negotiation a degree of complexity is to be expected.

With the development of the digital market we agree that there are small and innovative businesses developing Business to Business relationships with right owners and we agree that any DCE could play a useful “signposting” role for these. That is, providing information about rights and directing users unfamiliar with the system to right holders. Copyright owners are as keen as other stakeholders to find solutions to licensing their works effectively.

Nevertheless, Government needs to understand and respect the “complexity” that will inevitably be relevant to the “back office” functions that link a “front end” licence with the network of interlocking licences that are often embedded in what a licensee may read as a single permission or point of licence.

7. The key to economic growth supported by recognition of copyright must be the ability for copyright works to be used and combined with other works in clear, flexible and innovative ways.

The British Copyright Council and its members hope that the responses made to your Call for Evidence will help to throw the spotlight on the interlocking back office databases that already exist to support copyright licensing. Signposting and improving the transparency of this, often detailed, work will be important as work to assess the feasibility of the wider Digital Copyright Exchange concept continues.

We look forward to working with you on the next phase of your Study.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Janet Ibbotson', is written over a light grey rectangular background.

Janet Ibbotson
Chief Executive Officer