

Digital Single Market Strategy

Position paper from the British Copyright Council

“The BCC supports a Digital Single Market Strategy that encourages and respects the rights of creators and performers and the rights of companies working within the creative industries and the cultural sector.”

The British Copyright Council 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. 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 do so privately. 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. A list of BCC members can be found at <http://www.britishcopyright.org/bcc-members/member-list>.

Introductory comments

- The creative economy is one of Europe’s most diverse and dynamic economic sectors. The most recent UK Creative Industries Economic Estimates¹ demonstrate that in the UK alone in 2013, 1 in 12 jobs fell within that economy and that the GVA of the UK Creative Industries was £76.9bn and accounted for 5.0% of its economy. UK creators and performers have been at the forefront of innovative use of digital technology and our industries have been pro-active in launching new digital services and business models. A Digital Single Market Strategy that recognises their contribution and which continues to support growth of the European creative economy and not merely the transfer of value from the creative content sector to internet businesses, is essential.
- With the removal of online barriers for consumers and for internet companies and start-ups at the core of its strategy, the Commission must be wary of damaging the specific legal framework, including copyright, that underpins and supports the creation and delivery of culturally diverse work for use in the online market and ensures respect for the work of creators and performers.
- We urge caution in adopting changes to the European online legal framework which may be different to those in operation in third countries and so may detract from EU investment.
- There is potential for conflict arising between copyright law and changes proposed to other areas of law due to the Commission’s lengthy “shopping list” of proposals including reviews of the AudioVisual Media Services Directive, the Cable and Satellite Directive, and the e-Commerce Directive.
- We do not think that a review of the e-Commerce Directive will be helpful, nor is it necessary.
- We continue to emphasise the importance of evidence-based policymaking including real evidence of barriers and evidence that proposed solutions will work.
- We ask that legislative proposals and actions expected later in the year include clarification and definition of the terminology used in the Commission’s Communication (see our points below).

¹ Department for Culture, Media and Sport, “Creative Industries Economic Estimates January 2015”

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/394668/Creative_Industries_Economic_Estimates_-_January_2015.pdf

- There is a risk that excessive harmonisation of copyright exceptions and limitations could remove vital secondary revenues for creators and performers and others providing content used by intermediaries.
- The enforcement agenda should not be allowed to fall behind any reform of copyright.

Unjustified geo-blocking

The BCC supports the exclusion of geo-blocking, as applied to legitimate copyright interests, from any definition of “unjustified”.

It is essential that the Commission defines “unjustified”. The examples of “unjustified” geo-blocking provided by the Commission focus on pricing differentials. We see these as an issue for market regulation rather than as a problem for application of copyright law. It follows, therefore, that the existing copyright framework is the wrong forum in which to prohibit unjustified geo-blocking e.g. exhaustion of rights concerns only physical objects. Therefore, there is no rule within the framework from which it could hang.

Geo-blocking can be used to limit access to a licensed territory, but it is a matter for the contract rather than for copyright. In this context it is used to distinguish between markets for the purpose of permitting genuine recoupment of investment particularly in new films, television programmes and graded payments for other forms of content that involve layers of rights contributors (e.g. performers, directors, writers, composers and owners of artistic works all contributing to a single film). Preventing this type of geo-blocking i.e. by treating it as “unjustified”, would give global access to services currently offered as limited territory rights and would therefore reduce the options for selling content within windows that reflect different consumer demand. We also believe that such an approach challenges development of culturally diverse work for consumers across the EU.

It is worth noting that worldwide licensing agreements are available under the current regime and are entered into where appropriate.

The BCC would be interested in hearing the European Commission’s comments on how it sees geo-blocking in relation to the Technological Protection Measures for which provisions are contained in the InfoSoc Directive.

Portability

The Commission must clarify exactly what it means by “portability”. If its real concern is to allow consumers travelling within the EU to access content to which they have legal access in their own country, then this is a specific problem in need of a tailored solution. Rights holders recognise and understand this concern and, with the rest of the market, are actively seeking a solution. The Commission should support the market in identifying and introducing those solutions without undermining the existing safeguards which copyright affords to territorial licensing arrangements and without increasing the challenges and problems faced when enforcing copyright.

The copyright framework does not prevent multi-territorial or pan-European licensing. For example, in the music and the photography sectors multi-territorial licensing is already widespread. In publishing, particularly in books, publishers acquire rights by language but then grant licences for distribution on a European-wide or even a global basis.

Ensuring cross-border access to legally purchased online services while respecting the value of rights in the audio-visual sector

Far greater clarity is needed on what it is that the Commission is seeking to achieve here.

The BCC notes that there is a major difference between subscription terms enabling subscribers to access what they have agreed to pay for, as compared with the creation of rules which prevent local and culturally diverse markets from developing to serve and support specialist local language market interests in new production. Rules that push production into a “one size fits all” approach, to release new productions or works for the EU, is not in the long-term interest of cultural diversity in the EU, nor is it a driver behind an effective EU economy.

Give greater legal certainty for the cross-border use of content for specific purposes (e.g. research, education, text and data mining, etc.) through harmonised exceptions

Any change to copyright exceptions at EU level must be based on thorough economic evidence which takes into account any harm to rights holders likely to result from the changes proposed. In 2014, the UK widened existing exceptions (including those for research, education and text and data mining) and introduced new exceptions (including Regulations linked to identification and licensing of orphan works and the now quashed private copying exception) on the basis of what were initially asserted to be substantial economic benefits. That evidence has since been shown to be inadequate and it can now be seen that the benefits which had been anticipated within specific areas were vastly overstated. In the case of orphan works licensing this was both in terms of the demand for, and the economic value of, such an exception.

The Commission must demonstrate the need for cross-border harmonised application of exceptions, particularly when couched in terms of general terminology that may be interpreted differently in various Member States. General wording referring to exceptions for “education” or for “research” seems to highlight why it is so important for policymakers to try and map how the “boundaries” of where one exception, tested against application of the Three-Step Test, applies against other exceptions. Specific exceptions are provided for under the InfoSoc Directive for “libraries” and “museums” and “educational establishments” and “private study” and “research” and “text and data mining”.

There can be no justification for sweeping away rights for educational markets. Textbooks and other publications and digital resources are produced specifically to address a particular need, market or language base and, where applicable, such material is readily available under commercial licensing arrangements. The markets for educational products are of substantial economic value to the EU.

In cases where the Commission feels there is a proven need, a better solution is to encourage voluntary licensing arrangements and negotiation between rights holders and users, which in turn provide workable licensing solutions and ensure fair remuneration for rights holders, often as secondary revenue through collecting societies. The successful licensing options linked to application of educational exceptions preserved under current UK regulations are a case in point and should be considered.

The BCC does not see how any exception that permits text or data mining by intermediaries, that grow business at the expense of and/or on the back of creators and producers of the materials mined, can maintain compliance with the Three-Step Test within an online digital environment. Licensing models already exist and can address this issue.

Clarifying the rules on the activities of intermediaries in relation to copyright-protected content

The BCC supports the Commission's initiative to clarify the rules on activities of online intermediaries so that certain services fall outside the scope of the E-Commerce hosting defence. Like others in the creative sector, the BCC is concerned that online service providers have used the protection afforded by the E-Commerce Directive in ways which were not originally envisaged and that these uses and abuses have benefited certain internet businesses at the expense of creators, performers and other rights holders.

The BCC is concerned that the Commission should differentiate clearly between intermediaries which are mere conduits or hosting service providers (and therefore subject to limitations under the e-Commerce Directive) and those intermediaries or content service providers which engage actively in the act of communication to the public of copyright-protected works to the detriment of the rights holder. One of many examples across the creative content sector is where "intermediaries" are effectively taking over the traditional distribution chain (in effect the main revenue stream of the publisher) for magazine titles by hosting pirated content posted by users.

Such intermediaries should secure licences for content provision and should not be permitted to use "safe harbour" provisions. A lack of clarity here, which the Commission has now indicated it wishes to address, has encouraged abuse by some content service providers and has caused distortion in the marketplace. The Commission should address the CJEU's ruling in *Svensson* that hyperlinking is only a communication to the public where it makes content accessible to a "new public". It should be recognised that many online services aggregate and monetise links to content (by inlining and framing as well as by hyperlinking).

Creators and performers should not be precluded from participating in this. The BCC is encouraged by the Commission's recognition of the particular need for measures which safeguard fair remuneration of creators ("transfer of value") and performers.

There is a need for greater clarity in relation to online liability for cross-border transmissions. The BCC encourages the Commission to follow the approach that liability arises at the point of initial transmission and at every point of accessibility.

Modernising enforcement of intellectual property rights, focusing on commercial-scale infringements (the "follow the money" approach) as well as its cross-border applicability

The BCC supports the Commission's intention to modernise enforcement of intellectual property rights and welcomes the reference to its cross-border applicability. However, the BCC sees enforcement matters as a priority and not as something which should follow on from other measures.

The BCC stands alongside other rights holder organisations in the UK in supporting the “follow the money” approach outlined in the Commission’s communication.

While recognising there is a difference between infringements of copyright that occur in terms of levels of intent and resulting commercial damage to rights holders, the BCC is concerned to ensure that any definition of “commercial” and “scale” does not reduce the ability of individual creators and performers to enforce their rights in the digital marketplace.

Online copyright infringement is a rapidly developing sphere of activity. It is important that measures target new developments such as stream-ripping and mobile apps.

A fit-for-purpose regulatory environment for platforms and intermediaries

The BCC welcomes the Commission’s recognition of the need to modernise the regulatory environment for platforms and intermediaries and to introduce measures for combating illegal content on the internet.

Internet intermediaries must be made to take a more pro-active approach to ensure a fair online environment for rights holders. The BCC supports the Commission’s proposal that there should be a duty of care on internet intermediaries regulating against those who pay little or no regard to existing notice and takedown processes and abuse the current safe harbour provisions, particularly those whose business models are based on infringement of protected content.

**British Copyright Council
19th August 2015**