

BRITISH COPYRIGHT COUNCIL

“The Path to Strong, Sustainable and Balanced Growth” Department for Business Innovation and Skills call for evidence on DIGITAL AND CREATIVE INDUSTRIES GROWTH REVIEW

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 CCIs. Our members also include collecting societies which represent right holders and which enable access to works of creativity.

BCC Member organisations:

Association of Authors’ Agents . Association of Illustrators . Association of Learned & Professional Society Publishers . Association of Photographers . Authors’ Licensing & Collecting Society . BPI . British Academy of Songwriters, Composers and Authors . British Association of Picture Libraries & Agencies . British Computer Society . British Institute of Professional Photography . Broadcast Entertainment Cinematograph & Theatre Union . Chartered Institute of Journalists . Copyright Licensing Agency . Design & Artists Copyright Society . Directors UK . Educational Recording Agency . Equity . Music Managers’ Forum . Music Publishers Association . Musicians’ Union . National Union of Journalists . Periodical Publishers Association . PPL . PRS for Music . Publishers Association . Publishers Licensing Society . Royal Photographic Society . Society of Authors . Writers’ Guild of Great Britain .

We welcome the Growth Review being carried out as part of the HM Treasury and BIS objective of achieving strong, sustainable and balanced growth and particularly welcome the recognition that the UK digital and creative industries are amongst the most influential and successful in the world and that UK digital content reaches round the globe.

Our comments are limited mainly to the copyright framework and we leave it to representatives of the individual sectors within the BCC to provide detailed comments on the other issues raised in the briefing note provided by BIS. We regret the summary nature of our response but the very short timeframe available for its preparation has limited the time available to us to consult our own members on a more in depth response.

ECONOMIC VALUE OF THE CREATIVE INDUSTRIES IN THE UK

We represent organisations of creators, performers and other right owners working primarily in the creative and cultural industries. Within those industries, our members create for, develop, or work with digital media. They are leaders in digital communication and distribution, for example, advertising, journalism and publishing. All provide creative content for use on-line or in digital formats; for example, music, film, software and games design, as well as in more traditional formats and media.

Our members represent highly innovative companies and individuals with great economic potential and they make up one of the UK and Europe’s most dynamic sectors. According to a report published by NESTA on 29th November 2010: *“The contribution of the creative industries to UK plc cannot be*

understated: as a high-growth sector worth 6.2% of GVA and growing at double the rate of the rest of the economy, it is a crucial engine of growth.”¹ It is also a major exporter of services.

As creators of content for on-line and other forms of digital distribution, our members also contribute to the success of the information and communication technology industries (ICTs), including the network infrastructure. In acknowledging the contribution which the creative industries make to the ICTs, it is essential that Government policies recognise the distinction between the creative works and performances that these industries produce, publish and broadcast and the electronic services by which such works are increasingly disseminated within the course of their exploitation.

Government should also recognise the additional value which the creative industries bring to our rich cultural life, to social education, innovation in the UK and to the wider economy, at the most obvious level through their contribution to tourism and the heritage industries. This extensive contribution to the economy and to UK growth goes beyond the digital or more traditional media industries within which they operate.

As recognised by the Growth Review paper, the importance of small businesses to the economy and to the potential for growth must not be underestimated. The creative industries provide a large numbers of jobs as well as sustaining a large population of freelancers and sole traders. Being dependent on creativity and originality, our creative industries encourage entrepreneurship and innovation. We welcome Government’s recognition of the specific needs of this group and its intention to provide business support and help targeted at SMEs including freelancers and sole traders.

Effective copyright law underpins the success of the creative industries in the UK and is central to the micro-economy of each sector within those industries. Copyright and other intellectual property rights are the foundation on which the economic wellbeing of our creative industries rest, as well as the foundation of the as yet fully realised potential of our digital industries. Without effective copyright law those industries cannot recoup investment in such works, or develop or promote new products and services. Copyright supports the UK’s role as a world leader in music, film, publishing, television and radio, fashion and games design.

The copyright system is sufficiently flexible to cope with this changing environment. It brings recognition, respect and support to the grass roots of the creative industries as well as to the sophisticated markets they support.

1. REGULATORY BARRIERS

We believe that the UK has a sound copyright legislation framework already in place and we look forward to detailed discussion on this point with Professor Ian Hargreaves and his Review Team as part of the forthcoming Review of IP and Growth. We would, however, like to highlight the following: -

- a) **Pre-eminence of exclusive rights:** We strongly support the pre-eminence of exclusive rights and believe that where licensing arrangements are already in place in the market and work well, they should not be interfered with. (Also see our comments under 2.a))
- b) **Collective Licensing:** While restating our support for the pre-eminence of exclusive rights, we recognise that the UK’s system of voluntary collective licensing operated by our Collective Management Organisations (CMOs) provides a straightforward and effective method for accessing vast repertoires of works by large numbers of individuals. Such schemes are of increasing importance in the context of digital use. They ensure a suitable and fair return for different right owners, exemplifying the necessary balance between access and reward.

¹ http://www.nesta.org.uk/events/assets/events/creative_mass_growing_creative_clusters

The British Copyright Council's CMO members are committed to transparency and accountability and welcome discussions around regulation and other mechanisms aimed at ensuring this.

Rather than developing yet more limitations and exceptions to copyright, as currently envisaged in some quarters at international level, regulators in the UK should rather concentrate on licensing mechanisms and effective systems of remuneration, such as those provided by the collective licensing of rights.

CMOs have established networks of agreements that allow works to be used in a way that respects the rights of authors and performers to control the use of their works and to receive a fair return. These arrangements acknowledge the cultural and legal differences in different territories. Any European regulatory measures aimed at providing one-size-fits-all solution for cross border access are unlikely to provide a just and workable system.

- c) **Orphan Works Licensing:** We recognise that in certain non-commercial contexts e.g. libraries and archives, access could be facilitated by a regulated approach to the licensing of orphan works. The British Copyright Council originally considered this subject two years ago and has held discussions with the Intellectual Property Office on a number of occasions. We are currently preparing an updated version of our original proposal on Orphan Work Licensing, based on a national solution, to accommodate recent developments and sectoral concerns. We will be pleased to share this with Government once it is finalised.
- d) **Withholding Tax and Royalty Payments Cross Border:** The complexity of the system for withholding tax/double taxation agreements within Europe is a barrier to growth for those in our creative industries working at European and international level. Delays in royalty payments caused largely by issues of withholding tax on cross-border rights and royalty flows, both in and out of the UK within the EU and also between the UK and non EU countries has been highlighted by our member PRS for Music. A briefing paper from PRS for Music is attached. Not only does this affect the collecting management of rights, it impacts on the fees paid, and royalty payments made, to individual creators and performers and other small scale right owners working in similar circumstances. The British Copyright Council is currently gathering evidence for a response to HM Treasury's IP and Taxation Review on this point.

2. HOW CAN THE INTERNATIONAL REGULATORY REGIME ADAPT TO THE RISE OF THE INTERNET

a) Copyright has evolved and adapted to recognize technological development

Copyright provides a system that recognises and rewards creativity, enabling adequate remuneration for creators and performers. It is clear from the many on-line business models already in existence that the copyright framework has adapted successfully to accommodate the rise of the internet alongside other digital uses.

The British Copyright Council is currently working on a Glossary of licensing terms across all the sectors we represent. It gives an indication of the breadth of on-line business models and new licensing arrangements offered by the creative industries through rights granted under copyright. As an example, copyright has supported investment in the development of literature and publishing with the provision of online subscription services, audio books, podcasts, interactive websites, blogs, online news services, electronic books all of which support a whole range of new online streaming and download services. When this work is complete, we will be pleased to forward it to Government.

b) No "one size fits all" solution

The UK's creative industries are sophisticated and any changes or adjustments to the copyright framework should be approached with care. Each sector of the industry responds in different ways to developments in the exploitation of works. There is no "one size fits all" solution in terms of their responses to the need to protect and ensure a just remuneration for creativity to accommodate the rise of the internet.

- c) **Exceptions and limitations:** Rather than conceding to the lobby for more exceptions to copyright, as a “catch all” solution to issues around access, regulators in the UK should concentrate on licensing mechanisms and effective remuneration, such as collective licensing of rights (see 1.b) above).

“Free” services appeal to consumers but business models behind the delivery of creative work in the digital age, perceived as free by consumers, must be supported by an effective copyright regime to enable payments to be made to creators and performers and to our industries. The essential thing is for the creator to receive payment/reward from others who benefit from the use of their work.

We believe that any new exception that may create imbalances in the commercial market must be reviewed carefully and in the light of the requirements of the Three Step Test, by which the UK is bound under art.5(5) of the EU Information Society Directive.

The BCC does recognise the value of national interpretation of application of the optional exceptions recognised within the EU Information Society Directive in cases where this supports valuable cultural diversity within the EU. Nevertheless, differences which result in the loss of fair remuneration for rights owners linked to application of exceptions and limitations should be addressed.

- i. **Three Step Test** - If the use conflicts with a normal exploitation of the work and prejudices the legitimate interests of right owners, there are no good grounds for the recognition of an exception or a limitation. At national level, explicit incorporation of the three-step test into UK legislation could greatly reduce the difficulties of interpreting legislation on exceptions and limitations to copyright.
- ii. **Exception subject to licence** - Where exceptions or limitations on exclusive rights are necessary, we hope that the UK Government will continue to support the principle of an exception subject to licence and suggest that this principle should be promoted at European and International level. The principle of exceptions subject to licence has created a flexible system benefiting right holders and users in the areas in which it applies (e.g. the Educational Recording Agency scheme under Section 35 of the Copyright Designs and Patents Act 1988).
- iii. **Private copying exceptions** - In principle, many of our members have no objection to a limited private copying exception for protected works in the UK, but we strongly believe that any such exception should provide for fair compensation to rights owners; such fair compensation would also be required if such exception is introduced under mandatory European rules (Article 5 (2b) Copyright Directive 2001/29). Such systems of compensation function successfully in other parts of Europe, for example, in Germany and in France. There is no reason why they should not do so in the UK.

d) **Enforcement of rights**

i. **Online infringement**

Strong enforcement mechanisms are even more important in an online world which poses new challenges for creators, performers and other right owners. Following through with legislation to engage ISPs in partnership with right owners, is a priority for the creative industries and we are still hopeful that the Digital Economy Act will be implemented swiftly. The internet age has created a situation in which extensive unlawful on-line activity occurs nationally, regionally and internationally, while the available legal sanctions - court orders, lawsuits, injunctions – often require massive resources. This places redress for aggregated, individual infringements beyond the reach of most. One solution to this may be to provide CMOs and/or other collective bodies with a statutory authority to pursue infringements on behalf of individual right owners, in accordance with the IP Enforcement Directive.

Government has an important role to play as a facilitator of dialogue between stakeholders.

ii. **Enforcement accessible to all right owners** - The current copyright enforcement system does not provide a viable means for individual creators and performers, that is, freelancers, sole traders and small companies, to enforce their rights either in the existing marketing place, or against digital and online infringers. Enforcement of rights is frequently too expensive and too complicated to be worthwhile for individuals and small companies to pursue in a practical way. Recent changes to Patents County Court rules are to be welcomed but we are disappointed that the recommendation for a fast track and small claims track, of considerable benefit to individuals and small companies, remain no more than a good idea. Government should continue to investigate ways of ensuring that enforcement of rights is available to right owners of all types and sizes.

iii. **Copyright Tribunal** - Recent changes to the Tribunal, following earlier reviews, are welcome and will hopefully streamline the process of the Copyright Tribunal. However, there is still an intrinsic injustice within the process: despite relevant recommendations in the reviews leading to the changes, right holders themselves still do not have the right of recourse against users through the Tribunal, only users can apply to the Tribunal. We urge Government to adopt such changes as soon as possible.

3. HOW CAN THE COMPETITION REGIME, AND ITS APPLICATION, BE BEST STRUCTURED, EMPOWERED AND GUIDED TO DELIVER A COMPETITIVE AND THRIVING UK MEDIA SECTOR

Our creative industries thrive on competition and this is even more true for content produced for, and services and media developed for, online and digital use. The structure and ownership of our media are changing and this should be reflected in any development of competition policy.

There is a natural tension between the increased demand for one-stop shops which facilitate the market and European competition policy. It is important that such policy takes account of the benefits of collective licensing to right owners and users alike.

4. HOW TO REMOVE BLOCKAGES IN THE SKILLS SYSTEM THAT MEAN THE NEEDS OF EMPLOYERS IN THE SECTOR ARE NOT FULLY MET, DRAWING ON UK CES

Our members are better able to describe skills needs within each of their sectors.

Government is clearly aware of the high proportion of freelancers and sole traders operating in the creative industries. Therefore, it is not just the needs of employers which should be taken into account when considering the skills system. It is essential that initiatives supporting and enabling creative professionals, whether freelancers, sole traders, or small companies, take greater account of their need for greater awareness of, and better information about, copyright and related rights, about how they can use those rights to draw value from the content and innovations which they create and how they can apply that knowledge in practice.

Many who work, or who will go on to work, within CCIs, not as creators or performers but as commercial users of rights, are as much in need of education about rights as creators and performers themselves. An understanding of copyright and related rights and more and better information about the practical application of those rights must be a priority for our educational establishments and for industry support mechanisms if we want our creative communities to be in a position to help themselves.

5. HOW CAN WE ATTRACT THE BRIGHTEST INTERNATIONAL TALENT?

The UK's creative industries already attract the brightest international talent. The question should rather be: How to create an environment in which the UK can retain its own creative talent and ownership of its creative works. For example, we understand that while we have some of the best games designers and developers in the world, few of those games reach the market via British producers or investors.

On a more general note, new creativity and innovation frequently come from the exchange of ideas and views and from experiencing a wider range of cultural expressions. Through our members, we frequently hear of the difficulties which overseas authors, artists, musicians and performers encounter in obtaining visas for the UK, whether for a lecture tour, residency or for live performance.

6. ARE THERE PROBLEMS WITH ACCESS TO FINANCE AND BUSINESS SUPPORT THAT ARE PARTICULARLY RELATED TO THE CREATIVE INDUSTRIES?

It is for our creative industries to make choices about whether to invest in and produce high-quality creative content for new markets and services. Government can provide incentives in a number of ways but a priority must be a strong copyright system which supports economic return from investment and protects creative content in what is a sometimes precarious marketplace.

Websites, blogs, Apps, are some examples of the new routes by which creative individuals can get content to market. Creative content is already reliant on freelancers, sole traders and small businesses and the advent of digital media platforms and the breakdown of traditional media structures is likely to increase the number of individuals and small businesses in the market. These small freelance entities need a range of business-level support from set up through to market development.

We welcome initiatives which encourage other industries to understand and value their own intellectual property. A better understanding at this level not only encourages an innovation culture, it brings wider respect to the products of the creative industries.

7. DO WE HAVE THE RIGHT STRUCTURES IN PLACE TO ALLOW OUR CREATIVE INDUSTRIES TO EXPLOIT DEVELOPMENTS IN TECHNOLOGY TO MAXIMUM BENEFIT?

We support initiatives which encourage technological innovation, that enable and encourage rights owners of all types to track the use and re-use of their content in automated ways, to be part of the digital content chain and not to be excluded from it.

The HM Treasury and BIS paper rightly recognises that the UK's creative industries are amongst the most successful in the world. A strong copyright system has played an essential part in that success and must continue to do so if our industries are to have a strong and sustainable future. We welcome Government's determination to provide the conditions for it to grow further and assure it of the British Copyright Council's cooperation at every level to achieve this goal.

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