



Creative Content in a European Digital Single Market: Challenges for the Future

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Introduction

The Authors' Licensing and Collecting Society Limited ('ALCS') is the UK collecting society for writers of all genres of literary and dramatic copyright works including fiction, journalism, plays, poetry, academic texts, TV and radio scripts and story-lines, dramatisations, translations, abridgements and adaptations.

Established in 1977 and wholly owned and governed by the writers it represents (of whom there are currently over 70,000), ALCS is a not-for-profit, non-union organisation. The Society's governing body, the Board of Directors, is composed of elected writers. Since its foundation, ALCS has paid writers over £200 million in fees and today it continues to identify and develop new sources of income for writers.

The reflection document covers a very broad range of issues and we have limited our response to comments and observations that we feel have most significance for our members.

General observations

- We welcome the stated aim to create a framework that would secure 'appropriate remuneration' for creators and rightsholders in the digital use environment. Independent research on writers earnings funded by ALCS¹ found that less than 15% of authors surveyed had received payments for online uses of their works. The research also highlighted the cyclical way in which writers receive income, with royalties from past works and fees from secondary licensing schemes supporting the often speculative process of developing new projects. A robust rights framework supporting content creators is a key part of a sustainable transition to a digital content market.
- The term 'user-created content' occurs increasingly in EU digital content policy documents; the definition appearing at the footnote to page 3 gives some cause for concern. We foresee legal and practical problems in trying to identify a sub-tier of protected works that 'reflect a certain amount of creative effort' and are created 'outside of the professional practices.' Many writers create valuable works in what is, in effect, a non-professional capacity, yet their works deserve an equal and certain level of copyright protection.

¹ Authors' earnings from copyright and non-copyright sources: A survey of 25,000 UK and German writers. Research by the Centre for Intellectual Property Policy & Management, Bournemouth University (December 2007)

- Under the heading ‘online distribution of literary works and e-books’ the paper refers to the public policy objective of ensuring public access to works via digital libraries. Inevitably the controversial Google Library project looms large over European discussions on this issue and differing views arise. However it is worth noting that the models promoted under the Google Books Settlement have always placed remuneration for use at their core. It is important that alongside the public policy imperatives driving digitisation plans in Europe the right to receive recognition and reward for these subsequent uses is given equal prominence.

Comments on Chapter 5 (Possible EU Actions)

Consumer Access

In its most recent Communication on the Knowledge Economy the Commission expressed a preference for a Europe-wide solution to the question of accessing orphan works. Current UK policy is to introduce new legislation to enable bodies to apply for Government mandates to permit them to issue licences for the use of orphan works, such licences to be supported by extended collective licensing rules. ALCS supports this approach and envisages the following elements as being key to a workable and fair solution:

1. A defined and transparent process for identifying works as orphan is essential. Building on the work of the European High Level group, at a national level industry bodies and Government IP agencies should develop and publish sectoral search guides and protocols.
2. ALCS supports the development of voluntary registers of orphan works, such as through the ARROW project, to limit the creation of new orphan works and facilitate the process of uniting creators, nationally and internationally, with their due remuneration.
3. Commercial uses of orphan works should be remunerated at fair market rate. Uses identified as being non-commercial should still be subject to terms designed to protect the non-economic interests of the underlying author of the work.

4. Any bodies mandated to offer orphan works licences should fulfil the following criteria:
- they should be genuinely representative of the rightsholders concerned in that category of copyright work;
 - they should be permitted to charge a reasonable rate based on fair schemes approved by those rightsholders;
 - they should undertake reasonably practicable steps to identify rightsholders to whom the resulting payments are due;
 - they should have in place transparent policies for dealing with undistributable fees, approved by the rightsholders they represent.

Regarding copyright exceptions and their possible further harmonisation at EU level, we can see value in taking this work forward. The categories of exception that would appear most suited to mandatory application are those that relate to commonplace, uniform activities - such as the routine function of various devices to generate 'transient copies' of copyright works supported by a mandatory exception in the Copyright Directive.

Arguably a comparable example arises in relation to acts of private copying of works. Irrespective of changes in future technologies it is likely that a uniform exception permitting individuals to make personal copies for private, non-commercial use would aid consumer certainty. A truly harmonised EU regime for private copying/ personal use would also avoid partitioning the single market and provide some certainty for creators in terms of their return from the new markets being built around the copying and re-use of lawfully acquired digital content.

The above example focuses on an activity undertaken by individual consumers and we agree with the suggestion in the paper that a separate approach may be appropriate when looking at certain 'public interest' exceptions.

Through its partnerships with licensing bodies like the Copyright Licensing Agency (CLA) and the Educational Recording Agency (ERA), ALCS collects fees from the licensing of various secondary uses of writer's works. In the education and library sector this kind of licensing scheme operates to build on the uses permitted by UK law by offering a broad repertoire of works for uses beyond those dealt with by the legal exceptions.

Increasingly these licensing schemes are evolving to permit copying and access to learning materials within on-line networks, for example through making works available through Virtual Learning Environments. What these schemes do in effect is to build upon the statutory allowances for public interest exploitations of copyright works and through consultation with end users in the education and library sectors develop workable access solutions. At the same time these schemes provide for the acknowledgement of and reward for the use of the underlying works.

In the context of public interest access to content, we feel that this is a balanced model that works well in the middle ground between commercial uses and the individual allowances provided by copyright exceptions.

Commercial Users' access

The paper suggests the consideration of a European Copyright title. While this is an interesting concept we wonder if this proposal may be conflating two things: perceived problems associated with the differing regimes applying to exceptions and limitations - which generally address activities that are broadly speaking 'non-commercial', and the aim of securing a single licence to exploit a work across the Community on a *commercial* basis. These are two different policy aims and as such may not necessarily have the same solution.

In the latter case of commercial exploitation, due to the diversity of the different markets - socially, financially, culturally - within the various Member States it is hard to see, at this stage, how a single Copyright title would manage to adequately acknowledge these disparities.

The paper goes on to look at alternative forms of remuneration:

Compensation from ISPs. The UK is currently trying to establish regulatory powers to establish ground rules under which ISPs/ rightsholders can monitor infringing peer-to-peer file-sharing activity and issue warning notifications/ pursue court orders to limit this kind of activity. As a means to addressing a serious problem that impacts on the return that creators receive for the on-line use of their works we feel that this is a necessary measure. However for various reasons this approach may not prove comprehensive and other routes need to be investigated. Alongside work on improving education/ awareness on the impact of copyright infringement and the promotion of legal offers, a licensing option whereby the ISP business model would include a compensatory payment for rightsholders merits further consideration.

Extended collective administration for making available rights of audiovisual authors. We support further exploratory work in this area subject to two caveats: (i) the differing regimes in place in different territories under which authors already receive remuneration for this kind of use must be taken into account (ii) a previous attempt in the Rental and Lending Directive to 'ring fence' equitable remuneration for audiovisual authors has failed to achieve that aim in the vast majority of Member States; the reasons for this failure will need to be analyzed with care before re-adopting this model in a different context.

ALCS is grateful for the opportunity to contribute to this review and would be pleased to provide further information or assistance as required.