



Charles Clark Memorial Lecture 2013

Copyright licensing: fit for purpose for the digital age

Lecture given on Tuesday 16 April 2013 at The London Book Fair

By Richard Hooper CBE

“One Man Studies Seven Year, to bring a finish’d piece into the world, and a Pyrate Printer Reprints his Copy immediately, and Sells it for a quarter of the Price...these things call for an Act of Parliament.”

Daniel Defoe – in the year of our Lord 1706¹

The logic of the argument in my lecture goes like this. How can you, the publishing industry, significantly reduce the pressures on Government to make what are in your view unwelcome changes to the law and unwelcome inroads into your commercial rights? And how can you, simultaneously, increase the pressure on Government to enforce copyright more vigorously? The answer to both questions is: ensure that your copyright licensing processes and organisations are truly fit for purpose for the digital age.

Wars of attrition

On the 7th of December 2011, Dr Ros Lynch, a senior civil servant from the Department of Business, and I started work on our independent review of copyright licensing for Secretary of State Vince Cable. This followed on from Professor Ian Hargreaves’ review, which itself followed on from the Gowers review.

We found ourselves immediately on a field of war, with shells whistling over our heads, making craters in the winter landscape. Not one, not two, not three but four battles were going on around us. These battles continue today unabated and are being waged not just in the UK but across much of the world. Someone recently in the music industry called them “the wars of attrition”.

¹ ‘Encounters with pirates’ by Melanie Reinhart, *The Author*, Spring 2013, page 11

The first battle is between those who believe that the internet should be free, paid for where absolutely necessary by advertising, and those who believe that the internet cannot live by advertising bread alone.

This first battle – free versus paid-for - morphs into the second battle raging alongside. Between those groups of people, often led by technology companies, who believe that copyright is an obstacle to the free and open internet and to economic growth - and the creative industries who believe that the protection of copyright is a fundamental legal right and the driver of economic growth - especially in the UK with its strong position in copyright creative industries. There is a rather sinister term “content liberation” which can be seen painted on some of the shields of the advancing anti-copyright army.

This second battle – for and against copyright - morphs into a third. Between those who believe that the internet is the Wild West, anything goes and that the internet is beyond the reach of the law and those who argue that the internet is subject to the general law and that some sectoral regulation of matters internet may increasingly be necessary.

This third battle overlaps with a fourth² – between those who believe that the internet is an unalloyed good that should brook no criticism and receive no restraint and those who are increasingly concerned about the darker side of the internet – rampant piracy of copyright works, pornography, child abuse, cybercrime, cyber bullying, invasions of privacy, trials by the tweeting mob, anonymity, conspiracy theories, terrorism.

Compromise between exclusive rights and reasonable access

Underlying these battles and this field of war, there is a genuine tension, there is a genuine conflict.

Charles Clark’s obituarist in The Independent (12 October 2006) neatly summarised Charles’ stance on the matter as follows: “Although [Charles Clark] was a staunch defender of copyright, and the need to protect publishers’ investment in creative works, [he] understood that copyright has historically been a compromise, between exclusive rights on the one hand and reasonable access on the other.”

This compromise between exclusive rights and reasonable access plays out in three different arenas:

- copyright law
- copyright licensing processes and organisations

² There is actually a fifth battle around “net neutrality” (called the “open internet” in the UK) where fixed and mobile telcos, facing massive growth in data volumes, wish to charge differentially content/edge/over the top OTT providers like Google’s YouTube to carry their traffic all the way to the end user, especially for bandwidth-hungry video applications.

- the commercial rights of rights owners to charge what they wish to whom they wish and withhold their content if they so wish.

Charles Clark's compromise between exclusive rights and reasonable access can be achieved by changing copyright law as Professor Ian Hargreaves recommended. This is currently happening in the Houses of Parliament right now with the Enterprise and Regulatory Reform Bill, covering orphan works, extended collective licensing, codes of conduct for collecting societies and various exceptions to copyright.

This compromise between exclusive rights and reasonable access can be achieved by making changes to copyright licensing processes and organisations as Ros and I strongly recommended in our final report to Government, Copyright Works³.

This compromise between exclusive rights and reasonable access can also be achieved by squeezing, either legally or in other ways, the commercial rights of rights holders. For example, the Financial Times reported on the 15th of November 2012 that the internet music service Pandora "has urged Congress to pass the Internet Radio Fairness Act, which would cut royalties by 85%."

The walls are porous Part I

A key further argument of my lecture is that the walls separating the three arenas - copyright law, copyright licensing and commercial rights - are not watertight. They in fact turn out to be quite porous. Actions taken on one side of the wall can influence actions on the other side of the wall. Actions on one side of the wall can obviate the need for action on the other side. There is a strong interrelationship between changes to copyright law, changes to copyright licensing and changes to commercial rights.

Let me give you an example of the porosity of the wall that separates copyright law and copyright licensing processes. In our two reports, Rights and Wrongs⁴ and Copyright Works, Ros Lynch and I were especially critical of copyright licensing in educational institutions. Schools for example need licences for fourteen different activities from photocopying to recording a school concert and need to deal with as many as twelve different licensing organisations. The proposals for a widely drawn educational exception in copyright law which came out of Hargreaves and which upset many in educational licensing, would not have appeared, in my view, if educational licensing had got its act together earlier. If the whole process of educational licensing had been made simpler to use and more streamlined years ago - with rights aggregation and one-stop shops. Sensible action on one side of the wall in relation to copyright licensing processes and organisations obviates the need for widespread and disruptive changes to copyright law on the other side of the wall.

³ Copyright Works, Intellectual Property Office, London, July 2012

⁴ Rights and Wrongs, Intellectual Property Office, London, 27 March 2012

This task of simplifying educational licensing is going on now, under the chairmanship of lawyer Stephen Edwards, as one of a number of follow-up work-streams recommended in our final report. These work-streams are overseen by the Copyright Licensing Steering Group, which is directed by Ros Lynch, chaired by the former head of licensing at the BBC, James Lancaster, and funded by the creative industries themselves. These work-streams are attracting encouraging levels of support and interest across the creative industries.

The walls are porous Part II

I also wish to argue that the wall separating changes to copyright licensing processes and the commercial rights of rights owners is also porous. The example I would cite is from the audiovisual industry – television and film.

It concerns what is called rather arcanelly “repertoire imbalance”. Repertoire imbalance refers to the fact that certain copyrighted works are not always legally available to consumers on the internet but are available in physical form. Lovefilm (now owned by Amazon) has a subscription streaming repertoire of 8,000 films over the internet but a much greater repertoire of 70,000 films is available in DVD and Blu-ray disc formats via the traditional route of the Royal Mail and your letter-box. The publishing equivalent would be a book available in print but not in e-book formats.

If a copyrighted work cannot be found legally to buy or rent on the internet, a digital native (that is not me – I am a struggling digital immigrant hanging on to the ledge of modern technology by my fingernails!), a digital native may believe it is justified to find the copyrighted work from an illegal source. It is clearly not justified but...

Last October I was in Singapore, where I have advised both the media and the telecommunications regulators. Singapore is seen rightly as a very disciplined and law-abiding society where chewing gum on pavements, graffiti on walls and water left lying around are all forcefully forbidden. Stagnant water encourages mosquitoes, which Singapore airspace is mercifully free of. But, and this is openly admitted, there are a lot of digital pirates in Singapore airspace. I prefer to use the term “copyright infringement” rather than “piracy” since the words “pirates” and “piracy”, thanks to Johnny Depp, Keira Knightley and Geoffrey Rush in films like *The Pirates of the Caribbean*, might be seen as rather trendy and excusable.

I was talking with a member of the Singapore Government and he explained the political difficulty with cracking down on copyright infringement as a result of repertoire imbalance. A popular Chinese television programme is premiered in Hong Kong and rather like [Downton Abbey](#) or [Homeland](#) here in the UK, lots of people want to see it immediately and discuss it next morning at work. 85% of the Singapore population is Chinese. They have to wait three months until the Hong Kong show comes to their television screens because of various rights contracts - all of which are legal and permissible. But the Singapore population is not going to wait

three months if it is a really popular show, so illegal copies are found and used. Faced with a significant, and some would say reasonable, consumer response of this nature, politicians anywhere in the world find it difficult to bear down heavily on this type of infringement, this type of piracy.

Audiovisual producers are fully within their commercial rights to behave like this but if they do and continue to do so, then politicians across the world will not necessarily stir themselves to action on enforcing copyright. Licensing windows are, as a result of this problem, gradually and sensibly being shortened.

But the real straw in the wind is the recent worldwide premiere of the USA version of the British House of Cards, starring Kevin Spacey. Netflix, one of the leading film and television service providers over the internet, commissioned House of Cards itself (at a cost of \$100m). Netflix then made all thirteen episodes of House of Cards available to their customers worldwide on Day One. If that is not a response to repertoire imbalance, I don't know what is. And that response is coming from an industry outsider, an industry disrupter, so the audiovisual industry will have to take note and not just stand on the ceremony of its traditional framing of commercial rights.

The focus is on improving copyright licensing

If you accept that the walls between copyright licensing processes and copyright law, and between copyright licensing processes and the commercial rights of rights owners, are indeed porous as I have tried to demonstrate, then a focus on improving copyright licensing is essential. As a result of simplified licensing, an even greater flowering of competing digital services can be expected giving greater consumer satisfaction, thus reducing the inclination to infringe. This creates jobs and economic growth and greater revenues to rights owners across both the technology and creative industries. The UK is already leading the world on internet usage and e-commerce, as a number of studies have shown⁵. This will increase that leadership.

But I must emphasize that the task of simplifying copyright licensing is not just for this year and then it will be over. Streamlining copyright licensing will be, like modernisation or management reengineering or cost reduction, a permanent never-ending requirement of the copyright creative industries as new technologies continue to disrupt the established order. I fear that the winds of change from the internet and the digital world have barely begun to blow. All businesses and all collecting societies do and will require eternal vigilance, leading to new strategies and excellent execution of those strategies. We British are often better at strategising (which tends to be seen as high status) than we are at execution (somewhat lower status). The great countertenor Andreas Scholl was asked what was the biggest myth about being a singer: "That it's all about inspiration. It's actually a rather unspectacular

⁵ E.g. Boston Consulting Group, The \$4.2 trillion opportunity, 19 March 2012

process, requiring hard work, brains, homework, preparation, and lots of perspiration.”⁶

Let me now focus on two of a number of copyright licensing strategies which the four creative industries – music, publishing, audiovisual and images – are executing this year and will, I hope and pray, execute for years to come.

The first one concerns improving what I will call “dodgy data” and the second one concerns the Copyright Hub and digital copyright exchanges.

Dodgy data

Ros and I were most surprised by the poor state of data across the creative industries. The digital world drives data and is driven by data in a way that the analogue world is not. Sloppy data in the analogue world can just about get by but not in the digital world. Sloppy data leads to creators and rights owners not being paid, or the wrong people being paid. Sloppy data leads to huge and expensive manual intervention thus reducing profits and pay-outs. Whilst I think publishing has been better at data than other parts of the creative industries, there is no room for complacency even in publishing. The internet is characterised by being borderless and intrinsically multi-media. So even if the publishing industry can hold its data head a bit higher than the others, poor data elsewhere will drag down future potential.

Images – still pictures – are a separate industry but are part and parcel of publishing as well. Routinely, when web publishers put pictures on their website using standard industry software, the metadata (i.e. the data about who owns the rights to the image) is automatically stripped out. A senior figure in Cambridge University Press said to me last year that it is a hassle finding and licensing a specific image for a book. The net result is either no image at all or some overused generic copyright-free one. A central argument behind streamlining copyright licensing is that the size of the overall pie will be bigger and thus the amount going to creators, writers, directors, composers – even to you poor publishers in the audience today – the amount will be bigger.

Your industry has pioneered unique identifiers for copyrighted works with the long-established system of ISBNs but their equivalents in other industries either don't exist or exist and then are not used properly. The audiovisual industry, for example, has two competing classes of unique identifier for audiovisual works – ISAN from Europe and EIDR from the USA. We were critical in our report of the BBC, a leader in audiovisual production worldwide and a leader in public service broadcasting, which uses neither system of unique identifier.

Even in the publishing industry I am not sure you have cracked the system for identifying, uniquely, a chart or a paragraph within an article or a book – i.e. a subset

⁶ [The Guardian](#) G2, page 19, 20 March 2013

of an ISBN. Informa Business Information made the following point to us last year: “Book authors often need to reproduce a photograph or table from an academic journal in their book. Managing requests from rival publishers for this content or knowing who at another publisher to approach to secure rights when compiling our own books is difficult, time-consuming and more costly than it should be given the proportion that the requested content makes up of the whole project.”

Carlo Lavizzari asked me to make reference here to DOI technology – “digital object identifier”. “DOI is in use in a sub-sector of publishing: STM...It allows persistent identification and actionable location on the internet of any piece of content, whether a chart, a book, a chapter of a book, a chemical formula in an image, a marked gene sequence. Very versatile. Wiley is able to sell academic books chapter by chapter because each chapter has a DOI – a bit like going from an LP to a single.”⁷

In the music industry the ISBN equivalents – ISWCs and ISRCs – are not used as consistently as they should be. As a result musical works are searched by titles not by unique numeric identifiers. This leads to the disease of retitling – a massive problem when titles are translated. Lost in translation indeed.

I believe that you, the publishing industry which very much led the world with ISBNs can provide leadership to sorting out the long list of data problems across the creative industries, so that the multi-media and borderless nature of modern creativity can truly prosper. You, the publishing industry, have been the key drivers of the Linked Content Coalition project which only a few days ago published its final recommendations for data architecture and best practice. In Copyright Works we wrote that the LCC work was “a very real and necessary building block for the Copyright Hub and its associated databases and Digital Copyright Exchanges” (page 3).

The Copyright Hub and digital copyright exchanges

At the heart of the task of streamlining copyright licensing for the digital age, the four creative industries have committed, under my chairmanship, to design and build the Copyright Hub. This idea stems from Ian Hargreaves’ recommendation about a digital copyright exchange. The Copyright Hub Launch Group meets regularly and thanks to some money from HMG, the pilot phase will launch in July – all going well. The CLA, the NLA, PLS, Pearson and CCC (the Copyright Clearance Center, our only non-UK organisation at this moment) are all closely involved from the publishing industry in launching the Copyright Hub idea - as members of the Launch Group. You can follow our progress on copyrighthub.co.uk.

The Copyright Hub and its network of interoperable websites in the UK and beyond have a clear vision. It is one that Charles Clark would, I hope, have approved of – it

⁷ Email to the author

was Charles who coined the iconic phrase: “The answer to the machine is in the machine”⁸.

Signposting

First of all, the Copyright Hub will be the portal/website to go to in the UK to find your way through the maze of copyright’s complexity. A constant of our consultation last year was the need for signposting, the need for navigation, the need for copyright information. I remember well my first ever conversation about licensing, with a Hollywood agent in Hollywood, appropriately on Sunset Boulevard. I asked him what problems he had with copyright licensing, expecting him to say “None”. He actually said: “Finding out who owns what rights to literary works *is a nightmare*” (My italics).

Rights registries

This brings me neatly to the second function of the Copyright Hub. It should be a place where websites connected to it encourage and welcome rights owners to register their rights, any licences given and any permissions granted. Conscious of the long shadow of the Berne Convention, any such registration is voluntary of course not mandatory. Indeed the whole style and feel of the Copyright Hub is “voluntary, opt-in, non-exclusive” - words taken directly from Copyright Clearance Center’s guiding principles. We have added the word, “pro-competitive”. Voluntary, opt-in, non-exclusive, pro-competitive.

I have to say that I am more and more interested in this rights registry function for the Hub, if we can achieve it. I was fortunate to have Sir Robin Jacob, the former member of the Appeal Court in the UK, as my philosopher guide last year on rights registries. He pointed out that if copyright is indeed like property as rights owners regularly attest, it is worth remembering that there is a requirement to register ownership of land/property and that a squatter on your land after twelve years and not challenged can take over ownership. In Copyright Works (page 23) we quoted Maria Pallante, Register of Copyrights in the US Copyright Office: “A robust public record of copyright ownership and copyright status is essential to facilitating marketplace transactions...public registration is of growing interest in the global copyright world.”

Not long after Dr Ros Lynch and I had completed our final report in July 2012, my author wife and I were driving through Meredith’s homeland, South Australia, on holiday. At the entrance to the small town of Meningie, she noticed a sign which read: “Be a responsible dog owner – Register Now!” Is it too much to ask and too difficult to execute, that publishers, authors and agents join with colleagues in other sectors to create authoritative and updated databases of who owns what rights to what? The dog owners of Meningie, South Australia are clearly showing a lead.

⁸ Charles Clark: The answer to the machine is the machine and other collected writings, edited by Bing and Dreier (2005)

Copyright licensing

But signposting, navigation, copyright information and rights registries are only fifty shades of foreplay to the key role of the Hub. At the heart of the Hub there must be the ability to license copyrighted material easily and at a low transaction cost. Digital copyright exchanges, some of which exist already, for example Getty Images, carry out automated licensing at low transaction costs for specified uses. It is important not to confuse the price of a licence with the cost of acquiring that licence – the transaction cost. They are separate issues.

These ideas for the key licensing function of the Copyright Hub stem from insights that we gained last year from the BBC, News International and Simon Juden at Pearson. The BBC pointed out that whereas in the analogue age there were a small number of copyright licensing transactions each of high monetary value and each with high transaction costs (e.g. lots of lawyers), the digital age was and is totally different. In the digital age we have a (potentially) high volume of transactions by the long tail of users for the long tail of uses. These transactions are of low monetary value and hence require low transaction costs.

Examples would be music for the wedding video, music for the small business website, any publisher or author using a picture or graph or a piece of text from an existing published work in a new published work. The photographer Sally Fear, in an email to me last week, crystallised the bottom end of this market which is high volume, low monetary cost, low transaction cost as follows: “There is very little respect for the copyright of small people in this country now. It can take a month’s work to nail them for £50 – if indeed you ever find out – so they rely on us not bothering or even better not finding out.”

In summary, the Copyright Hub will aim to be the technological embodiment of streamlined licensing via good signposting and good knowledge of who owns what rights to what. We would welcome anyone who wants to join in the work of the Copyright Hub in the second phase. So do please email us via the address on copyright@copyrighthub.co.uk. Especially if you have a Big Idea. Some Big Ideas are already floating around.

Pearson’s Simon Juden has made the point on more than one occasion that we will not be able to predict the big successful applications of the Copyright Hub in advance, so traditional business cases and traditional market research don’t necessarily work. As the great founding father of Sony, Akio Morita, said to me when I had the good fortune to meet him in 1980, when I was at British Telecom pioneering Prestel, the world’s first commercial view data service – Internet Mark One! “You cannot market research an innovation,” Akio Morita said to me. You have to take a leap of faith. Sony had noticed young men in town centres walking around balancing transistor radios on their shoulders blaring out music – Sony’s leap of faith led to the astonishingly successful Sony Walkman.

Concluding thoughts

Let me conclude with four exhortations aimed first at the Houses of Parliament, the IPO, the Government and lobby groups, then at politicians more generally, then at the technology companies, and lastly an exhortation aimed at you, the creative industries.

Exhortation One - the Houses of Parliament, the IPO, Government and lobby groups

My exhortation here is simple. Please get the copyright law changes, currently in the Enterprise and Regulatory Reform Bill, through both Houses of Parliament and into law as quickly as possible. We have spent years first with the Gowers Review and then the Hargreaves Review discussing and debating changes to copyright law. The current proposals are broadly sensible, with the exceptions not being too widely drawn.

The time has come to move on. Let us now reallocate the immense resources of energy and time and money away from lobbying and into making copyright licensing processes and organisations more and more fit for purpose for the digital age. As a result, there will be greater consumer satisfaction with a greater range of services, therefore less inclination to infringe and a much bigger pie for publishers and for writers. No more time needs to be spent on the legislative dimension. Legislative indecision only prolongs the wars of attrition.

Exhortation Two - the politicians

Turning to the politicians more generally, in the UK and across the world. The creative industries are now investing much resource in making copyright licensing more streamlined and easier to use. They are committed to doing this into the future, as technologies and circumstances change. Therefore, it is reasonable to ask the politicians to enforce more vigorously compliance with copyright, whether that is

- peer-to-peer file sharing of copyright-infringing material,
- copyright-infringing websites,
- search engines indexing to copyright-infringing websites,
- advertisers buying space on copyright-infringing websites,
- payment providers servicing copyright-infringing subscription services.

The UK is a knowledge-based economy, as politicians and ministers regularly remind us. At the heart of a knowledge-based economy are not bricks and mortar but intangible assets such as patents, trademarks, design rights and copyright. They need protection from theft – within the law and as the law defines, in a democratic society, Charles Clark's compromise between exclusive rights and reasonable access.

Exhortation Three - the technology companies

Exhortation to technology companies. You are quick to protect yourself and attack when another company invades your patent rights. Why should you not treat copyright equally seriously now that licensing of services has been and is being made so much easier? The UK has more digital music services than anywhere in the world. The creative industries made mistakes ten years ago as the internet loomed to threaten their traditional businesses. Those mistakes are now firmly in the past. Work with the grain of the copyright industries and not against the grain – to the benefit of consumers and economic growth. The UK is especially strong in copyright creative industries and we are getting much better at technology companies from the big ones like ARM to the smaller ones like Soundmouse.

Exhortation Four -You!

Finally my exhortation to you here in the audience at the London Book Fair. Publishers, authors and the members of other creative sectors.

It is important to be in the right place at the right time. I believe that you have got yourself into the right place at the right time. I believe that your stance towards and support for innovative and streamlined copyright licensing and the Copyright Hub put you in the right place. The ball now moves from your court to the politicians'. It is now time for the politicians to deliver the proposed changes to the law so that the endless debate can be closed down. And it is now time for politicians to deliver more rigorous and equitable enforcement of copyright.

Thank you very much for listening and I look forward to your questions and your views.