

LATEST DEVELOPMENTS IN COPYRIGHT LAW

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HARGREAVES REVIEW

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BACKGROUND

- Started by David Cameron, influenced by a personal friend, a senior figure in Google UK, who told him that Google would never have got off the ground in the UK because of the UK's "restrictive fair dealing" provisions compared to the USA's fair use provisions
- Fair dealing versus fair use; the former is precise/restrictive in terms of purposes – fair use is not; and in any case, EU law would have to be changed, not UK law, if we wanted to move to fair use
- But that's not the reason why Google did not start up in the UK!
- Nonetheless, David Cameron asked Hargreaves to undertake a review of fair dealing versus fair use, but also of other ways the law can be updated to improve competitiveness
- Hargreaves reported in May 2011: "Digital Opportunity: A Review of Intellectual Property and Growth"

HARGREAVES' RECOMMENDATIONS

- Be evidence based, not lobbying based
- Rejected (rightly) the idea of fair use
- Set up a so-called Digital Copyright Exchange (now the Copyright Hub) for easy identification of who can offer licences for a particular work
- Extended collective licensing, i.e., existing RROs will offer licences for all works in their genre, including orphan works, e.g., CLA for text-based products,
- Introduce new exceptions, including format shifting, parody, fair dealing in all media, library preservation and archiving, extend educational exceptions to cover networked materials
- New exception for text and data mining
- Contracts must never over-ride exceptions
- IPO should be able to give informal legal advice

THE GOVERNMENT ACCEPTED PRETTY MUCH EVERYTHING

- It is not pursuing fair use
- It agrees that policy must be evidence-based (BUT Gov't failed to follow that in regard to the EU Directive on extension of term for sound recordings/performers' rights)
- Pilot phase of Copyright Hub to be launched in July
- It has split the recommendations into two; some are in the Enterprise and Regulatory Reform Act 2013, the others are awaiting a Statutory Instrument

ENTERPRISE AND REGULATORY REFORM ACT 2013

- Powers to reduce the lifetime of unpublished works, other than photos or films, to 70 years after death of author, or assumed date of creation, whichever is the later (depends if identity of author is known)
- Power to give licensing of orphan works by an approved body – with broader range of media types or possible uses than envisaged by EU Directive
- Requirement for “diligent search” for OW before one applies for a licence – but details of such searches are yet to be agreed
- Power to move to extended collective licensing (including OW) from “opt in” to “opt out”
- Power to regulate RROs, to create a licensing code ombudsman and to impose penalties on RROs

ENTERPRISE AND REGULATORY REFORM ACT 2013

- But these are all “powers” – although the Act has been signed (not by the Queen apparently, but approved by Privy Council), they won't come into force till Regulations are approved by Parliament

SUMMING UP ON THE PROPOSALS TO CHANGE THE LAW ON ORPHAN WORKS

- Licensing bodies should be able to offer licences to OW for a modest fee even though they don't own the rights to do so. If later the owner of the OW copyright comes out of the woodwork, they would be entitled to receive money from the licensing agency, but cannot stop any licences already granted
- However, the photographers' lobby is totally against this, so it may not happen – artistic works may well be specifically excluded from any such changes to the law
- They oppose it because it is a form of compulsory licensing

COPYRIGHT HUB

- The proposal came about as a result of complaints from users that it was impossible to easily find out whether something was available for licence, and at what price

LATEST ON HUB

- Pilot will be launched in July
- Free service, which will let people search for who is offering licences for anything – text, images, sound, film, etc.
- If you get a hit, you will be linked to the licensor's Web site, where the fee and terms/conditions are explained
- Idea is not just for big collections at high price – it is expected that there will be lots of low priced items for small bits of materials or for limited uses
- Some of the licences on offer will be free
- It is hoped that the concept will extend world-wide in due course
- It is expected that in future, owners will become much more aggressive with infringements where a licence was on offer, as there will be no excuse that the infringer says “I had no way of knowing I could license this legally”

BUT OTHER CHANGES ARE BEING DRAFTED IN A SERIES OF BITS OF A NEW SI

- First bit was issued in early June, offering a new exception for private copying (e.g., ripping CDs, but applying to ALL media types) already owned and no levies – VERY CONTROVERSIAL WITH MUSIC INDUSTRY even though it happens so much (illegally) already
- Importantly, no contract can over-ride this exception
- Also offered a new exception for public authorities to put items they are obliged to make available under another statute (FoI) on the Web, as well as making physical copies
- New exception for “quotation” to replace the current exception for fair dealing for criticism or review
- Unfortunately, not clear whether it extends to all classes of work – might only apply to literary and musical works. Needs to be teased out more.
- Again, no contract can over-ride this proposed new exception
- New exception for parody/pastiche
- These terms are not defined – may need Court cases to clarify

WE ARE AWAITING MORE ANNOUNCEMENTS

- For example, Hargreaves' proposals that....
- Libraries to be able to copy artistic works, films, other AV works, sound recordings, broadcasts, for preservation
- Fair dealing copying for research or private study to also cover sound recordings, films and broadcasts
- Inviting comments on whether educational exceptions, libraries, archives or museums can make works available for research or private study by e means – they want evidence of demand for this
- Proposed new exception for text and data mining – VERY CONTROVERIAL WITH PUBLISHING INDUSTRY

EVEN MORE.....

- Make educational exceptions wider and more flexible, including distance learning
- Extend exception for visual disability to those with dyslexia and widening media types that can benefit
- Extend exception for time shifting to hospitals, care homes and prisons
- No doubt these will be issued in a series of announcements in the coming weeks
- If there is anything else to report, I will provide a verbal update!
- All very strange – two pieces of legislation (ERRA, and an SI amending the CDPA) and the SI is being issued in dribs and drabs

FINALLY

- IPO to develop plans for a “copyright opinions service” for (anyone/only educational institutions?) worried that they might be infringing
- Draft Statutory Instrument with a view to implementation in Autumn 2013 but that timetable may well slip

CRYSTAL BALL GAZING

- Some of the best bits will get watered down or deleted thanks to intense lobbying by rights holders
- We will NOT move to evidence-based policy
- But some good bits will get through
- The Copyright Hub will be an important free to use resource to identify potential licensors and then to go to their Web sites to conclude a licence. Licences will be both for large-scale deals and for small ticket items.
- Authorities are likely to come down harder on infringers once the Hub is well established, as there will be no excuse not to take out a licence

DIGITAL ECONOMY ACT 2010

- Passed in the dying days of the Labour Government
- I watched the debate in the Commons – embarrassingly ignorant MPs
- Although both LibDems and Tories opposed it at the time, they have confirmed it will remain on the statute book
- However, it is not yet implemented – awaiting an Ofcom Code of Practice
- Clauses 3-18 were all about online infringement of copyright
- “Three strikes and you are out” provisions
- Their implications, if that part of the Act is implemented

DIGITAL ECONOMY ACT 2010

- Written request from, amongst others, LACA, JISC.... to Ofcom to accept that libraries and other public wifi installations should NOT be covered by the Act
- Ofcom has the powers to do this, but so far has proved remarkably reluctant to use its powers in the absence of a clear instruction from Ministers to do so
- It has however indicated it will use its good offices to get public wifi establishments, wifi network providers, and rights owners to talk to each other to develop a modus operandi to avoid formal legal action
- There are ample other powers, e.g., in Copyright Act, to get at those who deliberately upload and download infringing materials

THE NEW CLA HE LICENCE

- Not really a change to the law, but some changes to the licence terms and conditions
- I am a member of the negotiation group with the CLA, but have some concerns about the agreed deal – see later. But I am no expert on some of the ILL issues that have been raised (see later).
- Just one licence now available – covering both copying/scanning of print AND copying of born digital
- Inevitably some objections to this; majority of licensees at the moment don't bother with the born digital choice, and there will be some double paying if you already subscribe to (say) e journals or e books of relevance
- The cost of the digital component of the licence (for those who have it) has reduced from the current 67p per FTE student to 15p
- If the CLA proposal is rejected the only recourse available will be a continuation of the existing one-year licence with the 2013 April RPI with applied to it, costing an additional 18p per FTE student for a licence without a digital component.

THE NEW CLA HE/FE LICENCE

- A number of outstanding issues: some of these may be quick to resolve and should be implemented during the term of the new licence at no cost – for example, a widening of the definition of ‘Authorised Persons’, a review of the current recording arrangements for non-credit-bearing students, and an improvement in the current limitations on the copying of short stories, poems and plays.
- More substantive issues will undoubtedly take longer to negotiate and resolve. Amongst them will be the undesirability of the RPI applying in each year of a three-year licence, the current copying limitations, and the inclusion in the licence of more students registered overseas for UK higher education qualifications.
- The census reporting method will continue to be monitored throughout the term of the three-year licence and beyond.

THE NEW CLA HE/FE LICENCE & BL

- The CLA licence does not cover copies obtained by document supply services for an individual's use – that is an activity provided for in law. The same applies when to individuals copying for themselves – it is an act done under a copyright exception and not an act done under licence.
- Issues arise when copies are sourced for use in VLEs and course packs, particularly via the BL HESS service. If you held only a basic licence it has recently been determined that this did not allow you to use a copy provided from a digital original from another library. BL had no process to 'prevent' this and the recipient libraries often had no way of distinguishing the source for the copy – leading to the difficulty, subsequent amnesty and the current proposal for a single licence.
- There is currently an amnesty for those undertaking such copying into VLEs and course packs, but this is due to end when the new licence takes effect.
- Currently, because the CLA's repertoire for digital publications is not as extensive as that for print publications, there will be occasions when users will require a BL copy from print because the e-version is excluded and course copying is licensed from the print version.
- BL cannot fulfill BLHESS copies specifically from print, because BL's systems can't differentiate between requests from print and from e-publications.
- The opt-in nature of CLA's digital repertoire means that there are occasions where the digitally delivered copy is potentially not covered by the CLA licence. BL digital acquisition is focused on medium to large publishers, many of whom are included in CLA's licence. CLA will request from BL a list of publishers with whom they have direct digital document supply agreements. It will then compare that list to the CLA digital opt in list to identify any gaps. It will then try to close those gaps. —

MORE ON ILL

- If the law changes so that contracts cannot ever override exceptions, then the problem is solved – you are permitted to provide ILL under the law, and will be able to irrespective of any contract that purports to stop you, whether that contract is from CLA or from a journal publisher
- Also, there is pressure on journal publishers to relax their stance on all this
- So with any luck the problem will go away _

MY THOUGHTS ON THE NEW CLA HE/FE LICENCE

- I'm not happy about the only option being a single licence including digital; this is something that will have to be reviewed in the future
- I'm not happy about RPI being applied annually throughout the three year licence. Price increases should be tied to increased repertoire or increased copying permissions only.
- I'm not happy about the burden imposed by regular reporting/surveys
- I'm now retiring and so will no longer be on the negotiation team, but it's a good team and I hope these and other outstanding issues will be resolved in the coming years. —

TIME FOR QUESTIONS!