

International Media & Archive Consortium warns of Judicial Review over UK Government plans to weaken copyright

LONDON – 15 January 2013: A consortium of the world's largest news agencies, commercial licensing companies and commercial audiovisual archives has today called on the UK Government to rethink its plans to weaken UK copyright law and its use of secondary legislation. The Government's proposals are being implemented through the Enterprise & Regulatory Reform Bill, currently being debated in the House of Lords. Controversially, the Government proposes to make wholesale changes to UK copyright law via secondary legislation and without the benefit of Parliamentary scrutiny, which includes time for public review and comment. The consortium has delivered a Letter Before Claim to Business Secretary, Vince Cable, which is the first step in the process of initiating a Judicial Review - a formal legal challenge to the Government's planned legislation and the manner in which it proposes to introduce it.

The consortium includes The Associated Press, Getty Images, Reuters, British Pathe, The Press Association, and the Federation of Commercial and Audiovisual Libraries, who operate advanced digital licensing businesses of content on all formats. In order to meet the changing needs of users in the digital age, members of the consortium have, in recent years, invested heavily in the building of innovative digital delivery platforms and infrastructures which allow their content to be accessed and licensed easily and efficiently, also ensuring that content creators are fairly and promptly compensated for their work. This in turn incentivises an independent and thriving community to invest in creating new and rich digital content and, in doing so, benefits the economy and society as a whole. The consortium believes that the economic growth arguments originally put forward to justify the Government's proposals are without basis and has challenged the Government's plans to introduce its proposed changes through so-called 'Henry VIII clauses' - secondary legislation which is not subject to the full scrutiny of Parliament, which includes visibility to the public.

The planned legislation has arisen from reforms proposed by Professor Ian Hargreaves in a report commissioned by David Cameron in 2010 and published in 2011. In his report, Hargreaves opined that British copyright law was not fit for purpose in the digital era and suggested a number of radical changes to the law which was calculated in Appendix EE to his report to create between £55bn and £79bn in GDP contribution for the UK economy over 10 years. This has been disputed by many in the UK creative industries. These doubts are vindicated in the IPO's follow up report of 20th December 2012 on implementing new Exceptions to Copyright, after review by the Government's Independent Regulatory Policy Committee. They reduce the minimum benefits from these new exceptions, which were included as part of the total in Appendix EE, from £4bn to £0.5bn, and the maximum from £26bn to just £0.79bn. These are reductions of 87% and 97% respectively for the smallest and largest projected benefits.

Many prominent rights holders both in the UK and overseas have expressed concerns that not only will such growth not be achieved, but that existing revenues will be damaged by the proposed legislation. Professor Hargreaves proposed a number of changes to copyright law, some of which have been supported by the consortium and other rights holders, including new provisions for private copying, new

rights for disabled groups to use content freely, and the ability of archives and museums to digitise copyrighted content that they do not own but wish to preserve. However, the consortium is concerned about three proposals that it believes will damage the UK economy.

The first concerns the widening of `exceptions to copyright` which allows for content to be used without paying a licence fee under certain circumstances, which the consortium argues will remove many instances where creators can currently be paid for their work. The second contentious proposal concerns the shortening of the life of copyright in some circumstances, which again removes the ability of owners of copyrighted works to be compensated for the commercial use of their property. The third concerns a system known as Extended Collective Licensing which allows for third party organisations to commercially exploit the copyrighted works of others without their prior consent. The consortium and other rights holders are concerned that reducing or removing their ability to commercially license their content will have a direct impact on their ability to create it, leading to both economic and societal damage. There is particular concern in the area of news provision where much international news content consumed by the public originates from international news agencies, who rely entirely on their ability to commercially license news content in order to fund their newsgathering activities.

Not only are the proposals contentious but, crucially, so too is the manner in which they are being introduced. Firstly, many rights holders have repeatedly pointed out to the IPO that significant details about how the new legislation will work in practice have not been properly considered and that without such detail having been thought through, a huge amount of uncertainty will descend upon both users and suppliers of content. Secondly, many rights holders have expressed grave concerns that changes are to be made via secondary legislation without the full scrutiny of Parliament and visibility to the public which would ordinarily be given to such weighty changes in the law. If the copyright clauses in the Enterprise & Regulatory Reform Bill are passed in their current form, this will leave the door open for further changes to copyright to be made at short notice by future governments via `the back door`.

The consortium has taken legal advice on the new legislation and the manner of its introduction, resulting in it issuing its Letter Before Claim.

The consortium believes that any changes to the UK's copyright framework should be industry-led and fully supports the creation of the `Copyright Hub` - an initiative led by businesses and stakeholders to create a digital registry of copyrighted works.

A spokesperson for the consortium said, "The UK's content licensing sector is one of Britain's great success stories, revered throughout the world and characterised by technical innovation and enterprise. The sector contributes billions of pounds to the UK economy and the changes being introduced through the Enterprise & Regulatory Reform Bill have the potential to seriously disrupt a vibrant and growing industry sector. We call on the Government to listen to businesses and to work with them in growing the UK's digital economy."

Notes to Editors

About the Hargreaves Review of Intellectual Property & Growth

The Review was commissioned in November 2010 by David Cameron and led by Professor Ian Hargreaves of the Cardiff Business School. Professor Hargreaves put forward his hypothesis that copyright is “not fit for purpose” in the digital age and it was claimed that measures to relax UK copyright law could deliver to the UK economy between £55 billion and £79 billion over the next 10 years, a figure which has since been vastly downgraded. The review called for submissions from stakeholders and interested parties. There were 471 submissions in all, following which Professor Hargreaves published a range of recommendations. Some of his recommendations have been welcomed by the creative sectors, while many rights holders have raised serious concerns over other proposals which they believe will damage the UK economy. In November, 73 content licensing companies signed a briefing letter to members of the House of Lords urging them to vote against the most contentious proposed changes.

About the Enterprise & Regulatory Reform Bill

The Bill addresses a wide range of measures including the proposed Green Investment Bank and changes to UK employment law. It also contains 3 clauses relating to changes in copyright law that give great cause for concern:

- **Clause 66:** Will allow the minister to make changes to copyright exceptions by Statutory Instrument. According to the government, this clause is solely intended to protect the duration of criminal penalties associated with certain types of copyright infringement, which intention the consortium supports. This clause, as drafted, is unsuitable for the stated purpose and could instead be used to widen or narrow existing copyright exceptions. However, the consortium says that this clause is unlawful and is characteristic of a ‘Henry VIII clause’, defined by the House of Lords Select Committee on the Scrutiny of Delegated Powers as “a provision in a Bill which enables primary legislation to be amended or repealed by subordinate legislation, with or without further Parliamentary scrutiny powers”. It is the consortium’s view is that laws of this sort should be subject to full parliamentary scrutiny – indeed that only Parliament and not individual government ministers should have the power to adjust the law in this area. Furthermore the clause is irrational in that as currently drafted it is unsuitable for the stated purpose and could instead be used to widen or narrow existing copyright exceptions. It is feared that the clause will be used as a mechanism to bring into law a number of highly contested changes to copyright, announced by the government in December. Repeated attempts by lobby groups to persuade Dr Cable’s office to change the wording of the clause to more accurately reflect its intention have been ignored.
- **Clause 67:** Reduction in the length of term of copyright. According to the government, this is largely intended to enable the legal digitisation of very old content – medieval manuscripts and other content such as historic material currently held by cultural institutions. But, due to the lack of detail in the draft bill, it could confiscate rights from hundreds of thousands of content creators and their families “without compensation and without compensatory benefit to the UK economy”.

- **Clause 68:** This deals with the easing of restrictions around 'orphan works' (pieces of content which are difficult or impossible to attribute) allowing them to be made more easily available for study and/or commercial exploitation, which in general the consortium supports. However, the clause also introduces a most unusual and in the intended context, untested concept, hardly used anywhere in the world known as "extended collective licensing" (ECL). This encourages statutory schemes that will allow organisations which do not own copyright to commercially exploit copyrighted works of all kinds (not just orphan works) without the knowledge or approval of the owner. The government mitigates the objections of rights holders by claiming that ECL will be "voluntary". However, what is actually being proposed is a system where unless a rights holder opts out of ECL schemes, his intellectual property is by default included and can be commercially exploited by ECL agents without his permission or knowledge. This puts an unrealistic onus on rights holders throughout the world to constantly monitor the emergence of new ECL schemes in the UK in order to opt-out of them and will be hugely disruptive to their own licensing activities.

The consortium believes that this would have a devastating impact on many sectors of the creative industries including the film business, TV companies, Independent production companies, News Agencies, Archive owners and distributors, Newspapers, Education Publishers and Photographers.

ECL removes the fundamental link between the cost of creating content and the generation of income from that content, upon which most rights holders completely rely. It would therefore have the resulting effect of reducing the amount and plurality of professional and quality content that is currently available in the UK. Britain, which is currently a world leader in these fields, might instead become shunned by content owners, creators and distributors. The critical issue of whether ECL would apply to just UK content or all content, how that would be defined and how one would know the difference has not been properly considered by the IPO. In November, the 6 main photography industry bodies in the US wrote a joint letter to Vince Cable explaining that ECL in the UK would disrupt the licensing businesses of overseas companies as it would compromise exclusive licensing opportunities, and warned that "If the use of foreign works in the UK is directly or indirectly permitted by this bill, a firestorm of international litigation is predicted."

Flaws in the Economic Case for Hargreaves' Reforms

Appendix EE to the Hargreaves Report included certain Impact Assessments. Within the report, a total benefit per annum from growth for each proposed type of change is provided, with a minimum and a maximum for each item. The total benefit of all of the proposed reforms were stated as £5.5bn as a minimum per annum (i.e. £55bn over 10 years) and £7.9bn as a maximum per annum (i.e. £79bn over 10 years). Within these figures, proposed new Exceptions for Format Shifting/Private Copying and Parody/Pastiche amounted to a combined total of a minimum of £0.4bn per annum (i.e. £4bn over 10 years) and a maximum of £2.6bn per annum (i.e.) £26bn over 10 years). In the IPO's 20th December follow-up document, after review of the Impact Assessment by the Government's Independent Regulatory Policy Committee, it states the minimum benefits spread over 10 years will be reduced to

£0.5bn (87% reduction from Hargreaves' estimates) and the maximum benefits spread over 10 years to be £0.79bn (97% reduction from Hargreaves' estimates).

About Members of the Consortium

The Associated Press (AP) is a global news agency which has provided independent news and information since 1846. AP's reporting, photography, audio and video are licensed to the world's leading newspapers, TV channels, apps, radio stations, websites and magazines. www.ap.org

British Pathe is a major commercial provider of archive footage and still images that dates back to 1896. It offers over 90,000 historical clips via its digital platform to broadcasters, producers, websites, private individuals and schools. www.britishpathe.com

FOCAL is the *Federation of Commercial Audiovisual Libraries* and is the trade body for the commercial footage licensing industry. Its membership comprises many of the world's largest media brands, including broadcasters, major archives and museums. www.focalint.org

Getty Images is one of the world's leading creators and distributors of still imagery, video and multi-media products, as well as a recognised provider of other forms of premium digital content including music. www.gettyimages.com

Press Association is the national news agency of the UK and Ireland and provides a continuous feed of text, photos, video and data into newsrooms, while also licensing its content to creators, publishers and broadcasters for use across all media platforms. www.pressassociation.com

Reuters is a global news agency and provider of financial information and media to businesses and professionals. It commercially licenses its current and archival text, video, and photography to media outlets and creators throughout the world for use on all platforms. www.reuters.com

Contacts

Laura Imregi | Speed Communications
Telephone: +44 20 7842 3267
Email Laura.Imregi@speedcommunications.com

Scott McLean | Speed Communications
Telephone: +44 20 7842 3260
Email Scott.Mclean@speedcommunications.com

Attachments

Letter Before Claim
House of Lords Delegate Powers & Regulatory Reform Committee (report on the ERR)
All Party / IP report