

Digital Copyright Exchange (DCE) Feasibility Study: Call for Evidence

Response by LACA: The Libraries and Archives Copyright Alliance

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The Libraries and Archives Copyright Alliance (LACA) is a UK umbrella group convened by CILIP (Chartered Institute of Library and Information Professionals). LACA brings together the UK's major professional organisations and experts representing librarians and archivists to lobby in the UK and Europe about copyright issues which impact delivery of access to knowledge and information by libraries, archives and information services in the digital age.

LACA is pleased to have the opportunity to comment on the suggestions for a Digital Copyright Exchange (DCE). As we stated in our evidence to the House of Commons BIS Select Committee Inquiry into the Hargreaves Review of Intellectual Property¹, we support the concept of a DCE as we believe it would benefit users and creators alike. Libraries and archives could contribute significantly to such a project by making their cultural heritage and research output material available for licensing online.

The proposals for a DCE have to be seen within the whole IP framework, however. Contracts awarded through the Exchange should not be used to undermine the statutory limitations and exceptions in the CDPA for example.

Question 1: A hypothesis about licensing

The hypothesis

LACA agrees with the hypothesis set out in the consultation document in general terms, but does not believe that the hypothesis applies to the licensing of most Crown copyright material. Since the adoption of the Public Sector Information Directive in 2003 the great majority of Crown copyright material, and much non-Crown material as well, is available for re-use on terms that are simple, clear and readily available as part of the UK Government Licensing Framework².

Reasons for agreeing with the hypothesis in whole or in part

1. Copyright licensing is expensive

While many licences are not unduly expensive, there are concerns over the lack of transparency in relation to how licence fees are calculated by Collecting Societies, together

¹ <http://bit.ly/ysEugs>

² See <http://www.nationalarchives.gov.uk/information-management/uk-gov-licensing-framework.htm>

with a lack of consistency over charges. LACA welcomes the recommendations and proposals from the Government to ensure that collecting societies adopt a code of conduct with independent review mechanisms to address these problems.

Orphan works (works in copyright where the rightholders are either unknown or cannot be traced) present a particular problem. A 2009 report, 'In from the cold' commissioned by JISC and the Collections Trust³ concluded that publically funded organisations spent on average just under half a day tracing rights for each orphan work, in many cases without any success. The British Library/ARROW study 'Seeking new landscapes' published September 2011⁴ confirmed this finding. It established, from a sample comprising 10 books from each of the 14 decades between 1870 and 2010, that on average it took four hours per book to undertake a manual "diligent search" to clarify the copyright status of the book and any embedded works within it, identify rightholders and request permissions (of which locating rightholders and seeking permissions for just over half the sample took on average 2.75 hours per book). The study showed that manual rights clearance for a typical mass digitisation project of 0.5m books "would take one researcher over 1,000 years to clear the rights". In contrast the study demonstrated that "use of the ARROW system⁵ took less than 5 minutes per title to upload the catalogue records and check the results."

The extensive time needed to clear rights is not only with regard to orphan works. Many organisations, both rights managers and rights users, hire staff specifically to negotiate licences. While some of this effort cannot be avoided a DCE could do much to reduce it to more manageable proportions if it offered immediate comparison of standard licence terms, conditions and prices offered to license the same materials. The cost of rights clearance can indeed be very high, often involving public funds, and the process needs not only automation, but simplification, to include easier permission seeking. A DCE that offers the establishment and maintenance of an online registry (voluntary in compliance with the Berne Convention) with the following functionality would very much ease the process:

The DCE should be an integrated gateway, acting as a one-stop licensing shop for nearly everything that:

- Includes all classes of works regardless of media held in libraries, archives, museums and galleries etc., including those not published or otherwise made available by commercial publishers and producers
- Establishes the copyright or public domain status of works and embedded works within them
- Links copyright works of all classes to their current rightholders
- Records details of assignment, transference and reversion of copyright ownership
- Facilitates online automated copyright clearances
- Enables permission seekers to contact individual rightholders direct via the DCE to resolve issues not covered by the online offer
- Includes licences for all information goods, including those for bibliographic, abstracting and full text commercial databases as well as databanks of raw data.
- Includes works licensed by Creative Commons licences

Some of this functionality is already offered by the ARROW system (still under development) which should indeed become an important part of the DCE. However, ARROW only covers published literary and dramatic works.

³ <http://www.jisc.ac.uk/publications/reports/2009/infromthecold.aspx>

⁴ <http://www.arrow-net.eu/sites/default/files/Seeking%20New%20Landscapes.pdf>

⁵ <http://www.arrow-net.eu/>

Creative Commons⁶ licences are an example of the benefits of the use of standardised licences in terms of cost savings for users of digital materials, particularly by cultural and research organisations and the Higher and Further Education communities. Rightholders and content intermediaries are also able to benefit from access to free template licences to manage third party use of their works.

2. Copyright licensing is difficult to use

See our comments below.

3. Copyright licensing is difficult to access

There are gaps in the current arrangements for collective licensing that hinder access. A sizeable number of rightholders and works are excluded from Copyright Licensing Agency's licences, for example, and there is no dominant licensing body for film. There is also no licensing body for unpublished works. (See also point 5 below).

Print disabled people find copyright licensing particularly complicated and difficult to access because, despite the Copyright (Visually Impaired Persons) Act 2002, there is no one source of authority to produce an alternative format.

4. Copyright licensing is insufficiently transparent

The licensing of public sector information, especially of Crown copyright information, is fully transparent. However, with some collecting societies LACA has concerns over transparency with regard to the charging matrixes employed (see point 1 above).

5. Copyright licensing is siloed within individual media types

The difficulties of access to collective licensing mentioned in point 3 above are compounded by the fact that existing licensing bodies in the UK are media specific. So long as licensing is distributed between licensing bodies on the basis of media type, silos will continue to be a problem.

Print disabled people, for example, need access to a mixture of formats depending on their personal abilities, preferences and the purpose for which they are reading.

6. Copyright licensing is victim to a misalignment of incentives between rights owners, rights managers, rights users and end users

See our comment in point 7 below.

7. Copyright licensing is insufficiently international in focus and scope

The international framework of copyright treaties, conventions and European Directives sought to harmonise a minimum level of provisions that must be made in member states' national legislation to *protect* copyright, whereas the permitted limitations and exceptions for rights users provided by these instruments in the public interest, are mostly optional. Reports commissioned by the European Commission (2007)⁷ and WIPO (2008)⁸ have shown the disharmony that has resulted between their respective member states.

The DCE will become a resource accessed by people and organisations worldwide. The model of national copyright regimes is increasingly dysfunctional in a digital information society in which people located in one legal jurisdiction access works on the internet that reside on servers located in a multitude of legal jurisdictions. An even digital playing field is

⁶ See <http://www.creativecommons.org>

⁷ http://www.ivir.nl/publications/guibault/Infosoc_report_2007.pdf

⁸ http://wipo.int/meetings/en/doc_details.jsp?doc_id=109192

needed, underpinned by a framework of mandatory international minimum levels of limitations and exceptions implemented in national copyright laws, also voiding any contractual terms that undermine those limitations and exceptions. This would do much to increase the public understanding of copyright, creating a fairer world market in digital information goods.

Claims about copyright licensing

4. Innovation is being held back

Copyright permissions to use material and data for research purposes are difficult and for the most part expensive or impossible to obtain, resulting in a loss of innovative research. Real life examples of the problems encountered in rights clearances are identified in the BL/ARROW report referenced above. Anna Vuopala's 2010 report⁹ to the European Commission also reports on the costs.

5. Infringement of copyright content remains persistent

Infringement is undeniably common and persistent. Yet, in many instances it will be the information manager, librarian or archivist within an institution who acts as copyright adviser, and sets in place institutional policies and education programmes to encourage compliance with copyright law.

6. The end user is deprived of access to a significant amount of commercially and culturally valuable content, e.g. archive material

Re-use of much culturally and scientifically valuable material held in archives, libraries and museums is hampered by the difficulties encountered in locating the current rightholder to seek permission. The BL/ARROW study showed that the greatest difficulties lay in locating the rightholders of works where the rights in them had either reverted from commercial publishers to the authors and illustrators, or where the works were not published commercially. In the study's sample there were orphan works occurring in every decade between 1870 and 2000 - the 2000s being the only decade for which all rightholders were found. The long term of copyright (life+70 years) means that the rights in many older works are held (often in complete ignorance) by the grandchildren of the original creator.

Question 2: definitions

Except as specified otherwise below, LACA is in general agreement with the definitions. However, we would like to make the following points:

The "six distinct processes" of copyright licensing need to include the following two additional and distinct stages:

- Discovering the current location of the rightholders
- In many cases, negotiating the terms and cost (if any) of the licence (this may be a collective licence with a collecting society or individual one-offs negotiated directly with the rightholder).

The copyright licensing process is complicated because the stakeholders identified in the rights clearance process are interchangeable. In the information chain individuals and organisations can simultaneously be rightholders, rights managers and rights users.

With regard to the "two important distinctions which need to borne in mind with copyright licensing", a distinction should also be drawn between primary licensing, which permits the

⁹ http://ec.europa.eu/information_society/activities/digital_libraries/doc/reports_orphan/anna_report.pdf

first publication, distribution or other exploitation of a previously unpublished work, and secondary licensing, which permits reproduction of the already published work.

Creators are fundamental to copyright, but appear to have been missed out of these definitions. Not all creators are “rights owners” even initially (e.g. work done in the course of employment belongs to the employer), but in the European Economic Area creators still hold moral rights in their creations unless they waive them.

Media types

1. Music and audio - *should specify that this refers to sound recordings (and not musical notation).*
3. Text - *should specify that this refers to literary and dramatic works, musical notation and computer code.*
4. Artworks - *should specify that this refers to works such as paintings, drawings, sculpture, architecture, diagrams, charts, graphs and maps (in law all classed as ‘artistic works’)*
5. Still pictures - *should specify that this refers to still photographs (in law classed as ‘artistic works’)*
8. Mixed media (content that contains moving pictures, text and still pictures, e.g. a newspaper website) - *should indicate that mixed media production is capable of encompassing **all** the individual media types.*

There should be an additional category for databases – they may contain mixed media, individual media or raw data.

The digital age

We generally agree with the statements made in this section except as follows:

The statement “the erosion of monopoly status” in the context of this list is inaccurate. Rather, the copyright monopolies of rightholders have been *extended* in the digital age:

- Nearly all digital information products are supplied to libraries and archives under contracts and licences, most of which undermine the statutory limitations and exceptions to some extent.¹⁰ As more and more information products become solely digital, this increases copyright monopolies.
- The prohibition against circumvention of technological protection measures (TPMs) on digital works and devices supplied under licence is, in practice, unchallengeable even in the most deserving cases such as access by print disabled people. TPMs often hinder or prevent people from making use of the statutory limitations and exceptions available to them.
- The unparalleled level of enforcement of copyright and related rights in the digital environment conflicts in places with certain civil liberties (e.g. the UK’s Digital Economy Act 2010, HADOPI in France, the SOPA Bill in the USA and the multilateral ACTA treaty signed by the UK on 26/01/12).

The statement ‘if the content is digitisable, then sooner or later in the digital age it will be digitised’ is probably true. The role of libraries and archives in the transition to digital through a myriad of wonderful projects making works hitherto only available to those who could afford to travel great distances, accessible by the public online the world over, not least

¹⁰ Analysis of 100 contracts offered to the British Library’ <http://pressandpolicy.bl.uk/content/default.aspx?NewsAreaID=316>

through the big well known enterprises such as Europeana, the Internet Archive, and Google Books, deserves acknowledgement!