Action on Authors' Rights

Hargreaves Review: Extended Collective Licensing and Orphan Works

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Digital Opportunity. A Review of Intellectual Property and Growth by Ian Hargreaves was published on 18 May. The Review was commissioned by the Government in November 2010 and supported by a team at the Intellectual Property Office. This paper examines the Review's proposals on extended collective licensing and orphan works.

All non-specific references are to the main report document, *Digital Opportunity. A Review of Intellectual Property and Growth.* <http://www.ipo.gov.uk/ipreview-finalreport.pdf>

References preceded by *Econ. Impact* are to *Supporting Document EE. Economic Impact of Recommendations*. <http://www.ipo.gov.uk/ipreview-doc-ee.pdf>

Extended Collective Licensing and Orphan Works

Ian Hargreaves calls for legislation to permit 'Extended Collective Licensing' (ECL) for mass digitisation, that is, digitising whole collections of copyright works without the authorisation of the rights-holders. Instead, it would be up to the rights-holders to opt out of the scheme. [4.48–4.51] This would catch orphan works (works with unlocated copyright holders) but would also net works in a very much larger category, works whose rights-holders are fully traceable but have not taken the steps required to register an opt-out (very probably through ignorance of the scheme's operation). As Hargreaves outlines his proposals for what he calls an 'orphan works solution', this latter category of work, those whose rights-owners have not registered to opt out of an ECL scheme, slides in and out of the category 'orphan' without notice. [4.52–4.60]

The only reference to ECL in the Executive Summary to the Hargreaves Report is in relation to orphan works. The recommendation that ECL should also be imposed in respect of works with known or traceable copyright holders is buried in the middle of the text and is not signalled anywhere in the summaries. As an effect of this, the proposal to institute it for works whose copyright holders are known or traceable passed largely unnoticed in the initial public commentary in blogs and the press, much of which focused mainly or wholly on the Executive Summary.

Hargreaves defines orphan works, conventionally enough, as 'works to which access is effectively barred because the copyright holder cannot be traced'. [4.52] But in his proposals 'orphan' very often means simply 'a work that has not been opted out of an ECL scheme'. What is being presented overtly as a solution to a cultural problem, the existence of works whose copyright owners cannot be traced, is actually a set of proposals designed to override the basic principles of copyright and the standard procedures for rights clearance. The object of this is to facilitate mass-digitisation programmes. All of this is explicit in the report and the supporting document *Economic Impact of Recommendations*. Hargreaves' proposals, if implemented, would also introduce a de facto system of copyright registration; this is fudged in his report, but is an inescapable concomitant of the opt-out requirement.

In addition, the supporting document *Economic Impact of Recommendations,* which was produced by the IP Review Team at the Intellectual Property Office (IPO), makes it competely clear that these mass-digitisation programmes would include schemes run for profit by commercial entities. This is another important point that is fudged in the main report. Furthermore, the document produced by the IPO team is explicit about the fact that the mass-digitisation of public libraries and archives, which is presented as a benefit of the scheme, would be done with a view to sublicensing the materials to commercial entities (who, in many if not all cases, would probably also carry out the digitisation). The IPO team cites the example of the licensing of public census information to commercial genealogical services. [*Econ. Impact* p. 23] Census data is Crown Copyright; the National Archives is the Crown's agent for managing its copyrights and is fully entitled to enter into arrangements for their commercial exploitation. For the most part, however, the rights to the works in libraries and archives are not owned or controlled by those institutions. As far as older, out of print books are concerned, the digital rights generally belong to the author or literary estate, unless the rights were assigned in full to the print publisher. These rights should be available to the authors to exploit or not, as they choose. But in sectors where an ECL scheme is imposed, authors will lose the right to control the use of their works unless they take the steps required for them to opt out. Otherwise their works may be used commercially without their authorisation. They may also be used in ways that are distasteful to the author, damage his or her reputation, or injure the future market for the work. What is currently being proposed is the mass appropriation of private intellectual property, much of it belonging to the original creators, and its licensing to commercial corporations, with archives and libraries that hold copies of the originals receiving inducements to participate.

Authors, agents and the executors of literary estates need to be fully alert to what is contained in the Hargreaves report. As a model for his ECL proposals, Hargreaves cites a project currently running in Norway for the mass-digitising of books in the Norwegian National Library. The Google Book Settlement agreement, recently rejected by the US courts, would have set up a scheme with many similarities to ECL. Meanwhile, the EC is planning to bring in ECL 'to allow large-scale digitisation' of what they term 'out-of-commerce books'. <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/333> In France a framework agreement for such a project has already been signed. <http://www.arrow-net.eu/news/signature-framework-agreement-digitization-and-online-exploitation-out-print-french-books-20th-> Books are very much in the sights of the institutions and commercial enterprises pressing for the legitimation of mass-licensing programmes.

Hargreaves says that ECL 'should not be imposed on a sector as a compulsory measure where there is no call for it'. [4.51] But this is ambiguous. Does he mean that it should only be brought in if there is a request for it from the creators who work in that sector, or does he mean it should be introduced if there is a demand from content-aggregators who wish to digitise works without clearing the rights? Clarification on this point was sought through the Review blog but has not been forthcoming. <http://www.ipo.gov.uk/ipreview-blog-20110518.pdf> [p. 9]

Hargreaves' proposals are closely similar to Clause 43 of the Digital Economy Bill, which was struck from the Bill at the last minute on the insistence of the parties that have since

formed the coalition government. This was mainly due to the hard work of a number of photographers who pointed out the flaws in the legislation.

Hargreaves calls for legislation to enable ECL for 'mass licensing of orphan works' and establish a procedure for clearing rights in individual works. In the Executive Summary he says that 'a work should only be treated as an orphan if it cannot be found by search of the databases involved in the proposed Digital Copyright Exchange'. [p. 8] This implies that the sole or main determinant of orphan status would be the failure to register a work with the Digital Copyright Exchange. In a couple of other places, however, he talks as though checking with the projected Exchange would only be one of the requirements (though an important one) in a more extensive 'diligent search' process that would necessary before a work could be treated as an orphan. [4.34, 4.56].

In the context of the continuing debates over orphan works legislation, a 'diligent search' is understood to be a careful search of the available sources of information, made in good faith, to try and trace the rightsholder. The phrase is found, among other places, in Clause 43 of the Digital Economy Bill, which specifies that a search must be made of sources that include, but are not limited to, 'licensing bodies; associations of publishers or authors; systems for identifying works of the type concerned; published library catalogues and indexes; public databases, including public records that may indicate successors in title'. (This clause was not enacted.) <http://www.publications.parliament.uk/pa/cm200910/cmbills/089/2010089.pdf> [p. 54] But this is not what Hargreaves means by a 'diligent search'. Outlining his proposals for mass licensing he says, revealingly: 'A scheme should involve a diligent search of rights registries (to ensure the supposed orphans are not in fact owned and opted out of the collective licensing scheme).' Here it is transparent that the purpose of such a search would be to find out whether a work had been opted out, and nothing more. [4.56]

Under Hargreaves' proposals, anything not specifically opted out of the ECL scheme is to be treated as an orphan for the purposes of mass licensing, regardless of whether its owner is traceable. This would circumvent any need for a proper 'diligent search'; which is, of course, the whole point. The phrase 'diligent search' has been hollowed of meaning, and the category 'orphan' extended beyond anything that is usually understood by that term. In this context the reference to 'rights registries' in the plural is anomalous, since if the only data that matters is the record of whether or not the owner has exercised the right to opt out, there is no obvious reason why that data should be scattered through different registries. And indeed Hargreaves continues: 'Such searches would be made much easier once the Digital Copyright Exchange proposed in this review is functioning.' [4.56] Here and elsewhere, the clear implication is that one of the key functions of the projected Exchange would be to hold a record of opt-outs. And as Hargreaves says, 'Tying the orphan works solution into the Digital Copyright Exchange … should provide rights holders with a further incentive to join the scheme.' [4.59] A few pages earlier he has laid down that participation in the Copyright Exchange should be 'genuinely voluntary', but plainly this is another phrase that does not mean what one might normally expect. [4.34]

If a check of the relevant registry shows that the work has not been opted out of the ECL scheme, a licence will be issued on payment of a small fee. This will be held by the collecting society running the scheme, pending the possible appearance of the owner. After 'a

reasonable period of time', any unclaimed fees are to be used for 'social or cultural purposes', or to fund the running costs of the Digital Copyright Exchange. [4.56, 4.58]

The procedure for licensing individual works might be 'similar' (this is ominous); alternatively, it might involve what Hargreaves calls 'a more tailored approach'. In this case, following a 'diligent search' for the copyright owner (no form for which is prescribed), the Government would authorise a licensee 'to deal in a specific work'. If the owner comes forward later, 'future use of the work from that point would be subject to negotiation, but there would be no liability for past use beyond any licence fee set by Government or its appointed agent.' [4.57] This seems to leave open the possibility that no fee might be set, but perhaps that is just bad writing. It also throws into relief the fact that the section on mass licensing procedures is silent on the scope for renegotiating use, should an owner emerge to claim the work.

Hargreaves expressly recommends that works should be licensed for what he calls 'nominal' fees, so that any sums that might be recovered by the rights-owners after the event would be extremely small. He remarks that 'some rights holders' will 'fear that a growing resource of almost free to use orphan works could injure markets for other works', but says that the 'perceived risk' is outweighed by 'wider economic interest'. [4.58; compare *Econ. Impact* p. 23]

Whose interest? In *Supporting Document EE. Economic Impact of Recommendations* the IPO Team states: 'The organisations likely to be most affected by the orphan works problem are those wishing to undertake digitisation projects to make works available through newer channels. An orphan works system would save these content holders the initial rights clearing costs for digitizing their collections.' [*Econ. Impact* p. 22] This is rather a give-away. The purpose of orphan works legislation as ordinarily understood is to make it possible to put works with unlocated copyright holders back in circulation. It is not supposed to be a device for circumventing the normal process of rights clearance. What is being talked about here is not, in truth, a proposal aimed simply at solving a perceived orphan works problem. If it were, there would be a 'diligent search' requirement, and there would, in consequence, be costs involved. What is being proposed under the name of an 'orphan works system' is actually a system for imposing ECL schemes, and the whole object of this is to slash costs to licensees by removing the requirement to clear rights.

In the main report, Hargreaves is explicit about the fact that the purpose of ECL is to keep to a minimum the transaction costs involved in obtaining permissions. [4.49] Actually what it would do is transfer the the transaction costs from the licensees (typically well-resourced national institutions and commercial companies) to the licensors (frequently inadequately-paid, hard-worked creators), who have to find out that such schemes are being instituted and take steps to opt out or claim their share of any revenues that may be paid.

Who are the organisations who would be expected to benefit? Hargreaves mentions 'national libraries, the BBC archive and private collections'. [4.48] The IPO team mentions the British Library and the BBC. But the IPO document is completely open, as the main report is not, about the fact that a key aim of the proposed legislation would be the possible creation of 'new businesses around content rich services'. This is where they see the 'higher long term benefits': in 'the services which can be created around orphan work content'. (Keep in mind

that ‘orphan work content’ is a placeholder term for anything not directly claimed and opted out by its owners.) The IPO observes that ‘Because digital technology has radically diminished the costs of reproduction, there is interest in re-using even works which do not have a large likely market, and the most significant remaining obstacle is rights clearance.’ They see services to family historians as a good prospect. They think that if the licensing of census data is good business, then it should be possible to do even better out of ‘the much broader information held in newspapers, public documents, radio, news shows, photographs, music scores and film footage’. [*Econ. Impact* pp. 22–23]

As has been stated above, Hargreaves argues that ‘in most cases’ the fees charged to licencees should be ‘nominal’. The reason he gives is that to do otherwise would be to ‘impose inappropriate costs, particularly on use of materials which were not created for commercial purposes, or which might be found to be out of copyright if the rights information were available’. [4.58] The notion that although you have not traced the owner of the rights in a work, you can confidently identify the creator’s purpose in producing it is questionable, to say the least; one might call it absurd. Moreover, the market value of any work is not determined by the creator’s original intentions. But if it is proposed that works may be tagged ‘non-commercial’ and licensed at rates that make them ‘almost free to use’, then it should be laid down as a concomitant principle that such works should not be licensed, directly or indirectly, for any commercial purpose.

As its title suggests, *Supporting Document EE. Economic Impact of Recommendations* is presented as an assessment of the economic impact of implementing the recommendations in the main report. This being the case, it is remarkable to find that the document makes no mention of the proposal to impose ECL on works whose rights-holders are known or traceable. There is no attempt whatsoever to assess the likely impact . The first recommendation in Hargreaves’ report is that ‘Government should ensure that development of the IP System is driven as far as possible by objective evidence.’ [p. 8] His proposals on ECL fail that test completely, and belie his claim that ‘Throughout the Review, we have sought to base our judgments on economic evidence’. [p. 3]

The IPO team notes that ‘concerns’ about orphan works legislation ‘ have come from specific groups of rights holders … concerned that their content could be intentionally stripped of identifying metadata and the content used without reasonable compensation’. [*Econ. Impact* p. 23] (This is a particular concern for photographers and graphic artists.) There is no acknowledgement of the widely held concerns that any scheme should incorporate a ‘diligent search’ requirement, and that ‘diligent search’ should mean exactly what it says. Nor of the concerns that there should always be provision for terminating or varying a licence at the request of the rights holder, should one turn up. And though many creators have urged that any orphan works legislation should be accompanied by strengthened moral rights, particularly the author’s right to be identified in any publication, these calls have been totally ignored.

As for the concerns about Extended Collective Licensing: there is a detailed section on this in the submission from Action on Authors’ Rights. <http://www.ipo.gov.uk/ipreview-c4e-sub-authors.pdf> [See pp. 6–12.] One problem was pointed out above: ECL removes the transaction costs from licensees, but it does not make them disappear; instead they become a

burden on the rights-holders. It would be good to see the IPO's economists analyse the likely costs in lost production and income.

Of very particular concern are proposals to enforce ECL in relation to primary rights. The right to publish a book in printed form is a primary right, and so is the right to publish a book as an e-book. Existing (voluntary) collective licensing schemes in the UK apply to certain secondary rights, such as photo-copying. In such cases, collective licensing suits the convenience of rights-owners, who are relieved from the burden of individually negotiating numerous small payments with multiple parties. By contrast, schemes for mass-digitising printed works in order to issue them to the public impact on the primary rights to those works.

Most freelance authors license their works directly to publishers on an exclusive basis. This system allows the author to make the best agreement he or she can for the exploitation of the work, based on the known or likely demand. It also gives the author control over where the work will appear, and in what form and context, which are matters in which every author has a legitimate interest. It is an efficient, market-driven system. Under collective licensing, by contrast, fees are paid at a flat rate, yet it should be obvious that not all rights are of equal value, even where they pertain to works of a similar kind. It is essential that creators are rewarded in a way that takes into account the demand for their work. ECL would destroy that principle and undermine the (typically modest) incomes of creatively active professional authors.

Under ECL, the rights owner has no necessary knowledge of the licenses issued by the body authorising the scheme. The authorising body, for its part, has no way of knowing what publishing agreements might be in force, or in process of negotiation. If it is imposed in respect of projects (such as book digitisation) that impact on primary rights, ECL will break the system of licensing rights on an exclusive basis and compromise the normal exploitation of published works.

It would be good to see the IPO's economists factor into their equations the costs of disrupting the existing market in rights.

Under ECL authors' works would be used in ways of which they had no knowledge and over which they would have no control. This would deprive them of their important moral right to object to a work's being treated in a derogatory manner: that is, in a way that 'amounts to distortion or mutilation', or that in some way prejudices the author's 'honour or reputation'. [Copyright, Designs and Patents Act 1988, 80.2 <http://www.ipo.gov.uk/cdpact1988.pdf>]

This is a legal right, and as Hargreaves himself acknowledges, it is important. [1.4] He calls it a 'non-economic' factor, but a previous report on copyright law, *© the way ahead: A Copyright Strategy for the Digital Age* (IPO, 2009), was more perceptive, noting that 'Moral rights can have economic significance, for instance, by protecting reputation'. [*© the way ahead* p. 16, fn27 <http://www.ipo.gov.uk/c-strategy-digitalage.pdf>] Reputation is of immense economic importance to all individuals and all businesses.

In *Supporting Document R. Copyright Licensing* Call for Evidence *Responses* the IP Review Team notes 'the importance of markets for advertising in proximity to copyright works'. [*Supporting Document R* p.1 <http://www.ipo.gov.uk/ipreview-doc-r.pdf>] There are many

advertisements on the web for illegal or unsavoury businesses. Posting an author's work alongside such advertisements could certainly prejudice his or her honour or reputation. (It may be noted that Google is currently in deep trouble in the US for serving advertisements from pharmacies that were operating outside the law. [Thomas Catan and Amir Efrati, 'Google Near Deal in Drug Ad Crackdown', *Wall Street Journal*, 13 May 2011 <http://online.wsj.com/article/SB10001424052748703730804576319572448399628.html#ixzz1MEyChtv4%3Cbr%20/%3E>])

Hargreaves repeatedly stresses the importance of basing policy firmly on the evidence, and emphasises his own commitment to an 'evidence-based' approach. [pp. 1, 3, 8, 10, etc] But although some sections of the main report are larded with references to relevant research, the sections discussing Extended Collective Licensing are almost entirely free of anything of the kind. At one point, it is true, Hargreaves claims 'There are successful precedents elsewhere in Europe.' [4.51] He supports this with a footnote referencing an agreement negotiated in Norway between an umbrella organisation representing collecting societies, KOPINOR, and the Norwegian National Library, for making works by Norwegian authors available on the web. No source is given.

In fact, it is possible to find some useful information about this project. It was launched in May 2009 and is due to be completed this year. The KOPINOR website describes it as a 'pilot project'. <http://www.kopinor.no/en/agreements/national-library> So far no detailed assessment has been published in English online, but the *Wall Street Journal* published an informative article about it last year. [Max Colchester and Christopher Emsden, 'In Europe, Book-Scanning Efforts Feel Their Way Into New Territory', *Wall Street Journal*, 11 March 2010 <http://online.wsj.com/article/SB10001424052748704541304575099943467728882.html>] It might be said that the Norwegian National Library and KOPINOR have set a 'successful precedent' for concluding an ECL agreement for digitising in-copyright books. It is far too soon, and there is too little information available, to claim success for the project, which is, in any case, quite limited. It might be noted that Norway, though 'in Europe', is not a member of the European Union (EU).

Though he speaks of 'precedents' in the plural, Hargreaves omits to give any other examples. He may be thinking of the framework agreement recently signed in France for digitizing in-copyright, out-of-print books . The law, however, is yet to be changed to permit the scheme to go ahead; it is, again, a 'successful precedent' for concluding an agreement, no more. [<http://www.arrow-net.eu/news/signature-framework-agreement-digitization-and-online-exploitation-out-print-french-books-20th->; see also the British Library submission to the Hargreaves Review, p. 22 <http://www.ipo.gov.uk/ipreview-c4e-sub-bl.pdf>]

Hargreaves noted that the European Commission (EC) has been 'considering a limited (and expected to be non-commercial) initiative in the area of orphan works'. [4.60] The EC draft directive on orphan works was published a week after the Hargreaves report. It does, in fact, contain provisions that open up the possibility of the commercial exploitation of orphan works. It stresses the importance of a proper diligent search, which seems to rule out ECL on the automatically opted-in model. At the same time it says in the preamble, 'This Directive should be without prejudice to existing arrangements in the Member States concerning the management of rights such as extended collective licences.' [Proposal for a Directive … on

certain permitted uses of orphan works, preamble, section 20 <http://ec.europa.eu/internal_market/copyright/docs/orphan-works/proposal_en.pdf>] If this means what it seems to, we can presumably expect moves in the UK to ram through the proposals for ECL in the Hargreaves Report before the directive comes into force.

ECL schemes are recognised by EU law. The copyright harmonisation directive says 'This Directive is without prejudice to the arrangements in the Member States concerning the management of rights such as extended collective licences.' [Directive on the harmonisation of … copyright and related rights, preamble, section 18 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML>] At the time the Directive was issued the ECL schemes in existence applied to secondary rights (such as photocopying), not to the primary right to authorise the publication of the work.

The EC's draft orphan works directive states: 'For reasons of international comity, this Directive should only apply to works that are first published or broadcast in a Member State.' [Draft Directive, preamble, section 11] The object of this, of course, is to to avoid conflicts with other countries over breaches of international copyright law. In the case of UK published works, what is being proposed may not be sufficient. UK publishers publish works whose authors come from many English-speaking countries. In the case of some of the works by foreign authors it is likely that the UK publication is the first. Moreover, it is not always clear from the information in a book's prelims whether there has been a prior publication in another country. In the case of an orphan work, however, checking this kind of thing could be part of a diligent search.

An ECL scheme which checks only for opt-outs is another case entirely. In this connection, it is noticeable that nowhere in Hargreaves' report is there a single mention of the rights and interests of foreign authors published or distributed in the UK, though English is a major world language. Authors from the Indian subcontinent, the USA, the Caribbean, Canada, Ireland, Australia, New Zealand and some African countries write in English and are published or distributed in Britain. Then there are many other works published in English translation.

Unless applied very narrowly and in very limited, specific circumstances, extended collective licensing would place the UK in breach of its obligations under the Berne Convention. The fundamental copyright principle is that 'authors of literary and artistic works … have the exclusive right of authorizing the reproduction of these works, in any manner or form'. Member nations are only permitted to override this principle in 'certain special cases', when there is no conflict with 'a normal exploitation of the work' and the author's 'legitimate interests' are 'not unreasonably prejudice[d]'. All three of these conditions must apply. Moreover, member nations guarantee that 'the enjoyment and the exercise' by foreign authors of the protected rights 'shall not be subject to any formality'. <http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html> [Berne Convention 9.1, 9.2, 5.2] A requirement that foreign authors should have to register an opt out of an ECL scheme in order to continue to enjoy their rights would be a 'formality' in any normal meaning of the word.

The 'no formality' provision in the Berne Convention exists for excellent reasons. If extended collective licensing and similar schemes are brought in separately on a broad basis by

countries across the world, it will impose impossible administrative burdens on creators. If this were to happen, the international copyright regime would have ceased to function to protect authors' rights. The consequences would be disastrous – not least for the UK's creative industries.

Hargreaves claims that 'Opening up orphan works is a move to which there is no national economic downside.' [4.54] Two paragraphs later, and he has slipped from talking about works with untraced copyright holders to works that are 'not … opted out of the collective licensing scheme'. [4.56] He refers to them as 'a national treasure trove'. [4.58] Yo ho ho and a bottle of rum! But some 'treasure hoards' can cost more to exploit than they are worth. For one thing, as Hargreaves acknowledges, there is a possibility, to say the least of it, that releasing for digital publication a large number of works that are 'almost free to use' will undercut the sales of new works. [4.58] The IPO Review team seem to think that a slump in the market for new works would be nothing to worry about, because it would be offset by a growth in services based on aggregating old material. [*Econ. Impact*, p. 23] Their calculations look distinctly scrappy. But in any case, what they are dismissing so briskly are the markets in new creative works that sustain our living culture.

Under the innocuous-seeming label of an 'orphan works solution', Hargreaves is proposing to remove from authors their fundamental right to authorise publication. This would be a major change in copyright law, with all kinds of potential for economic and cultural damage. Here are some questions that the Review should have asked, but failed. What would be the costs and complexities of an ECL opt-out registering system? What would be the likely toll on creative production? If currently out-of-print books are summarily co-opted into a mass-digitisation scheme, what will this do to the emerging market in digital editions? If ECL is allowed to erode the principle of direct licensing, will authorship still be an economically sustainable profession? What would be the disadvantages to the UK of undermining the international copyright regime? What are truly innovative, services based on aggregating and manipulating old content, or creative industries that produce new works, new forms of works, and with them, new value?

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for

Action on Authors' Rights

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Action on Authors' Rights is a network of authors and agents campaigning from the grass-roots in support of authors' rights

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