

# ALAI Congress 2017 in Copenhagen

## Copyright, to be or not to be

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### *Questionnaire*

#### **RESPONSE FROM BLACA, UNITED KINGDOM**

### **The traditional justifications for copyright and related rights**

Q. In your country, which justifications for copyright have been presented in connection with your national legislation, for example in the preamble of the Statute or in its explanatory remarks or similar official documents?

A.

#### 1709. Preamble to the Statute of Anne

*“An Act for the Encouragement of learning, by vesting the copies of printed books in the authors...”*

*S.I “...for the encouragement of learned men to compose and write useful books”*

Works protected: “Books and other writings”

1734 – engravings (Engraving Copyright Act 1734)

1777—musical and dramatic compositions held by the courts to be “books” within the meaning of the Copyright Act

1814—sculptures (Sculpture Copyright Act 1814)

#### 1842 Preamble to the Act

*“Whereas it is expedient to amend the law relating to copyright and to afford greater encouragement to the production of literary works of lasting benefit to the world.”*

Works protected:

1842--Literary works including books and pamphlets, sheet music, maps, charts and plans.

1862—Paintings, drawings and photographs (Fine Arts Copyright Act)

#### 1878 Royal Commission

*“Taking the law as it stands, we entertain no doubt that the interests of authors and of the public alike requires that some specific protection should be afforded by legislation to owners of copyright; and we*

*have arrived at the conclusion that copyright should continue to be treated by law as a proprietary right..."*

Works protected: As above

1882/1888—Performance rights in musical works introduced

1909 Committee on the law of copyright

*The present state of the law "has been reached through what at the present day would probably be considered inadequate recognition of the principles which should regulate the rights of persons in the products of their brains".*

As above.

1911 Act

Works protected:

As above plus: choreographic works; copyright to subsist in records, perforated rolls and other contrivances by means of which sounds may be mechanically reproduced (sound recordings), in like manner as if such contrivances were musical works.

1912—held by the courts that each frame of a film was a photograph, ie an artistic work.

1934—the courts recognized the performance right in sound recordings.

1952 Gregory Committee Report

*"It will not be out of place to say at the start that copyright is a right given to or derived from works, and is not a right in novelty of ideas. It is based on the right of an author, artist or composer to prevent another person copying an original work, whether it be a book, tune or picture, which he himself has created."*

Works protected: Literary works, dramatic and musical works, artistic works, works of artistic craftsmanship, architectural works of art, photographs, choreographic works, sound recordings and films.

1956 Act

Works protected: As above plus: cinematographic works, sound and television broadcasts and published editions of works.

1977 Whitford Committee Report

*"Copyright finds its justification in fair play. A person works and produces something. The product of his skill and labour ought to belong to him (or possibly his employer). A writer writes an article...He puts words on paper. He is not entitled to a monopoly in the writing of articles [on the same subject] but the law has long recognized that he has an interest not only in the manuscript, the words on paper which he produces, but in the skill and labour involved in his choice of words and the exact way in which he*

*expresses his ideas by the words he chooses. It has long been recognized that only the original author ought to have the right to reproduce the original article and sell the copies thus reproduced.”*

*Not only writers of books were concerned. As time went on “it came to be realized that the creators of other kinds of works were equally deserving of protection. The basic philosophy being that the fruits of a man’s creative labour should be protected, so far as profitable exploitation was concerned.*

*We believe that it is in the interests alike of the general public and of authors, composers and artists, that the rights of the latter in the works of their brain should not merely enjoy protection in the country of origin, but also that wider protection to be gained only in association with other countries.”*

#### 1981 Green Paper on Reform of Copyright, Designs and Performer’s Protection

*“Copyright exists to protect the products of intellectual endeavour...Not only does it serve to protect the individual against plagiarism and ensure reward for his intellectual efforts. It provides the legal framework which permits the commercial exploitation of copyright material on which depends the livelihood of the multitude of firms and organisations who, with the agreement of the creators, disseminate their material for public consumption. The record or film maker and the broadcaster are themselves creators of copyright matter; they are also users of copyright works and other material which form a vital ingredient of their own productions.”*

#### 1983 Green Paper-- Intellectual Property Rights and Innovation

*“A system of intellectual property rights should encourage new products and processes to reach the market and bolster the trade in ideas....*

*It is therefore in the overall national interest that a strong world-wide system of protecting intellectual property should exist”.*

#### 1985 Green Paper on Audio and Video Copyright Material

*“Copyright underpins the livelihood of creative workers and the viability of the industries based on their work”.*

#### 1986 White Paper on Intellectual Property and Innovation

*“Intellectual property is about creative ideas—the products of the mind such as inventions, designs, music and drama. Widespread dissemination of these ideas benefits society as a whole and stimulates further creative activity.*

*The Government’s broad aims in this revision of copyright law are to ensure continued protection for those who create copyright works while at the same time recognizing that the public has a substantial interest in the availability of their works.”*

#### 1988 Act

#### Works protected:

Ch. I, s. 1: (1) Copyright is a property right which subsists in the following descriptions of works—

- (a) original literary, dramatic, musical or artistic works,
- (b) sound recordings, films or broadcasts, and
- (c) the typographical arrangement of published editions.

(2) "Copyright work" means a work of any of those descriptions in which copyright subsists.

The 1988 Act introduced "moral rights" for authors into the law for the first time.

The 1988 Act also provides for rights in performances, including economic and moral rights. Previously, performers were protected by the Performers' Protection Acts 1958 to 1972, which made certain unauthorized acts connected with performances criminal offences.

*Q. Are there any similar justifications for related rights? Are the arguments the same as for copyright in literary and artistic works or are there different or additional justifications?*

A. It should be noted at the outset that the term related or neighbouring right is not recognized by the CDPA 1988, as amended.

The UK does not make the same distinction between copyright and related rights as is made in civil law countries, the above justifications apply to the protection of sound recordings (protected since the 1909 Act) and to broadcasts. As regards performers, the justifications for their protection are similar. To sum up, the UK's attitude is that copyright serves to: encourage creation of works and performances thereof; foster investment in creativity and innovation; benefit society as a whole through the dissemination of copyright works. Finally, copyright is considered to be in the overall national interest.

Since 1988, the UK's legislation has been amended regularly to bring it into line with EU Directives on copyright. Its current attitude to the justification for copyright is similar to that expressed in Recitals 9-12 of the Information Society Directive:

(9) Any harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation. Their protection helps to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large. Intellectual property has therefore been recognised as an integral part of property.

(10) If authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work, as must producers in order to be able to finance this work. The investment required to produce products such as phonograms, films or multimedia products, and services such as 'ondemand' services, is considerable. Adequate legal protection of intellectual property rights is necessary in order to guarantee the availability of such a reward and provide the opportunity for satisfactory returns on this investment.

(11) A rigorous, effective system for the protection of copyright and related rights is one of the main ways of ensuring that European cultural creativity and production receive the necessary resources and of safeguarding the independence and dignity of artistic creators and performers.

(12) Adequate protection of copyright works and subjectmatter of related rights is also of great importance from a cultural standpoint. Article 151 of the Treaty requires the Community to take cultural aspects into account in its action.

*Q. Is it possible with any certainty to trace the impact of such justifications in the provisions of the law, or is their influence more on a general (philosophical) level?*

Yes, see above.

*Q. Are there similar, or different or supplementary justifications for copyright and related rights expressed in the legal literature?*

In the legal literature, there are some academic authors who favour a less commercial and public interest approach to copyright and advocate that more emphasis should be put on the rights of authors of literary and artistic works as defined in the Berne Convention.

## **Economic aspects of copyright and related rights**

*Q. Has there in your country been conducted research on the economic size of the copyright-based industries? If yes, please summarize the results.*

A. The Office for National Statistics, a UK governmental organization, prepares and publishes statistics on the contribution of the “creative industries” to the UK economy.

“Creative industries” are defined (since 2001) as “those industries which have their origin in individual creativity, skill and talent and which have a potential for wealth and job creation through the generation and exploitation of intellectual property”. The definition could thus embrace a wider range than copyright. However, perusal of the occupations listed as contributing<sup>1</sup> suggests that the figures centre on the copyright industries: see *Creative Industries Economic Estimates Methodology* (2016), ch 2, available at

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/499683/CIEE Methodology.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/499683/CIEE_Methodology.pdf)

Assessment of the creative industries’ contribution is based on estimates of gross value added (GVA). For example, the pages for 2016 can be found at

<https://www.gov.uk/government/statistics/creative-industries-economic-estimates-january-2016>

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<sup>1</sup> Advertising and marketing, architecture, crafts, design (product, graphic and fashion), IT, software and computer services, museums, galleries and libraries, publishing, music, performing and visual arts.

The 'Key findings' summary notes

- “GVA of the Creative Industries was £84.1bn in 2014 and accounted for 5.2 per cent of the UK economy.
- GVA of the Creative Industries increased by 8.9 per cent between 2013 and 2014. This compares to 4.6 per cent for the whole of the UK.
- Between 1997 and 2014, GVA of the Creative Industries increased by 6.0 per cent each year compared to 4.3 per cent for the UK economy.
- The GVA of the Creative Industries was 3.9 per cent of total UK GVA in 1997, but had increased to 5.2 per cent in 2014”

These pages in turn link to other sources, and data from earlier years.

A couple of economics-driven policy reports on intellectual property for the UK government include material on copyright:

- The Gowers Review on Intellectual Property, 2006, summary and text available at [http://webarchive.nationalarchives.gov.uk/+http://www.hm-treasury.gov.uk/gowers\\_review.htm](http://webarchive.nationalarchives.gov.uk/+http://www.hm-treasury.gov.uk/gowers_review.htm)

This included comment on the difficulty for business of navigating the IP system. It made a number of legislative and administrative policy recommendations.

- Ian Hargreaves 'Digital Opportunity: A Review of Intellectual Property and Growth' 2011, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/32563/ipr\\_eview-finalreport.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32563/ipr_eview-finalreport.pdf)

The Evidence section of this report, at p16, briefly surveys and criticizes the available evidence. A number of recommendations are made for copyright.

Apart from the general Government surveys and commissioned reports, a number of studies have been carried out by scholars and consultants into specific parts of the copyright industries. For example:

Erickson, K., Heald, P., Homberg, F., Kretschmer, M., and Mendis, D. (2015) Copyright and the Value of the Public Domain: An Empirical Assessment. Project Report. UK Intellectual Property Office, Newport, available at <https://www.gov.uk/government/publications/copyright-and-the-value-of-the-public-domain>

This did not purport to estimate the value of the public domain in GPD terms. However, it concluded that suggest that products inspired by the public domain perform well and attract funding.

Useful bibliographies of other material including UK data may be found at

<http://www.copyrightevidence.org/create/esrc-evidence-symposium/methodology/bibliography/>

<http://www.serci.org/biblio.htm>

For comparative purposes, papers from many of the annual congresses of the Society for Economic research on copyright issues may be accessed at <http://www.serci.org/documents.htm>

*Q. Has the research been conducted in accordance with a generally accepted and described methodology in order to make it comparable to similar research abroad?*

A. The UK Creative Industries figures are derived from the Office for National Statistics' annual business surveys and analysis of employment data (from labour/population surveys) and export statistics. The figures are qualified by various riders. For example, the business surveys do not capture all GVA from museums, galleries and libraries, nor from 'micro-businesses' – self-employed creators.

Methodologies are described: see for example

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/499683/CIEE Methodology.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/499683/CIEE_Methodology.pdf)

The statistics are prepared in accordance with a 'Code of Practice for Official Statistics', the current code dating from 2014. They use identified standard classifications for occupations, goods and services. Some of the figures are experimental in the sense that methodologies are under consultation and review. Because of changes to definitions and criteria, long-term comparisons at a detailed level must be made with caution. In fact one could say that GVA - or other metrics for measuring the size of the "copyright industries" – is inherently problematic because there is no consensus on which are most appropriate. Figures have gone up and down over the years not necessarily because there has been growth or decline but because what is being measured has changed. Methodological research has been directed at improving this aspect.

It should be possible to compare figures for the UK with those for other countries, although some adjustments for methodology might need to be made.

The UK IP Office has published *Guides to Evidence for Policy*, see,

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/510985/Guide to evidence for policy.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/510985/Guide_to_evidence_for_policy.pdf)

*Q. Has there been any empirical research in your country showing who benefits economically from copyright and related rights protection? If yes, please summarize the results and the methodology used.*

A. Yes. Those for which the full text and methodology are available include:

Kretschmer, M., Singh, S., Bently, L., and Cooper, E. (2011) *Copyright Contracts and Earnings of Visual Creators: A Survey of 5,800 British Designers, Fine Artists, Illustrators and Photographers*. Project Report. CIPPM (Centre for Intellectual Property Policy and Management), Bournemouth. Abstract and summary of findings available at <http://eprints.gla.ac.uk/71445/>; full report at <https://microsites.bournemouth.ac.uk/cippm/files/2011/05/DACS-Report-Final1.pdf>

This survey suggests that photographer's bargaining position has worsened in recent years while [that of] fine artists' has improved.

Kretschmer, M., and Harwick, P. (2007) *What are Words Worth? Counting the Cost of a Writing Career in the 21st Century: A Survey of 25,000 Writers?* Project Report. ALCS, London, UK, available at

This survey of 25,000 writers demonstrates that “Writing is ... a very risky profession with median earnings of less than one quarter of the typical wage of a UK employee. There is significant inequality within the profession, as indicated by very high Gini Coefficients. The top 10% of authors earn more than 50% of total income, while the bottom 50% earn less than 10% of total income... Cultural markets are winner-take-all markets, both in Germany and the UK. Bench-marking the results against the Society of Authors survey, reported in 2000, appears to indicate that the earnings of a typical writer are deteriorating in real terms.”

## **Individual and collective licensing as a means of improving the functioning and acceptance of copyright and related rights**

*Q. Is there a wide-spread culture of collective management of copyright and related rights in your country, or is it limited to the 'core' areas of musical performing rights and reprography rights? Please describe the areas where collective management is used.*

1.1 “A widespread culture of collective management” is perhaps a better way to describe the Scandinavian approach and attitude than the British. In particular, the development of extended collective licensing in Scandinavia over the last half a century seems to have depended on the fact that the communities of rightsowners were and are relatively small and relatively cohesive, neither of which adjectives would be very apt as qualifiers of potential licensors in the United Kingdom.

1.2.1 That said, collective licensing of musical performance rights (petits droits) and of the performance rights in sound recordings have a long history in the United Kingdom: the Performing Right Society was founded in 1914 and PPL in 1934.

1.2.2 Collective licensing of copyright in the two fields mentioned in 1.2.1 are undertaken by PRS for Music ([www.prsformusic.com](http://www.prsformusic.com)) and by PPL, the Phonographic Performance Limited ([www.ppluk.com](http://www.ppluk.com)). In 2015 PRS for Music reported revenue of £537.4 million and Phonographic Performance Limited reported revenue of £169.8 million.

1.2.3 Other organisations representing rightsowners collectively as licensors of particular rights include:

1.2.3.1 ALCS, the Authors’ Licensing and Collecting Society.

ALCS was founded in 1977, after a long campaign led by Brigid Brophy and Maureen Duffy. The campaign lobbied for the right of authors to be remunerated for the lending of their books by public libraries. The Public Lending Right Act 1979 established such a right, and the administration of PLR is now dealt with by the British Library responsible for disbursing funds from the public purse. In 2014-15 just over £6 million was paid out to 22,000 authors in 25 different countries with a minimum payment threshold of £1 and a ceiling of £6,600, an amount received by 190 authors (under 1 per cent of the recipients).

Currently, the income which ALCS collects and distributes to its members comes from multiple sources. Since 1977 payments to members have amounted to £450 million. ALCS has

90,000 writer members. The activities which ALCS licenses include photocopying, scanning and digital copying: these account for 65 per cent of ALCS income. Other licensing income comes from overseas PLR, from cable retransmission and from the authors' share of payments to the Educational Recording Agency (see below). In 2015-16 ALCS distributed £27.8 million to 77,718 of its members (an average payment of £357 per member).

#### 1.2.3.2 BECS, British Equity Collecting Society Ltd

BECS was founded in 1998 by the British performers' union Equity.

BECS receives payments for its members generated by private copying levies in EU member states. It also collects and distributes payments generated by the cable retransmission of British television productions. Since 1998 BECS has collected £59.9 million on behalf of its members.

#### 1.2.3.3. CLA, Copyright Licensing Agency Ltd

CLA is a private company, limited by guarantee and run on a not for profit basis.

It was founded in 1983 by the Authors' Licensing Collecting Society Ltd

("ALCS") and the Publishers Licensing Society Ltd ("PLS"). CLA currently has 4 members: ALCS, PLS, The Design and Artists Copyright Society ("DACS") and Picture Industry Collecting Society for Effective Licensing ("PICSEL").

CLA is a "licensing body" and operates "licensing schemes" as defined in the Copyright Act and its CLA Licences are therefore subject to the jurisdiction of the Copyright Tribunal. CLA Licences authorise the copying of extracts from books, journals, magazines and other periodicals by photocopying, scanning and, increasingly, the use and re- use of electronic publications and websites.

#### 1.2.3.4. ACS, Artists' Collecting Society

ACS was set up in 2006 to act as a not for profit organisation collecting and distributing the revenue generated for UK artists entitled under the terms of the EU resale rights Directive 2001/84/EC (see also DACS).

#### 1.2.3.5. DACS, Design and Artists Copyright Society

DACS was founded in 1984 as a not for profit rights management organisation, collecting and distributing income to visual artists generated by licensing the use of visual images in publications. Like ACS, DACS also collects resale right income on behalf of its members. In 2015 DACS distributed £16.7 million to members.

#### 1.2.3.6 ERA, Educational Recording Agency

ERA was founded in 1991 as a company limited by guarantee and with no share capital. It is an umbrella organisation, consisting of UK broadcasters, and other rightsowners who

represent those who contribute to the broadcasters' programmes such as Equity, the Musicians' Union, the Writers' Guild etc. Its remit is to license off-air recordings of television programmes and their educational use. In the year ended 31 March 2016 the accounts show that £2,266,571 was available for distribution to rightsowners.

#### 1.2.3.7. PLS, Publishers Licensing Society

PLS is a not-for-profit company limited by guarantee, which is owned and controlled by the trade associations representing publishers' interests: the Association of Learned and Professional Society Publishers (ALPSP), the Independent Publishers Guild (IPG), the Publishers Association (PA) and the Professional Publishers Association (PPA). Over 3,300 individual publishers are members of PLS. PLS together with ALCS and DACS/ACS pool their rights in the CLA. In 2014-15 PLS distributed £33.8 million to its members.

#### 1.2.3.8. Directors UK

Directors UK, which has almost 6,000 members, represents British film and television directors. It is both a campaigning body and a collecting society. Its predecessor, DPRS, the Directors' and Producers' Rights Society was established in 1987 by the Directors' Guild of Great Britain to collect payments due under European legislation. Directors UK launched in June 2008.

Q 2 Are there legislative provisions in your national law aiming at facilitating the management of copyright and related rights? If yes, please summarize

A. 2.1 See Chapter VII (Copyright Licensing) and Chapter VIII (The Copyright Tribunal) of Copyright Designs and Patents Act 1988. Disputes concerning collective licensing of rights may be referred to the Copyright Tribunal for adjudication. Collective management organisations are also subject to competition legislation.

2.2 See also The Collective Management of Copyright (EU Directive) Regulations 2016.

Q 3. Which models for limitations and exceptions have been implemented in your national law? Such as free use, statutory licensing, compulsory licensing, obligatory collective management, extended collective management, other models? Please provide a general overview.

A. See Chapter III of Copyright Designs and Patents Act 1988. Acts permitted in relation to copyright works (sections 28 – 76A).

Permitted acts may be grouped together into 15 categories: introductory (which includes the making of temporary copies), general (which includes the fair dealing exceptions of research and private study; text and data analysis for non-commercial research; criticism, review, quotation and news reporting; caricature, parody or pastiche, as well as incidental inclusion of copyright material), exceptions for disabled people, education, libraries and archives, public administration, computer programs, databases, designs, typefaces, works in electronic form, miscellaneous provisions relating to literary, dramatic, musical and artistic works,

miscellaneous provisions relating to the lending of works, miscellaneous provisions relating to films and sound recordings and miscellaneous provisions relating to broadcasts.

Free use, statutory licensing and compulsory licensing are not provided for by the Act in relation to copyright works; obligatory collective management exists in relation to e.g. Artist's Resale Right and extended collective management has been introduced recently to comply with EU law.