CHANGES TO COPYRIGHT LAW?

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WHAT I WILL BE COVERING TODAY

- Orphan Works, and the draft Directive
- Hargreaves Review of UK copyright law
- Digital Economy Act

ORPHAN WORKS

- An OW is a work that is still in copyright, but where either one cannot identify the rights owner at all, or you have identified them, but cannot find contact details for them
- It's a big, and increasing problem, because…
- Longer copyright term, and
- More and more stuff being created (electronically) where the rights owners have not identified themselves
- Applies to ALL copyright works, i.e., text, images, moving images, sound recordings…..

EU DIRECTIVES

- What they are
- The process for introducing and then passing them
- Once finally passed, member states have up to (normally) two years to put the Directive into national law
- If they fail to do so, then the EU can impose the wording on the member state
- Very recent European Court case (not copyright) where Sweden had failed to implement a particular Directive in time, and the European Court concluded nonetheless that Directive applied to Swedish Courts

DRAFT DIRECTIVE ON ORPHAN WORKS

- Introduced in late 2011
- Gives permission to copy (e.g., digitise) the OW
- The Draft Directive covers only literary works and films.
- Definition of orphan works very restrictive, e.g., if a work has four authors, and one can be traced and the other three cannot, it is NOT an OW.
- Therefore, in its present form it is doubtful that the Draft Directive is of any value to large-scale digitisation projects.
- The majority of works would only be able to be digitised and made available to the public if the rights to do so are acquired for each work from each individual rightsholder in the work on an individual basis, or if the digitisation projects take the risk of infringement actions from owners of rights of orphan works.
- Draft Directive currently under scrutiny and may well end up very different – or might vanish!

HARGREAVES REVIEW

- Professor Ian Hargreaves, Cardiff University

BACKGROUND

- Started by David Cameron
- Allegedly 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 for easy identification of who can offer licences for a particular work
- Extended collective licensing, i.e., existing RROs will offer licences for all orphan works, e.g., CLA for text-based products,
- Introduce all the exceptions recommended by Gowers, 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 legal advice
- Change the name of the Patents County Court to Intellectual Property County Court, able to hear small claims cases involving copyright infringement

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); UKIPO will set out guidance on what constitutes evidence
- On DCE, Gov't is committed to putting Crown Copyright materials onto the exchange, and will encourage other public bodies to do so. Richard Hooper has been commissioned to facilitate the creation of a viable financial model for the DCE and to develop a functioning system in 2012. He is quite well advanced with this work, which seems to be acceptable to both creators and users. I am still uncertain what the business model would be.

DECEMBER 2011 – CONSULTATION DOCUMENT

- Lengthy document setting out Government ideas/proposals and inviting comments on proposals as well as requests for background information from interested parties
- Not a White Paper (i.e., commitment to action) – yet!
- Responses submitted, now awaiting White Paper later this year.

PROPOSALS

- New exception for orphan works for non-commercial use
- Reduce lifetime of copyright for unpublished or anonymous/pseudonymous works to: life of author plus 70 years, or 70 years from date of creation
- Use DCE as part of diligent search for OW
- Not clear what happens if someone comes out the woodwork after a while – can they stop further copying? Can they insist copies made are deleted?

MORE…..

- Possible Extended Collective Licensing schemes, so that collecting societies covering a majority of rightsholders in their media can offer licences for copying materials not currently in their repertoire
- Codes of conduct for collecting societies (CS). UK is one of only three EU Member States that does not regulate its collecting societies. CLA has no code of conduct at the moment.
- Gov't wants advice on what penalties should be imposed in a CS fails to comply with a code of practice or refuses to install one.

MORE…..

- New exceptions for private copying (e.g., ripping CDs) already owned and no levies – VERY CONTROVERSIAL WITH MUSIC INDUSTRY
- 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 SCHOLARLY PUBLISHING INDUSTRY
- New fair dealing exception for parody/pastiche
- Make educational exceptions wider and more flexible, including distance learning – but nothing on extending examination exception to old exam papers or defining further what is meant by examination
- Extend exception for visual disability to those with dyslexia and widening media types that can benefit
- Extend exception for quoting others' works beyond fair dealing for criticism/review, e.g., on blogs and social networks, and/or extending criticism/review definition
- Extend exception for time shifting to hospitals, care homes and prisons
- No contract can over-ride exceptions

FINALLY

- IPO to develop plans for a “copyright opinions service” in 2012, for (anyone/only educational institutions?) worried that they might be infringing
- White Paper with proposed legislation in “Spring 2012” – more likely to be late Summer; copyright law changes are always controversial and take longer to implement than the Gov’t hopes
- We have a way to go; photographers don’t like orphan works bit; publishers don’t like text and data mining bit; music companies don’t like private copying bit, most commercial rightsholders don’t like the contracts cannot override exceptions bit……

CRYSTAL BALL GAZING

- Some of the best bits will get watered down or deleted thanks to intense lobbying by rights holders
- It will get postponed again
- We will NOT move to evidence-based policy, see, e.g., on lifetime for sound recordings
- But some good bits will get through
- CS will not get tamed
- And also remember my awful track record for predictions – see my public statement in 1973

DIGITAL ECONOMY ACT 2010*

*Right after this webinar is was announced that the first letters under the Digital Economy Act would not go out till 2014

- Passed in the dying days of the Labour Government
- I watched the debate in the Commons – embarrassingly ignorant MPs
- Only ones who performed well were Tom Watson (now better known for hacking scandal), Stephen Timms and Dom Foster.
- 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
- Judicial Review challenges by TalkTalk and BT rejected

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- 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
- There are ample other powers, e.g., in Copyright Act, to get at those who deliberately upload and download infringing materials
- Rumour is that the first letters to subscribers warning of infringement will not be sent until 2013
- There was an attempt in the debate on the Protection of Freedoms Bill to get the crucial clauses repealed, but the debate ran out of time before this amendment could be considered

THE DEA COULD WELL END UP AS….

TIME FOR QUESTIONS!