Initial response to the Hargreaves Review

Creators' Rights Alliance

18 May 2011

The Creators' Rights Alliance welcomes Professor Hargreaves's recognition that the so-called "fair use" clause in US law in fact benefits no-one except lawyers. Other parts of his proposal, however, will need to be developed with great care if they are not to undermine the creative activity that the government says it wants to promote. The devil is, as so often, in the detail, not the headline recommendations.

The Creators' Rights Alliance is an affiliation of organisations representing the interests of over 100,000 original creators in a wide range of fields – including music, illustration, journalism, photography and writing. Most of the 100,000 creators we represent make their living by licensing copyright and performers' rights in their work.

We regret that, following the sad example of previous reviews, Hargreaves has avoided confronting the issue of creators' rights to be identified as author of their works and to defend their integrity – the so-called "moral rights". It is a nonsense to propose mechanisms for licensing of works whose authors cannot be identified – "orphan works" – while authors in the UK, whether they be scriptwriters or photographers, do not have a secure and enforceable right to *be* identified, preventing the orphaning of their future works. The deficiencies in UK law need to be remedied.

In an age where, as Hargreaves notes, all citizens are likely to be published or broadcast creators through FaceBook and YouTube and so on, these rights and the right to a fair share of income from commercial exploitation of works are essential for every citizen. Hargreaves's proposal that remedies for unauthorised use be restricted for those who have not registered their works (buried at paragraph 4.34) risks undermining the legitimate interests of citizens, particularly those of young creators who will be the drivers of the next generation of the creative economy.

Indeed, the CRA is disappointed by the lack of measures to help individual creators – the people who actually do the creation that underpins the "creative economy" – achieve a level playing field. An exception is the recommendation for a Small Claims Court procedure for copyright cases, which we wholeheartedly welcome, long having called for it.

In this context the headline proposal for a "digital copyright exchange" requires much careful thought: how will it serve the interests of the actual creators, and how will it be regulated to ensure that it does? The biggest problems that individual creators face are not with teenagers copying stuff on their iThings: they are with publishers and broadcasters imposing unfair contract terms that restrict their ability to continue working as dedicated professionals on whose work the entire "industry" depends.

We append an extract from our submission to Hargreaves on "orphan works", the principles of which must be applied to any "digital copyright exchange".

Unless very tightly drafted, Hargreaves' proposals for extended "exceptions" to creators' rights could lead to the same problems that we observe with so-called "fair use" in US law. This may

allow people to use a creator's work without permission but no-one knows whether that use is "fair" until the author can raise several hundred thousand dollars to bring a court case. As we pointed out in our submission to the Review, Google continues to claim that its scanning of 15 million books without permission is "fair use" – but, when authors and publishers collectively raised the money to challenge this, found it worthwhile to offer a $125 million settlement.

It is interesting that Ireland has launched a review of the possibility of US-style "fair use" and also called for a "clearing house" in Dublin. The question has to be asked whether the UK and Ireland have been set up to compete to best serve certain online interests.

In conclusion: we need a level playing field for creators to negotiate with "the industry" – which Francis Gurry, Director General of the World Intellectual Property Organization, in February helpfully described as "the intermediaries that [creators] engage" to distribute our works.

Mike Holderness, Chair, CRA

mike@holderness.eu

See our full submission at www.creatorsrights.org.uk

Orphaned works

Any mechanism for use of orphaned works must be predicated on it being permitted only with a licence, obtained:

- in advance of use;
- against evidence of diligent search for the author(s) and/or performer(s);
- for a payment reflecting market rates for works which, as far as can be ascertained, are similar;
- granted by a body subject to regulation – which should include ensuring that it is genuinely representative of known creators in the relevant field; and
- with provision for treatment of revenant authors – which should echo the German "windfall" provision [mandating renegotiation of licences for works that turn out to be more valuable than first envisaged].

CRA members the Association of Illustrators and the Outdoor Writers and Photographers Guild can support the licensing of orphaned works for non-commercial use only.

Provision for fair treatment of revenant authors is essential: the value of a work is, for better or worse, tied to its authorship. If a work is in good faith licensed as "orphan" but turns out to be by David Bailey or Carol Anne Duffy rather than an unknown, this must be reflected in a new licence.

… The "moral rights" are of course also essential to every creator in their day-to-day efforts to build a career and thereby make their contribution to growth and innovation in the sector.