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As I See It! — Copyright in the Digital Age: Has the Balance of Interest Between Owners and Users Really Changed?



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The UK Prime Minister announced on 4 November that the new Coalition Government has commissioned a review of UK intellectual property law to make it “fit for the internet age.” **David Cameron** made particular reference to the concept of “fair use” in U.S. copyright law, which some people believe gives companies more breathing space to create new products and services. The Government’s concern is focused on the ability of small and medium-sized businesses (SMEs) — the engine room of economic recovery and growth — to innovate.

The review will be conducted by **Professor Ian Hargreaves**, Chair of Digital Economy at the **Cardiff School of Journalism, Media and Cultural Studies** and **Cardiff Business School**, an experienced journalist and academic. It will report in April 2011. Its terms of reference were announced on 10 November and include barriers to new business models, the costs of obtaining rights-holders’ permissions, the cost and complexity of enforcing intellectual property rights both in the UK and internationally, and the problems facing SMEs in accessing services to protect and exploit their intellectual property. In other words, the review is going to cover patents and trademarks as well as copyright.

Does this presage immediate reform? Will UK copyright law be changed to incorporate U.S.-style “fair use?” Will “fair use” replace or sit alongside the current UK law on fair dealing and library privilege? We simply do not know at this stage. But extending the exceptions to the rights-holder’s rights to encompass fair use would represent a change in direction for the UK.

Copyright is a property right. It forms the foundation on which the book, journal and newspaper publishing, music, broadcasting, movie and software industries operate. The general international framework of copyright law is today grounded in the Berne Convention for the Protection of Literary and Artistic Works, of 1886, updated by a number of treaties of which the most significant is the World Intellectual Property Organization (WIPO) Copyright Treaty in 1996. The WIPO Treaty addressed the issues arising from the use of the internet and information technology. It is notable that the USA acceded to the Berne Convention only in 1989, more than a century after most of the rest of the world — but that is another story.

Copyright law is a national law enacted by each nation, and the Berne Convention provides the framework in which copyright can be enforced internationally, so that an American copyright owner can enforce his or her rights

in the UK, and vice versa. It is essentially a balance between the interests of the creator or owner of the copyright, and the public interest in ensuring reasonable access to copyright works. This is achieved by providing for exceptions to absolute ownership by the rights-holder, to enable users to use or copy the work without the copyright owner’s permission. In the UK these exceptions are called “fair dealing” and “library privilege,” while in the USA they come under title of “fair use.”

However, there are significant differences between fair use in US law, and fair dealing in UK law:

Fair use is a general test. Under the *Copyright Act of 1976* (17 U.S.C. section 107), copying a copyright work for purposes such as reporting news, criticism, comment, education, and research generally does not amount to a breach of the rights-holder’s copyright. In judging whether the use of a work is fair use, the Act provides for multiple factors:

- the purpose and character of the use, e.g., commercial or not-for-profit educational use;
- the nature of the copyrighted work, e.g., use of fiction is less likely to be fair than non-fiction;
- the amount and substantiality of the use in the context of the work as a whole. i.e., a test of proportionality; and
- the effect of the use on the potential market for the work.

These factors are not defined further in the Act. It is merely a general statement of principles. It is worth noting that only the USA and Israel embrace the concept of fair use. Other countries recognize similar exceptions to copyright, but use very different criteria to provide for them, even though they all fall within the Berne Convention framework. Within the European Union the rules vary between different member states.

Fair dealing, by way of contrast, is not a general statement of principles, but a series of defenses to a claim for breach of copyright. In the UK, they are set out in the *Copyright Designs and Patents Act 1988*, Sections 29 and 30, comprising fair dealing for three specific purposes:

- research or private study;
- criticism or review;
- reporting current events.

If a use falls outside one of these specific purposes, it cannot be fair dealing. The law is specific and clear, and avoids the imprecision of fair use principles. Libraries enjoy library privilege under the Act, which enables them to make a single copy for non-commercial

research or private study on behalf of its users. It should be noted that, in the context of **Prime Minister Cameron’s** remarks about encouraging business innovation, that use for commercial purposes (even by a charity or not-for-profit organization) is excluded from library privilege and fair dealing.

Fair dealing is clearly more restrictive than fair use. But it is used throughout the common law jurisdictions in the Commonwealth. That may please rights-holders, but is inflexible and requires updating to keep pace with technological change. Fair use, on the other hand, is flexible and extendable as it is a set of principles rather than a group of specific exceptions. It is that flexibility that is seen to give companies that “breathing space” to innovate that **Hargreaves** is to examine.

But it is not that simple. The nature of the fair use tests invites litigation. Indeed, it is surprising how little reported case law on breach of copyright exists, given their vagueness. While the user may regard the use as fair, the rights-holder may disagree. If the rights-holder is a large corporation in publishing, movies, or software, it will undoubtedly have the resources to initiate legal action and take the matter before a court. Litigation is not a trivial matter, with most breach of copyright cases involving legal cost of \$½ million or more. That automatically disadvantages the individual and the small business — the very users that are needed to drive economic growth.

The Internet and the availability of digital information have changed perceptions of what users may do with information they see on the screen. Where content is the online manifestation of a formally published work — a book or a journal, most of us understand that copyright still applies to it. Nevertheless, that a Website does not carry a copyright notice does not mean that it is free to download and use regardless of the rights of the Website owner. It is still a copyright work. But this does not accord with the way most of us perceive Websites and use their content. Fair dealing, being a static set of provisions, has not kept pace with reader practice and the Internet culture.

On the one hand fair use is so vague, and on the other fair dealing is so specific. That is why academic and scholarly publishers offer licenses that define what the library and its users can do with the material. A well-drafted license provides clear and unambiguous rights and obligations for both the publisher and the library. In most cases, they extend library and user rights well beyond the copyright exceptions provided in local law. One of the unintended consequences of this is to harmo-

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nize the terms on which e-content can be acquired and used, even to the extent that it has been possible to create the **SERU Guidelines**,

expressing the community's acceptance of custom and practice that is now widely accepted. The adoption of **Creative Commons** licenses is another example of a set of rules that have been widely accepted to govern open access publishing. Both **SERU** and **Creative Commons** show that a particular industry or community can create its own solutions to intellectual property issues.

What the **Hargreaves** inquiry will recommend is anyone's guess. We have been down this road recently, with the Gower Review of Intellectual Property, which reported late in 2006. Both Gower and more recent initiatives in the European Union have tended to tighten copyright law in favor of rights-holders. Just this year the **Digital Economy Act 2010** has enacted measures to make it easier to identify persistent infringers and introduce measures to terminate their Internet connections.

Cameron's initiative may be a change in direction. There is a demand for fair dealing to include the right to make personal copies of music and video — which is widespread anyway! The law needs to keep pace with the wider public interest, but still needs to provide for the proper commercial interests of the creative industries. The UK has a range of export-based creative, cultural, and publishing industries that extend well beyond the interests and concerns of small businesses.

It is right that the balance of interest between rights-holders and users should be addressed again as technology and user expectations evolve. Traditionally, UK copyright law has been less generous to users than in the USA. Striking the right balance is always difficult and controversial. If the **Hargreaves** recommendations call for an extension of copyright exceptions, or even the introduction of fair use in UK law, that will be truly radical. 🌱

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Notes from Mosier — Back to the Future, Part 2

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In my last column I began a piece on approval plans and their role in the delivery of new print books. I'm intrigued by the inevitable intersection (if not actual collision) of several trends affecting books: declining print runs, scaled-back library approval plans and profiles, and increasingly restrictive publisher coverage afforded by the few remaining domestic approval plan vendors.

One of the major factors driving this process is the current state of library budgets, coupled with the need to attempt somehow to balance demand for print and digital resources. Quite simply, fewer dollars translate into fewer books purchased.

As attention has shifted from predominantly print to a blend of print and digital, various efforts have been undertaken to incorporate eBook discovery and acquisition (or access) into the well-established processes of technical services. Extending the profiling mechanism utilized by approval plan vendors to e-content seems, at first glance, like a natural evolution.

Anyone familiar with the somewhat strangled route eBook development has followed will appreciate that the path has been anything but straightforward. There are a couple of fundamental reasons why this is so: demand for eBooks has been and remains fragmented, and publishers have been uncertain about and inconsistent in their commitment to and delivery of the format.

Let's start with demand, and talk first about aggregators. We'll come back to individual publishers in due course. eBooks arguably emerged not in response to a coherent and focused market

clamor for digital content, but rather because technology had advanced to a point where it was possible to offer *something* — and quite possibly something with some flash. Many early advocates of eBooks exhibited a "if you build it they will come" mentality. Bear in mind the advent of eBooks coincided with the dot com boom, fueled by an excess of venture capital wandering the commercial landscape searching for a comfortable and hopefully lucrative home.

I well recall attending a presentation by an early eBook company's CEO (attempting to secure additional backers) who delivered a very slick multi-media presentation. "Who do we reach?" he asked the audience, "Who do we touch?" He went on to describe a gauzy interchange between the company's headquarters in the U.S. and a village in Borneo. The village library only had Internet access a few hours a week (allegedly supported by solar power), but they were hungry for eBooks. The company naturally came through with just what the happy villagers wanted.

I attended two subsequent performances of this presentation. Somewhat reminiscent of the beggar who switches his cast from one leg to the other, one day to the next, the village re-surfaced in the second presentation in Malawi, and by the third installment it was in Papua, New Guinea. Not to worry, though; all the neo-colonial nonsense was still present in full force.

This early eBook model wasn't helped by requirements that libraries purchase large initial collections, or that access was limited to a single user. The first condition was a reflection of the

pressure early aggregators were under to generate quick profits. The single-user restriction was intended to appease publishers, who had understandable concerns about copyright, fair use, and revenues.

Publishers also worried that a digital edition of a work would compete with and depress print sales. Consequently many houses imposed an embargo on the digital edition to allow the print product a first stab at the market.

Early publisher participation with aggregators was also an issue with eBooks. Many publishers agreed to furnish some content early on, but instead of releasing their entire backlists they took a title-by-title approach. In many instances this was because publishers either didn't have permissions for use in a digital edition (or they might have rights to text, but not images), or they couldn't readily ascertain whether they did or not. To be on the safe side any titles in doubt were held back. For a librarian, this meant you couldn't be sure that everything from Publisher X was available from a given source, even if the publisher was listed as being included in the aggregator's database.

As content grew, however, various eBook collections began to achieve a certain critical mass. This growth of content coincided with an emerging population of students both familiar and comfortable with electronic resources: the digital natives. As their ranks began to enter college they brought with them expectations about what they'd find.

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