

BSkyB Response to Consultation on the Review of the Copyright and Related Rights Act 2000

1. Introduction

A thriving creative and digital industry has a vital role to play in building Ireland's economic success. Investment in creative content and digital technology will play a central role in driving Ireland's future economic performance and maximising the benefits for consumers and for society as a whole. The creative industries already make a significant contribution to the Irish economy with several thousand people engaged in employment, and given technology developments, this contribution is likely to rise.

There are a number of key factors that have facilitated the success of creative industries in Ireland, namely:

- Legal system – A 'certain' body of law is vital for industries that depend on intellectual property
- Competitive marketplace – a competitive market funded by a range of models, for example in broadcast content can be public funded, advertiser funded, subscription models and combinations of these models.
- Skills – A highly skilled creative economy workforce and a critical mass of scale and SME companies from which to draw talent.

We believe that these factors serve the creative industries well, and mean that they are well positioned to deliver above average growth within Ireland and in export markets.

This Review is focused on the legal system, and in particular IP including copyright. We understand that the Review Committee are aware of the importance of the protection of IP to businesses in the sector, but the correlation between legal and regulatory certainty and investment appetite can not be underestimated.

Content owners are incentivised to widely distribute their content but they should be free to determine how and on what terms it is exploited, be that locally, nationally, linguistically or any other basis. Content owners may wish to negotiate directly with licensees or use collective licensing arrangements or other permissions-based rights management systems. The key is that the regime should be suitably flexible to allow rights-holders to innovate in choosing how to exploit their rights.

The new digital economy will see new dynamic business models emerge as well as creating challenges, such as piracy, but it is important to recognise that historically, and in practice, copyright and IP has underpinned all investment in content, both for established companies and new entrants for whom protection of rights is key to their ability to generate revenues and thus gain funding.

It is critical that the recommendations of the Review reinforce the central role that IP plays in sustaining innovation and investment. The IP regime is a complex web of different protections interacting with competition law and private contractual arrangements. As the Review moves forward, it must balance the needs of all stakeholders, and preserve the delicate interaction between different aspects of the framework.

There has been much recent analysis of the IP regimes across Europe, for example, the recent Hargreaves Report in the UK. We would welcome the Committee's consideration of this Report which makes a number of important recommendations to ensure that the regime in the UK evolves and the Creative Industries remain competitive in the new digital age. Importantly the Hargreaves Report rejects the notion of Fair Use in a European context, but stresses the need for effective enforcement.

2. Sky's contribution

Sky's investment in the creative and digital economies has been on an unprecedented scale, frequently involving significant commercial risk. Sky is a long-term supporter of, and investor in, creativity with a huge investment of over €2bn a year in audio-visual content, two thirds of which is invested in the UK and Ireland. As a major media and communications business employing over 30,000 (perm and contract) staff in both territories, Sky's interest in this area is multi-faceted, as:

- a significant licensee of rights from entertainment and sports rights-holders
- one of the major licensees of music collection societies
- a major copyright owner in our own right
- a significant aggregator and retailer of content
- a patent owner, of 220 patents, with a further 84 under application
- as a user of patents which support the technology in some of our key consumer products
- a company keen to enforce our rights using the IP framework

Sky has earned a reputation as a relentless innovator, for example in its role in the development of whole new sectors of the digital economy, such as High Definition television. Through innovations like Sky+, Sky has helped people to take control and define their own TV experiences - watching what they want, when they want. We have helped to create global competitive advantage for the UK by being first to exploit new technologies, such as 3D TV, where Sky's leadership is helping drive exports in the production economy. None of this would have been possible without the protections and opportunities offered by an effective IP regime. These developments are testament that the regime is working.

However, the copyright regime also needs to be sufficiently flexible to cope with technological developments and consumer expectations, and there are a number of areas where improvements should be considered.

3. Licensing

The current licensing models for audio visual rights are developed through commercial negotiations between interested parties, and through contractual agreements, the interest of content owners and distributors are balanced. Such agreements are, of course, subject to commercial, copyright and competition law. Content creators licence rights in many different ways, as they seek to innovate in how they reach consumers. The current IP regime offers this flexibility and it is important that it is preserved.

Having said that, there are a number of known licensing issues that present challenges in relation to copyright. These range from the well-documented problems surrounding orphan works to other aspects whereby users and rights-holders can find it difficult to agree to an acceptable valuation of underlying rights, say, in the licensing of online music services.

Within this range, it is important to distinguish between issues that arise due to deficiencies in legislation and those issues which are essentially commercial disagreements.

It is also important to distinguish between the experiences of licensees across different forms of content. There are some sectors within the wider creative industries where licensing works very well. In proposing recommendations that address observed deficiencies in one sector, great care must be taken to avoid inadvertently damaging the well-functioning operation of other sectors.

For example, it may be that difficulties in obtaining rights clearance for audio-visual archive material is a burden on broadcasters that wish to exploit large archives. In that instance it has been suggested that collective licencing would address the problem.

However, considerable caution is required when thinking about collective licensing in the audiovisual sector. Whilst it may be the case that it has a role to play solving specific problems such as orphaned works and archive, we believe it would be wholly inappropriate to mandate this approach where the rights-holder is willing and able to negotiate directly with the licensee.

Collective licensing, extended or otherwise, can work well, but it is up to rights holders to determine the model that best suits their needs.

4. Exceptions

The Copyright and Related Rights Act 2000 sets out a number of exceptions. The Department's consultation document, in its terms of reference, includes, inter alia, an undertaking to examine the 'US style fair use doctrine to see if it would be appropriate in an Irish/EU context'. Proponents of this doctrine believe that the introduction of a much wider US style 'fair use' defence would benefit users of digital content. It is argued this would drive economic growth by increasing legal certainty around commercial use of rights. However, Sky believes that there are significant flaws in this argument based on the experience in the United States.

4.1 Fair Use

Fundamentally, the suggestion of a US style 'fair use' exception does not address the problem of consumers' non-commercial use in specific instances. Rather, a US 'fair use' exemption is designed to create a wider, vague commercial exemption that extends beyond the established exceptions such as educational exceptions, research and private study or parody.

We believe that any exceptions need to be fully justified, and need to be clearly defined. Any proposals would need to meet the requirements of the 'three step test' found in the Berne Convention, other international treaties and EU directives. This test ensures that exceptions and limitations to the general protection offered by copyright legislation are only made when they do not conflict with the normal exploitation of the work or other subject matter, and do not unreasonable prejudice the legitimate interests of the rights holders by allowing unauthorised commercial exploitation by third parties.

It is worth considering the implications of the 'fair use' defence's operation in the United States. It is a doctrinal exemption and it is argued it is deliberately vague. It is for the Courts to apply on a case by case basis building on case law dating back over 170 years. This seems to run contrary to the way in which EU/Irish exemptions work, and out of line with all of the preceding recommendations in evolving copyright considered in the last 5 years. If implemented in Ireland, it would create significant uncertainty, and one could expect long and protracted court cases between legitimate rights owners, and other commercial enterprises who have exploited these rights. It would be particularly damaging to smaller enterprises not in a position to engage in expensive legal trials.

Importantly, Professor Hargreaves concluded "that importing Fair Use wholesale was unlikely to be legally feasible in Europe".

4.2 Format-shifting

One area not specifically referenced in the Committee's terms of reference but featuring in IP reviews in the UK and Europe is that related to format-shifting by consumers for non-commercial use. There are obvious examples where technology and consumer practice has evolved at a faster pace than the legislative framework, and it is argued this undermines the credibility of the legal framework. The most frequently cited example is the inability to legally download CDs to MP3 players or to a PC.

For example, in the UK, the challenge faced by the Government in implementing a recommendation from a specific IP review (the Gowers Report 2006) was to take an apparently simple exemption and apply it in law in a way that is sufficiently precise to deal with wider issues such as the misuse on a wider scale, and to ensure that such an exception remains compliant with EU law. These challenges still exist today and are no less important. Indeed, the UK Government's 2009 copyright strategy document set out:

"Making non-commercial use less onerous for consumers, for example by removing the need to seek permission and make payment for personal use of individual copyright works, would help tackle the "mismatch of expectations" problem. But fair compensation for rights holders would be required. Action at a European level would be necessary"

From Sky's perspective, we can fully understand why a consumer may wish to listen to a CD in a different format, but we are also concerned that the exception may be drawn too widely such that it may encourage activity which either economically damages rights-holders or enables widespread copying to multiple users in a way that would clearly infringe on copyright.

Accordingly, as thinking develops in this area, we would urge policy makers to be mindful of the need for an exception to be drafted in a way which is precise and free from any ambiguity. It is vital that the outcome from any exception is certainty, as to what the law permits and what it prohibits.

We would also highlight that in taking forward any policy in this area, proper attention needs to be paid to developing a thorough and deep economic analysis to determine if, and how, fair compensation is paid to rights-holder.

5. Patents

As both an active user of patents, and patents owner, patents are key to our business. As such we have a deep interest in ensuring the regime is fit for purpose.

It is our experience that there is sometimes insufficient scrutiny of patents by the UK patents office (and potentially the Irish Patents office). This can result in patents being granted, when it is questionable whether they meet the new and/or inventive tests. The consequence for business, is that it increases costs, and increases uncertainty. This is especially the case with non standardised patents where negotiations of licensing can be difficult. We appreciate that there is a cost implication for more thorough searching of publicly available information and examinations of a patent under application, however the cost to business of having to deal with 'bad' patents means this is a price worth paying.

Our experience when using patents under the auspices of ETSI, are on the whole very positive. The benefits of using a consensus based, independent organisation are significant. It might be interesting for the Review Committee to explore how greater use of such organisations can be encouraged.

6. Enforcement

It is vital that appropriate enforcement measures exist to allow rights owners to protect their copyright against digital and online theft. Effective enforcement is vital in underpinning the rest of the IP regime. Without enforcement, innovators will not be properly protected, and as a result the wider economy will suffer.

This will become increasingly important given the risk of erosion in value of content through illegal downloads and file sharing as the speed and penetration of broadband coverage accelerates.

It is worth noting what the Hargreaves Report says about enforcement:

"IPRs cannot succeed in their economic function of incentivising innovation if rights are disregarded or are too expensive to enforce.....Widespread disregard for the law erodes the certainty that underpins consumer and investor confidence"

We note that the Department is currently consulting on a draft statutory instrument amending the Copyright and Related rights Act 2000. We also note that the consultation emphasises that the proposed amendment "is not about ...the Three strikes regime set out in the Digital Economy Act in the UK". However, Sky believes it is essential that the principles underpinning the UK's Digital Economy Act are made to work in which ISPs are provided with a framework to assist rights holders enforce their rights. To the extent that the proposed amendment supports this objective and those principles, Sky welcomes the Department's proposal. However, we believe that it may be more appropriate to await the final Report from the Review committee before any legislative amendments are adopted.

More generally, our experience on the practical aspects of enforcement leads us to believe that the process could be improved. It is often the case, that law enforcement agencies do not have the technical experience, time or resource to sufficiently prioritise enforcement of breaches of the IP framework that we identify. We believe that a central, appropriately resourced agency should be identified, whereby the enforcement of the IP regime is seen as a priority.

