

## Bruton Review of Intellectual Property

### Response from Pearson Plc

13 July 2011

#### 1. Introduction

- 1.1 Pearson is the world's leading learning company, with 37,000 people across 65 countries and revenues of €6.4bn<sup>1</sup>. Penguin is the leading English-language publisher in many global markets, and Penguin Ireland, having opened an office in Dublin in 2002, is now one of the leading consumer publishers here. The Financial Times Group helps business people make good decisions. Through names like Edexcel, BTEC, Heinemann and Longman we provide educational materials, technologies, assessments and related services to teachers and learners of all ages. Our goal is simple: to help people get on in their lives through learning.
- 1.2 We would note at the outset that the US, specifically Silicon Valley, leads the world in terms of innovative tech start-ups. There are many reasons why Silicon Valley does this better than other places: access to finance; links between banks/venture capital/angels, Universities and clusters of small technology companies; mobility of labour; a different competition regime; effective teaching of technology in schools. These are important areas of policy which merit serious attention, albeit outside the scope of this review.
- 1.3 We do not believe that the US "Fair Use" regime is a significant factor in the different performances of the US and other territories with regard to tech startups. Copyright law is federal: Fair Use obtains just as much in other parts of the US as in Silicon Valley. However those other parts of the US also lag behind Silicon Valley in terms of technological innovation.
- 1.4 Indeed, we operate in the US as well as Europe, and an internal review concluded that the cost (to us) of clearing a given right under the US or European regimes like the UK (whose copyright law is very similar to Ireland's) is roughly the same: the US regime does not make it easier, cheaper or faster for us to licence material.

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<sup>1</sup> 2010 figures, excluding revenues from Interactive Data which was sold mid-year

- 1.5 However, we would certainly agree that copyright needs to work better online – for large, established players like us; for small, early-stage companies; for authors and other creators of works.
- 1.6 Clearing rights is a cumbersome and costly exercise, and it can be difficult to know who owns the rights to a given piece of content in the first place. Those problems are exacerbated for new entrants who want to aggregate content from multiple sources, possibly curating it in novel ways or layering value-added services on top of it.
- 1.7 Protecting rights is similarly difficult, be it from determined commercial-scale piracy, ideologically-driven “sharing” or more casual/inadvertent online infringement. Early-stage companies can find it confusing when trying to decide what to protect and how.
- 1.8 Despite all of this, the extant IP regime has delivered growth, innovation and success throughout Europe: not least in the creative sector, which represents some 7% of the EU economy, employing 14m people. The creative industries are a major European strength with world-leading exports, particularly in the English language; that export market depends critically on copyright. Europe is an international centre of creative activity, bringing major social, cultural, diplomatic and educational benefits as well as the obvious economic ones.

## 2. Pearson's transition to digital

- 2.1 Pearson's digital revenues<sup>2</sup> have grown from €800m in 2006 to €1.8bn<sup>3</sup> in 2010, 29% of our total sales. We have invested €4.4bn in content over this period, €1bn of which was invested in 2010. We have also invested very heavily in digital platforms to enable faster product development and more efficient creation and re-use of content.
- 2.2 Penguin's e-book revenues rose 182% in 2010, albeit from a low base: they now represent 6% of total Penguin revenues. FT digital subscriptions rose over 50% to 207,000 in 2010 and now form 35% of the FT's global paid circulation. Our digital education platforms served 55.9m students in 2010, up 33% from 2009; digital/services revenues were 44% of all education revenues in 2010.
- 2.3 These data evidence business growth despite a difficult economic climate and challenging external market conditions. Much of this growth has come from digital and content divisions of our businesses, and that in turn has come from innovation in business models and in new services and publications.
- 2.4 A common theme across Pearson is the absolute requirement for confidence in the security of our intellectual property and the return on investment that enables. Although there have been plenty of challenges in that regard we have been able to develop methods, systems and business models to respond to those challenges. We have developed our business models with a view to openness and engagement with other service providers and innovators.
- 2.5 As the digital world has developed, we have recognised the need for and benefits of striking a balance between rights ownership and opening up to the digital ecosystem – from readers to commercial partners. We actively partner with the tech start-up community and other external partners to find new and better ways to do things, making our content and data available for them to have bright ideas around, because we recognise that we're not going to have all of the best ideas.
- 2.6 Our successes across the group in this area, and the jobs predicated on them, have been achieved not as a result of any changes to copyright law, but by a reliance on the existing legislative framework coupled with the creative use of licensing, in turn allowing for sustained investment in quality content, journalism and innovation. Copyright law

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<sup>2</sup> Constant Exchange Rate

<sup>3</sup> Unlike most of our competitors we do not count mixed products as "digital" – if we did the 2011 figure would be €2.6bn/42%

has enabled and supported the innovations we have produced, buttressing the case for investment and enabling us to grow in terms of revenue, profit and jobs.

### 3. Making copyright work online: registries and metadata

- 3.1 The principal challenges faced by consumers, start-up companies and others in terms of their ability to re-use or transform content may be characterised as uncertainty around what is allowed and what isn't without asking permission; uncertainty around whom to ask for permission for a given use and how; and transaction costs across the whole clearance process.
- 3.2 One solution that has been put forward is a transformative exception to copyright; this would only address some of these challenges, and we believe it to be undesirable for other reasons expounded later.
- 3.3 There are two approaches which, either separately or together, could provide more complete solutions which would also be more adaptable to future changes in technology than a blunt exception whose wording may seem appropriate today but obsolete tomorrow. One is that of a registry of rights and ownership information: a "one stop shop" for these data. Another is that of metadata which flows with digital objects themselves. Either (or both) of these could sit atop a layer enabling micropayments (or other models of remuneration such as collective licensing) for chargeable uses (or where the publisher didn't have rights for such, easy information on who to contact). An inevitable corollary would be commercial pressure on rightsholders to make content available at prices that work on the internet.
- 3.4 The Hargreaves Review of Intellectual Property, which has recently reported in the UK, recommends the creation of a Digital Content Exchange along these lines. We are strongly supportive of this approach.
- 3.5 More broadly within Europe, as part of the Digital Agenda being delivered through DGINFSO, moves are underway to build a similar system at European level. This was adopted at the Digital Agenda Assembly in Brussels in June and there is a follow-up event in September. Pearson was one of a number of major multinational players from across the creative and technology industries supporting the initiative.
- 3.6 The technical and political challenges around extending these approaches to cover all content types, and to work globally, should not be underestimated: they are considerable and these approaches could not be considered as "quick wins". However those challenges are not insurmountable given support from industry, who would have to lead development of these systems; Government should play a convening role and set the context for this activity.

- 3.7 For reasons of space we will not go into details of any specific proposal here, but would be very willing to present on this concept in general, either or both of the above plans in particular, or any related matters if this would be helpful. We have direct, relevant practical experience and are very happy to share what we've learned.
- 3.8 We would strongly urge active consideration of these technological answers to technological problems. There is a genuine opportunity, by creating a level playing-field where content comes marked up with rights and re-use information in machine-readable ways, to create new markets and allow new business models to emerge. This approach stands the best chance of correcting what needs correcting in the operation of the copyright regime online, without damaging the benefits provided by the copyright framework overall.

#### 4. Tidying up/quick wins: orphan works and format shifting

- 4.1 The present situation on orphan works is entirely unacceptable. Almost all stakeholders agree that the way forward involves a requirement for a duly-diligent search followed by granting of a licence at low cost, with any rightsholder later coming forward retaining the right to royalties and subsequent control over use of the work. We would urge the Irish Government to support such a solution at European level.
- 4.2 We recognise and accept that there is an onus on industry to make the process of diligent search as seamless and efficient as possible within the operation of such a scheme. We are already working on projects like ARROW<sup>4</sup> to facilitate this and stand ready to support any other such initiative.
- 4.3 Pearson's view is that, in principle, a paying user should be able to access digital content on any platform or device they choose. For example, if a user has paid to access an article on FT.com, our view is that the user has acquired a licence to use that article and they should be free to exercise their rights under that licence across any digital device or platform they choose.
- 4.4 Innovative third parties – such as Flipboard and Instapaper – are already providing users with the ability to “format shift”. That is in these cases, to cache online content and view it for their personal use off-line.
- 4.5 Provided that format-shifting does not introduce the scope for unlawful and uncontrolled distribution of publisher content, Pearson supports a formalisation of the copyright legislation to expressly permit users to format-shift a piece of digital intellectual property they have paid for, for their own private and non-commercial use. This should not imply a “making available” right of format-shifted content, for example on social networks.
- 4.6 We are aware of arguments for a system of levies on equipment to compensate rightsholders for the format shifting of their works. Pearson considers that the imposition of levies on new digital platforms such as the iPad and competing tablets would risk alienating consumers who wouldn't understand why they should pay more for new equipment than they already do. Such a proposal also risks being seen by users as a licence to reproduce content without further regard to copyright law. For both of these reasons we would oppose the introduction of a levy system.

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<sup>4</sup> Accessible Registry of Rights Information and Orphan Works – see <http://www.arrow-net.eu/>

## 5. Fair use of copyright protected content: some thoughts

- 5.1 Pearson believes that an arbitrary widening of the defences available to copyright infringement, along the lines of US Fair Use, will stifle, not encourage business innovation.
- 5.2 The cost to Pearson of clearing a given right to use content under the US system and the European system is about the same. Otherwise put, as a major player operating under both regimes, we see no particular advantage or disadvantage in terms of business-as-usual in cost terms or ease of licensing content for us to use: the US regime does not make it easier or cheaper for us to use content.
- 5.3 However, a major disadvantage of the US system over the extant European regime is the litigation engendered by "Fair Use". There have been over 300 reported Fair Use decisions in the US since 1976; this compares with 21 decisions under Fair Dealing in the UK (for example) in the same period. The average cost of a Fair Use case to litigants is \$1m<sup>5</sup>, and the US Fair Use doctrine is supported by a canon of case law which could not be dropped wholesale into ECJ jurisprudence.
- 5.4 Pearson, along with other publishers and the Authors Guild, sued Google for breach of copyright in the US in 2005. Google relied on Fair Use in their defence. The parties subsequently agreed to settle the case, but the terms of the settlement were recently rejected by the Courts; discussions between the parties are continuing in order to see if a negotiated way forward is achievable. The cost to date to the plaintiffs in legal fees is somewhere north of \$30m. The case has taken six years so far and seems likely to take at least another two. These levels of costs would be entirely impractical for a small entity to bear.
- 5.5 Any new exception to copyright around transformative use, which would have to fit within the constraints of the Copyright Directive, Berne Convention and TRIPS agreement, would inevitably require significant interpretation by the courts. With no supporting case law it seems likely that the volume of litigation would be very high, certainly in the early years of such a regime. We do not consider that this scenario would assist early-stage companies in obtaining financial backing.
- 5.6 It appears to us that US statutory damages are intended as a legal counterbalance to Fair Use, whose legal boundaries remain very uncertain despite many decades of case law.

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<sup>5</sup> American Intellectual Property Law Association, 2007



We believe that the consequence of the two extreme legal doctrines in the US (Fair Use and statutory damages) results in parties being forced to adopt extreme legal and commercial negotiating positions. They do not encourage collaboration or innovation. We submit that if one doctrine is to be adopted, the other is needed but more importantly that Ireland, and Europe in general, are better off without adopting either of these doctrines.

- 5.7 On a related point, we believe that the existence of the Fair Use doctrine and the availability of statutory damages also immediately pushes rights-owners and potential infringers into adopting extreme and adversarial negotiating positions when seeking to resolve any dispute. This has been reflected by our own experience in the US.

## 6. Conclusions

- 6.1 The Irish Government should support technological solutions to the technological problems around the operation of copyright online.
- 6.2 The Irish Government should not lobby for "Fair Use" at EU level.
- 6.3 The Irish Government should act to "tidy up" the extant copyright regime by permitting format shifting and working towards an early solution at EU level on orphan works.

We are grateful for the opportunity to input to this debate, and as above very willing to share our own practical experiences of the operation of copyright in multiple global regimes, as well as in building or contributing to technological systems around the management of rights as adumbrated above, either in private or in public.

If further information on any matter would be helpful please contact Michael McLoughlin (Michael.McLoughlin@penguin.ie), Managing Director of Penguin Ireland; or Simon Juden (Simon.Juden@pearson.com), Head of Public Policy for the Pearson Group.