BRIEFING PAPER

FIXING COPYRIGHT

ten THE ENTREPRENEURS NETWORK

Introduction

ANTON HOWES
The Entrepreneurs Network
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This paper examines the ever more important role of copyright in affecting UK creativity, entrepreneurship, and innovation. Unlike other intellectual property rights, copyrighted works enjoy extraordinary privileges. Copyright is awarded automatically, from the moment that creation is fixed, and whether a work qualifies for copyright protections is only put to the test if challenged in court. It is also protected for much longer durations — usually for generations after the death of creators — and infringement can in some cases be a criminal offence. There are also very few exemptions to copyright.

Much of this strengthening of copyright took place in the context of widespread infringement. Indeed, the vast majority of the population has likely infringed without even being aware of it, as many practices that have become common are in fact illegal. Yet recent technological changes are now making it significantly easier for rightsholders to identify infringers and threaten them with prosecution. Rather than a situation of mass infringement, we may be entering a new age of mass enforcement.

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The copyright system exists on the basis that it incentivises the production of creative work, to the benefit of society as a whole. Yet it may now be doing the exact opposite. Albeit strong, the law on what counts as copyright is often unclear, providing very few reliable rules for creators as to the differences between inspiration and plagiarism, or on how much of another's work they can reuse without the creator's permission — a problem that has become compounded as recent developments to technology introduce ever more complex creative media, from digitally produced music to video games, which can involve multiple overlapping rights.

The borders of what counts as copyright infringement is only decided in the courts, but the case law is often inconsistent, if there is any at all. When it comes to new types of media, or recent changes to technology, the legality of many creative acts can be entirely open to question. Indeed, even for older kinds of creative work, many supposed "rules" that are widely known among creators in fact have no basis in law. In the context of mass infringement, this legal uncertainty has created a situation in which the most successful creators are often punished, despite exerting their own creativity — a major risk associated with entrepreneurial success. In a new context of mass enforcement, however, this stifling effect on creativity may soon extend to all creators, whether they become successful or not.

Over a decade ago, the UK copyright system became a major target for reform, as it needed to be updated to keep pace with technology that was transforming creative works and the habits of their users. Yet many of the proposed reforms have yet to be implemented, while technological change has continued to forge ahead regardless. Often, the proposed reforms were hampered by international treaties and EU laws that constrained what the UK was able to do unilaterally. Following Brexit, however, the UK now has

a unique opportunity to distinguish itself from other policy regimes and make itself the most attractive place for creators of intellectual property in the world, particularly at a time when such intangible investments account for an ever growing share of investment in the economy. If it grasps this opportunity, it will likely see benefits not just to the creative sector itself, but at the cutting edge of new digital technologies.

In making proposals for reform, this paper assumes that copyright should be geared as much as possible towards the encouragement of creative work — just as the system was originally intended. Policy should therefore seek to reduce uncertainty faced by creators, providing clear guidelines for what counts as copying, and giving creators greater leeway so that they are not penalised for success. By reducing uncertainty, it should also aim to prevent litigiousness, which otherwise incurs major costs on creators. Copyright should, however, continue to protect individuals' creative work. In the interests of achieving reform, rightsholders' interests are thus taken into account when recommending changes. Most of the changes recommended are at the very least neutral to rightsholders' current sources of income, and in some cases involve explicit win-wins, that benefit both the owners and users of copyrighted works — something that can often be achieved by reducing transaction costs. Finally, this paper takes the position that copyright rules should reflect societal norms about what counts as fair and reasonable usage, which have developed along with changes to technology, rather than creating a situation of widespread infringement — an especially urgent problem considering that enforcement is likely to become easier.

Proposals for reform

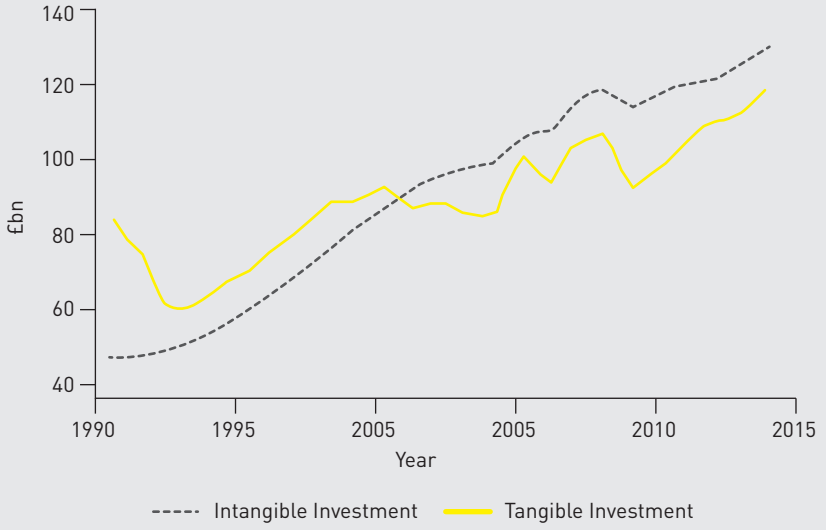
Some of my proposals might require further detail and fine-tuning, but I hope that they will at least provoke debate. For if the UK copyright system fails to keep pace with changing technology and societal norms, its economic and cultural output will stagnate. In summary, the proposals are to:

- Create an exemption from copyright for format shifting for personal use. This would bring the UK in line with other countries, and legalise something already widely perceived to be legal, thereby bringing the law in line with societal norms.
- Extend the exemption from copyright for text-and-data mining to for-profit uses, thereby lowering impossibly high transaction costs for companies pioneering Artificial Intelligence technologies, while giving the UK a competitive edge in providing certainty on such issues. This would also avoid problems of bias and allow for greater transparency.
- Limit liability for the use of orphan works that are of a certain age, provided that rightsholders have not registered the works on the government's Orphan Works Register. This would unlock the potential of the estimated 91 million orphan works, of which only 1,100 have so far been registered in the last six years, because the current system has not sufficiently reduced transaction costs.
- Differentiate UK copyright from EU policy by not requiring online platform services to use upload filters. This would give a competitive advantage in attracting online service companies, while ensuring that the UK's cultural output and freedom of expression on the internet is not compromised.
- Differentiate UK copyright from EU policy by not implementing a link tax. This would involve no change to current copyright laws, and would ensure that neither online content aggregators nor smaller online news publishers who benefit from brief preview snippets are penalised.
- Adopt a version of Article 14 of the 2019 EU Copyright Directive, to focus the UK's copyright system on promoting originality. But provide compensation to cultural heritage institutions to offset the costs they incur in making their collections available, perhaps through the creation of a tax credit for digitisation projects.
- Adopt a clearly defined exception from copyright for sufficiently transformative uses, which do not damage sales of the works being copied or result in derogatory treatment of the original. But provide clear guidance on what counts as transformative, perhaps by empowering the Intellectual Property Office as a regulatory body on the anticipatory model.

Why Copyright Matters

It is a truism to say that the UK is heavily reliant on the success of its entrepreneurs, innovators, and creators. But the kinds of investments they make, in "intangible", non-physical assets like intellectual property - patents, copyright, trademarks, and registered designs - constitute an ever larger proportion of the economy. In fact, for the past 15 years, investment in intangibles has already accounted for the majority of investment as a whole, with most of those intangibles in turn being affected by intellectual property rights.

Intangible and Tangible Investment



Source: Goodridge, P., Haskel, J., and Wallis, G. (2016) UK Intangible Investment and Growth: New measures of UK investment in knowledge assets and intellectual property rights. Intellectual Property Office.

But the system by which those investments are protected is deeply flawed, especially when it comes to copyright - a system that protects everything from film, musical recordings, written works, photographs, typography, and art, to musical performances, databases, and even software.

Significantly, unlike all other forms of intellectual property, copyright is awarded automatically — from the moment of creation. When you type, when you hit record, when you click your camera, or set brush to canvas, pen to paper, publish a book, or set hands to clay, then any original creative output is immediately copyrighted. Indeed, because of the lack of any registration system for copyright, one's creative output is generally assumed to be original, unlike patents, which need to be checked for their originality by highly skilled patent examiners before they can be awarded. The copyrightability of a creative work is ultimately *only* put to the test if it is challenged in court.

Moreover, copyright is protected for a long time, even if the rights are given or sold to another. Depending on the kind of work, many forms of

copyright will last for the creator's entire life plus an additional 50 to 70 years. Even the copyright owned by the UK government - Crown copyright - lasts for 50 years from the date of publication, and, in the cases of works that are unpublished, for 125 years from the date of creation. These terms are significantly longer than for other forms of intellectual property designed to encourage innovation and creativity. Patents, for example, not only need to be registered, approved, and paid for, but they last for only 20 years — after the first four years they even need to be annually renewed, at ever greater cost. Likewise, designs for products must be registered for full protection, with those protections lasting only 25 years. And, just like patents, the registration needs to be periodically renewed — in this case every 5 years.

Copyrighted works thus enjoy extraordinary privileges from the outset. Indeed, despite lasting for generations even beyond the creator's death, the rights themselves are also very strong. Owners have a total monopoly on all copies of their work, with very few exceptions, though the vast majority of the population do not realise it. There is, as one copyright scholar put it, a "general complacence and ignorance concerning Intellectual Property law".[1] It may surprise people to learn, for example, that in the UK there is no exemption for private copies of a work, and that infringements in some cases are not just a civil legal matter, but fall under criminal law. (Again, unlike patents or registered designs, which are purely civil matters). Whenever you download a copyrighted photograph to your computer without the owner's explicit permission, or even copy that file to another location on your computer, or print it out, let alone share it on social media or send it to a friend, then you are infringing copyright. Contrary to popular belief, the UK has no exemptions for private copying. Even if you legally bought a music CD and transferred the song to your MP3 player — a process known as format shifting — then unless the owner of the music gave explicit permission, you are breaching the law. Indeed, cloud storage services may be routinely enabling infringement simply by backing up the illegal copies you made on your hard drive. The same rules apply to trying to digitise your old VHS collection, or your vinyl records. Without a licence from the owner, this is illegal.

Much of the public are unaware of these issues. Back in 2015, when the government unsuccessfully attempted to legalise format shifting for private use (it was prevented by a legal appeal to the terms of an EU directive), polls suggested that only 15% of the public were aware that format shifting was not allowed.

The result of such widespread ignorance is that copyright infringement is rife — the vast majority of the public have likely infringed at least once in their life, probably unknowingly, or simply because they do not care. In fact, even creators themselves — the intended beneficiaries of copyright laws — are often operating under severe misapprehensions. It is widely believed among songwriters, for example, that one may copy up to five or

1 Joanna Teresa Demers, Steal This Music: How Intellectual Property Law Affects Musical Creativity (University of Georgia Press, 2006). Page 5.

ten seconds of someone else's recording for one's own song, or up to a few consecutive notes.[2] Yet no such rule exists. Depending on the context of the copying, artists who reuse even a handful of notes, or even a single second of another's song, may in fact be liable to prosecution. Real cases have hinged on much less.

This widespread ignorance is enabled by the manner in which copyright law is enforced. Despite the strength of copyright, the onus is on the owners to pursue people for infringement. As such, although there are no private use exemptions in the UK, the public are confident that they can get away with breaking the law. They share copyrighted images on social media without any qualms, expecting that at the very worst they might be told to cease and desist by the owner — not that they will be sued for damages, or threatened with criminal prosecution. Likewise, many musicians are in fact aware that copying a few notes of a song is illegal. But they rely on the principle of security via obscurity. Some 15 million new songs are uploaded to Spotify every single year — what are the chances, they think, of being caught out, especially if they are not especially popular or rich?

Indeed, some associations or lobby groups representing copyright holders have, in the face of the seemingly overwhelming tide of infringement, publicly stated they will not sue people for some limited forms of infringement. BPI, which represents the UK's major record companies, in 2006 announced that they would not pursue customers for copying CDs for their own private use.[3]

Yet this laxity is purely at the whim of the copyright owners, who have not given up their rights. They have simply said they will not sue — for now. Indeed, with changes to technology, it is becoming increasingly likely that members of the public, as well as less well-known creators, will in fact be pursued for their current or past infringements. Their grounds for complacency may well soon evaporate.

Already, a growing number of companies have begun offering services to copyright holders to pursue infringers and demand back-payment for the use of their images. There are already thousands of examples of people being pressured, under the threat of legal action, into paying extortionate amounts for the innocuous posting of unexceptional photographs they had simply found online and shared to a blog or tweet or personal website. The demands made by these services are generally out of all proportion to the damages to the affected copyright owners, and occasionally resemble ransomware notices by spammers. With their demands going beyond simple requests to cease and desist — usually the first action taken by reasonable people — these increasingly common services are in effect performing legal shakedowns.

Considering that the entire population has likely committed such

2 Ibid. & Joe Bennett, (2014), "Constraint, Creativity, Copyright and Collaboration in Popular Songwriting Teams" (PhD thesis, University of Surrey)

3 Andrew Gowers, (2006), "Gowers Review of Intellectual Property" (HMSO). Page 62.

innocuous acts of copyright infringement, much of the public will increasingly be at risk of such bullying tactics. Many otherwise law-abiding members of the public will likely thus submit to outrageous demands. Indeed, many creators are themselves likely to be increasingly penalised for potential infringements that may have been unintentional, minimal, or innocuous. They are increasingly likely to be threatened with legal action for creating things that bear passing similarities to copyrighted works, but are not actually copied. Although independent re-creation of something without copying is perfectly legal, proving that it was not a copy is becoming increasingly difficult. Traditionally, such cases hinged on whether the alleged infringer knew the rightsholder. Yet with the proliferation of so many creative works online, claiming ignorance of the original work is becoming ever more difficult. Indeed, existing case law establishes that copies are illegal even when done subconsciously and accidentally — the musician George Harrison, for example, was still found to have infringed copyright in 1976 for a case of cryptomnesia, in which he mistook a forgotten memory of a song (*He's So Fine*, by The Chiffons) for a new and original creation (his song *My Sweet Lord*).[4]

As things currently stand, those at most risk of suffering infringement suits (spurious or otherwise) are those who are most successful — pop stars are much more likely to be sued than jazz musicians, for example, who tend to make much less money from their music. Likewise, celebrities are more likely to be sued for uploading others' photographs to Instagram — even when the pictures are paparazzi shots of them — than ordinary members of the public.[5] Hence the widespread reliance by both creators and the public on obscurity as a defence against the threat of legal action. But as the technology to identify similarities between works improves — it is already widely available for images, and increasingly so for music, film, and more — so it will increasingly be a matter of whether copyright owners choose to pursue alleged infringers or not. Declarations like the BPI's, to not harass the general public for what they widely perceive not to be infringements, may at any moment be rescinded and past infringements punished, or at least threatened with demands for payment. Additionally, many rightsholders and their representative organisations never made such assurances in the first place. Digital technology, by lowering the costs of identifying infringement, just as it has for so many other services, is making it radically easier for both the wealthier and less wealthy rightsholders to at least threaten potential infringers. Indeed, by simply delegating these functions to legal shakedown services, who take a cut of the "recouped" licence fees, pursuing cases of infringement will become almost costless.

What is worrying about this scenario is that, as the following section will show, it may have a chilling effect on creativity as a whole, to the cost of the country's economy, society and culture. This is not to say that copyright

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4 Joe Bennett, (2014), "Constraint, Creativity, Copyright and Collaboration in Popular Songwriting Teams" (PhD thesis, University of Surrey). Page 81.

5 David Mack, (2019), "Ariana Grande Is Being Sued For Posting Paparazzi Photos Of Herself To Instagram". Buzzfeed.

owners should not defend their intellectual property, of course. But in response to the rising tide of mass infringement, enabled initially by the rise of photocopiers and printers, and increasingly by the use of digital technologies, almost all changes to copyright laws have generally favoured rightsholders over users, with ever longer durations, greater punishments, and very few exemptions. So we must now be prepared for the situation in which new digital technologies mean that those laws are instead suddenly very rigorously enforced. Rather than a situation of mass infringement, in which those laws were initially drafted, we must ensure that the system is designed in expectation of the age of mass enforcement.

Why Copyright Needs Reform

PURPOSE

The copyright system exists on the basis that it incentivises the production of creative work, to the benefit of society as a whole. Indeed, there is some evidence from economic history to back this up.[6] Patents and what we would now call copyrights were originally awarded by the monarch as temporary monopoly privileges, on the basis that risky and expensive creative ventures like publishing a book would be protected from copiers profiting from the creators' investment. Intangible assets, by their nature, have significant spillover effects — it is hard to police their use.[7] So state power was applied to temporarily aid creators in recouping their investment. Over time, however, these measures became increasingly enshrined in law, including international treaties, not just as ad hoc monarchical privileges that needed to be petitioned for, but as systematic and automatic rights. Their durations have steadily increased, from just a couple of years from publication, to lasting generations. They have been extended to more and more fields beyond just publishing — to essentially all kinds of creative work, with the exception of technology and product design (covered instead by patents and registered designs). Yet they have maintained their original raison d'etre — the encouragement, for the benefit of society, of original, creative work.

UNCERTAINTY FOR CREATORS

Rather than encourage creativity, however, an overly restrictive copyright regime — especially one in which already-strong laws become better enforced — might in fact stifle it. Especially if the rules around what counts as copying involve high degrees of uncertainty. Musicians, for example, given the greater ease of accessing and analysing their work for similarity with other songs, have become increasingly embroiled in cases where they are accused of infringing small elements of other songs — a beat, or part of a melody, or a few lyrics. They increasingly have to second-guess themselves during the creative process, checking things over for similarities with other songs, even when the resemblance is entirely unintentional, and increasingly seeking expensive guidance from forensic musicologists and other legal experts before publishing .[8] Indeed, the matter is not helped by the fact that the law is so unclear. As one leading forensic musicologist puts it, "unfortunately for songwriters, case law does not provide a reliable set of rules for what type of copying/allusion is permitted in the creative process."[9] This is especially problematic given all creativity in essence consists of combining, recombining, and improving

6 Giorcelli, M., & Moser, P. (2019). Copyrights and creativity: Evidence from italian operas. Available at SSRN 2505776.

7 Haskel, J., & Westlake, S. (2018). Capitalism without capital: The rise of the intangible economy. Princeton University Press.

8 Joe Bennett, (2014), "Constraint, Creativity, Copyright and Collaboration in Popular Songwriting Teams" (PhD thesis, University of Surrey). Page 80

9 Joe Bennett, (2014), "Constraint, Creativity, Copyright and Collaboration in Popular Songwriting Teams" (PhD thesis, University of Surrey). Page 106.

upon existing work.[10]

Inspiration is important, and we should take great care that copyright laws are not applied in such a way that they forbid it, as has begun to happen for certain types of creative works. Indeed, musicians are now routinely advised not to publicly cite their inspirations, in case it results in an infringement suit.[11] In commenting on a recent spate of musical cases in the US, leading forensic musicologist Peter Oxendale commented that "There would be no Beethoven without Haydn. Who would want to have lost his music?"[12] [13] And nor is this problem necessarily confined to musical copyright — it just so happens that that industry has experienced a number of recent technological transformations beyond what the framers of the current laws had envisaged.

GROWING COMPLEXITY

It is entirely reasonable to believe that a medium still in its infancy, such as software, which is subject to copyright, may one day become the subject of creativity-stifling court decisions at some point in the future — if, that is, remedial steps are not taken to guard against this in law. Software copyright in the UK lasts for the life of the author plus 70 years, so such issues are very likely to become increasingly important, as there will be a natural increase in the number of individuals or organisations that derive their income largely from the control of decades-old rights to legacy content rather than continuing to create new work — much as has already become the case with literary works, art, drama, music, and film. Creative works like video games provide especially gray areas of the law, given the multiplicity of creative works that they contain — from images, film, music, and recordings, to the software itself.[14]

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Video games have proliferated within a paradigm in which producers concentrate on producing new things rather than defending the old, and being almost entirely relaxed about the creation of heavily derivative works. But that will likely change as the economic incentives change and a distinct business model centred around profiting from legacy content emerges. The estates of authors or musicians for example routinely sue new productions that derive elements from the works of the long-dead creators they represent. It is not at all beyond the realm of possibility that the descendants of the producers of genre-defining games in the 90s may one day sue the latest works in those genres. So far, the lack of litigiousness has only persisted because of the structure of the market, and the current norms of the industry. But that is unlikely to persist as the industry matures. If the

10 Andrew Gowers, (2006), "Gowers Review of Intellectual Property" (HMSO).

11 Michael Hann, (2020). "A hit, a writ: why music is the food of plagiarism lawsuits". The Guardian.

12 Alex Marshall, (2016), "The Man Musicians Call When Two Tunes Sound Alike". The New York Times.

13 Peter Oxendale, Personal Communication.

14 Mac Sithigh, D. (2017). The game's the thing: properties, priorities and perceptions in the video games industries. In M. Richardson, & S. Ricketson (Eds.), Research Handbook on Intellectual Property in Media and Entertainment (pp. 344-366). Edward Elgar Publishing.

children of Marvin Gaye were able to get a successful infringement ruling against Robin Thicke and Pharrell Williams on the basis that a 2013 song simply had a similar "feel" — not even similar notation or melody or lyrics — to one that Gaye wrote in 1977, then we should expect similar issues to emerge with new and ever more complex creative works. (Although this was an American case, UK courts often take a lead from US and EU precedents, as copyright cases dealing with such specific grey areas are so few.) Indeed, that case was one of many that have muddied the waters of what counts as substantive copying, introducing confusion and lack of clarity for creators. The copyright system as it currently stands is thus a ticking time bomb of issues that are highly dependent on the decisions of judges and juries, but with vast consequences in terms of stifling creativity and innovation.

TRANSACTION COSTS

Even apart from the direct effects of copyright rules on the creative process, however, the system imposes significant transaction costs on all would-be users and creators. There may be many layers of copyright that a user has to deal with before they can safely use anything at all, let alone to combine those elements into something distinct. A composer wishing to sample a particular track, for example, may have to obtain permission from both the original composer and the owner of the recording. The copyrights may be distinct. If they wish to sample a track that was itself a cover, or a derivative work, they may have to obtain permission from the composer of the original, the performer of the cover, and the owner of the recording. Things get even more costly for more complex media. A film producer must of course obtain a licence to use a clip by another film-maker, but they may also have to clear the rights for any paintings or photos they happen to film, which might hang on a wall in the background, as well as to use scripts, stories, compositions, and particular recordings. Video games, in addition to all of the above, may need to clear their software permissions too. The more complex the creative work, the more transaction costs are likely to be incurred.

In a sense, these transaction costs are a necessary evil. Without the need to ask for licences, copyright would itself be meaningless. And many industries have begun to structure themselves in such a way that the ownership of works becomes more obvious — various collecting agencies, for a variety of media, have centralised the process, licensing work on behalf of creators. And the ease of online search has radically lowered the cost of identifying owners, of contacting them, and, if necessary, of paying them. Yet as a policy, we should explore ways in which the transaction costs of obtaining permissions might be reduced still further, while maintaining the security copyright protection — especially as the nature of creative works becomes ever more complex, as copyright durations have become so long, and as enforcement of copyright is likely to become easier. While some transaction costs might be inevitable, we should aim for them to be as low as possible.

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The Opportunity for Reform

The UK copyright system has frequently been a target for recent reform. Various government-commissioned reports have been published — most significantly the Gowers Review of 2006 and the Hargreaves Report of 2011 — that have made sweeping recommendations about intellectual property rights in general, while honing in on copyright in particular as the system in need of the most reform. Yet those reports' recommendations have only been partially heeded. Indeed, the Hargreaves Report itself complained of the "pile of IP reviews on the Government's doorstep — four in the last six years", which had gone unheeded.[15]

Almost a decade on, many of the original proposals have still yet to be fully implemented. And just as seriously, many of the proposals that were taken forward have failed before the final hurdle, or had problems with implementation. Many of them sought to keep the UK's copyright system up to date with rapidly changing technology, so the need for these reforms to be completed has become even more urgent.

Often, these proposed reforms were hampered by international treaties and EU laws that constrained what the UK was able to do on copyright unilaterally. Following Brexit, however, and the UK's decision not to implement the latest 2019 Copyright Directive, there is now an opportunity for the country to gain a competitive edge in innovation. The UK has the opportunity, in effect, to pick and choose the best elements of EU copyright law, as well as to implement some of the most pro-innovation and pro-entrepreneurial aspects of other countries' systems, without any of the elements that hold them back. It also now has the opportunity to implement copyright reforms that would place it ahead of all other countries in terms of encouraging creativity and innovation.

Incomplete Reforms

FORMAT SHIFTING

Most obvious among the incomplete reforms has been the introduction of an exception to copyright for format shifting for private use, such as the transferring of a legally bought song on a CD to one's personal MP3 player or computer. Such an exception was a key feature of the Gowers Review in 2006, and in fact was implemented in the UK in 2014, when it became permissible by an EU directive. But the exemption was rescinded following a legal judgement: the EU directive only permitted such an exemption on the grounds that if it materially affected the rights of existing interests they would be compensated. Such compensation in other EU countries often took the form of a tax on printers, computers, or other devices used for making private copies. The UK government attempted to implement the

15 Ian Hargreaves, "Digital Opportunity: A Review of Intellectual Property and Growth," Independent Report, May 2011. Page 1.

exemption without instituting any such tax or compensation scheme, in the belief that existing interests were entitled to no such compensation — a decision found by the court to have been based on insufficient evidence. Thus, despite the political will to enact it, the reform stalled because of EU rules.

Now, however, the UK is free to legislate for the introduction of an exemption — effectively legalising what the vast majority of the public have already been doing — without having to institute any kind of device tax, should it so choose. It should now take the opportunity to do so, as such private use has become even more widespread in the ensuing years.

Proposal 1: Create an exemption from copyright for format shifting for personal use.

TEXT AND DATA MINING

Similarly, the law has become out of step with more recent technological changes. Following the Hargreaves Review of 2011, the government implemented an exception for text and data analytics, for non-profit uses. It rightly recognised that the transaction costs of clearing permissions for files and text that were "copied" only insofar as they were used by a computer for analysis could be prohibitively expensive, especially for scientific researchers.

Yet they failed to foresee the widespread adoption of text and data analytics by companies that use machine learning, or Artificial Intelligence more broadly, as part of their business. As things currently stand, companies in the UK must license with the owners of existing databases, if that is even possible — as in many cases the dataset may itself be made up of the works of millions of different rightsholders. Indeed, the transaction costs of even searching for all the owners of data available on the open web, let alone obtaining their licenses, is prohibitively expensive, even for companies worth many billions of pounds, especially as they can do so without such costs in the USA (which has a more ambiguous situation, in which companies have been able to justify claiming exemption from copyright for all text and data mining, regardless of whether it is used for profit or not - so far, the courts appear to have upheld this exemption). The USA undoubtedly benefits from the ability of companies to appeal to a fair use exemption, especially in terms of staying at the cutting edge of new technologies like AI. Adopting a clear exemption for profitable uses of text and data mining would thus likely enable the UK to become more competitive in the creation of such technologies, rather than being a late adopter. Indeed, because of Brexit, the UK is no longer constrained by EU rules, which do not, as yet, permit an exemption. By adopting a clear exemption in law, the UK would likely even gain a competitive advantage over the US, where fair use for text-and-data mining is still in the process of being clarified through costly and lengthy court cases.

Moreover, the current situation in the UK accentuates problems of transparency and bias in how AI is trained. Companies can already train

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their AI on licensable collected databases that are already protected by database copyrights, or on data that has explicitly been put in the public domain. A potential risk here, however, is that by limiting the AI to licensed or public domain data rather than training it on the open web, this may introduce unforeseen and unpredictable biases. For a large company, this may not be a major issue, as they can potentially afford to buy many licences, and thereby to broaden the range of data. But start-ups and smaller companies may not have this luxury, instead being limited to cheaper, low-quality, or free data on which to train their AI.

And with regards to transparency, the law as it currently stands incentivises many companies to be reticent about sharing any details of how they train their algorithms. They rightly fear that revealing any details of how they have trained the AI may open them to copyright infringement suits — whether justified, accidental, or spurious. This is the case in the UK, certainly, where we can probably assume that much infringement is already taking place behind closed doors, and in the US also, where AI companies still face uncertainty about the strength of their fair use exemption. The overall situation is thus that many companies have strong incentives to keep quiet about their methods and sources. Providing a clear exemption for for-profit text-and-data mining would thus lift some of the barriers towards achieving more transparency in the AI industry, would benefit its startups and smaller companies, and would provide a clear competitive edge for the UK. Such an exemption would not weaken the rights of database owners, who would still be able to claim database copyright and restrict access to them, for example through paywalling. And it would not materially affect ordinary users of the web, whose uploaded material cannot already be exploited for revenue anyway, due to the impossibly high transaction costs of obtaining so many licences.

Proposal 2: Extend the exemption from copyright for text-and-data mining to for-profit uses.

ORPHAN WORKS

Yet another incomplete reform has been with the treatment of orphan works. These are works that are still under copyright, many of which were created generations ago, but for whom the owners are either unknown or untraceable — a situation that has become especially common in the twentieth century as copyright terms have extended to terms as long as 70 years after the death of the creator. Indeed, back in 2006 the Gowers Review estimated that a mere 2% of all creative works were commercially available. It cited the estimates that 40% of all printed works, 90% of archived photographs, and at least 50% of archived sound recordings had no recorded rightsholders .[16] The government likewise estimated that some 91 million UK creative works were orphan works.[17]

"The results of having so increased transaction costs are clear: in 6 years, just over 1,000 works have been registered — a negligible fraction of the tens of millions of orphan works, which will likely remain unused for generations."

16 Andrew Gowers. (2006). "Gowers Review of Intellectual Property" (HMSO). Page 69.

17 UK opens access to 91 million orphan works. Department for Business, Innovation & Skills, Intellectual Property Office, and Baroness Neville-Rolfe DBE CMG. (2014).

In response to this problem, the government in 2014 implemented an Orphan Works Register. If the owners of a work could not be found following a diligent search, then would-be users could apply for and pay for a licence to use the material for up to seven years (with the ability to renew). If the owners subsequently re-emerged, they could claim their licence fees from the accumulated fund, and reassert their rights to the material for future licensing arrangements. Yet in creating this system, the government failed to take into account the importance of transaction costs. By adopting the compromises suggested by groups of rightsholders, who worried that any policy to enable the use of orphan works would threaten their rights, they created a system that actually made orphan works even harder to use than before.

The principle of conducting a thorough search had already been in place, but the creation of the register meant that much more strenuous conditions were added to satisfy it — to the extent that the government recommends that any would-be users become amateur genealogists, purchasing wills and an Ancestry.co.uk subscription in order to track down the owner before even applying for an orphan works licence. Furthermore, on top of the substantial time costs that must be incurred to even apply for a licence, the government then added the requirement of applying and paying for the use of the orphan work up-front, even when no rightsholders may ever subsequently emerge to pay for them.

The results of having so increased transaction costs are clear: in 6 years, just over 1,000 works have been registered — a negligible fraction of the tens of millions of orphan works, which will likely remain unused for generations. Indeed, following the first year of implementation, when the system was most widely publicised and about a quarter of the works currently on the list had already been registered, not a single rightsholder had come forward to claim ownership.[18]

In order to encourage the use of orphan works, the government should instead adopt the principle of lowering transaction costs for would-be users, and perhaps to place some of the onus onto rightsholders. This is not to say that people should use copyrighted material without permission, but that the conditions of the register should be changed to reflect the principle that it would be better for the creative output of the twentieth century to actually be used, rather than to lie forgotten.

The system should allow would-be users to act first, without any lengthy application process, and suffer limited damages — if they can demonstrate that they have conducted a search. For works by unknown creators that are a certain number of years old — say, 35 years — and for works by known creators with untraceable heirs, if the creators have been dead for a certain amount of time — say, over 10 years — then the system should make the conditions for having conducted a diligent search especially lax. And when those conditions are satisfied, damages that can be claimed should be limited to zero, or perhaps at most the cheap fees currently demanded by

18 Orphan works: Review of the first twelve months. Intellectual Property Office. (2015).

the government for orphan works licences.

In order to facilitate this, the current government-hosted online register should be reoriented to instead enable the owners of works that are past those thresholds to register their ownership and make themselves known to potential licensees (perhaps subject to renewal every decade). In other words, if the works were over 35 years old without a known creator, or were by creators who had been dead for over 10 years, a search of the register would become the initial and more or less only step required for conducting a diligent search (save for cases where a simple online search for the works would reveal that they were already obviously being exploited by the owners). The register would thus act as a first port of call for would-be users conducting diligent searches, lowering transaction costs in using orphan works to just a couple of simple internet searches (first for ongoing use, and then of the register). Any unpermitted uses of works that had already been registered would, conversely, not be able to appeal for limited damages.

Such a system of limiting liability following the consultation of the register for older works would allow for the creative content of the twentieth century, much of which has been forgotten, to be unleashed to the benefit of today's creative industries. It would also incentivise the rightsholders of such older works to stake their claims, as well as providing an opportunity for rightsholders of lesser known works to advertise those works — all without at all threatening the copyright protection enjoyed by rightsholders who already currently exploit their works (which are, by definition, not orphan works at all). Current legacy content owners who regularly exploit their works should thus have no need to worry about such a change, and may even welcome the opportunity to very easily register their claims over older works.

Proposal 3: Limit liability for the use of orphan works that are of a certain age, provided the rightsholders have not registered the works on the government's Orphan Works Register

Adopting Best Practice

As well as improving upon past, recent reforms, the UK also now has the opportunity to adopt the best, and avoid the worst, of EU copyright regulations. Over the past decades, the UK's system has generally been informed by what takes place at the European level. But the 2019 EU Directive on Copyright has not been implemented into UK law, because the implementation period extended to a period after Brexit. Thus far, UK ministers have stated no intention to adopt its provisions, and indeed have said that they will not implement it. So the UK has an opportunity, even at this very early stage, to pick and choose the provisions that are best for the country.

UPLOAD FILTERS

Article 13 of the unimplemented 2019 EU Copyright Directive stipulates that online social media platforms bear some responsibility for preventing copyright material from being uploaded. Such an approach, however, would have forced services in the UK to use upload filters to scan works being uploaded and determine whether they are infringements. The cost of using such filters would likely be affordable only to the largest internet giants, with the directive punishing many mid-sized and smaller platforms.

More importantly, however, than the cost to internet platforms, would have been the effect of upload filters on the internet as a whole. Filters are unable to distinguish uses of material that come under exemptions — such as parody — which led some critics to call Article 13 the "meme ban". Likewise, there are various other possibilities by which upload filters might prevent material being uploaded that is in fact entirely legitimate, perhaps because it has been misidentified as being copyrighted, or because a purported owner's claims to ownership of the copyright is false. Upload filters thus threaten the freedom with which people use the internet, potentially preventing and stifling legitimate use of creative works of all kinds.

Given the EU has decided to go down this policy route, not implementing the measure, or anything like it, would make the UK considerably more attractive to internet services. Differentiation from the EU in this regard might also support home-grown challengers to existing US internet giants by not imposing additional costs on them, and would ensure that the UK does not stifle its population's flourishing online culture.

Proposal 4: Differentiate UK copyright from EU policy by not requiring online platform services to use upload filters.

LINK TAXES

Similarly, Article 11 of the EU Copyright Directive of 2019 stipulated that social media platforms and search engines should remunerate publishers of news articles for the brief preview snippets shown in links to the articles - a strengthening of copyright for publishers. In effect, such a "link tax" would force internet platforms to pay for linking to news organisations. They have already been implemented in Germany, Spain, and most controversially in Australia, where a proposed law explicitly targets Facebook and Google.

Yet implementing such laws has in some cases actually harmed news organisations, most affecting smaller media companies, as internet services simply reduce or stop providing the links rather than paying for them .[19] Indeed, Facebook has said it will block all links to news media in Australia should the government there pass a link tax. By not implementing such a measure, the UK would maintain its competitive advantage as an environment friendly to both internet companies and smaller media

19 Anna Solana. (2015). The Google News effect: Spain reveals the winners and losers from a 'link tax'. ZDNet.

organisations — such as local news organisations, and new media startups. This proposal involves simply not changing current UK copyright law, so it is neutral to current rightsholders.

Proposal 5: Differentiate UK copyright from EU policy by not implementing a link tax.

ORIGINALITY

As well as finding points of differentiation, the UK should also ensure that it does not fall behind the EU when it comes to the latest best-practice in copyright policy. The principle of originality, or of "intellectual creation", for example, is a core part of the American and most European systems, but in this respect is more ambiguous in the UK, where the principle of protecting the effort or skill involved in creation also applies. But this ambiguity has also led to potential abuses, with some individuals and organisations in the UK *claiming* copyright ownership over works that are simply photographic or digital reproductions of images that are already in the public domain.

When such claims have come close to being tested in UK courts, as in the case of the National Portrait Gallery vs the Wikimedia Foundation, they settled rather than establishing a legal precedent either way.[20] So cultural institutions like the NPG have continued to assert that they own the copyright to the digital images of works in the public domain. And have thus charged fees accordingly, to authors, film-makers, and various other creators. (Occasionally, they offer licences for non-commercial uses, but the extents of these licences are of course at their discretion, and subject to change, given they claim to reserve the copyright). Facilitating these practices, the Intellectual Property Office only offers ambiguity on the issue, stating only that "there is a degree of uncertainty regarding whether copyright can exist in digitised copies of older images for which copyright has expired", although in light of European Court of Justice decisions it thought it "unlikely".[21] Because this hesitant opinion by the IPO is based on European law, exiting the European Union may embolden those who are claiming copyright for such images.

The UK should provide clarity on the issue, by adopting a version of Article 14 of the 2019 EU Copyright Directive. In doing so, it should enshrine into UK law the principle that copyright is only extended to one's "own intellectual creation".[22] This would prevent abuses, and would ensure that the system remains focused on rewarding creativity, rather than on rent-seeking, as has always been intended. In enacting this reform, however, the government should consider offsetting the loss to cultural institutions

20 Grischka Petri. (2014). "The Public Domain vs. the Museum: The Limits of Copyright and Reproductions of Two-Dimensional Works of Art," Journal of Conservation and Museum Studies 12, no. 1: Art. 8,

21 Copyright Notice: digital images, photographs and the internet. Intellectual Property Office. Page 3.

22 Simon Stokes. (2019) Photographing the Public Domain: EU to Remove Copyright Protection from Public Domain Images. Blake Morgan.

that currently benefit from selling licences for images in their collections, especially as one major concern is that they might respond by simply restricting the availability of their images online. The government might do this by providing direct compensation, or perhaps through creating tax credits to cover the costs of digitising and hosting the images online (to be applied to taxes related to employment, as most affected institutions will be charitable and thus not liable to VAT or Corporation Tax). Indeed, such a tax credit for digitisation projects may have wider positive effects on making the UK's cultural heritage more broadly accessible.

Proposal 6: Adopt a version of Article 14 of the 2019 EU Copyright Directive, to focus the UK's copyright system on promoting originality. But provide compensation to cultural heritage institutions to offset the costs they incur in making their collections available, perhaps through the creation of a tax credit for digitisation projects.

Becoming a World Leader

As well as adopting best-practice from the copyright policies of other countries, the UK should also consider ways in which it can innovate in copyright policy, so that it has a system that is better at promoting creativity than anywhere else in the world.

One of the key differences between the British and the American systems, for example, is that the UK specifies exceptions from copyright in law, whereas the US has a much more flexible doctrine of "fair use". The advantage of a fair use system is that innovations in the creative industries do not need specific exceptions to be made for them ahead of time. One may act first without having to lobby for changes to legislation, making copies without requiring a licence and claiming fair use so long as the copying satisfies various criteria: for example, if the purpose is for education or noncommercial uses, or if the use is transformative in providing a different character to the work that will not impinge on the existing market for the work. It is this advantage that has led to the US seeing the creation of widely used cultural contributions like Google Books, or Archive.org, which have enabled authors' works to be more easily discovered, but which would not have been possible in the UK - neither service would fall under any of the clearly defined British exceptions, and the transaction costs of attempting to licence all the works that they provide access to would have been impossibly high.

"A system of fair use also has considerable drawbacks. Although it allows for flexibility in the application of its principles, it also seems to lead to considerable uncertainty and litigiousness."

Likewise, the US system provides flexibility for creative but derivative works, such as the writing of fanfiction, which arguably fall under fair use, but which in the UK require a licence. The BBC, for example, explicitly prohibits the unlicensed publishing of fanfiction for properties like Doctor Who, either in print or just online, even if it is noncommercial.[23] Yet the creation of fanfiction not only increases creativity as a whole, but can also

23 See Doctor Who - Frequently Asked Questions, BBC.

provide new and greater sources of revenue for the original by keeping a fan base alive.

Overall then, the fair use doctrine favours flexibility and innovation, and has thus been of great interest to British policymakers.[24] Yet a system of fair use also has considerable drawbacks. Although it allows for flexibility in the application of its principles, it also seems to lead to considerable uncertainty and litigiousness. So while it emboldened Google to create Google Books, the legality of the service still had to be tested in court, at the cost of considerable time and money. By creating an overall environment of litigiousness, the US system may also be biased against individuals, startups and smaller firms which cannot afford protracted litigation.

Whereas the UK provides both certainty and clarity by defining exceptions through legislation, the US fair use doctrine places considerable influence in the hands of judges and juries when defining the extent of copyright exceptions. This has led to situations in which the appeal to transformative fair use, especially for more complex media, has been watered down according to the judgements of non-experts, with the result that creativity has been stifled. Copyright in music, for example, provides a recent cautionary tale. A spate of copyright lawsuits in the past two decades have set a precedent for minor aspects of a composition to be the basis of successful infringement cases. The default view had long been that copyright claims were valid only for *substantial* copying of lyrics and melody, not for abstract elements like rhythm, beat, or "feel". But this came under especial attack in 2015 with the decision by jurors that Pharrell Williams's and Robin Thicke's song *Blurred Lines* had infringed Marvin Gaye's *Got to Give it Up*.

The decision, which weakens the transformative use defence by radically lowering the standard for what counts as "substantial" copying, has led to many copycat cases, with many artists now having to spend thousands in fees to musicologists and lawyers, or to clear the rights to samples that vaguely resemble what they had independently created — all to prevent even costlier infringement suits. Such a situation privileges much larger music producers and record labels, who are able to bear such costs, at the expense of poorer yet entrepreneurial interests.

An ideal copyright system should thus be one that enables innovative copying, but without the litigiousness or uncertainty of the US system. One way to do this may be to define, in legislation, an exemption from copyright for sufficiently transformative uses, with the caveat that those uses do not damage sales of the work being transformed or result in derogatory treatment of the original. Care would have to be taken, however, to provide guidance for courts in deciding what counts as sufficiently transformative, or in how to measure the market impact of a transformative work on the original, perhaps with reference to the case law

24 Andrew Gowers, (2006), "Gowers Review of Intellectual Property" (HMSO). Page 62-68.

of other countries, and in consultation with industry bodies. Alternatively, power might instead be given to the Intellectual Property Office to regulate the boundaries of the transformative use exemption, with a remit to promote creativity and innovation, while protecting existing markets for creators - a more proactive, principle-based and anticipatory regulatory role that might allow the copyright system to react faster to changing technological circumstances.[25] Transformative use exceptions were proposed for the UK in the 2006 Gowers Review, but never acted upon, largely as it was not permitted by the EU's 2001 Information Society Directive. Due to Brexit, however, there is now the possibility of implementing such an exception. But it must be done right.

Proposal 7: Adopt a clearly defined exception from copyright for sufficiently transformative uses, which do not damage sales of the works being copied or result in derogatory treatment of the original. But provide clear guidance on what counts as transformative, perhaps by empowering the Intellectual Property Office as a regulatory body on the anticipatory model.

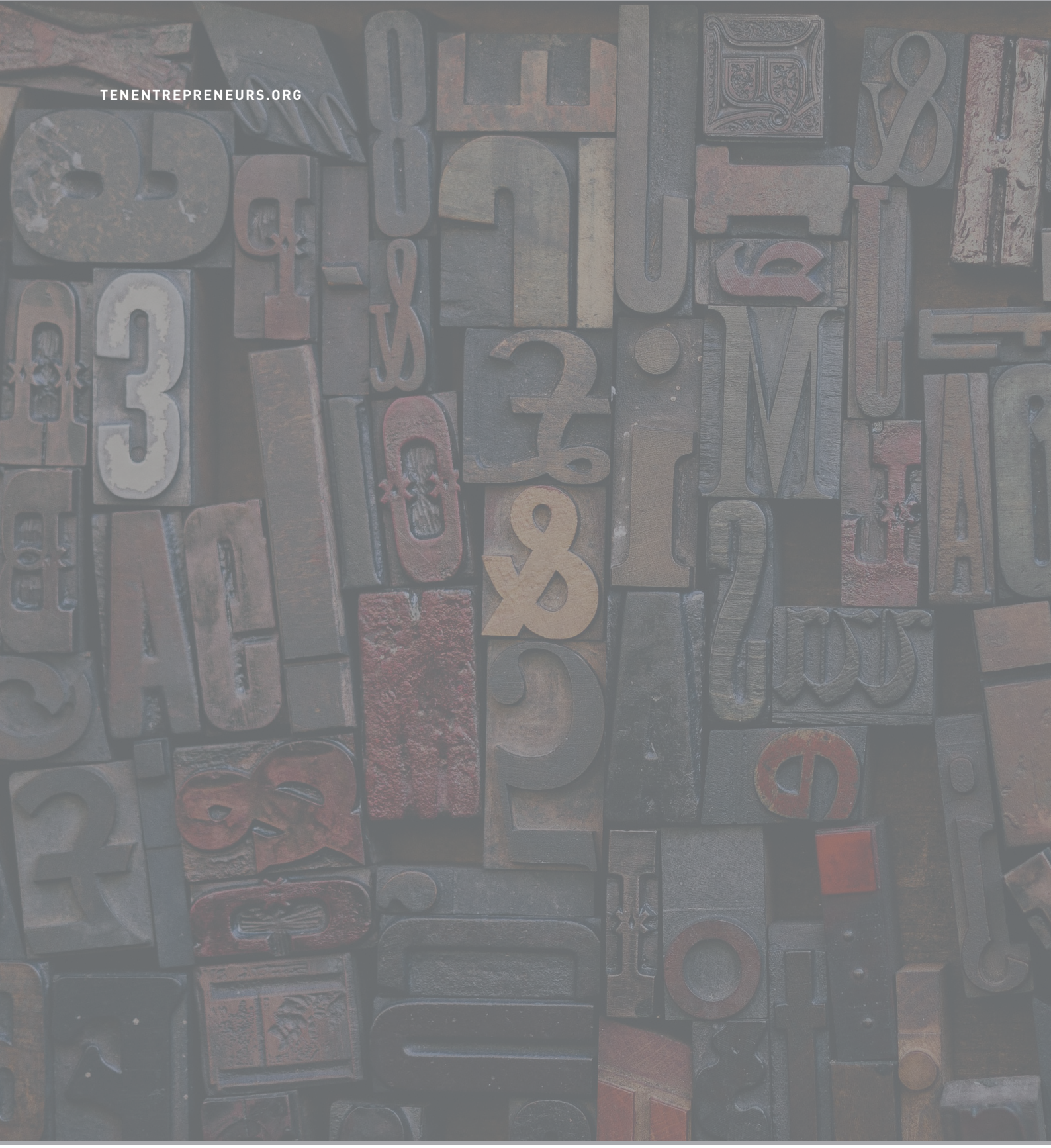
25 Harry Armstrong and Jen Rae. (2017). A working model for anticipatory regulation. Nesta.

Conclusion

This paper outlines some ways in which copyright might be tweaked for the better. As an issue of ever greater importance for the UK's creative industries, and for its economy as a whole, it is an area of policy that needs to be constantly monitored by policymakers - especially when the effects of copyright protections can be felt for generations, and the system is constantly faced by technologies that transform the works being protected, the nature of enforcement, and the very creative process itself. From print publishing, to music, the old mediums have been changed, and new ones like online publishing and video games have appeared.

As such, I have identified a few ways in which the system has not yet adjusted to technological developments, and sketched out the emerging scenario in which enforcement is becoming easier. Many reforms that were proposed a decade ago need to be completed, or taken further, while technological change has continued regardless. And with Brexit, the UK has an opportunity to distinguish itself from other copyright policy regimes, to make itself the most attractive place for creators of intellectual property in the world.

Throughout, I have tried to identify win-wins for creators and rightsholders - especially when they help reduce the transaction costs of reaching licensing agreement and create new markets for copyright-protected work, or when they reduce uncertainty. In other cases, where I have proposed new exemptions from copyright, I have tried to identify ways in which rightsholders may be compensated for any actual loss of revenue. In such cases, of course, rightsholders may disagree on the details, or raise objections that need to be ironed out. An exception for transformative use is likely to be an especially thorny issue, which would require detailed examination of all the different kinds of copyrighted works - especially if it is not to result in increased litigiousness and uncertainty. Getting around these problems may necessitate a much more powerful role for the Intellectual Property Office in determining the appropriate boundaries between inspiration and plagiarism, and what that role would look like would also be a topic of considerable debate. But having those debates is important. For if the system fails to adapt, then creativity and innovation - the very things that copyright was invented to protect - will suffer.



The Entrepreneurs Network
84 Eccleston Square
Pimlico
London
SW1V 1PX