All-Party Parliamentary IP Group Inquiry: The Role of Government in Protecting and promoting Intellectual Property

Open Rights Group response.

March 30th 2012.

We welcome the opportunity to respond to this inquiry. We do so with a very brief submission focused on copyright. Due to the short time frame permitted by the inquiry, we focus primarily on 'process', and our experiences of recent IP policy making by the Intellectual Property Office (IPO) and Department for Culture, Media and Sport (DCMS).

Broadly, we believe that consolidating policy making for intellectual property policy issues may help bring clarity and coherence to IP policy making. However, over and above which department is responsible for IP, it is critical that any policy making is characterised by democratic legitimacy achieved through openness, transparency, inclusivity and a commitment to evidence over supposition and assumption.

Relatedly, we would encourage the inquiry team to look at what the ideal ultimate forum for a review of the government's role in IP policy making might be, and at the need to ensure that the full range of perspectives are solicited. Considering the secretariat for this Group is provided via Luther Pendragon by the Alliance Against IP Theft, there may be questions about impartiality. Perhaps one solution, that both addresses this problem and recognises the validity and legitimacy of the Group's voice, could be to consider any report and findings generated through this inquiry to be one submission to a broader review undertaken by a more demonstrably impartial group.

The purpose of IP

Regarding the purpose of IP, we would repeat much of what we submitted in the introduction to our submission to the recently closed copyright consultation.[i]

Open Rights Group believes that respect for and enforcement of intellectual property is an important policy goal. However, poorly designed or implemented enforcement can significantly harm the Internet as a tool for the enhancement of innovation and growth and the promotion of freedom of expression and privacy. We also believe that the copyright 'rule book' needs some updating to ensure that consumers, creators and innovators alike can take full advantage of the opportunities that new technology affords.

Copyright is an economic instrument or mechanism for ensuring creators are rewarded for their work whilst also helping society reap the maximum benefits of their work. We believe that technology should help increase the creation of and access to information, culture and knowledge. This requires copyright law that reflects the new wonderful opportunities for creative or economically useful activity afforded by new technology. Promoting well framed exceptions for legitimate and useful activities is an important part of this. This requires an acknowledgement that exceptions do not in principle represent a 'weakening' of copyright.

That should go hand in hand with strengthening creators' position by, for example, encouraging fair markets in which they hold a stronger stake, improving the visibility of the provenance of a work and instances of works' reuse, boosting mechanisms of redress and remuneration, and by significantly improving relationships between creators and intermediaries such as collective licensing bodies.

We believe that the direction of travel of reforms set out by the Government in its recent copyright consultation, following the Hargreaves Review, will help to do this. Taken together, and with careful consideration of how to maintain or strengthen the legitimate control that creators retain over their works, these proposals represent a much needed shift in IP policy making that will ultimately encourage a cultural

and economic flourishing. Creators should see greater rewards, connecting their work with more people, and helping society learn from or build upon their endeavours.

Open, transparent policy making: learning from recent examples

With regard to proper policy making process, we believe it is helpful to compare recent policy making by the IPO and DCMS.

Here, we focus on process rather than the substance of policy making, given the nature of this inquiry. And we make these comments not because we prefer the conclusions reached by one or the other department (although it is likely not news to this inquiry that we are more critical of DCMS on some of the substantive policy issues), or because the two departments are in competition in any sense. We simply hope that the inquiry will, in considering the institutional arrangements, note the importance of openness, transparency and inclusivity. In this respect we believe the comparison is useful.

The IPO and the Hargreaves process

The IPO, through the 'Hargreaves Review' and the consultations regarding its implementation, asked that robust evidence be the driver of policy.

During that consultation they also held a number of consultation events with the full range of 'stakeholders' invited. Open Rights Group were present at some of these, and all perspectives seemed well represented. The consultation asked for clear and, where possible, publicly available evidence. The IPO created a subsection of their website that helped people track the process and included notice of related events and publications associated with the review.

If a stakeholder disagreed with or did not like the ideas or the evidence presented, the IPO consultation provided a clear mechanism to show them why. This has helped ensure that those promoting, defending or criticising any of the proposals are required to provide not only opinion and supposition – which are perfectly legitimate and useful to a point – but also as much evidence as possible.

The IPO provided a clear time-line to a coherent body of policy making work that facilitated broad engagement with the full range of stakeholders.

DCMS, the Digital Economy Act and recent roundtables

The DCMS revealed to us last year[ii] that they had no evidence to support the Digital Economy Act, except for that which was provided to them by industry. This very limited evidence, cited in the Impact Assessment for the Act[iii], was not available publicly or properly analysed or assessed by the Department. This situation was described by DCMS, in a hearing held by the Business, Innovation and Skills Committee in November, as the making of 'the best brick with the straw available.'[iv]

For the past year DCMS have been hosting roundtables that have seen creative industry trade bodies meeting intermediaries such as search engines and ISPs. We managed to establish that these roundtables were happening only through leaks, letters to the Minister[v] and Freedom of Information requests[vi].

Consumer Focus were allowed in to some of these meetings last year after initial concerns were raised. At the end of the year, Open Rights Group were invited to one broader roundtable discussion at which our concerns were raised. Documents under consideration, for example proposals made to search engines about how they should regulate search results put forward in a separate private meeting, were not shared[vii] until the very end of the year.[viii]

Ongoing discussions are not proceeding in a transparent or open fashion. We understand further private talks between rights holders and intermediaries have been held through early 2012. Again DCMS have done nothing to communicate what is happening publicly.

DCMS admitted[ix] they have no evidence of their own to support or steer these discussions regarding copyright enforcement.[x] The department says that they are simply encouraging voluntary agreements between industries, and that legislation will proceed if no agreement is forthcoming.

In the absence of guiding evidence or analysis, it is not clear how DCMS will assess when legislation is necessary, how they will judge any proposals represent the equivalent of good public policy, or what they believe the substance of any legislation should be.

The process has involved a narrow range of interests – a select group of rights holder trade bodies and intermediaries. This process has provided no channels for broader input, and certainly has not included channels for public input. It makes it hard to see how the full range of concerns can be built into any voluntary arrangements that may emerge.

This is undesirable when the roundtables are focused on proposals for significant new powers, effectively amounting to a digital power carve up that will establish who has power over what we are allowed to see and do online.

On metrics of openness and transparency, respect for evidence, and democratic legitimacy, the IPO have engaged in a better policy process than DCMS in the recent past.

Disagreement, bias and good policy making

IP policy making involves managing a complex mix of evidence, principle and opinion. Disagreement, and the management and reconciliation of those competing perspectives in the formulation of policy, are two separate issues.

Whatever position one takes on the substance of this debate about IP, there is a right way and a wrong way to make public policy. It has to be democratically legitimate, open, transparent and be grounded in robust evidence.

In practice this means that policy making for IP is transparent and inclusive. That requires a clear distinction be drawn between people or groups making the case for particular policies or representing particular interests, and those responsible for developing public policy.

There are responsibilities in this regard on both the policy makers, such as the IPO or DCMS, and stakeholders such as Open Rights Group.

For policy makers, they must formulate policy in an open and transparent way, driven by clear and preferably publicly available evidence and a clear analysis of the problem at hand. Good public policy will not always involve a facsimile of the interests of one or two stakeholders. In such a controversial policy area it is increasingly important for policy makers to recognise, understand and demonstrate this.

For stakeholders, we must respect others' perspectives and not mistake disagreement for bias. The latter means recognising that, where the process is properly open and clear, it may be possible for policy makers to disagree with a given stakeholder without necessarily being biased against them.

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i Our full submission to the copyright consultation is available at http://www.openrightsgroup.org/ourwork/reports/submission-to-the-ipos-copyright-consultation

ii See http://www.openrightsgroup.org/blog/2011/evidence,-copyright-enforcement-and-self-regulation and http://www.openrightsgroup.org/blog/2011/the-need-for-evidence

iii http://www.ialibrary.bis.gov.uk/uploaded/Digital-Economy-Act-IAs-final.pdf

iv http://www.openrightsgroup.org/blog/2011/evidence,-copyright-enforcement-and-self-regulation

v http://www.wired.co.uk/news/archive/2011-03/31/ed-vaizey-site-blocking

vi http://www.openrightsgroup.org/blog/2011/secret-website-blocking-proposals

vii http://www.openrightsgroup.org/blog/2011/private-copyright-policing-update

viii http://www.openrightsgroup.org/blog/2011/new-powers-over-search-results-proposed

ix http://www.openrightsgroup.org/blog/2011/the-need-for-evidence

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