

Review of Intellectual Property and Growth: Call for Evidence

on behalf of the Pirate Party UK*- March 4, 2011

1 Introduction

The Pirate Party UK is a political organisation registered with the electoral commission. It campaigns for significant reform to copyright and patent law, protection for personal privacy and government transparency, and greater freedoms of speech and communication.¹ It was formed in 2009 and has fielded candidates in elections for local government and the UK Parliament. It will be standing candidates in the Scottish Parliament elections in 2011, and intends to contest the London Assembly Elections in 2012 and European Parliamentary Elections in 2014.

The Party has links (through the umbrella organisation Pirate Parties International) with similar organisations in nearly fifty countries worldwide, and “Pirate” politicians have been elected or appointed to positions at local, national and international levels.

This response to the Independent Review of Intellectual will focus primarily on the impact of Copyright on small business and individuals, although will present case studies on other areas.

2 Duration and Scope of Copyright

The Party feels that the current duration of copyright represents a significant barrier to growth and poses a serious risk to the preservation of our culture and history. While material is automatically ‘locked away’ for such a long time there is a significant risk that the material can be lost or destroyed either directly, or due to the methods for accessing the original being lost (‘Digital Rights Management’ issues are also relevant with this but will be discussed later).

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¹It should be noted that the Party does not condone, support or encourage any illegal or unlawful activity

Duration of Copyright - hypothetical example

With a life expectancy of around 80 years in the UK, a work created when the creator was twenty would stay covered by copyright for 130 years. With an average age of parenthood of 30 years, this means that the original creator's great-grandchildren will own the copyright when it expires. This would make the ownership of the copyright hard to trace and is unlikely to be of much particular encouragement to the creator.

Source: Office of National Statistics

With regard to the duration of Copyright The Pirate Party strongly recommends a reduction from the current terms to a value closer to the original duration stated in the Statue of Anne. This length of copyright grants the holder sufficient privileges and a monopoly on the product for the length of time that generates the majority of the revenue derived from said product over time. Copyright protection for the sake of protection - as it were - is severely detrimental to the market, and to our culture as a whole, and a duration of the current length is a significant barrier of entry, and severely restricts competition.

Optimal Duration of Copyright A paper, published in 2009, attempted to derive an optimal copyright term based on economical analysis and a few empirical parameters. The paper found that the median 'optimal duration' was only 15 years with a 99 percent chance of it being below 38 years. This is significantly shorter than any copyright term in the UK, but is remarkably similar to the original duration.

Source: Forever Minus a Day? Calculating Optimal Copyright Term - Pollock, 2009²

A further issue exacerbated by the current duration of copyright is that of 'orphan works'. As copyright automatically applies to works, and lasts for such a long time, it can become particularly hard for the creator of a work to be identified. While it has been suggested that the solution to this problem is some form of compulsory licensing scheme, the Party feels that this is only a temporary fix. The underlying issue is the flexibility of copyright and the uncertainties it can create in the ownership of copyrights and the corresponding duration (dependent on the creator's life).

Shortening the duration of copyright could lessen the problems caused by complicated licence agreements (see below). At the moment, anyone wishing to set up a new content distribution system (for example, an online music site) must obtain individual licence agreements with all relevant copyright owners, which can be prohibitive.³ However, if more works were available in the public domain, these could be used to help establish a business as no licence agreements would be required (although there would be nothing preventing the business from paying the content creators directly) - once the business was established, it might be easier to obtain fair licences for newer content.

² Available at http://rufuspollock.org/economics/papers/optimal_copyright_term.pdf - accessed 4/3/11

³ *How The Record Labels Kill Off Innovative Startups With Ridiculous Licensing Demands*, Mike Masnick - <http://www.techdirt.com/articles/20100826/02422310780.shtml> - accessed 4/3/11

The Party would recommend shortening the duration of copyright in all cases and in particular, restrict all durations to fixed terms (rather than terms dependent on life times). This would increase the certainty of duration and ease to calculate this, as well as being 'fairer'.

Fixed Duration - hypothetical example

Consider two identical (literary) works created by different people. One has a life expectancy of merely a few years after the creation, the other has a life expectancy of 70 more years. As a result of this, the expected durations of copyright in the works are around 70 years, and 140 years. Despite the works being identical and their inherent 'value' being equal, the values of the copyright are considerably different.

As it is at the moment, the uncertainty of copyright is not related only to the duration but also the scope of copyright - in terms of what is covered. Due to the complicated nature of the rules on copyright; what is covered and what defences there are, it is hard for any individual or SME to know whether a certain action is lawful without seeking professional legal advice with the associated costs.

This gives individuals and SMEs the choice of obtaining advice to gain some certainty, risking significant costs or damages if they breach copyright, or avoiding anything that could involve copyrighted material. This would demonstrate a clear barrier to growth and development.

Consumer Uncertainty over Copyright

A survey commissioned by Consumer Focus in 2009 found that 73% of people admitted to being uncertain over copyright law. Obviously this only represents those who are aware of their lack of knowledge, not those who think they do understand copyright law but do not. This is reflected by the fact that 15% of respondents knew it was illegal to copy a purchased CD or DVD to an 'iPod' for personal use. It is clear that the majority of consumers (and therefore, likely SMEs) do not understand copyright law.

Source: Consumer Focus⁴

The Party recommends drafting a new Copyright Act, simplifying the law wherever possible.

3 Licensing

The Party feels that licensing issues are also a barrier to growth. This is focused into three main areas; licensing agencies, implied licences and end user licence agreements.

⁴*Outdated copyright law confuses consumers:* <http://www.consumerfocus.org.uk/news/outdated-copyright-law-confuses-consumers> - accessed 4/3/11

Licensing Agencies

In the UK there are several major copyright licensing agencies. The Party feels that these agencies occupy a position that is problematic as they are neither competitive nor particularly transparent. Copyright owners are given little choice if they wish to license their works; they either have to accept the terms of the particular agency or try to license their work personally. Questions have also been raised over licensing agencies being overly aggressive in protecting copyright or trying to collect royalties for works outside their catalogues or already licensed.

Copyright Licensing Agencies

An investigation by a Belgian TV show into SABAM, the Belgian association of authors, composers and publishers, found that the organisation was happy to 'license' works that they were not able to license (due to the works not existing).⁴

In another example from 2009, a shop assistant was threatened with a fine by the Performing Rights Society for singing while stacking shelves. While the threat was withdrawn after media pressure, the Society was within its legal rights to demand payment (or take legal action) against the individual. If the story had not reached the media it is entirely possible further action could have been taken.

Sources: TorrentFreak⁵ and BBC⁶

The Party recommends encouraging either competitive licensing bodies, or more transparent, better regulated organisations to ensure that copyright owners and licensees get a fair deal.

An alternate option might be to look into encouraging the creation of "one-click licence" catalogues, whereby copyright owners can register their copyrights on a central system, with their own licensing terms. Anyone then wishing to use the work could easily check the database and directly purchase a licence for the use they require without needing to go into negotiations. This could speed up and simplify the process of licensing and close the gap between the copyright owner and licensor that is created by licensing societies.

Implied Licences

Another area of difficulty and confusion is that of implied licences, particularly with regard to websites. At the moment there is a great deal of uncertainty as to whether websites grant their visitors implied licences to copy the content for their personal use. The same applies to emails and other electronic communications, which could be covered by copyright and so the act of reading (or forwarding) an email or text message could be

⁴The show itself is available in Dutch; <http://www.een.be/programmas/basta/sabam-en-de-makro-artiesten> - accessed 4/3/11.

⁵Music Royalty Society Collects Money For Fake Artists, Bathroom Equipment and Food - <http://torrentfreak.com/music-royalty-society-collects-money-for-fake-artists-bathroom-equipment-and-food-110308/> - accessed 4/3/11

⁶Apology for singing shop worker - http://news.bbc.co.uk/1/hi/scotland/tayside_and_central/8317952.stm - accessed 4/3/11

an infringement of copyright. While some websites will have licence agreements in their “Terms of Use” or similar, these are often not particularly clear or easy to find.

The NLA v Meltwater⁵

Many of these issues were raised before the High Court in the case of *The NLA v Meltwater* where it was held that there was a *prima facie* infringement of copyright merely in receiving an email or visiting a website. In particular, it was noted (at [104]) that “[a]n End User who uses the share function to forward a headline Link (and, a fortiori, an End User who simply forwards an email) ... will make further copies and thus further infringe. Such forwarding will also be issuing a copy to the public under s. 18 CDPA.” While implied licences were suggested, the judge was not convinced by the arguments.

The Party recommends that the law is clarified with regard to electronic communication and implied licences - in particular, making it clear how visiting websites and/or receiving emails interact with copyright law.

End User Licence Agreements

The Party is also concerned with the validity of the extensive use of exhaustive End User Licence Agreements (“EULAs”) that explicitly limit the use of software to extremely unrealistic levels. Users are often required to agree to these licences in order to install or use software. Often these agreements are particularly complex, technical and ignored by the user. In addition they can contain terms that are particularly burdensome on the user.

⁵ *The Newspaper Licensing Agency Ltd & Ors v Meltwater Holding BV & Ors* [2010] EWHC 3099 (Ch) - <http://www.bailii.org/ew/cases/EWHC/Ch/2010/3099.html> - accessed 4/3/11

parties, as judgments are more likely to be made based on the arguers rather than the arguments.

Fair Use and Unbalanced Parties - hypothetical examples

There are two particular examples of note; in a situation where a small party (A) - an individual or SME - is using copyrighted material in a particular way and receive a threat of legal action from the copyright owner (B) - a much larger organisation. While A may claim fair use, if B disagrees, A may be unwilling or unable to spend the resources to defend themselves in court and successfully argue that the use was fair.

Secondly, a situation where the roles are reversed (for example, a photographer with their picture being used by a major news agency), where the larger party might claim fair use as a defence, and although the copyright owner may feel otherwise, they are unable to invest the resources required to challenge the defence.

The “fair use” defence will likely be even harder to argue with no domestic case law to base decisions on. While there is some (limited) case law on the current “fair dealing” even this is uncertain enough to cause confusion. Making the possible defences even less precise is unlikely to be of much benefit to the general public or SMEs.

Righthaven and Fair Use

Recently there have been a number of cases of copyright infringement brought in the US by Righthaven LLC, a Las Vegas-based company. In many of the cases the defence of “fair use” has been raised and despite it being relatively clear the defence was valid, the cases were brought. Without a clear definition of the defence, it is much harder to argue it outside (or inside) a court. A selection of articles containing Righthaven and “fair use” is easily obtainable.

Source: [Righthavenlawsuits.com](http://www.righthavenlawsuits.com)⁹

The Party recommends that, rather than creating imprecise, broad defences, copyright law be changed to give positive rights, rather than negative rights. Currently copyright applies to a wide range of material, automatically, in all circumstances unless a specific defence applies. A better option might be for the law to set up a list of specific cases where copyright will apply. This would add much greater certainty to the law, and make it clear where copyright will and will not apply.

In particular, copyright defences should be strengthened in terms of educational and personal use, and with regard to freedom of expression. In the case of educational use, the Party feels that existing copyright laws are acting as barriers to the spread of academic knowledge and learning. This is particularly clear with certain academic journals who may charge particularly high prices for access to their content, as well as charging academics for publishing their papers. This can even be used to restrict the author’s access to their final paper.

⁹<http://www.righthavenlawsuits.com/articles.html> - accessed 4/3/11

Academic Journals and Copyright A recent example of this was when the professional societies ACM and IEEE changed their copyright policies so that the authors of papers were required to sign over the copyright of their own work to the organisation, and were no longer allowed to make their paper available anywhere else (for free or otherwise).

Source: *Exhaustive Search; Science, Security, Curiosity*¹⁰

In addition to issues surrounding academic use, the Party also recommends adjusting the law to ensure that copyright cannot be used to stifle freedom of speech. It is clear that copyright “is antithetical to freedom of expression”¹¹ and so care must be taken to prevent copyright being used as a form of censorship (as has occurred elsewhere).

5 Enforcement of Rights

The Pirate Party has strong views concerning the appropriate ways of enforcing rights. There is a tendency among copyright owner umbrella groups to focus more on enforcing and extending their existing rights than developing new content or business models. Recently, the Motion Picture Association of America was focussing on “increasing the federal government’s efforts to stop online film piracy” as its top priority.¹² The Party feels that copyright owners should be encouraged to produce more content as well as enforcing or extending copyright.

The Party also feels that the approach being taken by some groups is inappropriate and should be discouraged. In particular, effort is being wasted pursuing those committing minor infringements of copyright (which, one imagines, occur on a daily basis, often innocently). Action should only be being taken against those causing significant damage. While this is reflected in the law - the Copyright Act recognises that an “infringement of copyright is actionable” and “relief by way of damages”¹³ is available but must be based on actual losses suffered - this is not always reflected in the actions or statements of copyright owners or umbrella groups.

¹⁰Shaking Down Science - Matt Blaze; <http://www.crypto.com/blog/copywrongs/> - accessed 4/3/11

¹¹Lord Phillips MR, *Ashdown v Telegraph Group Ltd* [2001] EWCA Civ 1142 at [30]; <http://www.bailii.org/ew/cases/EWCA/Civ/2001/1142.html> - accessed 4/3/11

¹²Report: Dodd on verge of becoming MPAA chairman; <http://thehill.com/blogs/hillicon-valley/technology/145389-report-dodd-on-verge-of-becoming-mpaa-chairman> - accessed 4/3/11

¹³S.96, Copyright, Designs and Patents Act 1988; <http://www.legislation.gov.uk/ukpga/1988/48/section/96>

Damage Caused by Copyright Infringers to the Music Industry

The Music Publishing Industry claims to be making around £200m less a year due to copyright infringement - although this is likely to be an upper bound on the damage done. There are also estimated to be around 7.3 million people “engaged in unlawful filesharing”. By examining these statistics, we can estimate how much ‘damage’ each person is causing.

$$\text{damage per person} = \frac{\text{£200million}}{7.3\text{million}} \approx \text{£25}$$

While the damage that it is claimed is being done may be high, on average any one person is causing minimal damage (which is, in turn, spread across a large number of record publishers).

*Source: British Phonographic Industry*¹⁴

The Party recommends that emphasis is placed on punishments for copyright infringement being based on actual damage done, not on any hypothetical losses or statutory minimums. The Party strongly discourages the excessive use of copyright law to “make examples” of a few individuals in order to discourage many others.

Another significant issue concerning the enforcement of copyright is the use of “Digital Rights Management” technologies. DRM often consists of technical measures that place restrictions on the use of content or material. However, these can reduce access for legitimate users but are easily bypassed by those who wish to. DRM and its related technologies are constantly, and consistently criticised by academics, businesses, newspapers, pressure groups and political Parties alike.

Criticism of DRM In 1997 Richard Stallman (GNU, FSF) wrote an article in *Communications of the ACM* (Volume 40, Number 2) titled ‘The Right To Read’ detailing a dystopian world where you can be sent to prison for letting someone else use your computer, and it’s notes expanding on the real world issues that are alluded to in the piece. Later, in 2003, John Walker (AutoCAD) wrote ‘The Digital Imprimatur: How big brother and big media can put the Internet genie back in the bottle’ which proposes that DRM will be the first step towards total Internet censorship and surveillance.

Damian Kulash Jr published an OpEd article in the *New York Times* (December 6 2005) about DRM exposing users to viruses under the title, ‘Buy, Play, Trade, Repeat’.¹⁵

Gabe Newell (Managing Director and Co-Founder of Valve Corp.) stated in an interview with that DRM “[is] just dumb” and that company’s should “create greater value for customers through service value” rather than “decreasing the value of a product”.¹⁶

DRM will severely reduce the ability of future historians to create an accurate portrait

¹⁴BPI - File-sharing FAQs; <http://www.bpi.co.uk/digital-music/article/online-faqs.aspx> - accessed 4/3/11

¹⁵Buy, Play, Trade, Repeat; <https://www.nytimes.com/2005/12/06/opinion/06kulash.html> - accessed 4/3/11

¹⁶Gabe Newell Says DRM Strategies ‘Are Just Dumb’; <http://www.1up.com/news/gabe-newell-drm-strategies-dumb> - accessed 4/3/11

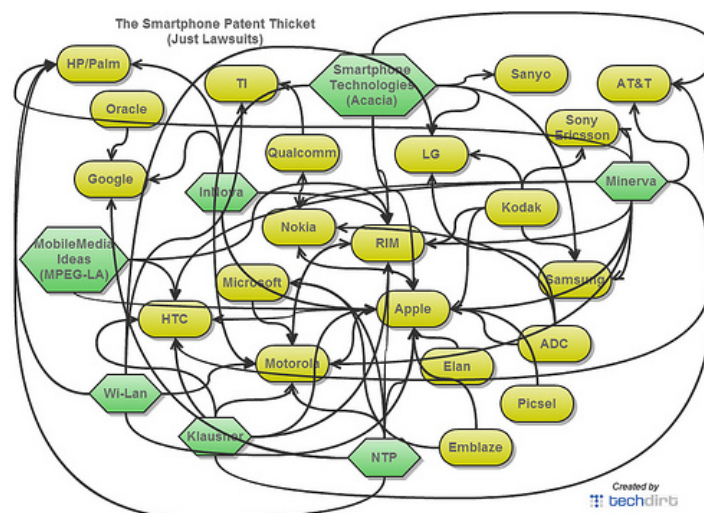
of the late 20th/early 21st-Centuries as restrictions on content will have very real restrictions on the accessibility of data and information due to unsuccessful data recovery. In addition, DRM can be used to prevent lawful use of content as anti-circumvention laws (such as s.296ZA of the CDPA) make it illegal to circumvent “effective technical measures” even for some lawful ends.

The Party suggests there is some need to warn the public about DRM technology, in particular, products that can be remotely turned off or altered by the manufacturer, or products that ‘phone home’ and would therefore stop working if the manufacturer went bankrupt, or products that are ‘region coded’. The Party recommends implementation of a form of warning system on products restricted by DRM, methods to ensure that the DRM can be removed if it no longer functions or the copyright has expired, and defence to prevent DRM being used to restrict lawful use.

6 Other Issues

The Party has some concerns over the use (or abuse) of patent laws. There seem to be many cases where patent lawsuits are being used either to hinder competition or in “vendettas” between different companies. Due to the possible breadth of patents and how close areas of development can be, it seems that many companies are required to obtain patents simply to defend themselves from patent lawsuits by others, or to use them to counter-claim in such cases.

Patents and Mobile Phones Issues of patents being used to hinder competition are most clear in the mobile phone industry where there are (at any one time) a large number of lawsuits between the different parties involved. This is demonstrated by the following diagram, with each arrow representing a lawsuit:



It is unlikely that all of these lawsuits are aimed at promoting innovation.

Source: *Techdirt - Meet The Patent Thicket: Who's Suing Who For Smartphone Patents*¹⁵

The Party recommends a closer examination of patent law to ensure that it is being used only as a means for encouraging innovation, not simply for direct profit through litigation.

The Party also has concerns over the use of patent or trade mark law to prevent trade between other countries by seizing materials passing through the UK (or EU). The Party recommends that law make it clear that any items merely ‘passing through’ the UK should not be seized for infringing on patents or trade marks that would not be valid in the country the materials have come from or their destination.

This was recently made clear when a Maltese Court ruled it acceptable to seize material (in this case, pharmaceutical products) passing through Malta on the way from India to Libya; where there was no infringement.¹⁶

“European and British consumers are paying for the outsourcing of trademark protection in third countries as private enterprises have increasingly moved for customs authorities to enforce injunctions against goods that are not destined for the territories within which those authorities technically do not have jurisdiction. Apart from the extra costs incurred on state treasuries, this also disrupts markets in third countries where European enterprises otherwise could have established presence.”

Amelia Andersdotter - elected MEP for Sweden

The Party also considers it unusual that the ‘moral’ and ‘economic’ rights contained in copyright are tied together. The Party suggests separating the two ideas, extending the former and restricting the latter.

¹⁵Techdirt, Mike Masnick; <http://www.techdirt.com/blog/wireless/articles/20101007/22591311328/meet-the-patent-thicket-who-s-suing-who-for-smartphone-patents.shtml> - accessed 4/3/11

¹⁶“They shall not pass”: Maltese make a fake-trader cross; <http://ipkitten.blogspot.com/2011/03/they-shall-not-pass-maltese-make-fake.html> - accessed 4/3/11

7 Recommendations

In summary, the Party recommends the following:

1. Reducing in the duration of Copyright and related rights to below 30 years, ideally 15 years.
2. Reducing the duration of copyright and related rights to fixed durations.
3. Creating a new Copyright Act, simplifying the law wherever possible.
4. A thorough examination of licensing laws and agencies to ensure fair deals are available for all.
5. Encouraging the establishment of “one-click” licensing services.
6. Clarifying how copyright law interacts with electronic communication such as websites and emails.
7. Clarifying the nature of End User Licence Agreements.
8. Restricting copyright law to specific cases and areas, rather than creating new, broader defences.
9. Ensuring there are adequate defences to protect academic use and freedom of expression
10. Emphasising that copyright and related rights should be enforced primarily in direct proportion to the damage done.
11. Ensuring patent laws are used to encourage innovation, not merely for directly profiting through litigation or ‘forced licensing’.
12. Separating the moral and economic rights contained in copyright; extending the former and restricting the latter.

