Economics of Copyright Collecting Societies and Digital Rights: is there a case for a Digital Copyright Exchange?

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Introduction

In her excellent article presented at last year's SERCIAC, Nancy Gallini (2011) presented some new insights into the economics of copyright collecting societies by comparing them to patent pools and concluded that the case for collecting societies as transaction cost minimising natural monopolies was still sound. At the end of the article, she suggested that her conclusions might be changed by the spread of digital rights in copyright works and that is what I consider in this paper. She argued that if new technologies lower the costs of licensing, monitoring and enforcement, there would be a tendency to more decentralised alternatives to collective administration; but on the other hand, extensive unauthorised use might make collective licensing more important.

In this paper, I discuss the first point in the context of the current discussion in the UK about the formation of a Digital Copyright Exchange (DCE), for which two basic arguments were put forward in the Hargreaves Review (2010): one, that a central exchange could more efficiently handle cross media (and possibly cross national) licensing of digital rights of all types of works than is the case in the current situation in which a collecting society manages a restricted bundle of works in particular media, thus making it necessary for some firms that deal with multi media, such as broadcasters, to obtain licences from several societies; and two, that this would introduce competition into the 'locked-in' system of collecting societies, each with its specific bundle of rights, territories and administrative procedures, which are held to be anti-competitive, lacking transparency and inefficient and, more to the point for this paper, unable to handle the needs of new digital platforms.

The paper begins by asking what evidence the UK government has so far produced on the proposed DCE and then discusses two relevant questions economists would ask: are digital rights fundamentally different in economic terms from analogue rights and if so, does that negate the acceptance of the natural monopoly of existing collecting societies? Secondly, can effective competition or contestability be introduced in to the world of collecting societies? These should throw light on the economic case for the DCE.

UK Government research on the DCE

The UK government has a policy of evidence-based policy-making (Mitra-Khan, 2011) which typically proceeds by appointing an independent person in a position of authority but usually with no specific expertise in the topic under examination to head an enquiry to produce evidence on which policy can be based. In relation to copyright law, there

have been three such enquiries in the last few years – the Gowers Report (2006), the Hargreaves Review (2010) and now Hooper's study *Rights and Wrongs* (2012) which is phase 1 of the inquiry into the feasibility of a Digital Copyright Exchange (DCE) proposed by hargreaves. Each of these reports has a different emphasis: Gowers was to investigate whether the whole IP system was 'fit for purpose in an era of globalisation, digitisation and increasing economic specialisation'; Hargreaves was asked to report on whether the current IP framework was 'sufficiently well designed to promote innovation and growth in the UK economy'. Both these reports covered the whole range of IP, concluding broadly that aspects of copyright law and its administration were in need of reform. The Hooper inquiry has the specific task of considering the case for Hargreaves' proposal of setting up the DCE and phase 1 presents evidence from a dubious questionnaire and the findings of the inevitable stakeholder discussions held over the previous few months. Each of these inquiries had calls for evidence (the submissions to which are published), which impose considerable costs on responding organisations and individuals and which are typically biased towards the larger commercial interests that have the resources to submit their case. Though Hargreaves specifically deprecated what he termed 'lobbynomics' evidence (Mitra-Khan, 2011), the predominance of experienced evidence-providers is hard to avoid; moreover, there are other such enquiries calling for submissions in the EU and there is a tendency for stakeholders to produce generic responses.

The Hooper study

Hooper's call for evidence was in the form of a questionnaire, to which stakeholders were invited to respond. It in essence elaborated on what is called 'the Hargreaves Hypothesis': '*Copyright licensing, involving rights owners, rights managers, rights users and end users across the different media types, in the three defined copyright markets, is not fit for purpose for the digital age.*' Hooper (2012; 53). Respondents were invited to agree of disagree and to give their reasons and evidence for their replies. As may be seen from Annex 2 of the study, the 'questionnaire' was actually a list of value-laden statements bundled together; there was no opportunity for the respondent to identify on the response sheet those which they agreed with or to what extent (agree strongly … don't agree at all), requiring respondents to write at length what they thought. Apart from contravening normal practice of eliciting replies, it imposes greater demands on respondents and both lowers response rates and biases replies to those organizations and individuals with the time and inclination to reply.

The response rate from an open call for evidence cannot be calculated and so there is no way of knowing how representative the responses are. There were 117 responses to the questionnaire and the study lovingly reported responses to each question in percentage terms. For example: 'Of the 117 responses, 26 (22%) broadly **agreed** with the hypothesis that copyright licensing was not fit for purpose, whilst 61 respondents (52%) broadly **disagreed** with the hypothesis, 18 respondents (16%) both agreed and disagreed and 12 (10%) didn't provide a definite answer. Of those who disagreed with the statement, some agreed that in some areas there was opportunity for 'improvement'. Respondents were reported as reflecting the wide and varied nature of those participating in the copyright licensing 'space': libraries, museums, music publishers, print publishing, image

publishing, and education amongst others' (Hooper, 2012: 57). Reporting of responses and figures leaves much to be desired and is meaningless in places. For example, what does it mean to say that SMEs make up 90 per cent of the creative industries: measured how? In terms of the number of firms? Value of turnover? Number of employees? It is true that there are many SMEs in these industries but to put so precise a figure implies some criterion and that is not stated. This loose thinking characterises almost all the reporting of data. These methods do not obtain objective responses and so do not result in valid evidence.

The study set out to evaluate whether copyright licensing in the UK is 'fit for purpose' (a phrase beloved of the UK government) without attempting to define what it meant by that. It could be interpreted to mean is it efficient and/or is it fair? Both aspects seem to be considered. Efficiency could mean 'economic' efficiency, as, for example, in setting a price that just covers the cost of supplying the service, or it could mean 'administrative' efficiency, for example, minimising transaction costs. The latter appears to be the dominant issue in the study. Equity issues are also referred to – a 'fair royalty'- but no attempt is made to define that either. Much is said in the study about the cost of obtaining rights being 'expensive' and 'high' but there is little attempt to meaningfully define 'expensive' for example, the BBC's frequently quoted shock-horror £10 million licensing costs needs to be set in the context of its nearly £5 billion revenue; the BBC is in the business of rights licensing and sales! What is not considered at all is that if users are prepared to pay 'expensive' prices, the market would be economically efficient. Additionally, transaction costs are referred to vaguely as if there is a standard definition and they are an economic 'bad', though those employed in the transaction cost areas of licensing (as in other industries) are of course contributing to the macro economy just as other workers are and are included in the oft repeated data on the contribution to the economy of the creative industries. It is incorrect to confuse the microeconomic problem of deadweight loss with reducing macroeconomic growth.

The question that should be asked is: are the administrative costs of copyright licensing *unnecessarily* high and if so, why? The Hargreaves Review suggested that it was because there was insufficient competition in licensing services, mainly those provided by the various collecting societies. Competition is not discussed in the *Rights and Wrongs* study and the point is firmly made early on that *Rights and Wrongs* is not about competition issues in the 'industries'.[1] That need not exclude discussing competition in licensing services, though, and it is a pity that was not gone into. To economists (and Hargreaves) collective licensing by collecting societies is viewed as a regulated natural monopoly and it has been noted that so do competition authorities for the most part (Gallini, 2011; Katz, 2006); however regulation varies considerably by country - in the UK it is only by resort to the Copyright Tribunal.

What was not considered by Hooper was whether the case for collective licensing is fundamentally altered by digitization. One of the problems listed in the study is 'repertoire imbalance between the digital and physical worlds'; is that an attempt to raise

[1] Evidence submitted to both the Hargreaves Report and to the Hooper study by some parties had argued that problems in copyright contracting emanated from the oligopolistic nature of the creative industries.

that question? What is not known is the proportion of digital and non-digital material that is being handled by the collecting societies (evidence that could have been asked for in the Call for Evidence). That is clearly relevant to the case for the DCE.

The study consistently takes the view that copyright licensing for digital works can be improved. There are hints here and there that digital rights management (DRM) would improve matters but there is no evidence offered on how collecting societies could adopt better technical means to do so. DRM is an ambiguous term that could mean management of digital rights and digital management of rights, which in principle would also be used for non-digital material but that is not discussed. It is suggested that digital methods would enable 'knowing exactly' what uses are being made of works and allow rights owners to be 'correctly' paid for their contribution. The study does not always seem to report objectively and displays a tendency to look for trouble. Despite the fact that the majority of respondents replied that they found copyright licensing 'fit for purpose', the authors remain convinced they can do better.

What economists want to know

I now turn to the matters that economists would want to investigate in order to evaluate the case for a centralised copyright exchange, a 'one-stop shop' for digital rights which would offer a central clearing house on who owns what and where to go for a licence and that may possibly also act as a licensor itself, though that has yet to be decided. In order to evaluate the DCE proposition, we need to ask what differs as between analogue and digital rights: what exactly is the basis of the natural monopoly of the collecting societies? Are there other arguments for collective rights management besides minimising transaction costs? Is blanket licensing justified by cost saving or are there other arguments for it? What are the economic features of individual licensing the DCE is said to promote? Then it will be possible to discuss the prospects are for a competitive market emerging that contests the current hegemony of collective licensing of limited bundles of rights according to media.

What is meant by digital rights?

As a start we need to clarify what is meant by digital rights since the term seems to be used to mean several things: there are rights to works that were created digitally or were digitized from analogue form and there are digital rights that attach to copyright works in tangible form (such as a book). Then there is digital rights management that could mean digital management of rights by electronic means (DRM) using technological protection measures (TPM) or management of digital rights, which could be done using 'analogue' age methods by existing collective licensing systems. Forms of DRM are used in various ways by collecting societies and by the producers of creative products though the cherished ideal of technology solving all licensing problems has not been realised and firms that used them, for instance record labels, have had to abandon some types of DRM for both legal reasons and its unpopularity with consumers; moreover standards do not yet exist for distribution to all platforms. Thus we need to distinguish the management of digital rights from the use of DRM as a management tool in collecting societies and in order to ask if the nature of digital services and their markets calls for a new structure of rights administration.

Electronic distribution and digital goods called for new 'digital' rights or the adaptation of existing copyright law to the new technology. The right to make a work available on demand and the right to consent to electronic communication to the public were created to extend the existing bundle of copyright protection to internet trade (though some legislations may have added other items at the time – the US accorded public performance rights to performers of digital sound recordings); as with other rights in the copyright bundle, they may be traded separately from other rights in the same work.

Additionally, copyright law has extended protection to neighbouring rights for broadcasters, sound recording makers and performers and new products have entered the market that are or contain copyright works. Some of these extensions, especially those mandating statutory licences, require remuneration to be administered by collecting societies, leading to the creation of new collective management organisations and boosting the status and revenues of older ones. Performers have been accorded individual rights in digital works which they may or may not choose to enforce via a collecting society. All in all, copyright law has become more complex, broader in scope and longer in duration.

What is different about digital rights in economic terms?
One of the biggest shifts caused by digitization and trade in digital services is that goods that were previously sold in tangible form for a price – books, CDs, videos – in digital form are licensed as a service under different contracts in various ways for a fee. Some features that apply to sales of goods do not extend to licensed services, however; the first sale doctrine that enables resale, lending or sharing of a physical book or CD may not extend to the same book or CD in electronic, form depending upon national law. That has been a source of consumer confusion over downloading and file-sharing of CDs. In tangible form, products that contain a bundle of works will have had rights cleared for sale to the consumer. The transformation of the same product into digital form, say a book, that allows the user to download files involves further permissions. As is well known, digitization has made rival and excludable products into public goods with only copyright law and TPMs and as means of exclusion to discourage ('prevent') free-riding. Different business models are needed for licensing than for outright sales. Two basic models are used for the licence fee: a subscription that covers a bundle of items for a period of time or a per use model in which the user pays to use the item, say a book title or music track; these are characterised 'as all you can eat' and 'á la carte' models (Liebowitz and Margolis, 2009). Subscriptions require renewal of the licence and fee from time to time and for monitoring and enforcement, the trade in these services requires technological protection measures (TPMs) to enable digital management of rights and management of digital rights.

Two things follow from this: one, that far more licensing of products of the creative industries is going on in the digital than in the analogue world; in that world, the only licences most people had were for driving a car and for their TV sets; second, revenues for licences now replace sales revenues wholly or in part, depending on the specific product. Both these developments make the ease and cost of licensing arrangements more

significant. The growth of digital products, growth of digital rights and growth of the number of transactions has put the administration of copyright licensing in the spotlight. There has been renewed interest in the pros and cons of collective licensing and of the way copyright collecting societies go about their business.

What is also the case, however, is that many copyright works are not digitised; indeed, the vast majority of works in copyright are even not in publication any more; copyright lasts so long and by far exceeds the shelf life of the products that contain those works. Products currently on the market may not be digitised and even ones that are may well exist in both analogue and digital form, say a book or newspaper. Digital rights are only part of the whole bundle that needs clearance for copying in these cases. Though little is known about the age structure of collecting societies' portfolios, potential users may prefer to obtain a licence for all rights in one transaction rather than obtaining analogue and digital rights separately, which they could do through collecting societies. That argues against the DCE.

What impact has digitisation had on the administration of rights?
Digital rights combined with effective DRM held out the promise of individual licensing for digital services by digital means; that was the scenario presented in Katz (2006/10). That scenario seemed at first sight to suggest that a competitive market would be possible for administering digital rights, making collecting societies redundant or at least contestable. It suggested that creators would be better able to contract directly with users to control secondary use, though the extent of piracy suggests otherwise. The DRM dream has faded but does that mean no change at collecting societies?

Collecting societies have utilised the internet and electronic means to enable easy access to licensing arrangements making it is trivially simple to obtain a standard blanket licence for a defined set of uses. That requires the user knowing where to go for the licence, however that is also easily searched online. But they do not put users in touch with copyright holders. The chief merit of a Digital Copyright Exchange is that is would act as a clearing house for *information* on all rights holders and the agencies that license their rights across different media and it may also provide a gateway to contacting them, providing what amounts to a club good. Similar models already exist, for example JSTOR supplies that service for academic publications: it can be seen as a club good serving academia and SSRN fulfils the role of a centralised information service. Club goods are typically financed by membership subscriptions and there is an issue as to how many members are admitted, for example to a tennis club, but the DCE presents the opposite case as its value as a network subsists in supplying a comprehensive list, suggesting that there could be free-riding and hold-ups by rights owners who do not wish to join or pay for the maintenance of the service. Providing information to the DCE would have to be voluntary on the part of rights holders just as membership of a collecting society is, since registration of copyright (which in former times solved this particular problem) contravenes the Berne Convention. A potential weakness of the DCE would be that if it does not have comprehensive information, which rights holders do not wish to supply, it could still leave users with the task of searching to contact them.

To sum up this section: from the economic point of view, the impact of digital rights is that by requiring more rentals and licensing, they have increased the volume of transactions though online transacting has reduced the cost of obtaining the licences when it is known where to go for the licence. The case for the DCE is that it improves that information. But to go beyond that function into licensing itself and to discuss the merits of individual versus collective licensing, we need to consider the economics of collecting societies.

The economics of collecting societies

What makes collecting societies natural monopolies?
Collecting societies perform several functions: they provide the service of administering rights for their members, they licence those rights to users and they monitor use and enforce copyright for their members. These services are bundled together and the bundling is the basis of economies of scale and scope.[2] They are joint products for the rights holder and offer a service to users of access via a bundled licence to all works in the repertoire held by the national society and, through its agreements with comparable collecting societies in other countries, effectively offer a licence to world repertoire of the type of work they administer (music, literature, etc). It costs very little to offer these services to additional members once the structure of licensing, fees and monitoring is in place hence the natural monopoly and vastly reduces the cost of the individual licensing in the analogue world. The question is: does that differ in the digital world?

Anyone with a published copyright work may join the appropriate society, whose specialisation is determined by the medium and the scope of the rights, and in doing so he or she 'registers' the work with its title and author's name(s), provides contact and bank details.[3] That yields two databases: one of works and their rights holders and one of rights holders' details for distributing revenues, both of which the rights holders themselves have the incentive to keep up to date.[4] It is worth noting that the cost of registering works is largely borne by the rights holders not the society as once the template for the required information is on the society's website, registration can be done by the rights holder online. That can be time consuming even for a small rights owner as detailed information must be provided. The collecting society in addition has a database of licensees and some details about them such as those relevant to the type and cost of the licence; it incurs costs of maintaining that database but applications for licences are made online and the information is supplied by the applicant The terms of the licence in some cases requires the licensee to provide information about the use made of individual works, such as a song title, which adds to the compliance costs to the licence fee.

Collective licensing has falling average costs since the marginal cost of another member is very low to the collecting society (member have to provide their own details) and the services are offered collectively. Unlike a club good, there is no loss of benefit to

[2] For a fuller analysis, see Handke and Towse (2007).
[3] In some jurisdictions, open membership to qualifying creators is mandatory
[4] That is not always the case for heirs and indeed, one weakness of copyright is that heirs do not always know they own rights or perceive them to be of value. Many 'orphan' works belong to unknowing owners.

members from enlarging membership. Though there are probably no economies of scale in creating the databases of copyright holders and works that the collecting societies have, replicating them would be inefficient and that is one of the elements of the natural monopoly of collective licensing, putting them on the same basis gas pipes and rail track. Of course the databases could easily be copied but the collecting society would have no incentive to allow that as they are its commercial assets and it knows that doing so would invite competition.[5] As with utilities, a competition authority could enforce 'common carriage' to encourage competition but without it, duplication of the database information would increase administrative and other transaction costs for rights holders and the cost of setting up the databases would put new entrants to the administration of licensing at a disadvantage. It is likely for this reason that the Hargreaves Review suggested the DCE should cooperate with the collecting societies, though that Review and the Hooper study showed no sign of having considered the cost side of the proposal.

Collecting societies in addition to being natural monopolies acquire monopoly control of a specific bundle of rights since they require the exclusive assignment of those rights as a condition of membership, thereby enabling them to offer a blanket licence. Exclusivity typically rules out individual licensing and the opportunity that gives for negotiating licences for particular uses and for rewarding the owners of works more exactly for the use made of their works, a topic that is discussed below.

Blanket licensing

Economies of scale and scope particularly come into play with the blanket licence that is the standard practice of collecting societies. The main argument for blanket licensing is that it reduces transaction costs to both rights holders and users. Blanket licences are typically negotiated with representative user organisations, for example, of broadcasters, discotheques, and shops. Collecting societies' monopoly of licensing services gives them power over pricing that is a cause for concern but it is also the case that these organisations have some countervailing power, especially the big broadcasters.[6] There are economies of scale in transaction costs of negotiating and agreeing terms which then enables individual businesses to easily obtain a licence.

The blanket licence does not fully ensure that every available work is licensed for all uses in all the territories that the collecting society covers through its mutual agreements with sister societies abroad but given the enormous cost of licensing trillions of titles in many countries, it is not unreasonable to assume that it does. A point that is not often mentioned is that since not every rights holder wants to join a collecting society, collecting societies do not have the mandate to licence all works of genre. According to

[5] British Equity Collecting Society that licenses performers' rights has licensed access to some of the information held on its database to assist producers of new programmes with completing cast lists for new productions. This ensures that existing data being reused where possible rather than data being retyped, possibly with minor errors, which in turn create rights verification issues for the future.' BECS evidence to the Hargreaves Review.

[6] In the UK the BBC is still a leading broadcaster with considerable clout. Before the advent of commercial broadcasting, national broadcasters like the BBC were monopsonists in the market for music and TV and radio scripts (see Peacock and Weir, 1975).

Katz (2005) the purchase of a licence from the appropriate collecting society is deemed by courts as a defence against unauthorised use and so offers peace of mind to users. If licences are offered individually, there is a greater risk of not having permission.

It may be questioned if blanket permission is what all users want: does every user wish to obtain permission and pay, say, for copying articles from hundreds of newspapers? Some business users may just want to copy articles from a top few national dailies, for example. Katz (2006/10) points out that in principle collecting societies can offer a collectively determined price for individual works but that would have to be lower than the fee for the blanket licence to make it attractive. Liebowitz and Margolis (2009), however, deny that this is beneficial (see below).

Setting the rate for licences

The blanket licence is a flat fee for the whole range of works whose rights are owned by the membership; it does not discriminate in pricing according to their quality, characteristics or popularity. Setting the rate itself involves considerable costs of negotiation with multiple users in a market environment. Even in the analogue world, new technologies developed new uses and rates had to be set for unknown future revenues. Especially where a copyright board or court is involved, that seems to be done by analogy to a similar existing medium or platform, for instance, treating digital replay devices like time shifting using a VHS device and increments are set according to a rule of thumb, such as the rate of inflation rather than according to the market conditions for the type of work. These rates then become accepted and path dependency sets in. This also can happen in 'free' bargaining and that currently applies to online uses because their value cannot be verified in advance; moreover, some ventures would become prohibitively expensive if payments had to be made in advance but if creators or performers have to wait for their payments, they are effectively involved in financing the undertaking but without any power of decision-making. It is widely accepted that 'nobody knows' in launching new works in the creative industries but that equally applies to new business models. There is also the risk that digital media and platforms 'cannibalize' existing goods. Experience of the existing market may not be a guide; but in a radically uncertain world of new products, previous experience of a similar market may be the best guide.

Individual licensing by the right owner herself would require exactly the same process of bargaining and record keeping but the associated costs would be borne by the individual with no benefit of economies of scale; rights holders would have to set up their own websites and make arrangements for secure payment. A private agency could offer the services of rights administration, a move envisaged by Hargreaves (and also by Hollander, 1984, and Besen et al, 1992), but until it achieved comparable economies of scale and scope as a collecting society its administration charges would be higher. For the potential licensee, the search costs would also be higher but there may be other advantages, such as a lower fee than a collecting society would offer in a blanket licence, which might increase demand. Having the DCE might encourage the development of such agencies by reducing the search costs to users. If it were to be involved in price-setting itself, these would be problems it would also face.

Distribution of revenues
The distribution of revenues requires a database of rights holders' contact details. A glimpse at the website of many collecting societies shows that members do not always keep them up to date; collecting societies regularly publicise lists of creators and rights holders to whom money is owed from revenues they collect, including that due to non members. Revenues from the sale of licences are distributed to every rights holder who earns more than the minimum annual sum that is distributed net of administration costs. The distribution of revenues takes use of individual works into account by rather indirect means based on the amount of use reported by some users such as playlists and top ten charts. The lack of accuracy on the value of the individual's work has been criticised on the grounds that the financial incentive of copyright is blunted. It is believed by Hooper (2012) that DRM would make it possible to make distributions more accurate; that may be (no figures are provided to substantiate the claim) - what needs to be recognised is that there is a trade-off between the costs of more detailed monitoring of use and administrative costs to the membership. Some societies have compensating preferential rates for distributions to particular groups of members, for example, classical composers, whose works do not figure in listings or in returns by large scale venues as compensation for the lack of detailed information.

Administrative costs
Much of the criticism of collecting societies has been aimed at their administration costs, which vary quite a lot, the lowest in the UK being around 8 per cent and the highest around 20 percent. Societies in other countries often have higher charges, and those are passed on though the system of international transfers that are made through agreements between national societies, which in some countries are required by their articles to deduct 10 per cent for 'cultural purposes', much to the annoyance of some UK rights holders.

There has been little effort made by either the Hargreaves or the Hooper reports to put these costs (that they refer to as transaction costs) in perspective, however; all businesses have transaction and administrative costs. For example, administrative expenses for insurers of small health plans in the US constitute 25 to 27 percent of premiums.[7]

It is assumed in these reports that DRM can considerably reduce or avoid such administrative costs though no figures have been given for the costs of DRM management.

Other arguments for blanket licensing
In addition to the transaction cost minimization rationale for blanket licensing, other arguments have been advanced in favour of blanket licensing and they offer a critique of individual licensing.

[7] Small Business Research Summary (ISSN 1076-8904) of the U.S. Small Business Administration's Office of Advocacy.

The main bone of contention is that collecting societies everywhere (except the US) are monopoly providers of licensing services and typically only offer a blanket licence, ruling out individual licensing and the opportunity that gives for rewarding the owners of works more exactly for the use made of those works, though it would not necessarily increase the sum they command on the open market. As Katz (2005) is fond of pointing out, there is no requirement for collecting societies to offer a blanket licence for all the works in the repertoire of members; they could debundle rights and works and license them at discriminate prices. Digital rights could be licensed separately and at a different price from the equivalent analogue right even without the intervention of the DCE.

A variation on the transaction cost argument is presented by Parisi and Depoorter (2003) who argue that if the works in the repertoire of the collecting society are complementary, the blanket licence is efficient because it prevents the 'tragedy of anti commons pricing', meaning that excessive diversity of rights owners and properties (works) results in no trade being feasible due to the high cost or impossibility of tracing owners. If the repertoire consists of substitutes, blanket licensing simply reinforces the monopoly and prevents competition. The case can be made either way, it seems: in one sense all works are substitutes – several plays cannot be put on in one theatre simultaneously – but users wanting a broad repertoire of works seem to view individual works as complements in a diverse service, such as a radio programme. The point is how users behave when faced with changes in relative prices for which, however, there needs to be the option of individual pricing. The one situation in which that exists is per programme or per use licensing enforced by decree in the US (and in the EU for cable and satellite broadcasting?).

Liebowitz and Margolis (2009) have commented on that subject. They adapt economic analysis on bundling and tie-ins to information goods, pointing out that as they are non-rival and can have zero reproduction costs there is no social benefit from excluding users for already created works: the 'eat all you can' not the 'a la carte' model. Individual pricing is therefore inefficient and since the collecting societies use price discrimination in a detailed way in setting the licence fee (for example, setting the rate according to the size of the premises or putative number of users), most users' willingness to pay is accommodated. They argue that 'carve-outs' from the blanket licence are necessarily inefficient, not least because there is no efficient pricing rule for the extracted works. They also point out that bundling is normal in many goods; a CD is a bundle of songs, a book bundles the underlying authorial work with paper and binding. Moreover, those goods have had rights cleared for sale. The difference is that digital works can easily be debundled and their use restricted either by DRM or by contract but that does not make individual pricing more efficient in general and the public goods features of information goods anyway imply that scarcity pricing is economically inefficient. The authors apply this reasoning to US court decisions on per programme licensing. This is consistent with the reasoning advanced by Gallini (2011) but here it relates to digital goods.

A different line of argument is offered by Kretschmer (2001) who pointed some time ago out that collecting societies offer solidarity to their members through collective bargaining for the blanket licence. For many individual creators that is their best means

of obtaining a reasonable reward for secondary usage. Collective bargaining has always been particularly well established for stage and audiovisual performers in the UK, though not in other European countries.[8] Professional associations exist in most creative areas of work and have recommended rates for primary work but few seem to be set in stone and the individual is often forced to accept a lower rate on a 'take it or leave it' basis; therefore, the collectively bargained remuneration for secondary use is valued by collecting society members in addition to the fact that for most, individual bargaining for secondary uses would be prohibitively expensive in terms of time and transaction costs. No evidence on the costs of bargaining by individual creators and copyright holders for either primary or secondary use has been presented in either the Hargreaves or Hooper reports.

Thus both efficiency and equity arguments have been advanced in favour of collective administration of copyright using blanket licensing and applied to both analogue and digital technologies. The obverse is that individual licensing is inefficient.

Economic benefits of a DCE

The economic case for the DCE has to be made in terms of net benefits. Hargreaves Review calculated the benefits to economic growth from easier licensing procedures and the resulting boost to innovation; it is claimed that UK GDP would increase by £2.2bn due to the DCE, a figure that has been queried not only on academic grounds (Towse, 2012) but was believed by only a tiny proportion of the few respondents who replied to that point in the Hooper questionnaire.[9] So far, no evidence has been offered on two crucial points on the cost side: one is the cost of setting up and operating the DCE and the second is the anticipated reduction in administration and other transaction costs from a DCE in relation to those of collecting societies. Nor did the Hooper study consider the costs of setting up a new system, always remembering that costs are incurred now and benefits only come in the future, an uncomfortable feature of discounting necessary for cost benefit analysis. The full cost would have to take into account switching costs, the costs of displacement of the existing licensing system and any reduction to creators' earnings.

Electronic management of rights has already reduced costs of licensing for right holders and users. Both digital and 'pre-digital' rights can be administered by a collecting society with one comprehensive licence and many users would presumably like to clear all available rights in a work, to save time and trouble and to avoid risk of unauthorised use. If a rights holder preferred to debundle the digital rights in a work with the objective of

[8] That seems to explain the greater emphasis on statutory remuneration for rights such as the rental right in EU Directives that has to be paid to collecting societies. It is worth noting that in the UK, Equity which represents stage, TV and film performers used to work on a repeat fee basis for TV programmes. With the rights effectively cleared for one or two performances, the repeat fee was based on the payment for the performance with allowance for inflation over the intervening period. In the 1990s, Equity renegotiated its agreements on to a royalty basis, thus reducing the upfront cost of making a programme. GEMA in Germany still uses the initial payment rule as the basis for distributing revenues.

[9] Seven respondents (6%) agreed that UK GDP should grow by extra £2bn per year by 2020, 41 (35%) disagreed with the statement and 5 (4%) both agreed and disagreed. 64 respondents (55%) did not provide an answer out of the 117 respondents (Hooper, 2012; 64)

maximising revenue outside the collecting society that would increase administration costs and presumably the price of the licence. Most copyright works are bundled with some other works and/or medium by an intermediary before sale or rental to a user and rights in each work have to be cleared before the product reaches the market.[10] That is the case whether DRM is used or not. In principle DRM encrypted in a product can handle debundling but it has so far not overcome the problem of the lack of standardization on all platforms. DRM embodied in a product such as a sound recording or an e book can log use but without standardised databases of rights holders' contact details, cannot distribute revenues from licence fees to rights holders. For that the databases of the collecting societies are needed; as argued above, duplication of these would be inefficient. It is not clear how the DCE could assist with these matters without becoming a full scale collecting society.

Katz (2005) and before him Hollander (1984) have argued that agencies other than non-profit membership-based collecting societies could collect royalties and administer individuals' rights and in fact, such agencies do exist as for-profit and non-profit businesses for registering copyrights and searching for owners (as a brief look on the internet reveals). Indeed, evidence to the Hargreaves Review showed that various industry based 'meta' database schemes are already underway. Among them are the International Standard Name Identifier (ISNI) which will produce a database of unique names of authors and performers and the Global Repertoire Database (GRD) of musical works and eventually of sound recordings. These standardized electronic listings may enable further developments in rights management; it remains to be seen if they encourage more individual licensing. Of course, as mentioned earlier, they are only able to include data about rights holders who choose to enter their works with an agency or collecting society that would appear in the 'meta' listing so the problem of 'orphan' works would still exist.

Assuming collecting societies are natural monopolies, and we have not yet found evidence to suggest otherwise, private agencies would have higher administrative costs; however, the view is that they could offer a large rights holder a discounted price. That undoubtedly means agencies would cherry-pick top earners. What collecting societies fear most from such competition is that default of high revenue members would leave them with smaller rights holders for whom unit licensing costs are greater, thus imposing higher administrative costs on the remaining members. Eventually those costs would be passed on to licensees who might then prefer to buy a limited bundle of works that are cheaper, setting off a downward spiral for the collecting society. That may be good for intermediary firms in the creative industries but it would reduce the reward and incentive to the creators whom copyright is supposed to benefit.[11] Yet collecting societies are often

[10] Liebowitz and Margolis (2009) point out that most goods are bundled though we do not think of it. New technologies innovate by rebundling in product and process innovation – 'old wine in new bottles'. Diigitization is not the first technology to achieve that!

[11] One cannot escape the impression from reading industry evidence to Hargreaves that underlying the views of some is the belief that creators and rights holders get too high a slice of the pie. They need to be reminded that copyright is designed to reward creativity! Smaller businesses do not always understand that

required by their articles of government or by law to accept any and all qualifying members however small the number and value of their works. Those requirements would become unsupportable with cherry-picking.

So what are the benefits of a DCE? The clear and obvious benefit is the centralised register that would supply data on all rights across all media and information on whom to go to for licences. One of the prior assumptions of economics is that increasing information that enables markets to work better is always a good thing and there is strong support for the DCE as a register on those grounds. With standardization of databases, the DCE could meld them together. Any further activity would involve running costs for which current administrative charges of the collecting societies are the only guide. The Hargreaves Review and the Hooper study state that these are 'very high'; they are not all high because of mismanagement or managers paying themselves inflated salaries as they imply! Why would they not be 'high' for the DCE too?

The bone of contention from new digital industries and the bane of aggregators' lives is the multiplicity of licences needed to clear the all rights in all the works needed for a particular product or online service. Multi media users such as TV stations need to deal with several collecting societies but they also license their own works and accept the value of collective licensing. That could be assisted by a register. A further complaint is the problem of cross-border licensing. There is a useful discussion in the Hooper study of 'private' initiatives to improve cross media and cross border licensing and it would have been worthwhile to have asked why this has not developed more widely and in the more contentious areas, such as music. When national collecting societies for performing rights in Europe attempted to jointly organise one-stop shop cross-border licensing under CISAC, they were forbidden to do so by EU competition authorities, which must have put a dampener on other such attempts; that is not mentioned by Hooper, however,

Contestability

Hargreaves' advocacy of the DCE is tied with the view that it would encourage competition that would put pressure on the collecting societies to improve their service to their members and licensees. It is argued here that this is view misunderstands the economics of natural monopolies and the complexities of the copyright system.

So far, the development of new licensing services and individual digital rights does not seem to have been a threat to collecting societies. There could be several reasons for that: licensing and monitoring secondary use is too expensive for individual creators and businesses; creators and rights holders believe that they can get a better rate collectively than individually; a great deal of repertoire is not in digital form; digital and 'analogue rights are bundled together; collecting societies have a track record of offering a

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they have to have several licences for playing music on the radio in their premises – one for the public performance right and one for the sound recording and performers' performances; that comes about due to the historical creation of rights in copyright law. In the UK there is a complication because a licence is also needed from the BBC for having a radio set and people assume that that licence allows them to play music without further ado.

reasonable service; and legislation requires equitable remuneration for works subject to statutory licences to be paid to collecting societies for distribution. In other words, incumbent organisations have considerable organisational and reputational advantages over an unknown entity in a very complex area where mistakes could be costly to users and rights holders. Collecting societies do not compete with each other mainly because they specialise in a particular grouping of rights determined by copyright law. There is nothing to stop rights holders from joining foreign societies if they think they will get better service and some do. There have been some mergers of collecting societies, for instance, the PRS and MCPS in the UK merged; however, their scope of rights and rights owners overlapped significantly and in other countries both performance and mechanical rights were anyway managed jointly.

Having gone through every possible argument in law and economics for and against the development of competition in licensing services, Katz (2006/10) concluded that the problem lies not in the marketplace but in the exclusive assignment of rights that collecting societies typically require for the works they license in all uses that in Canada and in other countries that is promoted by legislation; some additionally require assignment of the creators' whole repertoire, probably to save the costs of sorting through a huge bundle of works to see which rights are included and to ensure to a licensee that the whole lot is covered by the blanket licence. He believes that digital management of rights should be able to reduce that requirement; critics have pointed out the DRM has been around for 20 years and that has not yet happened.

Governance of collecting societies

This is not the place to discuss wider issues in the governance of collecting societies. The EU is currently addressing these questions. In that context, though, preliminary work by Rochelandet (2003) on the impact of governance arrangements on the administrative efficiency of collecting societies is worth noting. He found that the greater strength of regulation by the state in Germany yielded a better performance in terms of administration charges than the internal governance system in the UK and the looser state regulation in French, comparing the similar repertoires of the authors' rights societies for musical performance rights. An overhaul of governance by regulators and of the regulation of collecting societies could likely achieve a considerable improvement in their services without any change to the law or setting up new institutions.

Conclusion

There is a strong case for a register of copyrights, logging who owns what and how they may be contacted. The scope of the DCE (or similar facility) had been left open by Hargreaves but the Hooper study clearly states that the idea goes far beyond a mere central register and that the DCE would also perform the functions of selling licences, collecting revenues and distributing revenues to licensors, who, it is envisaged may well be collecting societies themselves (though there is undoubtedly a sub plot to encourage individual licensing). But it is precisely those activities that are so 'expensive' (to use Hooper's word) in existing collecting societies and the even more costly job of monitoring uses and enforcing rights is nowhere mentioned. What is needed is some thinking about why the DCE would cut administrative costs overall and where it would

leave collecting societies still having to manage considerable numbers of undigitised works. The natural monopoly argument would predict that splitting off digital rights would raise unit costs of licensing.

So far, both law and economics support the view that the collecting societies' monopoly is a natural monopoly that reduces transaction costs for both rights holders and users. Belief that DRM raises the possibility of greater flexibility in pricing and contestability seems to have foundered with DRM itself. If there are strong tendencies to natural monopoly, would they not show up in a DCE that took on pricing and licensing? There would seem to be nothing to stop the DCE becoming a huge monopoly itself.

What shines out from all contemporary studies of copyright licensing is that it is excessively complex and that that is because of the complexity of copyright law itself. In some cases it is the law that inhibits markets from developing, not the administration of rights and that the law itself provides as a barrier to contestability. What needs to be decided is whether the perceived problems of licensing are due to the inability of the law to adjust to new technologies and uses or to the reluctance of rights owners and managers to adapt to them. We need to be told what can effectively be achieved by reorganising licensing services without changes to the law and governance practices. Although the Hooper study was focussed solely on the feasibiltity of the DCE and not on other of the Hargreaves recommendations, many of the problems discussed in the study in fact boil down to problems of permissions for orphan works.

What emerges from reading the evidence is that most creative industry businesses have adapted their methods and models to existing regime of collective licensing – not very surprising. They have made it work and there would be considerable switching costs (the typical reason for 'lock-in'. Path dependency is often the rule of human behaviour especially for risk averse small time creators; in other fields where there is choice consumers do not switch – in the UK 80 per cent of households have not switched utility suppliers since privatisation over 20 years ago, mainly because tariffs are so complex that people cannot understand them. The same argument could well apply to copyright.

What is clear is that some form of collective licensing is essential for the working of copyright law. That requires a system of charging for use and remitting rewards to creators and rights holders. Collecting societies currently do this by licensing secondary rights and publishers do it for primary rights. It is worth remembering that the development of collecting societies was a spontaneous *market* response to the problem of licensing copyright, not (at least in the UK) down to state intervention. New collectives have emerged as new technologies and uses developed. So one might well ask: if the case for a DCE is so strong, one might well ask why it has not developed spontaneously? There could be two explanations for this: one, that competition authorities have been demonstrably suspicious of any such moves that appear to strengthen the 'monopoly hold' of collecting societies and that has discouraged any such moves and secondly, that the legal situation is just too complex.

It has always been understood that natural monopolies require state regulation and for copyright this is done in several ways – by direct control over licence fees, by oversight by a board or tribunal or court and through competition law. Uniquely in the US, competition in the between three collecting societies was created by consent decrees, though this has not apparently resulted in direct competition in identical markets. It seems therefore that improved governance may achieve more efficiency than contestability. Ultimately, though, copyright law has to be reformed to make it appropriate to the digital age; it needs to be less complex and shorter term.

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