Legal Information Management, 24 (2024), pp. 162–164
© The Author(s), 2025. Published by British and Irish Association of Law Librarians
doi:10.1017/S1472669624000367

MAIN FEATURES

Copyright and ESG: Ethical Imperatives for Compliance and Responsibility

Abstract: Colin Hulme, head of intellectual property (IP) at Burness Paull, considers the impact of environmental, social, and corporate governance (ESG) programmes on the observance of copyright by corporates. This article was commissioned by the Copyright Licensing Agency (CLA) and first appeared in the *New Law Journal* in 2023.
Keywords: Copyright; intellectual property; sustainability

INTRODUCTION – COPYRIGHT MEETS ESG

I have spent the last 25 years of my legal career pursuing (and very occasionally defending) claims of IP infringement, often copyright. In that time I have always been fascinated by what motivates those who infringe IP to do so. I know from discussions with clients like CLA, PPL, PRS for Music, AVLA Sky and others that those engaged in protecting content from infringement consider that understanding the motivation of infringers is key to prevention. Or if not prevention, then at least mitigation of it. Very occasionally, I have the chance to engage with those who have infringed the copyright of my clients and I always take the opportunity to seek to glean their motivation for what they have done. With this in mind, I was delighted when CLA approached me to share my thoughts on the factors which influence IP and copyright compliance.

In particular, this paper considers the impact of having an ESG programme on the observance of copyright by corporates. To set the scene, I found real value in the British Business Bank's definition of ESG, as "a collective term for a business's impact on the environment and society as well as how robust and transparent its governance is in terms of company leadership, executive pay, audits, internal controls, and shareholder rights".

The perception that ESG is only important for publicly traded companies is dated. It should be a topic in all boardrooms up and down the country. I have been in management roles in Burness Paull for over 10 years now. When I joined our management team CSR, or Corporate Social Responsibility, was very much the acronym of the day. In recent years, in our firm, that has been supplanted with a focus on ESG. In my mind, ESG incorporates a great deal of the ethos behind corporate social responsibility, with the critical additional emphasis on environmental considerations. At the core of both CSR and ESG is the need to have business practices that respect ethical values, comply with the law, and respect economic values and environmental responsibility.

For publicly listed companies, being able to display strong ESG credentials will make them more attractive to the increasing number of investment funds seeking to invest in companies which operate responsibly and ethically. For private businesses, strong ESG credentials are of increasing importance to stakeholders such as clients / customers and employees. Typically, larger clients or customers will now require to see robust ESG policies and credentials as part of a tendering process. There are very considerable gains to be achieved through a company operating with respectable ESG values.

It is self-evident that misappropriation (or theft) of content created by authors and artists will bring with it many risks, which I discuss below. Essentially, the social harm done by those who deprive content creators of payment for their labours harms us all. It removes the economic incentive for the creation of original material which can be enjoyed by all. I like the way the essayist Samuel Johnson put it "no man but a blockhead ever wrote except for money". He was not far wrong. We all lose in a society which has no respect for copyright.

It is not good enough for the C-Suite to be issuing high-minded statements confirming a company's respect for intellectual property. I would argue complying with ESG values requires detailed policies and practices which effectively engrain respect for IP throughout the business. I worked with one very respectable business in the energy sector which did not realise that incoming employees and consultants were bringing with them extensive material in which their former employers owned the copyright. This material 'polluted' my client's own servers with content infringing the copyright of others. They had no wish to receive this and for it to be woven into content created by their own employees. Nevertheless, they had no effective policies or practices to prevent this from happening when onboarding new arrivals to their business. Just as we may safeguard against loss of IP with departing employees, companies need to be alert to risks such as this which exposes them to inadvertently infringe IP.

https://doi.org/10.1017/S1472669624000367 Published online by Cambridge University Press

Copyright and IP compliance should be an important part of the risk management practices of all businesses. Effective compliance programmes will involve corporates educating employees, both old and new, on what they should do to observe IP rights, and avoid infringement of IP rights, whether inadvertent or deliberate. Inadvertent infringement of IP can come from a lack of understanding of which licences your business needs to have in place. This can be confusing, and it is important to get advice on IP licensing. For example, until recently, there was greater scope for confusion over whether your business needed a PPL or PRS for Music Licence, or both. Through a joint venture between these two collecting societies, music licensing can now be secured by obtaining TheMusicLicence, issued by their licensing joint venture.

On a fairly regular basis, clients approach my team about correspondence received from The Copyright Licensing Agency. The least informed clients, who have never heard of CLA, will ask if it is a scam. Of course, it is easy to disabuse them of that misconception. More typically, they will ask if this is something they actually need. As we now act for the CLA we are in a certain degree of a conflict in advising on this, but if we direct them to the CLA website it is pretty obvious that any organisation which copies from books, magazines, journals or websites will need a CLA licence.

WHAT MOTIVATES INFRINGEMENT OR COMPLIANCE?

We are complex creatures but very often the motivation behind corporate conduct can be attributed to financial gain – profit. Whether or not that financial gain is perceived to be received in the short, medium or long term it is often a key attributable factor in corporate decision making. There are other factors which will play greater or lesser roles, but, in my view, none have such a significant and common impact as financial gain.

HOW COULD INFRINGING IP HELP SAVE YOUR BUSINESS MONEY?

In the very short term you avoid paying licence fees for content consumed by your business. This means that news articles or photographs copied or music or audio-visual content played within your business infringe rights of others. This short-term gain can quickly seem insignificant in exchange for the long-term risks associated with such conduct. Significant financial costs can arise from court proceedings for infringement. Copyright infringement proceedings can include claims for (a) damages for lost notional licence fees going back five or six years or (b) payment of all profits derived by your business through the infringing conduct. If the court decides that the infringing conduct is particularly blameworthy such as if it is done deliberately and / or at scale then additional damages can be awarded. In addition, you should budget to pay the legal costs of the right holder pursuing the claim.

The risk of infringement can sometimes be weighed up in the belief that individual officers of the company can hide behind the corporate vehicle. A risk / reward analysis might wrongly assume that the worst-case scenario is the company is allowed to fold and the business can move on with a phoenix vehicle. That analysis does not take into account the increasing drive, amongst right holder clients for whom we act, to establish individual director liability when possible. These clients have been successful in ensuring that those responsible for egregious IP infringement have faced considerable personal financial penalties as well as custodial sentences.

Depending on the company concerned, the reputational risks associated with being seen as a business which infringes the IP of others can be a huge cost. The obvious risk is that clients and customers will not wish to be associated with an organisation which does not respect the IP of others. Publicity is an important consequence for those engaged in blameworthy IP infringement. My team regularly seeks and secures publicity orders under the Intellectual Property (Enforcement, etc.) Regulations 2006, which enable clients to communicate to the market that they take protection of their rights seriously and, in the process, 'name and shame' those who have sought to misuse IP without payment. Such shame may well have an impact on current and prospective investors.

LOOKING AT THE ISSUE FROM A DIFFERENT PERSPECTIVE, HOW COULD COMPLYING WITH IP LAWS BRING FINANCIAL GAIN?

I have argued above that there are clear benefits for businesses having strong ESG policies and that complying with the law should be a cornerstone of ESG. Being able to demonstrate to all stakeholders that the business is reputable will have its own positive impact. It will attract ethical investment, customer loyalty and aspirational employees who wish to be associated with ethical and reputable businesses. It is morally right to pay for content your business consumes but there are medium- and long-term gains to be achieved by doing so.

As ESG policies require companies to have consideration for the communities and markets within which they operate, paying for content which will incentivise those engaged in the creative industries seems obvious. If not paid for the 'fruits of their labour' then all society suffers when the financial incentive to produce new material is removed from content creators. I know many authors and artists are not primarily incentivised by money, but this will almost always be part of the picture, especially for those who depend on the income from their creative works for their livelihood.

https://doi.org/10.1017/S1472669624000367 Published online by Cambridge University Press

CONCLUSIONS

Will ESG policies influence compliance with copyright? I hope so. Implementing an effective ESG programme should encourage the design and implementation of IP compliance polices. If backed by appropriate employee training this should lead to increased IP and copyright observance which is in the interests of not only those corporates but society as a whole.

ESG principles encourage us to operate having regard for all affected by what we do rather than out of self-interest. There will always be some focussed on short-term gain and self-interest, but we can hope to encourage them to see the long-term benefits for them and others of respecting IP rights, as Mark Twain would guide us "you're never wrong for doing the right thing".

Biography

Colin Hulme is Head of IP at Burness Paull LLP, which has a market-leading IP practice. The firm typically acts for large corporate and right holders, including Copyright Licencing Agency, Sky, PPL, PRS for Music, ALVA and a large number of photo libraries.

https://doi.org/10.1017/S1472669624000367 Published online by Cambridge University Press