House of Commons

Business, Innovation and Skills Committee

Hargreaves Review of Intellectual Property

This is a volume of submissions relevant to the inquiry into the Hargreaves Review of Intellectual Property, which have been reported to the House.

Only those submissions written specifically for the Committee have been included.

Version 4

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Written evidence submitted by Action on Authors' Rights

Action on Authors' Rights is a network of authors and agents campaigning from the grass-roots in support of authors' rights

Summary

We believe that

- arrangements for licensing orphan works must respect the rights of authors and do as little as possible to disrupt the market in copyright licenses
- the same applies to any extended collective licensing scheme

We welcome

- the Government's statement that any orphan works scheme would incorporate safeguards to protect the rights of the owners and the interests of other rights holders

We advocate

- the strengthening of authors' moral rights

We do not support the use of extended collective licensing schemes

- to evade the diligent search requirement for licensing orphan works
- in relation to licensing primary rights, such as the right to issue an edition of a book
- to facilitate clearing rights for mass digitisation programmes

We caution

- that a parodic work, though imitative, should always be original

We advocate

- implementation of the recommendation for a small claims procedure for intellectual property cases
- a programme of public education about copyright
- a ban on placing advertisements on pirate websites

We observe

- that the planned IPO copyright opinions service must be set up so that it operates in complete independence from the IPO's policy-forming functions, in such a way that it cannot become, or be seen as, an instrument for effecting change in copyright law

1. Without the original creative work of authors, publishers and booksellers would have nothing to sell. It is authors who produce the value on which the entire publishing industry depends. Most freelance authors license their works directly to publishers on an exclusive basis. This system allows the author to make the best agreement he or she can for the exploitation of the work, based on the known or likely demand. It also gives the author control over where the work will appear, and in what form and context, which are matters in which every author has a legitimate interest. It is an efficient, market-driven system.

2. Schemes for identifying and licensing works with unlocated copyright holders (often known as 'orphan' works) intrude on the market in licences and interfere with the rights guaranteed to authors under international and European Union intellectual property laws and human rights laws.[1] So, to an even greater extent, do schemes for extended collective licensing (ECL), under which authors' works are automatically opted in and made available for use unless they arrange to opt out.

3. Any such scheme should be limited, and respectful of the rights of authors and their heirs. Care should be taken to do as little as possible that may distort the market. Questions of proportionality should be carefully considered:[2] will the benefits that may reasonably be expected to flow from an orphan works scheme truly outweigh the benefits to the economy of the good functioning of the markets that sustain our creative industries? Is the objective of such a scheme important enough to justify encroaching on the fundamental rights of creators? How can that encroachment be minimized so as to do no more damage than is absolutely unavoidable?

4. With this in view, we note the announcement in the Government's response to the Hargreaves Review of their forthcoming proposals for an orphan works scheme. We welcome their statement that any such scheme would incorporate adequate safeguards to protect the rights of the unlocated owners and the interests of other rights holders, who, as the Government state, 'could suffer from unfair competition'. They promise that these safeguards would include 'diligent search for rights owners, licensing at market rates for commercial use and respect for the rights of "revenant" owners that come forward'. These assurances are, as far as they go, encouraging. Plainly many important details remain to be explored.

5. In the consultation paper 'Orphan Works - Potential Solutions', circulated early in 2009, the Intellectual Property Office (IPO) stated: 'A licence (whether issued by the Crown, or other third party) for a specific activity of relatively short duration or limited scope (e.g. a licence for a limited period or for a limited number of uses (e.g. a licence to make 100 copies) would seem to be appropriate. This is in view of the fact

[1] See Berne Convention for the Protection of Literary and Artistic Works <http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html>; Universal Declaration of Human Rights, article 27.2 <http://www.un.org/en/documents/udhr/index.shtml>; Charter of Fundamental Rights of the European Union, article 17.2 <www.europarl.europa.eu/charter/pdf/text_en.pdf>.

2 See for example the observations of Lord Steyn in the case of R (Daly) v SSHD [2001] 2 WLR 1622 § 27 <http://www.bailii.org/uk/cases/UKHL/2001/26.html>

that the owner of the orphan work may be discovered.'[3] This may be felt to be a proportionate approach. Likewise, in the same paper the IPO state: 'A scheme could provide for the termination of any licence where the granting authority is satisfied that the licensed work is no longer to be regarded as being an orphan work … subject to the exception that the licence could continue in effect with the consent of the rights holder.'[4] Granted that this could be done, it follows that it must. Any other approach would be inequitable, as it would bind the rights holder without his or her consent to a contract that might be injurious. We briefly discussed this point in our submission to the Hargreaves Review.[5]

6. In our submission to the Review we joined many other creators' organisations and individual creators in calling for a strengthening of authors' moral rights.[6] Under the 1988 Copyright Act moral rights do not exist in the case of works produced for publication in a newspaper or similar work. They may also be waived by the author, and publishing companies frequently use their economic leverage to compel this, to suit their own convenience. In France and Germany the moral rights legislation is considerably more robust. If UK law gave authors a stronger right of paternity (the right to be identified as the author of the work) there would certainly be fewer 'orphan' works. The right of integrity is also important: that is the right to object to distortion or mutilation of the work, or any treatment of it that prejudices the author's honour or reputation. Professor Hargreaves has described authors' moral rights as a 'non-economic [factor]', though he does, at least, note the importance of the right of integrity.[7] In truth, moral rights have strong economic importance to authors; they promote visibility and protect against damage to reputation.[8] In the digital age it is more than ever important to authors and copyright users alike that works should not be allowed to circulate without being properly attributed. We are disappointed that the call for strengthened moral rights has not been reflected in the Review.

7. We note the announcement in the Government's response to the Review that they plan to introduce proposals for extended collective licensing 'to benefit sectors that choose to adopt it'. This raises important questions: first, as to how a 'sector' will be defined, and secondly, how creators working in that sector will be consulted. We are also concerned that ECL may be viewed as a means to evading the diligent search procedure required before orphan works are permitted to be licensed. We consider the diligent search requirement to be very important. Any attempt to evade it would smack of bad faith.

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[3] IPO, 'Orphan Works - Potential Solutions' § 8.8 <http://www.ipo.gov.uk/c-owpaper0809.pdf>
[4] ibid, § 8.9
[5] Action on Authors' Rights, 'Submission to the Independent Review of Intellectual Property and Growth', § 5, p. 6 <http://www.ipo.gov.uk/ipreview-c4e-sub-authors.pdf/>
[6] ibid, § 3
[7] Ian Hargreaves, 'Digital Opportunity: A Review of Intellectual Property and Growth', § 1.4 <http://www.ipo.gov.uk/ipreview-finalreport.pdf>
[8] See the discussion of moral rights in our submission to the Review, § 3; also © *the way ahead: A Copyright Strategy for the Digital Age* (Intellectual Property Office), 2009, p. 27

8. Of very particular concern would be any proposals to impose ECL in relation to primary rights. The right to publish a book in printed form is a primary right, and so is the right to publish a book as an e-book. We believe that any such move would destabilise the important emerging market in digital editions. Our further views on ECL have been set out in detail in our submission to the Review.[9]

9. It should be apparent from this that we do not support the imposition of ECL schemes to facilitate clearing rights for mass digitisation programmes. We note that in his Review Professor Hargreaves claims that 'There are successful precedents elsewhere in Europe' for using ECL in this way.[10] He supports this statement with a footnote referencing an agreement negotiated in Norway between an umbrella organisation representing collecting societies, KOPINOR, and the Norwegian National Library, for making works by Norwegian authors available on the web. Investigations have established that this project was launched in May 2009 and is due to be completed this year. The KOPINOR website describes it as a 'pilot project'.[11] So far no detailed assessment has been published in English online, though the *Wall Street Journal* published an informative article about it last year.[12] It might be said from the evidence that the Norwegian National Library and KOPINOR have set a 'successful precedent' for concluding an ECL agreement for digitising in-copyright books. It is far too soon, and there is too little information available, to claim success for the project, which is, in any case, quite limited. It may be noted that Norway, though 'in Europe', is not a member of the EU. Though he speaks of 'precedents' in the plural, Hargreaves omits to give any other examples. He may be thinking of the framework agreement recently signed in France for digitizing in-copyright, out-of-print books.[13] The law, however, is yet to be changed to permit the scheme to go ahead; it is, again, a 'successful precedent' for concluding an agreement, no more.

10. In response to the Hargreaves Review the Government has said that they will 'bring forward proposals … for a substantial opening up of the UK's copyright exceptions regime'. Among the specific proposals is one that would put parody on a secure legal footing. Parody has an ancient and distinguished history in this country. We are, however, concerned by the one example that Professor Hargreaves, and more recently the IPO press release announcing the Government response to his Review, have cited as demonstrating the need for this piece of legislation. This is the episode relating to the 'Newport State of Mind' parody song that was removed from

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[9] Action on Authors' Rights, 'Submission to the Independent Review of Intellectual Property and Growth', § 6 <http://www.ipo.gov.uk/ipreview-c4e-sub-authors.pdf/>

[10] Ian Hargreaves, 'Digital Opportunity: A Review of Intellectual Property and Growth', § 4.51 <http://www.ipo.gov.uk/ipreview-finalreport.pdf>

[11] <http://www.kopinor.no/en/agreements/national-library>; see also Marianne Takle, 'The Norwegian National Digital Library', *Ariadne*, Issue 60, July 2009 <http://www.ariadne.ac.uk/issue60/takle/>

[12] Max Colchester and Christopher Emsden, 'In Europe, Book-Scanning Efforts Feel Their Way Into New Territory', *Wall Street Journal*, 11 March 2010 <http://online.wsj.com/article/SB10001424052748704541304575099943467728882.html>

[13] <http://www.arrow-net.eu/news/signature-framework-agreement-digitization-and-online-exploitation-out-print-french-books-20th->

YouTube.[14] Curiously enough, a good account of the issues involved in that case may be found elsewhere on the IPO website, in an article by IP lawyer Steve Kuncewicz.[15] He points out that though the lyrics to this song are different to the parodied original, the melody is very similar, and suggests that this would have made it hard to defend against a charge of infringement. A parody, though an imitation, should be an original work throughout. It is important that that line should not be blurred. It should also be understood that the copyright in the words to a song is distinct to the copyright in the music. Writing a parody of the lyrics does not and must not legitimate infringing the composer's rights in the melody.

11. We welcome Professor Hargreaves' recommendation that the Government should implement the proposal, originally made by Lord Justice Jackson, to introduce a small claims track in the Patents County Court.[16] The Government has said that it will do this 'subject to establishing the value for money case'. We trust that the Government, in weighing this matter up, will bear in mind that what may appear to be modest sums are often very important to the profitability of small creative businesses.

12. Professor Hargreaves recommends that education should be part of the Government's strategy for tackling piracy.[17] The Government has said, apparently in response, that 'Rights holders must continue to take responsibility for the exercise and protection of their rights and to educate and guide consumers.' We are dissatisfied by this. We believe it is right that the Government should take a role in this area. We consider it to be very much in the interest of the public that there should be better education and advice available on copyright and related matters.

13. The World Wide Web has put the means of publication into the hands of nearly every member of the population. This has facilitated copyright infringement, but it also means that very large numbers of people are regularly publishing their own writings and other creative material. Education has not kept up with this. Many people are confused about copyright. They do not understand what they can and cannot do with a copyright work without obtaining a licence from the rights holder, nor do they appreciate the benefits of copyright in protecting their own creative work and stimulating cultural production. We believe that the public should be provided with clear information about copyright and authors' moral rights, and that instruction on these topics should form part of the curriculum at school and university level. We

[14] See Ian Hargreaves, 'Digital Opportunity: A Review of Intellectual Property and Growth', § 5.36
[15] Steve Kuncewicz, ' "Newport State Of Mind", old Parody issues' <http://www.ipo.gov.uk/news/newsletters/ipinsight/ipinsight-201009/ipinsight-201009-4.htm>
[16] Lord Justice Sir Rupert Jackson, *Review of Civil Litigation Costs: Final Report*, December 2009, pp. 11–12, 249–250, 255–256, 257 <http://www.judiciary.gov.uk/Resources/JCO/Documents/jackson-final-report-140110.pdf>; see also *Intellectual Property Enforcement in Smaller UK Firms: A report for the Strategic Advisory Board for Intellectual Property Policy (SABIP)*, October 2010 <http://www.ipo.gov.uk/ipresearchipenforcement-201010.pdf>
[17] Ian Hargreaves, 'Digital Opportunity: A Review of Intellectual Property and Growth', pp. 5–6, 9, 85 and §§ 8.24, 8.34, 8.39, 8.45

think that among other benefits this would strengthen public regard for copyright and improve compliance with copyright law.

14. We welcome the emphasis in the IPO's paper on 'IP Crime Strategy' on tackling websites that make a business out of illicitly distributing copyright works. We applaud the recent moves by City of London police to try and prevent pirate websites from obtaining credit card facilities, and wonder whether there are ways in which such initiatives might be extended and given more teeth.[18] In our submission we drew attention to the Marine, &c, Broadcasting (Offences) Act 1967, which made it a criminal offence to buy broadcast advertising on the pirate radio stations.[19] We suggest that this is an approach that might be tried again.

15. The Government has announced that the IPO is to publish plans for a copyright opinions service. Such a service might be useful. It must, however, be completely independent and impartial, and, in particular, it must function in complete separation from the IPO's role in formulating policy. It must be protected against any form of political influence and any risk that it may become or be seen as, an instrument for advancing policy objectives in relation to the development of copyright law. This is especially important if the opinions of this service are to be taken account of by the courts, as has been suggested.

5 September 2011

[18] Andrew Orlowski, 'Credit card squeeze looms for pirate music sites', *The Register*, 4 March 2011 [http://www.theregister.co.uk/2011/03/04/visa_mastercard_ifpi_pirate_squeeze/]

[19] <http://www.legislation.gov.uk/ukpga/1967/41/contents/enacted>; Action on Authors' Rights, 'Submission to the Independent Review of Intellectual Property and Growth', pp. 14–15 <http://www.ipo.gov.uk/ipreview-c4e-sub-authors.pdf/>

Written evidence submitted by Kevin Allen

It never ceases to amaze me that my Government is discussing ways to make my work less profitable for me, that they appear hell bent on providing easy free access to my work and loop hole get out clauses for those that seek to profit from my efforts.

Why do I hear my Government stand up for the rights of Music and film makers, yet photographers and artists work they try to make a free for all.

Why does there have to be any debate about Intellectual property of my work, why is the burden put on me as an individual to defend my work against theft from "big business" when you make laws that make it easy for them to defend their theft.

Orphan works

Why should Universities (or anyone) be allowed to use images they don't know the ownership of under the guise of education or orphan work, they are run to make a profit the lectures get very well paid, yet it looks like you intend to give them free access to others work with minimal effort on their part to prove it is an Orphan work. The Universities publish work to profit the University, why should they not pay for the content? I doubt the power companies provide free electricity, book suppliers free books, etc. Yet you look to provide a legal get out clause so my product can be used for free by them and other profit making companies.

Why can't my work remain my work with the protection of the law and not have others use your laws to cloud the issue of what they can do with my work for their gain at my expense. There is nothing in your proposed bill that helps me as a creator in any shape or form, it is there just to satisfy the needs of others, to justify their profit at the expense of others work.

It would be great if you all had to actually make a living out of your efforts, if you got paid day to day on the value of your work , no expense account, just paid for what you produce and not the luxury of tax payers coughing up your wages every month. You might then see a need to protect those of us that create our income that way, you might just see how hard it is. No one is going to bail us out if we fail, yet here you are trying to make it so much harder for us to succeed.

We need our rights strengthened not eroded, we need a Government and Law Courts on our side, not extra work added on our part to keep what is ours.

Shame on you all.

9 September 2011

Written evidence submitted by the Alliance Against IP Theft

- The Alliance Against IP Theft welcomes the decision by the Business, Innovation and Skills Select Committee to hold an inquiry into the Independent Review of Intellectual Property and Growth conducted by Professor Ian Hargreaves and the Government's response to that Review.
- Hargreaves was given a clear remit to "develop proposals on how the UK's intellectual property framework can further promote entrepreneurialism, economic growth and social and commercial innovation."
- Given the urgent need to promote economic growth, the Alliance Against IP Theft (the Alliance), believes that the findings of the Review and the Government response must be evaluated in exactly those terms.
- Whilst we have no desire to provide detailed comment on how the Review was conducted, there is a sense that the Review had decided before it began that reform was required. There seemed to be a pre-emptive attitude that IP law was a barrier to innovation and growth, when it is clear from all available economic data, and the significant innovation in the last few years in business models, that this is not the case. Please see our submission to the Review for further information.[1]
- We appreciate that the Committee is seeking new comment, as opposed to that which organisations have already submitted as part of their response to the Review. Therefore, the Alliance is limiting its response to the following specific issues:

Absolute economic growth

The Alliance is concerned that the findings of the Review and the Government response have become too focused on promoting relative growth. By that, we mean that whilst the reforms proposed may stimulate growth in certain companies, sectors and industries, the consequences of the proposals for others has been glossed over. There is little benefit to the overall national economy of certain sectors or companies experiencing 100% growth as a result of favourable policies if at the same time these policies prejudice other sectors and cause even a 0.1% reduction in the output of existing IP rich industries, which would lead to an overall reduction in economic output. Therefore we think the Review and Government needs to be clearer about the overall impacts of their proposals, and demonstrate how the recommendations will deliver a real net increase in economic output.

Risks to growth

The Alliance is also concerned that risks to the new 'potential' growth espoused by the Review has been underestimated. The growth of new businesses is as impacted by issues such as finance or taxation policy as it is by IP policy – 'fixing' IP policy may not lead to an increase in economic growth as there are numerous other

[1] http://www.ipo.gov.uk/ipreview-c4e-sub-thealliance.pdf

reasons why businesses succeed or not such as access to finance, availability of skilled employees and employment law. At the same time the risk the recommendations expose to existing businesses will impact on investment decisions now. In this scenario, not only would the UK see lower growth from existing businesses, but the substitution effect might fail to materialise. We are therefore concerned that the Review has placed too much emphasis on the impact of IP policy reform on innovation and not enough on other factors.

Branding and counterfeiting

The Review appears to have become nearly entirely focused on copyright. The Review should have placed more emphasis on the importance of branding and of trade marks in the digital economy as these are as central to consumer confidence, strong competition and the effective commercialisation of new business ideas. Branding is as powerful in the online world as it is in the physical world. UK-generated brands play a key role in the economy and in the UK's global competitiveness and yet this is not acknowledged or even mentioned in the Review. To explain this omission by claiming that trade mark policy is "fit for purpose" is inadequate. The UK continues to lag behind other economies in not providing business with effective tools to tackle the parasitic copying of packaging of consumer products, for example. Equally it is disappointing that the harm to consumers caused by counterfeits was not highlighted and there was not a clearer analysis made of the potential benefit of greater enforcement in this area.

Design

Whilst the Government is saying how important design is to the UK economy (£23 billion invested in 2009) it is also suggesting that design protection could be diluted. There is concern that the Government wants further research on whether to eliminate national unregistered design rights and bring UK unregistered rights in line with EU. This would mean that 99% of the UK's 232,000 designers who do not register their rights (only 2111 did last year), would have their protection cut from 10 to 3 years. This is unfair when comparisons are made with a songwriter or artist who will get copyright protection for 70 years after their death. European designers also benefit from unfair competition law which kicks in and runs alongside the rights so once the 3 year period is over, there is still an available remedy. In the UK designers can only rely on passing off which is ineffective and for small businesses who find it difficult to provide evidence of consumer confusion.

Extension of copyright exceptions

We are disappointed to see the Government agreeing with the Review that the UK should seek the widest possible exceptions to copyright. We do not agree with the Government's conclusion that the system of copyright exceptions requires a radical overhaul, but instead believe answers lie in, collectively, doing more to raise awareness of the importance of IP and the value, both financially and culturally, that

it brings to the UK. Transparency, education and licensing are key to this, not the addition of new exceptions which, in some cases, look to impose a ‘one size fits all’ solution to different sectors with different business models. For example, the recommendation to introduce a blanket format-shifting exception will create consumer confusion about how it applies to different copyright industry sectors and has the potential to harm existing business models where format shifting has an economic value built in to current commercial propositions. For further information on this please see the submission from the British Video Association.

In addition, the Hargreaves proposal to widen exceptions to allow data and text mining, both within the current European framework and eventually through amending European law, is an unnecessary, blunt instrument. Licensing models which are highly sensitive to the needs of users are already in place and publishers strongly support those seeking to access data for research purposes. An exception to allow untrammelled copying would expose works to copyright abuse. The Publishers Association will be submitting to the Committee’s inquiry with further detail on this issue.

Evidence and the economic impact assessment

The Review and the Government response make significant commitments to an evidence based policy making process for IP policy. Yet the economic impact assessment provided by the Review makes assumptions on the basis of questionable and, in some cases, a lack of evidence.

1. It states that technological innovation and markets are restricted when it is illegal for consumers to format shift legally purchased content. However, no evidence is provided to support this statement and it fails to take into account the innovation and new markets that have been created which absolutely allow consumers to format shift legally purchased content using existing licensing.

2. Contradictory statements are also made in relation to whether or not the introduction of such an exception would require ‘fair remuneration’, as allowed for under the Copyright Directive. On the one hand it comments that consumers already format shift and therefore no levy would be required as its introduction would not distort the market, but then on the other it states that content industries would benefit as they ‘should experience increased demand as output can realise higher value’. Both cannot be the case.

3. The Alliance also believes the calculations used by the Review to reach the conclusion that the growth impact of the introduction of a format shifting exception would be potentially £2 billion are highly suspect. Simply halving what Apple made from the iPod over the past decade as the basis for this figure is poor economics and should not be used to justify such a significant change to UK law.

4. It is also unclear why the Review is so certain that the UK is better placed than other EU economies to benefit from the predicted explosion in technological innovation which they believe would accompany a private copying exception. Many other EU nations have had such an exception in place for years but seen no such accompanying growth and indeed less innovation than the UK.

5. Even given our conditional interest in a Digital Copyright Exchange, we recommend the Committee evaluates whether the Copenhagen Report, used by the Review to make the economic case for a Digital Copyright Exchange, is an appropriate piece of research to use in this context. This report does not look at how changes in the UK market can improve growth and productivity, but is about cross-border market unification of digital services. The assessment also ignores the economic impact or risk to innovation from a Government inspired intervention and the creation of a monopoly. It is possible this could lead to higher prices to users of licensed material and consumers than if companies were able to licence in competition in competition to each other.

6. The evidence base to support the introduction of an exception for parody appears equally questionable. It is stated as fact that a reduction in moral rights will have no effect on a creator's incentive to produce new works but with no evidence to support such an assertion. It also paints a curious picture of the state of British comedy and its success, or otherwise, on the global stage.

7. The Review Team's selective discarding of evidence provided to the Review is contrary to its intention to have policy made on the basis of evidence. Abundant evidence was supplied to the Review that shows that economic growth and effective enforcement are linked, and so economic growth in the UK can be linked to better enforcement of IP rights. To simply discard this evidence because it did not appear to fit with the Review's own perception of the markets was extremely disappointing.

It is a positive step that the Government has said the IPO will be providing guidelines on transparency and methodology in relation to evidence that will guide its development of IP policy. However, any policy recommendations proposed by Hargreaves and accepted by Government must, as they are consulted on, be accompanied and led by a similar evidence base rather than the broad and sweeping assumptions found in the Hargreaves review economic impact assessment and repeated in the Government response.

Summary

While we do have concerns with the Review's findings and the Government's response, as expressed above, there are elements of Government policy in relation

to IP which we welcome. In particular, we support the publication of the new IP Crime Strategy and the commitment to more joined-up thinking in this area. The strong commitment to support UK businesses seeking to exploit and protect their IP internationally is to be commended.

Continuing investment in IP rich industries relies on an ability to monetise and protect IP rights. The Government needs to understand better the importance of IP to economic growth and the economic consequences of weakening the IP regime at a time when the economy is so delicately balanced.

Written evidence submitted by the Association of Colleges (AoC)

The Association of Colleges (AoC) represents and promotes the interests of Further Education Colleges and their students. Colleges provide a rich mix of academic and vocational education. As autonomous institutions, established under the Further and Higher Education Act 1992, they have the freedom to innovate and respond flexibly to the needs of individuals, business and communities.

The following key facts illustrate Colleges' contribution to education and training in England:

- Every year Colleges educate and train over three million people.
- 35% of entrants to higher education come from Colleges.
- More than half of all Foundation Degree students are taught in Colleges
- 171,000 students study higher education in a College
- Colleges teach over 45,000 students from outside the UK.

Colleges are centres of excellence and quality. 89% of employers training through a College are satisfied with the service provided. 100% of colleges inspected in 2008/09 were judged satisfactory or better by Ofsted for the quality of their provision.

For more information on Colleges please see www.aoc.co.uk

Summary

- AoC supports the findings of the Hargreaves Report and agrees with the Government's response as it applies to the safeguarding of intellectual property in order to support and develop the digital economy.

- AoC does have concerns about the use of the Digital Economy Act as the primary means by which to enforce the recommendations of the Hargreaves Report.

- The Digital Economy Act has a number of serious consequences for Colleges that may hinder efforts to maximise digital inclusion and foster creativity and innovation in education and learning. These include the cost of enforcement and also the ambiguity around the status of Colleges with respect to certain provisions within the Act.

- AoC seeks clarification from Ofcom as to the status of Colleges under the terms of the Act and strongly recommend that Colleges are defined as 'non-qualifying ISPs' to ensure that they remain places for learning, creativity and innovation.

Introduction

1.0 AoC supports the findings of the Hargreaves Report and, broadly, agrees with the Government's response as it applies to the safeguarding of IPO in order to support and develop the digital economy. In particular we note that the Government state that it is

> 'important to stress that while the Government's focus is firmly on economic growth, issues of fairness and social impact are also important in the context of IP rights' [1]

And also that,

> 'A key factor in achieving this is reliable evidence, which is particularly challenging in respect of IP infringement because much infringing activity takes place away from the eyes of rights owners and enforcement bodies.' [2]

1.1 In line with previous AoC policy however it should be noted that we continue to have reservations about the Digital Economy Act 2010 (DEA) as a primary means of enforcing the recommendations of the Hargreaves Report.[3]

We believe that guidance provided by Ofcom may create confusion about the effective implementation of the DEA as it applies to IPO. The Government's response states that,

> 'Following advice from Ofcom...site blocking will not be brought forward at this time. However, the Government is keen to explore the issues raised by Ofcom's report and will do more work on what other measures can be pursued to tackle online copyright infringement.[4]

1.2 The use of the phrase, 'other measures' will require explicit clarification if uncertainty as to the ways in which the DEA is to be implemented by Colleges is to be resolved. This is particularly the case as one of the actions listed in the Government's response to the Hargreaves Report is to,

> 'bring forward proposals for a substantial opening up of the UK's copyright exceptions regime, including a wide non-commercial research exception covering text and data mining, limited private copying exception, parody and library archiving. We will consult widely on the basis of sound evidence'.[5]

The Digital Economy Act and Colleges

2.0 The DEA has a number of serious consequences for Colleges which we do not believe were the original intention of the legislation and may hinder efforts to

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[1] The Government Response to the Hargreaves Review of Intellectual Property and Growth, Crown Copyright, 2011, p.3
[2] Ibid, p.10
[3] Ibid, p.11
[4] Ibid, p.12
[5] Ibid, p.16

maximise digital inclusion and foster creativity and innovation in education and learning.

2.1 In particular Colleges are concerned about the cost of enforcing the Act's provisions. AoC argues that it would place an excessive administrative and financial burden on Colleges to ensure that they are not in breach of the Act and that this may lead Colleges to adopt a 'risk averse' position. If Colleges make the decision to withdraw services rather than risk breaching the DEA then students and staff could be disenfranchised with regard to access to digital resources. The educational and, broader socio-economic, effects of such 'digital exclusion' would be profound, not least with reference to information access, the costs of obtaining permissions from existing rights-holders, and fair use.

2.2 The Act contains certain ambiguities as it currently stands and it is possible that Colleges could be defined as an Internet Service Provider (ISP), a subscriber and/or a user. AoC would argue that the guidance provided by Ofcom on the enactment of the DEA has to make clear these distinctions and, moreover, that Ofcom include Colleges under its definition of a 'non qualifying ISP'. In so defining Colleges they would be afforded a degree of dispensation essential to the ways in which the DEA will be interpreted and enforced. The difficulty in interpreting the provisions of the DEA, not least the technical problems involved in its enforcement, pose real challenges for Colleges.

2.3 At a time when Colleges are seeking to make cost savings while remaining innovative in the use of technology, not only in relation to learning and teaching but as part of the economic life of the communities within which they exist, any legislative measure that restricts the use of digital resources is of real concern to the sector.

2.4 Colleges have expressed concern over the implied technical measures required to implement the Act, both in terms of cost and efficacy. As one College IT Manager has noted,

> 'I do not think there is a technical solution to this at the moment. As soon as there is a technical solution someone will find a way round it. I think we as Colleges should ensure our staff and students are "educated" to understand the issues around downloading or using copyrighted material. If necessary, our disciplinary processes need to be amended to reflect the seriousness of abusing the Act.'[6]

This point was endorsed by the Government's response to the Hargreaves Report.[7]

2.5 The level and scope of monitoring implied by the Act has also raised concerns from those tasked with implementing it within Colleges. As one IT Director has argued:

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[6] Director IT Services, Warwickshire College

[7] The Government Response to the Hargreaves Review of Intellectual Property and Growth, Crown Copyright, 2011, p.10.

> 'We don't at the moment keep an audit track of every logon because frankly it would generate so much data that we would be hard pushed to make any meaningful sense of it. In this respect ISPs have a slightly easier task in that they know which IP they have allocated to which subscriber at any moment in time. We may be able to track which PC has which IP (although even that isn't simple due to Dynamic Host Configuration Protocol (DHCP) lease times) but we would also then need to track which user was logged on to that PC at the time any infringement took place which is another layer of recording.'[8]

The inability of technical measures to enforce the Act was, again, endorsed by the decision of the Government not to enforce site blocking, but this does raise the question of how the provisions of the DEA will be used to promote the ethos of Professor Hargreaves' findings.

Despite the use of extensive monitoring systems within Colleges, including software and firewalls to block outgoing ports, most Colleges would face additional burdens in enforcing the Act in that,

> '…what we don't have is anyone to actually "monitor" these things let alone anything more proactive. What we in fact do is report after the fact if we are given cause to suspect that something has taken place. Even this places a burden on resources from a staffing point of view as this takes a person away from their actual job'.

The above correspondent went on to conclude that whether Colleges were defined as ISPs or as Subscribers under the terms of the Act that, 'Looking at what this entails in terms of monitoring I have no doubt that we cannot currently fulfill those requirements either technically or…more importantly manpower wise'.[9] How Colleges resource the 'education' required to create a culture that supports innovative IPO thus remains an issue.

Conclusion

3.0 Colleges already operate simple, effective and proportionate steps to prevent copyright infringement on their networks. AoC argues that the additional cost and administrative burden that the Digital Economy Act requires, and the potential detriment to learning, far outweighs the risks of infringement, for which there is little credible evidence regarding College students. AoC argues strongly that Ofcom guidance should define Colleges as 'non qualifying ISPs' or that the Act be amended to allow this definition.

September 2011

[8] IT Director, Derby College
[9] Ibid.

Written evidence submitted by the Association of European Performers' Organisations (AEPO-ARTIS)

AEPO-ARTIS represents 28 European performers' collective management organisations from 22 countries, 19 of which are established in Member States of the European Union. The other countries represented are Croatia, Norway and Switzerland. Combined, these organisations have in excess of 350,000 performers as members.

In EU member states, private copying remuneration represents almost 40% of revenues collected by our members on behalf of performers. As well as benefitting performers in these member states, a significant share of this remuneration is distributed to UK performers.

We have had sight of the submission made to the BIS Select Committee by our member organisation, BECS (British Equity Collecting Society Limited) and wish to express the fact that we share their concerns about the UK Government's announcement that it agrees with the Hargreaves Review's central thesis that "the widest possible exceptions to copyright within the existing EU framework are likely to be beneficial to the UK, subject to three important factors".

It is noted that the UK government desires a system which "avoids…the need for a copyright levy". However, we do not believe it is justifiable to adopt a strategy which is clearly designed to achieve this result, but does not take into account the fact there are almost no circumstances in which "fair compensation", regarding an exception to the reproduction right, could ever be construed to mean "zero compensation".

A system of private copying remuneration exists in almost all EU member states and in these countries it is widely acknowledged that harm does indeed occur when private copying takes place. We respectfully request that the UK authorities reconsider their analysis, taking into full consideration the framework of applicable EU law.

Xavier Blanc
General Secretary

2 September 2011

Written evidence submitted by the Association of Learned and Professional Society Publishers (ALPSP)

Summary

1. ALPSP broadly welcomes the Government's response to the Hargreaves Review of Intellectual Property. We are, however, perplexed about the proposal and need for a "text and data mining" exception, as *evidence* of its requirement is lacking.

2. ALPSP is focussing the response to the BIS Inquiry on the proposed "text and data mining" exception. We will refer to this as content mining.

3. It is far too early to anticipate how content mining will develop. It is entirely possible that it will replace human-reading, becoming the normal exploitation of the work. An exception would therefore be in contradiction to the Berne Convention.

4. It is unclear what evidence there is to suggest there is a problem with content mining that requires an exception. A recently published study found that over 90% of publishers who had received requests for content mining were happy to oblige. Given the small number and infrequent nature of requests, the majority are handled on a case-by-case basis. Assumptions should not be made where a publisher may have refused a request – dialogue with publishers is required.

5. A survey of ALPSP members (small and medium publishers) indicate that of those who have received requests for text and data mining, all have been accommodating to those requests. Those who have not received requests (currently the majority) are understandably anxious about what effect a potential exception will have on their business.

6. The potential for a negative effect of such an exception on the UK Growth Agenda should be given careful consideration.

Introduction

7. ALPSP broadly welcomes the majority of the recommendations laid out in the Hargreaves Review and as accepted by the Government. We recognise the importance of and are already engaging in projects to resolve issues surrounding Orphan Works (for example, the ARROW Project[1]). We also look forward to participating in discussions surrounding the development of a "Digital Copyright Exchange" (DCE), which will be an important tool as part of a diligent search for owners of potential Orphan Works and in enforcing deliberate acts of copyright infringement.

8. As part-owners of the Publishers Licencing Society, ALPSP supports the British Copyright Council proposals on Principles of Good Practice for Collective Management Organisations. We support properly managed extended collective

[1] http://www.arrow-net.eu/

licensing schemes, where appropriate, that will further simplify the clearance of copyright permissions and provide remuneration to creators and other rightsholders.

9. We particularly welcome improvements in SME access to the IP system, including access to lower cost IP legal and commercial advice.

10. ALPSP submitted a response to the Hargreaves Review and therefore we will focus this response on an aspect not already covered, namely the proposed "text and data mining" copyright exception.

11. *Digital Opportunity* provided no evidence of the requirement for, nor an impact assessment of the effects of, such an exception. Indeed, it is likely to be far too early to be able to carry out a full and proper impact assessment, given the infancy of this market.

12. There is a common misconception that the Malaria Research example reiterated in *Digital Opportunity* would be solved by a "text and data mining" exception. It would not. This will be solved by the orphan works and Digital Copyright Exchange proposals, in conjunction with the already receptive attitudes of publishers to text mining requests (evidence for the latter in paragraphs 17-30).

13. Exactly what text and data mining is and its potential is far from clear. In addition to the primary example of finding previously un-noticed patterns in text and data, there is another potential for this technology, referred to in the National Centre for Text and Data Mining's submission to the Hargreaves Review (*Digital Opportunity*, Supporting Document T, p7). It is very possible, given the current climate of technological developments, that "text and data mining" will replace the normal human reading and assessment of published works. This means that it will become the normal exploitation of the work and an exception would therefore be contrary to the Berne Convention.

14. Text and data mining are not well-defined at this stage. Do they mean the same thing? Or does text mining refer to published article content and data mining refer to the raw data that is held by researchers rather than publishers? For the remainder of this document, we shall refer to 'content mining' to mean the 'content' as produced by publishers, whether as a replacement for human reading or to find patterns. This is content that the publisher has invested in, adding value to enhance and optimise its trust, discovery, usage and preservation.

15. Content mining is an emerging field. It is a long way from reaching its potential, so much so, that it is difficult to assess the full effect it is going to have on the scholarly publishing market.

16. It is premature to suggest that this "market" has failed when it is still an emerging, embryonic market.

Evidence

17. A survey of ALPSP members has demonstrated that the majority of them (SMEs) have never had any request for text or data mining of their content. How then, can

publishers be accused of blocking access to “medical data”, when access for content mining has yet to be requested? This is further evidence that this is an emerging market, which has not had time to establish. How, then, can it be said to have failed?

18. The majority of ALPSP publishers are currently unable to ascertain the positive and negative effects that content mining may have on their business. It is too early to estimate this. It is too early to carry out a meaningful impact assessment.

19. ALPSP publishers who have yet to receive mining requests are obviously worried about resource issues in enabling appropriate access; they do not yet understand what it would entail. They are concerned about traffic to sites and servers being overloaded, whether they will have to produce content in a standard format, potentially requiring changes to their workflows, and how will they fund it.

20. The market is yet too young for this to have embraced all publishers and only a fraction of the overall market is currently involved.

21. Given the potential for content mining to become the primary exploitation of the work, an exception would mean that SMEs would be denied the potential to expand their business, directly contradicting the UK Government’s policy for Growth.

22. The few ALPSP members that have received requests to mine their content have all been receptive and facilitated the request. It is becoming a negotiated inclusion in licences with pharmaceutical companies; those who have paid to access the content publishers have invested in are facilitated in their requests to mine it.

23. Where is the evidence that content mining is being blocked by publishers? A recent study has demonstrated quite the opposite[2] (attached to this submission). The study discovered that requests for content mining were, at the present time, found to be infrequent (reflecting the response from ALPSP members).

24. The study found that over 90% of “publishers tend to treat mining requests from third parties in a liberal way, certainly so for mining requests with a research purpose”.

25. 28% of publishers surveyed already routinely allow content mining without restrictions as part of their Open Access policies.

26. Publishers are understandably less able to positively respond to requests for content mining where the purpose will compete with the original content. Where content mining is refused, it would be prudent to establish the reason for this, rather than to simply *assume* that publishers are being obstructive.

27. It is clear from this study that publishers are perfectly willing to licence subscription-based or Gold OA material for content mining (i.e. that access to the content they have invested in, is appropriately remunerated).

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[2] Journal Article Mining. A research study into Practices, Policies, Plans and Promises. http://www.publishingresearch.net/documents/PRCSmitJAMreport20June2011VersionofRecord.pdf

28. Content mining requires downloading of content to the user's own systems. It is unreasonable to expect all publishers to have the bandwidth and server capacity to allow mining on their own sites. This means that content has to be reproduced and repurposed and thus would require a license. As already mentioned, publishers are receptive to requests for such licences. Indeed, some (larger) publishers are already providing their content in an offline format where necessary.

29. It should also be noted that 100% of article abstracts *are* already readily available for content mining.

30. The potential of an exception also raises the issue of where the content is published. Would the exception apply only in the UK, to UK-published material? This raises two very important points. 1) how do users distinguish between UK-published and non-UK published material? We are already being told that the UK copyright framework needs to be simplified for users – this would simply increase complexity unnecessarily, and 2) would this be an incentive for publishers to move their publishing away from the UK, thus undermining the UK's growth agenda?

Conclusions

31. This evidence clearly shows that publishers are **not**, contrary to what others may have suggested, blocking access to content they have invested in, in response to reasonable requests for mining. As such, we fail to understand why an exception is necessary.

32. The proposed 'text and data' mining exception appears to be a knee-jerk reaction, which currently is not backed by evidence of its necessity. Indeed, the market is not even yet fully established.

33. Evidence shows that publishers who have received content mining requests understand its importance and the exciting possibilities it creates. The evidence available to date shows that publishers are positively responsive to content mining requests and are willing to facilitate them.

34. Publishers are more than happy to enter into dialogue with those who think there is a problem and to discuss how it can be resolved for the benefit of all. We wait to be invited.

Dr Audrey McCulloch
Executive Director, UK

On behalf of ALPSP membership

September 2011

Written evidence submitted by the Association of Photographers Limited (AOP)

The Association of Photographers Limited (AOP) is a not-for-profit professional trade association, founded in 1968. Its aims are to promote and protect the worth, credibility and standing of its members and to vigorously defend and lobby for the interests and rights of all photographers in the photographic profession.

With around 1,500 members, the AOP represents professional photographers, assistants, agents and students. Members have a wide client base, ranging from individual clients in the corporate sector to design groups, publishing houses, music publishers and advertising agencies. Their work is published worldwide in magazines, newspapers, books and advertising campaigns and many sell their images as Fine Art through galleries, both traditional spaces and online.

The AOP is a member of the British Copyright Council, British Photographic Council, Pyramide Europe (EEIG) and AOP members are represented by the Design and Artists Copyright Society (DACS) for collective licensing.

1. We welcome the Government's commitment to providing a fast track small claims route for copyright infringement through the County Court system but with reservations on the proposed reform.
2. The proposed limited private copying exception makes sense for some areas of creativity but not all.
3. An exception for parody must also be limited.
4. We approve of the proposal that any Digital Copyright Exchange (DCE) would work as an independent marketplace but have reservations on the actual workings of such a register.
5. We are very concerned by the proposal that licensing of orphan works could extend to commercial uses
6. We are alarmed that the Government has made no mention of Moral Rights, which we believe are enshrined as Human Rights in the Universal Declaration of Human Rights (1948) and also in the International Covenant on Economic, Social & Cultural Rights (1966)
7. The lack of reform in contract law (The Unfair Contract Terms Act 1977), which has precedence over copyright law, is misguided
8. The burden of copyright education has incorrectly been left to creators and rights-holders

1. We welcome the Government's commitment to providing a fast track small claims route for copyright infringement through the County Court system. We have lobbied over many years for this reform, and it was recognized as a necessity in the report made by Lord Justice Jackson in January 2010. However, we are concerned to see that the caveat of 'value for money' has now been attached to this. This crucial reform of the court system must be implemented as

soon as possible and the current proposed ceiling of £5000 for claims should be raised to £10,000.

2. The proposed limited private copying exception makes sense and would legalise the actions of a huge sector of the population without affecting the revenues of those creators. However, this exception is not right for all areas, in particular, the visual arts sector. As stated in our reply to Hargreaves, visual arts creators will be greatly disadvantaged through a loss of revenue from sales of images through online galleries; and sales of prints from wedding and portrait sittings if it becomes legal to download images from the Internet for personal use. Following the Gowers' Review it was recognized that visual works could be at risk from a private copying exception a fact we are concerned has been overlooked.

3. A carefully drafted exception for parody may be appropriate in some cases, but this must be done in such a way as to not prejudice the creators of the original work. This exception must also be limited to ensure all types of creators are protected. We note that the Government has said it will consult widely on this and we insist that all types of creator must be involved in the process.

4. We approve of the proposal that any Digital Copyright Exchange (DCE) would work as an independent marketplace where rights holders can set their own rates, and that participation should be free to both creators and users with open standards, so that access to such a database can be automated through software solutions. We agree that participation should be voluntary and therefore not in contravention of the Berne Convention. However we do have a great many concerns regarding any DCE, with respect to the actual formation, daily running, costs and international participation. We understand that a prototype may be introduced before the end of the year and look forward to participating in its formation.

5. We agree with and welcome the statement that any proposals for the use of orphan works (in essence, any copyrighted work for which the copyright owner cannot be contacted) should be subject to satisfactory safeguards to prevent unfair competition from any licensing of such orphans. We agree that any proposals for Extended Collective Licensing (ECL) should be adoptive rather than enforced on any sectors in the industry. We are very concerned by the proposal that licensing of orphan works could extend to commercial uses, something we, and many others, have been against from the start as it undermines the creators' marketplace and makes a mockery of existing licensing arrangements. We have seen no published evidence to show that UK industries are disadvantaged through being unable to commercially exploit orphan works. We understand the need for cultural institutions to protect and display orphaned works for cultural purposes and, if cultural use is clearly defined, would have no problem with this type of use. We strongly suggest that any arguments presented for the loosening of intellectual property rights are presented by those

corporations that seek to gain the most financially from such legislation. These arguments seek to erode creators' rights, not strengthen them and as such, we oppose any move to seek to make commercial use from orphan works.

6. We are alarmed that the Government has made no mention of Moral Rights, which although outside the remit of Hargreaves' review, are vital to the development of better IP legislation. It is nonsense to talk about licensing orphan works when we still do not have unwaivable Moral Rights - in particular, the right to be identified. To ignore the obvious need for the strengthening of existing moral rights to give creators an automatic, unwaivable right to a credit, before introducing a system to address orphan works, is extremely remiss at best. Given the number of creator-led submissions supporting the overhaul of this area, we are very disappointed that it has been ignored yet again. UK creators are at a disadvantage compared to all other EU countries, where moral rights are unwaivable and treated with respect and are in line with the Universal Declaration of Human Rights, Article 27, paragraph 2 which clearly states; "Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author." This is explicit. In addition the Covenant on Economic, Social & Cultural Rights states in Article 15, paragraph 1(c) that: "The States Parties to the present Covenant recognize the right of everyone - To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."

7. The lack of reform in contract law, which has precedence over copyright law, is also remiss. As stated in Schedule 1, Clause 1 (c) of the Unfair Contract Terms Act 1977, any rights given under copyright law can be superceded by contract law, making any copyright reforms futile as large corporations will continue to include clauses in their commissioning contracts to over-ride them. The review stated "The Government should also legislate to ensure that these [exceptions] and other copyright exceptions are protected from override by contract." This does not go far enough - if current and new exceptions, which are mainly in favour of publishers, can be protected against contracts overriding them, then there is no reason why legislation cannot be reformed to ensure creators rights under copyright law are equally protected.

8. We are dismayed to see that the Government has not taken the opportunity to provide appropriate education and protection for consumers regarding enforcement, but has placed the burden of such activity on rights-holders and creators. Future creators, rights holders and commissioners need to be educated at an early age on the importance of copyright both in an economical light and a moral one enabling them to protect their work. Additionally, if private copying is to be allowed then it is imperative that a Government campaign is undertaken to educate the public on what can be legally done with copyright works.

In conclusion, we accept that there seem to be some areas that the Government wishes to address for the benefit of creators and welcome the opportunity to be involved in discussions around this but we are dismayed that the Government has seemingly missed an opportunity to really strengthen the creative industries in the UK and ensure their survival and future growth.

We note that the Government proposes to move forward on the basis of “open and transparent” evidence and are alarmed that whilst they acknowledge that SMEs find it very difficult to provide empirical evidence, there is little suggestion that other ways of engaging with those businesses will be sought. This consultation also asks for “new evidence”, it was a difficult task to provide evidence for the original review and so, given the short time between this and the Hargreaves’ submission and the even shorter time lapse of the request and close of submissions, it has not been possible to provide new evidence to back up this submission. We hope that this fact will not prejudice the outcome of further discussion.

5 September 2011

Written evidence submitted by the Authors' Licensing and Collecting Society Limited ('ALCS')

The Authors' Licensing and Collecting Society Limited ('ALCS') is the UK collecting society for writers. Established in 1977 and wholly owned and governed by the writers it represents (of whom there are currently over 83,000), ALCS is a not-for-profit, non-union organisation. ALCS exists to ensure that writers receive a fair level of return when their works are used in situations in which it would be impossible or impractical to issue licences on an individual basis. Since its foundation, ALCS has paid writers over £280 million in fees and today it continues to identify and develop new sources of income for writers. We would be happy to provide oral evidence to the Committee in support of this response.

1. We recognise that the Committee will be reviewing the submissions made to the original call for evidence. The ALCS submission, supported by statistical data and case studies from writers, made the following inter-related points:

- Writers work at the heart of the UK's creative industries;
- The UK copyright system must maintain the access/reward balance;
- This balance is, in part, underpinned by established licensing structures ;
- Licensing income supports the creation of new works (the 'regenerative cycle of creativity').

2. The Government response to the Hargreaves review supports 'a substantial opening up of the UK's copyright exceptions regime.' This will include new measures to allow: limited private copying; extensions to the current non-commercial research exceptions (including new allowances for 'data-mining') and creating works of parody. Given the Government's support for the principle that 'evidence should drive policy', plans to press ahead this autumn with proposals for new legislation seem premature when there are several questions that have yet to be fully explored and researched. These include:

3. Private copying. A full examination of the potential 'harm' resulting from a new private copying exception for individual users and their families has yet to be undertaken, not least in the context of the requirements of the European Copyright Directive relating to the payment of fair compensation.

Furthermore, harm to rightsholders is a criterion by which the need for fair compensation may be judged, but this is not an absolute or exclusive test. The Hargreaves report notes the 'considerable evidence of overall public benefits' from acts of private copying. This benefit-focussed analysis has yet to be undertaken and should form part of any process of pre-legislative review.

4. Non-commercial research. The proposals to widen the current UK exceptions to the fullest extent permissible by EU law do not take account of extensive and evolving UK licensing structures, particularly in the context of developing new educational access models. A full review of how the new proposals fit within this structure is required to avoid the unintended consequence of weakening economic growth, by prejudicing the future output of writers and other key contributors that rely on licensing income.

5. A similar concern relates to the proposals due to be brought forward on orphan works and extended collective licensing. The parameters of these new schemes will, to a large degree, depend on how works are defined – orphan, in or out of commerce – and how proposed uses are characterised: commercial, non-commercial, 'cultural'. Prior to considering the terms of possible legislative solutions, more work needs to be done to further define the uses and works that may be within the scope of these new schemes.

6. Parody. Apart from the paucity of evidence advanced in support of a new parody exception, the wider issue of how such a provision would operate within the UK's current moral rights regime – which offers authors far weaker protection and redress than that in other countries with parody exceptions – should also be reviewed in detail as a precursor to any legislative intervention.

5 September 2011

Written evidence submitted by B3ta.com

For the last ten years I've co-run a website called B3ta.com which has helped establish the practice of photoshopping images in the UK. Our site does 15 million pages per month and our newsletter is read by over 100,000 people.

B3ta.com is about grassroots creativity, encouraging people to pick up the tools of the internet and use them to make jokes, entertain each other and ultimately help people flower their creativity into new careers. Along the way we've played a part in the careers of generation of people who are the bright new talents in the UK's creative industry. Our alumni include Ben Wheatley, one of the most feted directors of recent years who has just had a hit film with Kill List, music producer Swede Mason who has taken his mash-ups into the top 40 and figures like Joel Veitch, Jonti Picking and Cyriak whose animations have become a mainstay of advertising.

In the ten years of B3ta we have had various problems with lawyers and copyright holders. Unfailingly business uses copyright to suppress criticism and humour, so we're very excited to note the "5.32 Other Copyright Exceptions" section of Professor Ian Hargreaves's Digital Opportunity report, specifically "an exception for parody and pastiche." This would be enlightened policy making.

Letters we've received from copyright owners to shut down humour include:

1. **Halifax** demanding removal of a joke suggesting there was a double entendre to be found in their slogan, "Who gives you extra?"

2. **Hasbro** apparently didn't like their Monopoly brand associated with legitimate political criticism of the power of supermarkets within our society. They forced us to remove the below image on copyright grounds.

3. Musician **Prince** recently went after all his fan sites for copyright reasons. Bizarre behaviour - suing your fans who pay your wages is self-defeating lunacy. We decided to highlight this by asking our members to photoshop Prince, and he of course made us remove all the images again under copyright.

Our point, and it's a very serious one despite the silly images is that those who can afford lawyers use copyright to shut down legitimate criticism. This is wrong in a society that believes in equal rights to all. We full support the proposed government move to allow parody and pastiche to be exempt from copyright. This would be sane and fantastic policy. Do the right thing.

Rob Manuel and the creative B3ta community.

24 October 2011

Written evidence submitted by BECTU

1. BECTU is the trade union for workers in the audiovisual and live entertainment sectors. Nearly half our members are freelancers and a significant minority (including producers, directors, set designers, costume designers, art department, animators, stills photographers and visual artists) potentially have copyright in their work. We therefore have a close interest in policy on intellectual property.

2. We are disappointed that the Review by Professor Hargreaves and his recommendations have failed to address a number of issues of very real concern to individual creators of copyright protected works, such as unfair copyright contracts and the weakness of moral rights legislation in the UK. Our comments on the Government's response to the relevant recommendations made by Professor Hargreaves follow.

Evidence should drive policy

3. In BECTU's response to the Review we flagged recent and authoritative research carried out by the film and television sector and as part of that sector we look forward to co-operating with Government on any future research programme.

4. There are, however, difficulties inherent in any attempt to define or to research the creative, cultural heritage, media and copyright industries. Difficulties which have long been recognized by industry, researchers and Government such as the irrelevance of established SIC codes and the overlaps between our industries. Government must take a lead in establishing standards for industry research if it wants to see good-quality evidence which is of value to the sector and can be compared with what is already available for other sectors within the UK economy.

5. We would also like to see greater recognition of the difficulties which SME's and individual right holders and those who represent them face in carrying out research, not least in terms of funding. By focusing on "headline" figures such as economic value to the UK economy, Government rarely sees more detailed research finding which indicate the needs, interests and contribution made by those at the bottom of the value chain i.e. the creative individuals and SMEs on who the success of our industries depend.

- **International Priorities**

6. The UK film, TV and entertainment industries are world renowned. We therefore welcome the Government's recommendations for international priorities.

Digital Copyright Exchange

7. The Government's proposal for a Digital Copyright Exchange is an interesting one and BECTU looks forward to participating in its development. We are also interested in hearing how Government thinks the DCE can function successfully in the film and television industries, given the involvement of multiple contributors and right holders, complex chains of rights, global transfers and a market which is dominated by the

USA. We are also interested in how the DCE could operate across all our creative and cultural industries. We do not think that a "one size fits all" solution is the answer.

8. Bearing these issues in mind, we think there is potential for a DCE which fulfils a "signposting" function e.g. by directing potential licensees to right holders but not for a "one stop shop" which would provide a full rights clearance function e.g. by setting or negotiate prices on behalf of right holders.

9. We also note the very ambitious deadline for this project.

Copyright Licensing

- **Cross-border licensing**

10. The film and TV industry already functions effectively across borders but we look forward to commenting on the forthcoming Commission proposal and to contributing to UK thinking on this.

- **Orphan Works**

11. BECTU supports the BCC's proposal on orphan works licensing.

12. We do, however, have a number of concerns which must be addressed before any orphan works licensing can be permitted. These include: - clearer definition of what is an orphan work, due diligence search processes, licensing at market rates, commercial licensing of orphan works. We would also like to ensure that measures are taken to prevent any future increase in the numbers of orphan works. Finally, we are still waiting to see hard economic evidence of user needs for orphan works licensing.

- **Extended Collective Licensing**

13. The Government's response does not make it clear how widely it intends to introduce extended collective licensing and though we support its introduction in relation to orphan works licensing, we do not support the widespread introduction of extended collective licensing across the film and television industries.

14. While we recognize that certain existing voluntary licensing arrangements, already in place in the UK, function as extended collective licences, these were developed by right holders and their representatives, with industry encouragement and with relevant collecting societies and in response to a recognized need. That is, such licensing arrangements came out of industry initiatives and through voluntary co-operation. They were not imposed on right holders or on the industries concerned.

- **The Role of Collecting Societies**

15. As we said in our response to the Review, BECTU already engages with a number of the UK's collecting societies on behalf of its members. Our members benefit from schemes operated by ALCS, DACS, Directors UK and Screen Crafts Rights. We support their work and are consulted about their activities. We look forward to working with the European Commission and with the UK Government on proposals for

increased openness and transparency of collecting society operations, particularly those operating elsewhere in Europe. We also welcome and support the British Copyright Council's initiative to develop Principles of Good Practice for Collective Management Organisations.

Lawful copying

16. We fully support the view expressed by the British Copyright Council in its initial reaction to the Government's response which states:-

    "We share Government's concern that "widespread flouting of copyright through private copying brings the law into disrepute" when the copying is currently unlicensed or unauthorised. However, we do not see that this leads naturally to the conclusion that the "widest possible exceptions within the existing EU framework are likely to be beneficial to the UK"."

17. We would like a clearer understanding of Government's position on this.

18. We do not support the Government's recommendation to introduce a private copying exception without fair compensation.

19. Any private copying exception must be carefully framed. While we understand consumer frustration at their inability to legitimately format shift it must be recognized that creators and the industries in which they work are increasingly reliant on on-line distribution and sales revenue. We are particularly concerned that private copying of films and television programmes, will greatly damage those revenues through the introduction of a wide reaching exception.

- **Text Mining and Technological exceptions**

20. The introduction of an exception for text and data mining or any exception for technological development must be given very careful consideration, be based on hard economic evidence and must take account of the potential impact on all the creative industries.

- **Non-commercial research and Library archiving**

21. Following the Recommendations of the Gowers Review, proposals for amending the relevant exceptions for non-commercial research and library archiving in UK law, were already underway and have been delayed by the Hargreaves Review. We hope this work will now continue.

- **Parody**

22. Government must consider how an exception for parody will impact on authors' moral rights.

Future proofing

23. We await Government's view on this.

Adapting the design framework

24. Within BECTU, our Art Department represents a large number of designers, many of whom are freelance individuals, from set designers to art directors and costume designers. We welcome Government's renewed interest in design rights.

Enforcement

25. Much of our response to the Hargreaves Review focused on our concerns about enforcement. Like the rest of the film and television industry we are concerned about the impact of physical and online piracy on our sector which poses a significant and growing threat to investment in our sector.

26. As we said in our original submission to the Hargreaves Review we have little choice but to find a way of making the DEA work. We therefore welcome Government's commitment to implementing the Digital Economy Act. We are working with our colleagues in the Creative Coalition Campaign on this issue.

27. As representatives of SMEs, sole traders and other individual right holders, we welcome Government's commitment to a small claims track for copyright infringement in the County Court system.

28. We welcome Government's recognition of the value of education on right but regret that Government intends the full burden for such initiatives to lie with right holders.

Helping SMEs

29. We look forward to the publication of IPO's plans later in the year.

5 September 2011

Written evidence submitted by the BioIndustry Association (BIA)

I am writing on behalf of the BioIndustry Association (BIA), the trade association for the UK's healthcare focused bioscience sector, with regard to the Business, Innovation and Skills Committee's inquiry into the Hargreaves Review of Intellectual Property and the Government's recent response to that Review.

The BIA welcomes the Committee's inquiry into the Review and the added scrutiny this will bring to the IP issues under consideration. It is encouraging to see the increased focus on the importance of a robust and reliable IP framework in the UK, brought about by the Hargreaves Review and the Select Committee's inquiry. IP, in the form of patents, is incredibly important to BIA members in helping to ensure equity is obtainable and the large financial outlays in drug development are suitably incentivised.

While the Hargreaves Review has a focus on the IT / software / digital sectors it is worth reiterating that changes to the IP framework for the benefit of certain sectors has the potential to affect all sectors. In the BIA's view this should be borne in mind when considering the potential for unintended consequences in sectors where the IP framework is, on balance, effective, workable and conducive to growth such as in life sciences.

The BIA understands that the Committee will be reviewing the evidence submitted to the Hargreaves Review (a copy of the BIA response is enclosed for reference)[1] and is keen to avoid submissions which repeat those points. With this in mind, a short response and reaction to the recommendations of relevance to the BIA and its members contained within the Hargreaves Review and the subsequent Government response to that Review is provided below for consideration. For the life sciences sector, this Review should also be placed in the context of other ongoing IP related policy initiatives and consultations, namely the Research and Bolar Exemption and the Patent Box.

Once again, the BIA welcomes the Business, Innovation and Skills Committee's inquiry into the Hargreaves Review and the Government response as adding an important voice to the debate on the UK's IP framework.

Nigel Gaymond
Chief Executive

2 September 2011

BIA response to the Hargreaves Independent Review of IP and Growth and the Government response

<u>Overview</u>

The BIA welcomes the Hargreaves Review and its focus on using Intellectual Property to support growth and innovation for UK companies. We further welcome

[1] http://www.ipo.gov.uk/ipreview-c4e-sub-bia.pdf

the Government's response to the Review and the clarification provided as to its future actions towards the IP framework.

While this Review, and subsequently the Government's response, has predominantly focused on the digital / IT sectors it is the BIA's view that some aspects touched by the Review have the potential to affect the wider IP environment and the life sciences industry. It is therefore important to ensure the views of all sectors are heard to avoid any unintended consequences.

As outlined in the original BIA submission to the Review, IP, specifically in the form of patents, form the lifeblood of bioscience companies. It is worth reiterating that for BIA members reliable and secure IPR underpin their development and value.

It costs, on average, $1bn and takes between ten to fifteen years to bring a biopharmaceutical product to market. Expenditures and risk taking of this magnitude can only be justified by the limited exclusivity right provided by a patent to recoup these research and development costs and to allow continued research on other projects.

SMEs in particular rely on IPR to protect their innovations, which form the value of their company. An SME is judged on the efficacy of its research, but that research is worthless unless it is adequately protected. Without the value conferred by IP, the company would be unlikely to attract finance (nor be able to find out-licensing partners) and this promising research would not be taken through the various clinical development stages to market.

The BIA is aware that the Hargreaves Review was tasked with examining the possibility that IP is obstructing growth and innovation in certain sectors. The BIA does not believe this is the case in the bioscience sector. It is the funding made available on the strength of the IP present that allows for innovation to flourish and growth in the UK bioscience sector.

It remains the BIA's view that attempting to change or weaken the IP system to address the specific concerns of certain sectors where IP is perceived to be a block could have a significant adverse impact on the life sciences sector, an outcome which would be of considerable concern to our members. Changes made to one sector have the ability to affect all sectors and should be approached carefully to avoid these unintended consequences.

Continued growth within the bioscience sector in the UK can be aided by maintaining the UK's positive approach to IPR and examining ways to enhance the system both in the UK and internationally. It remains important to have a strong and flexible IP system, both nationally and internationally, and we look forward to working with Government throughout the post-Review process to ensure this happens. The recently completed consultation on the Research and Bolar exemptions is a welcome development in this regard.

<u>Recommendations of relevance to the BIA</u>

While the Hargreaves Review appears to have a digital / IT / copyright focus, there are recommendations with regards to patents and the IP framework more generally which is of wider relevance. These specific recommendations are discussed below.

Recommendation 2: International priorities. "It [The UK] should attach the highest immediate priority to achieving a unified EU patent court and EU patent system".

The BIA agrees with this recommendation and supports the Government's approach with regards to the ongoing Enhanced Cooperation procedure. We reiterated our support for the development of a unified EU patent, alongside the associated EU Patent Court, in a recent submission to the UK Intellectual Property Office following a notification from the Court of Justice of the European Union with reference to C-295/11 Italian Republic v Council of the European Union (Patents).

The cost of securing and maintaining a patent across the European Union territories is significantly more expensive than in many other comparable geographies, the US or Japan for example. This disadvantages European businesses and is particularly prohibitive for Small and Medium Sized Enterprises which form the majority of the BIA membership. As such, it is the BIA's view that streamlining the patent process in the EU is to be encouraged and would support the growth of sectors reliant on robust IPR, such as the bioscience industry.

Discussions regarding an EU Patent have been ongoing for a number of years and it is therefore in this context that the decision to commence with Enhanced Cooperation was taken. Given the length of time discussions have been taking place, and the broad alignment from the majority of Member States on the parameters of an agreement, the BIA believes the utilisation of the Enhanced Cooperation procedure was the correct one. We support the UK Government's involvement in this procedure and hope to see it successfully followed through to conclusion. Furthermore, it is not our belief that the use of the procedure in this case has set any kind of precedent for future use in other cases but rather is justifiable when applied to the current circumstance.

It is also worth stressing that the EU patent must come into affect alongside the proposed EU Patent Court. There must be an agreed enforcement framework in place. It is our understanding that there are provisions within the draft EU Patent regulations which stipulate they will not come into force until a court structure has been agreed in order to provide for this.

The BIA is encouraged by the momentum which has been built towards completing the project and is keen that this should not be lost. It is, however, important that it does not serve to obscure or override the need for quality and cost efficiency in the new Court procedures which must be designed to ensure that the Court produces decisions of consistently high quality in a reasonable time and at a reasonable cost. We consider that adoption of the proposals currently under consideration would not achieve these objectives and, accordingly, we and others in industry will continue to work constructively with the UK IPO and others to seek improvements.

Recommendation 6: Patent thickets and other obstructions to innovation. In order to limit the effects of these barriers to innovation, the Government should:

- Take a leading role in promoting international efforts to cut backlogs and manage the boom in patent applications by further “work sharing” with patent offices in other countries;

- Work to ensure patents are not extended into sectors, such as non-technical computer programs and business methods, which they do not currently cover, without clear evidence of benefit;

- Investigate ways of limiting adverse consequences of patent thickets, including by working with international partners to establish a patent fee structure set by reference to innovation and growth goals rather than solely by reference to patent office running costs. The structure of patent renewal fees might be adjusted to encourage patentees to assess more carefully the value of maintaining lower value patents, so reducing the density of patent thickets.

The BIA is supportive of international work sharing arrangements and recommends the UK continues to lead by example and promote best practice. In its response to this point of the Review the Government has committed to reduce global backlogs through work-sharing with other patent offices and encourage greater use of suitable mechanisms, including the Patent Prosecution Highway. The BIA agrees that work sharing with other patent offices that meet the same quality standards are to be encouraged. The duplication of international patent searches for example can cause unnecessary delay. The Peer to Patent initiative also holds promise and we look forward to the completion of the first pilot study.

With regards to patent thickets more generally it is the BIA’s view that these are considered a problem in the IT / digital sectors. In these sectors technology is fast moving with patents quickly becoming obsolete as developments occur. Further, there are often multiple patents held within each product. In contrast, development timelines for bioscience companies are long and, as explained above, it is vital that a company holds robust IP protection to ensure the potential for a return at a future date.

It is therefore towards the end of the patent life, when the product reaches market, that it is profitable to a company. It would be counterproductive to punish a company financially by demanding higher fees when its innovation is realised. This would not act as an incentive to the continuing development and early marketing of products and medicines in the UK.

There is also some danger in subjectively attempting to ‘value’ innovation in determining its patent renewal fee. Innovation is a fluid concept and within the life sciences sector is currently the subject of discussion with regards to the shift to Value Based Pricing.

Therefore, proposals to amend the patent fee structure, as explained in the BIA’s submission to this Review, should be considered carefully with full consideration of the potential negative consequences on all sectors.

The Government has committed, in its response, to investigate the prevalence of issues with patent thickets, including whether they present a particular problem to

SMEs seeking to enter technology sectors. The IPO will publish findings on this issue by November 2011 and the BIA looks forward to reviewing this.

Recommendation 8: Enforcement of IP rights. "In order to support rights holders in enforcing their rights the Government should introduce a small claims track for low monetary value IP claims in the Patents County Court."

In its response the Government has committed to introducing a small claims track along the lines recommended by the Review and subject to establishing the value for money case. It is also suggested in the Government's response that this may necessitate the changing of the name to the Intellectual Property County Court.

The BIA submitted views on the cost limits imposed on the newly formed Patents County Court and believes a period of time is now required to allow the PCC to develop before a review of its operations is carried out. Similarly, it may be that as the PCC develops and is refined it is able to capture the type of cases this recommendation for a small claims track seeks to cater for. However, as this recommendation is now being taken forward we agree with the Government that the small claims track is unlikely to be suited to the complexities of patent disputes.

Written evidence submitted by Peter and Georgina Bowater

SUMMARY

- Paragraphs 1 – 4, our situation and how it may be affected.
- The challenge and risks of being an independent artist and creator. The importance to society of independent creative people and businesses and the impossibility of attaining and maintaining high creative and ethical standards without an independent body of artists supported by IP legislation.
- The probable consequences of the implementation of the Hargreaves Report.
- The importance and difficulty of maintaining high artistic and ethical standards in the digital age.
- The lack of legal basis under international and human rights law for the Hargreaves proposal and the probable consequences.
- International reference comparing the Hargreaves proposals to dangerous events in China.
- Our recommendations to the Committee.

1. We are both self-taught professional photographers. We have been in business for about 40 years mostly working in publicity and advertising for UK companies and UK interests. We spent about 20 years working world-wide photographing industrial and agricultural developments and projects, largely for UK corporate clients. We financed long overseas assignments for groups of companies, preferring to be paid by results, and to reserve our rights to the resulting images and to have the time between assignments to build up a large library which we imagined would provide us with a safe and substantial pension.

2. For some years we worked from a studio in Edinburgh producing very high quality work for international advertising and publicity.

3. As our work has involved total dedication from both of us, seven days a week, many hours a day, for nearly 40 years, we have tried at the ages now of 67 and 66 to slow down and enjoy something approaching retirement. Alas, due to the declining prices paid for licensing of the images from our library, and due to the blatant theft and monopolistic pressures that dominate our market, we are still having to work very long hours to survive.

4. Although we now live in France (we continue to be British citizens) nearly all of our business interests have been and still are in the UK. If the proposed Hargreaves Report recommendations, or if the greater part of them become law in the UK, this will amount to the wholesale theft of our intellectual property and we will be left with only the equity from our house and our remaining pensions of about £580 per month.

5. Independent photographers, writers and other artists do not choose an easy calling. Risks, particularly financial, are extreme and, in the digital age for photographers, costs are accelerating well beyond the ability of most of us to pay. Britain has long prided itself in its originality and enterprise of its citizens and has taken the lead in many artistic pursuits. Without the creator's natural right to the proceeds from his/her work, the only artistic enterprise that can continue to prosper will be as a salaried employee of a large corporation, or the recipients of government subventions. One can not imagine that such an artistic community could continue to retain the UK's place in the artistic and creative world. It is hard to separate the proposal by government to effectively remove the creator's absolute right to his intellectual property from the scheming of the unscrupulous and dishonest to remove other rights and properties from other groups of citizens. Indeed, what is the difference between the government that refuses to impose sanctions on organisations and individuals who remove our copyright data from our files

and then allows these same people to go ahead and use the material for what they will without either payment or reference to the creator, and the individual or corporation who removes the number plates from cars and takes them away because the owner has not properly identified them?

6. Recent sad events in British cities begin to explain themselves given a government that proposes to condone and facilitate the removal and use of our intellectual property to the benefit of large businesses that will result in our impoverishment. Is it not hypocrital to choose to punish rioters and looters with firmness on the basis of teaching a sharp lesson to those without social and moral standards while, at the same time, shrugging off the results of the government's own legislation intended not only to take away our moral and physical rights in our property but to assist in this confiscation by refusing to legislate against the removal of our copyright information? The behaviour that is being condoned, in fact encouraged, by the Hargreaves Report is normally considered to be criminal activity and the results will not be a sudden flowering of large media corporations who will briefly benefit from free content but the death of creativity and the disappearance of serious artists, photographers and writers, the disappearance of serious news reporting, critical independent journalism and other creative originality. How can it be otherwise?

7. There are widespread beliefs that photography in the digital age is just a case of possessing the right equipment. But we all have voices. How many of us can sing? I could buy a Stradivarius if I had the money. Would that make me a great violinist? We have worked for 40 years to build up our skills, our judgment, our techniques and our business acumen. We have stayed in business because we have always satisfied our clients and have built up an aesthetic judgment that is not acquired overnight, if ever. Yes, of course, there are competent and sometimes brilliant amateurs but they are very much in the minority and can not have the commitment needed to provide the market with what it wants. Standards are falling all the time because professionals can no longer exist due to corporate, and now government, abuses. Also, governments, particularly in the UK, seem unaware that the amateur competitor, for what he is worth, sells his work but does not pay taxes and social security on that income, as the professional does. The size of the black economy is far larger than the government dares to estimate.

8. Art and creativity are high in the list of the most important aspects of any culture. As the recent riots in the UK have shown, culture is under stress. To destroy or at least decimate artistic and creative minds is not going to militate towards solving any state's social ills. We see corruption in high places go unpunished. Should we trust government to strike a balance between the haves and have-nots, not in terms of equality but in terms of justice? If the British Government goes ahead with the proposed legislation it will be flying in the face of the Berne Convention, the United Nations Declaration of Human Rights, the EU's standpoint on Human Rights and, of course, the Intellectual Property Laws of all other advanced countries. The putative users of this windfall of free material will not know or care about the origin of the material that they are using, a large proportion of which will undoubtedly be protected by the laws of other states, particularly the USA. Look forward to a bonanza for American Class Action lawyers and threats to property overseas owned by British companies who choose to implement the advantages of legislation that allows them to ignore the rights of the creator.

9. We have both frequently worked in China where social pressures are contained only by a brutal and inhumane regime. One of the most shocking recent tendencies there has been the expropriation of the land of small farmers for industrial and domestic development. The effects are currently shrugged off particularly as the rewards of

these, mostly corrupt, deals continue to enrich and empower the authorities concerned. The inhumanity is evident and there is already widespread disorder as a result of this practice. We are struggling to understand the difference between what the British Government is proposing and what Chinese authorities are doing.

10. We recommend the complete abandonment of Hargreaves' proposals. We propose a re-think of the whole intellectual property framework based on a proper consultation with those affected. Hargreaves has entirely ignored the proposals and suggestions of those over whose lives he holds so much sway. Both our finances and our morale are already suffering from the laxity of the implementation of existing copyright legislation and our lack of moral rights. A fair proportion of our work is being used without our permission and without payment to us, not only by individuals for their websites etc. but, much more damagingly, by large corporations, national newspapers, publishers and other commercial interests. There seems little or nothing we can do about these abuses. Some photographers spend the greater part of their time taking legal action against infringers with mixed results. Certainly none of them becomes rich. And anyway we do not have the mentality or the wherewithal to do this. Our property has every right to be protected in the same way as all other legitimate property. Artists and creators depend on building a reputation. How can we build a reputation if our photographs are nearly always credited to some agent or giant corporation rather than to ourselves? There should be an absolute right for artists to be credited and paid for their work and for them to remain the inalienable owners.

1 September 2011

Written evidence submitted by Richard Brine

I am an architectural photographer working across the UK for a variety of architectural firms and designers. My work is published nationally and internationally and my images are syndicated in a global market place.

Points outlined below:

A: UN & EU Human Rights

B: Equality (Creators & Industry)

C: Orphan works

D: Registering work in a global market place

E: Conclusion, the morality question

F: Hypothetical Example

A: The United Kingdom is signed up to the European Convention On Human Rights and this is respected in all other areas of policy making by government. The UN and EU Human Rights Act have made it perfectly clear that artists rights are also human rights. On that basis I make the point that artists rights have been not fully recognised by Hargreaves IP Review.

B. There has to be a level playing field between the individual artist and industry. As an architectural photographer it is vitally important that my work is always credited when published or used as this raises my profile and leads to new work. The digital signature on the image also means that if a third party comes across the image and wants to use it they contact me and purchase a license to use the photograph. This is a vitally important income stream for self-employed photographers and without it, survival is questionable. So how can it be allowed that at present industry can remove digital copyright data from creators work, not credit them and require a waiver on the artist's moral rights. It is worth noting that in many cases a single photograph can involve weeks of planning hours and sometimes days to shoot with a significant financial cost to the photographer in the form of assistants, travel costs and accommodation. Photographs are a product with an intrinsic value and any legislation should strengthen this notion not weaken it.

C: 'Orphan works' is a term used to describe a creative work which has no signature or identification of authorship. In this digital era this has become more common as digital copyright information can be so easily removed from digital works. To allow orphan works to be used commercially will only encourage the immoral behavior of stripping digital copyright data from works in order to benefit

from free usage. I see this as nothing more than theft and any legislation should help artists to protect against this not encourage it.

D: The suggestion of registering every individual works on a national and international level is completely impractical. We operate in a global market place and it would be completely unrealistic to suggest that in my case a photographer could register every image in every country in which that image may be used at sometime in the future. Surely the most sensible way is to shift the emphasis the other way and have the obligation on the potential user of the image be to respect the authorship and ownership of the works with the backing of the law. With that in mind any action to the contrary would be illegal and therefore a strong deterrent to most.

E: In conclusion I feel it is important to make the point that with our manufacturing industry no longer the workhorse of our economy and the creative sectors and service sectors now relied upon to contribute to the GDP of the country, surely any legislation should be in favour of strengthening the integrity of these industries not weakening them. There is already an imbalance of power between large corporations and the individual entrepreneur / self-employed artist. The government should be doing everything in the power to help the artist to protect the copyright of their work and discourage immoral behaviour. This brings me finally on to the moral question. Moral rights have still not been made unwaivable as in other EU countries. The right to be identified as the creator of a work is absolute and law should support this. It is completely immoral in my opinion for this principle to not be acknowledged.

F: Hypothetical Example

I finish with an example: Imagine it is the quiet month of August and all your clients are on holiday so you have decided to photograph a new scientific observatory in the Scottish highlands designed by a famous architect for your portfolio.

After weeks of planning and correspondence, accompanied by your assistant (£100 per day) you drive from London to Scotland to spend three days photographing the interior and exterior of the building.

You drive back to London and spend three days processing and retouching the images. The shoot is a success and you are very proud of the results. Within weeks you have sold a license to the architectural firm who designed the building as well as secure a portfolio meeting to introduce yourself to the practice. You have also received a request from a design magazine in Japan which you are delighted about and happily sell a license to them for three of the pictures to be published once. A month goes by and a representative from Nasa calls you and explains that they have seen your images in the Japanese magazine and would not only like to purchase a license of their own to use the images in an internal

publication, but they would like to commission you to fly to the use and photograph a new observatory they have had built.

The process outlined above would be seriously undermined if there was a situation where by the photographs were stripped of their digital signature and distributed by a third party. I have to disseminate my images to third parties in order to promote my work and raise awareness of me as an artist and most importantly to generate business. It is vital that reproduction of imagery is protected by the law. This is something I rely to support my business on a daily basis. If this was undermined by inadequate legislation it would be near impossible to maintain sole ownership and copyright of my photographs which I work so hard to create.

Joint written evidence submitted by
The British Beer & Pub Association, Association of Licensed Multiple Retailers (ALMR), British Hospitality Association and NOCTIS

Executive Summary

Evidence (Recommendation 1)

- The debate on intellectual property in the 21st Century needs to be broadened, encompassing all those with an interest in it. We would, therefore, welcome more openness and transparency in policy development, and indeed across the whole of the intellectual property system, particularly in our dealings with the collecting societies, where, in our experience, a sound evidence base to support proposed increases in tariffs is often lacking.

Copyright Licensing (Recommendation 3)

- Our Associations fully support the recommendations in the Hargreaves Review for a cross sectoral Digital Copyright Exchange operating across European borders in the interests of making copyright more accessible.

- We strongly support the requirement for collecting societies to adopt Codes of Practice, which will be voluntary, but will contain minimum standards. We have welcomed the introduction of the PRS for Music Code of Conduct, which has had resulted in a marked reduction in the number of complaints. PPL has yet to publish a similar Code, although it did consult earlier in the year with the Music Users Council on an initial draft.

- While a Code of Conduct alone would not prevent the collecting societies from putting forward proposals on tariff values such as those currently being consulted on by PPL, we believe that if the minimum standards for the Codes included the following, they would be extremely helpful in securing the proper process for discussion:

    - Consultation with a wide range of stakeholders and compulsory negotiation with the leading representative sectoral bodies;
    - Transparent reporting on income, collection and distribution of monies;
    - Robust complaints procedures for individual licensees, eg. an independent Ombudsman, such as that established by PRS for Music under their current Code of Conduct

- We would prefer to see a firmer commitment in the timetable contained at Annex A of the Government's Response to the Hargreaves Review to the implementation of the Codes of Conduct, which we believe need to be introduced as a matter of urgency. In the absence of

even a voluntary Code, PPL are not currently bound to negotiate on the SFE tariff proposals beyond the closing date of the consultation in October 2011.

Enforcement of IP Rights (Recommendation 8)

- We support the proposals to introduce a small claims track for low monetary value IP claims, and the renaming of the Patents County Court to the Intellectual Property County Court.

- It is important that collecting societies ensure that those unlicensed businesses using music obtain the necessary copyright licences. A wider reach in terms of licensing would increase revenues for the collecting societies and could alleviate the pressure on copyright values overall.

Small Firm Access to IP Advice (Recommendation 9)

- It is crucial that small businesses should have easy access to the right information on their copyright obligations so that they can obtain the correct licences. We very much welcome, therefore, the recommendation in the Hargreaves Review that the IPO address this issue and the Government's commitment to confirming the way forward on this by the end of this year.

An IP System Responsive to Change (Recommendation 10)

- We fully support the proposal to strengthen the role of the Copyright Tribunal to allow it to focus on innovation and growth and the Government's plans for a copyright opinions service.

Introduction

1. Our associations represent a wide range of SMEs. For example, of the 52,000 pubs in the UK, 43,000 are small, independently run businesses. The vast majority of our members' businesses will use music as part of their business offering, either as background or "specially featured", for example in nightclubs, where the provision of music and dancing is integral to the business model. These businesses will obtain the relevant copyright licences from PRS for Music, PPL and, to a lesser extent, VPL. We recognise the value of collective licensing, and fully support this approach.

2. We welcome this opportunity to respond to the BIS Inquiry into the Hargreaves Review of Intellectual Property and the Government's response. We support many of the overall

objectives and findings of the Hargreaves Review on Intellectual Property, but for the purpose of this Inquiry, our key interest is in the following recommendations and we are pleased to comment further on these below:

- Evidence (Recommendation 1)
- Copyright Licensing (Recommendation 3)
- Enforcement of IP Rights (Recommendation 8)
- Small Firm Access to IP Advice (Recommendation 9)
- An IP System Responsive to Change (Recommendation 10)

3. We are also supportive of the Government's proposed actions to implement the recommendations of the Hargreaves Review. We particularly note its commitment to reducing barriers to creating viable IP using small firms in existing industries such as ours or in new niches, and would therefore urge the Government to ensure that the actions identified in its response are delivered as soon as possible and in accordance with the timetable.

4. We comment further below on the tariff system which governs our particular sectors, and our experience of the collecting societies.

Evidence (Recommendation 1)

5. We wholeheartedly support the recognition that there is a balance between the economic objectives and needs of various groups. The imposition of uncompetitive and unrealistic costs for copyright material is potentially damaging to businesses wishing to utilise that material as part of their business offer. **The debate on intellectual property in the 21st Century needs to be broadened, encompassing all those with an interest in it. We would, therefore, welcome more openness and transparency in policy development, and indeed across the whole of the intellectual property system, particularly in our dealings with the collecting societies, where, in our experience, a sound evidence base to support proposed increases in tariffs is often lacking.**

Copyright Licensing (Recommendation 3)

6. **We fully support the recommendations in the Hargreaves Review for a cross sectoral Digital Copyright Exchange operating across European borders in the interests of making copyright more accessible.**

7. **We strongly support the requirement for collecting societies to adopt Codes of Practice, which will be voluntary, but will contain minimum standards. We have welcomed the introduction of the PRS for Music Code of Conduct, which has had resulted in a marked reduction in the number of complaints. PPL has yet to publish a similar Code, although it did consult earlier in the year with the Music Users Council on an initial draft.**

8. The values of our members' music copyright licences are governed by tariffs, which have traditionally been negotiated by the leading sectoral trade bodies with the collecting societies themselves over many decades. Tariff negotiations have always aimed to achieve a fair price for music, which is acceptable to the collecting societies and music users. For the latter group, this generally means what the market will bear. Compromises have been made on both sides over the years. Once agreed, tariffs have tended to be in place for many years until the collecting society concerned decides to review and re-negotiate.

9. By way of example, the BBPA last negotiated with PRS for Music on Tariff P for pubs in 1998, and the tariff has increased in line with RPI every year since then. While we have had some discussion with PRS for Music on the structure of the tariff in the interim period, since it would benefit from some simplification, there has been no further discussion on the value of the tariff itself.

10. We regret to say that our recent experiences with PPL on tariff reviews have been less satisfactory. The BBPA and the BHA won a Copyright Tribunal case in 2010 which resulted in PPL refunding in the region of £20 million to retail and hospitality businesses as result of imposing average increases of 200-300% on its background music tariff following the introduction of a new right to charge for the public performance of broadcast music. The new, higher rates were introduced in 2005 following a one month consultation exercise and virtually no consultation, despite the efforts of the then Patent Office to broker discussions. The case was referred to the Copyright Tribunal in 2006 by the Secretary of State for Trade and Industry, under a new legal process which has since been repealed.

11. The final ruling of the Copyright Tribunal in this case increased the tariffs concerned by 10% in recognition of the new broadcast right.

12. PPL have consistently criticized the Copyright Tribunal for this decision, and in responding to the Call for Evidence for the Hargreaves Review suggested that the Copyright Tribunal is not making valuation decisions "that are achieving a proper market value". We fundamentally disagree. The value of music must relate to what the market will bear. During the period that the higher PPL tariff was in place, in the region of 6,000 pubs closed. There is no doubt that the additional cost imposed by PPL will have been a contributing factor to the demise of a number of these businesses. In discussions with PRS for Music last year, they advised us that they had seen their revenue from pubs drop by 2% in the previous twelve months as a result of the great economic pressure on the sector.

13. Our organsiations are once again in the process of responding to a consultation issued by PPL in July on its Specially Featured Entertainment (SFE) Tariff, which proposes excessive and unwarranted increases to the existing tariff on the basis of a choice modelling study carried out by FTI on what consumers perceive the value of music to be. The average increases for BBPA and ALMR pub members are in the region of 2000%, but for others it is much more than that. .

14. A wide range of businesses are affected by the proposals, including holiday centres and caravan parks. The proposals would devastate the nightclub sector. PPL may consider their proposals to reflect "proper market value", but this cannot be the case when the impact of such proposals will be to render many well established businesses unviable.

15. **While a Code of Conduct alone would not prevent the collecting societies from putting forward proposals on tariff values such as those currently being consulted on by PPL, we believe that if the minimum standards for the Codes included the following, they would be extremely helpful in securing the proper process for discussion:**

    - **Consultation with a wide range of stakeholders and compulsory negotiation with the leading representative sectoral bodies;**
    - **Transparent reporting on income, collection and distribution of monies;**
    - **Robust complaints procedures for individual licensees, eg. an independent Ombudsman, such as that established by PRS for Music under their current Code of Conduct**

16. **We would have welcomed a firmer commitment in the timetable contained at Annex A of the Government's Response to the Hargreaves Review to the implementation of the Codes of Conduct, which we believe need to be introduced as a matter of urgency. In the absence of even a voluntary Code, PPL are not currently bound to negotiate on the SFE tariff proposals beyond the closing date of the consultation in October 2011, although we will make every effort to ensure that further negotiation takes place. Ideally, there would be no changes to tariffs and charges (over and above RPI) until the Codes of Conduct have been implemented by the collecting societies.**

17. We are aware that the collecting societies believe that they should also have the right to refer a dispute to the Copyright Tribunal, as well as licensees. We would take this opportunity to express our deep concern that this could have the effect of removing an important protection for music users from the current monopoly position of these organisations.

18. Enabling collecting societies to refer tariffs to the CT would potentially allow them to win increases by outspending trade associations who couldn't afford the legal costs. The ease with which the collecting societies would be able to refer tariffs to the Tribunal could undermine the proposed Code of Conduct, as it would weaken even further the effectiveness of negotiations and strengthen their ability to rely on the legislative process to push through tariff increases.

19. The proposal contained in the Hargreaves Review to lift barriers across the EU would have the effect of making collecting societies more competitive on price and in other areas such as service. Further consideration could only be given to allowing collecting societies to refer cases to the Copyright Tribunal in the event of a more open and competitive European

market, where music users would have choice across a number of collecting societies in terms of licensing.

Enforcement of IP Rights (Recommendation 8)

20. **We support the proposals to introduce a small claims track for low monetary value IP claims, and the renaming of the Patents County Court to the Intellectual Property County Court. We would also take this opportunity to make the following observations on enforcement based on our experience with the collecting societies.**

21. According to papers submitted as part of the Copyright Tribunal hearing on the background music tariff for hotels, restaurants, pubs and bars, shops and stores and factories, in 2005 licensed 21,005 pubs and bars, 12,922 restaurants and cafes and approximately 4,000 hotels. To the best of our knowledge, these figures have not substantially changed.

22. Given the many thousands of premises in our sectors, we do not consider PPL to be robust enough in ensuring that those unlicensed businesses using music obtain the necessary copyright licences. In this context, the effect of major tariff increases is to further penalise those who are already paying, rather than addressing the need to licence those who are not. **A wider reach in terms of licensing would increase revenues for the collecting societies and could alleviate the pressure on copyright values overall**.

23. Improvements in enforcement should go hand in hand with improved education on copyright obligations in general. Again, the proposed Codes of Conduct for the collecting societies could help inform small businesses of their legal obligations in this area. We comment further on this below. We do not subscribe to the view expressed by PPL that ignorance of the need for a PPL licence is a "tactic" to avoid licensing. While our associations are a source of information, many small businesses outside membership of any trade body will be genuinely unaware of the existence of the collecting societies.

Small Firm Access to IP Advice (Recommendation 9)

24. It is crucial that small businesses should have easy access to the right information on their copyright obligations so that they can obtain the correct licences. **We very much welcome, therefore, the recommendation in the Hargreaves Review that the IPO address this issue and the Government's commitment to confirming the way forward on this by the end of this year.**

An IP System Responsive to Change (Recommendation 10)

25. **We fully support the proposal to strengthen the role of the Copyright Tribunal to allow it to focus on innovation and growth and the Government's plans for a copyright opinions service.** We have always found the IPO to be very approachable and helpful with regard to

information and advice on copyright issues, and we would welcome their enhanced role in ensuring the modernisation and improvement of the copyright landscape in our new digital age.

5 September 2011

Written evidence submitted by the British Equity Collecting Society Limited (BECS)

Summary

BECS urges the Committee to argue for evidence based links with European Commission work on private copying compensation for performers when considering the Government's intention to bring forward proposals for a substantial opening up of the UK's copyright exceptions regime, including a wide non-commercial research exception covering text and data mining, limited private copying exception, parody and library archiving.

Background

The British Equity Collecting Society Ltd (BECS) was set up by Equity (the UK trade union representing professional performers and other creative workers) in 1998.
It is a collecting society that administers performers' remuneration for their work in films and television programmes due from rental, retransmission and certain other exploitation of such works.

BECS represents actors, singers, dancers and other performers who perform in any way, other than musicians. Since 1998 it has paid out more than £30 million in revenue to performers.

Growth in levels of distribution has been significant over the last 12 years.

BECS therefore welcomed the opportunity to respond to the Call for Evidence by the Hargreaves Review of Intellectual Property and Growth.

BECS would draw the attention of the Committee to its response to the Hargreaves Review Call for Evidence. It has been published at

http://www.ipo.gov.uk/ipreview.htm

In its response BECS highlighted the way in which it collects private copying and other statutory revenues due to actors and other performers (other than musicians) when the statutory revenues are recognised and provided for by the laws of the vast majority of EU Member States.

BECS therefore has some reservations about the Government announcement that it agrees with the Review's central thesis that "the widest possible exceptions to copyright within the existing EU framework are likely to be beneficial to the UK, subject to three important factors".

Reservations include the fact that "the three important factors" include adherence with EU and international treaties.

Under these EU and international treaties, most EU Member States have found that copyright levies are the only practical means to provide "fair compensation" to cover private copying.

Therefore BECS would urge the Committee to recognise that careful work is needed to see how the UK can select cases where "the amount of harm to rights holders that would result in "fair compensation" under EU law is minimal, and hence the amount of fair compensation would be zero".

BECS believes that this work must be properly linked with wider review of the private copying issues to be undertaken by the European Commission.

This is vital if the Government seeks to take forward proposals for a substantial opening up of the UK's copyright exceptions regime, including a wide non-commercial research exception covering text and data mining, limited private copying exception, parody and library archiving.

It is helpful that the Government intends to consult widely on the basis of sound evidence, in taking forward the above proposals. As part of this evidence, details of the payments that have been made to actors and other performers from private copying levies across all EU Member States will be an important indicator of the value that the "fair compensation" provisions provide to the performing community within other EU Member States.

31 August 2011

Written evidence submitted by the British Film Institute (BFI)

1. Executive summary

This submission is made by the British Film Institute (BFI), the Government's lead agency for film.

The BFI welcomes both the Hargreaves Report and the Government's response to the recommendations in the Hargreaves report. We believe that the UK needs an intellectual property regime that maximises public access while protecting effectively the interests of rights holders.

The proposals to make orphan works legally available, and those to help make available works (via Extended Collective Licensing) where rights are currently blocked are extremely welcome. Taken together will enhance public access to films and moving images in an equitable way.

We strongly welcome most of the proposed copyright exceptions, including the one that allows archives to legally copy material that they hold. We look forward to seeing further detail on the proposed private copying exception. However we would also like to see the Government commit to introducing the educational exceptions which were proposed by the Gowers Review of Intellectual Property but which were outside the terms of reference of Hargreaves.

The BFI very much welcomes the idea of the Digital Copyright Exchange (DCE) and is keen to play a significant role in helping to establish this initiative – for example by making material that it holds available for inclusion in the DCE.

We strongly welcome the announcements that the Government made regarding the need to protect intellectual property online through the Digital Economy Act. These measures are important to help protect investment – including public investment – in films and moving images. We look forward to the relevant provisions of this Act being implemented by Ofcom as soon as possible.

2. Detailed comments

A dynamic knowledge economy requires a regulatory framework that enables the UK to benefit from all the advantages of the digital age and the Hargreaves Review and the Government's response to the Hargreaves Review brings that a step nearer. The BFI remains committed to the basic principles of the existing copyright system but we are heartened to see the introduction of measures which balance the rights of creators and investors with the opportunities to significantly expand access to film in all its variety in a digital era.

We welcome too the Government's commitment to an evidence-based approach to the intellectual property regime (as recommended by Hargreaves), and we look forward to working with Government and others in the creative industries to create a framework fit for the times we live in.

In particular we have the following comments:

i. Orphan Works

We believe in unlocking the value of orphan works to provide as much public access and commercial use as possible, so we very strongly welcome the provision recommended by Hargreaves and supported by Government. It will be beneficial to the public, archives across the UK (including the BFI National Archive), researchers, academics, and innovators. We also look forward to seeing the Government's proposals on Extended Collective Licensing which could help address rights blockages which currently prevent some works being made legally available.

ii. The Digital Copyright Exchange

We are very pleased that the Government has accepted Hargreaves' recommendation that a Digital Copyright Exchange should be created to help facilitate copyright licensing. As the Government observes, to be successful, such an Exchange will need to create value for both purchasers and sellers of rights. We note that the Government is encouraging public bodies to make material they own available via the Exchange as soon as it is set-up and the BFI looks forward to discussing with Government how we can contribute material which we own and data we hold to the Exchange and others ways in which we can assist in contributing to this valuable initiative.

We are especially interested in ways in which the Exchange could help to ensure that independent companies which own rights to British films are able to make their films more easily available to the benefit of the public. In many cases, the public (taxpayer and lottery player) has contributed to the cost of financing these films.

iii. Copyright Exceptions

We strongly welcome a number of the new exceptions which Hargreaves – and now the Government - is now proposing to incorporate into UK law.

The BFI holds the UK's collection of film and television material, much of which is very fragile and in constant need of care. We own less than 1% of the material and this makes preservation through copying difficult from an access and legal point of view. We therefore strongly welcome the exception being proposed that will freely allow us, and archives throughout the UK, to legitimately make copies of the material we care for, without having to secure permission from the rights owner each time.

The support for legalisation of text and data mining - which would allow researchers, including those working in film scholarship for example, to analyse electronic information far more rapidly - is very welcome and the exception allowing reproduction for non-commercial research should be helpful.

With regard to the exceptions generally – particularly the proposed exception on private copying as it applies to film - the devil will inevitably be in the detail and we look forward to contributing to the thinking which will help design these exceptions so that the

public's ability to access film is enhanced without damage to the legitimate interests of rights holders.

The Hargreaves Review's brief was focused on economic growth and therefore did not consider the educational exceptions which were proposed as a consequence of the Gowers Review of Intellectual Property published in 2006. These exceptions include one allowing audiovisual material to be used in a distance learning environment. This is something that the BFI would now like to take up with Government with the aim of exploring how legitimate educational access in schools (primary and secondary) can be radically improved in an age when film material is increasingly stored in "the Cloud".

Copyright infringement and theft

The BFI also welcomes the announcements by Government regarding the next steps for the implementation of the Digital Economy Act (DEA) in respect of measures to curb online copyright infringement. It is crucial that rights holders are able to make their films and moving images available to the widest possible audiences secure in the knowledge that there is a robust legal framework in place which is designed to significantly reduce copyright infringement and theft – both online and offline. As an organisation which invests public money in the production, distribution, exhibition and archiving of films, the BFI is keenly aware that copyright infringement and theft is damaging to the interests of citizens generally as well as to rights-holders and the creative community. We wish to see rapid implementation of the measures to significantly reduce online copyright infringement that are contained within the Digital Economy Act.

5 September 2011

Written evidence submitted by the British Library

Executive Summary

- The British Library supports the recommendations with regard to modernisation of the copyright regime made by Professor Hargreaves in his report Digital Opportunity.

- Further to the government's response and endorsement of the report, this submission by the British Library is set out in the form of a roadmap as to how the Hargreaves recommendations might be achieved and implemented and reaffirms why the inclusion of certain elements are vital for the research, education and library sectors.

- The following areas are considered in the British Library's response:
  - Evidence based policy making
  - Digital copyright exchange
  - Cross border licensing
  - Orphan works
  - Extended Collective Licensing and special licences
  - Data Analytics
  - Format neutral fair dealing
  - Library archiving
  - And most importantly, that copyright law itself should not be overridden by contract law

Introduction

1. The British Library was established by statute in 1972 as the national library of the United Kingdom. It is one of the world's greatest research libraries - it benefits from legal deposit and is the main custodian of the nation's written cultural heritage. The Library's incomparable collections cover three millennia of recorded knowledge, represent every known written language, every aspect of human thought and a sizeable sound, music and recordings archive. The British Library plays a vital role in the life of the nation as a cultural heritage resource by:

   - managing, preserving, and ensuring access in perpetuity to the UK's national published archive and the national repository of sound;
   - comprising an integral component of both the national research infrastructure and the UK Science Base;
   - playing a correspondingly significant role in ensuring the research excellence of the UK.

2. The British Library contains a vast array of material and expertise that supports every sector from the creative industries to science, technology and medicine; small businesses to major pharmaceutical companies; school children to lifelong learners; academics to authors:

   - Through our Business & Intellectual Property Centre, we support entrepreneurs and SMEs in developing, protecting and exploiting their ideas, and in growing their businesses.
   - Through our learning programme we provide £1m worth of resources to 1.2 m teachers and school students who visit our learning website each year.
   - We support the Government's lifelong learning policies by providing resources to everyone who wants to research; 43 per cent of people using our newspaper collections are personal researchers doing genealogy or local history projects.

3. The British Library has a unique position as a legal deposit library, a purchaser or licensee of copyright content and materials, a licensor of its own intellectual property and a support service to users of intellectual property be that for academic research or business development which ultimately benefits the UK economy.

Evidence based policy making (Recommendation 1)

4. The British Library is reassured to see the government championing evidence-based policy making and fully supports its intention to ensure that policy making should consider the perspective of all stakeholders and not be ruled by "lobbynomics".

5. Copyright is a system of balances and it is vital that both the creator's and the user's requirements are taken into account, especially given that the economic value actually derives from the user and use of a copyright work.

Copyright Licensing (Recommendation 3)

6. As both a licensor and licensee, the Library supports the government's aim to establish a Digital Copyright Exchange to facilitate licensing and to make the UK a leader in licensing best practice and endorses the necessity for an efficient system of copyright information and trading. The value in such an Exchange as a directory of rights information should not be underestimated – having a place to seek rights holders takes users a step closer to legal certainty over uses of works which currently does not exist in areas such as orphan works and is an important tool to promote respectful use of copyright works. The Library points the committee towards the ARROW project[1] , for which the British Library was coordinating partner in the UK, as an example of how such a system might be implemented.

7. The Library welcomes the proposed introduction of regulation and a code of conduct for collecting societies. As most UK collecting societies hold a de facto monopoly position it is essential that they are regulated as in most other European countries. Openness, transparency and fairness will increase trust and the representative nature of such bodies. This is particularly important if their remit is extended by any orphan works solution, or the introduction of extended collective licensing as they will be representing a large number of individuals who are not actually signed to collecting societies and therefore are not their members. This public interest function takes collecting societies beyond their existing role and therefore governmental oversight as well as oversight from creators, industry and their users is important to guarantee legitimacy for these bodies.

8. The Library advises the government to ensure any amendment to legislation on points 6 and 7 above should be worked on with the European Commission to facilitate cross border licensing and the free movement of digital "knowledge goods" throughout the member states of the EU. We believe given the demand for English language material abroad the UK has a particular interest in ensuring the existence of a well-functioning IPR single market.

Orphan works (Recommendation 4)

9. The nature of the British Library's collections means that we hold a significant number of orphan works[2], estimated at around 40% of the total collection and across a range of formats including printed works, manuscripts, photographs and sound recordings[3].

10. Recent British Library research[4] has shown the difficulty of clearing permissions on a one-by-one basis for a small digitisation project of 140 books – after more than 500 hours, rights holders had not been identified for 43% of the in-copyright sample and no response had been received for 69% of the rights holders contacted. In the context of a mass digitisation project, scaling these figures up to 1000 times that number becomes utterly impractical. The Library is therefore heartened that the Government proposes to tackle this problem with solutions to facilitate the reuse of orphan works.

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[1] http://www.arrow-net.eu/about-arrow
[2] Orphan works are copyright works where the rights holder cannot be identified or traced.
[3] http://pressandpolicy.bl.uk/content/default.aspx?NewsAreaId=316
[4] Stratton, Barbara (2011): Seeking New Landscapes: A rights clearance study in the context of mass digitisation of 140 books published between 1870 and 2010.

11. Just as there are different licensing solutions and collecting societies across works of known authorship depending on the type of work and the intended use, it must be recognised that a one-size-fits-all approach will not resolve the orphan works issue and the Library strongly recommends that a variety of solutions are implemented which should recognise:
    - uses of orphan works may be for non-commercial as well as commercial purposes;
    - many works were not created for commercial purposes and/or have not been published (e.g. oral histories, grey literature, personal collections of photographs);
    - usage of a digitised orphan work will not always mean communicating it to the public. (Please refer to Appendix F of the British Library's Hargreaves submission which sets out a case study of a request for digital access to orphan works in our collections);
    - aside from copyright, ethical considerations such as reuse of forms of traditional cultural expression[5] also exist and should be part of any solution.

12. The table below illustrates a variety of possible scenarios based on the Library's experience of requests for digitised material and proposes solutions. These solutions are set out in more detail in the subsequent paragraphs:

Proposed usage of digitised orphan work(s)	**Quantity of works**	**To be[6] published**	**Purpose for which work was produced**	**Proposed solution**
1) An academic requests that a library supplies digitised copies of multiple copyright works to enable remote research and teaching.	Item by item clearance / diligent search possible	N	Non Commercial (e.g. unpublished plays)	Copyright Exception
			Commercial (e.g. fanzines)	Copyright Exception
2) Local history society wishes to use maps and pamphlets as information resource on their website.	Item by item clearance / diligent search possible	Y	Non Commercial (e.g. unpublished sketches by local resident)	Special Governmental Licence[7]
			Commercial (e.g. published book from 1930s on local landmarks)	Extended Collective Licence[8]
3) Digitisation of audio recordings for education resource: a) 120 hours of 1930s unpublished recordings of Cornish folk music. b) 120 hours of 1950s recordings of jazz concerts.	Multiple works - Item by item clearance not possible	Y	a) Non Commercial (e.g. ethnomusicologists recordings)	Special Governmental Licence[7]
			b) Commercial (e.g. performers are subject to record company contracts)	Extended Collective Licence[8]
Mass digitisation of out of commerce 20th century novels.	Multiple works - Item by item clearance not possible	Y	Commercial	Extended Collective Licence[8]
Mass digitisation by library/archive of works in different formats (magazines, letters, pamphlets, photos)	Multiple works - Item by item	Y	Non Commercial (e.g. letters, drawings, brigade newsletters)	Special Governmental Licence[7]

[5] http://www.wipo.int/tk/en/folklore/

[6] This might mean published on paper or digitally or made available to the public by performance in the case of a play or piece of music.

[7] As envisaged by the Digital Economy Act, rather than being granted each time at ministerial level, a special governmental licence could be granted by a delegated body that complies with the appropriate governmental requirements (see Paragraph 14).

[8] In the case of mass digitisation, there will likely be a mixture of orphan and non-orphan works so an extended collective licence would sit alongside direct rights holder licences.

relating to WW1 for educational resource.	clearance not possible		Commercial (e.g. magazines)	Extended Collective Licence[8]
Mass digitisation by library/archive of conference proceedings (so called "grey literature") for research resource.	Multiple works - Item by item clearance not possible	Y	Non Commercial (e.g. research reports issued by charity / research institution)	Special Governmental Licence[7]
Publisher wishes to commercially publish rare early 20th century novel which has been out of print for 60 years.	Item by item clearance / diligent search possible	Y	Commercial	Extended Collective Licence[8]
Digitisation of historic newspapers by a commercial publisher for a pay per view service.	Multiple works - Item by item clearance not possible	Y	Commercial	Extended Collective Licence[8]
Commercial use of an illustration.	Item by item clearance / diligent search possible	Y	Non Commercial (e.g. 1950s documentary photograph taken by unknown member of the public)	Special Governmental Licence[7]
			Commercial (e.g. modern professional photograph)	Extended Collective Licence[8]

Special Governmental Licence

13. It is important to remember that large numbers of works held in library and archive collections were not produced for commercial reasons and are therefore unlikely to be managed by nor be in the mandate of a collecting society.

14. The Library recommends special licensing arrangements to be granted at ministerial level or by an equivalent appropriate cultural body where the request is for a project for the cultural benefit of the UK and where material is drawn from sources of unpublished material or where the material is not of the type generally represented by collecting societies.

15. The British Library is currently scoping its contribution to a Europe-wide digital project as part of the Europeana portal[9] which will bring together materials relating to World War 1 to be made available for the 100th anniversary of the outbreak of war. Such a historically and culturally important portal will be all the less rich if large numbers of works such as photographs, postcards, correspondence and privately produced brigade / military journals are excluded from inclusion because rights holders cannot be traced.

16. The British Library's experience of such use has been overwhelmingly positive where we have engaged not with the individuals who cannot be found, but with their representative communities. For example, as part of the Archival Sound Project[10] of 2000 days of sound recordings, the project team canvassed opinion amongst the UK traditional and folk music community before publishing a large number of unpublished sound recordings. Not only was feedback supportive but in fact the community also wanted to see the material made

[9] http://www.europeana.eu/portal/aboutus.html
[10] http://sounds.bl.uk/About.aspx

accessible to any interested listener worldwide – the Library was proposing UK universities only – and the community would give backing on the basis of the widest possible distribution. If forced by any future legislation to approach a commercial body like a collecting society for such non-mainstream collections, whether their territory based commercially rights driven thinking would have been so broad in its permission is an interesting question to consider.

Clearance procedure for individual works

17. It is essential that a straightforward solution is made available for individuals or companies wishing to use individual or very small numbers of orphan works where that usage exceeds the boundaries set by the fair dealing provision and therefore normal copyright clearance should be sought. The Library advocates an exception in such circumstances for non-commercial use where the rights holder cannot be traced after a diligent search.

Extended Collective Licensing and Mass Digitisation

18. This form of licence has been used successfully in Scandinavia[11] for 50 years and laws have recently been updated to include a digital mandate. Extended collective licensing does not replace 1 to 1 business transactions around which there has been much misunderstanding in the UK. It seeks to deal with situations of "market failure" where each individual rights holder cannot be negotiated with given the volume of what is being used and is therefore limited to areas such as broadcast, mass digitisation etc.

19. There are clear societal, cultural and economic benefits from facilitating digitisation of digital content. For example the British Library is working across Europe with other libraries and archives to digitise part of their First World War collections much of which will still be in copyright – this will certainly allow European citizens access to much of their own history that has never been visible before. Technology companies and consumers will also benefit from streamlined rights clearance mechanisms and demand for pre-21st century material is certainly high. The third most downloaded iPad app in June 2011 in the UK was a collection of historical books from the British Library. The same app was in the top ten in the United States.

20. Example of successful use of this kind of licence include:

    - Kunstindeks Danmark (Art Index Denmark)[12] a resource giving details of all Danish artworks in public held collections for which in-copyright images have been made available through a licence with the Billedkunst collecting society;
    - Danish sheet music index[13] - a Danish Royal Library project facilitated by the Copydan Writing collecting society and music publishers to provide a central portal for display and ordering of Danish digitised sheet music.

21. Orphan status could be established through Digital Copyright Exchange or the existing ARROW project. The Library would point the committee to the results of our recent study of a diligent search compared with the ARROW system where 92% of the books had the same copyright status result[14].

22. We believe that any solution for Orphan Works should:
    - Cover all media, commercial and non-commercial uses, commercially and non-commercially produced material as well as published and unpublished works.
    - Recognise that one size does not fit all – an exception, governmental licence and collecting society based licence should exist simultaneously.
    - Use of an orphan work should be nominally costed as recommended by Professor Hargreaves to facilitate mass digitisation, and recognise that much of the material would never be available if it had not been collected and preserved at the expense of the public purse.

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[11] http://www.eblida.org/uploads/eblida/1/1215770997.pdf
[12] https://www.kulturarv.dk/kid/Forside.do
[13] http://www.kb.dk/en/kb/nb/mta/dcm/komponenter/download/DCM-UK_web.pdf
[14] Stratton, Barbara (2011)

Limits to Copyright (Recommendation 4)

Format neutral fair dealing

23. Fair dealing, the copying of a book chapter or an article, currently only applies to written or printed works. Audio / audio-visual materials are widely used by students and researchers but they can't get even "fair" copies of material without permission from rights holders. This means it can be very costly to access certain classes of research materials.

24. In their essays in the British Library publication "Driving UK Research[15]" Profs Lionel Bentley and Nick Cook set out the impossibilities and impracticalities of trying to use music for teaching purposes because fair dealing and teaching exceptions do not extend in any pragmatic sense to this medium. For example a lecturer can play a sound recording to a student, but they cannot copy in order to make a compilation so have to carry all the music with them. Similarly university researchers[16] have to apply for sizable grants to the Research Councils to travel to London to listen to or watch commercially unavailable audio / audiovisual material as copies cannot lawfully be sent to them.

25. We believe also that with the recommendation for format shifting for private copying for consumers having been accepted, it is important that fair copying by individuals and librarians is also extended beyond text based works.

26. The British Library proposes the following legislative solution[17]:

- *S.29 Research and Private Study*

  Fair Dealing with a copyright work for the purposes of research for a non-commercial purpose does not infringe any copyright in the work provided that it is accompanied by a sufficient acknowledgement.

- *S. 38 & 39 Copying by librarians: copyright works*

  (1) The librarian or archivist of a prescribed library or archive may, if the prescribed conditions are complied with, make and supply a copy of part of a copyright work without infringing any copyright in the work. In regards to an item in the permanent collection that is no longer commercially available, if the prescribed conditions are complied with a librarian may, upon determining as a result of a reasonable investigation that a copy of work is no longer commercially available, make and supply a complete copy from the library or archive.[18]

  (2) The prescribed conditions shall include the following –
  (a) that copies are supplied only to persons satisfying the librarian that they require them for the purposes of –
  (i) research for a non-commercial purpose, or
  (ii) private study,
  and will not use them for any other purpose;
  (b) that no person is furnished with more than one copy of the same material or with a copy of more than a reasonable proportion of any work; and
  (c) that persons to whom copies are supplied are required to pay for them a sum not less than the cost (including a contribution to the general expenses of the library) attributable to their production.

Data Analytics / Data Mining

27. Data or text mining enables computer analysis of large amounts of information which cannot be processed by humans in order to extract facts. These new techniques are vital for research, medical advances and common practice in an advanced information society like

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[15] http://intranet.bl.uk/newsevents/archive/2010/drivingukresearch.pdf
[16] http://pressandpolicy.bl.uk/imagelibrary/downloadMedia.ashx?MediaDetailsID=563
[17] cf CDPA paras 29, 38
[18] Researchers using sound and film frequently do comparative work across an album or film and therefore a practical mechanism to cater for this where the work is no longer commercially available is required.

the UK, and yet copyright law is not keeping up with it. Both Schedule A of the British Library's submission and Hargreaves's report itself, as well as Hargreaves submissions from pharmaceutical companies (e.g. AstraZeneca) and technology companies (e.g. IBM) contain plenty of examples of the importance and power of these techniques so we focus here instead on the legal barriers to text mining and on a potential solution.

28. For the scientist intending to data mine to accelerate his research, the key issues requiring legal clarity are that:
    - to assemble a dataset, copies of material need to be made and format shifted;
    - the material itself has already been lawfully purchased/licensed by the user;
    - the material to be analysed is frequently from a very wide variety of sources;
    - the analytics tool searches individual terms or facts which are not in themselves subject to copyright;

29. We support the proposed legislative wording as recommended by JISC, and support the need for a text and data mining solution at both a UK and EU level to allow commercial as well as non-commercial data analytics.

Library Archiving / Format Shifting

30. It is vital that libraries are able to transfer materials to new formats to ensure protection and preservation of all their holdings particularly given the increase in both digitised and born-digital holdings. Such rights exist within an analogue context but not in the digital sphere where the issues are more complex particularly concerning electronic media such as discs and recordings where not only is the content format likely to become obsolete, but also the supporting operating software and hardware is an issue, and technical protection measures may exist.

31. The British Library proposes the following legislative solution:

> *(1) The librarian or archivist of a prescribed library or archive may, if the prescribed conditions are complied with, make a copy, including a format shifted copy, from any item in the permanent collection of the library or archive-*
>
> *(a) in order to preserve or replace that item by placing the copy in its permanent collection in addition to or in place of it, or*
>
> *(b) in order to replace in the permanent collection of another prescribed library or archive an item which has been lost, destroyed or damaged,*
>
> *without infringing the copyright in any work, in any illustrations accompanying such a work or, in the case of a published edition, in the typographical arrangement.*
>
> *(2) The prescribed conditions shall include provision for restricting the making of copies to cases where it is not reasonably practicable to purchase a copy of the item in question to fulfill that purpose.*

Contracts should not override copyright exceptions

32. It is vital to reiterate that where the licence of digital data is governed by a contract, the licensor's terms and conditions may undermine all and any of the copyright exceptions permitted by law. Without legislation similar to that in Ireland, Belgium and Portugal to ensure such exceptions cannot be overridden, any legislative changes achieved by the Hargreaves review will be worthless.

33. It is important for government to recognise that limitations and exceptions in copyright law have an essential role to play as they facilitate access to knowledge, as well as nurture innovation and creativity.

Other Gowers recommendations

34. The extension of educational copyright exceptions to distance learning and whiteboards was recommended by the Gowers review but was not mentioned in Hargreaves' report. The Library requests that this is revisited.

Conclusion

35. The British Library is encouraged by recommendations outlined above and also the positive steps suggested by the Hargreaves review to bring copyright legislation in step with digital developments since 1988 and ensure flexibility in the copyright regime so that it can react to future developments. We would however reiterate the importance of ensuring that contracts cannot override copyright law, whose very role is to nurture innovation and creativity. If we continue to allow legal access and reuse of content by innovators and creators to be overridden by private contract law, we will undermine innovation in the digital economy itself. It is of the uppermost importance that this key issue is dealt with before all other recommendations are addressed, otherwise the statutory amendments will simply be negated by subsequent contractual override.

36. We look forward to working with government in the implementation of the Hargreaves recommendations to the benefit of the UK's citizens and economy.

6 September 2011

Written evidence submitted by the British Video Association (BVA)

About the British Video Association

1. The British Video Association (BVA) exists to champion video entertainment in all its forms, from packaged media such as DVD and Blu-ray Discs through to digital services available on demand, to rent or to own on portable devices and for home viewing.

2. The proliferation of content delivery channels is increasing consumer choice and the video industry releases about 8,000 titles a year, with a UK consumer spend of £2.6 billion last year, making it the most valuable part of the audiovisual sector.

3. The BVA's members include film companies, television companies and independent labels who produce, license and distribute pre-recorded video entertainment, covering film, sport & fitness, music, TV, children's and special interest programming. Its members account for some 90% of the sector.

The Hargreaves Review and Government response

4. The BVA believes that the Hargreaves Review has significantly under-estimated the impact of certain proposals on the audiovisual sector. There are many positives in the Hargreaves Review, particularly the importance of improved co-ordination between agencies and government departments around enforcement; however its recommendation to create a blanket copyright exception for format shifting has not been properly thought through.

5. The audiovisual sector has a unique metabolism. The production of audiovisual content is finance and labour intensive. The production of a film, for example, costs vastly more than a music album. The film industry has limited opportunities to monetise its output because most films are only watched once.[1] Returns on investment in film production are made through cinema exhibition, video distribution (physical or digital) and broadcast television, in the UK and international markets. By selling or licensing rights to these forms of distribution in advance, a film producer is able to raise finance to "green-light" a new film production. Apart from cinema exhibition, this financing system applies also to the production of high-end television drama. Some audiovisual properties also generate returns from merchandising and gaming, though this is limited to certain genres, particularly where a franchise can be established, such as with television and children's titles. Any change to the way content can be monetised can significantly disrupt the industry's unique metabolism and its ability to finance new production.

[1] Research by Kantar Worldpanel in BVA 2011 Yearbook, page 76 covering buyer cross-over within visual entertainment markets

6. Unlike music, there are no other sources of revenue outside of those listed above, such as live concerts for music - you cannot go and watch a live performance of The King's Speech, for example. The ability to drive as yet unexplored means of generating new revenue is therefore limited.

7. In suggesting that an exception should be created to allow format shifting, the Hargreaves Review has failed to understand the existing value of digital copies and format shifting to our sector. Our industry currently offers viewers different price propositions according to the timescale, quality and type of use/access desired, providing different levels of value to consumers by packaging different forms of content together. A DVD is priced differently to a Blu-ray Disc because it provides a different quality of picture, sound and viewing experience. In addition, a digital copy may be offered alongside a DVD and/or Blu-ray Disc with a different price point that reflects of the added value, flexibility and benefit they bring.

8. There is also a significant difference between the audiovisual sector and other sectors in the way consumers use content. As noted in point 5 above, for the majority of film productions, once a consumer has either seen it at the cinema, bought or rented it on DVD/Blu-ray Disc (and in most cases watched it with other friends or family members) or on one of the many digital services, those viewers do not need/want to watch it again. This is not the case for music, where people frequently listen to a song, playlist or album many times and want to own their own copies so they can do this repeatedly with ease. This means for music a digital copy being taken from a legally purchased CD, as currently happens for use on mobile devices for personal use, will not stop others in their circle of friends or family buying their own copy for personal use.

9. The introduction of a new copyright exception to provide blanket format shifting for all sectors will give consumers the impression that they have a right to take copies of all discs they buy, regardless of the fact that technical measures and digital rights management systems (DRMs) exist on DVDs and Blu-ray Discs to determine the use to which the content may be put, therefore impinging on rights owners' ability to create value from different consumer offers that allow them to monetise the value of their content. The mere announcement that the Hargreaves' recommendation has been accepted has caused some members of the public to believe this now legalises circumvention of technical measures. For film it will certainly lead to lost revenue.

10. Developments in the audiovisual sector have seen rapid evolution in viewer services in recent years, so that there is no need to change copyright law to allow audiences to make personal copies of video content outside existing authorised uses. The 29 platforms currently operating in the digital marketplace provide 44 different points of access for audiovisual content on all manner of consumer electronics devices.

11. While the volume of transactions in the video entertainment market has declined since its peak in 2008, the overall value of video is declining at a faster rate due to the maturing market and shift to viewing on digital platforms, whether digital sales and

rentals (which command lower prices than physical discs) or online services which are free at the point of use. A recent Oxford Economics report[2] suggests that video entertainment makes up nearly 50% of the revenues for films and a third for TV series and that producers increasingly depend on this source of financing in the current economic climate. Thus a format shifting exception for video would be very likely to further reduce the value of video rights by introducing more uncertainty in the market and its role in the funding mechanism, thereby increase the difficulty in raising finance for new production.

12. The Review appears to assume that the current levels of format shifting between content types are similar. The Review again treats video usage in the same way as music, which does not reflect reality. DVD and Blu-ray Disc packaging generally carries a "no copy" symbol to make it clear to buyers that they are copy protected and there is no right to rip the contents. These days most consumers understand this, although there is software available on the market making illicit circumvention of technical measures very simple. Were a format shifting exception that included video be introduced, we believe it would actively encourage more people to make illicit copies. Rather than law being changed to catch up with consumer behaviour, as the Review suggests its recommendation is designed to do, it would actually drive a change in behaviour to the detriment of our industry.

13. The BVA is concerned that a format shifting exception will increase video piracy. It only requires one copy of a work to be uploaded to the internet in order for millions of digital replicas to proliferate and become available to file-share, post on social networks, stream and burn to discs, which are frequently sold for criminal gain. The number of British people who claim to be watching unauthorised video content via a digital source emailed, on a memory stick or burned from a disc (9%) is almost as high as the 10% who say they are downloading and streaming pirated film and TV content.[3] We would argue that consumer confusion arising from a new copyright exception would contribute significantly to the 30.9% of the British population who are currently engaged in some form of copyright theft, currently costing the audiovisual sector over £0.5 billion in cannibalised revenues. We believe that some consumers will use this amendment to copyright law as an excuse to justify their engagement in digital copyright theft.

14. The Review is unclear as to whether a format shifting exception could be overridden by rights management technology or contract. Making DRM unavailable would clearly have a negative impact on a range of innovative services and platforms that are providing content in the digital environment as explained above. Video-on-Demand services would be harmed if they were included, for example, as they use contractual agreement and DRM to protect their content from being copied. It would therefore have a negative impact on the investment environment for these new services. The BVA understands that any proposal to allow the circumvention of Technical Protection

[2] *More Than A Support Act: The True Value of the UK Video Industry* published by the BVA in June 2011. http://www.bva.org.uk/news-press-releases/no-video-entertainment-no-funding-british-film-and-tv-dramas

[3] IPSOS 2010 surveyed 2000 people 15+ for the industry's annual piracy tracking study. Had under 15s been questioned it is likely these figures would have been higher.

Measures (TPMs) would be in breach of the EU Copyright Directive, so it would be useful for the Committee to examine whether Ministers agree that a right to format shift will not be interpreted as a right to circumvent TPMs.

15. The Hargreaves Review is silent on the issue of the legal protection of technological protection measures which gives rise to a number of concerns related to TPMs embedded in content sold as 'view only'. Moreover, the Review ignores in particular Article 6(4)(4) of the Copyright Directive which provides that rights holders are under no obligation to accommodate exceptions where works are made available on-demand. As explained above, access to audiovisual content may be sold as view-only or provide the right to have a digital copy for one or more additional devices, but new technologies are being used to expand on this to create an "authorised domain" in which legally acquired audiovisual content may be moved and viewed on several registered devices in a household. An example of this is UltraViolet, due to be launched in the UK this Autumn. See http://www.uvvu.com/index.php for further information.

16. For the audiovisual sector, there is a specific concern with respect to on-demand transactions. According to article 6(4)(4) of the Copyright Directive rights holders are not required to accommodate exceptions where content is made available on-demand on agreed contractual terms. This vital provision was designed to encourage the launch of business models – and has done so particularly in the UK (see also Hargreaves' own VOD study). Even in the examples of the two countries where exceptions have mandatory conditions, this essential element of the Copyright Directive was either taken into account (see the Belgian Copyright Act) or arguably does not apply in the on-demand sphere (see the Portuguese Copyright Act).

17. Viewers' willingness to pay for the timescale, level of access, quality and use creates a market with varying price points in the same way that the public can choose what time and price they will pay to use other services in many other industry sectors, for example in travel services. Some who are time poor but value a premium service are prepared to pay a higher price and for those who wish to pay less there are services available at later times with more basic benefits. We do not believe it is for governments to determine how the market develops these services by reducing the value of copyright to rights owners.

18. Ultimately, in proposing a format shift exception, the Review has developed a 'one size fits all' solution to industries whose eco-systems are very different. We do not believe that IP law should be used to compel all copyright owners to provide a 'Buy one get one free' proposition. This would lead to a significant distortion in the highly competitive video entertainment industry, reduce investment in innovation through the lower expectations of a commercial return and, in reducing the industry's ability to monetise its content, reduce investment in the development of future audiovisual production

Written evidence submitted by Simon Brown

1. Summary

- As a creator, I seek the moral right of attribution, enforced with no exceptions
- I oppose commercial use of photographic Orphan Works
- I oppose Extended Collective Licensing of photographs
- I seek Government recognition of creators' human and moral rights with respect to intellectual property
- I request that effective deterrents for theft of intellectual property enacted
- I support the creation of an Intellectual Property Ombudsman
- I ask that Intellectual Property contracts are subject to Unfair Contract Law
- I seek the removal of responsibility for copyright from the Intellectual Property Office

2. Introduction

I am a self employed photographer. I create intellectual property (photographs) and derive income by licensing the right to use images. Clients include newspapers, magazines and individual companies and individuals. Licensing the use of my intellectual property in international markets derives a good proportion of my income.

A submission was made to the Hargreaves commission, but the views expressed were – almost without exception – not considered or referred to in the report.

Two aspects of the report – the commercial use of Orphan Works and Extended Collective Licensing – will have a detrimental effect upon my business. The reasons are outlined below.

Furthermore, various governments and their representatives have consistently ignored the fact that there are inherent moral rights to my intellectual property. In spite of a change of government in the last elections the same policy has remained in place. If we look at the Digital Economy Bill and the removal of Clause 43 (Orphan Works and Extended Collective Licensing) in washup – thanks to Conservative pressure – the very same proposal has now been accepted following the Hargreaves review.

3. Objections to the Hargreaves Report

1. The moral rights of creators has been overlooked again. The proposal for Orphan Works (whereby the creator cannot be found) makes no recommendation for the *mandatory* right (this is a moral right) to a credit when the work is used. Without this protection, the orphan work

conveyer belt will simply continue to run and add more content available for licensing. During the debate of the Digital Economy Bill, Viscount Bridgeman made the following observation in the House of Lords:-

"*It is a logical and legal absurdity to talk of licensing works whose authors cannot be identified while there are still significant groups of authors who do not have the right to be identified*."

Nothing has changed. Creators are facing exploitation of their works without their permission (see below) whilst enabling more orphans to join the pile
Creators seek the unwaivable, enforceable right of attribution with no exceptions.

2. The proposal of commercial use of Orphan Works and Extended Collective Licensing breaches my moral rights as the creator, as enshrined in Article 17.2 of the Charter of Fundamental Rights of the European Union, the Human Rights Act 1988 Schedule 1 Part II[1], The Berne Treaty and TRIPS.

   In summary, the creator and creator alone has the right to decide how their property is used, by whom, for how long, for what purpose and for how much.

   There is no compelling case for an exception to the Human Rights Act 1988; the proliferation of cameras – and by that definition I include mobile phones – ensures the vast majority of the public are creators and therefore benefit from these rights.

   Furthermore, the Fox vs BT judgement demonstrates that the courts are prepared to accept Human Rights arguments:-
   "…I am satisfied that the order sought by the Studios is a proportionate one. It is necessary and appropriate to protect the Article 1 First Protocol rights of the Studios and other copyright owners."

   And finally, the Human Rights Act Section 6(1) states that it is unlawful for a public authority to act in a way which is incompatible with a Convention right.

   On this aspect I would like to suggest that the committee ask; Having been removed – and for good reasons - from the Digital Economy Act, why are Orphan Works and Extended Collective Licensing now back? Why is the Intellectual Property Office now proposing a breach of the Human Rights Act?[2]

3. Creators ask that *Schedule 1, clause 1(c) of The Unfair Contract Terms Act 1977* be repealed. Contracts seeking 'all rights' to intellectual

[1] http://www.legislation.gov.uk/ukpga/1998/42/schedule/1/part/II/chapter/1

[2] Legislation of Orphan Works and Extended Collective Licensing have been stated as a goal of the Intellectual Property Office at a meeting hosted at BIS, 23rd of August 2011.

property are numerous and widespread. Bauer Media in the UK has frequently offered contracts that have been declared illegal in Germany where Bauer UK's parent company resides. All we seek is a balance.

4. Creators ask that effective deterrents to infringement be enacted. Currently, when I find my work used without permission all I can charge is *what I would have charged the infringer if they asked first.* From an infringers perspective there is no incentive to ask; *if we get away with theft, great! If we get caught, we only pay what we would have paid anyway.*

5. I welcome a small claims court process to allow creators to seek redress when infringers refuse to settle claims. This is one aspect of the Hargreaves report I welcome, and is backed up by Lord Justice Sir Rupert Jackson's recommendations[3].

6. An OFCOM style ombudsman, but not under the auspices of OFCOM. Since the appointment of Dame Lynne Brindley photographers have lost confidence as we find Brindley, or Ben White, her Head if Intellectual Property at the British Library at the very heart of the Orphan Works debate, but not for very negative reasons. This one example of why:-

   '*The proposal [Clause 43] was nearly... enacted as part of the Digital Economy Bill for orphan works. It's our view that that was and still remains fit for purpose and should be reintroduced to Parliament, hopefully as part of the Communications Bill planned by the Coalition Government*.' - Dame Lynne Brindley, Chief Executive, The British Library, speaking at the IP for Innovation and Growth event at the RSA, 2nd. March 2011. Speech written by Ben White.

   It is clear that those who continue to support Clause 43 do not understand why it was removed. For this point to be really understood I request the opportunity to present oral evidence.

[3] See http://www.judiciary.gov.uk/NR/rdonlyres/8EB9F3F3-9C4A-4139-8A93-56F09672EB6A/0/jacksonfinalreport140110.pdf

Written evidence submitted by Peter Carroll

I am submitting this in a personal capacity. I am an ex-IT manager,now retired. Since retirement I been working on a project (Scibella.com) to set up a Current Research Information System (CRIS) covering scientific technical and medical (STM) public sector research in UK universities and Research Councils. Further background to the Scibella project can be found in my submission[1] to the Hargreaves Review.[2]

Summary of submission:

I have structured my submission around the Government response to the Hargreaves Review.[3]

- Evidence based approach. Should apply to online enforcement of IP infringement – Digital Economy Act 2010. Should extend to legal evidence and opinion behind draft legislation arising from Hargreaves Review.

- Digital Copyright Exchange (DCE). Public sector research outputs are not just papers published in scientific journals there is also a lot of information about current research on university & research council websites. The aim of this website information is to "translate & engage" research for envisaged users. At present re-use of this information is restricted to non commercial private research and study. This creates a "pull" model of information flow. Permission to commercially re-use involves many separate negotiations which inhibits the setting up of innovative firms who could "push" the information out to the widest audience. The same applies to the Open Educational Resource materials being developed by universities for on-line education. There is an important role for the DCE so that these materials can be easily and fairly licensed for commercial re-uses. JISC could also play an important sector co-ordinating role in getting these materials into the DCE as soon as possible.

- Exceptions to copyright. Exception for quotations (section 30 of CDPA) needs to be extended to accord with EU Infosoc Directive Article 5.3 (d). Gowers Review 2006 recommendation 11 transformative use exception (limited, for now, to research) could be introduced into UK legislation. Clear exemption from definition of works covered by copyright for metadata.

1. Evidence based approach

The Government responses states that:

1.1 "To deal with the second concern, **the Government will in future give limited weight in IP policy-making to evidence that is not sufficiently open and transparent in its approach and methodology, and we will make it clear where we are taking this**

[1] Submission to Hargreaves Review - Scibella
http://www.ipo.gov.uk/ipreview-c4e-sub-scibella.pdf
[2] Hargreaves Review into Intellectual Propery & Growth.
http://www.ipo.gov.uk/ipreview.htm
[3] The Government Response to the Hargreaves Review of Intellectual Property and Growth
http://www.ipo.gov.uk/ipresponse-full.pdf

view. IPO will set out guidance in Autumn 2011 on what constitutes open and transparent evidence, in line with professional practice." [3 p:3]

1.2 To practice what it preaches this evidence based approach must be applied to the cost-benefit analysis of the impact of Government legislation in the area of Intellectual Property. There is little point in revisiting IP legislation that has already been fully implemented. However, where implementation is still under consideration this would be of value in establishing the appropriate level of public resource to be allocated [see para 1.5 below]. Therefore, I think this approach should be re-applied to the BIS cost benefit analysis carried out for the Digital Economy Act 2010".[4] The £200M a year benefit of the act is based on a key assumption:

"Costs to digital product consumers are not monetised since this content is only available illegally; US evidence indicates that were this cost to be monetised it could outweigh the monetised benefits" [4: p54]

1.3 Good morality but poor economics. As the Hargreaves Review [2 :section 8.15] noted "money not spent on legal copies is not lost to the economy – it may be spent on other purchases. This is of no comfort to the sector suffering losses, but the effects across the economy will not necessarily be problematic."

1.4 The Hargreaves Review [2:section 8.48] concluded about online enforcement in the UK

"At this moment, given our state of knowledge, no-one in the UK could make an informed assessment of what is the right level of resource for online enforcement in the UK. We can only guess and get on with it, using rigorous evaluation to develop the kind of cost-benefit framework described by WIPO"

1.5 The WIPO framework referred to is:

"Turning to policy, it is optimal for governments to devote a level of public spending on law enforcement, such that the marginal benefit of fighting IPRs violations equals the marginal cost of enforcement activity. The marginal benefit includes the welfare effects outlined in Section 3. The marginal cost includes the opportunity cost of not using scarce fiscal resources to provide other public goods"[5]

1.6 Recommendation:

To demonstrate the Government's commitment to evidence based IP policy re-evaluate the cost-benefit analysis for the Digital Economy Act 2010 in line with Hargreaves Review section 8.48

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[4] Digital Economy Act 2010 Impact Assessments April 2010
http://webarchive.nationalarchives.gov.uk/20100511084737/http:/interactive.bis.gov.uk/digitalbritain/wp-content/uploads/2010/04/Digital-Economy-Act-IAs-final.pdf

[5] WORLD INTELLECTUAL PROPERTY ORGANIZATION GENEVA
ADVISORY COMMITTEE ON ENFORCEMENT Fifth Session Geneva, November 2 to 4, 2009
ENFORCING INTELLECTUAL PROPERTY RIGHTS: AN ECONOMIC PERSPECTIVE, para 66
http://www.wipo.int/edocs/mdocs/enforcement/en/wipo_ace_5/wipo_ace_5_6.pdf

1.7 However, the need for "open and transparent evidence" is not just limited to economic evidence. In the area of Intellectual Property, legal and economic evidence is inextricably interlinked- a point addressed in supporting document J to the Hargreaves Review.[6] The economic framework for IP arising from the Hargreaves Review will be determined by changes made to UK and EU law.

1.8 Whilst in progress the Hargreaves Review was often called by certain sections of the media "The Google Review"- that it was all about the possible introduction of US style "fair use" legislation in the UK. In the end the Hargreaves Review [2: sections 5.18-5.19] said:

"Evidence considered by the Review on the legal arguments about the feasibility of introducing Fair Use into the EU legal framework and so into the UK is violently diverse. It ranges from those who argue that it could, in effect, be achieved within the terms of current EU law,(viii) to those who see this as definitively impossible…..The advice given to the Review by UK Government lawyers is that significant difficulties would arise in any attempt to transpose US style Fair Use into European law. It is against this background that the Review has stuck to its Terms of Reference and sought to isolate the particular benefits for economic growth that Fair Use exceptions provide in the US, with a view to understanding how these benefits can be most expeditiously obtained in the UK…….viii Analysis provided to the Review by Professor Lionel Bently"

1.9 I was intrigued by footnote viii and by the "advice given to the Review by UK government lawyers". So, I submitted a FOI request to the IPO asking for a release of Professor Bently's analysis and the legal advice to the Review.

1.10 Professor Bently is the Director of the Centre for Intellectual Property and Information Law at the University of Cambridge and a eminent barrister and his analysis "Exploring the Flexibilities Available to UK Law" has now been published in full by the IPO.[7]

1.11 Regarding the legal advice to the Review by UK Government lawyers the IPO has refused to release any information as it is covered by legal professional privilege (LPP) and I have now asked the IPO for an internal review of this decision.

1.12 With the publication of Professor Bently's analysis we now have on one side a open and transparent body of evidence setting out the "flexibilities available to UK law". On the other we have advice very probably of a quasi-evidential nature, and of equal quality, from the UK government lawyers but because of the application of legal advice privilege it can be, at best, only partially disclosed.

1.13 In the light of the Government response that they "will in future give limited weight in IP policy-making to evidence that is not sufficiently open and transparent in its approach and methodology", to which body of evidence should they give most weight in policy making?

1.14 Recommendation:

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[6] Dnes A, 2011 A Law and Economics Analysis of Fair Use Differences Comparing the US and UK, Report for the Review of IP and Growth
http://www.ipo.gov.uk/ipreview-doc-j.pdf

[7] Professor L Bently. Exploring the Flexibilities Available to UK Law. Submission to Hargreaves Review
http://www.ipo.gov.uk/ipreview-c4e-sub-bently.pdf

That the open and transparent approach to economic evidence set out in the Government response be extended to the fullest extent possible to the legal evidence and opinion behind draft legislation arising from the Hargreaves Review.

2. Digital Copyright Exchange (DCE)

The Government responses states that:

2.1 "The Government will work to ensure that Crown copyright materials are available via the exchange from day one, or as soon as possible thereafter, and will encourage public bodies to do likewise" [3 :p5]

2.2 The outputs of public sector research are not just published scientific articles, patents, IP licensing, or data-sets. There is also a very large amount of "grey literature" about current research published on research council grants websites & grant databases, university departmental & unit websites, researchers home pages, blogs etc..

2.3 A recent NESTA-RIN report characterised these research outputs as the "translating and engaging" part of the research cycle :

"involving the envisaged users of the research in actual or potential applications of it, in other research fields, commercialisation or policy" ..by means of "General articles, web pages, briefings, public exhibits, presentations".[8]

2.4 It would seem obvious that the widest dissemination, within and beyond the UK, of this "translate & engage" information would be of great economic value. However, at present, nearly all of this information is only available under terms & conditions which limit its use to non-commercial private research & study. Re-use for any other purpose is forbidden without "express written consent" - even if you are a non-commercial academic researcher. Getting this express permission, and perhaps negotiating license terms, from over 100 separate universities and institutions is a long and daunting task. From initial experience I know that it is not easy in many cases to find who to contact.

2.5 This emphasis on non-commercial private research & study seems to me to hark back to a vision of university research as a "club for gentlemen & scholars " untainted by industrial or commercial concerns. Times have changed as have academic attitudes but a "pull" model of information flow persists. If you are a fellow academic in the same discipline you will know who to look for, where to look. There also needs to be a "push" model to maximise dissemination and consequent economic benefits. The best chance for this push model to happen will be commercial incentive to set up innovative firms. These firms will not be set up unless they can easily and fairly license the re-use of "translate and engage" information for commercial purposes.

2.6 The push model based around innovative firms also applies to the high quality Open Educational Resources (OER) that UK universities are creating to support on-line education. To lapse into marketing jargon, "University UK" is a strong global brand as witnessed by the large number of overseas students wishing to study in the UK. The potential world market for "University UK" distance learning is very large but again the role of innovative companies working with UK universities will be essential.

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[8] Open to All? Case studies of openness in research, http://www.rin.ac.uk/system/files/attachments/NESTA-RIN_Open_Science_V01_0.pdf

2.7 The role of the Digital Copyright Exchange in making all this happen, as soon as possible, after it has been set up is vital. There already exists in the Joint Information Systems Committee (JISC)[9] an organisation with substantial experience in licensing and legal issues, and the development of OER resources, who could coordinate activity across the university sector in placing material into the DCE.

2.8 Recommendation:
In addition to working to ensure that Crown Copyright materials are available via the DCE from the start the Government should prioritise work to ensure that the "translate and engage" & OER materials from UK university and research councils are also available via the DCE from the start, or as soon as possible thereafter.

3. Exceptions to copyright

3.1 The Government responses states that:

"**the Government agrees with the Review's central thesis that the widest possible exceptions to copyright within the existing EU framework are likely to be beneficial to the UK, subject to three important factors:**

• That the amount of harm to rights holders that would result in "fair compensation" under EU law is minimal, and hence the amount of fair compensation provided would be zero. This avoids market distortion and the need for a copyright levy system, which the Government opposes on the basis that it is likely to have adverse impacts on growth and inconsistent with its wider policy on tax.

• Adherence with EU law and international treaties.

• That unnecessary restrictions removed by copyright exceptions are not re-imposed by other means, such as contractual terms, in such a way as to undermine the benefits of the exception.

The Government will therefore bring forward proposals in autumn 2011 for a substantial opening up of the UK's copyright exceptions regime on this basis.." [3: pp 7-8]

3.2 First, I would draw the committee's attention to section 2, "Flexibility within Art.5", of the analysis provided by Professor Bently to the Hargreaves Review [7 :pp 5-11]. This section addresses directly the Government response:

"**the Government agrees with the Review's central thesis that the widest possible exceptions to copyright within the existing EU framework are likely to be beneficial to the UK, subject to three important factors"**

3.3 In particular I would draw attention to Professor Bently's paragraphs covering copyright exceptions for quotations:

[9] Joint Information Systems Committee
http://www.jisc.ac.uk/

"It is worth noting in particular the breadth of Art 5(3)(d) that permits quotations. This goes well beyond the current definition of 'fair dealing for criticism or review.' Expanding the UK defence to cover all quotations (not just those made for criticism or review) would be a very useful amendment…" [7: para 29]

"**what I would like to draw your attention to here is the mandatory nature of this exception**. The international law of copyright requires the UK to adopt a broader exemption than that currently provided by section 30." [7: para 31]

3.4 Section 30 of the Copyright, Designs and Patents Act 1988 provides an exception to copyright for:

"Criticism, review and news reporting...(1)Fair dealing with a work for the purpose of criticism or review, of that or another work or of a performance of a work, does not infringe any copyright in the work provided that it is accompanied by a sufficient acknowledgement [F1 and provided that the work has been made available to the public].." [10]

3.5 This section of the CDPA is the transposition into UK law of Article 5.3(d) of the EU Infosoc Directive which states that an exception applies to :

"(d) quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose."[11]

3.6 The critical difference here are the words "for purposes such as" in the EU directive and "the purpose of" in section 30 of the CDPA. The EU directive clearly uses "criticism or review" as examples of excepted uses, section 30 restricts that exception to the sole purpose of criticism or review.

3.7 Recommendation:
That section 30 of the CDPA be revised to enlarge its scope in line with article 5.3(d) of the EU Infosoc directive.

3.8 Second, the Government response notes that:

"The Government sees the areas where copyright restricts activity to no direct commercial benefit as doubly wasteful: neither new opportunities nor incentive to invest in copyright works result from them. Nor does the Government regard it as appropriate for certain activities of public benefit such as medical research obtained through text mining to be in effect subject to veto by the owners of copyrights in the reports of such research, where access to the reports was obtained lawfully. We recognise that some publishers view licensing of text mining as a legitimate commercial opportunity; however we are not

[10] Copyright, Designs and Patents Act 1988
http://www.legislation.gov.uk/ukpga/1988/48/section/29
[11] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML

persuaded that restricting this transformative use of copyright material is necessary or in the UK's overall economic interest." [3 :p7]

3.9 I have already set out the public benefits of wider access to current research materials on university and research council websites in section 2 of this submission. I am sure that use of the information in expired vacancy adverts for public sector scientific research posts, as the basis for a CRIS [1:pp 2-3], is a "transformative use of copyright material" in accord with the Government response above. However, both present EU [11: article 5.3 (a)] and UK[10: section 29] legislation restricts the exception for research to a "non-commercial purpose". The answer could be to revisit the possibility of introducing recommendation 11 of the Gowers Review:

"4.88 Recommendation 11: Propose that Directive 2001/29/EC be amended to allow for an exception for creative, transformative or derivative works, within the parameters of the Berne Three Step Test."[12]

directly into UK legislation – with, for now, a limitation of the exception to the area of research.

3.10 That this could be possible has been covered both in Professor Bently's submission [7 :para 45 et sec] and my own submission [1: pp 4-5] to the Hargreaves Review.

3.11 Recommendation:
Introduction into UK legislation of recommendation 11 of the Gowers Review 2006 with a limitation of the exception, for now, to the area of research.

3.12 Third, metadata on scientific and other research outputs (researcher name, organisation name, title of work, abstract etc..) has traditionally been excluded from copyright. However, in the light of the recent Meltwater v NLA decision[13] that copyright can reside in a title and very small portions of a text there is a risk that metadata for scientific and other research could now fall within the scope of UK copyright legislation. This is an area covered in Professor Bently's submission [7: paras 118-127] and my recommendation follows his paragraph 127

3.13 Recommendation
Amend section 3 of the Copyright, Designs and Patents Act 1988 to state: *"Copyright does not subsist in names, titles, items of bibliographical data or metadata."*

[12] Gowers Review of Intellectual Property 2006
http://www.official-documents.gov.uk/document/other/0118404830/0118404830.pdf
[13] [2011] EWCA Civ 890
http://www.bailii.org/ew/cases/EWCA/Civ/2011/890.html

Written evidence submitted by Channel 4

Channel 4 welcomes the opportunity to respond to the Business, Innovation and Skills Committee Inquiry into the Hargreaves Review of Intellectual Property. Channel 4's detailed submission to the Hargreaves Review is attached for the Committee's reference.

Channel 4 welcomes the targeted reforms proposed by the Hargreaves Review to improve the functioning of the UK IP system. As a major rights holder and commercial user of third party rights, Channel 4 believes that overall, the UK IP framework works effectively, and rewards creative stakeholders for their investment in IP. Intellectual property rules have supported and promoted entrepreneurialism, innovation and economic growth in the UK broadcasting sector. According to the Creative UK report, around £13 billion flows into the UK audiovisual sector each year, leading to investment in UK content production of around £4 billion per year.[1]

As you will see from our attached response to the Hargreaves Review, Channel 4 has a number of specific recommendations, summarised below:

Exceptions for Parody

Channel 4 supports the government's intention to legislate for copyright exceptions for parody. We believe the parody exception will enable UK broadcasters to commission more innovative and creative programming - building on the strengths of the UK creative sector. In Channel 4's experience, the lack of a parody exception in the UK has limited the range of content available to viewers - rights holders of content such as dips, music and advertisements have often prevented this content from being used in parody in programmes, for fear of damage to their own brand. A parody exception is needed to ensure this content is freed for such use in programmes - and there is no evidence that this use damages the interests of rights holders.

For example, we have been prevented from clearing music for sketches in innovative comedy programmes such as *Bremner, Bird and Fortune and School of Comedy* to make satirical points. We have also been unable to broadcast parodies of television advertisements due to the absence of a parody exception - content which could, for example, be broadcast as part of the satirical current affairs programme *10 O'Clock Live* and other factual and comedy genres.

We note that the exception for parody is permitted by the 2001 European Union Copyright Directive and is in use in several Member States including Belgium, France, Lithuania, Luxembourg, Malta, the Netherlands, Poland and Spain. In the Nordic countries, a new work which is derivative or transformative of existing copyright material is not treated as infringing it. Channel 4 believes if the exception to parody is implemented in the UK it is important that it should also include satire in the scope of the exception as it has successfully been implemented under Australian

[1] *Creative UK: The Audiovisual Sector and Economic Success*. A report Commissioned by Channel 4, ITV, PACT and Sky from Communication Chambers.

copyright law since 2006. This would avoid the inconsistent and uncertain application of the fair use provisions to parodies in the US, which has led to costly litigation.

Copyright Licensing

Channel 4 welcomes the Government's recognition that collecting societies will continue to play an important part in copyright licensing in the UK. As a commissioner and distributor of content, collective licensing remains vital for Channel 4 in the digital age. As a mass user of copyrighted works using a number of different distribution platforms, including on-demand services, Channel 4 believes that collective licensing is the only effective way to clear rights for programmes.

Governance of Collecting Societies

We recognise that collecting societies have a duty to be transparent and fair in their dealings that comes with their power to licence a wide range of rights. Channel 4 believes the reputation of UK collecting societies will be further enhanced if they adhere to minimum standards of accounting, management costs, transparency of tariffs and treatment of members. We look forward to the Government's publication of proposals for minimum standards for voluntary codes for collecting societies, and proposals for a backstop power that allows a statutory code to be put in place for a collecting society that fails to adhere to a voluntary code incorporating the minimum standards.

Extended Collective Licensing

Channel 4 believes there may be opportunities for the UK broadcasting sector to adopt extended collecting licensing for the wider benefit of the audiovisual sector including individual creators.

9 September 2011

Written evidence submitted by Norman Childs

Our copyright and moral rights are artists' human rights, guaranteed by the Universal Declaration of Human Rights.

The CDPA 1988 moral rights exceptions breach our artists' human rights.

An undefined Parody exception would breach our artists' human right to object to derogatory treatment of our work Any law which enables commercial use of our work in any way without our knowledge or permission, including by wide-ranging Extended Collective Licensing (ECL), would breach our human rights as well as international copyright law, and such law is forbidden by the Human Rights Act 1988 unless the breach is in the 'general interest'.

It is not in the 'general interest' to make such exceptions, because in the modern world the majority of the population will be negatively affected, especially when the IPO's 'growth' case is unproven (the economic Impact supporting paper is a work of fiction, little better than schoolboy economics, as recently pointed out in The Register:
http://www.theregister.co.uk/2011/08/24/ipo_economic_justification_of_hargreaves_wtf/

Preservation and cultural access to orphan works can be achieved by other means than breaching our human rights Exceptions to our human rights to allow commercial use of Orphan Works and ECL would be disproportionate - they would fail the three-stage legal test for proportionality (http://regulatorylaw.co.uk/Proportionality.html)

Non-commercial use of Orphan Works can stimulate growth - the IPO said so at last week's meeting.

Repeal of Schedule 1, clause 1(c) of The Unfair Contract Terms Act 1977, which exempts IP from fair contract law, is not only necessary to bring IP into parity with physical property and will not only fix broken IP markets, but will also help the Cultural Heritage Sector and academia who complain about the unfair T&C they're subject to by corporate rights-holders.

Written evidence submitted by the Coalition for a Digital Economy (Coadec)

I am writing on behalf of The Coalition for a Digital Economy (Coadec), an all-volunteer organisation that works to support policies and legislation that foster a vibrant, innovative and sustainable digital economy for Britain. We speak in particular for tech-driven startups and SMEs, both in Silicon Roundabout and throughout the country, and we are closely involved in a number of government and private initiatives for promoting technological entrepreneurship.

As you know, the Independent Review of Intellectual Property and Growth, chaired by Professor Hargreaves, published a report in May on potential changes to IP laws to support growth and innovation. The Government announced in early August its broad agreement with, and intention to legislate for, Professor Hargreaves's recommendations. I am writing today to express Coadec's strong support for the Government in its intention to implement these recommendations.

The Hargreaves report represents a watershed for this country's digital economy. The report recognises—as many digital businesses and entrepreneurs have known for a long time—that the nation's intellectual property laws, and in particular copyright law, must adapt to business, social and technological change. As Professor Hargreaves says, "Laws designed more than three centuries ago with the express purpose of creating economic incentives for innovation by protecting creators' rights are today obstructing innovation and economic growth."

The recommendations set forth in the report would, if implemented, go a long way toward righting that imbalance. They fully embrace and support the benefits of innovation by the creative and artistic communities while ensuring that the benefits of innovation in the digital sphere can be fully realised as well. This is why the recommendations have received such strong support from leaders of the Internet economy and were cited, at the recent e-G8 meeting in Paris, as best practice for copyright law in the digital age.

Innovation and commercialisation by digital businesses has the potential to be a key component of Britain's economy and play an ever-more important role in years to come. With the right support and legal environment, Britain can produce many of the great digital businesses in the coming years and decades. It would therefore be a tremendous shame if the good work the Government and private sector are doing for digital innovation on so many other fronts were to be undermined by a failure to seize the opportunity presented by the Hargreaves review to reform copyright law to make it suitable for the modern age.

Jeff Lynn

5 September 2011

Written evidence submitted by the CBI

SUMMARY

1. We welcome this BIS Committee inquiry into the Hargreaves Review, and the subsequent Government response. In addition to our original response, which was formally submitted in March, we would like to set out our priorities for taking the report forward in light of the Government's recent announcement.

2. The CBI supports the emphasis on IP and growth, in both the Hargreaves Review and the Government's response to it. We believe that the approach on intellectual property should be to support growth in IP-rich businesses and create open and competitive market access to promote innovation. We are pleased that the Government has acknowledged this in its longer term IP strategy.

3. The Government's acceptance of each of the key principles set out in the Hargreaves Review is an important milestone towards establishing a modern, robust IP regime in the UK.

DIGITAL COPYRIGHT EXCHANGE

4. We welcome the recommendation to create a Digital Copyright Exchange in the UK and the Government's intention to conduct a feasibility study into the possibilities of this. We believe that this is a positive step which would help reduce transaction costs for large organisations whilst helping smaller firms gain legitimate access to content. Many of our members already have sophisticated digital platforms that could help build an exchange.

5. But this support comes with a number of caveats. It is critical that the shape of a Digital Copyright Exchange is led by industry and should be genuinely voluntary to participate in. Key issues to get right include:

    - The system must not be governed by price controls; rights holders must retain the ability for differential pricing in different markets, including exports for example.

    - Rights holders must retain the right to refuse permission for commercial re-use of content.

    - The system must avoid "compulsion by the back door", where in the US for example rights registration is "voluntary" but it is a prerequisite of challenging breaches in the courts. So we are concerned, for example, that Digital Economy Act powers could only be available to those on the Exchange.

Fundamentally, the proposals must uphold the principle of rights-holders retaining control over their own content.

COPYRIGHT EXCEPTIONS

6. We are concerned about some specific measures in the Hargreaves proposal for copyright exceptions for both data mining and future proofing. Many of our members have experience of adapting their own copyright policies to take account of new digital technologies with great success. We are pleased that the Government has announced its intention to consult widely with industry on this, as this will ascertain whether new copyright exceptions are in fact needed or whether alternative solutions such as licensing can be found.

PATENT THICKETS

7. We also remain concerned about Hargreaves' proposal to address patent thickets. Whilst we are in favour of action that would reduce congestion in patent offices and provide a clearer landscape for potential new entrants, we would urge caution on immediate action to address patent thickets and recommend that the Government engage further with industry to better understand the problem. We welcome the IPO's intention to publish findings on the scale and prevalence of patent thickets by November 2011.

8. The CBI looks forward to working with you on these important issues to ensure that the IP rich industries can continue to play their part in the growth agenda.

September 2011

Written evidence submitted by Consumer Focus

1 About Consumer Focus

1.1 Consumer Focus is the statutory independent watchdog for consumers across England, Wales, Scotland and for postal consumers in Northern Ireland. Our role is to represent the interests of consumers, particularly those who are disadvantaged. We have worked on UK and EU copyright policy since late 2008, building on the work of our predecessor organisation the National Consumer Council (NCC). We work on copyright exceptions, licensing and enforcement to build competitive markets where consumer demand is effectively met through innovative products and services. We want to see a copyright system that supports this by balancing the interest of consumers, copyright owners, investors and creators. Copyright enforcement has to be proportionate and address the causes, not just the symptoms of copyright infringement by focusing on increasing the legal market in copyrighted content.

1.2 Consumer Focus has made a detailed submission on copyright exceptions, licensing and enforcement to the Hargreaves Review call for evidence, which the Business, Innovation and Skills Committee has reviewed:

Consumer Focus response to independent review of IP and Growth Part 1 the institutional foundations for competition innovation and growth

Consumer Focus response to independent review of IP and Growth Part 2 fair use, licensing solutions and appropriate enforcement [1]

1.3 We welcome the opportunity to submit additional evidence to the Committee on the recommendations to update the copyright system made in the Hargreaves Review on Intellectual Property and Growth, and the Government's plans for implementation. We would welcome the opportunity to provide oral evidence to the Committee.

2 Summary

2.1 Consumer Focus welcomes the Hargreaves Review and the Government's support for implementing its recommendations. We recommend that:

- The Committee inquiry should support the transparent and evidence based implementation of Hargreaves' recommendations
- The InfoSoc Directive should be fully implemented, especially with regards to copyright exceptions which are currently narrower than required by EU law
- A limited private copying exception should be implemented, covering format-shifting, back-up and place-shifting, and no levy should be imposed unless economic harm from private copying by consumers can be demonstrated in line with the 'fair compensation' principle in EU law
- Extended collective licensing should be enabled to facilitate the cost effective licensing for the mass use of copyrighted works, especially in broadcasting
- Consideration should be given to further simplifying copyright law in relation to moral rights and clarification of the interaction between copyright and contract law

3 Succeeding where the Gowers Review failed

3.1 The Hargreaves Review follows a string of Intellectual Property (IP) reviews which were not fully implemented. Many of the copyright recommendations of the Hargreaves Review, such as the recommendation to introduce a format-shifting exception, a parody exception and widen the non-commercial research and archiving exception to recorded music and films, were previously made by the Gowers Review of Intellectual Property in 2006. Gowers failed not only because of lack of political will, but principally because of lack of objective evidence and an ill-equipped Intellectual Property Office (IPO). The vacuum was filled by a handful of well-funded trade associations representing incumbents who actively lobbied against implementing Gowers' recommendations and are now lobbying against the implementation of Hargreaves' recommendations.

[1] See **http://bit.ly/ncVuC6** and **http://bit.ly/oDqLM2**

3.2 Copyright law and licensing effectively regulates the production, distribution and consumption of creative works, it affects a multitude of industries and public sectors. It is therefore inappropriate that copyright policy and law should be dominated by the narrow interests of lobbyists on the basis of what Prof Hargreaves termed 'lobbynomics'. The Digital Economy Act 2010 exemplifies the way copyright law and policy has been made; no proper economic impact assessment was ever established and to date section 3 to 18 of the Act have created zero value for the UK economy.

3.3 Neither the Gowers Review nor its implementation was subject to an inquiry by the Committee or its predecessor. We believe that this inquiry could make a valuable contribution to the much needed sea change in copyright policy. This inquiry could facilitate the transparent and evidence based implementation of Prof Hargreaves' recommendations with fair consideration of all stakeholders.

4 Ensuring that copyright law remains relevant as technology develops

4.1 We agree with the Government that the acceleration of technological development creates a need to update and future proof copyright law by building sufficient flexibility into the system. The British parliament passed the first copyright statute into law in 1709, now known as the Statute of Anne, under the long title *An Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or purchasers of such Copies, during the Times therein mentioned*. Parliament intended to encourage 'learned men to compose and write useful books' as well as harness the power of the printing press by establishing a competitive and regulated trade in books. In its 300 year history copyright has been continuously updated and needs to be updated again to remain effective in the digital age.

4.2 Technological developments have driven three total overhauls of copyright law by Parliament in the past century. The Copyright Act 1911 introduced copyright protection for sound recordings and codified case law on fair dealing for 'private study, research, criticism, review, or newspaper summary' and other permitted acts in statute law.[2] The Copyright Act 1956 introduced copyright protection for films and broadcast, as well as typographical arrangements of published editions.[3] The last comprehensive update established the Copyright, Designs and Patents Act 1988 (CDPA), which recognised new ways of creating, copying and disseminating works, such as computer programs (or software), photocopying, home taping, cable and satellite broadcast.

4.3 Following the CDPA, copyright received little attention in UK policy circles while the European Commission started the harmonisation of copyright law and licensing in order to facilitate a single market in copyrighted works. A number of Directives were passed by the European Parliament to harmonise copyright in computer programmes and databases, rental rights, satellite broadcasting, copyright term and resale rights in works of art.[4] Most significant for the implementation of the Hargreaves Review is the missed opportunity to implement Directive 2001/29/EC, the so called Information Society Directive (InfoSoc Directive), to the full extent possible in UK copyright law.

4.4 The InfoSoc Directive aimed to bring the copyright law in member states up to date with changes in digital technology and implement two 1996 World Intellectual Property Organization (WIPO) Treaties[5] on the same subject. The Directive introduced a 'making available right', which includes 'communication to the public', to account for online distribution of copyrighted works, it established provisions on technological protection measures (TPMs), or Digital Rights Management (DRM), harmonised reproduction and distribution rights, and in Article 5 provides for 21 copyright exceptions member states may implement in national law.

4.5 The UK implemented the Directive in 2003,[6] but adopted a bolt-on approach focused on making as few changes to the CDPA as possible. The CDPA's existing exceptions were matched against the

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[2] See **Copyright Act 1911**, sections 1(2)(d) and 2(1)(i)
[3] See **Copyright Act 1956**, sections 13, 14 and 15
[4] See **Directive 2009/24/EC** on the legal protection of computer programs, **Directive 96/9/EC** on database rights, **Directive 2006/115/EC** on rental right and lending right and on certain related rights, **Directive 93/83/EEC** on copyright and rights related to copyright in satellite broadcasting and cable retransmission, **Directive 2006/116/EC** on the term of protection of copyright and certain related rights, and **Directive 2001/84/EC** on the resale right of an original work of art.
[5] The **WIPO Copyright Treaty** and the **WIPO Performances and Phonograms Treaty**, both signed in 1996. The UK, along with all other EU member states, is a member of the World Intellectual Property Organization (WIPO), which is a specialised agency of the United Nations. WIPO was established by the **WIPO Convention** in 1967 and administers 24 international intellectual property treaties, including the **Berne Convention for the Protection of Literary and Artistic Works**.
[6] See **The Copyright and Related Rights Regulations 2003**

InfoSoc Directive exceptions. By merely bolting-on any additional limitations the Directive required, the UK failed to widen existing exceptions to the full extent possible. As a result the UK did not properly update the CDPA and existing exceptions became even narrower than required by the Directive.

4.6 Consumer Focus welcomes Prof Hargreaves' and the Government's recognition that exceptions have key role to play in establishing a copyright system that supports commercial, scientific and social innovation. Copyright exceptions allow certain uses without permission or licence from the copyright owner and are established as fair dealing or permitted acts in Chapter III of the CDPA. We agree with the Government 'that the widest possible exceptions to copyright within the existing EU framework are likely to be beneficial to the UK'[7] and that the UK should implement exceptions to the full extent possible under the InfoSoc Directive. More information on how copyright exceptions support social and commercial innovation can be found in Part 2 pg.6-24 of our submission to the Hargreaves Review.

5 The need to update and future proof copyright law with a private copying exception

5.1 We fully agree with Prof Hargreaves that, as a matter of principle, 'copying should be lawful where it is for private purposes, or does not damage the underlying aims of copyright' and that 'Government should firmly resist over regulation of activities which do not prejudice the central objective of copyright, namely the provision of incentives to creators.' However, while Prof Hargreaves devoted attention to the issue of format-shifting, eg the copying of music, films and e-books into different file formats for personal use, the Hargreaves Review neglects to mention other private copying by consumers which is illegal under UK copyright law, especially back-up and what is known as 'place-shifting'. Currently the only exception in UK law under the private use provision in EU law is the time-shifting exception for radio and TV broadcast introduced in 1988,[8] all other private copying of music, films or e-books by consumers for their own personal use is copyright infringement.

5.2 We therefore welcome the Government's commitment to implement a 'limited private copying exception'[9] under Article 5(2)(b) of the InfoSoc Directive. The boundaries of this exception are to be determined in a consultation in the autumn and we believe it should cover format-shifting, back-up and space-shifting by consumers of products they have legally acquired, for personal and non-commercial purposes. This would be in line with the Directive, which emphasises that private copying by consumers does not compete with the commercial interest of copyright owners and allows the UK to introduce exceptions for reproduction 'by a natural person... for private use and for ends that are neither directly nor indirectly commercial'.[10]
It would also comply with the so called Berne three-step test[11], according to which the UK may only introduce exceptions to the copyright owners exclusive right to reproduction in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the rights owner.

5.3 Private copying exceptions have existed in national copyright laws of civil law European countries since the late 19th Century.[12] Generally these exceptions have provided sufficient flexibility to accommodate technological developments, particularly in home-entertainment, and have therefore stud the test of time. Problems have only arisen in rare cases, such as where the private copying exception does not specify that consumers may only make a copy for private purposes of content they have legally acquired.[13] Therefore the UK should draft a limited private copying exception which

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[7] **The Government Response to the Hargreaves Review of Intellectual Property and Growth**, HM Government, August 2011, pg.7
[8] **Copyright, Designs and Patents Act 1988**, section 70
[9] **The Government Response to the Hargreaves Review of Intellectual Property and Growth**, HM Government, August 2011, pg.8
[10] **InfoSoc Directive**, article 5(2)(b)
[11] The three-step test is established by article 9(2), under the heading Right of Reproduction: Possible exceptions, by the **Berne Convention for the Protection of Literary and Artistic Works**. Article 5(5) of the **InfoSoc Directive** confirms that all exceptions listed in article 5 of the Directive are subject to the three-step test.
[12] For example the German Copyright Act of 1876 allowed the making of a single copy of a work of art, provided it was not intended for commercial use.
[13] In the Netherlands the private copying exception has been interpreted to mean that downloading content without the permission of the copyright owner is legal, so long as it is for private use, while uploading is regarded as unauthorised distribution and hence copyright infringement. The Dutch government has declared its intension to narrow the private copying exception to bring downloading out of scope.

is sufficiently flexible to remain relevant over time, but is specific enough so as to provide legal certainty and not result in lengthy litigation. More information on the appropriate boundaries of a private copying exception can be found in Part 2 pg.6-18 of our submission to the Hargreaves Review.

6 Updating and future proofing copyright law – place-shifting

6.1 While it has received little attention so far, it is critical that place-shifting, also called 'space-shifting', is legalised to provide legal certainty to UK based technology companies who want to innovate. Place-shifting is the process of accessing media stored on one device in another place through another device. In the past decade wireless technology for home entertainment has become affordable with the proliferation of Bluetooth. Bluetooth enables the wireless transmission of data over short distances, between five and 10 meters, using short wavelength radio transmissions. Bluetooth enabled speakers and headphones allow consumers to transmit music and sound within a room from Bluetooth enabled computers, mobile phones, TVs or home entertainment systems. More recently home WiFi networks are used to place-shift music, with Apple's AirPort Express device allowing consumers to stream the iTunes collection on their computer over their WiFi connection to any room in the house.

6.2 Unless place-shifting is legalised through a private copying exception, as it is in civil law European countries, the temporary copies made when place-shifting copyrighted content are copyright infringement. Place-shifting infringes copyright because when consumers are transmitting the media file between devices temporary copies are made. This infringes the copyright owners right 'to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part', provided for in Article 2 of the InfoSoc Directive,[14] unless the 'temporary acts of reproduction referred to in Article 2... are transient or incidental and an integral and essential part of a technological process and whose sole purpose is to enable... a lawful use'.[15]

7 Updating and future proofing copyright law – back-up

7.1 As consumers purchase more and more of their content in digital formats the need for backing-up their music, film and e-book collections has increased. Today computers, laptops and smart-phones function as media hubs and a variety of companies, such as Clickfree, have developed back-up solutions for the convenient back-up of media files. It is recommended that consumers regularly back-up their computer, but the lack of a private copying exception means that in the UK the back-up of copyrighted content is illegal, even if purchased legally. We believe that the limited private copying exceptions the Government intends to introduce ought to correct this anomaly.

7.2 We also believe that the Government should clarify the back-up exception for computer software[16] that was introduced in 1992 with the implementation of the 1991 Computer Programs Directive (Directive 91/250/EEC), which was replaced in 2009 by the Software Directive (Directive 2009/24/EC). Both Directives provide that the 'making of a back-up copy by a person having a right to use the computer program may not be prevented by contract insofar as it is necessary for that use'.[17] However, when the UK implemented the back-up expectation into UK law it provided that a lawful user may only make a back-up copy of a computer programme if it 'is necessary for him to have for the purposes of his lawful use'. In 2004 the High Court, in a case about games consoles, ruled that it is not 'necessary' for lawful use of computer programs sold on CDs or DVDs to make back-up copies because the storage medium was 'robust'.[18]

7.3 We are not aware that any other EU country has implemented and interpreted the back-up exception for computer programs so narrowly. While compact discs are certainly more durable than floppy disks, vinyl or cassette tapes, they are vulnerable to heat, cold, light, dust, fingerprints and scratches,

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[14] **InfoSoc Directive**, article 2

[15] The exception for temporary copies in Article 5(1)(b) is the only mandatory copyright exception provided for in the InfoSoc Directive and was central to updating copyright law for the digital age. It was implemented into UK law as section 28A of the CDPA. Computers and digital devices make temporary copies of media files in the RAM every time a file is received or accessed, similarly digital devices will make temporary copies of websites when browsing the internet. An internet service provider will make temporary copies of packets transmitted over its network. Without the exception for temporary copies, consumers would infringe copyright when operating a computer or browsing the internet.

[16] **Copyright, Designs and Patents Act 1988**, section 50A

[17] **Programs Directive**, article 5(2) and **Software Directive**, article 5(2)

[18] **Kabushiki Kaisha Sony Computer Entertainment & Ors v Ball & Ors [2004] EWHC 1738 (Ch) (19 July 2004)**

and compact disks manufactured in the late 1980s are subject to a deterioration process known as 'bronzing'. The Government should therefore make it legal to make back-up copies of computer programs, music, films and e-books consumers have purchased, regardless of the medium on which they are stored.

8 Levies and the fair compensation principle – the question of harm from private copying

8.1 Prof Hargreaves recommends that the UK should legalise format-shifting by consumers without a levy. In turn, the Government agrees 'with the Review's central thesis that the widest possible exceptions to copyright within the existing EU framework are likely to be beneficial to the UK, subject to... the amount of harm to rights holders that would result in "fair compensation" under EU law is minimal, and hence the amount of fair compensation provided would be zero'.[19] This statement implies that EU law requires 'fair compensation' for all copyright exceptions and since the Hargreaves Review has been published some lobbyists have suggested that a levy is required under EU law for any private copying.

8.2 Neither is correct. Levies are not mandated by EU law and Article 5(2)(b) of the InfoSoc Directive only establishing the need for 'fair compensation' to copyright owners for private use in the event of economic harm. According to recital 35 'rightholders should receive fair compensation to compensate them adequately for the use made of their protected works or other subject-matter... When evaluating these circumstances, a valuable criterion would be the possible harm to the rightholders resulting from the act in question. In cases where rightholders have already received payment in some other form, for instance as part of a license fee, no specific or separate payment may be due.'[20] According to a recent ruling by the European Court of Justice 'Article 5(2)(b) of Directive 2001/29 must be interpreted as meaning that the "fair balance" between the persons concerned means that fair compensation must be calculated on the basis of the criterion of the harm caused to authors of protected works by the introduction of the private copying exception.'[21]

8.3 A literature review Consumer Focus commissioned on the economic impact of consumer copyright exceptions found that there is no existing evidence to support the argument that activities such as format-shifting or back-up harm copyright owners. Assertions that it does are based on flawed economic analysis such as the incorrect equation of economic damage to copyright owners with the value consumers derive from an exception.[22] The Government should reject arguments by the music industry that hardware and software manufacturers should compensate the music industry for 'the value that the ability of being able to transfer music adds to devices such as the iPhone'.[23] This reasoning is not in line with the requirement of fair compensation in EU law. It also fails to recognise the mutually beneficial relationship of the music and hardware industries in which the technological innovation by the latter has nurtured the rise of recorded music in the 20th Century.

8.4 The Italian consumer organisation Altroconsumo has calculated that an Italian family pays more than €100 per year in levies on a range of hardware and blank media. While we are sympathetic to the desire of the Musicians Union to secure additional income for musicians, we object to suggestions that this should be achieved by making consumers pay for private use of what they have already paid for. In 2010 the UK recorded music industry generated £823.8 million in revenues,[24] to ensure musicians get a fair share of what consumers pay for recorded music the contracts by which musicians licence and assign recordings to record companies and collecting societies need to be re-considered.[25]

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[19] **The Government Response to the Hargreaves Review of Intellectual Property and Growth**, HM Government, August 2011, pg.7-8

[20] **InfoSoc Directive**, recital 35

[21] **Padawan SL v Sociedad General de Autores y Editores de España (SGAE) Case C‑467/08**

[22] Mark Rogers, Joshua Tomalin & Ray Corrigan **The economic impact of consumer copyright exceptions: A literature review**, Consumer Focus, November 2010

[23] **Article online question positive impact of Hargreaves' report**, Musicians Union, 3 August 2011

[24] In 2010 the UK recorded music industry generated revenues of £598 million from physical formats, £188.1 million were generated online through digital formats, and £8.9 million from recorded music sold through mobile platforms. An additional 16.3 million were generated from subscriptions, 10.8 million were generated from ad-supported platforms and 1.6 million were generated form 'other digital music content'. In total the UK recorded music industry had revenues of 823.8 million in 2010. BPI Yearbook 2011 – Recorded Music in the UK, BPI Limited, 2011, pg.9

[25] The practice whereby musicians assign and licence their performance rights to collecting societies was part of the 1988 Monopolies and Mergers Commission inquiry into the collecting society PPL. It was established that the PPL since

8.5 Beyond the requirement for 'fair compensation' introduced by the InfoSoc Directive, levies are not harmonised at EU level and remain subject to considerable controversy and legal action. The Spanish parliament has recently voted to abolish the private copying levy on digital media for being an 'arbitrary and indiscriminate system'.[26] Similarly the Dutch Government has announced its intention to abolish levies because it 'considers new levies on devices such as MP3 players, laptops, DVD recorders and USB sticks undesirable' and 'obsolete'. According to the Dutch Government 'levies only lead to unnecessary or double payments by consumers. Instead copyright owners can include a reimbursement for copying in the price of the product...'.[27] More information on the cost levies impose on consumers and the way in which they distort the market can be found in Part 2, pg.16-17 of our submission to the Hargreaves Review.

9 Facilitating the cost effective mass use of copyrighted works – Extended collective licensing

9.1 We welcome the Government's commitment to introduce enabling legislation which would allow industries or sectors to establish extended collective licensing (ECL) for particular types of work and for particular uses.[28] Such licensing schemes have operated successfully in Scandinavia for more than 50 years, and Part 2 pg.28-31 of our submission to the Hargreaves Review provides more detail on the benefits of ECL for broadcasting. ECL was designed to reduce the transaction costs of licensing the mass use of copyrighted content, particularly in broadcast, and in turn gives consumers cost effective access to a wider variety of content.

9.2 ECL schemes are run by collecting societies, who negotiate licensing rates and distribute payment to members and non-members. Proposals for ECL have caused particular concerns among photographers in the past. However, photographers are not represented by a collecting society in the UK, so it would be impossible to establish an ECL scheme for photographers anyway. In the past ECL has frequently been mentioned in relation to orphan works, that is works for which the copyright owner cannot be located or contacted after diligent search, but Consumer Focus is not convinced that ECL is appropriate for orphan works. ECL is based on the principle that creators get paid for the licensed uses of their work; it is not designed to cope with copyright owners that cannot be identified or contacted. Denmark has recently established ECL for orphan works, a first, and we believe it would be prudent to wait until the Danish scheme can be evaluated before reopening the discussion on ECL for orphan works.

10 Future proofing copyright law – Rewarding creativity through moral rights

10.1 The Government should consider strengthening the moral rights of creators, particularly the right to attribution. Moral rights were first enshrined in UK copyright law in 1988 and the CDPA provides that creators need to assert their moral right to attribution.[29] In civil law countries the moral right to attribution is automatic and removing the need for assertion would simplify copyright law. Standard contracts frequently force creators to sign away their right to assert their right to attribution, though it should be a matter of principle that creators are credited for their work even if they no longer own the copyright in their work. Prof Hargreaves considered moral rights outside the remit of the review, but moral rights need to be considered in relation to establishing a Digital Copyright Exchange (DCE). Information on asserted attribution rights need to be integrated into the DCE to enable the lawful use of copyrighted works.

11 Future proofing copyright law – the challenges ahead

11.1 Since the Hargreaves Review was published a dispute between the Newspaper Licensing Agency (NLA), a collecting society for newspaper publishers, and Meltwater, a commercial news aggregator, about whether users of Meltwater service need a licence from the NLA has thrown up significant

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1934 only passed 20 per cent of its net royalty income to named performers, and that the assignment of recording rights through the standard consent form issued by the Musicians Union to its members resulted in a system whereby royalties collected by the PPL were unlikely to be paid to the musicians who had performed on a recording. More information about the 1988 Monopolies and Mergers Commission inquiry can be found in Part 1, pg.25 and 29-30 of our submission to the Hargreaves Review.

[26] Francisco Javier Cabrera Blázquez, **Copyright Levies' War in Spain: Canon and unresolved Counterpoint?** Kulwer Copyright Blog, 13 July 2011

[27] **State Secretary Teeven plans copyright law**, Government of the Netherlands, 11 April 2011

[28] **The Government Response to the Hargreaves Review of Intellectual Property and Growth**, HM Government, August 2011, pg.7

[29] **Copyright, Designs and Patents Act 1988**, sections 77-79

questions about the interaction between copyright law and contract law. The High Court and Court of Appeal ruled that 'the copies made by the end-user's computer of Meltwater News on receipt of the email from Meltwater, opening that email, accessing the Meltwater website by clicking on the link to the article and of the article itself when clicking on the link indicated by Meltwater News are and each of them is, prima facie, an infringement of the Publishers' copyright' because the terms and conditions of newspaper websites commonly state that they may only be used 'for personal and/or non-commercial use.'[30]

11.2 The repercussions of users being regarded to be bound by terms and conditions they have not been made aware of, or accepted, before accessing a website is significant. Moreover, the ruling establishes the principle that if an email contains an infringing copy, the recipient infringes copyright by virtue of making a temporary copy when receiving an email, even before opening the email. By contrast, anyone receiving an infringing newspaper clipping by post is not regarded to be infringing copyright, as they do not make a temporary copy on receipt. As part of implementing the Hargreaves Review the Government should therefore consider how the law can clarify the relationship between contract and copyright law, and whether recipients of unsolicited infringing copies are regarded to infringe copyright by virtue of their computer making a temporary copy.

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[30] See **The Newspaper Licensing Agency Ltd & Ors v Meltwater Holding BV & Ors [2010] EWHC 3099 (Ch) (26 November 2010)** & **The Newspaper Licensing Agency Ltd & Ors v Meltwater Holding BV & Ors [2011] EWCA Civ 890 (27 July 2011)**

Written evidence submitted by Copyright for Knowledge

Copyright for Knowledge is an alliance of organisations representing education, learning and research in the UK. A number of our members are amongst the UK's most significant investors in research and innovation, such as the Wellcome Trust and the Research Councils. We are writing to express our strong support of the Government in its acceptance of the Hargreaves recommendations, as well as individual submissions made to the Committee by JISC, Wellcome Trust, RLUK and the British Library. Although Professor Hargreaves proposals are many, we believe that particularly important are his recommendations that accept that the UK needs appropriate copyright laws not just for the entertainment industries, but also for the research sector which as a country faces increasing competition from China and India, and in which we invested over £ 9 billion a year in in 2009.

We recognise and support the importance of a strong and healthy copyright regime, and believe that to encourage digital innovation this requires effective exclusive rights as well as strong limitations and exceptions to facilitate access to knowledge and scientific learning. To this end we believe swift implementation of the recommendations outlined below is required as a matter of urgency. This will achieve two goals – one to give the UK real competitive research advantage, the other to bring the UK's outdated copyright regime in line with other forward looking digital economies.

1. Data Analytics.[1]

Copyright law exists to protect artistic expression and not facts. For example a protein name and the name of a disease are not subject to intellectual property laws. Copyright law also does not seek to create absolute control over information and knowledge. Rather, by recognising the importance of sharing knowledge it aims to encourage future innovation and creativity by achieving an appropriate balance between the interests of society with the interests of the rightsholders.

The process of text mining is simply a substitute for reading a large volume of material and extracting facts from it, and the action of reading in itself is not restricted by copyright law. Indeed if the process were to be performed manually there would be no question of copyright implications as no copies would be made. Computers by definition need to make a copy of the data in order to process it but it is the facts within that data, not the copy that is the object of text mining. Professor Hargreaves stresses the dichotomy between facts and artistic expression, and explains the unintended consequences of copyright law in this area by stating the fact that "these new uses happen to fall within the scope of copyright regulation is essentially a side effect of how copyright has been defined, rather than being directly relevant to what copyright is supposed to protect."

[1] For further information please see the Hargreaves submissions from IBM, AstraZeneca / Pharmaceutical Drug Ring, National Centre for Text Mining, JISC and British Library. http://www.ipo.gov.uk/ipreview/ipreview-c4e.htm#ipreview-atoz-a

In order not to stifle digital innovation, we believe the UK should follow the example of Japan, a country globally known for its cutting-edge technological innovation, and introduce a limitation and exception for data analytics. It is interesting to note the Japanese government[2], as part of its pre 2009 impact assessment process made similar points to the Hargreaves Review regarding the fundamental legal difference between (artistic) expression and facts, saying "Research developments using data analytics do not use the expression contained in a copyright work itself, as it is no more than the extraction of information, and that while in the process of data analytics a copyright work is used, its actual essence is not." The Japanese Copyright Subcommittee of the Department of Culture report also recognised that data analytics is central to a successful and modern information society by stating "In an advanced information society amidst vast volumes of information, data analytics technology allowing the extraction of information as well as the advanced processing of such knowledge is a necessity for users, as well as a fundamental of a digitally networked society."

We would also strongly agree with the Hargreaves submission made by AstraZeneca[3] that given that data analytics is to be performed on material that an organisation has legal access to (which in the case of scientific publications will be purchased material), revenue will not be harmed. On the contrary it encourages greater usage of journal and book content, and in a period of economic difficulty, helps justify the very large investment made in published information by UK universities, research institutes, and bodies like the National Health Service.

We believe that in order to give the UK's R&D sector international competitive advantage, prior to an amendment at EU level to allow commercial data analytics, the CDPA should be amended as follows[4]:

1. The extraction of facts and information from all works subject to copyright and related rights that the user has lawful access to is not an infringement. (S. 29 – Fair Dealing for Research and Private Study)
2. The making of copies specifically for the process of data analytics is not an infringement provided that the computer generated copy created for the purposes of data analytics is not communicated to the public. (S. 29 – Fair Dealing for Research and Private Study)
3. This, and any other exception cannot be overridden by contract law. (Chapter III – Acts Permitted in relation to Copyright Works)

2. Research Exceptions

i) <u>Preservation</u>

[2] http://www.bunka.go.jp/chosakuken/pdf/21_houkaisei_houkokusho.pdf
[3] http://www.ipo.gov.uk/ipreview-c4e-sub-astrazeneca.pdf
[4] Please see wording for a proposed data and analytics UK exception in the JISC submission.

This country has some of the world's greatest museums, libraries and film institutes. One of their core aims is to preserve their collections, and therefore the intellectual and cultural heritage of the United Kingdom. Digital preservation is a very complex, expensive and yet to be proved science. While the main challenges are financial and technological we believe that the legal framework for preservation must also be fit-for-purpose and brought into line with many other European countries.

S.42 of the CDPA should be amended to allow:

1. All types of copyright works to be preserved – currently film, sound, stand alone artistic works and broadcast material is excluded from preservation.
2. The creation of multiple format-shifted preservation copies to be created, irrespective of the existence of a technical protection measure.
3. To minimise the cost to the public purse, avoid duplication of effort and maximise the chance of preserving British historical content digitally the creation of preservation technology networks between designated not-for-profit public institutions.

ii) Fair Dealing for Sound and Film and its facilitation by Libraries

Fair dealing, first introduced into UK copyright law in 1911, reflects the analogue world of a hundred years ago in that it only allows fair copying of works that are "written" or "drawn"[5]. In the modern world private study and research can and does take place equally with a text based work as a film, sound recording or illustration. We believe that in order to modernise this central research exception, as well as ensure that users truly feel copyright law to be fair as a tool to minimise damaging copyright infringement, that fair dealing must be extended to cover sound, film, and broadcast material. Similarly the facilitation of this exception, to allow librarians to copy material in their collection is extremely important.

It makes little sense that a researcher can make a fair copy of a musical score or the lyrics of song, but not make or receive from a trusted intermediary like a librarian a fair copy of the sound recording itself. This amendment will remove barriers to research, reduce the burden on the public purse[6], and increase respect for copyright law. We are particularly concerned that the format shifting recommendation for private copying for consumers should be complemented by this recommendation for researchers otherwise consumers will benefit from an update to copyright law but the research and development sector does not. This would be palpably unfair and act as a further barrier to research and innovation in the UK.

[5] Literary, Dramatic, Musical and Artistic works.
[6] A Scottish based film lecturer for example has had to apply for a £600 research grant to come to London to watch films that are not commercially available as they cannot be supplied by a librarian to her. http://pressandpolicy.bl.uk/imagelibrary/downloadMedia.ashx?MediaDetailsID=563

We recommend that S.29, S.38 and S.39 of the CDPA are expanded to allow fair dealing of all copyright works, and the facilitation where appropriate of research copying by librarians.

More broadly we would recommend that previous Gowers recommendations that facilitate distance learning, as well as best practice teaching and learning exceptions from other European countries are explored as part of the government's commitment to adopt all the exceptions allowed under the EU Copyright Directive.

3. Increasing Digital Access to Knowledge

In June 2011 the third most downloaded ipad application in the UK was an app of 1000 digitised copies of historical books from the British Library. The same app was in the top 10 most downloaded apps in the US. This demonstrates clear consumer demand at home and abroad for historical material from the great libraries, museums and archives of the UK. The digitisation of our great cultural institutions also will speed up and enhance research, learning and scientific innovation. This is why the Wellcome Trust is currently investing in the digitisation of a part of its 20th century scientific collection.

i) Orphan Works

As part of the EU funded ARROW[7] project to create a "digital copyright exchange" infrastructure for books, the British Library undertook a study of rights clearance of 140 books, ten per decade from 1870 to 2010. The study entitled "Seeking New Landscapes" found that 43% of randomly selected in-copyright books across this period were orphan works. This clearly acts as a substantial and unacceptable barrier to mass digitisation of copyright works. Similarly researchers also in wanting to make copies of individual whole items, published and unpublished, text as well as audio and audiovisual material hit up against the problem of orphan works as they cannot get the appropriate permissions from rightsholders who cannot be found.

As the ethical and moral issues as well as economics of orphan works in the context of an individual item or mass digitisation are vastly different we believe that there is no one solution to be recommended. We therefore recommend that the following three solutions are implemented simultaneously to allow commercial as well as non-commercial uses of orphan works:

1. A limitation and exception where communication to the public is not required.
2. A governmental licence for material never produced commercially, or material not associated with collecting societies. e.g. Unpublished photos or sound recordings such as oral histories through to grey literature.[8]

[7] Accessible Registries of Rights Information and Orphan Works towards Europeana
[8] Grey literature is material not produced by commercial publishers but self-published, technical reports, society publications, governmental reports etc.

3. A governmental licence, that is governmentally regulated but operated through a collecting society for the type of material that collecting societies traditionally represent. e.g. Popular music, commercially produced books etc.

We strongly support the Hargreaves recommendation that the costs for using an orphan work should be nominal as this will encourage mass digitisation and recognise the very fact that this material has become accessible is because of public investment in its collection and preservation. It is also important to stress that any monies paid for using an orphan work should essentially remain in escrow and after an agreed period of time be used for public interest purposes such as investment in public libraries, or scholarships for students.

ii) Extended Collective Licensing

Orphan works by definition will not be digitised in isolation. In order to facilitate mass digitisation – a process where each and every rightsholder cannot and will not be contacted individually – extend collective licences as exist in Scandinavian law is a prerequisite to putting more 20th century material online. The Seeking New Landscapes study[9] study makes clear that at an average of 4 hours to clear a single book it would take one researcher over 1,000 years to clear the rights of just 500,000 books – a drop in the ocean when compared to the rich collections of UK's cultural institutions.

Not only will extended collective licensing (ECL) enable mass digitisation of 20th copyright works for education and research purposes, thus avoiding the so-called "black hole of the 20th century" it will facilitate the business of broadcasters, technology companies, creators as well as publishers. Given the demand for English language material abroad, and the keen interest amongst consumers in historical material as demonstrated by the success of the British Library's ipad app, we believe that UK industry has much to benefit from the adoption of well-regulated extended collective licensing. One particularly interesting statistic from the British Library[10] is that 71% of POD publishers of 140 historical books were based in the US. This in part may be due to the fact that books of this age are in the public domain in the US but in the EU may not be and therefore require a diligent search for rightsholders – many of whom are not there to be found for material more than 10 to 20 years old unless commercially active. This acts as a disincentive for these sorts of businesses to operate in the UK. Simplified rights clearance mechanisms like extended collective licensing will facilitate the rights clearance of historical material simply and cost effectively and thus incentivise commercial companies, or technology companies as represented by COADEC, to offer more products and services online and offline

As ECL will increase the de facto monopolies of collecting societies, the UK should follow the rest of mainland Europe and regulate the activities of collecting societies to ensure that:

[9] www.bl.uk/ip
[10] http://www.ipo.gov.uk/ipreview-c4e-sub-bl.pdf

1. Their activities and financial operations are open, transparent and they adhere to minimum standards of practice;
2. Royalties collected are fair and proportionate, and distributed fairly to creators (or other groups in the case of orphan works –see above.)
3. In addition to governmental regulation they should be overseen by a board or committee that represents industry, creators, and licensees of content (such as universities / schools / businesses etc).

4. Copyright Law Undermined by Contract Law

The importance of copyright law is to create a balance that rewards innovation but at the same time guarantees access to knowledge and information through exceptions, thus in turn stimulating further creativity. However this carefully drawn balance in the interests of stimulating innovation is being systematically replaced by contract law which create de facto monopolies[11]. Trade monopolies are regulated in the interests of free trade and competition and we believe that contractual monopolies must also be regulated to ensure that copyright law and the innovation it represents cannot be undermined by contracts.

We believe that the recommendation, accepted by government, that limitations and exceptions in copyright law should not be undermined by private contract is the most important Hargreaves recommendation. Without this copyright law becomes irrelevant in a digital world where access to knowledge is controlled absolutely by rightsholders. This will ultimately undermine innovation and also make any policy setting around limitations and exceptions by the UK government meaningless as it will be simply overridden by contract.

We would point out to the committee that the UK already does not allow limitations and exceptions that pertain to database rights to be overridden by contract. We believe that we should follow the lead of other countries and introduce the following section (taken from the Irish Copyright Act) into Chapter III of the CDPA:

> *Where an act which would otherwise infringe any of the rights conferred by this Act is permitted under this Act it is irrelevant whether or not there exists any term or condition in an agreement which purports to prohibit or restrict that act.*

5. Evidence Based Policy

We strongly support the Hargreaves recommendation that policy should not be the result of “lobbynomics” and who can lobby hardest but be based on

[11] Of 100 contracts offered to the British Library well over 90% undermined exceptions in law ranging from fair dealing to preservation exceptions. http://pressandpolicy.bl.uk/ImageLibrary/detail.aspx?MediaDetailsID=691

facts and evidence. We would also go one step further and say that currently there is no clear and defined aim or goal of UK policy formation in the field of IPR. It appears too often about who can lobby hardest. We therefore have no way to measure success or importantly to counter the pressure of lobbying. We believe that the aim of copyright and should be to maximise economic and social well-being – namely the public interest as equally important as the private interest, and this goal or “mission statement” should be publicly stated by government

6. Digital Copyright Exchange

Universities, and other public institutions are significant licensors and licensees of content we therefore welcome any steps to simplify the making available of and clearing of rights. A digital copyright exchange will also support the Orphan Works and ECL recommendations, and facilitate online and offline business. Given the importance of the recommendation, as was the case with EU funding of ARROW, we believe that appropriate governmental incentives will help turn this important recommendation into a reality.

Paul Ayris
Chair
Copyright for Knowledge

5 September 2011

Written evidence submitted by Creative Coalition Campaign

1. The Creative Coalition Campaign (CCC) welcomes the opportunity to make a submission to the BIS Select Committee inquiry into the Hargreaves Review of Intellectual Property and the Government's response to that Review.

2. The CCC is a partnership comprising trade unions representing workers in the creative industries and organisations in the music, video, film, TV, publishing and sports sectors. We have come together to articulate our shared view of the threat that online copyright infringement poses to jobs and growth in the UK creative industries.

3. We campaign to highlight the impact that piracy has on small and independent rights holders and the threat this poses to jobs and growth in the creative sector. As such we have focused our response primarily on the issues surrounding implementation of the Digital Economy Act (DEA) and the need for effective enforcement of intellectual property (IP) online.

IP Enforcement and DEA Implementation

4. We welcome Professor Hargreaves' confirmation of the value of intellectual property to the UK economy. In particular we welcome the review's reinforcement of the High Court's judgment in favour of the Digital Economy Act (DEA) which will be critical in successfully tackling the problem of digital piracy.

5. The CCC supports Hargreaves' statement that 'Government should pursue an integrated approach based upon enforcement, education and, crucially, measures to strengthen and grow legitimate markets in copyright and other IP protected fields'[1]. The DEA's notice sending regime will provide an opportunity to educate consumers engaged in online copyright infringement, and is the first step in changing attitudes and behaviour.

6. The industry has made great strides in recent years in making legitimate content available online using various business models (including free advertising funded services). However, the industry is in a transition phase, moving from traditional business models to online business models. Widespread copyright infringement means that these new economic models have to compete with illegal free content and are therefore very fragile. In this respect, the sector needs the support of an appropriate regulatory framework to ensure a fair and level playing field in the online environment.

7. We are now at a stage where the development of new business models needs to be combined with an effective enforcement regime to ensure a fair and level playing field in the online environment. It is not fair or sustainable to expect legitimate business models to compete with illegal material.

8. We welcome the Government's commitment to press on with the implementation of the notice sending elements of the DEA and will continue to work with the

[1] p. 85 Hargreaves Review of Intellectual Property

Government, Ofcom and other stakeholders to ensure that a workable and proportionate system can be established as soon as possible.

9. We believe that the Government's decision to introduce a modest refundable fee for the appeals process of the DEA will help to mitigate against the risk of an organised campaign of vexatious appeals and will help to make the system financially viable. However, we urge the Government to continue apace with implementation and we look forward to the publication of the Initial Obligations Code which will outline how the system will work in practice.

Existing evidence on copyright and designs

10. We welcome the Report's recommendation that 'Government should ensure that development of the IP system is driven as far as possible by objective evidence'[2]. However, we are deeply concerned by Professor Hargreaves' assertion that 'much of the data needed to develop empirical evidence on copyright and designs is privately held. It enters the public domain chiefly in the form of "evidence" supporting the arguments of lobbyists ("lobbynomics") rather than as independently verified research conclusions.'[3]

11. In particular we are concerned at the manner in which the Report dismisses[4] evidence showing the impact of copyright infringement on the UK Creative Industries that was produced by TERA Consulting in 2009. This evidence has since been validated by both the High Court and European Commission and it is disappointing that the Hargreaves Report does not recognise this fact. According to TERA's report, the creative industries alone account for 2.7 million jobs in the UK and contribute £160 billion to the UK's GDP, the highest in Europe. TERA Consulting also estimated that in 2008 the UK lost £1.3 billion and 39,000 jobs in the film, TV, music and software industries due to digital copyright infringement.

12. The Hargreaves Report's economic impact assessment does not recognise the substantial economic benefit to the creative industries of effectively addressing online copyright infringement. This is a major flaw in the Report's evidence. In order to realise these significant economic benefits we believe that the Government should adopt a consolidated approach which includes a comprehensive suite of measures to secure growth in the creative sector including effective anti-piracy measures.

Digital Copyright Exchange

13. In essence, the Digital Copyright Exchange (DCE) appears to be a sensible suggestion, although not necessarily in the form proposed by Professor Hargreaves. We recognise that the details on how the DCE would actually function in practice are not yet clear, and we look forward to the outcome of the Government's feasibility study on this issue. As a result, we support the notion that the development of any DCE should be handled by the private sector. Certain business models within the creative industries are already tailored to consumer and market demand, and a one-size-fits-all model may not work for all sectors. We are clear however that it must

[2] p. 20 Hargreaves Review of Intellectual Property
[3] p.18 Hargreaves Review of Intellectual Property
[4] p. 6 – 11 Supporting Document CC: Data on the Prevalence and Impact of Piracy and Counterfeiting

function in compliance with international and EU law and not interfere with the normal exploitation of copyright works.

14. Any DCE must also be truly voluntary and accommodate an evolutionary approach to its adoption and implementation. There should be no exclusion from availing yourself of the measures of the Digital Economy Act if you choose not to be involved in the DCE.

15. The CCC represents a broad range of rights holders, including those who produce a large number of small registerable works such as photographers. We also represent collecting societies who already have successful business models tackling this very issue. Other sectors rely on direct licensing. The answer to these business issues is not, as Professor Hargreaves suggested, a regulation penalising rights holders who do not subscribe to a Government-sponsored database. That would lead to a bureaucratic approach and a two-tiered system to the particular disadvantage of small, independent rights holders (and may also run contrary to international law, including the Berne Convention). This recommendation is therefore best defined and delivered by industry so that it can take on an international dimension.

16. Speedy licensing, contractual freedom and effective protection are necessary to 'UK firms' access to transparent, contestable and global digital markets' (see for example Hargreaves' own study on the VOD sector which is attached to the IP Review).[5] Indeed this is already happening across the industry where we are developing business solutions in the form of databases. We believe strongly that the Government should back business-led solutions to business issues.

Exceptions to copyright

17. In response to the Hargreaves Review, the Government has announced that it agrees with the Review's conclusions on limits to copyright, that: 'Government should deliver copyright exceptions at national level to realise all the opportunities within the EU framework, including format shifting, parody, non-commercial research, and library archiving.'[6]

18. However, under the 'EU framework' most other EU countries have chosen to use the flexibility in approach permitted by the EC Copyright Directive in ways that recognise varying cultural approaches in different Member States.

19. In the case of format shifting there is also a difference in economic approach.

20. As compensation for private copying most Members States have introduced some form of copyright levy system (only the UK, Ireland, Malta, Cyprus and Luxembourg do not). Copyright levies are charged on blank discs, MP3 players and other electronic products to compensate for the sharing and editing of copyrighted material. These levies are paid into a fund which pays out to rights owners whose material has been copied.

[5] PACEC, 2011, The VoD Sector. Copyright Issues. Research on Business Impacts, Innovation and Competition, Report for the Review of IP and Growth
[6] p. 7-8, Government Response to the Hargreaves Review

21. The UK Government response to Hargreaves indicates that any "new" format shifting exception would only be allowed where a rights holder would not be entitled to a payment from a similar copyright levy fund under EU law[7]. Therefore they do not feel it is necessary to introduce such a copyright levy compensation scheme in the UK.

22. It is understandable that the Government is keen to avoid introducing a copyright levy which it feels is 'inconsistent with its wider policy on tax'.[8] But it can surely not be conducive to growth if the right to receive fair compensation for use of work, recognised at EU level, is conveniently 'ignored' within the UK?

23. Instead the approach represents a clear threat to the rights and incomes of copyright owners and performers. It will put the UK even further out of step with most other EU countries.

24. This issue is not new, and has been debated extensively in the EU in recent years[9]. A further review of private copying issues is shortly to be undertaken by the European Commission. It therefore appears hasty for the UK Government to make such a fundamental change to rights when the Commission review has not yet been completed.[10]

25. The CCC therefore believes that the Government's work must now be linked with the wider review of private copying issues to be undertaken by the European Commission, in order to put in place the right regulatory framework for the UK creative industries to flourish and grow.

26. Furthermore, a blanket copyright exception as proposed by the Review does not take account of the differences in creative industries. There are very different financing systems used throughout the creative industries and a blanket exception is likely to have differing impacts on different sectors which rely on different funding streams.

27. In addition to this, the Hargreaves proposal to widen exceptions to allow data and text mining, both within the current European framework and eventually through amending European law, is an unnecessary, blunt instrument. Licensing models which are highly sensitive to the needs of users are already in place and publishers strongly support those seeking to access data for research purposes. An exception to allow untrammelled copying would expose works to copyright abuse.

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[7] *' […] exceptions to copyright within the existing EU framework are likely to be beneficial to the UK, [provided that] the amount of harm to rights holders that would result in "fair compensation" under EU law is minimal, and hence the amount of fair compensation provided would be zero […]'* p. 7-8 Government response to Hargreaves Review of Intellectual Policy

[8] p.8 Government response to the Hargreaves Review of Intellectual Property

[9] See http://ec.europa.eu/internal_market/copyright/levy_reform/index_en.htm

[10] Prof Martin Kretschmer has produced a report on the legal basis, rationale and economic effects of copyright levies for the IPO, due for publication in September 2011; http://tinyurl.com/kretschmer-IPO

Written evidence submitted by the Creators' Rights Alliance

Member organisations of the Creators' Rights Alliance represent over 100,000 creators, from novelists and illustrators to journalists and composers and musicians, in the UK[1].

We draw the Select Committee's attention to our submission to the Hargreaves Review and to the National Union of Journalists' submission to your Committee, which we are aware raises important further questions about the specific case of authors who are journalists.

In this short submission the Creators' Rights Alliance highlights some essential issues that have been bypassed in the Hargreaves process to date.

- Originality is the heart of the matter
- Everything has changed – but probably not in the way you think
- Every citizen is a creator, and needs rights
- Enforcement – not just for the big players
- Orphan works
- Matters of governance

Originality is the heart of the matter

The Creators' Rights Alliance is deeply disappointed that the government, responding to the Hargreaves review of intellectual property law, failed to take this opportunity to deal with the fundamental issues that Professor Hargreaves considered outside his narrowly economistic brief.

We take this opportunity to remind the government once more of the necessity of new, original creation to the "creative economy". Not only in the interests of the economy, but for the sake of culture and democracy, it must possible for creators to make a living as independent professionals dedicated to making high-quality new work. The focus on making it easier for organisations, such as web-search engines, to make money by reshuffling existing work is equivalent to proposing that the "service economy" be built around households taking in each others' washing.

Everything has changed – but probably not in the way you think

Professor Hargreaves' brief excluded probably the most important consequence of the new communications technology: one that plays far too little part in public and political discourse.

This is that almost every child now in school will be a published or broadcast author or performer before they can vote. Some – no-one can know which – will go on to be the professional creators on whose work the "information economy" is founded – but only if they can negotiate on a level playing field to obtain fair remuneration for their work. This too must be addressed.

Any proposal to make the proposed "Digital Copyright Exchange" effectively compulsory – for example by failing to correct the serious obstacles to access

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1 See www.creatorsrights.org.uk for details.

to justice for creators who do not register their work with it – would be to discriminate against those starting out on their careers (and, indeed, citizens who will not develop any wish to become professional) and will be resisted.

Every citizen is a creator, and needs rights

Every citizen needs an enforceable right to be identified – that is, given a credit or byline and to defend the integrity of our work. We all – especially, perhaps, politicians – need these rights as a protection against the abuses of creative works and news reporting that are so sadly common when copying, manipulation and out-of-context use are a matter of a few taps on a keyboard or screen?

It is more important than ever that citizens should have a right to know the source of the information they are receiving: this can only be achieved through creators taking responsibility for their work through strengthened rights of identification and integrity.

In detail – albeit rather a large detail – the Creators' Rights Alliance points to the logical and legal absurdity of legislating to permit use of works whose creators cannot be identified, without at the same time giving all creators an unwaivable right to be identified. The right of identification is essential to prevent a burgeoning of such "orphan works", especially when some online services automatically strip identifying information from works distributed through them.

The recommendation in the Hargreaves Report for a "Digital Copyright Exchange" equally requires that these deficiencies of UK law be remedied, not least for the reasons identified by CRA member the National Union of Journalists: in summary, if it were to be possible for a journalist's work to be "one-click licensed" by any advertiser, let alone a purveyor of dangerous goods or their least-favourite political party, without the redress that the rights of identification and integrity provide, that could end a career and would certainly undermine public confidence in news reporting. Similar, if less stark, considerations of ethics and reputation apply for other kinds of creator.

The CRA welcomes the government's decision that entering works into such an Exchange, if it gets off the ground, will be cost-free; and that participation in any extended collective licensing scheme would be voluntary.

Enforcement – not just for the big players

The CRA strongly welcomes the proposal for a Small Claims procedure to enable individual creators to pursue those who use work without permission.

We would welcome an opportunity to discuss with the Select Committee ways in which this proposal could be expedited – as well as the further proposals for enforcement by individuals and for levelling the playing field on which they negotiate fees for use of their work, discussed in our submission to the Hargreaves Review.

Orphan works

The CRA is slightly encouraged by the spirit of the government's proposal

(contrary to Hargreaves) that, if use of work by uncontactable authors is licensed, the fee should reflect the commercial value of such uses.

Any such licensing of so-called “orphan works” must be done by bodies accountable to creators in that field of work; and the licences must be reviewed if the creator shows up.

It is also necessary to make it once more plain that *if* there is to be any provision for the licensing of so-called “orphan works”, then one absolutely necessary concomitant to this is, again, the extension of enforceable “moral rights” to all creators, including journalists.

The crispest of the many arguments for this is that to do otherwise would ensure that many more works were made “orphan” in the future.

Matters of governance

We would draw the Committee’s attention to the points that the Creators’ Rights Alliance made to the Hargreaves Review about the governance of collective licensing systems:

- Collective licensing provisions must be structured so as not to preclude true micropayment systems developing later;
- That is, a part of the creative ecology must include support for platforms and ways to market for individual creators;
- They must not undermine fees for primary commissions of creative works;
- Collective licensing is acceptable only with provisions to ensure that actual creators get rewarded;
- They are acceptable only when administered by bodies that are truly representative of the creators affected; and
- They must be transparent in their accounting.

The transparency requirement, in fact, should apply to business models that in some ways emulate collective licensing.

The requirement that such systems be administered by bodies that are truly representative of the creators affected is an essential feature of legislation in the Nordic countries that have implemented such systems – not an optional extra. If creators are asked to relinquish the exclusive control over the use of their works guaranteed them by international and European law, they must control the mechanism that compensates them for this; any legislation that provided otherwise would be open to challenge in international forums.

The CRA would be happy to expand on this submission at the Select Committee’s convenience.

Mike Holderness
Chair, Creators’ Rights Alliance

Written evidence submitted by William Cross

l am an Aerial photographer and the existing Copyright laws provides me with some legal protection of my IP.

The main problem with this law is it is not enforceable, thief of copyright is a criminal offence but how often is this law enforced, rarely the police and the office of fair trading appear to be not interested in pursuing IP unless you are a very large company.

l was even told by both the police and OFT that it was a civil affair and not a criminal offence.

What is required is Education of what IP is and how it is protected and how this protection is enforced because in my 40+ years experience there is a lack of knowledge and understanding of the existing laws within the community who use images and the general public, especially the general public.

It would seem from what l have read the proposed changes to the IP laws will only benefit organisations that want to exploit commercially "Orphan works" and in doing so remove what little protection there is of IP for the rest of us who rely on generating income from IP.

l do not agree that the Hargreaves report will improve matters, just the opposite, what is required is for the wider world to be educated that images are not free and to steal them is a criminal offence, not make new laws that will also be unenforceable.

As the law stands at the moment the cost of legal action against thief of IP is too high for small companies and individuals to afford and the changes proposed will only make matters worse.

9 September 2011

Written evidence submitted by Nick Daly

I am a practising Advertising Photographer, with over 20 years experience.

My work and my passion is photography, and the ownership of what I have produced, and will produce, is fundamental to my business and to my artistic expression.

I am happy to give oral evidence in person before the Committee.

These are my main points:

- The moral rights of authors are not automatically granted as in other EU countries
- Moral rights have still not been made unwaivable as in other EU countries
- No sanctions are proposed for the removal of digital copyright information from digital works
- The rejection of the proposal allowing orphan works to be used for commercial purposes.
- That remedies for unauthorised use are restricted for those who have not registered their works
- Creators are not given a level playing field with industry
- Artists rights have not been recognised as human rights by Hargreaves IP review.

7 September 2011

Written evidence submitted by Charlotte Davies

Summary of concerns:

- **Introduction – IPP from a photographer's perspective**
- **Artists' rights have not been recognised as human rights by Hargreaves IP review, while both the UN and EU Human Rights act have declared that artists' rights are also human rights.**
- **The moral rights of authors are not automatically granted as in other EU countries.**
- **The right to be identified as the creator of a work should be absolute**
- **It is imperative that there are disincentives to the stripping of identifying data attached to digital image files, making them 'orphans', and thus free for commercial exploitation**.
- **Registering creative works at a national level is completely impractical in a global market.**

About Charlotte Davies

I am a professional photographer based in London, UK. I work in the commercial, editorial and fine art fields.

Introduction – IPP from a photographer's perspective

When I make something, it is mine. If I plant a seed in a field which I either own or rent, I water it, a plant grows, and I harvest that fruit, the fruit is mine because I worked to make it come into existence, using tools and resources which were originally mine. I can either eat the fruit, give it away, feed my family with it, or sell it to someone else. That way, my work sustains my ability to live and feed my family. I suggest that the above would generally be acknowledged as one description of how a person can create something, which is then recognized as his property. Simplistic, maybe, but nonetheless valid. I would also suggest that property rights are generally recognized, when applied to physical objects, be they inherited, created, bought or given.

The difficulty which one encounters when applying these rights to non-physical property, is that people often struggle to see the parallel case of ownership when there is no particular 'object' in question. In the case of my work, I am a photographer, so the 'objects' I create can exist in varying forms, all of which are, in the 21st century, infinitely replicable. Using the above analogy, I take an exposure in a studio, or a street, or in my house, I process it, either by paying a laboratory to process film, or spending time at my computer processing a digital file. The end result is an image, which I can

hang on my wall, give away, or sell it to someone else. That image can exist solely as a negative (physical object), print (physical object) and/or digital file (I would argue, non-physical object in the context of this discussion).

If the image exists only in the first one or two manifestations, I believe it is quite safe to argue that if someone takes that away from me and either hangs it on their wall, thereby depriving me of it, or sells it elsewhere, thereby depriving me of the income derived from its sale, that would described as theft.

If the image exists in the third manifestation, a digital file, it becomes infinitely replicable. Identical files, identical images can be created at the click of a mouse button. In my opinion, therein lies the problem in distinguishing simple 'property' from 'intellectual property'. Forgive me if I am being simplistic, I am merely trying to present my case in a clear and simple way without assuming understanding of the photographic industry and its daily production of images. The minute a created work becomes infinitely replicable at apparently no cost, there is an assumption amongst many that it has become freely available to anyone and everyone at no cost to them, or to me. The fact that I have created the image, the work, and that I own it, seems to disappear into the ether of the internet, where I have no way of ascertaining how many times it has been replicated, copied, used, printed, sold, given away or discarded.

The question is then, "But what harm does it do you, if people like your images, and copy them? Surely that's a good thing – people will share your work, your reputation will be enhanced, it's free advertising for you." with the implicit assumption that more people seeing your work will lead to paid work in the future. I would counter this latter assumption with the observation that if people are able to find my work freely available at no cost without even contacting me, I can see no reason why they would offer to pay me for it unless they are extraordinarily altruistic.

I believe that **copying, using and generally appropriating images in digital form is not seen as theft.** And I believe that creators' moral and intellectual property rights are not generally understood, acknowledged or protected within the UK, and the current review needs to take this into account.

"Theft of intellectual property doesn't count, it's not the same as theft of physical objects." This or similar is an opinion that photographers often hear – that is, when someone copies your image, you are not deprived of it, so it doesn't 'count' as theft. Of course the answer to this is that once something becomes freely available, its value as a saleable item dramatically reduces, if not disappears entirely. That is clear and proven, and I doubt anyone with sense would argue against it. So why does that opinion still prevail? I suspect that the proliferation of images in the world over the past few years is the answer. Advances in digital technology have meant that it is now easier than it ever was to take photographs and distribute them all over the world. So much to the good, of course – I enjoy taking photographs and I'm delighted that that enjoyment is available to more people. However, the vast number of images being uploaded to the internet on a hourly basis has served to blur the

distinction between professional and amateur photography. Amateur photographers, however good their images may be, are often more than happy to give their work away, for the pleasure of seeing it published. Good for them. And this, of course, has put pressure on the professionals who are obliged to charge for the use of their images, in order to make a living. So much for economics – I can't say I like my income being drastically effected by others who are willing to give their work away, but I can't fight it. What I do need to fight is the unintended consequence of their giving their work away; mine is also deemed to be worth less. And because amateurs don't realize that their work has worth, is their intellectual property and has a right to be protected, so mine has become vulnerable to those who would take advantage of an invalid common perception that what I create is free. I don't choose to give my work away, but many people expect me to do so, or may take it without my permission.

This brings me to a dichotomy I often encounter when discussing the industry of photography. The following two statements are often heard, but mutually contradictory:

"Copyright is meaningless since everything is available to copy from the internet"

'My company is unable to commission you to work for us unless you agree to give us your copyright"

So copyright is meaningless and worthless, but at the same time, so very valuable that a large number of companies which I have come across have a policy of not employing any photographers who refuse to sign away their copyright. So is copyright worth something or not?

I would argue that it is indeed worth something, otherwise what's all the fuss about? Intellectual property is incredibly valuable, be that in patents, scientific advances, writing or other creative industries. In fact, I would argue that it is the most important thing that the modern world creates. It is as valuable, possibly more so, that physical objects which we have no problem recognizing as 'property'.

Please excuse the rather conversational introduction, I felt it important to describe the environment in which I find myself and my work, in order that the review committee can understand the context of photographic images in the world today. I also felt it was imperative to address the argument that copyright or other intellectual property theft is not actually theft. I would like to continue my submission with the assumption that it is in fact, stealing, in the same way that stealing a car would be stealing, and as such, illegal.

The UK government should take steps to ensure that there are disincentives to those who would steal, and that there are penalties for those who do.

1. Firstly, artists' rights have not been recognised as human rights by Hargreaves IP review, while both the UN and EU Human Rights act have

declared that artists' rights are also human rights. The United Nations Universal Declaration of Human Rights Article 27 (2) states: *"Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."*

2. Secondly, the moral rights of authors are not automatically granted as in other EU countries. It should not be necessary for me to assert my moral rights as at present under UK law, this should be an automatic right granted to all UK citizens.

3. Thirdly, the right to be identified as the creator of a work should be absolute, the law should prohibit any person or organisation from requiring that the creator waive their moral rights. Almost all photographers are individual sole traders, and as such have little power to fight large companies who insist on copyright assignment by bullying tactics. The lack of protection against this very common practice on the part of many commissioners leaves individuals vulnerable to exploitation, extremely unfair negotiating positions, and ultimately, risks a huge diminution in the creative industry itself. If creators are unable to profit appropriately from the work which they create, they will be forced to look elsewhere for their income, and will stop producing the very work which the publishing industry and others depend upon to create their own products.

4. Fourthly, it is imperative that there are disincentives to the stripping of identifying data attached to digital image files, making them 'orphans', and thus free for commercial exploitation. Industry at present can strip digital copyright data from creators work with extreme ease. It can be done remarkably quickly and leaves no trace. If this is done, deliberately or otherwise, that work becomes 'orphan' and becomes explioitable for financial gain by someone other than its creator. At present it is necessary to show that removal of digital copyright information has been done with intent to infringe before it can be recognised by the courts as an offence under current UK legislation. Yet worldwide, every day, millions of digital works are having their digital copyright information stripped rendering these works as orphans. This is just wrong,. It is the equivalent of physically removing a signature from a painting, which anyone would agree was wrong. And yet the Hargreaves review recommended the commercial exploitation of orphan works. It is illogical to create legislation for the licensing of orphan works when the law as it stands has no provisions which will prevent the (inadvertent or otherwise) creation of orphan works.

There is no proven need for orphan works to be commercially exploited, although I believe that there is a case for cultural use of true orphans in libraries, museums, research facilities and for the general public to have access to images which they would like to see. There is no published evidence that shows that UK industries are disadvantaged through being unable to commercially exploit orphan works, although there would doubtless be an advantage to some UK industries if they were to have access to a large number of resources at a substantially lower price than they might have been

able to negotiate with the rightful owner, should they have been found. Simply put; large and powerful companies would like to have legislation which enables them to bully individual creators such as myself, and allows them to use my work with the reasoning 'there was no identifying data on the image so we thought it was free'. Much as I would like to think that all those employed in these companies would be scrupulously honest, I can't help but think that every so often, an employee might find it expedient (and profitable) to create an orphan work, rather than contact the creator, and negotiate and pay a fee for its use. Of course as noted above, if deliberate data-stripping can be proved, it is recognized as an offence, but as an individual, not only would this be difficult to prove, more often than not one would never know the enfringement had taken place. Your image is used on page 5 of a newspaper you don't read – only if a friend recognizes your image and lets you know would you ever find out. And then in order to be paid for your work you are obliged to take on a multi-million pound organization. It's just not practical or expedient. The situation as it stands stacks the odds heavily against the individual creator such as myself, and there is nothing to be gained from it excepting perhaps the shareholders of large companies.

So how to address this problem? Is it possible to allow true orphan works to be seen, enjoyed, and used (commercially or otherwise) rather than sitting in museum vaults gathering dust, while protecting other works from being 'orphaned' and exploited, depriving their creator of his just gain from that exploitation? Registration of each individual image might be one solution. Expensive and time-consuming, especially for those photographers who create literally thousands of images every week, but perhaps it is the only solution.

5. Registering creative works at a national level is completely impractical in a global market. It will lead to anomalies of the type already exposed by the US system of copyright registration where creators' remedies for infringement are compromised if they have not registered that work in the USA. If every country were to go down that road, as could happen, creators would be in an impossible situation, needing to register their work in every country, but unable to afford the time and expense of doing so. If registration has to come into the equation it should be a global system. Such a universal system already exists and is supported by the PLUS Coalition.

However, perhaps I could leave you with this thought: No register would be necessary, if artists' rights were acknowledged as human rights. If moral rights were automatically recognized as belonging to the author of a work, every use of every image would be licensed by its creator and any infringement would be a clear case of theft. Individual creators would be able to spend more time creating new things rather than worrying about who has been making money at their expense while there is not a great deal they can do about it.

In summary:

- Theft of intellectual property needs to be recognised as such

- Artist's rights must be recognised as inviolable human and moral rights
- Steps must be taken to disincentive those who would steal intellectual property
- Substantial penalties must exist, and be exercised against those who steal intellectual property
- If a register of images is the solution to unfair exploitation and theft, such a register must be global in reach, robust, and accessible to individual creators in both price and availability.

5 September 2011

Written evidence submitted by DACS

DACS welcomes the opportunity to contribute to the Business Innovation and Skills Select Committee inquiry into the Review into Intellectual Property and Growth conducted by Professor Ian Hargreaves.

1. **About DACS**
   Established by artists for artists, DACS (the Design and Artists Copyright Society) is an innovative visual artists' rights management organisation, representing over 60,000 creative individuals including fine artists, photographers and illustrators from the UK and abroad. We are a not-for-profit organisation and our mission is to translate rights into revenues and recognition so that artists and their works are properly valued. We provide three rights management services for artists: Payback, Artist's Resale Right and Copyright Licensing.

2. **The consultation process**
   DACS feels that the Hargreaves team did not consult as widely as they could have done and particularly neglected to engage with the visual arts sector. This is reflected in the 'one size fits all approach' taken in the Review's recommendations to extend copyright exceptions, without due consideration of how the impact of widening such exceptions differs between sectors. For example, exceptions for private copying and parody will impact visual art in a very different way to music and films. Furthermore, the consultation process failed to engage adequately with the issues facing creative individuals who constitute the majority of visual arts rightsholders.

3. **Evidence**
   The published Review of Intellectual Property, and the Government's response to the Review have supported a call for stronger evidence in policy making. It was disappointing therefore to find many of the Review's recommendations supported by anecdotal evidence at best. For example, the arguments for a parody exception were not backed up by any evidence to support the assertion that: "Video parody is today becoming part and parcel of the interactions of private citizens, often via social networking sites, and encourages literacy in multimedia expression in ways that are increasingly essential to the skills base of the economy. Comedy is big business."[1]

4. **Orphan works**
   We must express our concern regarding the recommendation to provide for only nominal rates for the use of orphan works. This will create a two-tier tariff system for orphan works and non-orphan works thereby undermining existing primary markets. Rather than the proposed nominal fee, we believe that a commercial fee should be applied. There also needs to be acknowledgement that in many cases, non-commercial organisations use orphan works in a commercial way. Therefore, commercial fees would be most appropriate.

[1] Page 50, Digital Opportunity: A Review of Intellectual Property and Growth (2011) by Professor Ian Hargreaves

5. **Fair use**

It was widely understood that a key element of the Review was to test the viability of a system of fair use being introduced into the UK. While the Review did not take forward this recommendation, it did introduce the concept of ‘non-consumptive use’, part of the fair use doctrine. The Government should consider carefully the implications of a data and text mining exception which, coupled with exemptions for ‘non-consumptive use’ and ‘non-commercial research’ could inadvertently clear the way for undermining commercial licensing requirements for corporate search engines such as Google and Facebook. Noting that the Review highlights the potential problems and uncertainty caused by the introduction of a fair use exception, the Government should resist implementing single fair use elements like non-consumptive use without any corresponding balancing mechanisms. The above has heightened perceptions that the Review was unfairly biased from the outset towards the interests of large corporate media entities such as Google and Facebook.

Written evidence submitted by Directors UK

Directors UK is the professional association for film and television directors in the UK. The organisation is both a collecting society for the distribution of secondary rights payments to directors, and the professional guild providing services and support to members, and seeking to protect and enhance the creative, economic and contractual rights of directors in the UK.

We welcomed the Hargreaves Review and we are generally supportive of most of its recommendations. During its writing Directors UK contributed our own paper on the key issues and necessary measures. As the committee has stated it will be examining these documents, we will not repeat the bulk of the arguments or evidence here.

The Committee's inquiry does allow the opportunity to give the unique perspective of UK film and TV directors at what we believe is a crucial moment for the future prospects of the UK's creative industries.

There are two areas we would like to comment on in particular that were addressed by the Hargreaves Review and in the Government's response – IP protection enforcement and the proposed Digital Copyright Exchange (DCE). We have sought to be concise in this submission, but are more than happy to appear before the committee to expand upon this evidence if asked to do so.

The role of film and TV Directors

The process of making film and TV is one in which the director plays a central and crucial part – along with production companies, directors are 'joint authors' of an audio-visual work, in recognition of the fact that the director plays a highly significant part in defining and shaping the final content.

However in the UK directors' intellectual property rights are undervalued. In the case of film, directors frequently receive no compensation for the surrender of their copyright nor any meaningful reward for the success of their film. This has caused some of our leading talent to leave the industry or move overseas to make content where the cultural and economic benefit accrues to non-UK enterprises.

There is a real missed opportunity here: Directors UK believes that if directors (and indeed other creators) were fairly incentivised on the success of their works, there would be an energising effect on the growth of the film industry in much the same way that UK television exports were hugely boosted by the incentivising impact on producers of the terms of trade created under the 2003 Communications Act.

For this reason Directors UK is keen to ensure that not just IP protection, but the extension of IP rights to its members, is part of any new distribution and rights payments system.

Copyright Enforcement

It is crucial to our creative industries that action needs to be taken consistently to close down the sources of pirated content. Those suffering are not only large media conglomerates, but individual content creators and small businesses. IP theft damages the ability for the industry to grow and maintain a skills base.

The Digital Economy Act introduced some key methods of ensuring such enforcement and the Government should continue to pursue that agenda as a priority.

With legitimate methods of obtaining content now becoming more widespread and adapting to consumer demand, it is crucial that people are educated as to why illegal file-sharing is not acceptable.

Digital Copyright Exchange

Directors UK supported the recommendation by Professor Hargreaves that work should be done to create a Digital Copyright Exchange (DCE). He is correct to say that: "We have found that the UK's intellectual property framework, especially with regard to copyright, is falling behind what is needed". It is vital to ensure that legitimate models of digital distribution are made as user-friendly as possible, whilst ensuring that fair rights payments go to the creators of the content.

This is a key step in ensuring that the alternatives to pirated content are as accessible as possible. Getting the system right will create opportunities for revenue and greater rights protection. As Hargreaves puts it: "The prize is to build on the UK's current competitive advantage in creative content to become a leader in providing the services global players use to license their content for world content markets".

Many existing distribution systems (and their associated rights management and payment systems) are poorly equipped to handle new digital distribution markets and business models. At the same time it is increasingly difficult for licensing to take place on an individual author basis where the costs of administering licences and payments is becoming a very high proportion of the revenue received. This points us to collective licensing models as the best way to meet the challenge.

The Government has announced its intention to encourage an industry-led approach to the creation of the DCE and Directors UK supports this. The creation of a comprehensive DCE, dealing in a standardised way with every type of audio and audiovisual content, depends on all the relevant industry players being willing to play their part. It may be hard to achieve this in one leap, but to begin with we think it would be worth exploring the

concept of parts of the industry 'piloting' the DCE to deal with rights for certain types of content.

The creation of a DCE can also be an opportunity to redress the issue of rights payments to directors in the UK. Directors UK would like a key principle of the DCE to be that fair rights payments to copyright owners are a condition of its use.

It is worth noting that the EU is currently consulting on updating the online licensing regime, via its Green Paper on the online distribution of audiovisual works in the European Union. The UK can be engaging with this and even mark out a position of being a leader in terms of developing such a scheme, as a result of creating either a full or pilot Digital Copyright Exchange.

Format Shifting

The Hargreaves report has recommended that the UK government introduce a copyright exception to allow individuals to make copies of protected works for their own use and use by their immediate family on different media, with no condition that rights holders receive fair compensation. The Hargreaves report states that "rights holders will be free to pursue whatever compensation the market will provide by taking account of consumers' freedom to act this way and by setting prices accordingly".

Our understanding is that in practice this could be problematic, due to the fact that failure to provide any conditions for rights holders for fair compensation would contradict EU Directive 2001/29/EC. This Directive stipulates that Member States may provide for format-shifting for private use, and for ends that are neither directly nor indirectly commercial, on condition that the rights' holders receive fair compensation.

The UK government would like to use recital 35 of the EU Directive which states "In certain situations where the prejudice to the rightholder would be minimal, no obligation for payment may arise". Unlike the limited exception for recording for purposes of time-shifting (section 70 of the UK Copyright Act), this argument cannot apply to format-shifting as envisaged by the Government. Today, format-shifting is a major private copying component made possible by the proliferation of devices allowing the copying, storage, access and playback of protected music and audiovisual works. It is at the core of the 22 Member States' private copying schemes developed for compensating rights holders. These schemes significantly benefit UK rights holders.

It logically follows from this that the only way for the UK government could allow UK citizens to fully benefit from all the possibilities of all these devices would be to provide for a specific condition of fair compensation to rights holders.

The European Union Court of Justice in the Padawan case gave some interesting arguments to help the UK government comply with the 2001 EU Directive:

- "The concept of 'fair compensation', within the meaning of Article 5(2)(b) of Directive 2001/29, is an autonomous concept of European Union law which must be interpreted uniformly in all the Member States that have introduced a private copying exception, irrespective of the power conferred on them to determine, within the limits imposed by European Union law and in particular by that directive, the form, detailed arrangements for financing and collection, and the level of that fair compensation" (Paragraph 37).

- "Copying by natural persons acting in a private capacity must be regarded as an act likely to cause harm to the author of the work concerned" (paragraph 44)

- "Given the practical difficulties in identifying private users and obliging them to compensate rightholders for the harm caused to them, and bearing in mind the fact that the harm which may arise from each private use, considered separately, may be minimal and therefore does not give rise to an obligation for payment, as stated in the last sentence of recital 35 in the preamble to Directive 2001/29, it is open to the Member States to establish a 'private copying levy' for the purposes of financing fair compensation chargeable not to the private persons concerned, but to those who have the digital reproduction equipment, devices and media and who, on that basis, in law or in fact, make that equipment available to private users or who provide copying services for them. Under such a system, it is the persons having that equipment who must discharge the private copying levy" (paragraph 46).

In short, if a private copying exception were to be introduced in UK legislation, we assume it would have to comply with EU legislation and ensure that it is not detrimental to the income of creators.

9 September 2011

Written evidence submitted by Nick Dunmur

Summary

- An effective and affordable legal remedy with easy access be made available in the format of a copyright small claims court
- Moral Rights legislation needs to be strengthened to remove (i) the formal assertion requirement for the Attribution Right; (ii) exclusions for the Attribution and Integrity Rights; and (iii) the contractual ability of a waiver in order to prevent future 'orphan works'
- The introduction of effective sanctions against those who purposefully and knowingly strip metadata (identifying data within the work) from photographs
- Fewer exceptions to copyright legislation to ensure a better understanding of what is a legitimate use of copyright work

Introduction

1. I am a professional photographer and image-maker working primarily in the fields of advertising and commercial work but with interests and activity in selling my own work in addition. I have always worked for myself and have done so for 23 years. I have in general made a reasonable living as a professional photographer but that position is becoming more and more untenable as the worlds of the internet and digital photography meet, collide, develop and business models change beyond recognition. I work for a range of clients ranging from small design companies to large manufacturers like Triumph Motorcycles, Paul Smith (fashion designer) and Sandtoft Roof Tiles. I make my business work by licensing the work I am commissioned to make for a fee or from selling limited edition art prints of my own pictures. I need to be able to protect my work from unauthorised uses, abuses and mis-uses in order to safeguard the economic viability of my business and to ensure I can offer my clients exclusivity for the work they commission from me. Intellectual property rights are vital to the success of my business. Digital photography and the internet have resulted in a 'commiditization' of photography where buyers and commissioners of work are encouraged to buy by 'unit', not by 'use'. One does not have to be in business to

understand how that model can only ever benefit the large corporates which can enjoy economies of scale that are simply out of reach to SMEs and individuals working in the creative industries and actively contributing to the UK's economy and revenues.

Information

2. The Government has already responded to the Hargreaves Report on Intellectual Property and Growth and my comments here also address the Government's response.

3. I am pleased that the Government has made a commitment to the establishing of a fast-track small claims route for intellectual property (IP) rights infringements via the County Court system. I am, however, deeply concerned that this now appears to have the caveat of being 'value for money' attached to it. As creators, we need this small claims route to combat increasing infringement of our IP rights.

4a. Although the issues of Moral Rights and Orphan Works (copyrighted works for which the copyright-owner cannot be identified) were not part of the remit of the Hargreaves Review, Professor Hargreaves and his team saw fit to comment on both. In the UK we as creators/artists do not have the same benefit from moral rights as other EU countries; I have to assert my moral rights. This is wrong – they should be automatic. Granted, they are un-assignable, but they can be waived. Again, this is wrong – they should be un-waivable and beyond the ability of current Contract Law to remove them. As stated in Schedule 1, Clause 1 (c) of the Unfair Contract Terms Act 1977, any rights given under copyright law can be superseded by contract law, making any copyright reforms futile as large corporations will continue to include clauses in their commissioning contracts to over-ride them.

Moral Rights are artists' rights and also, I believe, enshrined as Human Rights. Both the Declaration of Human Rights and the Covenant on Economic, Social & Cultural Rights refer to "the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."

4b. The Hargreaves Review proposes that commercial as well as non-commercial, cultural use of Orphan Works be allowed. This is unacceptable. There is no defence in the argument that just because the rights-holder or copyright-owner of a work cannot be found that that should allow that work to be used for commercial gain by a third-party. There is NO published evidence to show that UK companies are disadvantaged by not being allowed to commercially exploit someone else's work without their permission. Given that Professor Hargreaves has stated publicly on a number of occasions that he wanted the Review to be evidence-based, this flies in the face of that completely. If you really want to see growth in the creative industries, then commission an original work from a creator. It is no surprise that those pushing for commercial use of Orphan Works and arguing that current copyright and IP legislation 'stifles' innovation are those large corporate entities (Google, the British Library, the BBC) who would benefit massively from exploitation of Orphan Works. The Hargreaves Review uses the word 'innovation' without really ever understanding what is meant by that. Being 'innovative' is NOT about taking someone else's work and re-hashing it, copying it, breaking it up and ultimately passing it off as something new – that is simply laziness at best and deceitful, sometimes criminal at worst. Creators and artists innovate all the time – that is part of being a creative person or running a creative business and it is the creative industries, the artists, the creators – the makers, that need support and legislation that protects our work and allows us to grow and make sustainable businesses.

5. There are no sanctions proposed for the unauthorised removal of metadata (data contained within a digital file which describes that file and which can contain copyright information, creator's details and much, much more) therefore allowing the further creation of Orphan Works to continue. Presently, it has to be shown that any metadata removed from a file was done so with intent to infringe the IP rights in that file before it can be recognised as an offence in the UK courts. A ten-year old could wriggle their way out of that. It is a nonsense. Removing metadata creates Orphan Works. Metadata is incredibly useful in providing a wealth of information about an image, a book, a text, a piece of music and is of benefit to both the creator and the consumer. We need legislation to enshrine that and make it far more robust that it is at present.

6. If an exception to copyright law is made for private copying, then it needs to be made very clear what is allowable under such a change. I agree that here, there is a need for change in some sectors and that this step would instantly de-criminalise a large sector of the population and bring the law up to date.

Conclusion

There is not a great deal wrong with current copyright law. It needs a little modernising but there a few simple changes that can and should be made to ensure that creators (and after all, that includes everyone, not just those who might earn a living from what they create) are afforded proper respect and protection from the law. Here's a simple list of what can and should be done;

- Equal bargaining power between commissioners/users and suppliers be facilitated by a change in Unfair Contract Terms legislation to now include IP
- The UK Government, and the bodies it wholly or partly funds, set an example by accepting licenses and end the current widespread practice of seeking copyright assignments and moral rights waivers
- Moral Rights legislation needs to be strengthened to remove (i) the formal assertion requirement for the Attribution Right; (ii) exclusions for the Attribution and Integrity Rights; and (iii) the contractual ability of a waiver in order to prevent future 'orphan works'
- The introduction of effective sanctions against those who purposefully and knowingly strip metadata (identifying data within the work) from photographs
- Funding to be made available to aid research into stronger, universal software to input and maintain robust metadata into all types of digital image formats
- Fewer exceptions to copyright legislation to ensure a better understanding of what is a legitimate use of copyright work
- A punitive element be introduced into copyright legislation to deter infringements, particularly in the digital domain
- An effective and affordable legal remedy with easy access be made available in the format of a copyright small claims court

- Mandatory copyright education in schools and Further Education/Higher Education establishments
- A Government-led public-facing copyright and IP rights education campaign

4 September 2011

Written evidence submitted by Equity

1. Equity is the trade union representing 36,500 performers and creative personnel who work across a range of media and creative industries including theatre, visual broadcasts, sound recordings and film. Equity is a member of the British Copyright Council, the Creative Coalition Campaign and works closely with BECS, the collecting society set up by Equity to manage and administer payments to audio visual performers.

2. Equity has supplied evidence to a number of previous IP inquiries and consultations conducted by BIS, the IPO and Ofcom, including the recent Hargreaves Review. We understand that the Committee will be reviewing the original submissions made to the Hargreaves Review. This submission will therefore focus on additional points not made in Equity's submission and on the Government's response to the 'Digital Opportunity' report.

Exceptions - Parody

3. The Government has accepted Recommendation 5 of the Hargreaves Report which calls for a number of new exceptions to copyright to be introduced. Two of the proposed exceptions would cover parody and format shifting.

4. With regard to parody, the Hargreaves Report recommended that video parody should be enabled through a new exception. A similar recommendation was made and then consulted on after the 2008 Gowers Report. Then, as now, Equity is opposed to an exception for parody as it could have negative, unintended consequences for artists.

5. At present parody is a well established and thriving part of the UK's tradition of artistic freedom and can take place simply, with the underlying work being licensed or consents agreed with rights holders. This enables the parody to take place, but also ensures that some appropriate remuneration can be agreed.

6. The Hargreaves Report itself presented very little evidence to demonstrate how parody could contribute to growth or deliver other economic benefits. Instead the Report sought to justify a parody exception as a means of promoting cultural ends and 'media literacy'. It is therefore difficult to see how a new exception for parody can be justified on economic grounds, which is understood to be the Government's intended aim in its overhaul of copyright law.

Exceptions – Format Shifting

7. Equity agrees that consumers should be able to undertake format shifting in a legal manner. However we are concerned that the Government prefers to introduce this exception without fair compensation for rights owners, contrary to international best practice. The Berne Convention 'three step test' stipulates that exceptions to copyright should only apply in special cases which do not conflict with the normal exploitation of a work and do not unreasonably prejudice the legitimate interests of the right holder.

8. The Gowers Review also initially recommended the introduction of a limited form of private copying exception for the UK which would allow consumers to make

copies in other formats of a work they legally owned for playback on a device in their lawful possession, for personal or private use only. Equity was in favour of this recommendation but believed very strongly that rights holders could potentially suffer significant harm as a result of the exception. Such an exception could jeopardise the right to control the use of works and established revenue streams for performers and artists as well as inhibit future business models. Therefore a scheme for fair compensation would be required.

9. Given that the Gowers recommendation was ultimately found to be unworkable, it is disappointing to see that the Government once again proposes to introduce a limited private copying exception in Autumn 2011. The Government aims to avoid the requirement to provide fair compensation by consulting on a system which will cause minimal 'harm to rights holders' under EU and international law. The rationale for this approach, which was put forward in the Hargreaves Report, is that rights holders can factor in consumer behaviour when setting the price they charge for content.

10. Equity and other trade unions representing artists do not believe it is possible to legalise format shifting without having to provide fair compensation to rights holders. The most suitable form of fair compensation acceptable to our members would be to mirror the systems for the collection of levies used in other EU states. In most other European countries except for Malta, Cyprus, Ireland, the UK and Luxembourg levies on recording equipment and blank media satisfy the requirement to provide 'fair compensation' to rights holders.

11. Furthermore, in the case of audiovisual artists, Equity's collecting society BECS is ready and well placed to facilitate a levy system due to their experience in administering the longstanding bilateral agreements in place with collecting societies based in Member States where the levy systems already operate.

Digital Copyright Exchange

12. The concept of Digital Copyright Exchange is welcome however there have been fears that it could lead to the development of a "two tier" system for recognition of copyright, particularly if participation in the exchange was to become a condition of being able to utilise enforcement mechanisms, such as the provisions of the Digital Economy Act.

13. We are pleased to note in the Government's response to the Hargreaves report that the Digital Copyright Exchange will not be compulsory and that the focus will be on 'incentives' for industry partners to take part in the project.

Enforcement of IP Rights

14. Successive Governments have accepted that illegal file-sharing does pose a significant threat to jobs in the creative industries and that the development of new business models alone will not, in the short to medium term, compensate for the losses incurred by copyright infringement.

15. Equity welcomes the Government's acceptance that there must be an integrated approach to IP rights based upon enforcement, education and measures to strengthen and grow legitimate markets in copyright, as recommended by the

Hargreaves Report. The creative industries have already implemented a large number of measures to address the problems of digital piracy and IP theft. The next step cannot be achieved without the enforcement measures contained within the Digital Economy Act.

Orphan works

16. Equity looks forward to the publication of proposals to enable the use of orphan works in the autumn and would urge the Government to continue to consult and work with the British Copyright Council when considering possible solutions. BCC has put considerable effort into engaging with rights holders from across the creative sector and has drafted a proposal which has gained support from trade unions including the Writers Guild of Great Britain, Equity and the Musicians Union as well organisations representing many other artists and rights holders.

August 2011

Written evidence submitted by Joseph Ford

I am a professional commercial photographer. I have been working full-time in the industry for seven years.

My income is derived from advertising photography and the licensing of my images. It is broken down into three parts:

A) Fees for creating images

B) Licence fees based on the use of images created for a specific purpose, e.g. advertising campaign for a product

C) Licence fees for use of existing non-commissioned images

Approximately 40% of my income derives from (A), 50% from (B) and 10% from (C), i.e. **60% of my income derives directly from intellectual property (IP) licence fees.** I am hence very concerned by the recommendations of the Hargreaves Review.

My main concerns are as follows; I will explain them in more detail below:

1. **The review does not recommend automatically granting moral rights as is standard in other EU countries.**

2. **Unlike in other EU countries, moral rights are not unwaivable.**

3. **The review does not propose sanctions for removing copyright information from digital works.**

4. **The review suggests using orphan works for commercial purposes.**

5. **Artists' rights are not recognised as human rights by the Hargreaves review.**

1 & 2: Simply put, moral rights are the right to be recognised and credited as the creator of IP and for the IP not to be altered without the creator's approval.

In other EU countries, moral rights are automatically granted and cannot be waived. This does not mean that use of IP without payment is impossible – a photographer can grant a licence to a charity to use his photographs for promotion for free, for example, but it does mean that creators of IP have an automatic right to determine what is done with the images or other IP that they create, and that large corporations cannot oblige freelancers to waive all their moral rights as a condition of working for them.

However the Hargreaves review proposes no automatic granting of these moral rights and does not suggest making these rights unwaivable. Here is an example of the potential effect on individual photographers and the industry as a whole:

A photographer is commissioned by a magazine to take a photograph, for which he is paid £100. The magazine requires him to waive his moral rights in order to get the job.

A multinational clothing company sees the picture in the magazine, contacts the magazine and pays them £10000 for the right to use the picture on T-shirts. The magazine makes money; the clothing company makes money; the photographer who created the IP receives neither money nor credit.

The knock-on effect to photographers and graphic artists in general is that because the clothing company bought an image from a magazine, no-one else was commissioned to create a design for the T-shirt.

3. Digital works including photographs can have metadata imbedded in them. This metadata can include the contact details of creator of the work, the terms of licensing etc, and is simple to imbed and read. It is also very simple to remove. Removing this information creates a so-called 'orphan work' – a digital file with no indication of ownership. The Hargreaves review proposes no sanctions for removing this copyright information, making it effectively legal to strip copyright protection from creators of digital images (photographers, illustrators etc).

4. The lack of any proposed sanction for removing this copyright information leads to my next point. The review suggests that orphan works should be allowed to be used for commercial purposes. If a company wants to use an image but can legally claim not to know who created the image, it can use it for free. Therefore all a company needs to do to steal an image with impunity is remove the copyright information, which takes a few seconds.

Images often cost tens of thousands of pounds to create, because of model fees, travel expenses, set-building, location hire etc, so there is a strong incentive for companies to steal IP in the form of images rather than commission photographers or license existing images. The recommendations of the Hargreaves review are in effect that UK legislation should encourage and facilitate theft of IP by allowing removal of copyright information and use of orphan works with impunity. This is morally wrong and goes against UK and International Human Rights legislation, as I will explain in my next point.

5. The UN Universal Declaration of Human Rights, Article 27 (2) states: "*Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author*." This means that the creator of a work has the right to protection of his moral rights and also to the material interests, i.e. the commercial exploitation of his work by licensing it for use.

A UK court ruling (20thC Fox vs 'Newsbin2') has also found that *"Copyrights are property rights protected by Article 1 of the First Protocol of the European Convention on Human Rights, as also expressed in Article 1 of the First Protocol of the Human Rights Act 1998*";
that "*piracy of copyright work is a breach of the copyright holder's human*

rights";
that "*the copyright holder is therefore entitled to legal redress*";
and, that "*because 'so far as possible, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with human rights', legislation drafted and enacted subsequent to the enactment of the Human Rights Act 1998 must also be read and given effect in a way which is compatible with human rights*".

Despite these explicit statements that artists' rights are human rights, the Hargreaves review does not recognise them as such, and does not offer artists and creators of digital IP the protection to which they are entitled.

To conclude, commercial photographers' clients tend to be national and multinational corporations: advertising agencies, news organisations etc. We are in a similar position to that of small-scale farmers selling to supermarket chains: our clients dictate prices and terms, and if we don't accept those terms, they refuse to work with us. We need our rights to be acknowledged in law in order to be able to work and make a living, as we are not given equal legal status to the commissioners of photography.

In deciding how to implement the recommendations of the Hargreaves Review, the government has been given an opportunity to protect the IP rights, a basic human right, of authors of all sorts. Implementing the recommendations as they stand would infringe the human rights of creators and immeasurably damage the financial productivity of the UK's creative industries. The UK is renowned as a creative hotbed, and this excellence needs to be protected. Instead of facilitating IP theft by allowing orphan works (unattributed works) to be used for commercial purposes, the government should take the opportunity to prevent orphan works being created, by implementing sanctions against those who strip the copyright information (metadata) from digital works.

Thank you for taking the time to read my response.

Written evidence submitted by the Forum of Private Business

Overall view of the Hargreaves Report

The Forum recognises that Professor Hargreaves was working within tight guidelines but we did feel there was an imbalance of focus towards issues around copyright (as opposed to patents and registered designs) as well as a slight imbalance towards helping firms to innovate and break into an area dominated by larger rivals, instead of the protection of their IP. Both are of course important but we would have liked to have seen a little more thought given towards the affordable detection and prevention of IP infringement. After all, it will be small firms, not small bands, which lead the economic recovery of the country. We do however welcome the fact that small businesses are kept in mind throughout the document, rather than segmented into a specific chapter.

Intellectual Property is important to growth

We agree with Professor Hargreaves but would note the wider economic conditions are more important. Issues such as accessing finance, a competitive tax regime and a good skilled workforce will all support greater growth in IP-rich SMEs. At present, the cost of employment and manufacture in the UK has led to innovative designs and products being produced under licence outside the EU, meaning companies transfer a significant amount of knowledge to other countries without any control over how that knowledge is used.

A Digital Copyright Exchange

This sounds a deceptively simple idea but if it can be made to work then in principle it has our full support. Small businesses can access what they need more simply and more quickly, with a clear idea of what fees are involved. This will lead to less infringement and allow the law to come down harder on those that continue to do so, as there would be little excuse for not accessing a single, simple, online, well-publicised and free register. On that last point, we do believe any DCE should be free at the point of use and further, would prefer the Government – or the IPO – to run it, rather than a big player in the private sector.

Collecting Societies

Playing music in the workplace is an issue our helpline receives a large number of calls about. Currently, businesses no matter what their size must obtain a license from both the Performing Rights Society and the PPL if they play music at their premises. Many small businesses are unaware of the law in this area and are confused as to why they have to pay for a single license at all, let alone two. Even more worrying are the reports of the aggressive nature in which PRS for music try to collect their fees. There need to be more transparency and we welcome the Government's decision to publish minimum standards for voluntary codes but this will only produce change if the ombudsman has more power to enforce the codes.

We believe that the Copyright, Designs and Patents Act 1988 needs to be reformed. The way people consume music has dramatically changed since 1988, with developments in digital technology and increasing levels of online consumption. We believe small businesses should not have to pay for a license unless they are playing music for their customers' benefit. Two test cases in court concluded that "workpeople are an audience" but we believe this should be reviewed. Businesses that must pay for a license should not have to pay for two licenses. There should be some form of coordination with the money split by the collecting societies, rather than businesses charged twice.

Case study 1
Forum member Tony Wade owns the Otley-based Trade Labels Ltd, which supplies to the printing industry. After receiving a call from the PRS telling him he must pay for a license he investigated and found he does not have to pay. *"Apparently, because only one person can hear the radio, we don't have to pay but I can't explain why,"* said Mr Wade. *"The system is completely confusing. When they initially called there was the assumption that we would have to pay. I can only presume they are geared towards getting the maximum amount of money they can. I knew nothing about an ombudsman. I had never heard this was available, nor did any other business I've discussed the PRS with."*

Case Study 2

Business owner Adam Aaronson is a glass artist and has a studio based in London. He has recently received calls from the PRS for Music.
"I have a number of issues about PRS for Music and the misleading and unhelpful manner in which they operate in parallel with PPL. I have recently become aware that I needed a PPL licence as well. I particularly object to the fact that PRS do not point out to people that they might need a PPL licence, whereas PPL do point this out to people. Given that it is legal for one of these two licensing bodies to surcharge a company that has one and not the other, it is almost a form of entrapment not to point out the possible requirement. As one of the founders of Anti Copying in Design, I am very concerned to ensure protection of copyright, but this is a system that has gone mad and certainly needs much more regulation than it seems to be getting. It is big business preying on small business. It was only when I asked if there was an ombudsman that the operator directed me to a page buried in their website that shows the code of practice."

Adapting the patent and design frameworks to changing circumstances

Although the report states that the patent system is broadly working well, this is not always the experience of our members. It remains costly to get a patent and when it is achieve, many businesses feel that a large company can still get their idea anyway.

Case Study 3
A chemical manufacturer has various utility patents but it has been a struggle to get some of them accepted. The Managing Director spends a lot of time looking through catalogues of competitors to make sure people aren't selling patented products without permission. Then the company has to call firms and get them to take their products out. This is very resource intensive. Since 2004 they have spent £56,000 on *maintaining* all their European patents. This does not include the lawyers' fees, patent applications etc. They estimate to have received about £15,000 back for these. They also go through a company that manages all the patents, so some of this cost will be fees for them. A European patent would really help as there are different fee structures for each country – hence why small firms have to go through an agent.

EU Patent Court and Patent system

We welcome an EU Patent Court but need to ensure it is properly introduced. To cause further delays with patent backlogs would be a barrier to growth, so whilst we are frustrated with delays to an analogous EU system (40 years and counting) we want to see it working when it is delivered.

However, it is also important to remember the wider international context. Whilst the Patent Court will help firms to grow in the EU by allowing them to better protect their IP, the Government's ambition is to increase as a proportion the amount of export with countries outside the EU. We need to ensure an emphasis on supporting IP in the emerging economies where the real economic prizes are.

Effective enforcement requires education, effective markets, an appropriate enforcement regime and a modern legal framework

We agree with Professor Hargreaves that ineffective regimes are worse than no regimes at all, as they appear to offer certainty but do not. We recommended in our submission stronger enforcement of UK patents and intellectual property overseas. The first a business knows about their intellectual property being abused is when a customer asks them why their product is more expensive than a competitor's. Time and resource issues to enforce – government backed institution can do this better, particularly as the Coalition has indicated that UK embassies should do more to help UK exporters. Agreements like the ones we have recently signed with Mexico and Nigeria can be of enormous help.

We also support the renaming of the Patents County Court to the Intellectual Property County Court as it better defines its role and standardises the landscape for small business.

Helping SMEs to realise the potential of IP

The problem for many of our members is that they have a vague idea that IP is defended by a law (criminal and not civil) and that it would be defended by the normal legal system. Some do not understand that images are subject to copyright and we have had problems with people paying for websites which contain copyright images put on by the website maker and not realising that they are responsible for this infringement.

Whilst we encourage business to protect intellectual property and to avoid infringing anybody else's, as well as outlining the differences between copyright, trademarks etc, there is only a certain level of support we can provide. We would signpost businesses to the IPO on specialist matters. Therefore it is of great importance that the support and advice are simple and easy to access. Whilst it doesn't necessarily have to be in one place, any government advice should be consistent.

The Hargreaves report survey of small businesses found that two thirds of SMEs indicated that they would be interested in having access to an intermediary who can provide basic advice on IPR (applications, maintenance, licensing, disputes or enforcement) in place of a legal advisor or attorney. One quarter agreed that "there are too many services available – it's difficult to choose the right one." Two fifths "you cannot tell which services are reliable or trustworthy."

Proposals for a one-stop shop of regulatory, financial and legal advice would be welcome but of most use to small firms with little experience of IP. For larger businesses or those more versed in IP issues, more specialist, sector specific advice would be needed. Further, the IPO – I have no direct knowledge of this but this is what our members are telling us – are constrained in the assured advice they can give and it's that consistency that would help some of our members. Professor Hargreaves saw an opening for a new kind of intermediary but there were no exact details.

HMRC's lack of clarity over use of Research and Development Tax Relief

The Forum fully supports R&D tax credits as well as the Patent Box. The measures announced in the Budget to extend the rate of relief for small and medium-sized enterprises (SMEs) were particularly welcome. This move, plus the decision to remove the NIC/PAYE cap and the current minimum spend amount of £10,000, will further encourage SMEs to innovate, especially start-up firms.

We have two issues over R and D Tax Relief. Firstly, we don't think it is widely enough known about by entrepreneurs. Further, among those that do know about it they do not think it is applicable to their business. So for us there is an issue with HMRC awareness raising and therefore a need to more clearly publicise the extent of R and D Tax Relief. A Deloitte Survey[i] suggested 12% of entrepreneurs hadn't heard of the scheme and 46% had heard but felt it was not applicable to their business.

Secondly, we have concerns over the consistency of advice from HMRC. Where companies have heard and taken part in the scheme then for the most part the process is easy. However, complaints to us from members are around the advice they are given on eligibility to claim for R&D tax relief by HMRC over the phone, only to be told that this was not the case when tax returns were submitted.

We would also be interested to learn whether research done into existing patents can be classed as research within this tax relief?

A lack of support within the UK's public procurement process?

We feel the current public procurement system is designed against innovative companies who could provide a unique service or product that provides a solution to the problem.

- Procurement processes are not just bureaucratic they are in most cases restrictive:
    - Businesses with less than 3 years accounts cannot bid for work
    - Call for tenders advise on detailed specifications rather than an output focussed model.
    - The model for evaluation is weighted towards bureaucratic compliance and is not always transparent (sometimes inessential requirements such as use of ICT, diversity of the workforce, environmental policy are more important than doing the job)
- Funding is restrictive – pots of money are allocated on a very specific basis e.g. Funding could be allocated for improving signage on a high street rather than offering funding on the basis of increasing footfall and the image of the area.
- Framework agreements and bundling contracts do not allow for small pilots of innovative solutions
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9 November 2011

[i] Deloitte Survey on Entrepreneurship 2011/12 - Is collaboration the key to success?

Written evidence submitted by FremantleMedia Group

Summary

- FremantleMedia supports many of the Hargreaves Report recommendations
- We have concerns about the possible complexity and expense of the Digital Copyright Exchange, particularly if there were to be penalties for failure to use the Exchange.
- We also are anxious that any attempt to encourage cross-border licensing is subject to thorough consultation to examine both whether this is necessary and what the impact would be on the UK television industry's current business models.

1. Introduction

1.1 FremantleMedia welcomes the commitment to review and update the UK's intellectual property laws to ensure these are suitable for the digital age. The creative industries are a valuable contributor to the UK's economy and intellectual property provides the foundation stones on which these are built. As one of the larger international rights companies, which produces and distributes television programmes and other audio-visual content worldwide, and owns and exploits in all media high-profile brands such as 'Idols' and 'X Factor', our business is dependent on the ability to acquire, produce and license a variety of intellectual property rights around the world[1].

1.2 Robust and effective IP laws can enable and encourage the creative industries to flourish, so that while it is clearly important that these laws do not act as a discouragement to investment and growth, it is also crucial that they provide adequate protection for investment in these areas. We recognise, and are happy to see, that the Hargreaves Report also recognises, that there is a balance to be struck between growth and innovation and the protection that exclusive IP rights gives to investment in the creative industries. We would also like to emphasise the need for determined enforcement of IP rights, and encourage the speedy implementation of the Digital Economy Act.

1.3 We fully welcome a great deal of the Hargreaves Report and the Government's Response on its proposed implementation including:

1.3.1 A solution to the Orphan Works issue which can only be helpful to everyone who uses copyright works in any way;

1.3.2 Improvements in the efficiency of collecting societies not just in the UK but across Europe.

1.3.3 The introduction of a small claims track for copyright claims which will make it easier for rights holders to enforce their rights – the cost of a high court action is a clear disincentive to action particularly in the area of online infringement where the costs of enforcement on a case by case basis may well outweigh any possible lost revenues, particularly when such legal enforcement costs and lost revenue are unlikely to be recovered from the infringer.

[1] FremantleMedia Group is the content arm of RTL Group, which is in turn a subsidiary of Bertelsmann AG. In 2010 it was responsible for nearly 9,500 hours of programming across 54 countries including formats such as 'X Factor', 'Idols', 'Neighbours', 'Got Talent', and 'Take Me Out'. Its production company in the UK is talkbackThames.

However, the areas where we believe care needs to be taken in the implementation to ensure the proposals have the positive effect intended are primarily

- the proposed Digital Copyright Exchange
- the issue of cross-border licensing.

2. Digital Copyright Exchange ("DCE")

2.1 In principle the idea of a central digital registry where information on who owns which rights, what rights are available, and how to acquire them is very appealing. We can see how this might work well in areas of simple copyright, such as book or music publishing, and where collective licensing is in effect. Audio-visual works such as television programmes, however, have many layers of different contributors who may have granted a variety of different territories and rights. In addition, there are currently no agreed industry definitions for many different digital rights such as 'catch-up' and 'video-on-demand'. These would have to be agreed before any digital recording of rights across different companies and industries could be effective.

2.2 This is therefore an extremely ambitious and complex project, and our concerns relate primarily to the idea that any rights owner who did not take advantage of the DCE would be penalised in some way, including being unable to enforce their rights fully. Our experience of trying to automate rights information is that it is extremely complex, and at best there will still be a need to check rights and availability with the rights owner. It would also be expensive to develop and implement and would need constant investment and upkeep to ensure it was an accurate record. We would want to be sure that the costs of setting up and administering the DCE would not outweigh the benefit either for the industry generally or us individually.

2.3 In summary:

We would be delighted to use a DCE if it is practical and we can accurately summarise the necessary information, or alternatively we can simply register ourselves as the point of contact in relation to properties we control. But we would not support this initiative and be extremely concerned if we were penalised because we were unable to use the Exchange if it could not properly reflect the complexity of our right position.

3. Cross-border licensing

3.1 The issues with cross border licensing are different for different industries. We welcome any efforts to improve cross-border licensing by collecting societies. However, where audiovisual works are concerned the issues are more complex. In the first instance, we may not have the rights for all territories to comply with this, and unless we are going to take away the right from writers, actors and other contributors to negotiate which rights they license to producers, this will continue to be a difficulty.

3.2 In addition, we need to be able to deal with our rights in a way the market wants. The issue with cross-border licensing of audio-visual works is not really that rights owners are blocking this, so much as that there is little market demand for this. The markets for audio-visual content are still predominantly national and linguistic, and this is the basis on which we distribute television programmes and other material. The one exception to this is English

language programming for which there is some very limited demand in non-English speaking countries.

3.3 We do not therefore have customers coming to us seeking to acquire multi-territory or cross-border rights which we refuse to give them. We would be happy to license rights on this basis, provided any such exploitation was additional to our current business rather than substitutional. Our concern would be that if cross-border licensing were encouraged without careful thought and consultation, we might reach the position that once an English language programme had been placed online in one country, we were compelled to make it available in other countries. This would mean we were unable to sell that programme in any other country, or at least only at a much reduced price. This would have a serious impact on the economics of the production and distribution of audio-visual content:

3.3.1 Our experience is that the revenues we might earn from cross-border licensing, whether we negotiate this, or some form of collective licensing is applied, would not compensate for the reduction we would suffer in the value of the national rights we could otherwise licence. Broadcasters pay for exclusivity; if a programme was easily available in their territory online, then the price they would pay would be significantly discounted. UK TV exports are currently worth £1.3 billion a year and this has helped fund an increase in the investment in original UK content which is now worth around £2 billion[2].

3.3.2 The funding of international programmes (ie. programmes such as high cost drama funded currently by broadcasters in several territories) would be eroded as the value to any but the initial broadcaster would be seriously undermined . We were reassured to see that the UK Government believes that any facilitation of cross-border licensing must be compatible with current effective licensing models. Our concern is that it is difficult to see how these two could be married to create a cohesive and effective system.

3.4 We realise that there may be some consumer interest in being able to access online material from different countries that currently might be geoblocked. We do in fact allow cross-border licensing where that will not materially damage the value of the rights we control, where for example a small minority population in one country may wish to access programmes in their own language from outside the country. We are happy to allow this if either the local broadcaster only has rights in their own language, or we can persuade them to agree. What we would not want to do is allow this where it materially undermines the value of the rights the broadcaster acquires, for which reason generally speaking we do not allow access to the English language version from outside the UK.

3.5 Finally we would have concerns that any form of mandatory licensing would encourage online piracy and make the tracking of infringers that much more difficult.

3.6 In summary:

This is a complex area where intervention in the market may have significant negative impacts on the UK audio-visual industry unintended by its proponents. Any action should be preceded by thorough and widespread consultation on the demand for and consequences of cross-border licensing and whether this is an area that requires

[2] Source: PACT

government intervention, or is best left to the market to evolve business models that work.

9 September 2011

Written evidence submitted by Getty Images

1. This is the response of Getty Images to the Inquiry (please see Annex I below for a summary of the operations and history of Getty Images).

EXECUTIVE SUMMARY

2. Getty Images supports the overarching goal of the reforms proposed by the Hargreaves Review report ("the Hargreaves Report") and the Government Response to that report (the "Government Response"), i.e. to reform our intellectual property laws in order to better promote innovation and growth in the UK economy.

3. We set out below a summary of our views in relation to certain recommendations for reform set out in the Hargreaves Report (as endorsed by the Government Response). We have confined this response to those recommendations which affect our commercial interests as a B2B digital content licensing business:

    - Third Recommendation: We have a number of reservations with regard to the proposed establishment of the Digital Copyright Exchange ("DCE") as set out below in the section entitled 'DCE';

    - Fourth Recommendation: We also have a number of reservations with regard to the proposed introduction of legislation to permit the licensing of orphan works and the introduction of extended collective licensing schemes ("ECLs"). We believe that there are alternative technology led solutions available to tackle the problems which these schemes seek to address. Our views on these issues are set out in more detail below in the section entitled "Orphan Works Reform and ECLs";
    - Eighth Recommendation: We support the recommendation made that "the Government should pursue an integrated approach *[to enforcement of IP rights]* based upon enforcement, education and, crucially, measures to strengthen and grow legitimate markets in copyrights and other IP protected fields". We also support the proposal to "introduce a small claims track for low monetary value IP claims in the Patents County Court" in order to support rights holders with the enforcement of their rights;

    - Tenth Recommendation: We support the recommendation made that the IPO "should be empowered to issue statutory opinions where these will help clarify copyright law", and

that the IPO should publish “an assessment of the impact of those measures advocated in this review which have been accepted by Government”.

Application of the DCE to the B2B content licensing industry

4. We believe that the existing UK copyright licensing regime for the visual industry (photographic and broadcast content) already possesses many of the optimal characteristics which the DCE seeks to bring about, i.e. the facilitation of a fast, secure, reliable and cost effective licensing process. In particular, it is characterized by the following features:

    - For creators, a wide choice of routes to market (whether directly through their own websites etc. or in collaboration with one or more of the many intermediary rights holders);

    - A highly competitive market for content users which offers a vast array of choice at a wide range of price points (Getty Images content is available at an extremely wide range of price points, with substantial volumes of micro-stock images available for licensing at less than £1 per image and imagery for use with high commercial value, e.g. use in an advertising campaign, costing tens of thousands of pounds):

        i. www.gettyimages.com itself has over 8.4 million images available online and a further 70 million images available in its archive collection. Today, gettyimages.com serves an average of 7.3 million visits and 4 million unique users, in addition to an average of 175 million page views, each month;

        ii. www.iStockphoto.com offers very affordable content with millions of vetted, royalty-free photos, illustrations, video, audio and Flash® files. Using the most advanced search in the business, customers download a file every second from a collection of more than nine million files for use in business, marketing and personal projects. iStockphoto started in 2000, pioneering the micropayment photography business model, and has become one of the most successful and profitable user-generated content sites in the world. iStockphoto receives in excess of 50,000 image downloads per day globally and more than 5,000 image downloads per day within the UK. It pays out more than $1.7 million per week in artist royalties;

        iii. www.thinkstockphotos.com, our royalty-free imagery subscription site provides access to over 7 million high quality images;

iv. Every day Getty Images issues approximately 400,000 thousand licences to customers globally and 54,000 licences to UK customers, across the various offerings within its corporate group;

- A highly automated, cross-border e-commerce licensing system which offers content users low transaction costs, in many cases effectively a 'one-click' licence;

- A high degree of price transparency (prices for standard licences are typically available for review on the websites of creators and intermediary rights holders);

- The absence of a complex network of collective licensing regimes of the type which applies to the music industry.

5. Given the optimal nature of the existing licensing processes for visual content, we believe that it would not be beneficial (and may potentially prove harmful) to include the B2B visual content industry within the proposed DCE regime. In particular, we are concerned that it would require a very substantial amount of resources and commitment from rights holders to ensure that all relevant rights are recorded within (or accessible via) the DCE. Given the efficiency of the current visual content licensing regime in the UK, we are not convinced that this use of resources would be justified by a commensurate benefit to creators or content users. The Report states that the DCE would be run by private companies and funded through a 'small user charge'. The Government Response further states that “there will of course be costs in setting up the processes and infrastructure required” and that “Government will be looking carefully at what the appropriate roles for itself and of industry partners might be in supporting this work”. We are concerned that these costs would add to unnecessary transaction costs for creators, intermediary rights holders and content users without offering them a counter balancing benefit.

6. In summary, we believe that the Report's vision of a fast, reliable and secure licensing process for use of digital content has already been realized by market forces as regards the B2B visual content industry. Whilst the DCE may be of real benefit to other industry sectors such as the music industry (where the myriad of collecting societies and unmanageable levels of consumer piracy are contributing to decline of parts of this market), we believe that, with regard to the licensing aspects of the B2B visual content industry, it is a Government intervention which would be an unnecessary and potentially harmful diversion from the market driven processes of growth and innovation which have proved so successful in this sector. We believe that stakeholders suffer no detriment under the current system in the B2B visual content industry and that the proposed reforms would lead to an unnecessary regulatory burden on the industry.

7. As for other sectors such as music, we would be pleased to be involved with the development of a DCE that might wish to replicate aspects of the established licensing mechanisms in the B2B visual content industry, as well as addressing the first aim of identifying copyright owners. Getty Images also has a sizable business operation devoted to the licensing of music on a B2B basis, and we recognise that this sector currently has more complicated licensing considerations and could benefit from a degree of Government intervention in order to simplify and encourage a more efficient market place.

Orphan works reform and ECLs:

8. We note the Report's proposals that the Government should legislate to establish extended collective licensing for mass licensing of orphan works and a clearance procedure for use of individual works. We support the policy goal behind these initiatives, namely to ensure that orphan works do not lie neglected and unused. However, we believe that technology exists which can to a very substantial degree negate the need for these legislative initiatives, i.e. by facilitating the identification of the owners of copyright works.

9. Getty Images recently acquired one of the market leaders in the field of image recognition, a company called PicScout, which already offers an image identification solution called ImageExchange. The PicScout ImageIRC platform (ImageIRC stands for Index, Registry and Connection) has been adopted on a voluntary basis by over two hundred content providers globally which represent, together with the content of Getty Images, over 140 million images. It is the largest image registry anywhere in the world which allows users to identify in real-time, by visual search only, the copyright ownership of any content which has been indexed within its records. We attach a separate note which explains in detail the role which we believe PicScout can play in facilitating the direct licensing process which would very substantially negate the need for the legislative initiatives in relation to orphan works and extended collective licensing (see Annex II).

10. Getty Images' representatives attended a meeting on 23rd August 2011, chaired by the IPO, to discuss orphan works reform and ECL schemes. The IPO advised attendees of this meeting that it intends to publish a consultation paper in October 11 on orphan works reform and ECL schemes. Getty Images intends to respond to this consultation paper once published.

Annex I

Overview of the operations and history of Getty Images

1. Getty Images is one of the world's leading creators and distributors of still imagery, footage and multimedia products, as well as a recognized provider of other forms of premium digital

content, including music. Getty Images serves business customers in more than 100 countries and is the first place creative and media professionals turn to discover, purchase and manage images and other digital content. Its imagery appears every day in the world's newspapers, magazines, advertising campaigns, films, television programs, books and Web sites.

About Getty Images

2. The company has over 8.4 million images available online and a further 70 million images available in its archive collection dating as far back as 1860. Today, each month gettyimages.com serves an average of 7.3 million visits and 4 million unique users in addition to an average of 175 million page views. Nearly 100 percent of the company's visual content is delivered digitally.

3. Getty Images is the photographic partner and image licensee to world-class organizations such as Sky News, AFP and CNN. The company is also the exclusive partner to more than 40 sports organizations in the world, including the International Olympic Committee, certain English Premier League Clubs, FIFA and the English Football Association.

History

4. Mark Getty and Jonathan Klein founded Getty Images in 1995, as a UK company, with the goal of turning a disjointed and fragmented stock photography market into a thriving, modernized industry able to meet the changing needs of visual communicators. It was the first company to license imagery via the web, moving the entire industry online.

5. Some key acquisitions:

    - March 1995, Tony Stone Images acquired
    - April 1996, Fabulous Footage, Hulton Deutsch acquired
    - July 1997, Energy Film Library acquired
    - Feb 1998, Allsport acquired, Photodisc acquired
    - August 1999, EyeWire, Online USA acquired
    - Oct 1999, Newsmakers acquired
    - Nov 1999, Image Bank acquired
    - March 2000, VCG acquired

- May 2004, e-Lance media acquired
- July 2004, Image.net acquired
- Oct 2004, Sport Image acquired
- Feb 2006, iStockphoto acquired
- June 2007, Pump Audio digital music provider acquired
- Feb 2008, Hellman and Freidman acquires Getty Images for $2.4 billion

Products and Services

6. As described below, Getty Images offers its customers an extremely broad range of licensing options in order to meet their diverse needs with regard to pricing, nature and variety of content required, intended usage, contractual flexibility, levels of legal protection etc.

7. www.gettyimages.com: One of the world's most powerful distribution platforms, gettyimages.com enables professionals to search, purchase and download the finest photography, illustration, film and editorial images; commission world-class assignment photography; and efficiently create, manage, share and distribute marketing materials — all in one place. Getty Images' extensive image and stock illustration offering spans everything from conceptual rights-managed and royalty-free creative images to up-to-the-minute editorial coverage – including news, sport and celebrity photos – and timeless vintage photography. *(Rights-managed (RM) image licensing is based on usage, and pricing is calculated once the customer has provided usage specifications. These images are from our premier collections and offer highly stylized images with high production value – some can be licensed with exclusive rights. Royalty-free (RF) licensing is based on size, and pricing is available as soon as the image(s) is/are selected. Royalty-free means it is an unlimited-use licence, i.e. the customer does not have to pay any additional royalties for successive uses of a product.)*

8. www.iStockphoto.com: Getty Images also owns iStockphoto which is the web's original source for user-generated, royalty-free stock photos, illustrations, video, audio and **Error! Hyperlink reference not valid.**oto.com). iStockphoto offers millions of images with low price points for use by a wide range of customers including designers, advertisers, entrepreneurs and bloggers for use in marketing and personal projects.

9. www.thinkstockphotos.com Thinkstock is our royalty-free imagery subscription product which offers customers affordable access to premium, professional and user-generated imagery all in one place. It provides customers with access to millions of royalty-free photos and vector illustrations selected from leading image collections owned by Getty

Images. Thinkstock offers customers subscription or image pack plans; the former permits customers to download a certain number of images per month for an agreed monthly fee, whilst the latter permits the customers to download a specified number of images within a twelve month period for an agreed fee (the latter option offer customers greater flexibility as to how and when images are downloaded). All plans come with broad global usage rights and access to a constant supply of new content.

Creative

10. The success of Getty Images depends on a true partnership with the photographers, musicians and filmmakers whose work it markets to a truly global audience.

11. The company has strong partnerships with 2000-3000 of the best creative photographers around the world, who are regular contributors to the Getty Images creative service. In addition, it can call upon several thousand more for ad hoc projects. It has over 5 million creative images available online on gettyimages.com and over 7 million on thinkstockphotos.com. On average Getty Images adds more than 40,000 creative images to its database each month from approximately 200 contributing image partners.

Film

12. With one of the world's largest collections of top-quality film footage, Getty Images is the only place to find best-of-breed film collections in both rights-managed and royalty-free, offering customers commercial-quality footage to produce creative and original work. It holds over 100,000 film clips across all its collections, the equivalent of 45,000 hours of footage, which would take more than five years of continuous viewing to watch. Plus, it adds 1000 new film clips every month.

Editorial

13. With approximately 125 staff photographers worldwide, 24x7 picture desks in London, New York and Sydney and 7 million editorial images available, Getty Images' editorial service covers all major events around the globe. It posts over 13,000 images every day and its aim is to go far beyond the confines of traditional photojournalism to capture images that tell stories other providers often miss. The company's editorial photographers are subject-matter specialists with years of experience, not generalists -- a distinction that ensures its images capture defining moments with a unique perspective.

Music

14. Getty Images music licensing business allows customers to license pre-cleared, original professional quality music to enhance their broadcast, film, video, advertising and online projects. The service is based on the assets of Pump Audio, a leading provider of quality independent music to content creators around the world acquired by Getty Images in June 2007.

15. The service gives customers direct access to more than 20,000 original tracks by some of the world's best independent artists and bands for use in broadcast and film production, advertising and other media projects. The service offers a powerful, one-stop solution for our customers and for the growing 'new breed' of content creators that need music every day in order to be creative. The aim is to make it easier and more affordable for customers to license music for commercial use, while allowing artists to retain ownership of and profit from their music.

Bespoke Products

16. **Getty Images Photo Assignments** Getty Images full-service photography department has a global network of several hundred photographers who bring their style, expertise and inspiration to any genre of assignment photography. The tailored image service provides excellence at every phase, from conception to completion, including professional and personalized creative direction, production, and project and budget management.

17. **Getty Images Media Management Services** The on-demand digital asset management (DAM) service efficiently streamlines the creation, management and distribution of digital assets and marketing materials, using a centralized library to store materials and tools for uploading, managing and publishing approved assets. Business users can easily and quickly access, browse, search and download the assets they need. A flexible permission system ensures that users have the correct brand assets.

18. **Media Manager** Hosted and managed by Getty Images, Media Manager is browser-based, configured with web-based forms, and requires no software or hardware. When done successfully, digital asset management yields dramatic savings in operating costs, improves brand consistency, reduces technology burden and more.

Annex II

1. Getty Images recently acquired PicScout which is a market leader in the field of image recognition technology and the creator of a platform called ImageIRC™.

2. As discussed above, the PicScout ImageIRC platform has been adopted on a voluntary basis globally by over two hundred content providers which represent, together with the content of Getty Images, over 140 million images.

3. This content has been provided voluntarily by various types of visual artists such as direct photographers, stock photo libraries and heritage societies such as the V&A museum.

4. The ImageIRC platform has been well received by organizations such CEPIC, BAPLA and PACA from the visual art industry.

5. PicScout's Image Exchange service offers a business solution to identifying copyright ownership of visual content based on the Image IRC Platform. As explained above, users of the Image Exchange service can identify in real-time, by visual search only, the copyright ownership of any content which has been indexed within the PicScout ImageIRC.

6. Over 30,000 different users across the world currently use Image Exchange with over 10,000 doing so on a daily basis. New users can download a free add-on to their browser (Internet Explorer, FireFox, Chrome and Safari) from www.picscout.com which allows them to use the Image Exchange service.

Applications of the Image Exchange service

7. We believe that the Image Exchange service has several applications which would be of direct benefit to the initiatives proposed by the Hargreaves Review. In particular:

    - We believe that the Image Exchange service, to a very substantial degree, can negate the need for the legislative initiatives in relation to orphan works and extended collective licensing, i.e. by facilitating the identification of the owners of copyright works and thus facilitating the direct licensing process;

- To the extent that legislative initiatives in relation to orphan works and extended collective licensing are ultimately implemented, the Image Exchange service can form an important part of a 'diligent search' function to be undertaken by would-be licensees who wish take advantage of any extended collective licensing schemes and/or schemes for use of individual orphan works which may be introduced;

- In the event that the DCE is ultimately established and applied to the B2B visual content industry (for reasons given above, we do not think that such a development is necessary or beneficial) the Image Exchange Service would be able to assist with providing the DCE with image matching capabilities.

PicScout ImageIRC Services

8. We propose continuing to make PicScout's ImageIRC index generally available for use within the visual content industry in accordance with the following commercial principles:

    a. The following services, which facilitate the diligent search process, would be made generally available free of charge:

        i. Registration of images within the PicScout ImageIRC platform by rights' holders;
        ii. Access to a destination webpage where anyone may search for the copyright owner of images stored within the PicScout ImageIRC platform;
        iii. Download of PicScout Image Exchange software to a browser which enables the user to search for the copyright owner of images stored within the PicScout ImageIRC platform;

    b. Rights holders would be given the option to withdraw images at any time from the PicScout ImageIRC (entities such as photo agencies, which submit images on behalf of the copyright owner, would be permitted to grant the copyright holder the right to withdraw the images at any time);

    c. No licensing by PicScout of the images supplied to the PicScout ImageIRC save where the persons/companies which upload the images have authorised such licensing (such authorisation to be entirely at the discretion of those uploading the images);

d. PicScout would randomize ImageIRC search results, and would not provide preferential treatment for content owned or represented by Getty Images.

Government support

9. With regard to possible Government support for the PicScout ImageIRC platform, we would propose that this may take the form of legislation in this area (or any subsequent code of good practice) defining use of the ImageIRC platform (and any similar technology which may be developed) as a necessary part of completion of a 'diligent search' function to be undertaken by prospective licensees who wish to benefit from extended collective licensing schemes and/or schemes for use of individual orphan works.

5 September 2011

Written evidence submitted by Malcolm Hardie

1. I shall be most grateful if the proposed new legislation protects all my intellectual and creative poperty rights over images produced by me, in whatever form -– print, silver-based negative or transparency, digital file as stand alone or as transmitted attachment and any handiwork - for my lifetime and an appropriate period beyond my death. I consider the latter to be a period of at least fifty years and would prefer this to be one hundred years.

   2. I would also call for the new legislation to make it illegal to organise a photographic competition that provides the organisers and/or others to use non-prize winning images without remuneration for any period whatsoever. I would also call for the legislation to limit the free use of prize-winning images to one year and for the copyright owner's details to be displayed with the image at all times. I do not think a limit on markets and domains would be practical but I would encourage Government to consider with the major users of photography and the major photographic bodies whether a continental limitation might be imposed based on the location of the organiser's registered or principal place of business.

   3. In addition, I would call for the legislation to make it essential for any organisation whether for business purposes or not, that is granted a reproduction right whether electronic, in print or via some display, whether for remuneration by money or goods or prize or not, by the creator of an image to display that creator's name and copyright with the work.

   4. I most strongly object that I should be forced to actually register work and consider that such a rule would be completely impractical anyway: the number of images created each day in London alone would require a substantial number of clerks to register and the likely opportunity for cost, error, complaint and compensation would be massive. If I take steps to indicate on first submission that I hold copyright then that should stay with the created work thereafter.

   5. I challenge the view that enabling created works to be instantly deemed orphans if the intellectual property right holder's details are suppressed or omitted and the work is subsequently copied or transfered will add value to the UK economy. It may reduce some existing costs but there would be a consequent loss to the rights holder and possibility of legal costs expenditure on their part. Growth in the legal sector, apart from creating congestion in our system is, of course, not truly productive growth.

5 September 2011

Written evidence submitted by Andrew Harrington

Copyright.

I understand you are reviewing the copyright law in the UK. As a photographer I would like to make sure that any changes would not undermine my ability to make a living.

The things that I think are important are below.

- **The moral rights of authors should be automatically granted as in other EU countries.**

- **Moral rights should be made unwaivable as in other EU countries.**

- **There should be strong sanctions for the removal of digital copyright information from digital works.**

- **Orphan works should never for commercial purposes.**

- **That remedies for unauthorized use should be available to all.**

- **Creators should be given a level playing field with industry in contract and other matters.**

- **Artists rights should be recognized as human rights.**

Written evidence submitted by Gordon C. Harrison

1. Pro Imaging is a not for profit organisation founded originally to be a self-support group for its members. Our members are located throughout the world, are all imaging professionals, primarily in the field of photography but we also have other imaging disciplines within the range of skills we represent.

2. In our submission therefore we take a broad view of copyright issues, not constrained to the interests of photographers only. Copyright and the moral rights invested in the work of our members are of fundamental importance to their businesses. In this submission we will ask the committee to consider the following issues;

    - Moral rights are not automatically granted to citizens in the UK as in other countries, such as in France, in the UK they require to be asserted with the publication of every image.

    - Moral rights are not unwaivable in the UK, as in other countries, such as in France.

    - There are no sanctions for the removal of digital copyright information from images or other works, unless it can be proved that it is done with the intent to infringe. This weak law results in vast quantities of images and other works having the copyright data removed resulting in the creation of an equally vast quantity of orphan works.

    - The damage to creative businesses by enabling the commercial use of orphan works and the absence of any credible evidence that supports the argument that there is a wider public benefit to be gained through commercial use orphan works.

    - Independent creatives are not given a level playing field with industry through the use of unfair contract terms requiring creators to relinquish their copyright and/or waive their moral rights.

    - The state education system at primary and secondary level, while teaching our future wealth creators the various skills they need in the various creative disciplines, fails to impart the importance of their creative rights and the knowledge of intellectual property rights they need to protect and commercially exploit their creativity.

    - That the proposed digital copyright exchange, in itself an idea to be welcomed, needs to be global as opposed to national. Copyright does not stop at national borders and national registration systems will result in more problems being created than are solved.

    The remainder of this submission provides further detail on each of the above issues.

Moral rights should be automatically granted by UK law

3. Moral rights for photographers and other creatives include the following rights;

    - The right to be credited as the author of a work. This is of fundamental importance to all creators. It is in fact their 'brand', and like all brands is a key factor in identifying one creators' product as distinct from those of other sellers.

    - The right to object to a derogatory treatment of a work in a manner deemed to be prejudicial to the creator's honour and reputation.

    There are other rights associated with moral rights but these are the key ones, particularly the right to be credited, that we wish to highlight to the committee. Current copyright law requires these rights to be 'asserted' in order to benefit from their provisions. Currently, through the new opportunities offered by the internet, we have an ever growing section of a global public generating creative content, 'citizen creators', who, through no fault of their own, have little or no understanding of IP law concerning their works. They are creating a vast amount of content in which the author has not 'asserted' their moral rights, but they <u>have</u> attached their name to their work.

4. As a result, the majority of on-line works do not have moral rights asserted as required by the current UK legislation. This leaves such works open to abuse whereby they can be reproduced without the author of the work being credited, thus separating the work and its author, resulting in the creation of an orphan work.

5. The law should recognise that when a creator has added their name to a work that in doing so they are in fact asserting their moral right to be identified as the author of the work, and that they are, in a moral sense, entitled to benefit from all the moral rights provisions. This system works well in other countries and no evidence has ever been presented to justify the need for the UK's current 'assertion' requirement. 'Assertion' is an outdated concept overtaken by the opportunities offered by the digital age whereby everyone is able to participate in generating creative content under their own name.

6. The current copyright legislation lists a number of exceptions to moral rights in that newspapers, magazines and some books are exempted from the otherwise legal requirement to respect authors moral rights. These exceptions are yet another mechanism whereby an author's name becomes separated from their work and in consequence adding to the proliferation of orphan works. These are completely unjustifiable exceptions, when an author's name is known it should always be published with the work.

7. I urge the committee to recommend that the assertion requirement be excluded from any new or updated copyright legislation and that the current exceptions to exempting newspapers, magazines, etc., from respecting authors' moral rights should be repealed. Doing so will support the creative sector of the UK economy and form one part of the solution concerning orphan works.

Moral rights should be un-waivable under UK law

8. Under current UK law creators can be required by another person or organisation to waive their moral rights. That is, amongst other rights, they give up the right to be identified as the author of the work(s) concerned whenever that person or organisation uses them. The result of such a provision is that we have yet another mechanism to create orphan works which separates the work from the author's name.

9. In other countries moral rights are not only automatic without the need to assert them, such as in France, they are inalienable, perpetual and inviolable. No evidence has ever been presented to show why this should not be the case in the UK. Without strong moral rights UK creators will face an economic disadvantage in trying to exploit their work, for example pressure can be exerted on them to waive their moral rights or lose a commission, and they are also at a disadvantage compared to creators in other countries where moral rights are inviolable.

10. Given that the inquiry is also going to consider Professor Hargreaves recommendation for the use of orphan works, we would hope the committee will recognise the logical necessity of un-waivable moral rights to ensure that the orphan works problem is constrained.

Removal of copyright information from digital works should be an offence

11. Digital works such as photographs have a provision for embedded metadata, which amongst other things, identifies the copyright owner of the work, its copyright status, such as 'All Rights Reserved', and contact details for the copyright owner.

12. The committee will appreciate the importance of this digital copyright metadata to the creator of the work. It is a public statement of ownership, it can set terms for use, and it provides a means whereby the copyright owner of the work can be contacted. For example, using any one of a number of programs, any image in an internet browser can be easily accessed and made to display its embedded metadata, making it easy to contact the copyright owner in order to acquire a license to use the image.

13. Removal of copyright metadata from digital works should be an offence. Unfortunately under existing UK law it is only an offence if it can be shown that the person or organisation that removed the copyright information did so with the intent to infringe the copyright in the work.

14. Digital copyright metadata is removed daily on a vast industrial scale on the internet by organisations seeking submissions of digital works, such as social media to give but one such example. Some social media actually employ technical devices to overcome certain copyright protections which have been designed to make it difficult to copy such works. Yet, social media are now used as a significant part of promoting a company's business, a process which unfortunately undermines the businesses copyright protections. This issue not only affects professional creators, the public is invited to submit their own digital works to an endless appeal for creative content and when they do the copyright metadata is also stripped from their works.

15. It is virtually impossible to show that companies stripping out copyright data do so with the intent to infringe. They strip out copyright metadata simply as a matter of routine and in so doing create orphan works on a colossal global scale. There is no practical need to strip copyright metadata from digital works, such data is an insignificant percentage of the size of a digital work, and no organisation has ever published valid evidence to legitimise its actions. Stripping copyright metadata requires an organisation to take steps to remove it, retaining it requires no effort at all. Stripping out digital copyright data is unethical; it should be illegal under any circumstances.

16. We would strongly urge the committee to consider making the removal of copyright data from digital works an offence regardless of the intent behind the act. This will place no burden on the economy or the organisations who participate in this abuse.

Organisations will simply ‘switch-off’ the stripping mechanism and in an instant a major contributor to the orphan works problem is eliminated. Of course there will always be ‘rogues’, but the passing of such a law, giving the creator legal rights to pursue offenders, will eliminate copyright metadata stripping by otherwise reputable companies.

Orphan works should not be used for commercial purposes

17. Professor Hargreaves has recommended that orphan works be used for commercial purposes, yet presented no statistical evidence to show why business is disadvantaged by being unable to use orphan works. There is certainly a case to be made for cultural use of orphan works, whereby they are accessible to the public via academic and cultural institutions.

18. In his Digital Opportunity review Professor Hargreaves said that the release of “*a vast treasure trove*” of orphan works is “*a move with no economic downside*”. Providing the release is for cultural use only this is true, but is quite wrong when commercial use is considered.

19. Professor Hargreaves stated that in most cases the fee for the use of orphan works would be nominal, then went on to say this would cause concern from rights holders of a resource of “*almost free to use works*” but countered that fear by stating that the “*wider economic interest*” should prevail over their fears. Professor Hargreaves put forward no evidence to support such an assertion and we believe he is mistaken on this point. We have set out our arguments that led to our conclusion below.

20. The creative industries are a major driver of the UK economy; they survive by being able to market and license their creativity. That market is extremely competitive demanding innovation and business acumen to compete effectively. I have already mentioned that globally, every day, a vast quantity of digital works are being orphaned, and I agree with the Professor when he rightly calls this “*a vast treasure trove*”.

21. Such a quantity of creative works becoming commercially available as “*almost free to use works*” will have permanent and significant effects on the viability of the creative economy. It will tilt the market in favour of industries that consume creativity and severely disadvantage the market sector that generates creative content. It is clear that if you suddenly make available a vast, continually renewable, *almost free to use* resource of creative works, those who previously had a viable business model creating such works will find their business severely, possibly fatally, compromised.

22. Damaging the creative industries in this way will not serve the wider economic interest. It will serve well those industries which are consumers of creative content. Thus the commercialisation of orphan works will work strongly to the advantage of those segments of the economy which play no part in the UK’s most vital and key economic activity, creativity. Should commercial use of orphan works be passed, within a very short time commercial aggregators would be launched where anyone can browse through hundreds of thousands of ‘diligently searched’ orphan works that are *almost free to use*. Commercialisation of orphan works will create a huge imbalance in the market, to the advantage of one sector, and to the great disadvantage of the other sector. Legislation at all times should seek to be neutral in its effect on markets, allowing the market itself to determine winners and losers by innovation and competition. We are sure the committee will recognise the validity of this position and we urge them to reject the recommendation for commercialisation of orphan works.

23. What will serve the wider economic interest is to make orphan works available via cultural institutions. The vast treasure trove Professor Hargreaves refers to then becomes available to the public at large, preserving cultural works that otherwise could become permanently lost. Such access to cultural works will also serve as inspirational material for today's creators, and therefore will be a major factor in the generation of new creative content. In this way the wider economic interest is served, orphan works become a catalyst for the generation of new works instead of simply being a resource for "*almost free*" recycled creativity, to be copied without innovation, and the imbalance that commercialisation of orphan works would cause in the creative market is avoided.

Creators are not given a level playing field with industry

24. Creative businesses suffer from a number of issues which damage their economic viability. At present when bidding for business, and winning the commission, they are frequently presented with a contract which can require them to –

    Waive their moral rights, and/or

    Assign the copyright to the commissioner

    - and failing to do so will result in the contract not being awarded.

    We have already mentioned the problems caused by waiving of moral rights, both in its impact on the original creator (paras 3-10) and its contribution to the creation of orphan works.

25. With regard to copyright, while not prohibiting the assignment of copyright from the owner to another person or organisation, it should not be a mandatory requirement of a contract that the creator must assign their copyright to another person or organisation on penalty of not being awarded the contract. These are unfair contract terms which undermine the creators' economic viability. A transfer of copyright may be done voluntarily, bequeathing to a family member for example, but in contract law copyright should be inalienable, as in Germany. Given the dynamism of the Germany economy compared to the UK's it is clear that inalienable copyright has no deleterious effect on its vitality.

26. I would urge the committee to implement inalienable copyright with regard to contract law in the new copyright legislation to level the economic playing field between creators and those who wish to exploit the creators' rights.

The education system is failing to educate pupils concerning IP

27. Within the primary and secondary education system there is a mandatory requirement to teach pupils the skills they will need to become a citizen that can contribute to the social and economic well being of the United Kingdom. Thus skills in numeracy, science and literacy are taught, along with skills in the various arts and creative processes.

28. However, students are not taught a basic understanding of intellectual property rights they are granted by the law as soon as they create any kind of art work, a story, poem, photograph, etc. This has significant repercussions within the UK economy. One of which is that the greater part of the public have little or no understanding of copyright.

This has been highlighted and lamented in various government reports, such as in the "Copyright; The Way Ahead in a Digital Age" by David Lammy MP for the previous government. However no action has ever been proposed by the state to deal with this problem.

29. Apart from the lack of understanding of copyright, a section of the public has developed a culture which equates copyright with exploitation of the public's rights to free content, that it inhibits their rights to freedom of expression, and so piracy of copyrighted content has grown to become a significant issue.

30. It is too easy to blame the rise of the internet for such public attitudes, that technology has made it easier to copy. Technology is neutral; it is public understanding and the use of technology that is at the heart of this issue. It would help if throughout their time in primary and secondary education, in lessons concerning creativity, pupils were introduced to the intellectual property rights the law gives them in order that they can benefit from their creativity. That copyright is a universal benefit granted to everyone.

31. Such a program would result in pupils leaving the education system with an entirely different understanding of the purpose of copyright. They would no longer exclusively see it as a 'device' by which they can be exploited by global corporations, but as a benefit to them and their creativity. We don't pretend such a program would be a panacea to all the ills currently arrayed against the creative sector by piracy, but over time it would have a significant beneficial effect. While the education system is not a part of the remit of the committee, intellectual property and how to have a copyright system fit for the digital age certainly is, and that has to include how it is perceived by the public.

32. We therefore urge the committee to recommend that the primary and secondary education system include compulsory education on intellectual property law as part of the various subjects to which these laws apply.

The Digital Copyright Exchange should be global, not national

33. Professor Hargreaves is to be congratulated for introducing the concept of a Digital Copyright Exchange to provide a common platform for licensing transactions. While much of the detail needs work to bring such a concept to reality there is no doubt that a universal Digital Copyright Exchange would confer a considerable number of benefits to creators and consumers of creativity.

34. Professor Hargreaves has envisioned the Digital Copyright Exchange as a UK initiative, serving UK interests, with IPO or Ofcom oversight, with the aim of giving the UK an advantage over competitor nations by providing the means whereby licensing can become simpler, more efficient and at least partly if not wholly automated. These also are laudable aims.

35. However, the market in which creators operate is not national, it is global; copyright does not stop at national borders. There is a fundamental problem with national copyright databases, and it is this, if other nations introduce such national schemes, as the US already has done with its own national registration system, there will be a proliferation of national copyright schemes, each with their particular form of bureaucracy, charges, and legal implications.

36. Given that creators work in a global market, they are then faced with the difficulty and cost of registering their works on a variety of different national copyright registrations

systems to afford protection in that country. We are sure the committee will recognise that this is a most unsatisfactory outcome. Instead of achieving a more efficient licensing market place, it would be creating an even more burdensome one.

37. National registrations systems, such as the proposed UK Digital Copyright Exchange would not resolve the orphan works problem either. A diligent search of the proposed UK Digital Copyright Exchange may not find the rightful owner of a work, but a further diligent search of, for example, the US Copyright Registration system could disclose all the contact and other details necessary to proceed with seeking usage permission from the author.

38. Thus national copyright databases will neither help the creator protect their work globally, nor assist the consumer of creativity to discover the owner of an apparent orphan work without searching all the national copyright databases. Thus national solutions add further complexity to the copyright licensing procedures instead of making them more efficient.

39. A global solution is needed. Copyright is largely determined by various global treaties, such as the Berne Convention, that limit what national governments can impose within their own copyright regimes. It follows that if there has to be a Digital Copyright Exchange, and we agree there should be, the way forward is to implement such a system globally. There is no reason why the UK should not take the lead in initiating such a program, working with the UN World Intellectual Property Organisation (WIPO), supported by our partners in the EU, in order to establish a Global Copyright Exchange, a single database open to creators of all nations.

40. A global licensing system has already been developed by the PLUS Coalition.[1] PLUS; Picture Licensing Universal System, is an international non-profit organisation, its aim is to simplify and facilitate the communication and management of image rights. It is organized by respected associations, leading companies, standards bodies, scholars and industry experts. Given that such a well developed global system already exists it seems like an obvious candidate as the foundation for any further development to achieve all of Professor Hargreaves aims and also to benefit from the experience already accrued by the PLUS Coalition.

41. Therefore, we strongly urge the committee to accept the recommendation for a Digital Copyright Exchange, but to be developed as a global exchange in association with our international partners, such as the EU, through the United Nations World Intellectual Property Organisation.

[1] http://www.useplus.com/index.asp

Written evidence submitted by the Independent Film & Television Alliance (IFTA)

1. Preamble

1.1. The Independent Film & Television Alliance (IFTA) represents the interests of 150 companies in the business of production, financing, distribution and international sales of films and audiovisual works. Based in Los Angeles, IFTA has member companies all over the world, including Asia, Latin America and Europe. The United Kingdom is home to 14 IFTA members, among them some of the most established companies involved in the international financing and distribution of British and international films. Additional information on IFTA and its membership is available as an appendix to this paper.

1.2. IFTA welcomes the opportunity to participate in the BIS Select Committee's (thereafter "the Committee") Inquiry into the Hargreaves Review [thereafter "the Review"]. As a member of the UK's Creative Coalition Campaign, we discussed relevant IP issues with Professor Hargreaves and staff at IPO in the past and were amongst the organisations who filed formal comments during the Review process. Our comments in the present paper put more emphasis on the Government's published response to Hargreaves [thereafter "the Response"]. We hope these can contribute helpfully to the complex enterprise of introducing some changes to UK Copyright law, as is the Government's stated intention.

1.3. IFTA welcomes the Government's agreement with the Review's conclusion that IP is important to growth. We express the hope that Government will not be tempted to experiment with radical reform of existing copyright legislation and will continue to be guided by the principle – as suggested in the introduction to the Response – that "small improvements in the IP system can make an appreciable difference to the UK economy". Reform which weakens copyright protection can only prove detrimental to the global market performance of British cultural production. IFTA welcomes the moderate tone of the Response and especially its endorsement of the Review's view that "we must not put our hugely important creative industries [../..] at risk by what we do". We express the wish that the Committee will also uphold this principle.

2. Evidence and policy-making

2.1. IFTA supports both the Review's and the Response's insistence on substantiated and transparent evidence as the prerequisite for formulating sound policies in the area of IP. We regret, however, a tendency in both papers to vilify so-called "lobbynomics" or the alleged "overabundance of effective lobbying" in relation to the production of evidence. IFTA and allied

organisations aim for the highest standard of evidence and do not pursue arguments for law makers and Governments unless these are substantiated by the empirical facts available to us through our access to the microeconomic realities of our members' creative businesses.

2.2. We note that IPO is scheduled to issue Guidance on what constitutes open and transparent evidence and we look forward to this document being released later this autumn. However, we also believe standards of "quality evidence" must be defined objectively in order to avoid ideological contamination. We urge IPO to consult fully with concerned industrial private sector groups in establishing such standards: We at the business coal face know better than others what issues arise in gathering evidence.

3. Copyright and International policy

3.1. As an export led trade association, IFTA understands how important maturing markets such as Brazil, South Africa, India and China are becoming for audiovisual content companies. We support unreservedly the Review's recommendation that a special emphasis should be placed on opening up IP market opportunities in these countries, with Government in a strong support role.

3.2. IFTA also believes the UK Government has a unique opportunity to take a leadership role amidst the international IP community in this time of transition and reform. Through successful exports and program-format sales, the UK's audiovisual content sector is successfully integrated into today's global marketplace for rights. Its companies need global legal security, with similar principles underpinning licensing contracts throughout the world. The UK's leadership in the creative industries lends Government important credibility and weight in international fora such as the EU, WIPO or WTO.

4. Digital Copyright Exchange

4.1. IFTA is intrigued by the Digital Copyright Exchange [thereafter "DCE"], a proposal which is at the core of the Review. We also concur with the Government's view as expressed in the Response that its role in devising and operating the DCE should be that of a facilitator, with the various stakeholders in the market for rights taking the lead. A more hands on approach, establishing the DCE as a direct form of intervention into both the structure and practices of the marketplace for rights, would have sat oddly with Government's broadly deregulatory philosophy.

4.2. IFTA believes a centralised Exchange will not – in and of itself - create the marketplace for digital rights and, in fact, may distort it, unless clear expectations and appropriate safeguards are built in. As a threshold matter, it is of the utmost importance that any such DCE act only as a neutral

“accelerator” and conduit, not a market player in its own right. Transactions should be controlled by individual registrants as actual or moral persons, or by their appointed agent.

4.3. Further, the DCE proposal itself may well rest on a fundamental misconception as to how content is financed, marketed and distributed. Simply put, the concept and functions of DCE may be incompatible with the structure in the market for rights which supports Independent film. While a major Hollywood studio film is based on a hundred per cent financing of production costs by the studio against an outright upstream purchase of all worldwide rights in all media, the Independent film (and increasingly, high-value TV drama) is entirely dependent upon the producer being able to ‘pre-sell’ rights to specific countries and specific media against financial commitments which will allow the film to go into production. In this model, the ultimate revenues depend on being able to hand-select distributors by territory and media who have the ability to maximize revenues from this particular, unique title and who, in many cases, are positioned to share the risk of production. As a straightforward marketplace for buying and selling rights to completed films, the DCE simply would not address the financing, distribution or the marketing needs of the independents. At best, the DCE could be envisaged, perhaps, as a tertiary platform to make inroads into smaller markets once primary and secondary revenue streams would have been secured through standard distribution deals.

4.4. IFTA concurs with the observation that the transactional costs involved in licensing content to new audiovisual platforms place many independents at a competitive disadvantage. The majority of buyers in this new universe prefer to license high volumes of content (and known “blockbusters”), both because of the nature of their business and because it keeps transaction costs manageable. Independents who directly manage small catalogues of rights cannot benefit from this packaging effect and emergent platforms often cite unit transaction costs as an obstacle to purchasing independent titles. However, IFTA observes that there are a number of business possibilities that may emerge to alleviate the issue of transaction costs as revenues of digital services increase and distributors emerge at a local level (backed-up by real performance metrics), who will be in a position to advance royalties against revenues from these rights as well as against traditional distribution. Therefore, while DCE might play a role for certain rights holders or as a short-term vehicle for licensing older library titles, there is a huge risk that – if not carefully crafted -- it will create a new, rigid regime that will prevent those important business models from emerging at all.

4.5. Finally, IFTA agrees with the Response where it suggests that, if pursued, the DCE should be “compelling” not “compulsory” and that its success ultimately must rest on its “commercial attractiveness”. One concern we have had with the Review was the suggestion that strong disincentives not to

register content rights with DCE should be built-in. These measures would discredit the DCE, undermine the development of a cooperative culture between stakeholders and inevitably raise competition concerns. We are encouraged by the tone of the Response in this respect.

5. Cross-border licensing

5.1. IFTA notes the statement in the Response welcoming the European Commission's initiative in proposing a cross-border licensing framework. The EU's approach in this area contains ideas which, if implemented, may hinder rather than stimulate the growth of online audiovisual distribution in Europe. We therefore also welcome the Government's intention to work with both the EU and UK interests to develop proposals that are "compatible with current effective licensing models" (Response, p6). In exploring these issues with Government, the Committee is urged to take the following observations into account:

- the territoriality of rights is well adapted to the EU's great variety of cultures and languages – each film or TV program needs a bespoke release strategy and marketing campaign in order to attract an audience in each unique culture or language area
- simply making films and other content available on an EU-wide basis does not – in and of itself – create a new market. In addition to barriers such as costs of dubbing, subtitling, and digital format transfers, low demand for non-domestic content, will not be overcome by enabling European consumers to access any platform from anywhere
- weakening the territoriality of rights would – at this stage – create severe financing problems for Independent film, TV programming and other content. UK independent films are reliant on the ability to pre-sell exclusive territorial rights, against financial commitments which allow the film to go into production, and to use the process to establish a film's distribution network.

5.2. IFTA urges the Committee to press Government not to confuse the ends with the means in its engagement with the EU's plans for cross-border licensing. We believe the principles outlined in the Response in relation to the Digital Copyright Exchange, could serve as sound guidelines in the approach to a possible EU-wide scheme: it should be supplemental, not substitutive; stakeholders should be free to register or pursue alternative routes to market; sellers, not civil servants, should set rates; and incentive to join should ultimately be the commercial attractiveness of the scheme.

6. Orphan works

6.1. IFTA is aware that Government's action on the orphan works' front will be developed against the background of a proposed EU directive on orphan

works and hope the UK will use its influence to ensure that a sound, balanced and realistic approach prevails in the EU context.

6.2. Works presumed orphaned have been a headline issue in the national and international debates on copyright since the advent of digital reproduction technologies. There appears to be a consensus that the magnitude of the problem justifies legislative intervention. IFTA is concerned that no evidence has been produced to support the need for legislation where audio-visual is concerned. Nor, to our knowledge, has there been any initiative to look at a code of practice or other forms of stakeholder-led voluntary approaches as a possible alternative to a legislative or regulatory approach. IFTA urges the Committee to request that Government ensures that the planning of future policy is based on solid and verifiable evidence.

6.7. On the specific issue of diligent search criteria, IFTA is concerned that the language of the Review's recommendations could be interpreted as meaning that the Digital Copyright Exchange would be deemed the only necessary port of call for satisfying diligent search. IFTA believes it should be made clear that the DCE would be only one of several authoritative sources that must be consulted in satisfying these criteria.

7. Role of collecting societies

7.1. Government's plan to publish minimum standards for voluntary codes early next year is helpful and we look forward to providing further comments on the content of this proposal.

7.2. Self-regulation or co-regulation have proven their usefulness and efficiency in other areas in the past and we agree with Government's positive assessment of the voluntary codes of conduct promulgated by the music industry, under the arbitrating role of the BCC. We also accept that a more robust co-regulatory approach may yield more effective standards across the board.

7.3. While collective management of rights has its role to play in the rights' licensing economy in circumstances where a free contractual approach based on individual negotiation over terms would not be practicable, we note that the instances favouring collective management for audiovisual product are far more limited than has been the case in music (e.g. cable retransmission). IFTA believes Government should not be tempted to associate copyright reform with a widening of collective management as a means of regulating rights transactions in the online universe.

8. Exceptions

8.1. IFTA is concerned that both the Review and the Response support the introduction of a broad exceptions regime to enable format shifting and private copying.

8.2. We regret that little effort to differentiate the potential impact of format-shifting on different sectors of the creative industries is reflected in either the Review or the Response. We reiterate that Independent film financing is reliant on licensing rights to specific uses, platforms and markets (e.g. DVD, Blu-ray, VoD) as a means of financing production. A blanket format shifting exception may affect value in those different segments of the film exploitation cycle, and produce a negative impact on the financing of new films. We urge the Committee to request Government to conduct a closer impact assessment of the introduction of such an exception on the audiovisual sector. We further believe Government should give serious consideration to exempt certain sectors from this exception.

9. Enforcement

9.1. IFTA strongly agrees with the Government's observation that there is no clear cut causality between the limited online offer of strong legitimate content (as alleged but not substantiated by the Review) and widespread digital theft. We suggest that the argument that one fosters the other is rhetorical: no industry in the world may successfully compete with piracy as a business model offering illegal content for free.

9.2. The proposal that Ofcom should establish benchmarks and data on trends in online copyright infringement is useful. The Government's IP Crime Strategy document has also come to our attention and we will be providing comments and suggestions on this paper at a later stage.

9.3. We welcome references in the Response to Government's commitment to fully implement the DEA's measures to combat peer-to-peer infringement. In particular, we welcome the proposed introduction of a £20 fee for consumers filing appeals, as a measure to discourage vexatious or futile appeals designed to paralyse the mechanism.

9.4. We note the Government's decision not to implement the site blocking provisions of the DEA, following formal advice from Ofcom. We also welcome the Government's stated intention to "continue to explore the issues raised by Ofcom's report and [../..] do more work on what other measures can be pursued to tackle online copyright infringement". IFTA believes strongly that unless the issue of piracy perpetrated by websites offering pirated content is tackled forcefully, there will be a huge gap in the UK's deployment to contain online piracy. IFTA would welcome a robust statement from Government to the

effect that it intends to continue to examine limited site blocking as a possible addition to the anti-piracy arsenal.

9.5. Finally, we are alarmed, by the premise in the Response that if the enforcement of rights is deemed either “uneconomic or unreasonable,” the relevant rights should necessarily be attenuated through limited exceptions. The justification presented in the Response is that not to do so would dilute respect for legitimate enforcement. We beg to differ: introduction of exceptions and limitations just as easily creates confusion about the scope of the creators’ exclusive rights and disdain for laws that may be characterized as unduly detailed and circumstantial. Furthermore, notions such as “uneconomic” or “unreasonable” are subject to considerable ideological and political inflexions and may fail to factor fully the need to maintain strong incentives to creativity and enterprise. We are concerned about this approach leading to a general drift towards resorting to statutory exceptions each time enforcement appears to present challenges.

5 September 2011

Written evidence submitted by the Initiative for a Competitive Online Marketplace (ICOMP)

1. Introduction

1.1. The Initiative for a Competitive Online Marketplace, ICOMP, welcomes this opportunity to offer this submission of evidence to the Business, Innovation and Skills Select Committee's inquiry into the Hargreaves Review of Intellectual Property and the Government's response to that Review. ICOMP members support efforts to advance core principles that we believe are essential to the growth of a vibrant, competitive online ecosystem – including strong respect for intellectual property rights (IPRs). IPRs form the basis for much of the investment needed to produce compelling content that is made available by authors, publishers, broadcasters, designers, musicians, artists and other creators online – making strong, balanced IP protections essential to a diverse, competitive, and sustainable online marketplace.

1.2. ICOMP has been closely following this IP review since it was announced by the Prime Minister in November 2010, and we are grateful to have had prior opportunities to present our views. Most recently, in March 2011, ICOMP filed a submission responding to the Government's call for evidence, in which we emphasised the importance of maintaining a harmonised IP framework across the EU and noted our concerns with regards to any changes in the UK IP framework that would prevent creators from realising the commercial value of their efforts or "would make money for one type of stakeholder while depriving other stakeholders of the ability to make a living."[1] While we support several conclusions contained in the Government's response to the Hargreaves Review, certain recommendations set forth in that response pose a risk, in our view, of significantly diminishing existing incentives for high-quality content creation in the UK and undermining the Government's broader goal of promoting online content and commerce.

2. About ICOMP

2.1. ICOMP has a broad and diverse membership of more than 70 companies and organisations brought together by our common interest in healthy online competition and sustainable growth of the Internet. Our membership includes content owners, ISPs, search engines and other online intermediaries, technology companies, advertisers, and publishers. Our members[2] include small start-ups, large multinationals, and a great variety in between including, here in the UK, the Premier League, the online news navigator OneNewsPage, and the vertical search and price comparison service Foundem, among other UK businesses. We seek to advance core principles that we believe are essential to such growth, including

[1] ICOMP response to UK Independent Review of Intellectual Property and Growth (7 March, 2010) http://www.i-comp.org/blog/?p=435

[2] ICOMP Members Directory http://www.i-comp.org/about/member-directory

transparency, privacy, competition, and respect for intellectual property rights.

2.2. Since its founding in 2007, ICOMP has devoted considerable resources to exploring the role of IP rights in promoting a sustainable and competitive Internet. Most recently, we authored a white paper on *Intellectual Property on the Internet: The Search for Sustainable Business Practices*, a copy of which is attached to this submission.

2.3. ICOMP is funded by member contributions as well as sponsorship from Microsoft. Burson-Marsteller acts as the secretariat. For further information please visit our website – www.i-comp.org.

3. ICOMP response to the recommendations

3.1. We welcome the UK Government's recognition that IP is "*the foundation for a substantial portion of the UK's innovation and economic growth*" *and "intensely valuable to the UK."* As we noted in our March 2011 submission on the Hargreaves Review, "[a]n IP system that rewards creators should not be seen as a 'barrier' to our digital economy but rather a key ingredient of its growth." We also agree strongly with the Government's conclusion that a 21st century IP regime must both respond to the challenges posed by technology *and* seize the opportunities for growth that technology presents.

3.2. We also welcome the Government's recognition that piracy remains a serious problem and its commitment to devote further public resources, including potentially police resources, to combat online piracy (especially where it is undertaken by criminal organisations or otherwise on a commercial scale). This commitment, like the Government's intention to explore ways to further support SMEs looking to access the IP system, will undoubtedly help to encourage more innovation and competition online.

3.3. Despite these and other helpful proposals, we are concerned that the Government's response, in calling for a host of new limitations on IP protections, fails to recognise the degree to which the existing IP rules promote a diverse and sustainable Internet economy. Specifically, the response overlooks what we believe to be among the greatest challenges to IPR owners online: that there increasingly is a breakdown in the "virtuous cycle" of the Internet that otherwise would benefit creators, online services and intermediaries, infrastructure providers, and consumers alike. Instead, there is a significant risk that, if certain of the proposed recommendations are adopted, companies with market power in key sectors of the online economy will have even greater ability than they do today to exploit this market power to capture the online value of content created by others and thereby further entrench their dominance.

3.4. This concern is especially pronounced in the areas of search, online advertising and related markets. As Ofcom has observed, "The main way

that consumers discover content on the web is via search engines."[3] This role makes search the gateway between consumers, on the one hand, and web publishers, content creators and brand owners, on the other. Search is the principle means by which many UK content creators are found online today, while online advertising is essential to the ability of these content creators to commercialise their content. Given the importance of search and search advertising to IP holders, it is noteworthy that in the UK, a single company – Google – holds an overwhelmingly dominant position in these markets. In the absence of measures to address this market imbalance, the Government's efforts to promote new IP-driven online businesses and business models are at risk.

3.5. Similarly, the response proposes to expand existing copyright exceptions, but is silent as to how Government will ensure that these reforms serve to benefit a multitude of companies rather than simply reinforcing the dominance of a few existing firms. The proposed new orphan works regime is a case in point. ICOMP strongly supports legislation to facilitate online access to orphan works, and we have actively participated in discussions at the EU level in support of solutions that advance the public interest in expanding user access and spurring innovation.[4] At the same time, it is critical that any such solution promotes competition by ensuring truly open access to books through multiple channels, including multiple private-sector channels. In this regard, we note that the Government's response does not address whether the proposed orphan works legislation would require parties that have digitised orphan works without the prior authorisation of the IP owner to provide access to these unauthorised copies to third parties on fair, reasonable and non-discriminatory (FRAND) terms. ICOMP believes that current experiences of large scale book scanning projects (in particular that carried out by Google) demonstrate that such access should be a fundamental principle in relation to orphan works and an essential safeguard for online competition.

3.6. Despite rejecting proposals for a new "fair use" copyright exception, the Government nevertheless gives strong support for a re-opening of the exceptions to copyright in the current EU copyright acquis. Going forward the Government has announced that it will actively lobby at the EU level for "further flexibilities" in the EU copyright regime. If other Member States do so as well, there is significant risk that a host of new proposed exceptions to copyright will be floated at European level. As with the fair use exception, these new holes in the copyright regime could be extremely damaging to the UK's copyright-based industries. Furthermore, there is no evidence that existing copyright protections are a barrier to economic growth or innovation or that additional limitations on such protections are necessary to address any barriers that might exist. Unless carefully tailored and specifically

[3] Ofcom, Communications Market Report (2010), at 266, http://stakeholders.ofcom.org.uk/binaries/research/cmr/753567/UK-internet.pdf

[4] ICOMP submission to the EU, *Facilitating Online Access to Europe's Literary Heritage: The Need for a Legislative Solution* (May 2010)

targeted to address proven problems, additional copyright exceptions could end up benefiting certain dominant firms that are aggressively lobbying for these exemptions while undermining the ability of countless thousands of UK content creators to develop sustainable businesses.

3.7. As well as voicing support for new copyright exceptions on the EU level, the Government's response states that the UK will move forward with a list of new copyright exceptions in UK law within the scope of the existing EU acquis (to quote the review, "the Government agrees . . . that the widest possible exceptions to copyright within the existing EU framework are likely to be beneficial to the UK."). These include a widened non-commercial research and library archiving exception, text- and data-mining exceptions, and a new exception for parody. As noted above, however, there is a lack of evidence that such exceptions are needed or that socially beneficial activity is not occurring in these areas due to the risk of liability under the current IP regime. Although the scope of the exceptions has yet to be determined, it seems clear that, if they are not carefully circumscribed, any positive impact of these exceptions could be outweighed by their negative impact on UK artists, authors, and publishers. Their impact therefore needs to be carefully assessed in advance.

3.8. With regards to the proposal to establish a new non-compulsory digital copyright exchange, to facilitate a digital market in rights clearance and to act as a source of information about rights ownership, further details are essential. For example, it has yet to be determined how its incentives will be structured for rights holders. The Government will hold further consultations on this topic before a report is published at the end of this year. These may be positive steps towards a more efficient system of online IP enforcement, but ultimately will depend on the structure of the exchange, where it is important for industry to be fully involved.

3.9. As we noted in our submission to the Hargreaves consultation, any change in the UK's IP framework must not exacerbate the current lack of competition in certain online markets such as search and online advertising, as doing so would make it even more challenging for IP owners to monetise their content — and thus survive — online. We encourage the Government to review its response with this in mind, and to ensure that the reforms under consideration ultimately serve to promote a competitive and sustainable Internet and to preserve incentives for the creation of diverse and high-quality content.

Written evidence submitted by Intellect

Intellect made a substantive submission to the Hargreaves Review and our position remains the same, we should however like to take this opportunity of drawing attention to some recent new evidence-based reports that we did not cite in our original response.

1. Oxera report "Is there a case for Copyright levies? An economic impact analysis" commissioned by Nokia and released 12 May 2011 full report available at http://www.oxera.com/main.aspx?id=9481. The Oxera study complements a recent paper by Brussels University professors, Patrik Legros and Victor Ginsburgh, "The Economics of Copyright Levies on Hardware" also commissioned by Nokia. See ECORE WP 2011-34 at http://www.ecore.be/discussion_papers.php.

   In short, the studies conclude that:

   a. Removing copyright levies would make all stakeholders better off and generate **additional welfare for the EU economy of up to €1.88bn per year**.

   b. From an economic perspective, the copyright levy system is not well suited to the digital age because it creates distortions and inefficiencies affecting consumers, device manufacturers and rights holders. **Levies hinder innovation, investment and the development of a European digital market**.

   c. **Rights holders can make significant gains from the removal of copyright levies because levies hold back the development of new digital services** thus limiting the growth of digital music sales and the effective compensation that rights holders can extract. **Oxera calculates that rights holder remuneration could increase by up to €626 million per annum in the EU, should levies be removed.**

   d. An increased offering of innovative digital services would contribute to the **reduction of piracy**.

   e. Countries with high copyright levies collections have worse performing music industries and often have declining production of domestic content.

   f. Copyright levies reduce the uptake of devices capable of purchasing legal digital music and offering innovative music/content services (e.g. sophisticated smartphones). This reduces potential revenue for content consumption, limits opportunities for new digital services and holds back consumption of new content.

2. ENTER report “Compensation for private copying: an economic analysis of alternative models” commissioned by Hewlett Packard dated July 2010.[1]

   a. A conservative estimate of the quantifiable costs resulting from **current Copyright Levy systems** show that they cause an economic **waste** of **at least 51.2 Cents for each Euro collected.**

   b. This report compares economic effects of current copyright levy schemes against alternative methods to compensate right-holders for private copying of their copyrighted works. The study shows that **if levies were placed on the copyrighted work itself rather than on the digital devices suitable for copying, then the financial welfare impact would be reduced from 51.2 to 19 cents per 1 Euro collected** and even less for other alternatives.

2 September 2011

1 http://www.ametic.es/media/Ou1/Informe%20Alternativas%20al%20Canon%20Digital_%20Ingles.pdf

Written evidence submitted by the Internet Services Providers Association (ISPA) UK

About ISPA

1. The Internet Services Providers' Association (ISPA) UK is the trade association for companies involved in the provision of Internet Services in the UK. ISPA was founded in 1995, and seeks to actively represent and promote the interests of businesses involved in all aspects of the UK Internet industry.

2. ISPA's membership includes small, medium and large Internet Service Providers (ISPs), cable companies, content providers, web design and hosting companies and a variety of other organisations. ISPA currently has over 200 members, representing more than 95% of the UK Internet access market by volume. ISPA was a founding member of EuroISPA, the European Internet Services Providers Association based in Brussels, which is the largest umbrella organisation of ISPs globally.

Introduction

3. ISPA supports the findings of the Hargreaves Review and we are pleased that the Government generally welcomed the recommendations that were made in the final Hargreaves report. We encourage the Committee to do to same and to ensure that, unlike the approach taken with prior reports on intellectual property such as the Gowers Review, Government stays on track and actually implements the recommendations. Below we highlight areas of the Hargreaves report and the Government's response that are of particular importance to our members.[1]

The Internet – The building block of a digital economy

4. The Boston Consulting Group estimated that the Internet contributed £100 billion or 7.2% of GDP to the UK economy in 2009 and in addition offered a number of intangible benefits to consumers and business, such as productivity impacts through lower transaction costs or economic impacts through e-Commerce. The Internet further offers the creative industries an excellent opportunity to develop new business models and reach broader audiences with little associated costs. ISPA is concerned that the current regulatory framework for the digital economy does not sufficiently take account of these benefits and instead prioritises enforcement as an alternative to digital licensing and modernised copyright law.

5. The digital age offers both challenges and opportunities for the content industry but we feel that recent legislation – such as the Digital Economy Act - failed to strike the right balance between enforcing copyright, educating users about legal alternatives and encouraging services and formats that are demanded by the consumer. In addition, focus on enforcement diverts resources away from the rollout of superfast broadband, one of our members' biggest priorities, as ISPs will have to cover 25% of the costs associated with running the DEA copyright infringement notification system. Whilst we recognise the need to protect copyright online and do not condone copyright infringement, its existence is largely due to the lack of fully-licensed services offering consumers what they expect and demand.

6. We believe that only a balanced approach that is driven as far as possible by objective evidence will ensure that both businesses and consumers can fully benefit from the opportunities that are offered by the digital age. ISPA accepts that ISPs are a stakeholder in this issue, but our members neither benefit from, nor encourage, users to infringe copyright law online and as such should not be financially liable for the cost of enforcing the copyright of another industry.

[1] Our initial response to the Hargreaves Review was not published on the IPO's website and can be found here: http://www.ispa.org.uk/files/exaxlncqxz.pdf.

The Hargreaves Report and the Government's response

7. **Hargreaves recommended that *'Government should ensure that development of the IP System is driven as far as possible by objective evidence.'*[2]**

8. We are encouraged by the commitment *that 'Government will give limited weight in IP policy-making to evidence that is not sufficiently open and transparent in its approach and methodology.'*[3] However, we query the Government's statement that the *'Review's suggestion that "the cost of IPR infringement is neither negligible nor overwhelming in economic scale*[4]*, while plausible, is therefore itself open to challenge.'* This statement seems to suggest that Government is not fully committed to evidence-based policy making. We hope that proposals such as the IPO's revamped research programme and Ofcom's work establishing benchmarks and data on trends in online infringement of copyright will go some way towards alleviating our concerns.

9. ***Hargreaves recommended that 'Government should pursue an integrated approach based upon enforcement, education and, crucially, measures to strengthen and grow legitimate markets in copyright and other IP protected fields.'*[5]**

10. Alongside its response to the Hargreaves Review, Government published a statement setting out how it plans to move forward with implementation of the Digital Economy Act. While we welcome the Government's decision to not bring forward site blocking measures under the DEA and to remove some of the costs that ISPs have to share, we still feel that the current regime relies too much on enforcement and neglects Hargreaves' recommendation that *'policy should balance measurable economic objectives against social goals and potential benefits for rights holders against impacts on consumers and other interests.'*[6] ISPs will still have to share 25% of the costs associated with running the DEA copyright infringement notification system which, as admitted by Ed Vaizey, the Minister for Culture, Communications and Creative Industries, will reduce the demand for broadband connections by up to 40,000.[7] Moreover, Government decided to introduce a £20 fee for subscribers to appeal against DEA copyright infringement notices. This seems disproportionate and fundamentally unfair as notices under the DEA do not establish guilt but simply state that an Internet account was allegedly used for copyright infringing activities.

11. Overall we believe that more can be done to rebalance the UK's IP enforcement policy. More should be done to encourage the creative industries to streamline the licensing of their content, embrace the opportunities of moving their business online and develop the products and services that meet consumers' expectations. Whilst this is primarily a market issue, there is a role for Government to play in encouraging more innovative licensing to ensure the services that customers are demanding are available. The creation of a Digital Copyright Exchange (which needs to provide effective incentives), better cross-border licensing and effective voluntary codes (plus backstop powers) governing the behaviour of collecting are promising proposals, but Government needs to make sure that these measures are implemented in an effective way.

Conclusion

12. Overall, we want to see a rebalancing of the situation, so that ISPs can concentrate on what they do best: investing in infrastructure to provide superfast broadband for the benefit of society and the economy. It is for these reasons that we welcome Hargreaves' recommendations and hope that Government and Parliament are committed to their implementation.

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[2] Hargeaves, Ian. 2011. Digital Opportunity A Review of Intellectual Property and Growth. Retrieved from: http://www.ipo.gov.uk/ipreview-finalreport.pdf, p.8.
[3] HM Government. 2011. The Government Response to the Hargreaves Review of Intellectual Property and Growth. Retrieved from: http://www.bis.gov.uk/assets/biscore/innovation/docs/g/11-1199-government-response-to-hargreaves-review, p. 3.
[4] HM Government. 2011, p. 10.
[5] Hargreaves. 2011. p 9.
[6] Hargreaves. 2011. p. 8.
[7] HC Deb, 16 February 2011, c799W.

9 September 2011

Written evidence submitted by Anita Inverarity

These are my thoughts and recommendations

The rights of visual artists need to be protected as we make our living from our creativity and uniqueness of product. With the rise of internet share sites which are valid for promotion it becomes ever more easy for work to be stolen and copyright breached. The artists work and their rights must have robust protections in place—many create for a living and not just for fun, these rights should be automatic.

- Artists should have the right to profit from their own work
- Artists should have the moral right to their work
- Copyright should automatically be assigned to the artist
- Due diligence should be a matter of course for orphan works
- Art should be protected in the same way and manner as music and writing
- Instead of curtailing artist's right to their own work, education about copyright and copyright infringements should take place
- The government should not bow to the pressure of Google or other interested parties that want to steal artists' right to their own work.
- The UK should assimilate its copyright and intellectual property laws with the rest of the EU
- Considering that the internet is already facilitating a 'take what you want' attitude the government surely should not support and sanction this attitude
- Loss of revenue due to the fact that artist are not 'allowed' to profit from their own work

7 September 2011

Written evidence submitted by Darrin Jenkins

I am a professional photographer who makes a living from creating and licensing images. My images have been used for poster campaigns as well as other advertising, online and in marketing material worldwide.

I have had many photographs been used without my permission (or licence given), some of which I have had some success in retrieving a fee for but most of the time it is not commercially viable to chase each offender (thief) as there are no punitive damages awarded by the UK courts, in fact it is often that the thief would end up paying less for the image throughout the courts than the licence fee that I would have charged in the first place.

We need a fast track court system as suggested by Sir Rupert Jackson in his report on improving court costs. If the photographer is not awarded some element of damages court costs can currently far exceed the settled sum.

We need:

A system of Punitive Damages similar to the USA

Strong protection of photographers right to be named as authors of their work, and strong protection of Metadata (copyright names / contact details embedded in the digital files)

Concerning Orphan Works: Laurence Lessing wrote : *“In my view, photographers and other existing copyright holders are right to be outraged at the proposal.”*

The copyright law needs to be clear and unambiguous, one of the frequent failures and costs in simple copyright cases in the USA are caused by lawyers’ arguments over their complex and broad Fair Use clauses. If companies are allowed to 'declare' found images as Orphaned then this will make it a lot harder to contest a breach of moral and copyrights in a UK court. This will have an impact on the photography business as a whole an damaging to the economy as there will less revenue created, not a recipe for recovery. This will just make big businesses easier to get free images when they are perfectly capable of paying a reasonable licence fee to the photographer.

A few more points:

The moral rights of authors are not automatically granted as in other EU countries. (Moral rights are a basic human right and are part of the law of copyright to ensure that you are, amongst other provisions, rightfully acknowledged as the creator of your works.)

Moral rights have still not been made un-waivable as in other EU countries. The right to be identified as the creator of a work should be absolute, the law should prohibit any person or organisation from requiring that the creator waive their moral rights. It is illogical to bring forth legislation for the licensing of orphan works when

the law as it stands has no provisions which will prevent or significantly reduce the creation of orphan works

No sanctions are proposed for the removal of digital copyright information from digital works. At present it is necessary to show that removal of digital copyright information has been done with intent to infringe before it can be recognised by the courts as an offence under current UK legislation. Yet worldwide, every day, millions of digital works are having their digital copyright information stripped rendering these works as orphans.

This is morally wrong, it is the equivalent of physically removing a signature from a painting, an act that all would agree was reprehensible. Yet Professor Hargreaves, knowing this, has recommended the commercial exploitation of orphan works. This will only make it more difficult than ever for creators to make a successful business when there is huge resource of orphan works to exploit, a situation which will only get worse as time passes.

The review proposes allowing orphan works to be used for commercial purposes. There is no proven need for orphan works to be commercially exploited, and Professor Hargreaves said that copyright law should be evidence driven. There is no published evidence that shows that UK industries are disadvantaged through being unable to commercially exploit orphan works. There is no doubt a desire with many sectors of the UK industry, such as publishing, to have commercial access to orphan works at a price and on terms below what the rightful owner would require. This is robbing Peter to pay Pay, where Peter is the creator. This is unjust and unfair. There may be a case to permit orphan works to be used for cultural purposes, such as in libraries or museums, providing that a precise definition of cultural use can be defined and agreed.

That remedies for unauthorised use are restricted for those who have not registered their works. Registering creative works at a national level is completely impractical in a global market. It will lead to anomalies of the type already exposed by the US system of copyright registration where a creators remedies for infringement are compromised if they have not registered that work in the USA. If every country were to go down that road, as could happen, creators would be in an impossible situation, needing to register their work in every country, but unable to afford the time and expense of doing so. If registration has to come into the equation it should be a global system

Creators are not given a level playing field with industry. Industry at present can strip digital copyright data from creators work, not credit them, require creators to waive their moral rights or risk losing a contract, assign their copyright or lose a contract, all of which impose grossly unfair terms on the creator.

Moral Rights legislation should be strengthened to make those rights automatic; to remove all exclusions; and to render the rights unwaivable in addition to them being inalienable as they currently are

Effective sanctions are needed against the alteration, stripping or removal of metadata (specifically for ownership and rights information)

A simple and affordable system to be established for pursuing smaller infringement claims and punitive damages for copyright infringements to be introduced into legislation

Artists rights have not been recognised as human rights by Hargreaves IP review. Both the UN and EU Human Rights act have declared that artists rights are also human rights.

6 September 2011

Written evidence submitted by Pete Jenkins

Summary

- Creators moral rights are a pre-requisite to underpin copyright
- Digital Copyright Exchange requires extensive research
- Extended Collected Licensing not for commercial publishing use

Pete Jenkins is a photojournalist with more than thirty years experience. 'Fleet Street' newspapers, magazines, books, Public Relations and New Media. From black and white dunk tanks to tethered digital shooting.

Formerly a sports specialist working in London, Pete is now based in Nottingham, East Midlands. His clients include the UK photographic press (amateur and professional); 'East Midlands' based businesses (local and international), unions, magazines, newspapers, and anyone else who requires his unique specialist skills.

When not photographing Pete is usually editing, but does find time to give seminars on a wide range of photo related subjects including stock photography and copyright.

Pete Jenkins is a campaigner for photographer/creator rights and want to see Moral Rights underwriting Copyright in the UK, Europe and the world. Photographic Imaging has taken a beating since 1985, and we need to stem the tide of attrition of rates, and the low respect, which so many now have for creators. Re establishing copyright as a basic human right will help us achieve this.

1. The Hargreaves Review, and the official response made to it has Ignored creators moral rights, including the right to be recognised as the author of ones work, and the right to be credited on reproduction of that work largely because this is not seen as financially important.
2. Unfortunately the right to be recognised as the author of ones own work, and for ones work to be credited when shown or published is the bedrock upon which creators base their business. Creators such as authors, photographers, and musicians (and many others) do not sell outright their work but licence it so that it might be used for a specific purpose. It is the licensing system that allows many people to enjoy a work, rather than just one or two, and also allows the creator to earn from his or her work.
3. In the UK at the moment one has to specifically state that one wishes to be recognised as the author of ones own work, and even if one does this, for certain publishing areas – newspapers, magazines and books, outside of the internet the largest pushing areas in which most creatives will be involved, there is still no legal obligation for the author to be credited. This means many thousands of created works

published ‘professionally’ are released into the world without the details of their creator.

4. This blatant (and unnecessary) orphaning of work, which means many millions of desirable works are published every year has contributed to what has been described by the library and academic sector as the ‘orphan works’ problem[1].

5. As the report and response both look at orphan works, and the government proposes brining in an orphan works ‘scheme’, it now highlights the blatant flaw in current UK legislation that requires not only creators to assert their right to be recognised as the authors of their own work, but even when they do this, still allows so many publishers to ignore this basic human right.

6. Orphan works legislation cannot realistically be considered until this absurd situation has been remedied.

7. With regard to copyright licensing the government talks of publishing minimum standards for voluntary codes to be put in place. It also talks of using collecting societies with regard to copyright licensing. These are both causes of alarm amongst creatives.

8. Minimum voluntary standards for publishing? Any standard that is voluntary is immediately a standard that does not have to be recognised, and sets itself up as something that can be ignored. The publishing industry needs much higher standards that need to be enforced. This would be for the benefit of both the consumer, who has seen publishing standards drop so low that very public legal action has been taken (phone tapping scandal), and the creator, who by the nature of being largely small business people with a low turnover and profit are frequently the victim of unscrupulous publishers who attempt to control the rates paid to the their suppliers, and who have been reducing rates in recent years[2].

9. It has been made clear that self-regulation does not work, most especially in the publishing industry; the overwhelming failure of the Press Complaints Commission is an excellent example[3].

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[1] http://www.ivir.nl/publications/vangompel/the_orphan_works_problem.pdf

[2] http://www.epuk.org/News/891/herald-times-face-more-industrial-action
http://www.epuk.org/News/919/bpc-survey

[3] http://www.independent.co.uk/news/media/press/pm-signals-end-of-press-complaints-commission-2309210.html

10. Collecting societies are excellent in assisting creators obtain secondary and tertiary rights for the reproduction and other use of created works, where it is a financial impossibility for the creator to collect rights payments individually. They work well for both the creator and the user. However, whilst collecting societies would be perfect for collecting the payments from say libraries and academia for permissions to digitise work, on no account could Collecting Societies be regarded as suitable for dealing with first use scenarios. Individual creators have terms and conditions, as do individual pieces of work. Some created works will have cost many thousands of pounds to create, whereas others might only have required minimal funding and time. These two individual pieces will inevitably be licensed at different rates, and there is no way of establishing this without recourse to the creator.

11. The orphan works problem as introduced to the publishing sector by libraries and academic institutions is this: *"Although national copyright laws in Europe often allow archives and libraries to engage in acts of digital archiving without the consent of the rights holders concerned, permission is usually required if the digitised content is to be disseminated or otherwise made available to the public*[4]*."*

12. Yet despite this quite clear and non-commercial description of the problem, the government is proposing bringing in a scheme for the commercial licensing of orphan works. Libraries and academic institutions do not require the commercialisation of orphan works according to their own definition.

13. In the United Kingdom today every citizen has the opportunity to be both a publisher and creator, and many millions take advantage of the facilities offered by social networking via the Internet to do both these things.

14. When members of the public publish their thoughts and photographs on sites such as Facebook, Twitter, BEBO, Flickr, MySpace etc, they do not do so expecting publishers to take advantage of their work. Yet according to the many definitions of orphan works used in relation to the Hargreaves report, and work not registered with the Digital Copyright Exchange for example will be regarded as 'orphan works' and therefore useable in and extended collected licensing scheme for orphan works.

15. Not only will ordinary members of the public not expect their work to be exploited, but they won't even be able to benefit from such exploitation as realistically they will not be part of any E.C.L. scheme

[4] http://www.ivir.nl/publications/vangompel/the_orphan_works_problem.pdf

(nor should they be). In addition no member of the public will be registering his or her work on the DCE database, which immediately creates a two-level copyright structure in the UK. The first and largely professional level, of those works registered in the DCE – what professional would not take up such an offer, and the second non-professional level which comprises most work published on the internet in social networking pages, yet which is easily trawled for material.

16. Newspapers and even the BBC already do trawl social networking sites for material that they believe is both free of copyright and the need to pay, even though this is clearly in contradiction of current copyright laws[5]

Recommendations

1. Moral rights in the UK need to be seriously bolstered and brought up at least to the standard of Germany. All creators should have the automatic right to be recognised as the author of their work, and all creators should have the right to a credit when work is published or displayed.
2. Moral rights should be endorsed and supported in law
3. Commercial use of orphan works is not necessary in order to digitise libraries of work.
4. All use of created works must be referred to the creator.
5. Extended Collected Licensing is not an acceptable option for creators, when it is being used to avoid contact with creators by would be publishers, or simply as an option to obtain 'low cost' material.
6. Members of the public produce created works everyday, no copyright solution should ignore their needs, requirements, moral, and human rights.

4 September 2011

[5] http://pigsonthewing.org.uk/bbc-fundamental-misunderstanding-copyright/
http://www.bjp-online.com/british-journal-of-photography/news/1938870/photographer-accuses-daily-mail-copyright-infringement
http://www.jeremynicholl.com/blog/2010/12/13/uk-daily-mail-faces-million-dollar-us-copyright-suit-from-mavrix-photo/

Written evidence submitted by the Joint Information Systems Committee (JISC)

"In the UK, exceptions have failed to keep up with technological and social change, leading to widespread consequences. Technology has expanded the potential for communication, research, learning and access to resources, but out of date rules mean this potential is not fully realised. The UK's world class universities – a sector of strategic importance to future growth, both as source of skilled people and knowledge – find this on a daily basis."

Professor Ian Hargreaves - Digital Opportunity: A Review of Intellectual Property and Growth

EXECUTIVE SUMMARY

1. The Joint Information Systems Committee[1] (JISC), the United Kingdom agency that supports UK colleges and universities in the innovative use of information communication technologies (ICT) in administration, education and research, very much welcomes the opportunity to respond to this Inquiry.

2. The JISC provides the UK with unique and competitive advantages in the innovative use of ICT across colleges and universities by supporting the development of shared digital infrastructures, services and innovation investment programmes. As the provider of the world-class education infrastructure JANET[2] network, provider of commercial digital content through JISC Collections[3], investor in a range of innovation activities including mass digitisation, open educational resources and digital infrastructure, provider of advice and guidance through JISC Advance[4], such as JISC Legal[5], and Innovation centres, such as the National Text Mining Centre[6] and Digital Curation Centre[7] , we have significant knowledge and experience of the emergent Internet Economy and the importance of Intellectual Property towards fostering innovation and growth.

3. JISC sees the contribution of UK colleges and universities towards innovation and economic growth as part of a wider, rapidly evolving and complex eco-system which includes a spectrum of new and emergent business relationships and models. Recent studies by Nesta in its "Annual innovation Report[8]," have valued Universities' knowledge exchange income (mainly patents) at £3 billion (2008/09) and the Universities UK report on "The impact of Universities on the UK Economy[9] "stated that they contributed £59 billion to the UK economy in 2009. Although UK colleges and universities are significant net contributors to UK GDP, at the same time, they face increased overseas competition. In a

[1] http://www.jisc.ac.uk/
[2] http://www.ja.net/
[3] http://www.jisc-collections.ac.uk/
[4] http://www.jiscadvance.ac.uk/
[5] http://www.jisclegal.ac.uk/
[6] http://www.nactem.ac.uk/
[7] http://www.dcc.ac.uk/
[8] http://www.bis.gov.uk/policies/innovation/annual-innovation-report
[9] http://www.universitiesuk.ac.uk/ParliamentaryActivities/UUKInParliament/Pages/economicimpact.aspx

digital age, students, researchers and others are attracted to either study and/or undertake research in economies which offer academic and scholarly freedom. Countries like United States, South Korea and Taiwan have encouraged their colleges and universities' innovation by adopting flexible exceptions to copyright. This permits, for example, researchers in the United States to invest heavily in data and text mining, particularly in the bio-medical sciences.

4. We believe that the emergent internet business models, the creation of open education resources, co-production of new digital assets, extensive open source software, data and text mining, mobile devices, APIs, linked data, shared services through cloud computing and other forms of "mash-up" collaborations, which extend across national geo—political boundaries provide UK innovation, education and research with unprecedented opportunities to compete internationally. However, these economic, social and technological innovations are endangered by the limitations of the UK intellectual property regime, which to a large extent inhibits rather than incentivises innovation and growth. Indeed, the unimplemented recommendations arising from the Gowers Review of IP represents a lost opportunity leading to continued legislative restrictions on the innovative with a consequent reduction in the economic benefits arising from the uses of copyright materials within higher and further education.

   "Copyright law was never intended to be an instrument for regulating the development of consumer technology. But when it can block or permit developments or applications of technology that is precisely what it becomes".[10]

5. Indeed, studies have shown that a flexible exceptions regime as found in the United States stimulates growth, creativity and innovation, in particular in the technology field. In particular, fair-use dependent industries combined grew faster than the economy as a whole between 2002 and 2007, rising 31% during this period and accounting for around 18% of the US economic growth. From 2002-2007, revenues grew from $3.5 trillion to $4.5 trillion.

6. Ultimately, the UK needs a modern copyright system that puts economic growth, competitive markets and commercial and social innovation at its heart. It should ensure creators, innovators, researchers and consumers can all capture the full range of benefits offered by the Internet and digital technologies. UK copyright law needs to be modernised and simplified to enable British researchers, entrepreneurs and creators to make the most of the opportunities provided by the digital age.

7. JISC is therefore delighted that Her Majesty's Government has decided to endorse all the recommendations made by Professor Ian Hargreaves outlined within his independent evidence-led review of Intellectual Property (IP) and Growth[11]. JISC was amongst other organizations from across the public sector which submitted responses to the Hargreaves Review of IP consultation[12].

[10] http://www.ipo.gov.uk/ipreview-finalreport.pdf
[11] http://www.ipo.gov.uk/ipreview-finalreport.pdf
[12] http://www.ipo.gov.uk/ipreview/ipreview-c4e.htm

8. JISC believes that the implementation of all the recommendations outlined in the Review will further easy, widespread access to information and resources, which will ensure that technology and information management are placed at the heart of research and education. In particular, JISC supports the following recommendations made by Professor Hargreaves:

    - Enshrining the copyright exceptions in law, so that they can neither be undermined by contracts or technological measures. This will facilitate the uninhibited creation and subsequent use of research.
    - Creating exceptions for format shifting, preservation and parody, implementing the proposed extensions to Copyright Exceptions outlined in the Gowers Review of IP, plus implementing all remaining optional exceptions permitted under EU Directives. This will help researchers legitimately access materials generated by third parties.
    - Developing an exception for Text and Data Mining, which will assist researchers in exploring, making connections between, and publishing analysed mined content.
    - Work towards solutions for Orphan Works. This will reduce the impossible overheads experienced across the UK's education sector in managing works where the rights holders are unknown or cannot be traced.
    - Regulating Collecting Societies to ensure that they operate transparent, fair and equitable schemes to enable greater use and publication of repertoires of creators that they represent.

9. JISC supports the swift implementation of all these recommendations to help create a robust IP framework which can optimise the impact of UK research and enable our world class universities to fully contribute towards the UK's innovation and growth.

10. **Removing the barriers to innovative research: An Exception for Data and Text Mining**

    Although derived data can greatly assist research, researchers are frustrated and hampered by the limited ways in which they can access and use data and information. This is because the complex and often ambiguous IPR issues associated with both the original text and data required for data/ text mining, as well as the terms of agreements with publishers can restrict this either contractually and/or by supplying the text in formats such as PDF which negate the opportunity to text and/or data mine. As a result, As Professor Hargreaves has stated, *"Text mining is one current example of a new technology which copyright should not inhibit, but does". And "…copyright in its current form represents a barrier to innovation and economic opportunity"*[13]

[13] http://www.ipo.gov.uk/ipreview-finalreport.pdf

11. The immense economic benefits of text mining are measurable and indisputable, despite comments by the Publishers Association to the contrary[14]. In 2001, Dow Chemicals merged with Union Carbide Corporation (UCC), requiring a massive integration of over 35,000 of UCC's reports into Dow's document management system. Dow chose ClearForest, a leading developer of text-driven business solutions, to help integrate the document collection. Using technology it had developed, ClearForest indexed the documents and identified chemical substances, products, companies, and people. This allowed Dow to add more than 80 years' worth of UCC's research to their information management system and approximately 100,000 new chemical substances to their registry. When the project was complete, it was estimated that Dow spent almost $3 million less than what they would have if they had used their own existing methods for indexing documents. Dow also reduced the time spent sorting documents by 50% and reduced data errors by 10-15%[15].

12. JISC welcomes the creation of a new exception for data and text mining outlined by Professor Hargreaves, which will greatly assist the UK research and education to maximise the value of mining for scientific and academic progress and offers the prospect of competitive advantage for the UK based research sector. JISC therefore recommends that Fair dealing with a work for the purposes of data analytics should not be an infringement of copyright or database right when extracting and reusing the expression of facts and figures held within a copyright work. Any making of entire copies of work, or copies substitutable for the original work necessary for the process of data analytics does not infringe any copyright or database rights in the work provided that it is not made available to the public or used for any purpose other than non-commercial research or private study.

13. JISC also supports the extension of section 29 of the CDPA (fair dealing for non-commercial research and private study) to include films, sound recordings and broadcasts. Given that a wealth of research material is now held in digital or analogue media rather than in print, researchers (particularly in the arts and humanities) are currently unable to make copies of audiovisual material from libraries and archives for the purposes of their own non-commercial research and study. In most cases, researchers have no other access to these materials other than by seeking out specialist archives containing rare footage or collections of sound recordings. The ability to copy and use them at their place of work would enrich their research and greatly reduce the costs to the public purse by eliminating the need to make several trips to listen to sound recordings and/or view films.

14. **The significance of contract law over copyright law**
Technological protection measures and contracts often prevent legitimate researchers from accessing the materials they require. This is supported by evidence prepared by the British Library in analysing 100 contracts supplied by publishers to the BL, which revealed that 90% were shown to undermine the

[14] http://www.publishers.org.uk/index.php?option=com_content&view=article&id=1843:response-to-hargreaves-kicks-the-can-down-the-road-&catid=499:general&Itemid=1608

[15] Fan, W., Wallace, L., Rich, S., Zhang, Z. (2006) Tapping the power of text mining. CACM 4(9): 76-82.
see also: http://www.computerworld.com/s/article/85113/ClearForest_Scaling_Dow_s_Paper_Mountain

Copyright Exceptions[16]. It is deeply concerning when outputs of publically-funded research are commercialised and often thereby become inaccessible to the organisations who have either funded it or facilitated its development. The British Library is not alone in paying more for rights it should be entitled to under the law, as well as resulting in unnecessary restrictions on researchers, students, lifelong learners and the public at large to digitised content.

15. These restrictions have been reported to arise in specific situations and result in the following limitations:

- The inability to access information resources relevant to one's research but that are not available in an institutional library. According to Outsell, ("How researchers secure access to licensed content not immediately available to them") and to a second report, "Information access for members of research pools in Scotland", prepared by Key Perspectives, over 40% of researchers said they were unable readily to access licensed content at least weekly and 2/3 at least monthly as the library had not been granted a license for the content in question (usually the main reason being the cost of licensing arrangements or restrictions imposed upon licensees).
- The unavailability of content has an impact (in terms of (i) delay in research and delay in the submission of papers, and (ii) hindrance of collaborative working) on the research in 80% of the cases and in almost 20% of those cases, that impact is significant.
- The number of researchers using libraries other than their own institutional ones has decreased from 2001; there is evidence that this is due to the high costs involved in visits to other libraries. It is reported that amongst the barriers for access to e-resources, "licensing restrictions" is the most common one.

16. **Recommendation:**

As Professor Hargreaves has outlined: *The Government should change the law to make it clear no exception to copyright can be overridden by contract.* [17] Specifically, UK law should be amended so that it achieves the same objectives as the Irish Copyright Act 2000 Clause 2(10) which ensures that no contract can over-ride an exception to copyright. Belgium and Portugal have similar clauses in their copyright acts[18], and having such a clause in UK law would be compatible with the UK's international obligations and treaties the UK has signed up to. Without such regulatory measures (and similar measures that prevent the use of technological protection measures to prevent *bona fide* access to digital materials), access to publically funded content of benefit to teaching, learning and research will continue to be locked down to the detriment of innovation. There is already precedent for such clauses in UK copyright law, i.e., sections 296A and 296B of the CDPA.

[16] http://pressandpolicy.bl.uk/imagelibrary/downloadMedia.ashx?MediaDetailsID=691
[17] http://www.ipo.gov.uk/ipreview-finalreport.pdf
[18] Office of the Attorney General: http://www.irishstatutebook.ie/2000/en/act/pub/0028/index.html IRELAND. Copyright and Related Rights Act, No. 28 of 2000 Part I: S2(10) Where an act which would otherwise infringe any of the rights conferred by this Act is permitted under this Act it is irrelevant whether or not there exists any term or condition in an agreement which purports to prohibit or restrict that act.

17. **Removing the barriers to teaching**

The estimated total cost of digitising the collections of Europe's museums, archives and libraries, including the audiovisual material they hold is approximately €100bn, or €10bn per annum for the next 10 years, factoring in a cumulative efficiency gain of 0.5% per annum. The cost of preserving and providing access to this material over a 10-year period after Digitisation would be in the order of €10bn to €25bn, provided that centralised repository infrastructure is made available for the purpose.[19] This, compounded by the problems of academic staff in the UK who will often experience difficulties and expense in seeking and clearing permissions to use material, means that the much time, money and effort will be spent in the UK particularly in the arts and humanities, in trying to obtain copyright permissions to use creative content.

18. This is likely to include the time spent in trying to trace rights holders associated with Orphan Works. Orphan Works (works for which the rights holders are unknown or cannot be traced) represent a significant barrier to research and innovation, using up disproportionate amounts of precious public sector resources at a time of austerity. A 2009 report commissioned by JISC and the Collections Trust, **"In From the Cold"[20]** came to the following conclusions:

- The average proportion of Orphan Works in collections across the UK's public sector was measured at 5% to 10%, whilst in certain sectors (archives) this proportion was higher.

- Individual estimates suggest that there are single organisations in the survey sample that hold in excess of 7.5 million Orphan Works. It appears likely that this sample of 503 organisations could represent volumes of Orphan Works well in excess of 50 million across the UK's public sector.

- Organisations spent on average less than half of one day tracing rights for each Orphan Work. Therefore it would take in the region of 6 million days effort to trace the rights holders for the 13 million works represented in the survey, equivalent to 16,000 days. In certain high profile projects, some organisations had spent large resources of time on chasing rights holders.

- At least 35% of organisations across all sectors, regardless of the size of their collections, do not have any specific resources in place to help deal with Orphan Works.

19. **Recommendations:**

JISC supports the implementation of the outstanding education exceptions from the Gowers Review as well as the expansion of the defences in UK copyright law to include all exceptions and limitations as provided for in Article 5 of the EU Information Society Directive 2001/29. In particular, these exceptions must be medium and technology neutral, consistent with the use of ICT across teaching, learning and research and compatible with the implementation of

[19] http://ec.europa.eu/information_society/activities/digital_libraries/doc/refgroup/annexes/digiti_report.pdf

[20] http://www.jisc.ac.uk/publications/reports/2009/infromthecold.aspx

such measures across other EU member states. Without such provisions, (for instance, the UK, unlike Germany, has no provision in law to legitimately facilitate format shifting), UK innovation and research is presented with barriers not faced by our economic competitors and therefore placed at an economic disadvantage.

20. JISC also support the development of solutions to deal with the problems of all categories of orphan works and in particular: the *"…two distinct situations to consider: mass licensing of collections which include some orphans, and use of individual orphan works."*[21]

21. Any mass digitisation of in-copyright commercially produced material needs to be supported by the ability of organizations to negotiate licences with collecting societies for the use of any Orphan Works which might form part of the repertoire of digitised materials. JISC supports the legal extension of the role of collecting societies in this important activity, whilst also recommending that collecting societies are regulated to ensure transparency and accountability.

22. The majority of works that sit in the nation's university special collections, libraries, museum and archives were not produced for commercial purposes but are unique unpublished records, documents, sound recordings and videos.[22] Subsequently, these organisations should be provided either direct licence from government or an exception to use individual orphan works. Without such a provision, much of the nation's historic collections are unlikely to be made available digitally.

23. Another possibility could be the expansion of the current provision in the CDPA for orphan works created before 1989; Schedule 1 paragraph 16 of the CDPA permits the making of a copy of an unpublished literary, dramatic or musical work (together with any illustrations) that is available to the public in a library, museum or other institution (such as an archive), that is at least 100 years old and whose author has been dead for at least 50 years, for the purposes of research or private study or with a view to publication. It also permits a single publication of the work so long as the identity of the copyright owner is not known to the publisher and the subsequent broadcasting, performance or recording of the work. This provision should be amended so as to apply to:

    a. artistic works, films and sound recordings;
    b. unpublished works earlier than 100 years after creation (70 years, in line with duration periods);
    c. to published works that have not been commercially available for 20 years;
    d. online publication;
    e. and to permit second and subsequent publications, so that a work may be published online by, for instance, a library or archive and then be re-used by a user.

[21] [21] http://www.ipo.gov.uk/ipreview-finalreport.pdf

[22] http://www.jisc.ac.uk/media/documents/publications/infromthecoldv1.pdf JISC: In from the Cold – An assessment of the scope of Orphan Works and its impact on the delivery of services to the public.

24. To prevent orphan works from arising so easily, for unpublished works in copyright until 2039: apply the standard terms universally; this has been done in other European countries, including Ireland where (until recently) unpublished literary works had perpetual protection as they did in the UK until 1989. Similarly, the requirement that one must assert the paternity right should be removed; it should be automatic, as it is in all other countries that have adopted moral rights.

25. **The Case for an Exception for Digital Preservation**[23]
    The UK currently has no nationwide preservation strategy. Much digital preservation research and development activity in the UK higher and further education sector has been supported by JISC. A number of JISC-funded activities have focused on rights issues in digital preservation. For example, a study on archiving electronic journals was funded under this programme. This study included eliciting views on the archiving clauses of the JISC/NESLi model licence for journals. The study found that concern about continued archival access was one of the two most cited barriers for libraries to move to electronic only access to journals with any degree of confidence. The Digital Images Archiving Study concluded that "all images within a preservation system must have complete permission clearance, for any current or possible future use, in perpetuity; or, there must be a built in facility or process that enables permissions to be revisited in response to user needs". In some cases, preservation institutions may want to make microform copies of digital material some types of which are machine re-readable. Librarians and archivists will want to preserve all sorts of digital content, including recorded sound and moving images.

26. The practical effect of current copyright and related laws is that collecting digital content that is in copyright for preservation purposes through Web archiving, copying digital content to storage media and reformatting it will require the permission of right holders. Since there is not yet statutory deposit for digital publications in the UK, copying carried out on voluntary deposited material will also require permission from right holders. The preservation exception does not seem to be adequate for digital material and recorded sound and moving images cannot be digitised for preservation purposes under this exception. Since digital preservation cannot be carried out effectively under current UK copyright law exceptions, it is necessary to obtain licences from right holders. There is no blanket licensing scheme for digital copying for preservation purposes, which is time consuming, expensive and often futile. Ideally, the preservation process for items has to start on receipt by the library or archive not when deterioration has set in. As time goes on without an exception for preservation, as recommended in the Gowers Review of IP, the risk of losing parts of our digital heritage are increased.

27. **Recommendation:**
    JISC supports the implementation of an exception for preservation for all material irrespective of medium to ensure that important digital content is not

[23] Dr Adrienne Muir in the International Study on the Impact of Copyright Law on Digital Preservation http://www.digitalpreservation.gov/library/resources/pubs/docs/digital_preservation_final_report2008.pdf

lost forever, in accordance with Article 5.2(c) of the Information Society Directive 2001/29.

Conclusions and recommendations

Copyright law risks becoming a law that is ignored, or viewed with contempt by users in the near future if policy measures and legal reform are not put in place to reflect education's and research's *bona fide* use of digital media and technologies. Ultimately, copyright law needs to be re-cast in order to reset the balance between the public and private sector, creators, educators, researchers, the creative industries and end-users.

Ultimately, we need a modern copyright system that puts economic growth, competitive markets, educational, commercial and social innovation at its heart. It should ensure creators, innovators, researchers and consumers can all capture the full range of benefits offered by the Internet and digital technologies. UK copyright law needs to be modernised and simplified to recognise and enable British entrepreneurs and creators to make the most of the opportunities provided by the digital age.

Other countries within the European Union have a more permissive attitude towards exceptions to copyright and/or orphan works, in particular Belgium, Republic of Ireland , Hungary and Portugal. Outside the EU, Canada, the USA and New Zealand also have a more permissive approach. We risk being left behind by these countries by the UK's more regressive approach to the detriment of the UK's education sector's contribution to innovation and growth.

In this submission, we have identified a number of areas where the law as it currently stands presents unnecessary barriers to the use of copyright works for the benefit of society.

Key Principles

1. We need a simpler, quicker and more transparent way to obtain licences to use copyrighted material in the UK and across Europe. This might be achieved through the proposed Digital Copyright Exchange.

2. Copyright laws must stimulate education and research, Innovation and long term business growth.

3. Copyright laws must be technology neutral to cope with the future.

4. Contracts should not create barriers to the use of copyrighted works, and in particular, must preserve all exceptions to copyright enshrined in the law.

We look forward to hearing the results of the committee's deliberations on this vitally important issue for UK competiveness in the digital age.

Written evidence submitted by Gavin Kemp

1. **Summary:**

2. This document gives:

   - An outline to my photographic business, it details the sectors I work in.

   - It gives a details of how the Hargreaves Review will affect my business at a practical level, both in areas of my day to day work where it will add cost and reduce the protection afforded to my clients images.

   - There are other details of my personal work that will create an archive and which will contribute to my own pension provision, and how the reduced protection given to me and to other photographers will affect my/our pension incomes.

   - The latter part of the document provides a two part solutions to the problem of Orphan works. The first part solution being licensing all those who wish to reclaim works previously considered to be orphan works.

   - A second part of this solution is the identification of work by the legal requirement for metadata to be present in all images intended for commercial exploitation.

3. **Details about my business.**

4. I am a freelance photographer working in the fashion industry, based in the Midlands and London, my was company started in 2004 and became my photographic business in 2006, in 2009 following the completion of an MA in Fashion Photography at London College the business has grown. I also possess an MSc in Marketing Management from previous employment. I have worked in or have had first hand involvement in the creative industries for approximately 25 years.

5. **My Current Practice and the Implications for me and my clients of the new Hargreaves Review proposals.**

6. My work falls into 2 categories, firstly commissioned work for clients, secondly my personal body of work. My client work is for fashion designers, brands, on-line sellers and other clients. My personal work and archive is the work I produce for my own personal exploitation that is for exhibition and publication, it also that provides a vehicle for my own creative enquiry and expression. My business has 2 clear strands to it, my client work and my personal work.

7. The seasonal nature of designers collections, and commercial collections produced by clients means that the longevity of the revenue streams from client work is dependent on new seasons and replacement collections for new work to being generated. That in my commercial activity is the expected route for my new business to be generated.

8. As the proposals in the Hargreaves Review stand to protect my clients images, rather than add value, it adds cost as the business will need to charge clients to put their work on databases to register owner ship, if for no other reason than the time taken to register work. This process

rather than adding value will adds cost, this is not adding profit eligible for taxation but creating a tax neutral position, if these costs were not to be passed on they would be costs set against tax and come out of profit and therefore taxable revenue available to the government will fall.

9. There is already considerable deliberate orphaning of work produced by fashion photographers. This usually takes the form of the routine and systematic scanning the pages of the main high street fashion magazines, these scans being made available on-line. In some cases the creation of the original work can run into tens of thousands of pounds (and in a few exceptional cases potentially more). As my business grows and my work continues I expect this to be a problem I will need to deal with within 3 years.

10. The nature of my personal work is very different from my commercial work, this is artistic work, intended for exhibition, publication through books, on line, and for private sale. This growing body of work and the archive generated will increase over the next 15 years. It is expected to provide me with income that can contribute to my pension and upon retirement provide further revenues from sales. The proposals in the Hargreaves report provide others with access to my work that will not allow me to protect my pension. Every photographers archive is their pension, weakening this revenue potentially provides a liability to the state through the benefits system.

11. With no protection of my moral rights to my work, no penalty on those who remove the metadata in my work, and no protection of my property rights in my work (in the from of copyright) that is clearly in breach of Article 1 of the First Protocol of the Human Rights Act 1988 as defined and identified in the case of 20C Fox vs. BT this year, I can't protect my work and revenue.

12. As a working professional photographer I am aware that as defined by the copyright, designs and Patent Act 1988 copyright is a property right. This right is protected through the Human Rights Act. The importance of this has been shown in of 20C Fox vs. BT where The Hon. Mr. Justice Arnold made the clear link between Copyright and the Human Rights Act. To ignore this simply provokes legal challenge.

13. The Human Right Act in protecting copyright is protecting people who are seeking to generate business in the UK, who are seeking to exploit and grow their businesses. These businesses are taxable, paying corporation tax, VAT, and the individuals within them paying tax on their income. To threaten this has the potential to reduce taxation payable to the government.

14. It is very clear that through the Hargreaves Review and the weakening or removal of the protection that I am currently afforded through existing legislation, it will reduce my own ability to make provision for my old age through work currently being produced. There are also potential losses to The Exchequer that will need to be mitigated before the changes in legislation may be deemed a commercial success for the Government.

15. Solutions

16. Solving the Orphan Works Problem whilst also creating new businesses and new technology for exploitation.

17. There is a clear need to enable a large number of archives of Orphan Works to be exploited where the creator of original work can't be found. For many organisations (museums, educational establishments etc) these are already held as physical items, not having access to

these digitally is clearly a nonsense.

18. An manageable route, that is already proven in many areas is to licence certain groups or organisations to digitise what are currently orphan works to bring them back into commercial use.

19. Other areas where licensing works well and is controlled at one extreme 'Super Complaints' where only designated organisation can a super Complaint. In a mass market to the licensing of sellers of alcohol is mass solution for a large number of providers. There are many existing licensing models that can be quickly and readily applied.

20. A licensing system for prescribed groups or organisations to digitise orphan works will provide a controlled and managed solution to this problem. This approach will if the UK were first to implement it ahead of EU proposals in 2014 create a specialist body of knowledge, technology, services and new businesses that can be sold into Europe as EU copyright changes come into force over the coming 10 years.

21. Depending on how a licensing system was designed and managed it would create new specialist businesses solely or the digitisation of large and small archives and other collections.

22. An in many other environments licences are provided at a price, the price of a licence can be determined by a number of factors, these could include: the size of the organisation, if it’s a private commercial organisation, a public body, a charity, a museum. It could also be determined as a single or multiple licence based the type material to be digitised and reclaimed (still photographs, film, paintings or other items), A further determinant could be the expected commercial value of that licence to an organisation whose business is the digitisation of material and the expected commercial reward gained.

23. A licensing process will have the additional benefits of providing codes of practice, direction and leadership from the body providing licenses, industry regulation, plus the most important benefit of all it could be made to be entirely self funding.

24. Solutions - Metadata and Deliberate Orphaning of images.

25. Valuable items open to be stolen such as cars are required to be identified in a number of ways, Number plates, VIN numbers and identifiers, similar technologies are applied to other items of plant and equipment and other items of property. It is easy to steal images and with the low technical demands of the internet easy and relatively risk free to exploit them once stolen.

26. Metadata can be directly compared to an images VIN number, number plates and other serial numbers carried on the vehicle.

27. Stripping the meta data from an image is simple process, this process quickly and deliberately ‘orphans’ images.

28. A better approach would be to require all images intended for commercial exploitation to be required by law to carry meta data, and for it's removal to be made a criminal offence. It is easy to add metadata. Information to be carried by law could include the details such as creator, contact details and serial number of the camera used for the creation of the image and date to be found in each image for commercial exploitation.

29. This would then allow for a legal requirement for every image that is used in the UK for

commercial exploitation can only be used if contains the original creators metadata. Without this data it would be a criminal offence to use the image. This would put any user of an image in any in breach of the law if the image was used. This will protect the artist and simplify the search process users of image, and users of images would be able to do so with certainty.

30. Adding meta data is a simple process and can be done by the artist. For this to be required as of say January 1st 2015 it would by default identify all images available for commercial use or exploitation. This approach would create new images, new work and additional stock will need to be built up.

31. This approach will also protect large numbers of people creating new images every year that lack meta data – including unknowing members of the general public and members of the amateur photography community who do not routinely add meta data from having their images stolen and used. It will also protect images never intended for commercial use. This is the easy solution that protects the greatest number of people, and make the safe and legitimate exploitation of images intended for commercial use very easy.

32. Communication of the message that if an image has no metadata as of a certain date it is not available for commercial use is a simple message with no areas for interpretation. This is both a simple and practical solution that in one go allows for the protection of the artists moral rights, and also sits neatly with Article 1 of the Human Rights Act.

33. Together these two solutions will: allow access to vast numbers of works and archives not currently available, do not require the costly creation of data bases of vast numbers of works that may never get resold. It also avoids the creation of mass libraries of original works that may never be used or reproduced. That is in effect creating a library where there is an exponential growth and unrestricted growth in the numbers of 'books' turning up at the doors.

34. This solution neatly sidesteps any implications of the Human Rights Act that has already been demonstrated as relevant in this area as copyright is a property right as defined by the Act.

35. Using this approach will stimulate the creation of new services and technologies that can be sold into Europe as the intellectual property legislation changes in the EU, giving the UK a competitive advantage having had opportunity to test and develop it first.

36. This provides new streams of revenue for the government, thorough licensing, new businesses and new streams of revenue to existing business that will be subject to taxation. These new streams of revenue will be a clearly identifiable as a measure of the success of the changes in the legislation that ministers could rightly claim the credit for.

37. On a bigger scale it also provides a model that could be suitable for consideration at a European level that follow in the years after implication of the changes to legislation in the UK.

38. The power of the simplicity of these two solutions.

39. These two solutions provide considerable benefits with careful consideration, (that is both hidden and easily overlooked by the simplicity of the two individual elements), together solve all the problems of Orphan Works, and associated difficulties faced by photographers as the proposals currently stand. They also directly brings revenue to the government, whilst also allowing for other streams of taxation.

4 September 2011

Written evidence submitted by Richard Kenward

I've been a professional photographer working for industry and the world of fine art since 1963.

- Moral rights
- Identification of ownership of photographs
- Reasonable financial redress for unauthorised use of photographs
- Human and artists rights

1. The moral rights of creators have still not been made unwaivable as in other EU countries.

2. The identification information that enables the tracing of the copyright owner of creative material (metadata) can be removed with impunity by those who feel so inclined with no sanctions whatsoever unless it can be proved that it was their intention to deceive by so doing. This is almost impossible in most cases to prove and the cost both financial and time wise of bringing a sucessful action is beyond the resources of most creative workers. This renders creatives' material as "Orphans" Also the review proposes allowing orphan works to be used for commercial purposes further undermining the many hundreds of thousands of creative workers here in the UK. I understand that there are very reduced remedies for unauthorised use where the work has not been registered. It is going to be a huge burden for in particular professional photographers to have to register every picture that they produce. This will be very difficult for a busy photographer and even more so in the case of an amateur, who is not likely to understand the need and is going to be penalized.

3. Many in big business already take advantage of the inadequate provisions for redress by working on the basis that the penalties for being caught stealing the work of creatives makes it well worth the risk. This is because the small man/women has inadequate resources both in time and financially to take them on, and the best they can expect for their trouble is obtaining what was their right in the first place. There should be punitive damages to protect the creator to put a stop to this abuse. Just imagine a situation where you are caught walking out of the door of a shop with things you have failed to paid for, in the knowledge that if caught all you will have to pay is the cost of the goods. This is where many in the creative industries find themselves today.

4. Artists rights have not been recognised as human rights by Hargreaves IP review. Both the UN and EU Human Rights act have declared that artists rights are also human rights. Creators are not given a level playing field

with industry. They are very vulnerable yet have a significant part to play in the recovery and the prosperity of the UK.

Conclusions

The implementation of the report as it presently stands is likely to result in great damage to all who work in the creative industries. In particular the one men bands and small companies who make up the majority of workers in the creative industries, who through their dedication and brilliance enrich and bring prosperity to our great country.

5 September 2011

Written evidence submitted by Peter Kindersley

As a professional photographer that has seen the industry change quite a bit over the last 10 years, and work has become even more difficult, I want to make my voice heard that I reject what the government proposes as I make a living out of selling my images and keeping track of where and when my images are sold, as I spend a lot of money and time, creating new and marketable images, the last thing I want is to see my copyright as an artist challenged. It's not fair and it's not right. I very much doubt the government would give away any of its hardware for free just because it got lost.

5 September 2011

Written evidence submitted by Jonathan Knowles

Main Points

1. Commercial use of Orphan Works removes my human right to control my property
2. Commercial use of Orphan Works risks making me breach my contracts with my clients and suppliers
3. Lack of discussion on Moral Rights
4. Concern over what constitutes a diligent search
5. Concern where liability will fall if a revenant author appears (especially from abroad)
6. Concern over Extended Collective Licencing
7. Lack of punitive damages for copyright infringement

Brief introduction about Jonathan Knowles

Jonathan Knowles is a commercial photographer operating in the advertising field. He is also a member of Stop 43.

He is known Worldwide for his very striking liquid and still life photography and has received numerous awards across the globe. He has been listed in the Top 200 Advertising Photographers in the World for the last eight years and has recently had work published in the '100 Best in Photography' book. He is now one of the 10 most awarded winners of all time at the New York based Graphis Awards.

The business has three full time employees, and uses several freelancers as required. It has a turnover of around £1million per year. On average 40-45% of that turnover comes from clients outside the UK, though the majority of the work shot for UK clients will also run in other parts of the World.

In the UK, Jonathan is probably best known for his creation of the O2 bubbles. He has also photographed a number of well-known faces that include the current Prime Minister, Jonny Wilkinson and Dawn French.

Explanation of Main Points

1. Commercial use of Orphan Works removes my human right to control my property

Copyrights are property rights protected by Article 1 of the First Protocol of the European Convention on Human Rights, as also expressed in Article 1 of the First Protocol of the Human Rights Act 1998.
This fact was reaffirmed in the ruling in the 20C Fox vs. BT case on 28 July 2011. Any exception to this would neither be proportionate, nor in the public interest.

My work can very easily become orphaned, either deliberately or not, removing any identifying marks showing that I own it. As an example, no photograph leaves my studio without full metadata attached to it (Copyright information, owner's address, website etc), yet there are thousands of my own images on the internet that have had this metadata stripped by whoever, creating Orphans.

Currently there are no proper sanctions to punish someone for doing removing metadata, thereby orphaning my work, as it needs to be proved that the removal was intentional. This is almost impossible, and whilst this situation exists many of my images would be found and used without my knowledge, and could well be used to endorse causes to which I would not supply imagery at any price, if commercial use of Orphans is permitted. This brings with the risk that somebody who wants to use one of my images will intentionally orphan it, and then buy a licence from the proposed UK licencing body for a nominal fee, rather than negotiating a proper commercial fee with me for the licence they want.

Cultural use v. Commercial use

Cultural Use encompasses viewing and enjoyment as well as cultural enrichment, including research and education. It also allows museums and cultural institutions to use whatever means necessary preserve their archives. Archive preservation has been raised as a problem in the report under current rules; as long as it does not include consequential commercial exploitation, no sensible artist has a problem with archive preservation. At our meeting with the IPO last week, their representatives freely admitted that non-commercial use of Orphan Works can stimulate growth.

However, the allowance of Commercial Use of Orphan Works amounts to the largest enforced transfer of wealth from ordinary people to the powerful since the enclosures.

Control of private individuals' intellectual property will be removed from them, and it will be aggregated and exploited at minimal cost by larger and more powerful institutions. Commercial Use of orphan works will give private and state enterprise access to intellectual property that has largely been stolen, or misappropriated. For example, any image uploaded to the BBC has its metadata stripped in direct contravention of the Copyrights, Designs and Patents Act 1988, as does any image uploaded to Facebook. These images therefore have been automatically orphaned, and the organisations in possession of them aim to exploit them. Twitter's new photo service is quite open about its metadata stripping, and by uploading users agree to give Twitter a licence to exploit the work.

Commercial Use of Orphan Works undoubtedly breach Artists' Human Rights to control their property, and will legitimise commercial theft.

2. Commercial use of Orphan Works risks making me breach my contracts with my clients and suppliers

Almost all of my commissioned work involves granting exclusive 'licences to use' to my clients in specific territories, specific media, and for a limited duration. The permitting of Commercial use of Orphan Works would mean that someone could find one of these, and if it were a conceptual rather than a product specific image, use it commercially. I cannot imagine that O_2 would be happy to see one of their bubbles being used commercially by any other organization, whether in the telecoms sector or not; and there are literally millions of copies of the bubbles that I shot for O_2, on the internet, that have been orphaned.

On a human level, this is even more serious where models are concerned. When I use a model in a photograph, I pay a fee, and secure a signed model release with specific permitted uses listed. The fee reflects the extent of the usage purchased. A model's face is his/her livelihood, and sudden over-exposure without proper remuneration will kill a career. The licencing of Orphan Works for commercial purposes is a real problem for these people.

If I cannot guarantee exclusivity to my clients, through protection given by copyright law, then there is every chance that international clients will go and shoot work in a country where protection is more certain, such as the US, where registration with the USCO will guarantee punitive damages against infringers, and deter infringement.

3. Lack of discussion on Moral rights

The Hargreaves Review was expressly told to avoid Moral Rights, but these are inextricably intertwined with any discussion on copyright, and bring in the human rights aspect.

Moral rights are not automatically granted in the UK as they are in other European countries. Moral rights can be asserted, and I have done that to object to reworking of my images with which I do not agree, but I had to assert them to do so. If Moral rights were automatic, and unwaivable as they are in other European countries, the creation of orphans would be reduced, as initial users of an image would have to credit the creator.

4. Concern over what constitutes a diligent search

At a recent meeting I attended on behalf of Stop 43 with representatives of the IPO and others, we were told by the IPO that the Digital Copyright Exchange proposed by Professor Hargreaves would not be in the consultation, as they do not propose to put it in the legislation.

If the commercial use of orphan works is to be permitted, one of the key criteria in granting a licence is to show that a diligent search for the author has been done. The definition of what constitutes a diligent search is crucial to this, as is the question whether it is EVEN POSSIBLE to do a diligent search in the modern World. There are

already approximately six billion images on Flickr alone, many libraries with several million images each, aside from all the billions of unaggregated pictures from professionals and amateurs alike. The DCE proposed by Professor Hargreaves (based on the National Cultural Archive, originally put forward by Stop 43) is supposed to serve as a registry where we can register our work to give it additional protection, without removing the automatic right of copyright at the point of creation. This is intended as a place where, primarily, professionals might register all their work, to make it visually searchable. Use of the registry would undoubtedly be a compulsory element in a diligent search, if it exists. If commercial use of orphan works is to be permitted, there has to be a registry or series of registries in some form that are visually searchable.

The real downside of the DCE, which is probably why the IPO do not back it, is that it would create a two-tier system of copyright in clear contravention of the Berne Convention (which the UK signed as far back as 1887), and TRIPS (Uruguay GATT 1994), as registered works will be more protected than those which are not. Berne Article 5 clearly states that 'the rights' must not be subject to 'formality'; registration is obviously a 'formality'.

The proposed National Cultural Archive avoided this situation by allowing viewing only of orphan works, but allowing commercial use of registered works of known parentage, once a licence had been negotiated with the creator directly. It did not breach Berne, as it offered no additional copyright protection. That was not necessary, as no commercial use of orphan works was permissible under the Stop 43 scheme.

5. Concern where liability will fall if a revenant author appears (especially from abroad)

Without a doubt, much of the intellectual property likely to be licenced by the proposed, but yet to be defined, UK licencing body, for a nominal fee, is likely to be of foreign parentage. Different jurisdictions have different protections for their citizens' IP. For example, the US still has a registry, having been allowed to keep it in return for its signature to the Berne Convention as late as 1988. A photograph registered with the US Copyright Office attracts a penalty of $150 000 for the first infringement of copyright. The USCO is not a visually searchable database, and almost all the images registered there will never be registered with a UK body, so how will the UK body know if it is granting a licence for an image registered with the USCO? If the subsequent licencee is sued for $150 000 for each infringement, will that bill (and legal costs) be picked up by the UK licencing body? The Daily Mail is currently being sued for very large sums for infringing copyrights registered at the USCO; the same licences that would perhaps have been bought at the UK licencing body for a few pounds under the proposed system, but without any protection from US law.

Is it the UK Licencing body / the government or the Licencee that will be liable? If it is the latter, a licence is not worth the paper it's written on.

6. Concern over Extended Collective Licencing

Extended Collective Licencing is not applicable to a medium such as photography where the majority of licences are primary licences, between photographers and their clients. Most of these licences are exclusive, covering a number of territories, and some are for considerable durations. In the advertising sector, many of my licences last in perpetuity. Under the terms of these agreements, I am not allowed to sell the images covered to others. If Extended Collective Licencing were introduced, a collecting agency would take it within its powers to sell images for nominal fees without taking into account any exclusive contractual obligations a photographer (or artist / model featured) has with a client. It effectively makes it impossible to carry on a world-class commercial photography business in this country. Clients do not buy time from us, but licences to use our intellectual property, in this case photographs. In return for their money, they expect exclusivity, control and confidentiality, all of which will be breached by an ECL proposal.

Additionally, if this system is introduced, I am concerned that there is no sensible way of setting a generic 'Market Price' for a photograph. The price will always reflect who took it, and other aspects of its provenance. In the case of Orphans, these simple facts are unknown. In the case of non-orphan works, which, if not opted-out, Professor Hargreaves presumes will be available for Extended Collective Licencing, whether the owner is traceable or not, how will the body know what someone would be prepared to sell an image for? I may want to take into account what it cost to produce, whether I have any models to pay a royalty to, any other costs to defray, and whether I want to sell at all, sell for the money offered or try to negotiate a better price.

Not being allowed to decide whether to sell my work or not *(I obviously would not sell if there was an exclusive licence in place to a client, for example)*, nor to set a price, even if I am known as the author, breaches my Human Right to control my property.

7. Lack of punitive damages for copyright infringement

I had hoped the Hargreaves Review might introduce punitive damages for infringing copyright. Instead, as an incentive to register with the Digital Copyright Exchange, he came up with a suggestion of enhanced damages, for registered images.

This falls far short of a remedy that is 'effective, proportionate and dissuasive' as required by the EU, though obviously much better than the current situation where an infringer only has to pay what they would have paid anyway had they bought a licence. The current situation makes it worth trying to get away with everything, and only paying and saying 'sorry' whenever caught.

The only solution to this is to introduce stiff and automatic penalties for infringement that make it worth it for any organisation to be honest about what they are using.

5 September 2011

Written evidence submitted by Eileen Langsley

I have been a professional sports photographer for over thirty years and the bulk of my business has been the sale of licences for the reproduction of my images to books and magazines; latterly I have moved increasingly towards digital use of my work and am constantly frustrated by the thieving, looting, downloading and illegal use of my images especially as I have so little protection under the law.

- I need the law to recognise that I have created these images and own them. In most circumstances it costs me a great deal of money to attend events here and abroad. Illegal use of my images along with the stripping of metadata and IPTC information is costing me a great deal of money. Why should someone be able to strip out all the data that connects those images to me and then use them in their own way, often earning money from the theft.

- I work in several sports where young competitors are involved (Gymnastics, Figure Skating, Swimming etc). I am very careful about how I supply these images and check that usage it appropriate. Once my images have been stolen there is little I can do to ensure this.

- MOST IMPORTANT. When I receive media accreditation to work as a photographer at an event, I am obliged to sign a document, agreement or contract stating that I will agree to the use of the images in accordance with the requirements of that particular sport. Failure to comply means that my accreditation is banned the next time I make a request.

- If my photographs are looted from my website and blog, the copyright and credit line can be removed and the images used in any way that the thief see fit. If these 'Orphan Works' images are used pornographically or in a derogatory way there is nothing I can do about it but of course any official who recognises the image as mine, will make sure that I am the one who suffers, not the perpetrator. Why should photographers have to be treated this way? My website and blog are my 'shopfront'; why should 'shoplifting' from these be seen as acceptable when it is a crime in other areas of life?

- I regularly trawl the web using various image searches and constantly finding that my images that have been converted to Orphan Works and displayed/offered for sale as if they are the work of the perpetrator of the theft. Both my website and blog have copyright notices posted everywhere and my terms and conditions are also there for all to see. The law needs to protect my interests in the way that it does for other people. My colleagues in other countries are afforded much more protection and sanctions are in place for this kind of crime.

- The Hargreaves report doesn't seem to address the whole issue of education and information so that from a young age children are taught that the Web is not a totally free resource and what is meant by copyright. We are allowing youngsters to grow up in the belief that while shoplifting/stealing etc is wrong it is alright to steal images.

I trust that the committee will look very carefully at these issues and come to a realisation of the deep unfairness that lies behind the new initiatives.

Written evidence submitted by David Levine

I have worked in fashion and Music as a photographer where I have seen my work used by third parties without permission and payment for over my 30 year career.

If we have any rights as artist it should surely be that our work is protected in law without the need to apply any quotes tags or other markings.

Why do the large corporations have the seemingly unstoppable right to simply help themselves to the work of others. A simple comparison would be walking into a shop and just taking anything you felt like without passing the checkout.

The onus should be on the third party to seek permission of the copyright owner or not be allowed to use the work.

I believe mine and my family's human rights are being abused by copyright theft of my work and the laws failure to protect it.

Will the committee please consider this, many of my works have been used on millions of record sleeves and I have never received a royalty for a single one of these uses, while all other elements of the music industry collect their legally protected royalties.

An example is the Culture Club "*Karma Chameleon*" single. I had two images on the sleeve. The front cover became one of the most famous images of Boy George. It sold over 9 million copies and everyone made a great deal of money. I made £450.00 which I had to fight for months to get.

An example of this copyright infringement can be seen here http://en.wikipedia.org/wiki/Karma_Chameleon. My image is used and I haven't been asked or paid.

I am happy to come and speak to the committee if you feel it would be helpful and you may if you wish use this information.

It's time to properly protect the artist.

Yours sincerely

David Levine

Written evidence submitted by the Libraries and Archives Copyright Alliance (LACA)

Executive Summary

- LACA broadly supports all of the Hargreaves Recommendations and warmly welcomes the Government's Response to them, particularly with regard to the sectors that LACA represents.

- One of the key recommendations for LACA is the updating of the exceptions and limitations in copyright law. This will encourage economic growth and allow libraries, archives and educational institutions to achieve their full potential with regard to supporting learning and research.

- As a result of responding to lobbying from industry rather than assessing evidence from all sectors, previous changes to the copyright framework have routinely favoured intellectual property enforcement and disregarded the value to the economy and society of the exceptions and limitations; this has stifled innovation and research.

- Without adequate exceptions and limitations, institutions such as libraries and archives struggle not only to provide a relevant service to researchers but also are prevented from preserving valuable cultural, historical and research material.

About LACA

1. The Libraries and Archives Copyright Alliance (LACA) is a UK umbrella group convened by CILIP (Chartered Institute of Library and Information Professionals). LACA brings together the UK's major professional organisations and experts representing librarians and archivists to lobby in the UK and Europe about copyright issues which impact delivery of access to knowledge and information by libraries, archives and information services in the digital age.

2. LACA has submitted a large body of evidence to all the UK reviews of Intellectual Property and to EU consultations on copyright over the years[1] to highlight and communicate to policy makers the deficiencies in the current copyright framework in relation to the organisations that it represents. However, despite a recognition

[1] http://www.cilip.org.uk/get-involved/advocacy/copyright/Pages/default.aspx

from the Intellectual Property Office (formerly the Patent Office) that a number of anomalies exist in the Copyright, Designs and Patents Act (CDPA) 1988 which adversely affect educational and cultural heritage organisations[2], the Government has failed to implement changes (even minor ones) which would significantly enhance the services provided by them.

The Copyright Framework and Previous Reviews

3. Changes to UK copyright law in recent years have largely concentrated on intellectual property (IP) enforcement. The last legislative change to the CDPA was in 2007, where Trading Standards were empowered to use section 107A to seize counterfeit materials and prosecute those involved in criminal copyright infringement[3]. This was a direct implementation of recommendation 42 of the Gowers Review of 2006. This trend of enforcement continued with the implementation in 2010 of recommendation 36 of the Gowers Review in the Digital Economy Act, which increased financial penalties to a maximum fine of £50,000 for certain online infringement. This continued strengthening of enforcement measures has served to set a precedent of control, policing and monopoly over content, particularly digital.

4. The IPO's Audit of Recommendations from Previous Reviews of Intellectual Property clearly shows a priority on enforcement over and above exceptions such as private copying, educational exceptions and research[4]. As a result, the balance in the copyright framework has shifted to one in which rights holders are empowered to the detriment of cultural and educational development.

5. LACA therefore agrees with the Hargreaves Review and the Government's Response that "the UK's intellectual property framework, especially with regard to copyright is falling behind what is needed", and would urge the Government to implement its proposals for change to allow the cultural heritage, education and non-commercial research sectors to better serve the public.

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[2] LACA's response to the Gowers Review http://www.cilip.org.uk/sitecollectiondocuments/PDFs/policyadvocacy/laca/LACAGowersresponseFINAL21apr06.pdf p.1

[3] http://www.ipo.gov.uk/section107abrochure.pdf

[4] http://www.ipo.gov.uk/ipreview-doc-a.pdf

The Hargreaves Review of Intellectual Property

6. The Hargreaves Review of Intellectual Property and Growth, which led to the Digital Opportunity report, is commendable in terms of its evidence-based approach. Previous reviews of intellectual property have been heavily influenced by the power of industry and rights holder lobbying, which Professor Hargreaves picks up on in his report as "lobbynomics"[5], and have resulted in increased enforcement and rigorous licensing. Yet there is an overwhelming body of evidence to suggest that copyright exceptions contribute significantly to economic growth; this was reported at length in one of LACA's submissions[6].

7. The scope of the Review was focused fairly narrowly on how the IP framework impacts on innovation and economic growth in the UK. LACA's focus is wider, considering not only how libraries and archives contribute to economic growth through the management of information and research support, but also the public benefit of being able to access materials which otherwise remain dormant and under-used for their entire copyright term and, in the case of orphan works, potentially beyond the term.

8. Nonetheless, LACA broadly supports the recommendations made by the Hargreaves Review and particularly welcomes the emphasis on evidence and the broadening of the exceptions to copyright which will greatly benefit the cultural and education sectors.

Specific Recommendations

#1: Evidence should drive policy

9. LACA welcomes the recommendation that copyright policy should and must be driven by evidence. The Government's Response highlights the fact that there is "a near-total lack of high quality evidence on some issues and an overabundance of effective lobbying"[7]. In addition to the proposals for significant economic research to be undertaken by the IPO, there are initiatives afoot by funding

[5] http://www.ipo.gov.uk/ipreview-finalreport.pdf p.18
[6] http://www.cilip.org.uk/get-involved/advocacy/copyright/Pages/default.aspx
[7] http://www.ipo.gov.uk/ipresponse-full.pdf p.3

organisations in the UK to address this lack of evidence. One such significant initiative is the Centre for Copyright and New Business Models in the Creative Economy, proposed by the Arts and Humanities Research Council (AHRC)[8]. These types of initiative will independently expand and develop the evidence base required to robustly inform intellectual property policy. This body of evidence will shape and inform IP policy, allowing more flexibility and quicker reaction to technological developments.

10. The Government has indicated a widening of the narrow scope of the Hargreaves Review to consider issues of fairness and social impact. 'Fairness', in the context of copyright, is not defined in the legislation, and therefore a focus on what is fair and proportionate should be introduced to ensure a balance of the rights of copyright holders and the liberties of users. This is particularly significant for the cultural sector.

11. LACA agrees that there must be a continued strength of support for copyright reform at EU level, with particular regard to consultations from the European Commission, WIPO treaties and intervention in significant cases in the European Court of Justice. These interventions in Europe are critical to ensure that the laws relating to UK cultural heritage, educational and non-commercial research sectors are on a par with their international counterparts.

#3: Copyright licensing

12. The concept of a Digital Copyright Exchange is one which would benefit users and creators alike. LACA believes that libraries and archives could contribute significantly to such a project by making their cultural heritage and research output material available for licensing online.

13. LACA strongly recommends that representatives from the cultural heritage and education sectors be involved in the development stages of the DCE, not least because their collaborative experience of metadata and knowledge exchange

[8] http://www.ahrc.ac.uk/FundingOpportunities/Pages/CopyrightNewBusinessModelsCreativeEconomyEoI.aspx

could greatly aid the technical and administrative processes that the DCE has to develop.

14. LACA agrees that collecting societies should be open and transparent and accountable for their actions. LACA welcomes the recommendations and proposals from the Government to ensure that collecting societies adopt a code of conduct with independent review mechanisms.

15. However, LACA strongly recommends that licensee stakeholders are also consulted as to the development and implementation of codes for collecting societies, as it is the users who will be affected.

#4: Orphan works

16. LACA welcomes plans to move on orphan works, which have long been a complex and unresolved issue in libraries and archives in particular. Given that the term of copyright for most published works is the life of the author plus 70 years, finding the author of a forgotten or abandoned work can often prove impossible. In order to reproduce, display or digitise the work, then, many libraries and archives must adopt risk management strategies as to whether or not the original author of the work will come forward. This is not ideal, as dealing with copyright infringement claims can be costly.

17. Furthermore, there must be an element of future-proofing so that the number of orphan works decreases over time. LACA therefore urges the Government to factor into its proposals the need for attribution in the future of the author/creator of new copyright works. Librarians and archivists are highly skilled in the recording and updating of metadata (that is, key bibliographic information surrounding a creative work). It is imperative that this practice be applied to all creative works, particularly those being made available online, as a robust system of recording at least the author and date of creation will be vital to prevent creative works becoming orphaned in the future.

18. The commercial re-use of orphan works is also welcomed, as this will stimulate economic growth through the creation and production of new creative works such as documentaries and films. However, LACA agrees with the Government that provisions for commercial re-use of orphan works must be carefully considered and appropriate safeguards set in place to ensure compliance with the Berne Convention and other relevant laws.

19. One effective way to deal with a significant proportion of orphan works in cultural heritage institutions would be to properly implement the Term Directive[9] in the UK. Unpublished works, which previously enjoyed perpetual copyright, even now still remain in copyright until 2039 at the earliest, whereas under the Term Directive, their lifetime should have expired 70 years after the death of the author. Anomalies in UK copyright law such as this render unpublished works in cultural heritage institutions practically useless, as often they are extremely old and have no identifiable rights holder. Many other European countries do not suffer from this problem, and as such are able to digitise many cultural artefacts for both preservation purposes and the benefit of the public.

20. As it is likely that orphan works will be the subject of legislative change, it would seem prudent to remove the requirement for unpublished works to remain outside the public domain until 2039 and instead subject them to the standard term of copyright (life of the author plus 70 years). The Government has said in its response to the Hargreaves Recommendations that it does not like to see a "wealth of copyright works" unusable; removing this extended copyright term of protection from unpublished orphan works would therefore solve a large part of the problem of orphan works, which in turn would greatly benefit the cultural sector and the public.

21. This does not negate the need for other solutions to the orphan works issue. For example, LACA welcomes proposals by the Government and the Hargreaves Review for extended collective licensing for mass digitisation, particularly in instances where libraries and archives have large volumes of orphan works for

[9] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32006L0116:EN:NOT

which diligent searches for each individual item would render the entire project impractical.

#5: Limits to copyright

22. LACA welcomes the Government's response to the recommendation to open up the UK's copyright exceptions regime to take full advantage of the provisions set out in the Information Society Directive in a way which avoids the need to introduce levies in the UK. Other EU countries have implemented the exceptions and limitations listed in Article 5 much more widely than the UK, with no significant detriment to the rights holders. The enormous public benefit from the adoption of broader copyright exceptions would outweigh the minimal impact on rights holders. LACA fully supports and endorses all the exceptions, specifically those which relate to the organisations it represents; these exceptions are listed in the following paragraphs.

23. **Copying for preservation purposes**: in accordance with Article 5.2(c) of the Information Society Directive[10] , LACA endorses the extension of sections 42 of the CDPA to artistic works, sound recordings, films and broadcasts. Without an extension for preservation for these types of works, they will not only spend at least the next thirty years with restricted access, but they can pose a serious threat to the health and safety of those working on and around them[11]. In this fast-paced digital environment, libraries and archives must be able to make as many copies as technically necessary and as frequently as necessary to cope with the constant change in platforms and formats (as specifically recommended by Gowers).

24. The preservation process for items must start on receipt by the library or archive rather than when deterioration has set in. The BBC's Domesday Project in 1986 is a prime example of the importance of preserving valuable resources. The laser videodiscs used in 1986 could no longer be read, which meant that the data became inaccessible and was nearly lost for good until technology had advanced

[10] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML
[11] Kodak's advice on the handling of nitrate base film
http://motion.kodak.com/motion/Support/Technical_Information/Storage/storage_nitrate.htm

enough to allow the BBC to resurrect it 25 years later[12]. This situation must not be repeated with other works as a result of hindrances to the preservation process by copyright law.

25. With regards to technological protection measures (TPMs), there is a need for appropriate workarounds to enable licensed institutions to unlock TPMs where no key is available (for example, if a publisher goes out of business). This is essential for preservation purposes, and has already been recognised by three of the Nordic countries (Norway, Denmark and Finland) who have made sufficient provision for preservation in their laws. LACA and the British Library presented evidence of how TPMs impair digital preservation to the All Parliamentary Internet Group (APIG) Inquiry into Digital Rights Management in 2006[13]. Unless addressed, the dangers of losing valuable digital and cultural heritage will be exacerbated as time goes on.

26. Widening the preservation exception to ensure that valuable cultural items are preserved so that once they are out of copyright they can be used by and displayed to the general public, or used by researchers, does not adversely affect the rights holders, preserves cultural history, improves research opportunities and reduces the danger to health and safety.

27. **Fair dealing for non-commercial research and private study**: LACA endorses the extension of section 29 of the CDPA to include films, sound recordings and broadcasts. Given that a wealth of research material is now held in digital or analogue media rather than in print, researchers (particularly in the arts and humanities) are currently unable to make copies of material from libraries and archives which is essential for their research. In most cases, researchers have no other access to these materials other than by seeking out specialist archives containing rare footage or collections of sound recordings. The ability to copy and work with them in their own study environment would enrich their research and greatly reduce the costs to the public purse, as they would have immediate

[12] http://www.bbc.co.uk/news/technology-13367398)
[13] http://www.apcomms.org.uk/apig/current-activities/apig-inquiry-into-digital-rights-management.html

access to the source material for the duration of their projects without having to make several trips to listen to sound recordings and view films**.**

28. In addition, users expect libraries and archives to be able to copy material for them under the Permitted Acts in copyright law. For decades, the CDPA has allowed libraries and archives to provide a non-profit copying service for users under its Permitted Acts. It therefore stands to reason that any extension of the fair dealing provisions for research or private study proposed for consumers and researchers (i.e., library/archive users) need also be reflected in the library and archive copying provisions in sections 38 and 39 of the CDPA.

29. One particular issue that libraries and archives have is with the inability to copy free-standing artistic works, including the disembedding of artistic works from textual material. The CDPA currently only allows the copying of illustrations for non-commercial research and private study when they are surrounded by text, yet libraries and archives hold large amounts of photographs, drawings and other standalone artistic works. Extending the library provisions in the CDPA to include the copying of artistic works for users undertaking non-commercial research or private study is a logical and necessary step, particularly as users are allowed to copy artistic works under the fair dealing provisions. Libraries and archives hold much valuable and often delicate older materials which have to be handled with care; it is therefore logical that professionals who are skilled in the art of handling fragile items should be allowed to make copies of them for researchers.

30. **Use for the sole purpose of illustration in teaching:** One area which it was not possible to expand upon given the narrow scope of the Hargreaves Review was the use of material for teaching purposes. Currently, the permitted acts for educational purposes are largely unfit for the digital age, where teaching in educational establishments is interactive and computer software and the Internet are integral aspects of lesson and lecture delivery. Yet the Government requires educators to "teach lessons that invariably capture the interest of learners" and make "creative use of resources"[14], which under current copyright law is very difficult to do. By adopting Article 3(a) of the Information Society Directive, the

[14] Ofsted: Grade criteria for the inspection of initial teacher education 2008-2011 http://www.ofsted.gov.uk/resources/grade-criteria-for-inspection-of-initial-teacher-education-2008-11

Government will bring copyright law in line with its policies and inspection criteria for education and allow those involved in teaching and learning in public-funded institutions to use materials such as images from the Internet in a lawful way.

31. **Text and data mining:** LACA strongly believes that the introduction of an exception for text and data mining will revolutionise the research environment, making large amounts of text and data available for analysis and thereby significantly speeding up discoveries in the fields of science and medicine in particular. The Royal Society has recently opened a major new policy study on the use of scientific information as it affects scientists and society, looking at how information should be managed to support innovative and productive research that reflects public values[15]. The British Academy submitted evidence for the study, supporting the requirement for openness and transparency of data, but also noting the benefits of scientific data to other non-science sectors such as humanities and social sciences:

To take one example, in food and health related issues there is a huge range of questions about public policy and social behaviour, even though the data and research may be located in the natural sciences. If access to scientific information is opened up, natural scientists and social scientists will be able to work better together to improve scientific literacy and public understanding of the status, character and quality of data[16].

To have a large body of data available requires a means of analysing it effectively. Data and text mining is therefore essential to ensure that developments and innovation in the research field are timely and beneficial to the public, and also to keep up with international prowess.

32. Furthermore, facts are not covered by copyright, and therefore the copying and analysis of facts would not be an infringement of copyright and would not require a licence to do so. However, much of the material required to text or data mine is

[15] http://royalsociety.org/policy/sape/
[16] British Academy 2011: A Response from the British Academy to the Royal Society's call for evidence - Science as a public enterprise: opening up scientific information. p.1 http://www.britac.ac.uk/policy/index.cfm

covered by contract (often in the form of a licence) which restricts this type of activity. The process of text and data mining would not be an issue if the same material (under licence) was analysed using pen and paper. Computers merely make reprographic copies (as that is how they function) of data and text in order to run an analysis of them. Computers are infinitely faster at processing data than humans are (armed with pen and paper), and therefore if this activity is not restricted by human copying, it should not be restricted for machine copying either, as the activities are the same.

33. **Protection from override by contract**. LACA welcomes the Government's response and Hargreaves' recommendation that the exceptions and limitations to copyright should not be overridden by contract. This is specifically mentioned in Hargreaves Recommendation 5 and emphasised at length in Chapter 5 of the Digital Opportunity report. Licences play a large role in the digital environment and it is likely that most if not all information and data will be accessed via a licence in the future. Licences and contracts must not be allowed to override the exceptions and limitations in copyright law, as, if they do, any provisions which already exist in copyright law will become meaningless. Researchers, libraries, archives and educational establishments all thrive on the exceptions and limitations afforded to them by copyright law. Any attempt to monetise those exceptions through licence agreements is exploitative and against the spirit of the "encouragement of learning" aspect to copyright.

34. A clause to prevent contract from overriding copyright already exists in Irish, Portuguese and Belgian copyright law. Legislation is the only way forward for this particular issue, as previous attempts to find a voluntary solution have failed[17]. Voluntary solutions can also fall foul of competition law, not be adopted by all in the UK, and would not apply to the great number of foreign contracts which increasingly must be dealt with.

[17] LACA submission to the Hargreaves Review http://www.ipo.gov.uk/ipreview-c4e-sub-libraries.pdf p.16 8.6

#8: Enforcement of IP Rights

35. Despite the outcome of previous reviews focusing on IP enforcement, there is still room for improvement, which is why LACA supports the Government's plans to introduce a small claims court for claims of copyright infringement of up to £5000. However, given that there is now such an emphasis on enforcement, users and consumers need to have their rights strengthened to protect them against unjustified threats. In the UK, it is an offence in certain circumstances to make unjustified threats of legal action for patent infringement. It should be the same for copyright.

36. Recent examples indicate a worrying trend of unfounded legal threats of copyright infringement[18]. Additionally, some organisations (such as Righthaven) have made it their business to enforce intellectual property rights, but do not to want to cooperate with the courts when they are on the wrong side of the law themselves[19].

37. Other scenarios involve individuals or organisations (often known as 'trolls') who purchase the copyright in works and then seek to enforce their rights. For example, they may discover an instance where a newspaper article has been published without authorisation and then buy the copyright in the content with the specific intention of bringing a copyright infringement lawsuit. Such actions can lead to the 'trolls' being paid to resolve disputes through out of court settlements, especially where the infringer is concerned, at the cost of making a defence in court.

38. Libraries and archives may be adversely affected by the enforcement measures set out in the Digital Economy Act as intermediary providers of WiFi services. Any attempts to enforce IP rights must take into account the effect that this may have on intermediary internet providers such as libraries and archives, and the subsequent consequences. Intermediaries should not be penalised for the acts of

[18] Davenport Lyons case - http://www.sra.org.uk/sra/news/press/davenport-lyons.page and http://torrentfreak.com/anti-piracy-lawyers-accuse-blind-man-of-downloading-porn-110809/).
[19] http://paidcontent.org/article/419-righthaven-ceo-steve-gibson-brushes-aside-fair-use-setbacks/

their users, who may be successful at circumventing measures to prevent unlawful use such as file-sharing of third party copyright materials.

Conclusion

39. The current copyright framework in the United Kingdom is stifling innovation and economic growth. The direction of travel over the past ten years has been one of IP enforcement, as policy makers have listened to, and based decisions on, the effective lobbying by the creative industries rather than evidence. It is imperative that the Government bases its intellectual property policy on sound evidence and that it is committed to enhancing and developing this evidence base through the funding of independent research. The vast body of evidence submitted to the Hargreaves Review was an overwhelming indication that current copyright law is inhibiting creativity, in particular the type of creativity which would bring no economic harm to rights holders. A broadening of the exceptions and permitted acts under copyright law will not adversely affect rights holders as long as appropriate safeguards are in place.

40. LACA wholeheartedly supports the Government's response to the Hargreaves Review and welcomes the implementation of all ten of its recommendations in the proposals laid out within it. The benefits to the public and to public sector institutions will be significant and will finally allow the UK to catch up with its international counterparts in the areas of research, education, innovation and cultural preservation. Libraries and archives have an important role in supporting economic growth and innovation in research, but their full potential cannot be achieved until the provisions for their activities in the legislative framework are updated and improved. At the moment, a wealth of important content currently runs the risk of being warehoused for fear of copyright infringement. It is time to free this content for the greater public and national benefit. The Government, along with the IPO, should work swiftly to implement the proposals to ensure the stimulation of economic growth and to reap the long-lasting rewards of innovation and research.

August 2011

Written evidence submitted by Graham Linehan

I am writing regarding your Committee's inquiry into the Hargreaves Review of Intellectual Property. I support the findings of the Hargreaves review, and am delighted that the Government has committed to accepting the report's recommendations.

I am particularly keen to see that the Government follows through with the proposal for a new exception to copyright for parody and satire. It concerns me that an absence of legal certainty means that the creation of legitimate parodies and satires is being stifled rather than encouraged.

Encouraging parody and satire is especially important given the potential for a democratisation of culture in the digital age. New technology is so exciting because ordinary people, not just professionals, or professional comedians, can make videos and get them noticed. If they do get noticed, they potentially have a huge audience.

If I see somebody making a video that I think is funny, for example on YouTube, I have a look around and try to see who they are and figure out if they could write comedy. It's a big shift in the way people can get involved in the business, and overall, it means that the quality of comedy is going to go up.

As a writer of comedy it is important to know that parody and satire are to hand in my writing tool box. I might have a layer of lawyers between me and the final product, but plenty of people don't. I see too many examples of funny videos, for example the many ingenious 'Downfall' videos on YouTube, forced off the Internet for no good reason.

Some find their way back up to YouTube, of course. But this is because of users' persistence that helps them outmanoeuvre the enforcement of an outdated law. Creators' should not be at the mercy of a video service's take-down procedures when the law those services follow provides no certainty that their creations are legitimate pieces of work.

I hope the Committee supports the implementation of the Hargreaves review. I hope politicians are brave enough to ensure that, through a new parody exception, we have a copyright law that allows aspiring comedians to make the most of the wonderful opportunities of the digital age.

1 September 2011

Written evidence submitted by Julian Love

Summary

- The proposed changes to copyright legislation in the Hargreaves Review do not address several issues of great importance to the content creators that are the lifeblood of our creative industries:
- There is no penalty for stripping metadata from digital works, thus creating orphans. The majority of images and artworks distributed online therefore become orphaned.
- The proposed orphan works legislation allows commercial use of non-attributable works. This clearly creates a conflict of interest among publishing and distribution companies in creating and publishing orphan works.
- There is no automatic assignment of an artist's moral rights to their work, yet this is the case in every other EU state and is recognized by the UN as a universal human right.

About Me

- I am a professional photographer specializing in travel and lifestyle imagery for the publishing and corporate marketplace. My work appears in magazines, books, and advertising for tour operators, hotels and tourist boards. I am a member of the Association of Photographers, the professional trade association for the industry.

Detailed Points:

1. No sanctions are proposed for the removal of digital copyright information from digital works. However, almost all websites and other forms of digital distribution automatically strip metadata from digital files, creating an orphan work in the process. Every day, millions of digital works are having their digital copyright information stripped rendering these works as orphans.

2. The review proposes allowing orphan works to be used for commercial purposes. However, as the point above demonstrates, many of the potential commercial users of orphan works are also involved in creating them. This creates a clear conflict of interest.

3. Asking commercial users of orphan works to pay into a central fund simply allows those users to relax the need to locate the owner of the orphan work. It is unrealistic for any creator to search a database for their images as there is no way of automating this process at present.

4. Professor Hargreaves said that copyright law should be evidence driven. Yet there is no proven need for orphan works to be commercially exploited and there is no published evidence that shows that UK industries are disadvantaged through being unable to commercially exploit orphan works.

5. There may be a case to permit orphan works to be used for cultural purposes, such as in libraries or museums, providing that a precise definition of cultural use can be defined and agreed.

6. Creators are not given a level playing field with industry. Industry at present can strip digital copyright data from creators work, not credit them, require creators to waive their moral rights or risk losing a contract, assign their copyright or lose a contract, all of which impose grossly unfair terms on the creator.

Written evidence submitted by Scott MacGregor

I am writing to register my grave concerns relating to the possible implications of new proposals made by Professor Ian Hargreaves in his recent review into Intellectual Property rights. Some of the proposals he has made threaten the very future of the arts in the UK and I urge the committee to reject wholeheartedly the proposals re: Orphan Works in particular.

1. Background
2. Onus must be on protecting the creative talent
3. Moral rights of artist EU wide and how this contrasts with the proposals
4. Sanctions against those found maliciously doctoring works to create "Orphan Works"
5. In whose interest are these proposed changes being made?
6. Practical considerations for a global industry. Are these changes practical? What are the real implications on the individual artist?
7. Unscrupulous industry operators may use this legislation as an excuse for immoral practice.
8. Legal implications from a Human Rights perspective. Can reducing UK citizens Human Rights in direct comparison with those of other EU states stand up to future legal challenge? If there is any doubt then your responsibility to the UK taxpayer should be given serious consideration versus the perceived benefits to the special interest groups lobbying for these changes?

The artistic community in this country is already having a tough time adjusting to the greatly reduced funding opportunities now available as a result of HM Government's widely publicised austerity measures. Against this backdrop, this review appears to be coming at completely the wrong time. Artists need all the assistance they can get at the moment just to keep their businesses operating; the proposed changes are the moral equivalent of going through the pockets of someone lying helpless in a coma. [1]

The onus of any legislation chance must be to protect the creative talent in this country. The recommendations of this report do not do this. Rather the vested interests of a few proprietary media organisations, which seem keen cut corners and exploit those lacking the resources to defend themselves, would appear to be the sole beneficiaries. This is morally wrong and must not be allowed to happen. [2]

The convention across the EU at present is that the moral rights of authors are automatically granted**.** Under current UK law, this is an automatic right granted to all UK citizens. This must not be allowed to change. There is no need for it to change and anyone lobbying for such an amendment must have an ulterior motive. Why would anyone want to erode the moral rights of UK Citizens v's our EU counterparts? Are UK based artists not worthy of this right any longer? These moral rights should be made un-waivable as they already have been right across the EU. The right to be identified as the creator of a work should be an absolute, the law should prohibit any person or organisation from requiring that the creator waive their moral rights. It is illogical to bring forth legislation for the licensing of orphan works when the law as it stands has no provisions which will prevent or significantly reduce the creation of orphan works. [3]

Artists need protection more than ever now that we are living in the digital age. We require the introduction of sanctions against those found to be removing digital copyright information from digital works. This is a fundamental gap in current legislation that requires attention far more urgently. The onus is on the artist to prove that removal of digital copyright information from a work has been done with intent to infringe before it can be recognised by the courts as an offence under current UK legislation. Yet worldwide, every day, millions of digital works are having their digital copyright information maliciously stripped rendering these works as orphans. This is morally wrong, it is the equivalent of physically removing a signature from a painting, an act that all would agree was reprehensible. Yet Professor Hargreaves, knowing this, has still recommended the commercial exploitation of orphan works. This will only make it more difficult than ever for creators to sustain a successful.[4]

A pertinent question to ask must be “Why make this proposal to allow Orphan Works to be used for commercial purposes?” There is no proven need for orphan works to be commercially exploited, and let us not forget that Professor Hargreaves himself proposes that copyright law should be evidence driven. There is no published evidence that shows that UK industries are in any way disadvantaged through being unable to commercially exploit orphan works. Yet the proposal is still included in Professor Hargreaves review. This contradictory position suggests that either the report or its findings are fundamentally flawed or there must be some other agenda being pushed that the author feels merits him ignoring his own advice. [5]

Another thing to consider is that registering creative works at a national level is completely impractical in today’s global market. It will undoubtedly lead to anomalies of the type already exposed by the US system of copyright registration where creator’s remedies for infringement are compromised if they have not registered that work in the USA. If every country were to go down that road, as could happen, creators would need to register their work in every single country, with the obvious costs in time and expense of doing so. What would be the benefit of burdening our creative community with this additional requirement? If registration is inevitable then it should be a global system. Such a universal system already exists and is supported by the PLUS Coalition. If anyone advocating registration can come up with a logical explanation as to why a global system should not be introduced then I would expect their position to be robustly challenged. [6]

As things stand the technology exists to remove digital copyright metadata from a creators work, not credit them, and require creators to waive their moral rights or risk losing a contract, assign their copyright or lose a contract, all of which impose grossly unfair terms on the creator. This is something that requires to be addressed. It is of far more importance to the creative industry than the main thrust of this report which would appear to be no more a veiled attack on the artistic community in what appears to be no more than a "rights grab". [7]

Finally an important point to consider is that artists have human rights – something which appears to have bypassed Professor Hargreaves. He seems to have wholly ignored the subject or at the most given it very little consideration. This leaves the door open to future legal challenges should the need arise. I refer you to the United Nations position on the matter :-

United Nations Universal Declaration of Human Rights Article 27 (2) states:

1 Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

2 Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Note also that a recent UK court ruling (20thC Fox vs 'Newsbin2') established that -

Copyrights are property rights protected by Article 1 of the First Protocol of the European Convention on Human Rights, as also expressed in Article 1 of the First Protocol of the Human Rights Act 1998;

Piracy of copyrighted work is a breach of the copyright holder's human rights; the copyright holder is therefore entitled to legal redress;

and, because 'so far as possible, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with human rights', legislation drafted and enacted subsequent to the enactment of the Human Rights Act 1998 must also be read and given effect in a way which is compatible with human rights.[8]

5 September 2011

Written evidence submitted by Bob Marchant

I am a long established advertising photographer . and a member of the Association of Photographers. I was an early adopter of digital capture and have worked on a voluntary basis over many years in order to establish standards for the supply of digital imagery and best practice for digital workflow . I am the previous chair of the Digital Imaging Group of the Association of photographers , a contributing member of the UpDig group and a present member of the Periodical Publisher's Associations technical committee , working on the pic4press and pass4press initiatives that have streamlined the production process for UK magazines (We are at present working on the issues surrounding cross media publication) . I'm also Vice Chair of the Chartered Quality Institute's Special Interest Group for digital imaging . I would like to think that all of the above has contributed to the progress of digital imaging without causing any detrimental effects.

I have been able to give time to such causes because of the income derived from my photographic business.

I have been a self employed as a photographer for thirty seven years . During this period I have been commissioned because of creative ability and professional skills My business has survived for this period and been enabled to purchase and redevelop two studio properties because of the of ownership of intellectual property in my images , and the application of my moral rights when it comes to reproduction of my images . And of course the business has paid full UK taxes and generated large sums of VAT .

The proposals in the Hargreaves Report would seek to remove the mainstays of my income in order to benefit individuals and companies that wish to exploit digital content without appropriate financial compensation or with due regard to my moral rights.

The basis for promoting this act of theft and impropriety is that of economic gain for society as a whole . But this is a false assumption with no true foundation . The fact is that the UK gains a huge economic benefit at present from content creators , second only to the financial sector. It would seem that the government is prepared to put this at risk on the basis of false financial projections and because of the intense lobbying from businesses that want content free of charge. A number of these businesses are structured to avoid paying full UK taxes.

In addition to the waiving of IP rights , moral rights are also in question . I have no wish to see my images used for dubious campaigns , and IÕm quite certain that parents will not want images of their children used for doubtful purposes by third parties . According to the report this may be avoided by registering every image with some as yet unspecified body that will have the right to licence images (so called orphan works) that are not registered for usage at their discretion and at their price . I would like to know how such a third party would establish the worth of one of my images without knowing the production costs or my business fee structure .

Also , the recommendations in the report are illegal under the Berne convention and present Human Rights legislation , neither of which are addressed .

I have no problem with the liberation of older works for non commercial use , but this report makes recommendations that allow for the free commercial exploitation of current naturally IP and morally protected images by sanctioned theft. . It is an immoral approach that flies in the

face of current government "big society" claims.

I also note my earlier submission to the Hargreaves report that easily met the deadline was not published . This contained case histories of abuse of IP and the consequential damage to my business . I would be happy to forward this information again should it count as new evidence and not be lost in the system again.

5 September 2011

Written evidence submitted by Conor Masterson

I am a professional photographer and I have some concerns with regards to the current Hargreaves review of Intellectual property.

I understand that you will be receiving a lot of correspondence with regards to this matter so I will keep my concerns brief.

My position is that of a commercial and advertising photographer. I work for larger and medium sized organisations. I also work with the public in my guise as a wedding and social photographer and finally I would consider my position to be that of an artist as I sell some of my works as fine art photographic prints. I am a member of the Association of Photographers in the UK (The AoP), and the Pro Imaging Group (PI). In my career to date I have been consulted as a contributing author of a chapter in the current AoP Industry bible 'Beyond The Lens'.

As a photographer who make a living solely from my intellectual property I am concerned that the moral rights of my images, my right to ownership as a fundamental human right, is being eroded. I believe that there is no need to make it easier to use my images without my permission. If an image of mine is in circulation without my contact details because it has been copied it should be protected. I wish to see the rights of the creator protected. Bigger businesses have the an interest and resources to use images by smaller organisations or individuals. I believe that the sole trader or smaller organisation including artists and creators of intellectual property should be protected by the basic laws of the UK and the EU.

I don't believe the current recommendations are in favour of this position. I believe that intellectual property and its protection is a vital component of our society and even if an owner is not easily recognizable it is vitally important to stress that someone does own this property and its rights should be respected wholeheartedly.

I fundamentally rely on the laws of this country to protect my rights as an owner of everything I have created. If I cannot be protected my current and future income is in jeopardy and my business model is in danger of being destroyed.

All artists through the ages have relied on the understanding that they can create and profit from their creations and therefore this is a human right that must be respected. This current incarnation of the Hargreaves report does not deal with this issue properly so I reject it in its current guise and ask that a thorough report be generated that protects the rights of the creators and the small individuals who are not equipped with the same resources to protect their rights.

I rely on your positions in parliament to protect my rights as a citizen of the UK and I hope you will honour your position as a representative of the views of the people.

I would like to end by summarising the concerns I have with the Hargreaves document below.

- The moral rights of authors are not automatically granted as they are in other EU countries. This is a fundamental breach of our human rights. It should not

be necessary to assert your moral rights as at present under UK law, this should be an automatic right granted to all UK citizens.

- Moral rights should be unwaivable.
- There has been no proposal of sanctions against those who remove digital copyright information from intellectual property. All laws need enforcement and without some legislation or effective punishment there is no deterrent.
- An orphan work should not be used for commercial purposes. There is simply no need for this. There are enough images available that are recognisable to avoid this situation. A creator must be recompensed for commercial use. If the author cannot be found then do not use the image. It should be protected.
- It is fundamentally flawed to allow copyright information to be stripped so easily from an image and to then also allow the image to be used with no serious repercussions for misuse.
- It is completely unworkable to have any sort of copyright registration process. This is not in the interests of the creators. It will create more problems and only creates flawed and complicated bureaucracy. The rights of an image should be protected even if the author cannot be found.
- Artists rights should be respected as normal humans with normal human rights. The EU and the UN recognise this. It's a simple concept, they are humans. See the UN stance here:

> **UNITED NATIONS universal declaration of Human Rights Article 27 (2) states:**
>
> 1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
> 2. ***Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.***

It is also worth noting a recent ruling in a UK court between 20th Century Fox and 'Newsbin2':

> *Copyrights are property rights protected by Article 1 of the First Protocol of the European Convention on Human Rights, as also expressed in Article 1 of the First Protocol of the Human Rights Act 1998;*
>
> *piracy of copyright work is a breach of the copyright holder's human rights; the copyright holder is therefore entitled to legal redress;*
>
> *and, because 'so far as possible, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with human rights', legislation drafted and enacted subsequent to the enactment of the Human Rights Act 1998 must also be read and given effect in a way which is compatible with human rights.*

I look forward to your rejection of the Hargreaves report and a new proposal that is simple and protects our rights as humans, creators and contributors to our society.

It need not be complicated and we would all benefit from a reminder that intellectual property is a vitally important part of all societies and therefore needs stringent protection. Individual creators of intellectual property are more vulnerable as they are often separated from the legal resources available to serve the interests of larger corporate entities. They depend on the government to protect their basic human rights and no more.

2 September 2011

Written evidence submitted by Tom Miles

I have been a professional photographer for the past 14 years, working first as a photographer's assistant, and later as a photographer in my own right. I currently work regualrly for a range of national magazines (Men's Health, Runner's World, Golf Monthly...) several book publishers (Penguin, Octopus, Hodder) as well as countless PR and commercial clients. I am very concerned by some of the recommendations made by the Hargreaves review, as I feel if enacted they will worsen a situation that already favours the larger players over self-employed creatives such as myself.

I have to sign contracts with the people who commission my work, and am very careful to only sign contracts which allow me to retain both my copyright and Moral rights. In most circumstances I have to request these contracts specifically, as the companies that commission me initially only offer a standard "rights grabbing" contract, which in a nutshell would mean that for one single payment I would cease to own my work, they could reproduce it in any form they choose, as widely as they like, and for as long as they like, with no extra payment to me. In the case of both copyright assignment and a waiver of moral rights, I would even have to ask their permission to use an image I had created in my own self-promotional material, such as a website or portfolio, and the work could be credited to someone else, used in a defamatory way, or altered way beyond recognition and I would have no recourse.

From my own business experience, retaining my copyright brings in around 20% of my income annually, in respect of work that is relicensed and reused. As for negotiating fees in the first instance, an awareness of how copyright and licensing works is worth a huge amount to me each year, as I'm able to calculate a fee based accurately on the usage a client intends to put my work to, rather than simply accepting the first figure I'm offered.

As things currently stand, pursuing a copyright infringement, either in print or online, is a very costly and time-consuming business, and current proposals look like making it even more so. Needless to say, many creatives like myself will often abandon such battles, and try and concentrate on our core business activity. The potential loss of revenue to the SME sector is huge.

The following are my main concerns, in line with the artists bill of rights (http://artists-bill-of-rights.org):

The moral rights of authors are not automatically granted as in other EU countries. It should not be necessary to assert your moral rights as at present under UK law, this should be an automatic right granted to all UK citizens.

Moral rights have still not been made unwaivable as in other EU countries. The right to be identified as the creator of a work should be absolute, the law should prohibit any person or organisation from requiring that the creator waive their moral rights. It is illogical to bring forth legislation for the licensing of orphan works when the law as it stands has no provisions which will prevent or significantly reduce the creation of orphan works

No sanctions are proposed for the removal of digital copyright information from digital works. At present it is necessary to show that removal of digital copyright information has been done with intent to infringe before it can be recognised by the courts as an offence under current UK legislation. Yet worldwide, every day, millions of digital works are having their digital copyright information stripped rendering these works as orphans.

This is morally wrong, it is the equivalent of physically removing a signature from a painting, an act that all would agree was reprehensible. Yet Professor Hargreaves, knowing this, has recommended the commercial exploitation of orphan works. This will

only make it more difficult than ever for creators to make a successful business when there is huge rersource of orphan works to exploit, a situation which will only get worse as time passes.

The review proposes allowing orphan works to be used for commercial purposes. There is no proven need for orphan works to be commercially exploited, and Professor Hargreaves said that copyright law should be evidence driven. There is no published evidence that shows that UK industries are disadvantaged through being unable to commercially exploit orphan works. There is no doubt a desire with many sectors of the UK industry, such as publishing, to have commercial access to orphan works at a price and on terms below what the rightful owner would require. This is robbing Peter to pay Paul, where Peter is the creator. This is unjust and unfair. There is a case to permit orphan works to be used for cultural purposes, such as in libraries or museums, providing that a precise definition of cultural use can be defined and agreed.

That remedies for unauthorised use are restricted for those who have not registered their works. Registering creative works at a national level is completely impractical in a global market. It will lead to anomalies of the type already exposed by the US system of copyright registration where a creators remedies for infringement are compromised if they have not registered that work in the USA. If every country were to go down that road, as could happen, creators would be in an impossible situation, needing to register their work in every country, but unable to afford the time and expense of doing so. If registration has to come into the equation it should be a global system. Such a universal system already exists and is supported by the PLUS Coalition.[1]

Creators are not given a level playing field with industry. Industry at present can strip digital copyright data from creators work, not credit them, require creators to waive their moral rights or risk losing a contract, assign their copyright or lose a contract, all of which impose grossly unfair terms on the creator.

Artists rights have not been recognised as human rights by Hargreaves IP review. Both the UN and EU Human Rights act have declared that artists rights are also human rights.

United Nations Universal Declaration of Human Rights Article 27 (2) *states:*

1 Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

2 Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

*Note also that a recent UK court ruling (*20thC Fox vs 'Newsbin2'*)*[2] *established that -*

Copyrights are property rights protected by Article 1 of the First Protocol of the European Convention on Human Rights*,*[3] *as also expressed in* Article 1 of the First Protocol of the Human Rights Act 1998*;*[4]

piracy of copyright work is a breach of the copyright holder's human rights;

the copyright holder is therefore entitled to legal redress;

and, because 'so far as possible, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with human rights', legislation drafted

[1] http://www.useplus.com/index.asp
[2] http://bbc.in/pLaZZR
[3] http://bit.ly/nwH26q
[4] http://bit.ly/pAGzcO

and enacted subsequent to the enactment of the Human Rights Act 1998[5] *must also be read and given effect in a way which is compatible with human rights.*

[5] http://bit.ly/mTYKdZ

Written evidence submitted by Graham Mitchell

I am a commercial photographer working in the UK and other countries. I am deeply concerned about the current state of intellectual property law in the UK and the proposed changes. The creative sector in the UK is world-leading. It is deservedly a source of pride to the nation and yet there are those who for their own commercial reasons would like to see this sector weakened and compromised when if anything it needs to be fostered and protected and recognized for its true value.

The issues which concern me are:

- the lack of protection for moral rights. These rights should apply automatically and be unwaivable.

- copyright in a work should also be protected. Large companies are often using heavy-handed tactics to demand transfer of copyright. There is a disparity of bargaining power which is harming the creative industry.

- the artistic community consists of a very large number of very small businesses. On an individual basis, these businesses do not have the resources to enforce their rights. As a group, they require more protection.

- there is a lack of protection against works being stripped of their copyright information.

- even more damagingly, the legal process required to seek and obtain damages for each copyright infringement makes a claim of damages impractical in most cases. For example, I have seen my works used without permission on over 100 websites, but most claims might be in the region of £100 to £1000 – mostly too small to pursue individually, yet as a whole this is tens of thousands of pounds of potential lost income. Multiply this by all artists in the UK and this is a huge loss of revenue.

- the issue of 'orphan works' for commercial purposes. If an author of a work can't be identified, then a different work can be commissioned or licensed. There is no compelling argument for the use of so-called "orphan images".

- registration of copyright should not be necessary for the work to be protected –it must be automatic. Registration of works places an undue burden on the artist, and is insufficient in dealing with cross-border infringements. It is far too time-consuming and impractical to register all works in every jurisdiction. If it has to happen, then support a global registration system.

- there are already web-based applications in existence which can find matches for a given image on the internet. This technology can be extended to help people find the author of "orphan works" and to identify the copyright holder, contact details, etc. We are now at a stage where orphan works can be largely eliminated by technology but the lawmakers seem to be slow to catch up. I would like to see a national/global system which can take a submitted image and return information

about the work's author. The cost of such a program would be more than offset by the resulting increase in revenue (and taxable income).

- finally, artist’s rights have been declared as human rights by the UN and the EU. It is time to stop infringement of these human rights.

5 September 2011

Written evidence submitted by the Motion Picture Association

The MPA welcomes the opportunity to make a submission to the BIS Select Committee inquiry into the Hargreaves Review of Intellectual Property and the Government's response to that Review.

The recommendations that the Government is seeking to implement relating to the UK's Intellectual Property (IP) regime have significant implications for the UK's creative industries, economic growth and jobs. It is therefore important that they are given proper scrutiny by Parliamentarians to understand the potential implications for a vital part of the UK economy.

Introduction

By way of background, the Motion Picture Association is the international trade association that serves the interests of the six major international producers and distributors of films, home entertainment and television programmes (Paramount Pictures Corporation, Sony Pictures Entertainment Inc, Twentieth Century Fox Film Corporation, Universal City Studios LLC, Walt Disney Studios Motion Pictures and Warner Bros. Entertainment Inc.)

Our members are active across the European Union as well as in the US and globally – and they contribute towards the nearly two million jobs across the UK creative industries, which together account for 7% of GDP.

A 2010 Oxford Economics Report assessing the economic impact of the UK film industry identified inward investment amounting to £928.9 million in 2010 (an increase of 15% over 2009), much of this from major studios. Beyond its direct and indirect contributions to GDP, the film industry plays a key role in exporting British talent and crews worldwide and secures the country's position as a global creative hub. This is in addition to generating remittances and taxes which accrue to the overall benefit of the UK economy.

IP - copyright in particular - is the foundation of our members' businesses. It enables them to secure a return on their investment, to justify reinvesting profit in subsequent years and to continue a virtuous cycle of growth and reinvestment that has proved itself of substantial benefit to the public, the economy, the exchequer and the workforce for decades.

The Hargreaves Review and the Government Response

The UK has one of the strongest content sectors in the EU and we would urge the Government to ensure that any changes made to the current IP framework further enhance that position rather than place it in jeopardy. The MPA welcomes the Government's acknowledgment that the IP framework is a vital part of the business environment. The endorsement the Report gives to the value of IP is greatly appreciated by operators that rely on the certainty of copyright to finance, produce and distribute audio-visual works such as films and TV shows.

We have emphasised from the outset that the manner of implementation of the recommendations will go a long way to determining the success of the measures.

Indeed, the MPA has long supported some of the recommendations which the Government intends to implement - such as exceptions for non-commercial research and library archiving - but there are a number of measures which could impact negatively on growth and investment in our sector and which would benefit from thorough scrutiny from the BIS Select Committee.

The film industry, like many other sectors, is being transformed by the widespread availability of digital technology and the internet and it makes sense, therefore, to review the framework within which our IP is both protected and exploited.

We feel that there are several proposals for change in the Hargreaves Report that , if implemented appropriately, represent a sensible modernisation of the current system:

- **Widening the exceptions for archiving and non-commercial research to film content –** The MPA agrees that the preservation of a nation's film heritage is vitally important and supports the extension of the archiving exception to film. For some time, the MPA has also supported a limited extension of the research and private study exception to further the public interest in promoting academic studies, and in particular film studies. We also support bilateral dialogue between producers and archives to facilitate film preservation and education.

- **IP enforcement –** The MPA welcomes the fact that Hargreaves and the Government recognise the importance of IP enforcement. In that context, we note that successive Governments and, more recently, the courts have all considered the Digital Economy Act to be an appropriate and proportionate response to the problem of online copyright infringement - so we particularly welcome the Government's commitment to implementing the DEA.

There are some measures proposed by Hargreaves that the MPA believes need very careful consideration before a decision is made to proceed:

- **The introduction of a Digital Copyright Exchange (DCE) –** the MPA believes that as long as this is a purely voluntary initiative, grounded in commercial realities and limited to certain types of content then it could add value, although we have some concerns about certain details of this proposal which are outlined below.

The Hargreaves Report also includes a number of proposals which raise major concerns for our industry which we oppose in their current form:

- **The introduction of a private copy exception so as to allow for the format-shifting of digital content acquired in one format but which the consumer wishes to consume in another -** Whilst there may be instances where the introduction of a 'limited private copying exception' makes sense, e.g. for personal music collections, introducing a private copy exception for film or TV content which goes beyond the current scope would bring little benefit to UK consumers and undermine innovation of existing and new business models. EU legal requirements relating to the protection of technological measures (such as copy protection on DVDs) and on-demand transactions must also be carefully considered and suggest far greater legal difficulty in effecting this change than the Hargreaves Report implied. Moreover, where copying is not licensed but does fall within the scope of the private copy exception, EU rules (which have been confirmed by recent Court of Justice jurisprudence) require that fair compensation be paid to rights

holders. For all of these reasons, the MPA rejects the suggestion that a 'format shifting exception' should be legislated for and that it should apply to audio - visual works.

- **UK support for the creation of a new exception for 'non consumptive use' at EU level -** The MPA also opposes very broad measures that could very likely have the unintended consequence of legitimising rogue websites, or at the very least offering them a new defence to allegations of infringement in cases where they are not directly selling access to the works in question.

Please find below a more detailed outline of our position in response to the Government's thinking and the actions it plans to take in response to the Review.

Specific MPA response to the Government's recommendations

Widening the exceptions for archiving and non-commercial research to film – The MPA supports both measures to help preserve the UK's film heritage and encourage academic study, particularly film studies.

- Both film-makers and the general public benefit from the important work undertaken by film archives. We support this initiative subject to certain conditions, feeling that in particular any new exception should be narrowly drawn and limited to copying for preservation.

- The MPA also supports a limited extension of the research and private study exception to further the public interest in promoting academic studies, in particular film studies. Such an exception should apply only where no licensing systems are available. We are also open to continuing dialogue with film archives to facilitate such exceptions through agreements on issues such as print deposit.

The MPA welcomes the Government's commitment to implementing effective IP enforcement

- Content theft and infringement of our members' IP is the single biggest barrier to effective competition and investment in our sector. An IPSOS survey for 2010 indicates an annual revenue loss for the UK film and TV industry of £533 million due to copyright theft, up from £459 million five years ago. The total loss to the film industry alone was £463 million in 2010.

- The MPA believes that full implementation of the DEA in a cost-effective manner is a vital step in reducing piracy and key to building a thriving legal market online. The UK is a leader in this area and there are already a growing number of legal offerings online, such as iTunes, Lovefilm and Blinkbox.

- At the same time, our members accept the need to help educate consumers and to continue to make content available through new and innovative legitimate platforms. These are important parts of the transition to a digital world and our members are participating in them enthusiastically.

- The MPA is committed to working with the Government to deliver DEA implementation. We support speedy and effective implementation of the Initial Obligations stage and the exploration of other measures to tackle online infringement, taking on board in particular the recent High Court decision requiring BT to block access to the pirate website *Newzbin2* (subject to a Court Order that is

due to be made next month). Likewise, we support Government's efforts to address other components of the DEA legislation including addressing the activities of rogue websites and reducing the potential for consumers to be led to illegal sources of content by search engines.

The Digital Copyright Exchange (DCE) – MPA supports a purely voluntary and evolutionary DCE recognising the differences across content sectors

- The Government has stated that it plans to take forward the DCE recommendation by appointing someone to lead this work. The MPA believes that the person appointed needs to be someone that has the confidence of the content sector. The Government appears to recognise that the efforts to establish the DCE must be led by the private sector so that it can be tailored to commercial and operational realities, taking into account the varying natures of different copyright sectors as well as a number of important legal issues (including competition law) since, as the Government's response clearly states: 'Government is not best placed to do this'.

- In the audio-visual sector, a common licensing platform faces specific challenges, the most important of which is that it could undermine existing licensing arrangements and it would reduce the volume of economic activity arising from copyright works, thus harming innovation and growth. The value of the film industry is entirely based on the reliable exploitability of copyright works. This is particularly the case today, as industry players in their different ways innovate commercially with new digital distribution systems. It is important to appreciate that licensing arrangements are working well in the audio-visual digital market, due to the centralised and transparent consolidation of rights in film producers. UK law should support the continued recognition of the producer as central right holder, so as to facilitate licensing and incentivise new online business models. At this time, it is particularly important not to introduce uncertainty into this area.

- Both Hargreaves and the Government have pointed to various perceived shortcomings in current licensing procedures. However, the Hargreaves Report appears to have ignored the contents of its own research on the VoD sector[1], which dispels the notion that there is any serious problem with licensing in the audio-visual sector and indicates that the UK copyright regime is supportive of investment. While it remains to be seen whether the DCE is an appropriate response, we believe that the DCE could act as a directory of copyright interests and licensors' contact details and it could also serve as a signpost system which could direct users to information regarding the content owner and its licensing procedures.

- Hargreaves also suggests limiting participation in the Digital Economy Act only to those works which are listed via the DCE. This contravenes important aspects of international law: Article 5(2) of the Berne Convention expressly forbids the imposition of 'formalities' as a condition to the 'enjoyment and the exercise' of copyright. The Government's response appears to recognise this point while noting that 'a voluntary system can be incentivised' without violating international law. We believe that for it to work, the content sector needs to view it as an essential business tool rather than an interference with important commercial freedoms.

[1] *The VoD Sector. Copyright Issues*, PACEC 2011: http://www.ipo.gov.uk/ipreview-doc-i.pdf

Format shifting – MPA opposes introduction of a format shifting exception applicable to audio-visual works

- Government has made clear that it plans to implement a 'limited private copying exception'. Such an exception may make sense for some forms of content, but not for all. In the audio - visual sector, our members are developing new business models for the delivery of content online. Such models will harness the computing power of 'the cloud' and allow consumers to watch their digital entertainment across multiple platforms (connected TVs, PCs, game consoles, smartphones and tablet PCs etc) in an easy, consistent way whilst remaining in a secure environment. This type of innovation would be put at risk by a blanket exception. Indeed, the Hargreaves Report itself notes the vibrant UK Video-on-Demand market, which would itself also be undermined by such an exception.

- The Government also indicates that 'contractual terms' may undermine the benefit of exceptions and so endorses the Report's view that the new exception should override the contract between a copyright owner and its customers. This approach ignores an important principle of EU copyright law, Article 6(4)(4) of the Copyright Directive, which was designed to encourage the launching of new business models. Where content is made available to consumers on-demand, rights holders are not required to accommodate copyright exceptions. So, for example, films released online very soon after theatrical release can be made available for viewing only (and not downloading and/or copying). If such forms of exploitation were subject to mandatory application of the private copy exception this would constitute a significant and perhaps fatal disincentive for the rights holder to make the content available in such way. As a result, we reject this approach to contractual terms in principle and in practice- MPA member studios are investing in new business models, including providing format-shiftable digital copies in a secure manner that offer consumers different means to enjoy our films at different price points and on different devices. A new exception that overrides contractual agreements would undermine such business investments and indeed would thereby restrict consumer choice. Moreover, and as noted above, the Government must also consider the legal requirements related to technological measures (for example copy protection on DVDs, which is mostly absent on CDs by way of comparison) and the Copyright Directive's explicit prohibition on circumventing such measures.

Secure (at EU level) a broad copyright exception for new uses including so-called 'non-consumptive' uses – MPA opposes this initiative

- The Government has indicated that it agrees that there is a need for a wider set of exceptions at EU level to enhance economic growth and encourage new uses that 'do not directly trade on the underlying creative and expressive purpose' of works. This proposal effectively asks for the introduction of a broad category of 'fair' uses that far exceed the 'Fair Use' doctrine in the US. The risk of such a broadly-defined exception is that when rights holders are not allowed to exploit (or to prohibit) newly-enabled uses for their works, they will be disincentivised not only from cooperating with technology and service providers to find such new uses, but also from creating new works.

- Rogue platforms (including websites) would also be likely to invoke such an exception as a defence in certain copyright infringement cases, thereby further complicating online enforcement efforts.

- The Government acknowledges that EU level legislation takes a long time to adopt and as a result it will explore what can be done at UK level. The debate over such a broadly-defined exception at the EU level is likely to be very controversial with the UK's European partners. Such an approach runs counter not only to the civil law tradition of specific well-defined exceptions which provide legal certainty, and is inconsistent with existing EU and international norms.

Other important issues that the MPA wishes to comment on:

Legislation to enable licensing of orphan works – MPA supports a sector specific approach

- The Government endorses Hargreaves's view on orphan works but makes no mention of the European Commission's proposal for an Orphan Works Directive. While we agree that it is appropriate to address the issue of Orphan Works with regard to certain types of content where problems have arisen, we urge the Government to engage at the EU level in order to safeguard UK interests, so as to avoid practices that would diminish rather than increase the amount of economic activity that arises from in-copyright works.

- The MPA would also urge the Government to ensure the exclusion of audio-visual works from the scope of the EU Proposal as the licensing of such works is facilitated by the fact that rights are generally concentrated in the producer. Any orphan works proposal must also ensure a robust requirement for a good faith, diligent search in this regard. On this matter, we would direct the Committee's attention to the sector-specific guidelines on due diligence that were formulated as part of the Memorandum of Understanding process of the Digital Libraries Initiative.[2]

- Given the Government's commitment to 'satisfactory safeguards' including in particular diligent search, the role of extended collective licensing with respect to orphan works is not clear. As a general matter, the Government must carefully consider the impact of Extended Collective Licensing on the marketplace. It has been used mostly in 'ancillary' areas or to facilitate the operation of exceptions (where a remuneration is also due).

Evidence – MPA supports the need for objective evidence

- The MPA shares the Government's view that policy should indeed be driven by objective evidence. Throughout the Report, Hargreaves called for an evidence based approach. It is therefore surprising that the Report appears to ignore the contents of its own research on the VoD sector[3], which challenges the notion that there is any serious problem with licensing in the audio-visual sector and indicates that the UK copyright regime is supportive of investment. Instead the report makes a number of recommendations that could damage this stability based on little evidence. Indeed, a Google-commissioned study noted that only seven percent UK technology start-ups identified copyright as a barrier to their business. It would therefore seem that a significant change to the UK copyright regime is contrary to existing evidence. We also strongly support the Government's plan to 'give limited weight in IP policy-making to evidence that is not sufficiently open and transparent in its approach and methodology'. We look forward to the upcoming guidance in this regard.

[2] http://ec.europa.eu/information_society/activities/digital_libraries/other_groups/hleg/meetings/index_en.htm
[3] *The VoD Sector. Copyright Issues*, PACEC 2011: http://www.ipo.gov.uk/ipreview-doc-i.pdf

Conclusion

The UK has one of the strongest content sectors in Europe. Our members, along with many other content creators, are adapting their businesses to meet the changing needs and demands of consumers. Their ability to do that rests on the security and value of their IP and requires a stable legal framework.

The UK's IP framework has worked well over the years and whilst improvements can always be made, large-scale changes must be carefully considered for the reasons we have outlined in this submission. We therefore welcome the BIS Select Committee inquiry, which gives Parliament the opportunity to assess the implications of each aspect of the Hargreaves Report and the Government's response.

The MPA very much welcomes the Government commitment to consult on key parts of Hargreaves implementation. It will be vital to work with industry to ensure that changes to the IP framework promote growth and ensure that the UK is the best place in Europe to invest in content creation.

As we have set out above, we welcome a number of the changes contained in the Hargreaves Report. However there are key areas - for example, in relation to the introduction of a private copying exception, the Digital Copyright Exchange and a new exception for 'non-consumptive' use – where the Report's proposals have the potential to destabilise the current framework and undermine investment.

We have outlined our main concerns above and would be more than happy to give more detail to the Committee on request and/or to provide opportunities for the Committee to see examples of new technological developments and innovations that our members are undertaking. With the MPA and the companies it represents, we have available a comprehensive range of technical, legal and business experts who are at the disposal of the Committee to provide oral evidence on any of the topics raised in this paper. The MPA is also a member of the Creative Coalition Campaign (CCC), a partnership comprising trade unions representing workers in the creative industries and organisations in the music, video, film, TV, publishing and sports sectors. The CCC has also submitted evidence to this inquiry. Should the inquiry choose to call witnesses from the CCC we are confident that the views of the MPA and our member companies would be represented effectively.

5 September 2011

Written evidence submitted by Tim Motion

I submit that the creative industry which contributes at least 5% (?) of UK GDP is being largely ignored and is not taken seriously as a **valuable asset and tax provider** for the UK economy – particularly small businesses and creative individual operators

The over-riding principle is this: In the normal marketplace goods and services are displayed for sale, hire or usage license in return for a stated price – the cost of goods and services. If the goods and services are taken and **used without payment it constitutes theft.**

There appear to be no punitive sanctions in law against infringement of photographic copyright and the Moral Right to attribution.

In the present digital age photographs can be distributed throughout the world almost instantaneously. Even if the photographs contain METADATA, i.e. the IPTC - details of the creator, description and statement of copyright - this information can be stripped out, thus creating ORPHAN WORKS. This is certainly the case with photographs uploaded to online entities such as Facebook. These works can then be used for free unless the 'creator' can be identified through a search with 'due diligence'. Realistically the latter is unlikely to take place as it is time-consuming and expensive, certainly for a large corporation where usage of images runs into millions.

As a result the creator does not get paid and as his or her income declines they are less and less likely to be able to contribute purchasing power and tax to the UK economy.

The posited return of Clause 43 within the Digital Economy Bill by interested parties will impoverish the creators and benefit large corporations and multinational companies who make use of the creators' work. This is especially pertinent in the case of individual creators of illustration, photography and musical works.

Clause 43 was thankfully deleted from the Digital Economy Bill as being poorly thought through and prejudicial to the creative industry as a whole and individuals and small organisations. This is especially relevant to the retention of Copyright by the creator/artist/illustrator/photographer/writer/musician enshrined in the Copyright Act of 1988 and the Moral Right to be attributed as the creator of the work – without question.

It must be possible to setup some form of economically viable image registration – in particular for digital works, old and new, placed on websites and the internet.

1. Funding could be made available to aid research into stronger, universal software to input and **maintain robust metadata** into all types of digital image formats.

2. A punitive element be introduced into copyright legislation to deter infringements, **particularly in the digital domain.**

3. An effective and affordable legal remedy with easy access be made available in the format of a copyright small claims court.

4. Mandatory copyright education in schools and Further Education/ Higher Education establishments

Either way the principle of the creator's **Copyright and Right to Attribution** must be retained as sacrosanct.

INFRINGEMENTS:

- As a professional photographer I make a significant proportion of my income from licensing fees for the Intellectual Property (Photographic Images) that I create and own.
- If my printed work is copied or my digital images are stripped of identifying data (the METADATA) it becomes an ORPHAN WORK usable by anybody for free. I therefore have no income.
- I attach a few photographs as examples of infringements of my own copyright material. This constitutes a very small part of such activity worldwide.
- These represent only two infringements that I happen to have discovered by chance. The potential for further theft and misuse without attribution or payment is vast.

THEFT OF IMAGES: EXAMPLES OF INFRINGEMENT OF COPYRIGHT [WITHOUT ACCREDITATION OR PAYMENT]

CD Cover for Sonny Rollins SCOOP.

- Reproduced on the card box-cover,
- On the front of the CD box,
- On the CD itself,
- On the inside back of CD box (reversed):
- This equals four usages, with Worldwide distribution including Japan.
- **NO CREDIT, NO PAYMENT**.

I sent an Invoice to the Distributor in Germany but the letter was returned 'Addressee unknown'. The picture could have been copied from a book, exhibition programme or magazine.

Album Fotografico (Brazil).

Found on a general marketing/networking website, this 'album' reproduced no less than **THIRTY images** of musicians copied directly from my book "Jazz Portraits – An Eye for the Sound". I was unable to contact the owners of the site; there was no email address. **NO CREDIT, NO PAYMENT.**

The lost revenue to me would amount to about £2,000.

5 September 2011

Written evidence submitted by Music Managers Forum (MMF)

Executive Summary

- Government should focus on encouraging rights holders to participate in any process such as the Digital Copyright Exchange that will make licensing easier, cheaper and faster.
- Government should do more to educate consumers about copyright and computer use.
- Accurate databases are of course helpful to licensing but are part of the solution. They are not the solution in themselves.

The Featured Artists Coalition (FAC) was formed in 2009 to represent the voice of artists in every aspect of their career. Featured artists are those artists who are contracted to phonogram producers and publishers or who run their own record label, and whose name appears on recordings released to the public. A featured artist is always a musical performer but in many cases they are also musical authors.

The Music Managers Forum (MMF) represents managers of featured artists. Managers are the primary representatives of artists and earn their money by commissioning income that the featured artist actually receives. After the initial artist-management agreement has been signed the managers and the featured artist's interests are therefore mutual.

1. We welcome the Governments response to the Hargreaves review which set out to remove the barriers to use of copyright material by new and innovative businesses that will fuel growth. The Government does not wish to compel rights holders to take part in a Digital Copyright Exchange and wishes industry to lead efforts to establish such a market place. Unfortunately all the signs over the last decade are that industry will not provide the necessary leadership to make licensing easier, faster and simpler to enable growth. Terrestrial radio is licensed by collective agreement – why shouldn't internet radio be licensed in the same way?

2. The comparison drawn with rights holders working in an Amazon style market place is a false analogy. Rights holders in the latter are selling an individual good. Failure to agree a price will not halt the entrant into the market. However one substantial rights holder's failure to agree a price can halt the launch of a music service. Left to its own devices a music market place will continue to fragment rights and make entrance into the market expensive, slow and difficult. It is hard to garner evidence for this situation for 2 reasons:

A) Potential rights users are often still in the market and wish to continue to operate so disclosure of information regarding the difficulty of licensing is counterproductive. We can provide evidence if it is held in confidence.

B) Potential rights users often founder at the first hurdles of complexity and cost and are never even identified. By definition the services that have failed don't exist.

3. Databases are of course crucial to licensing and it is vital that they are accurate but in themselves they will not remove the barriers to better licensing. Licensing occurs at the moment for those that can afford it but the minutiae of behind the scenes attribution of ownership and payment of income is a job for the recorded music industry to solve; if we wait for perfect databases the licensing of music will grind to a halt. Most users want “all of the music” and as such a collective approach to licensing through a DCE will provide what is required but this also requires rights holders to inject their rights. This is a complex subject but could be achieved in small steps by a progressive injection of rights starting say with internet radio and moving through the spectrum of user requirements.

4. New entrants to the market with non traditional business models could be assessed collectively as to their viability but the price of those rights could be left to individual rights holders. The duplication of multiple negotiations could be avoided. Government should act as the catalyst for better licensing.

5. We welcome the introduction for voluntary codes for collecting societies but would like Government to ensure that the latter consult their members widely over those codes.

6. The introduction of a format shifting exception will have no effect on growth in the UK.

7. We welcome the view that restrictions removed by copyright exceptions are not re-imposed by contract.

8. We agree that it is not the role of Government to design new product offerings that consumers will pay for but if those new offerings cannot get off the ground because they cannot obtain licences easily, swiftly and cheaply (but with fair value for rights holders) then we will all be complicit in stifling new businesses and growth.

9. We welcome the Governments’ commitment to education about copyright. Whilst it is down to each creative industry to put its own case for respect of its own rights Government could to do much to educate computer owners about technological issues such as file sharing, router protection etc and should lead the moral debate about the value of creativity to this country’s economy

5 September 2011

Written evidence submitted by the Musicians' Union

1. The Musicians' Union (MU) welcomes the opportunity to respond to this Select Committee inquiry. We represent over 30,000 musicians working in all genres of music. As well as negotiating on behalf of our members with all the major employers in the industry, we also offer a range of services tailored for the self-employed by providing assistance for professional and student musicians of all ages.

2. The MU responded to the initial Hargreaves Review earlier this year in order to protect our members' rights and careers, and having considered the Government's subsequent response we have a series of further points to make on the recommendation to introduce a private copying exception.

3. We have studied the *Economic Impact of Recommendations* document, but the MU still is not convinced of how the introduction of a limited private copying exception will benefit the economy in any way, since it will not apply to commercial services.

4. The MU did, however, welcome the Hargreaves recommendation to introduce a limited private copying exception which 'corresponds to what consumers are already doing' and we believe that it is sensible that acts of private copying should no longer be considered illicit acts. We do, however, object to the multi-national companies who have made enormous amounts of money through the selling of iPods, mp3 players and other devices that enable format shifting not paying fair compensation to the performers.

5. The MU does not agree with Professor Hargreaves that the benefit of format shifting 'is already factored into the price that rights holders are charging' - the principle of fair compensation for performers and creators in return for a private copying exception is enshrined in Directive 2001/29/EC of the European Parliament.

6. Hargreaves seems to suggest that any fair compensation should be factored in to the price of the CD. This is wholly impractical in view of the fact that piracy and the buying power of the supermarkets has driven the price of CDs down to a record low and the market would not be able to sustain any increase.

7. To date, 22 out of 27 EU member countries have introduced private copying exceptions and corresponding levy schemes on copying devices. French performers in particular receive respectable payments (around €200pa for a regional orchestral player) from their country's audio and audio visual levies.

8. The MU feels strongly that UK composers and performers should be allowed access to the same income stream as their European counterparts, particularly since the European Commission has recently

been putting a lot of effort into attempting to harmonise the methodology used to impose these schemes and is about to appoint a high level independent mediator whose task will ultimately be to help arrive at an acceptable pan-European stakeholder agreement.

9. The Government's response suggests that it opposes a levy system on the basis that 'it is likely to have adverse impacts on growth and inconsistent with its wider policy on tax'. In its desire to provide an environment of simplicity and speed for the clearance of Intellectual Property rights for technological innovators in this country, however, the Government should also bear in mind that, while such innovators are applauded for their ability to receive remuneration through a network of licensing systems and micro payments, it is not always appreciated that performers and composers are very much in the same boat.

10. The vast majority of Musicians' Union members earn less than £20,000 a year from their profession. Even those at the top of the profession are now increasingly dependent on micro payments from collective licensing agreements and this is likely to increase in the future. A few hundred extra pounds generated under a fair compensation scheme for format shifting would be of real significance to an individual musician in that context.

11. It is not just in comparison to Europe that the UK risks being seen as behind the times - we are now seeing developing countries introducing fair compensation schemes. The device manufacturers are already paying for patents to software developers and the like on each device sold and yet the act of copying onto these devices the "software" the consumer is most concerned with (music) is not currently generating any income for the music industry.

Conclusion

12. The MU has no issue with private copying, as long as it doesn't put UK artists and composers at a disadvantage to the rest of Europe. Consumers should be free to transfer CDs that they have bought onto their mp3 devices. The MU would therefore support a new exception to copyright law as long as it complies with EU legislation.

13. We would therefore like the Government to recognise the principle of fair compensation as laid out in EU Directive 2001/29. As already stated, almost all EU countries operate a form of private copy levy system.

14. If a private copying exception were to be introduced in the UK without accompanying fair compensation, it would leave UK artists and creators worse off than their counterparts in 22 other EU countries.

August 2011

Written evidence submitted by the National Library of Wales

September 2011

Summary

- The National Library of Wales supports all ten of the Hargreaves Review's recommendations and the Government's proposals for their implementation.
- The response focuses on the five recommendations that are relevant to The National Library of Wales's current activities, namely 1, 3, 4, 5, and 9.

1. About The National Library of Wales

1.1 The National Library of Wales is the largest library in Wales and holds over 6.5 million printed volumes. It is one of the five legal deposit libraries in the UK and approximately 67,000 books and 100,000 periodical and newspaper issues are added to the collection annually.

1.2 The National Library of Wales's collections also include:

- Around 1,900 cubic metres of archival material;
- The most comprehensive collection of paintings and topographical prints in Wales, totalling over 60,000 works;
- Wales's largest collection of portraits (c.15,000 paintings and portrait pictures);
- The largest collection of photographic images in Wales (c.1,000,000 images);
- Wales's largest cartographic collection (c.1,000,000 maps)
- The National Screen and Sound Archive of Wales, which contains over 5.5 million feet of film, more than 250,000 hours of video, and over 200,000 hours of sound recordings.[1]

1.3 The Library welcomes people of all interests to access the collections on-site. As well as four Reading Rooms, the building has eight public exhibition spaces used for internal and touring exhibitions and a theatre where events are held regularly. In 2010, we welcomed over 85,000 people through our doors.

1.4 We also provide online access to digital reproductions of items in our collection and we have for many years promoted the use of digital technologies as means of widening access. Millions of digital objects are displayed on the website, and our digital collections (which consist of born-digital objects as well as reproductions of physical items) continue to grow apace. Nearly 960,000 unique users visited the Library's website in 2010.[2]

2. General comments on the Hargreaves Review of Intellectual Property and Growth

2.1 The National Library of Wales's response to the Hargreaves Review's Call for Evidence highlighted five ways in which the current intellectual property framework inhibited libraries and archives' role in preserving and providing access to works that could stimulate innovation and creativity.[3] These were:

2.1.1 Contractual agreements overriding statutory exceptions to copyright law

2.1.2 Digital Rights Management

[1] http://www.archif.com/
[2] http://www.llgc.org.uk/
[3] http://www.ipo.gov.uk/ipreview-c4e-sub-nlw.pdf

2.1.3 Barriers to long-term digital preservation
2.1.4 Barriers to the use of digital data for research and innovation
2.1.5 Barriers to the use of works whose authors are unidentifiable or untraceable ('orphan works')

2.2 The National Library of Wales welcomes Professor Ian Hargreaves's report *Digital Opportunity: A Review of Intellectual Property and Growth* as a thorough and balanced assessment of the current UK intellectual property framework and its impact on innovation and growth. The Review broadly addresses all but one of our concerns and makes recommendations that would go a long way towards remedying them. We were therefore exceptionally pleased to hear that the Government had accepted all of the Review's recommendations and had made proposals for their implementation.

2.3 Of the ten recommendations made by the Review, five are more directly relevant to The National Library of Wales's current activities. Our response to this inquiry will refer only to those five recommendations, namely 1, 3, 4, 5 and 9.

3. Recommendation 1: Evidence

3.1 Such is the importance of the intellectual property system to the UK economy that it is vital that its development is driven as far as possible by 'objective evidence'. Failure to do so in the past has resulted in too much emphasis being placed on enforcement, thus threatening the balance between the interests of rights holders and consumers.

3.2 The Review states that 'much of the empirical evidence on copyright and designs is privately held and enters the public domain when it is used to support the arguments of lobbyists'.[4] It is hoped that the commitment to 'openness and transparency' will address this issue. It order to measure success in achieving this aim, terms such as 'objectivity' and 'fairness' will also need to be defined and should be included in the proposed guidance on what constitutes 'open and transparent' evidence.[5]

3.3 The 'impacts on the consumer and other interests'[6] mentioned in the Review's recommendation may be difficult to quantify and we agree that the evidence of smaller businesses and organizations, many of which may not have measures in place to gather evidence to support their position, will need to be viewed sympathetically.[7] When responding to the Review's Call for Evidence, we were unable to supply statistical evidence of our impact on the economy, yet we are certain that our services play an important role in facilitating research and that our collections, accessed both within the building and on-line, inspire new creative works.

3.4 The quality of a corpus of evidence will depend on the range of sources consulted as well as the reliability of the data. Efforts are made to give a stronger voice to libraries and archives in discussions regarding the future of intellectual property law in the UK. The Libraries and Archives Copyright Alliance has a wealth of knowledge and experience and represents the interests of the sector on matters relating to copyright. Libraries and archives often work in close collaboration with Higher Education

[4] *Digital Opportunity: A Review of Intellectual Property and Growth* (2011), p.18. para.2.13.
[5] The Government Response to the Hargreaves Review of Intellectual Property, p.3.
[6] *Digital Opportunity*, p.20. Recommendation.
[7] The Government Response to the Hargreaves Review of Intellectual Property, p.3.

Institutions (HEIs). The Joint Information Systems Committee (JISC) is also particularly active in raising awareness of issues affecting HEIs and, next year, the Arts and Humanities Research Council will fund the establishment of a Centre for Copyright and Business Models in the Creative Economy.[8] It is hoped that this new Centre will generate the type of 'objective evidence' that will be used to drive the development of the intellectual property system in the future.

4. Recommendation 3: Copyright licensing

4.1 The National Library of Wales supports the recommendation that a Digital Copyright Exchange be established as a single, publicly accessible register and common platform for licensing transactions. The notion that the proposed Exchange could become 'the best copyright licensing system in the world'[9] may seem ambitious, but, as the report states, it is an opportunity that others are likely to seize unless the Government acts swiftly.[10] The National Library of Wales is currently discussing its strategy regarding e-commerce services and the Digital Copyright Exchange could possibly be a suitable platform for making items from our collections available for licensing.

4.2 In addition to making items from their collections available for licensing in the Digital Copyright Exchange, libraries and archives should contribute to the discussion regarding its delivery and management. Organisations such as The National Library of Wales often act as an interface between rights holders and consumers, and have much to offer in terms of knowledge and experience in the field of information management.

4.3 Though we accept that collecting societies currently fulfil an important role in licensing markets and should play a central part in the implementation of a Digital Copyright Exchange, we also agree that they should be required to comply with set standards of practice and transparency that are subject to independent review. This would be key to achieving and maintaining a balance between the interests of rights holders and consumers.[11]

5. Recommendation 4: Orphan works

5.1 The National Library of Wales has, through our digitisation activities, become very aware of the problems associated with the use of orphan works and we are able to relate to several of the Review's observations on this issue.[12] A solution to the issue is greatly needed and it is hoped that, supported by recent developments on the EU level, the Review will finally lead to unlocking this 'national treasure trove'.[13]

5.2 The Review acknowledges the challenges of clearing rights even for relatively recent material, citing as an example the British Library's project to digitise 4,000 hours of sound recordings and make them available online.[14] A significant proportion of the works in our archival collections contain little, if any, information that would lead to the current rights holder. In assessing their eligibility for digitisation, these works must

[8] http://www.ahrc.ac.uk/FundingOpportunities/Pages/CopyrightNewBusinessModelsCreativeEconomyEoI.aspx
[9] *Digital Opportunity*, p.32. para.4.29.
[10] *Digital Opportunity*, p.32. para.4.26.
[11] *Digital Opportunity*, p.36. para.4.46
[12] *Digital Opportunity*, pp.38-40. para.4.52-4.60.
[13] *Digital Opportunity*, p.39. para.58.
[14] *Digital Opportunity*, p.38. Case Study: The British Library.

either be condemned to obscurity or the Library must face the risks of associated with copyright infringement. We agree with the Review's view on the need for changes to enable the use of orphan works.

5.3 We broadly agree with the Review's recommendation that an extended collective licensing for mass licensing of orphan works should be established as well as a separate clearance procedure for use of individual orphan works. The details of this scheme would be key to its success or failure in unlocking orphan works. Bearing in mind the high percentage (as much as 40 per cent[15]) of orphan works in the collections of cultural organisations whose budgets may already be under pressure, the cost of obtaining licences will need to be considered carefully if the primary aim of this scheme is to enable the use of such works. As suggested, the fee structure for licensing orphan works should also take into account whether the materials in question were created for commercial purposes.[16]

5.4 The criteria for diligent searching should also be considered carefully and clear guidance on what constitutes a 'diligent' search will be needed. We agree that this should involve diligent searches of relevant rights registries[17] and that the orphan works solution could be tied to the Digital Copyright Exchange as a means of determining whether a search is sufficiently 'diligent'.[18]

6. Recommendation 5: Limits to copyright

6.1 The National Library of Wales agrees with the recommendation that Government should 'resist over regulation of activities which do not prejudice the central objective of copyright' and that it should deliver copyright exceptions at UK level 'to realise all the opportunities within the EU framework'.[19] We welcome the Government's intention to bring forward proposals in autumn 2011 for a substantial opening up of the UK's copyright exceptions regime.

6.2 Technological advances in recent years have posed new challenges to libraries and archives. The opportunities arising from our capacity for digitisation and the new demands of preserving and providing access to born-digital archives are two significant developments that the current intellectual property framework does not adequately support. In order to fulfil their role effectively in the digital age, libraries and archives need exceptions in place that will enable them to make the most of these technologies for the purpose of preservation and future access. As well as introducing an exception to enable 'library archiving',[20] we therefore urge the Government to include in its reforms an exception that would permit libraries and archives to carry out any activities regarded as essential to the preservation of collections and the retrieval of digital material.

6.4 Libraries and archives play an important role in facilitating and supporting research. We welcome the proposal to widen the exception for non-commercial research, particularly with regard to text-mining and data analysis. Emerging technologies have created opportunities that allow data to be explored and analysed in new ways. While we accept the argument that access to data in this way could generate commercial

[15] *Digital Opportunity,* p.38. para.4.52.
[16] *Digital Opportunity*, p.39. para.4.58.
[17] *Digital Opportunity*, p.39. para.4.56.
[18] *Digital Opportunity*, p.40. para.4.59.
[19] *Digital Opportunity*, p.51. Recommendation.
[20] *Digital Opportunity*, p.50. para.5.34.

streams, we believe that it is outweighed by the social and economic benefits of introducing an exception permitting this data to be used for non-commercial purposes.

6.5 Appreciating the limitations of the European system of specific exceptions to copyright, we support the recommendation that the Government should explore with our EU partners a new mechanism in copyright law to create a built-in adaptability to future technologies.[21] As advances in technology continue apace, we believe that this is an opportunity not only to address existing barriers to innovation and creativity, but also to identify ways in which the intellectual property framework could be made more responsive to change in the future.

6.6 Robust exceptions are important to balancing the interests of rights holders and consumers. We emphasised that contracts should not be permitted to undermine exceptions to copyright law in our evidence to the Review and we welcome the recommendation, and the Government's agreement, that copyright exceptions should be protected from override by contract. Unless this is addressed, efforts to open up the UK's copyright exceptions regime could be undermined from the outset.

7. Recommendation 9: Small firm access to IP Rights

7.1 The Review's recommendation that the IPO should draw up plans to improve accessibility of the IP system to smaller companies is particularly timely from our perspective. The National Library of Wales is in the final stages of applying for European Regional Development Funding towards (ERDF) four-year Digitisation for Business project. The project aims to create a sustainable platform to enable and encourage opportunities for growth by supporting companies (primarily SMEs) in the use of digital technologies. While preparing the application, we have identified intellectual property as an area in which we may be able to assist SMEs and we have held initial discussions with the Welsh Assembly Government's Innovation, Knowledge Transfer & Commercialisation Department regarding the possibility of setting up a patent information centre (PATLIB) at The National Library of Wales. The Review's findings confirm this need for better provision of IPR advice for smaller companies and, if our ERDF application is successful, we may be able to support the IPO in its efforts to achieve this.

8. Conclusion

8.1 In conclusion, The National Library of Wales would like to reiterate our support for the recommendations made by the Hargreaves Review and the Government's proposals for their implementation. We firmly believe that these proposed changes to the intellectual property framework will be an important step towards addressing barriers to growth and promoting innovation and creativity in the UK. We shall therefore look forward to the White Paper that is scheduled for Spring 2012 and to following the latest developments in the Intellectual Property Office's annual reports.

[21] *Digital Opportunity*, p.47. para.5.23.

Written evidence submitted by the National Union of Journalists (NUJ)

The NUJ represents 35,000 journalists who supply words, pictures and editing skills to publications and broadcasters in the UK and Ireland.

We draw the Select Committee's attention to our initial public response to the Hargreaves Review;[1] to our support for the submission to that Review by the Creators' Rights Alliance; and to the supporting data we supplied in confidence to the CRA demonstrating the extent to which the "playing field" on which individual freelance journalists negotiate fees for the use of their work is tilted.

Since then, some more detail has emerged about the most controversial of Hargreaves' proposals – the so-called "Digital Copyright Exchange" – and this short submission will focus on this, its implications and the new considerations these raise.

Our headings:

- The Digital Copyright Exchange
- Orphan works
- Non-consumptive use
- The limits of extension
- Matters of governance

The Digital Copyright Exchange

Some appear to harbour hopes that the DCE will embed a legal doctrine of "extended collective licensing" in the UK. Some, indeed, want to change the whole nature of copyright so that the author's or performer's consent is no longer required before use is made of their work – rather a "compulsory licence" would apply with some unspecified right of remuneration. The idea is presented with superficially seductive images of a frictionless market in creators' works, enabled by "one-click licensing".

But this idea has not been thought through even to the first step. The case of journalistic works provides a particularly sharp example of this.

For all the faults of *some* journalism, conscientious, independent and accurate reporting by professional specialists remains a prerequisite for a functioning democracy. Bluntly: citizens would have no basis to decide how to vote, were they deprived of a diversity of such journalism.

The feasibility of this depends on many things: one of those is the requirement for those conscientious, independent journalists to defend their reputations. The NUJ's Code of Conduct – the model for all the other Codes – requires of journalists that they do not:

> by way of statement, voice or appearance endorse by advertisement any commercial product or service save for the promotion of [their] own work or of the medium by which [they are] employed.

If a journalist's work were to be "one-click licensed" by any advertiser, let alone a purveyor of dangerous goods or their least-favourite political party, that could end a career and would certainly undermine public confidence in news reporting.

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[1] Hargreaves Review: government must deal with the fundamental questions, NUJ, 3August 2011 http://www.nuj.org.uk/innerPagenuj.html?docid=2197

Before any form of collective licensing is implemented, then, it is an absolute requirement that the “moral rights” to be identified as author of a work and to object to distortions of that work – whether by corruption or context – are made enforceable for the benefit of all who distribute creative works. The Select Committee may not be aware that a quirk of the Copyright Designs and Patents Act 1988 excludes from these essential rights works that report news and current affairs – and of all citizens and creators, who has more need to ensure identification and integrity than those who do such reporting?

The DCE may turn out to be simply a means for would-be users of journalists’ work to contact those from whom they must seek permission for the proposed use.

In this context we welcome the implication in the government’s response to Hargreaves that registration of works with the DCE would not be subject to charges, and seek confirmation that this is policy. Any other move would be discriminatory against those – such as journalists – who typically produce many hundreds of “works”, whether texts or images, each of relatively small cash value, in the course of a year.

But a broader DCE would have much wider implications: see below.

Orphan works

It is also necessary for the NUJ to make it plain that *if* there is to be any provision for the licensing of so-called “orphan works”, then one absolutely necessary concomitant to this is, again, the extension of enforceable “moral rights” to all creators, including journalists.

The crispest of the many arguments for doing so is that to do otherwise would ensure that many more works were made “orphan” in the future.

Non-consumptive use

Another of the preconditions for the best of journalism to make its essential contribution to the functioning of democracy is that journalists be able to make a living as independent, full-time professionals.

Some 8000 of the NUJ’s members are those most independent of creatures, freelance journalists, and depend directly on the enforcement of copyright in their work to make a living. All depend on the economic viability of the publications to which they submit their work.

Though the discussion of “non-consumptive use” in the Hargreaves report is framed in terms of the possibility of systems that trawl through the medical research literature and suggest new avenues of research, analysis indicates that it is something quite different: it is, in fact, a charter for internet search engines and internet advertising brokers to make extracts of works available to the public without permission or remuneration – and thereby to drain income from those who create and edit news reporting. This poses severe risks to the “information economy”.

One very large company that does both is currently under investigation by both the US and EU for possible abuse of a dominant position in the online advertising market. These investigations must consider whether Google’s practices tend to strangle the very provision of original “content” on which it depends for its considerable income.

No “non-consumptive use” provision should be made until these investigations are

complete, unless it is extremely tightly drafted to extend only to publicly-funded and publicly-accountable academic research.

The limits of extension

The "extended licensing" model poses the risks to the independence and economic viability of journalism that we note above, as well as others which we will describe on request.

Clarity over the distinction between "primary use" of a work – for example first publication in a magazine – and "secondary use" such as photocopying is essential to evaluating such proposals.

The NUJ insists that:

1) The *only* case in which "primary use" *could* be permitted without express authorisation of the author – that is, under an "extended licence" – is in a scheme for dealing with the case in which the author genuinely cannot be identified or located: the case of "orphan works". The other safeguards laid out in the Creators' Rights Alliance and British Copyright Council submissions to Hargreaves are also essential requirements for such a scheme.
2) The case for "extended licensing" has been made strongly by organisations such as the BBC and the British Library, wishing to make their archives of already-published material available – a "secondary use". Some of the requirements for such a scheme to be considered are:
   a. that it be restricted to non-profit use by a reputable public-service archive organisation;
   b. that it not include previously un-published works, for reasons set out in our earlier submissions;
   c. ensure that there is no possibility of infringing the right of integrity in the work through the location of its use – which means prohibiting sub-licensing to third parties and technical measures to make it difficult to "embed" BBC or BL content in others' websites, for example;
   d. specify that said reputable organisation make visible alongside every work used in this way a strong warning to users about the need to contact the author before making any further use;
   e. specify that authors shall be clearly identified alongside every work used; and
   f. be subject to said reputable organisation making equitable remuneration available to authors, on the model of Public Lending Right, to compensate for the loss of income from re-licensing a work that is now publicly available.

Matters of governance

It is necessary to re-iterate here points that the Creators' Rights Alliance made on the NUJ's behalf to Hargreaves about the governance of collective licensing systems:

- Collective licensing provisions must be structured so as not to preclude true micropayment systems developing later;
- That is, a part of the creative ecology must include support for platforms and ways to market for individual creators;
- They must not undermine fees for primary commissions of creative works;
- Collective licensing is acceptable only with provisions to ensure that actual creators get rewarded;
- They are acceptable only when administered by bodies that are truly representative of the creators affected – who are in most cases owners of the

material which it is proposed should be traded; and
- They must be transparent in their accounting.

The transparency requirement, in fact, should apply to business models that in some ways emulate collective licensing. Spotify, for example, does not operate to the satisfaction of independent record labels.

The requirement that such systems be administered by bodies that are truly representative of the creators affected is an essential feature of legislation in the Nordic countries that have implemented such systems – not an optional extra. If creators are asked to relinquish the exclusive control over the use of their works guaranteed them by international and European law, they must control the mechanism that compensates them for this; any legislation that provided otherwise would be open to challenge in international forums.

Written evidence submitted by News Corporation

Summary

1. News Corporation welcomes Professor Hargreaves report, and the seriousness with which it regards the role of IP in creating a vibrant and competitive market for creative works.

2. Several of the Review's recommendations can help the UK Government achieve its goal of robust economic and job growth. In particular we believe the establishment of a Digital Copyright Exchange, the implementation of a legislative solution for orphan works and the implementation of the Digital Economy Act (subject to the conditions outlined below) should be priorities for both Government and industry.

3. News Corporation however believes that the market, rather than Government, should dictate industry's business models, platforms and services. We are concerned about any proposals to introduce mandatory cross-border or extended collective licensing, or broader copyright exceptions, where there is no evidence of market failure. Introduction of these measures could inhibit News Corporation and other companies in the creative industries from contributing to such growth.

4. We would urge Government not to take a "one size fits all" approach to implementing policy changes across content sectors but rather to acknowledge the substantive differences that exist between industries and accommodate and reflect these in any proposals which are put forward.

Introduction

5. News Corporation is a diversified global media company with operations in six industry segments: cable network programming; filmed entertainment; television; direct broadcast satellite television; publishing; and other. The activities of News Corporation are conducted principally in the United States, Continental Europe, the United Kingdom, Australia, Asia and Latin America. News Corporation had total assets as of March 31, 2011 of approximately US$60 billion and total annual revenues of approximately US$33 billion.

6. In the UK, News Corporation companies include News International, HarperCollins and BSkyB (in which the company holds an approximate 39% interest). News International is the parent company of the publishers of The Sun, The Times and The Sunday Times. News International also publishes The Times Literary Supplement, a weekly literary review. HarperCollins is one of the largest

English-language publishers, with global revenues of over $1 billion every year. BSkyB operates the leading pay television broadcast service in the United Kingdom and Ireland, as well as broadband and telephony services.

7. Globally News Corporation owns businesses including the media network Fox, the film studios 20th Century Fox, and Dow Jones, which publishes the Wall Street Journal, many of which have a significant presence in the UK. News Corporation, through its investment in the production of entertainment, news gathering and reporting, and other media production is a significant contributor to cultural, creative and information knowledge base in the UK and worldwide.

8. News Corporation is pleased to have the opportunity to respond to this inquiry. We have long asserted that robust intellectual property protection and enforcement has helped the UK become a global leader among the world's creative industries, including in the news, audio-visual, publishing and music industries, and it was in this spirit that we welcomed Professor Hargreaves' Review.

9. In our response to Hargreaves we noted that like all content creators, we have two commercial objectives: to make our content more easily accessible to an increasingly global audience by enabling more market routes and choice for the consumer, and to ensure a fair return on our investment in that content so the value it generates can be reinvested in new content which drives, among other things, the demand for broadband and internet services.

10. To achieve the first of these aims we have become innovators in the technology space as well, creating platforms and services and investing in technologies that make our content responsive to consumer demand, including animation, 3D, etc, as much as we create content. We embrace new business models which improve our offering to our customers, even business models that disrupt our more traditional means of distribution, in the interests of maintaining a vibrant and competitive market for creative works.

11. We agree wholeheartedly therefore with Professor Hargreaves' acknowledgement that IP is critical to innovation and growth. Content creators and technology concerns both depend upon and benefit from the same IP framework and in particular the existence of a robust copyright regime to prosper, regardless of whether it is content or software code that we are protecting.

12. We believe that several of the recommendations proposed in the Review, if implemented appropriately, can help the UK Government achieve its goal of robust economic and job growth whilst ensuring the continued development of a robust, competitive and flexible IP framework in the UK. We do note though that

13. There are also substantive differences between each industry's business and licensing models. Therefore we would urge Government not to take a "one size fits all" approach to implementing policy changes across content sectors but rather to acknowledge these differences and accommodate and reflect these in any proposals which are put forward.

Specific proposals

Digital Copyright Exchange (DCE)

14. In our submission to the Hargreaves Review, we argued that the management of copyright can be revolutionised by the development of a lightweight standards-based cross media infrastructure. This would exist primarily for identification and communication of rights and permissions around which services can be developed for managing these and, where appropriate and at the discretion of the rights owner, automated and semi-automated tools for more effective transactional licensing. The result would be to broaden the legitimate market for rights transactions and use and reuse of content.

15. We therefore support in principle the creation of a DCE and have begun discussions with industry colleagues about how best to move its development forward. The primary function of a DCE should be as a signpost system which uses existing sources of metadata to direct users to information regarding rightsholder and how that content can be licensed. The technology already exists to facilitate this, and many initiatives are already under way across various content sectors. The challenge for a DCE is to create interoperability between the many technical building blocks that already exist. By the same token the DCE will need to be interoperable with other frameworks both in Europe and globally.

16. The voluntary nature of the DCE is of critical importance. Rightsholders should participate because it is in their commercial interests to do so. The DCE should not impose or in any way be prescriptive about licensing or other kinds of business models. Every industry is differently placed in this regard and already utilises different registries and sources of metadata, making participation in the DCE by necessity an evolutionary process. Beyond the signposting function, its evolution should be market led: some may quickly embrace its potential for transactional licensing; others may prefer to adhere to existing models.

17. Although we appreciate the need to incentivise participation, this should not be achieved by conferring the ability to enforce any IP rights, such as in relation to

the Digital Economy Act, as Professor Hargreaves tentatively suggests in his Review. Such a proposal would risk making registration with the DCE de facto mandatory for those wishing to protect their copyright, which would in turn be in breach of our obligations under the Berne conventions to keep copyright free of such requirements.

18. Regarding the governance of the DCE, in the first instance we would strongly favour a self-regulatory rights management framework which has the support and endorsement of Government. In the short term the success of the DCE will be determined by the ability of those leading the initiative to persuade rightsholders and users of its viability. Strong commercial leadership will be needed to achieve this, as well as a detailed knowledge of every facet of the content sector, technical knowledge and political nous.

19. This implies someone who has a deep knowledge of the copyright industries without having a strong sectoral bias, and can provide strong commercial leadership, a global outlook, a good technical understanding and has a full grasp of the regulatory and governance challenges. This list of requirements may imply that the Governments' apparent view –that it will need more than one individual to undertake this role – is a sound one.

Orphan Works

20. We have long argued that a legislative solution to enable a mechanism for licensing orphan print works is both desirable and achievable. A two-step process of diligent search and licensing is the most suitable and effective means to deliver this.

21. We support orphan works legislation that includes an obligation for a clearly defined diligent search which is sufficiently comprehensive and robust and by which a work can be accurately identified as orphan. This may include but should not be limited to consultation with one or more registries as well as the work itself (many films and books identify the copyright owner within the work itself). For this and other reasons an appropriate definition of diligence may vary on a sectoral basis.

22. However, the review of registries or the DCE should not be sufficient in itself to constitute a diligent search. Nor, under any circumstances, should a work not being on the DCE be interpreted as therefore being orphan. The rightsholder must reserve their right not to register a work with the DCE (a principle which is already enshrined in the Berne Convention).

23. In the case of AV content we are not aware that there is a problem of works being orphaned, nor has any evidence or impact assessments been produced to suggest otherwise. Therefore, orphan works legislation should exempt AV works.

Extended Collective Licensing (ECL)

24. We strongly urge Government to take note of Hargreaves' recommendation that ECL "should not be imposed on a sector as a compulsory measure where there is no call for it". ECL schemes can operate in limited circumstances but mass licensing of rights where owners had not explicitly given permission would be contrary to a fundamental principle of copyright - that the onus should never be on the rightsholder to opt-out of a licensing scheme. Where evidence exists to suggest that ECL may be needed to address a perceived market failure, it should be voluntary and based on an opt-in procedure to ensure consistency with the UK's international IPR obligations.

25. The VoD report referenced in Professor Hargreaves' Review confirms that there is no need for ECL in the AV sector as the UK VoD market is competitive and vibrant, which underlines the ability of platforms to license AV works. It is important to note that in certain industries, such as film, the rights are concentrated in the producer preventing the need for multiple licenses for a single work.

Enforcement of IP Rights

26. We look forward to working with Government to ensure the cost-effective implementation of the Digital Economy Act, the creation of a self-regulatory regime for blocking rogue sites and other efforts to advance the enforcement of IPR on the Internet. Such measures are essential to ensure that the copyright industries can do their part in promoting economic growth and job creation. Moreover, they are essential to address a market failure in that unlike legitimate online distribution platforms, pirate sites do not pay licensing fees for content and often do not comply with regulatory obligations or pay taxes. Without effective IP laws and enforcement the long-term sustainability of new and innovative business models will be jeopardized.

Cross-Border Licensing

27. News Corporation believes that licensing terms should be dictated by the market. Our subsidiaries grant multi-territory rights when sought by distributors and where commercially appropriate to do so (i.e. platforms serving countries that speak the same language). Clearly there is therefore nothing in the existing EU copyright acquis to prevent this. It is critically important therefore that any legal changes to the EU framework to facilitate cross-border licensing do not impose a mandated solution for all sectors and thus take account, as Hargreaves recommends (4.43),

"of the needs of particular sectors, including territoriality of pricing", and that licences of a national scope "remain available".

Format Shifting

28. We oppose such an exception for film for several reasons. First, it will likely require the illegal circumvention of technical protection measures that once hacked can allow for the uncontrolled and unauthorized redistribution of works via the Internet. Second, it will undermine the market-driven business models that allow consumers the ability to watch works on multiple devices in a secure way, such as Ultraviolet. Finally, it will undermine the vibrant VoD market recognized in the Hargreaves Report and indeed our ability to offer consumers different viewing options at different price points, thereby reducing consumer choice.

Non-Consumptive Use Exception

29. News Corporation has serious concerns about this vague recommendation, which is potentially much broader than the US Fair Use doctrine, and undermines a fundamental tenet of copyright in favour of a loose notion of 'adaptability'. In practice it could inadvertently legitimise business models that benefit from creative works without the authorization from the copyright owner. This goes well beyond mere technical functions such as search and could include sites that link to unauthorized copies of copyrighted works on the Internet. Indeed, research commissioned by Google indicated that only seven percent of UK start-ups consider IP a barrier to innovation. Nor does the Review provide any evidence for its assertion that the absence of such an exception is blocking innovation. With this in mind, this overly broad exception seems a very blunt instrument for what evidence indicates is a very limited problem.

Other Copyright Exceptions

30. A data mining exception may undermine legitimate business models that comply with existing laws and obtain authority to mine data via a license. Attempts to define parody and express when it should be protected are inherently problematic. Measures to undermine contractual freedom (a well established principle in UK law) are likely to inhibit the same freedom which has given rise to flexible licensing for new and innovative distribution platforms and uses of works. Contracts are capable of providing greater specificity, clarity and certainty between rightsholder and licensee than copyright law. We are not aware of any economic evidence that justifies such a proposal.

5 September 2011

Written evidence submitted by Open Rights Group

- Open Rights Group welcomes the findings of the Hargreaves Review and the Government's broad acceptance of its 10 recommendations.
- By recognising both the rights that creators have over their work and the limits and exceptions to them, the review sets out a blueprint for a 21st Century copyright policy that will help the UK be a leading digital, cultural economy.
- Recommendations to place a raft of new exceptions to copyright into law should be followed as a matter of urgency. In particular Open Rights Group supports the recommendation for a new exception for parody, satire and pastiche.
- These reforms do not p have to come at the expense of creators' well-being or their right to remuneration for their work.
- The Government should follow through on it's commitment to the findings of the review. This is an important opportunity to update the UK's approach to copyright so that it facilitates cultural and economic growth. Without it, copyright laws will continue to be a drag on both.

Open Rights Group was founded in 2005 by 1,000 digital activists. We have a core staff backed by an expert Advisory Council, including MPs Julian Huppert and Eric Joyce and leading figures from the media, technology and creative industries. We now boast 22,000 supporters and nearly 2,000 paying contributors. We are the UK's leading voice defending freedom of expression, privacy, consumer rights and creativity on the Internet. We campaign to change public policy whenever citizens' or consumers' rights are threatened.

Open Rights Group submission to the Hargreaves Review focused on digital copyright and emphasised three things. First, that policy needs to establish a better balance between the legitimate protection of IP and the appropriate flexibility. Second, that there is a need to challenge the assumption, widespread in policy making to date, that stronger protection and enforcement of IP equals greater innovation and growth returns in all cases. Finally, that policy needs to do better at ensuring the interests of consumers and citizens are respected through an appreciation of the effects of copyright on human rights, creativity and consumer rights[i].

In this short submission, we wish to emphasise our strong support for the findings of the review and the Government's response to it, and take the opportunity to highlight brief notes on two of the recommendations in particular. We hope to see the Government take forward the Hargreaves review findings and put its recommendations into policy as soon as possible.

The Hargreaves Review findings and Government response

Open Rights Group warmly welcomed the findings of the Hargreaves Review of Intellectual Property and the Government's broad acceptance of the recommendations. We believe the Government's commitment to 'to have measures in place by the end of this Parliament that will realise the Review's vision' should be applauded, and will lead to significant benefits to the UK's economy, creatives and consumers.

Professor Hargreaves' report recognises both the rights that creators have over the works that they create, and the limits and exceptions to those rights. New technology gives us incredible opportunities that should mean greater access to, manipulation of and learning from information. The review demonstrates that we can allow many new, beneficial uses of works to happen without harming the creators' livelihoods or the creative industries.

Policy has tended to focus almost exclusively on enforcement. The result is that the exceptions and limitations to copyright in the UK do not promote the widest range of economically and socially useful uses of work possible. It has also meant that there has been little from policy makers to ensure that markets for digital content are functioning efficiently in the digital age.

The UK has simply not grappled with the question of how to pursue these aims at the same time as ensuring respect for creators' rights and their ability to be remunerated for their work. Professor Hargreaves shows that it is possible to have more flexible rules to maximise the value society can get from works covered by intellectual property at the same time as sustaining flourishing IP industries. This should be applauded.

By recognising both the rights that creators have over their work and the limits and exceptions to them, the review sets out a blueprint for a 21st Century copyright policy that will help the UK be a leading digital, cultural economy. The Government is right to follow it.

Evidence and IP policy

Open Rights Group is particularly pleased to see the criticisms of previous policymakers for ignoring evidence and making policy on faith rather than facts. A commitment to evidence is to be welcomed and must be an essential part of IP policy making. It would count as a huge step forward.

As we set out in our submission to the Hargreaves Review, one of the clearest examples of the absence of a robust evidence base to past IP policy is the economic impact assessment for the Digital Economy Act. It features references to statistics that are not publicly available, which are given preference for no stated reason and whose methodology is not discussed. There is an absence of any serious critical analysis and a failure to connect evidence with policy choices taken.

The impact assessments are not of an acceptable standard to support an Act of Parliament. Is it right that Professor Hargreaves' review draws lessons from this and other similar examples?

This is not a problem limited to the UK's IP policy making. EDRi, the European umbrella body for digital rights groups, point out in their shadow IP strategy in May this year:

> "...for example, that, on 17 May, 2011, a search of the ec.europa.eu web domain finds 39 different references to the widely discredited 2008 OECD BASCAP study on "the Economic Impact of Counterfeiting and Piracy" and no references at all to either the 2011 Social Science Research Council study on "Media Piracy in Emerging Economies"[ii] or the 2009 Dutch government funded IVIR study on the Economic and cultural side effects of file-sharing on music, film and games."[iii]
>
> Similarly, Europol chose to advise the EU that EU-wide awareness raising programmes are required, inter alia to inform "illegal downloaders unaware of the links to organised crime," without providing any reference or analysis as to how/if/why this might be the case. On the other hand, when the SSCR investigated this issue, they found that, in reality, no "systematic connections to drug trafficking, prostitution or other major features of organized crime."[iv]"

Claims about the impact of digitisation on creators, creativity and the creative industry must be supported by robust evidence. Policy that responds to it must be evaluated and supported by similarly clear, transparent and robust evidence. Policy to date has failed to meet these standards. There is no doubt that digitisation has had a serious effect on the creative industries. Yet to date the nature of this problem has been over-stated and mischaracterized a deeper understanding of creativity and creative markets in the digital age will not only improve the quality of policy making but is the only way to avoid either bias or the appearance of it.

Setting out the standards to which evidence that wishes to influence policy should meet is one important step we support. We also welcome the suggestion that the IPO could work with organisations who may be able to contribute evidence to help them develop methodologies and ultimately data that is of a standard worthy of informing and influencing public policy debate.

Implementing the recommendations

Following the publication of the Hargreaves Review, Open Rights Group asked a number of key stakeholders to submit their thoughts on how the ideas in the Hargreaves Review should be taken forward.

The subsequent series of essays 'Hargreaves: From Paper to Policy', featured contributions from former IP Minister David Lammy MP[v], the Chief Executive of Featured Artists' Coalition Mark Kelly[vi], Chair of the Adelphi Charter John Howkins[vii], and Director of Government Relations for Ericsson Group Rene Summer[viii]. (The full set of contributions is available on the Open Rights Group website)[ix]. All of the contributions broadly welcomed the findings of the review, even where they recognised that more needed to be done to finalise the details of the recommendations.

There was broad support for the Digital Copyright Exchange, an expanded range of exceptions and proposals to deal responsibly but boldly with orphan works. New exceptions for activity such as data and text mining, format shifting and parody, satire and pastiche would unlock a eat range of useful activity that is currently stifled by over-regulation. We look forward to submitting further evidence on these exceptions in future consultations. We would like to raise two points here where we believe comments may be helpful at this stage.

The Digital Rights Exchange

Open Rights Group welcomes any initiative that helps the UK's creative industries take full advantage of digital technology and the internet, and has consistently supported innovation and fair and open markets for copyright material. The Digital Copyright Exchange (DCE) as proposed by Hargreaves has some potential for bringing greater efficiency to the digital content market, but both its design and eventual operation will need very careful consideration if it is to achieve its aims.

In particular ORG is concerned that any registration requirement should be a last resort and risks undermining creators who do not have the support of commercial enterprises, or whose intention is to create for other than simply commercial reasons. Establishing ownership of, and identifying contributors to, collaborative Open Source, or Creative Commons licensed work will be difficult, but it would be retrograde to use mechanisms intended to help manage orphan works to undermine collective and grassroots creativity. A DCE should have a fair chance to prove that it can efficiently serve creators and the market before additional registration incentives are considered.

A DCE should not automatically mean that those who choose to register their work forfeit their right to privacy or their ability to set their own moral or commercial terms for the use of their work. ORG believes that a DCE which protects individual creators while at the same time helping businesses find the creative works that they need is both possible and desirable.

Parody

An exception to copyright for parody, satire and pastiche is of crucial importance to facilitate a richer cultural environment, more creative commercial opportunities and a greater capacity for

meaningful political engagement and campaigning. It would benefit authors, publishers, broadcasters, museums, musicians, comedians, and film makers, and be of equal importance for amateurs and professionals alike.

Works of parody, satire and pastiche mock or criticise constructively – the law should be facilitating these legitimate aims, not preventing them. And such works do not harm the market for the original work. For example, rapper Chamilionaire attributes the success of his song “Ridin’ Dirty” to a parody by Weird Al Yankovic called “White and Nerdy”.

As Consumer Focus make clear in their analysis of the current legal status of parodies, Courts' have recently taken a narrow view of what is to be considered permissible reuse under the current law. There is ample evidence that this is actively discouraging and restricting the creation of parodies, satire and pastiche.

The most well known examples are perhaps the series of takedowns of parodies of the film 'Downfall'[x] from YouTube, or the problems that the creators of the infamous 'Newport State of Mind' video encountered. The latter involved a parody of a famous Jay-Z song, and was removed due to a copyright complaint shortly after it began to attract widespread attention.

The videos may be available now online. But the works were considered illegitimate in the eyes of the law. Their removal, however temporary, is a clear demonstration of the inadequacy of legal protection for these types of work, and in the case of the 'Newport State of Mind' video effectively destroyed the ability of the video's creators from fully reaping the financial and cultural returns from their creativity.

Furthermore their continued availability online is down to the persistence of people uploading the videos, the logistical problems of continually removing them, and the whims of rights holders deciding to pursue them for infringement or not. Hoping that the relevant rights holders either choose not to or fail to take advantage of an absence of protection for parody, satire and pastiche is not a sufficiently protective environment for the encouragement of legitimate, inventive creativity. This kind of work only contributes to our cultural conversations and some innovative creators' commercial opportunities and should be promoted not stifled.

There are other effects on freedom of speech from a lack of protection for such works, beyond hurting musicians and film makers. Greenpeace recently parodied Volkswagen’s popular ‘little Darth Vader’ advert. Their video uses the same theme and imagery but frames Volkswagen as the evil Galactic Empire, intent on destroying Earth with its VW-branded Death Star. The motivation was Volkswagen's opposition to European legislation that imposes limits on CO2 emissions, with the parody suggesting that the company’s claims of being ‘eco-friendly’ are dishonest.

Greenpeace’s video was removed from YouTube just as it was gathering momentum and, in the parlance of such sites, was 'going viral'. This followed a generic copyright complaint from Lucasfilm. The complaint took down Greenpeace International's whole YouTube account, because of the many translated versions of the video ran foul of YouTube's 'three strikes' policy on infringement. Two weeks later the video was returned after a 'counter claim' by Greenpeace. But this not only robbed the campaign of momentum and temporarily removed all of their videos from the site, but left Greenpeace vulnerable to direct legal action from Lucasfilm.[xi] This is a crystal clear example of how an absence of a parody, satire and pastiche can restrict important social commentary.

When there is no explicit protection for this class of works, these creators are at the mercy of the 'take down' procedures of content platforms and rights holders' willingness to pursue them.

Just because the UK has an impressive history of comedic output does not imply that copyright laws sufficiently protect the ability of inventive comedians to create better, funnier parodies and satires from the material they see around them. Creators of parody face too much uncertainty as to whether their works will be pursued for infringement, or taken down from a hosting platform such as YouTube. This is having an active chilling effect and is restricting many activities that we should be encouraging, whether amateur creativity, commercial publishing or campaigning.

Carving out explicit exception in copyright law for works, commercial or otherwise, of parody, satire and pastiche will create the legal certainty for creators that their work is legitimate. Doing so will create an environment ripe for much greater creative and commercial activity and can only enrich our cultural life. There is a clear need for this legitimate form of cultural reuse. Open Rights Group looks forward to continuing to highlight the need for this new exception in forthcoming consultations.

Following the findings

This is the latest independent review of evidence that has recommended serious reforms of copyright. It has also managed to establish broad support from across a number of sectors. We hope that this opportunity will not be missed. We suggest that the policy direction the Government has taken is the right one, and that support for the recommendations will lead to significant enrichment for the UK, both culturally and economically.

5 September 2011

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[i] Open Rights Group's submission to the Hargreaves' review call for evidence can be found here: http://www.ipo.gov.uk/ipreview-c4e-sub-org.pdf

[ii] http://piracy.ssrc.org/

[iii] http://www.ivir.nl/publicaties/vaneijk/Ups_And_Downs_authorised_translation.pdf

[iv] http://regnet.anu.edu.au/program/conference/papers/_PDFs/Day%202_Session%204.1_JoeKaraganis.pdf

[v] http://zine.openrightsgroup.org/hargreaves/hargreaves-has-the-right-ideas,-but-will-he-get-a-hearing

[vi] http://zine.openrightsgroup.org/hargreaves/mark-kelly-from-fac-on-the-digital-copyright-exchange

[vii] http://zine.openrightsgroup.org/hargreaves/hargreaves-has-the-right-ideas,-but-will-he-get-a-hearing

[viii] http://zine.openrightsgroup.org/hargreaves/hargreaves-from-paper-to-policy-%28rene-summer-%28ericsson%29%29

[ix] http://zine.openrightsgroup.org/hargreaves/hargreaves:-from-paper-to-policy/

[x] See http://mashable.com/2010/04/22/hitler-youtube-downfall/

[xi] http://www.greenpeace.org.uk/blog/climate/vw-film-youtube-u-turn-20110720

Written evidence submitted by Deborah Padfield

I am a free-lance visual artist specialising in photography and inter-disciplinary practice and research within Fine Art and Medicine. Collaborating with Dr Charles Pither and chronic pain patients from St Thomas' Hospital, I pioneered the use of photographic images within pain consultations to help improve doctor-patient dialogue. The resultant exhibition, ***Perceptions of Pain,*** was shown widely in London**,** toured nationally, published as a book[1] and gave rise to further research, including a pilot study within NHS pain clinics.[2]

Currently I hold an artist's residency at UCLH[3] collaborating with Professor Joanna Zakrzewska and the facial pain team investigating the photograph and the portrait as a mediating space between patient and clinician. The results of the residency and face2face project have been shown at the Menier Gallery and UCH Hospital Street Gallery, London from July – September 2011. I also work as a free-lance photographer and exhibit and lecture nationally and internationally. My work is reproduced, featured and written about critically in numerous publications. I am a PhD Candidate at the Slade School of Fine Art and a full professional member of the AOP.

Much of my income therefore is derived from reproduction fees for the use of my images. The funding available for the creation of most of my work, barely covers the expenses incurred during their production and research period – which can be extensive - so the income generated by reproduction fees is absolutely essential to my financial survival. Most organisations wishing to use the images have no idea of the time that goes into producing and working on them or the rigorous research process and negotiations necessary on the way. They also appear to have little understanding of the difference between owning physical prints and owning the copyright. It would be very helpful if this difference were clarified for companies and buyers and the need for artists to retain copyright emphasised.

As I work predominantly within the health sector I also have an additional need to retain control over how and where my images/photographs are used in order to protect both the subjects and the spirit and integrity of the projects; some of the material within them is of a very personal and sensitive nature and needs to be shown in an appropriate context. If I do not retain copyright I cannot control where or how they are shown.

I have had numerous protracted negotiations with various educational, pharmaceutical, and health service providing organisations where I have had to outline repeatedly the difference between owning the work as in the hard copy of the print and owning copyright, and that the latter needs to remain with the artist even when the physical print is bought. In some cases I have had to deny use of reproductions of the images as the companies concerned could not adapt their

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[1] Padfield D. Perceptions of Pain. Stockport: 1ed. Dewi Lewis Publishing: 2003.

[2] Padfield et al. A slippery surface, Can photographic images of pain improve communication in pain consultations? International Journal of Surgery, Elsevier, 8 (2010): 144–150

[3] University College London Hospitals NHS Foundation Trust

contracts to protect copyright on the images from being granted to any future third parties who might buy their journal or in one case an e-learning module ie they had no means within their existing contracts of allowing the copyright to remain with the artist, in this case me. With business arms of educational institutions and within the health service it is becoming more and more difficult to protect ones ownership of copyright so that if a particular journal or on-line module is re-sold then the artist retains control of the copyright of their images. Once copyright is no longer owned by the artist the images can turn up in any context, be used in anyway, modified in any way and used as many times as an organisation wants without the artist having any control over it or receiving any payment for it. It is imperative that it is as simple as possible for copyright to automatically be granted to the artist who makes the work/photograph and that their need to retain copyright is asserted. Otherwise many photographers cannot continue to function and to earn. As a sector we bring a lot of income to the country in the form of services and skills we both provide and pay for so energising the economy as well as in tax and in our contribution to the reputation the UK has for its thriving creative sector. If artists are not supported and continue to go out of business, this sector will lose its energy and diminish. I believe this will diminish all our lives.

I have also had countless occurrences where my photographs have turned up being used/reproduced by someone without permission, many of which I am sure I still am not aware of, as it is usually someone else noticing an images somewhere that brings it to my attention. If challenged, organisations frequently claim ignorance of the fact that they are breaching copyright law. Please do not make the lives of artists/photographers any more difficult for creative professionals by allowing commercial use of orphan works as there has been no proven need for this, or by recommending that artists have to register their work to obtain ownership of its copyright. It is a breach of their human rights for artists not to own their own copyright automatically on work they create. In a digital age it is getting increasingly difficult to spend time and resources, which many of us don't have, policing the internet for illegal reproduction of our images, ie without payment or permission. This is not always done knowingly, it occasionally happens through ignorance. It needs to be absolutely clear and general knowledge that it is an offence to remove metadata from a digital image, or publish a digital image in electronic form (website, DVD, etc) without metadata attached and without having obtained written permission and where appropriate payment of the required fees. Not getting permission for their use or paying for the use of images is exactly the same as breaking in and stealing piece of property such as a TV set, though exacting a larger toll on an artists income and ability to continue practicing. More education and guidance needs to be given to organisations who regularly use and reproduce artistic works and photographs so that all staff understand that to use an artist's image without permission is an infringement of their rights, is illegal and in the long term reduces artists' ability to carry out their profession so having a detrimental affect on work available for use.

I am very concerned about any changes to the copyright law which would mean that artists do not automatically own the copyright on images and work they produce as it would dramatically reduce their earning power in an already extraordinarily difficult financial climate. I am equally concerned about anything which would make it harder for us to enforce compliance with copyright and IP

law by those who use our images as for the most part we have limited financial resources to pursue those who do so illegally. The creative sector intersects with many other areas and structures of our lives, our research our educational and social endeavours and our health and well-being. If we lose or marginalise this sector and destroy its potential to contribute to our society our research and our economy, we all lose.

Please would you take these submissions seriously, they are heartfelt. Thank you.

Written evidence submitted by Sebastian Pearson

I am very concerned about the revised proposals regarding UK Artists copyright & moral rights.

As a skilled photographer of 15 years I am very concerned with the proposed changes to the protection of my copyright and moral rights of my imagery. This is my livelihood. I have invested in years of training and it is my only income. Like a car manufacturer, they protect their rights, their designs and investments in technology, why is an artist not treated in the same way?

I don't understand why is the government trying to undermine the lively hood of artists and going against the European directive?

Now we are in a digital world it is automatically becoming even harder to protect ones work from piracy. We need to protect our copyright digitally even more strictly, just as the banks have to protect against fraudulent credit cards, and not making it easier for people/companies to steal/remove digital copyright of images and sell on.

Yet Professor Hargreaves, knowing this, has recommended the commercial exploitation of orphan works. This will only make it more difficult than ever for creators to make a successful business when there is huge resource of orphan works to exploit, a situation which will only get worse.

With regard to registering copyright, while on the face of it, it makes sense, it becomes unviable as the internet is global and is not defined by National boundaries. The internet for an artist's point of view is a minefield when it comes to exploitation of any sort, and therefore it is important for an Artist to protect their work the moment it is created so why are these new proposals making this more difficult?

I hope you will take these points onboard and help protect those who should be allowed to protect their assets for the future as you will be making provisions for the future for creators of artistic works to suffer even more at the hands of the industry for many years to come.

On your conscience be it.

Written evidence submitted by Tim Platt

My name is Tim Platt. I have been a professional commercial photographer for over 20 years. I would like to make a few points about the importance of IP protection in my business.

I am extremely concerned about the effect that any dilution of Copyright Law will have on my business and on the creative industries in the UK.

I feel that Professor Hargreaves' IP Review has missed some real opportunities to improve the current creeping war of attrition on creator's rights that artists and creators are engaged in defending in an increasingly hostile commercial environment.

Artists rights have not been recognised as human rights by Hargreaves IP review. Both the UN and EU Human Rights act have declared that artists rights are also human rights.

Increasingly as a Photographer I am under pressure to waive my moral rights and/or Copyright or risk losing a contract. We do not work on a level playing field. Creators such as myself are often working alone and are in a weak position to defend our rights against aggressive Corporate rights grabs which are often formulated by a legal department who enjoy relative freedom to impose grossly unfair terms on their creative suppliers. For instance currently it is not unlawful to:

- require creators to waive their moral rights or risk losing a contract
- require creators to assign their copyright or lose a contract
- strip digital copyright data from creators work
- not credit them

I am also concerned that orphan works legislation may allow commercial use of images where the author cannot be found. When images are posted on the internet the author information (metadata) that photographers embed within the image is almost always removed. The fact is that most images on the internet are 'orphans' from the day they are published, in spite of the best efforts of the photographer.

For this reason it is essential that metadata 'stripping' becomes unlawful. This is something that could and should be legislated for.

A careless approach to Orphan Works legislation could create a situation where vast numbers of images will be available for commercial usage beyond the control of their creators. Clearly this will have a massive impact on the creative industries; why commission new images when there is a vast pool available to be used for free or for a token license fee payable not to the creator of the work, or anyone appearing in the photograph, but to a collection agency working on behalf of HMG?

There may be a case to permit Orphan Works to be used for cultural purposes, such as in libraries or museums, providing that a precise definition of cultural use can be defined and agreed.

I feel it is worth pointing out that tax revenue will fall if images are not paid for. Also the general public with its vast personal library on Facebook, Flickr etc. are also equally vulnerable. Imagine your teenage daughter, or her friends, ending up in an ad for a chatline or some other unsavoury activity after their 'orphaned' images were 'found' on some social networking site or similar. If a photo has no metadata embedded to enable the creator of that photo to be traced it could technically fall into a sea of ‘orphan’ photos which could in due course become fair game for anyone to use for any purpose.

As a creator I need to monetise my work in order to make a living, support my business and pay my taxes. It is absolutely vital to my business model that I retain the moral rights and copyright on my work as my income revenue derives almost entirely from the licensing of that work. In my case, and many other commercial photographers, this applies to the following three principle areas.

1. **Commissions**

   Commercial commissions are negotiated on a usage basis and licensed accordingly. This model works both in my interests and those of my clients. On the one hand it allows me to negotiate a fair rate of remuneration for the proposed usage of my photography by a client – for instance usage in a small internal brochure will be charged at a lower rate than a multinational ad campaign would. On the other hand my clients can tailor the usage fee to reflect the appropriate level for their requirements – rather than pay over the odds for a lot of usage they may never need. This system remains flexible further down the line as it allows clients to pay for additional usage if, and only if, their usage requirements change. This is also an important revenue stream for me as a photographer and underlines the importance of retaining my copyright as it enables me to continue to monetise my work in the future.

2. **Royalties**

   With reference to the last point above this is a key part of my business model. Fair and appropriate licenses for image usage are negotiated at the outset of every job. These licenses are based on three things; the purpose of the photography, the territory or territories that the work will be used in and the duration of said usage. In many cases the original terms of the license will suffice for a client, but quite often a marketing strategy will change and adapt and if the photography is proving successful for a client they may wish to expand or renew the usage license for an extended duration or a wider implementation. At this point they may wish to expand the terms of the existing usage agreement and it is a point of principle that an additional fee will become payable to reflect this additional usage. The key point is that as owner of the copyright in my work I am able to both protect my interests and provide a fair and commensurate pricing policy for my clients. I am also able to protect them from 3rd party infringement of the

work that they have paid for because I can exercise and enforce my legal ownership in cases of copyright infringement.

3. **Picture Library sales**

   A significant proportion of my income is derived from picture library sales. In this model I retain copyright on all the work I place with a picture library. This work is not commissioned and all the production costs are paid for by me. In other words, it is personal, self motivated work. I contract an independent library to syndicate my work to 3rd parties. All of this income is derived from a licensing model. The library will determine the usage proposed by the client and will license the photography accordingly based on the scale of the proposed usage. This revenue is then divided between the library and myself. Again it is essential that I retain the copyright in my work in order to protect it from being used unscrupulously and enable my appointed library, or agent, to represent me and negotiate fees on my behalf.

I hope this brief summary serves to illustrate how critically important the principle of copyright is for a professional commercial photographer. I have supported my family and paid my taxes for over twenty years through the fair and appropriate licensing of my work and it is essential that a robust copyright law remains in place to protect the thousands of creative professionals whose livelihoods depend on it, and in turn, whose work and output supports the wheels of commerce and industry throughout the world.

9 September 2011

Written evidence submitted by PPL

SUMMARY

1. PPL welcomes many of the Hargreaves recommendations and we look forward to playing our part in industry-led initiatives to develop and realise those ideas.

2. However, we are grateful for the opportunity to provide further information to the BIS Select Committee, as we are concerned by assertions and conclusions contained in the Review with regard to collecting societies, and in particular by errors and unsubstantiated assertions and conclusions in the *Economic Impact of Recommendations* (Supporting Document EE).

3. Having read the Government's response to the Hargreaves IP Review, we would like to draw the Committee's attention to the following:

    - Collective licensing in the UK is generally regarded as efficient and beneficial to both users and rightholders. The focus should be on codes at European level.

    - We agree with others that the Digital Copyright Exchange, as a network of databases, is in essence worth pursuing, provided it is industry-led.

    - The *Economic Impact of Recommendations* is flawed. Growth estimates and cost reductions for copyright are overstated.

4. We note and support the submissions made by UK Music, the Creative Coalition and the CBI.

PPL

5. PPL licenses the use of recorded music – not just digital services but traditional radio and television broadcasts and also the public performance of sound recordings in hundreds of thousands of sites across the UK. A PPL licence covers over 5m tracks, produced by PPL's 6,300 record companies (mostly small businesses), 47,500 performers and overseas contracting partners. Over the last 10 years, costs (as a proportion of revenue) have fallen from 28% to 14%.

6. A collective licensing company such as PPL is not a mere conduit for the passage of money from copyright users to rightholders. It has a dynamic role licensing rights and distributing royalties. In order to do this:

    - It is necessary to determine and agree tariffs (and licence terms).

    - Users must be licensed (and action taken against unlicensed users).

    - The awareness of the need for a licence has to be publicised (a point that the IPO wants PPL to devote even more expenditure to).

- Usage of the repertoire must be collected and processed (usage reports can contain millions of lines of data).

- Rightholders must be paid, based on the value of the usage of their repertoire.

7. The costs of licensing (let alone distributing) vary from one use to another. For example, even within PPL:

    - PPL's licensing of public performance requires a team of 80 staff to deal with hundreds of thousands of customers. Most of the licensees pay annual fees of around £100.

    - PPL's licensing of broadcasts requires a much smaller team of staff as there are far fewer licensees and the average fee per licensee is much higher.

8. A significant proportion of PPL's running costs relate to the costs of distributing licensing income accurately and fairly (by analysing millions of lines of usage) as opposed to the transaction costs of licensing.

9. There is a presumption in the impact assessment that all costs are bad. However, many of the activities which are called for - accuracy, transparency, investment in systems - require additional expenditure, beyond the bare minimum. For example, performers and record companies within PPL have voluntarily opted to spend an additional £3.5m a year on anti-piracy measures. This additional expenditure falls outside the licensing activities of PPL (and yet was included as a transactional cost in the impact assessment) and is for the benefit of the entire industry.

<u>CODES OF PRACTICE</u>

10. Recommendation 3 of the Hargreaves Review states that *"collecting societies should be required by law to adopt codes of practice."*

11. PPL fully supports the idea of codes of practice for collecting societies, recognising the benefits to members and licensees alike. We are actively participating in the British Copyright Council's initiative to develop a set of common principles for such codes, as well as developing our own code. However, we are concerned that the conclusion reached by the Hargreaves Review (which appears to doubt that concerted self-regulation by licensing bodies is sufficient) is based on unsubstantiated and mistaken assertions which may, in turn, lead to unnecessary regulation.

12. The proposal for Codes of Practice for collective licensing is described as an *"enabling measure"* in the *Economic Impact of Recommendations* and no additional growth or cost savings are predicted. Instead the impact assessment argues that collective licensing companies *"appear to be the cause of some avoidable deadweight losses and inefficiencies...[because of] this natural monopoly position."* This logic is inaccurate, flawed and unsubstantiated. The

accompanying analysis shows a fundamental lack of understanding of the economics of licensing.

13. Collective licensing bodies were set up by rightholders so they could benefit from the efficiencies of licensing collectively. These efficiencies also flow through to users who benefit from a one-stop shop. Rightholders control their collective licensing body (in the UK, at least) and control their costs.

14. For example, the PPL Board comprises four major record company representatives, four independent record company representatives and four performer directors, as well as four executive directors and one non-music industry director. Those Board directors are responsible for the financial management of the company and, as it is their revenue that is at stake, it is in their interests to ensure that costs are managed, the operations are efficient and the right investment decisions are taken. More information is contained in our original submission to the Hargreaves IP Review.

15. In addition to the Board, PPL has the specialist Performer Board, Finance Committee, Distribution Committee, and Audit Committee, all comprising members which scrutinise specific areas of the business.

16. We are pleased to note that the Government's response to Hargreaves places greater emphasis on the self-regulatory initiatives of licensing bodies. Their proposal is to publish voluntary codes, in consultation with collective licensing bodies and only then draw up a backstop power.

17. We look forward to participating actively in the consultation regarding minimum standards for voluntary codes and very much hope that a collaborative approach can be adopted. A voluntary framework, which avoids unnecessary regulation and bureaucracy, is likely to be more efficient and more conducive to encouraging collective licensing. The focus should be on building on current accountability and transparency and should not be unduly influenced by the flawed analysis in the *Economic Impact of Recommendations*.

NATURAL MONOPOLY

18. The *Economic Impact of Recommendations* assumes that, as a natural monopoly, PPL will behave in a monopolistic fashion. However,

    - Rightholders can choose whether or not to give their digital rights to PPL.

- Users choose whether or not to use sound recordings in their business. The comparison with utility companies[1] is erroneous as it is difficult to imagine a business operating without power or water.

- In many areas of business, PPL clearly does not have a monopoly (for example, digital licensing, international collections).

19. PPL is a natural pro-competitive monopoly for broadcast and public performance licensing, which exists because it suits all the parties. Because of its not-for-profit structure, the incentives are to work for all stakeholders. Furthermore it provides a level-playing field for users and rightholders alike.

INCENTIVES FOR IMPROVEMENT

20. The impression given by The *Economic Impact of Recommendations* is that collective licensing companies have no effective incentives to operate efficiently.[2]

21. Firstly, PPL's stakeholders demand low overheads, efficiency and service delivery. Given the well-documented financial pressures on the record industry, it is inherently unlikely that PPL's stakeholders would demand anything other than an efficient and cost-effective service.

22. Secondly, there is competition for licensing (for example, throughout Europe PPL faces competition for the licensing of background music services) and for distribution (for example, PPL faces competition with other societies and with third party rights collection agencies in respect of the payment to performers of their international revenues).

23. Even worse, the paper makes assumptions and assertions without any evidence to back them up. Among the unsubstantiated claims are:

    - *"The individual organisations appear to be the cause of some avoidable deadweight losses and inefficiencies"*[3] – yet no specific examples of such losses or inefficiencies are provided. This conclusion appears to be based on nothing more than the range of cost-income ratios for different licensing bodies. Leaving aside the fact that the wrong figures are used (for PPL, for example), the analysis takes no account of material differences in the scale and nature of each licensing body's operations (with different rights, rightholders, functions and licensee markets). It is erroneous to define and

[1] Even where utility companies are subject to regulators, those regulators are normally charged with looking at the interests of both parties (not just the position of the user). For example, the functions of OFWAT and the Competition Commission under the Water Industry Act 1991 are to: (a) further the interests of both existing and future water consumers (the 'consumer objective'); (b) secure that water companies properly carry out their functions; and (c) secure that they are able to finance those functions, in particular, by securing reasonable returns on their capital.

[2] For example, it is alleged that currently collecting societies do not need to compete on overheads, efficiency and service delivery, with benefits for rights holders, service providers and consumers: EE page 14 (second paragraph).

[3] EE page 18 first paragraph.

assess a single collective licensing model (as the *Economic Impact of Recommendations* seeks to do).

- *"A very wide dispersion of cost margins and director remuneration in the industry suggests inefficiencies."*[4] – however, the opposite is true. It would be inefficient if the figures were the same for societies with different business models. The *Economic Impact of Recommendations* takes a pejorative stance by setting out the remuneration of the highest paid directors without providing any context (such as the scale of the society's operations or the remuneration of directors elsewhere). In the case of PPL, it ignores the most important fact: that the top directors are appointed by the Board whose money is at stake and are subject to regular re-election by the wider membership at the company's Annual General Meeting.

- *"Instances of price discrimination."*[5] – again, no evidence is provided to support this claim.

- *"Repeated customer complaints – in submissions or tribunals."*[6] – no information is provided as to whether those complaints relate to digital licensing or other areas of licensing. Furthermore, no attempt is made to assess whether any such complaints are justified. The only example given is a Copyright Tribunal decision which was a dispute over price, not customer service or good conduct.

- *"Opaque financial reporting."*[7] – no specific examples are provided. PPL does provide detailed financial information, in its published annual accounts and in bespoke accounting to members. Again there seems to be a mistaken assumption that there should be a single reporting format, ignoring the different functions of different collective licensing bodies.

24. Several comments are made in respect of PPL making back payments following a Copyright Tribunal reference.[8] These comments contain several errors:

    - There was no *"over-charging"*[9], which suggests misconduct on the part of PPL. The fees of PPL were reduced but pending the decision of the Tribunal the statutory procedure allowed PPL to charge those fees.

    - There is a curious comment that PPL put that money aside in its accounts to refund licence fees following the Tribunal's decision, with the note that *"You will only be entitled to a refund if you make a claim to PPL for repayment"*. This suggests that PPL was wrong to say that the licensees had to make a

[4] EE page 18 first paragraph.
[5] EE page 18 first paragraph.
[6] EE page 18 first paragraph.
[7] EE page 18 first paragraph.
[8] EE page 18 first paragraph, footnote iii and page 19 footnote 20.
[9] Footnote 20.

claim. However, it was the Copyright Tribunal that specifically ordered in October 2009 that there should be a claims-based refund process.

- The refunds were only necessary because the Section 128A regime did not work (and has been repealed) and was not the expeditious process that PPL and copyright users alike had expected.

- In any event, this Copyright Tribunal order on tariffs is not evidence of any inefficiency or poor customer service.

TRANSPARENCY

25. The *Economic Impact of Recommendations* says that increased transparency is likely to improve confidence in collective licensing systems overall, thereby attracting more members to join, so the societies could gain from increased membership in the long term.[10] Yet there is no evidence at all that record companies and performers are deterred from joining PPL. In fact, the opposite is true. PPL's membership has been growing steadily year-on-year.

26. If anything, greater regulation (by the Copyright Tribunal or otherwise) could push stakeholders away from collective licensing.

27. The *Economic Impact of Recommendations* asserts that copyright would gain from greater transparency because they would purchase licences based on prices set in a more transparent fashion.[11] For example, it is said small businesses have reported that licences from the music collecting societies were among the more unpopular 'regulatory costs' and that the majority of customers are not aware that they can negotiate the licence fee. (Looking at the Government's Your Freedom exercise, this claim is overstated.)

    - This licence fee is not a regulatory cost – it is a transactional cost for goods and services (the use of recorded music).[12]

    - Many tariffs are negotiated with representative bodies.

    - Individual negotiations with all licensees would not be efficient. It would drive up costs for rightholders and users. It also would run the risk of PPL acting in a discriminatory fashion by treating similar licensees differently.

28. It is then said that *"greater transparency and standards of practice could reduce transaction costs for a wide range of private and public sector organisations, from sole traders to schools. Benefits from transparency may be most significant for organisations for whom licensing is an incidental rather than a central business*

[10] EE page 20 (first paragraph). See also EE page 20 (fourth paragraph).
[11] EE page 20 (second paragraph).
[12] As noted at (for example) EE page 13.

interest, who have few or no legal resources to devote to it, and so may be particularly poorly equipped to negotiate effectively."[13] There is no evidence to support this statement. On the contrary,

- PPL licensing tariffs are publicly available on the PPL website.
- Most tariffs are negotiated on behalf of small businesses by their representative trade body.
- Schools deal with a single company who have been appointed by PPL and PRS to issue licences to educational establishments.

29. Improvements for licensees will only be achieved if there are in fact substantial inefficiencies and yet the impact assessment offers no valid evidence on that crucial point. Greater regulation of an already efficient company will constrain its operations limiting flexibility and innovation just at the time when this is needed to adapt to new uses of content. More significantly, greater regulation will deter rightholders from choosing collective licensing.

COMPARISON WITH OTHER TERRITORIES

30. It is often stated that collective licensing is regulated in the rest of the EU, but not in the UK. It is also noteworthy that the EU agenda is dominated by complaints about collective licensing in member states other than the UK.

31. It is true that the UK does not have a proscriptive regulatory regime for collective licensing. However, there is a finely balanced regulatory system in place which combines private scrutiny with public adjudication. PPL is accountable to its members who govern and control every aspect of its business. In the public arena, PPL is subject to all the general regulatory requirements of companies. In addition, the Copyright Tribunal has specific jurisdiction and wide powers to adjudicate in disputes between collective licensing bodies and licensees.

32. In its ongoing analysis of the performance of collective licensing bodies, IFPI regularly upholds PPL as an example in terms of revenue and accountability and has asked PPL to develop a global repertoire database of recordings data.

33. Collective licensing in the UK is generally regarded as efficient and beneficial to both users and rightholders. The focus should be on codes at European level.

[13] EE page 20 (third paragraph)

DIGITAL COPYRIGHT EXCHANGE

34. The proposal for a Digital Copyright Exchange will purportedly deliver additional growth of £2.2bn per annum, with cost reductions of £10m - £20m per annum. The growth figure is based on a projected 4% acceleration in the digital economy in a report entitled *The Economic Impact of a European Digital Single Market* by Copenhagen Economics. However, this presupposes a wide range of changes in investment infrastructure, harmonisation of legal frameworks, skills and training and consumer attitudes to piracy and security. A Digital Copyright Exchange alone will not deliver this.

35. Similarly, the cost estimates are excessive. The starting point, i.e. current costs of collective licensing, assume that these are all digital, when in fact most of these costs relate to traditional broadcasting and public performance revenues. The projected saving from investment in IT systems is also erroneous given that PPL has just implemented an entire new suite of Money Out systems, including a globally-enabled recordings database.

36. In our experience, developing a comprehensive database does bring tangible business benefits (hence the PPL Board's decision to invest in those systems) and work on the Digital Copyright Exchange could facilitate these developments across the creative industries.

37. We agree with others that the Digital Copyright Exchange, as a network of databases, is in essence worth pursuing, provided it is industry-led (rather than a public IT project).

September 2011

Written evidence submitted by PraxisUnico

1) **PraxisUnico is an educational not-for-profit organisation set up to support innovation and commercialisation of public sector and charity research for social and economic impact. PraxisUnico has over 2600 members from 113 universities – most universities in the UK - and research organisations .52 commercial concerns, patent agents and intellectual property lawyers are associate members. PraxisUnico holds an annual conference and has delivered professional training to around 2500 individuals from 40 countries.**

2) PraxisUnico encourages innovation and acts as a voice for the research commercialisation profession, facilitating the interaction between the public sector research base, business and government. PraxisUnico provides a forum for best practice exchange, underpinned by first-class training and development programmes.

3) PraxisUnico supports the general direction of travel as indicated in the Hargreaves Report and in the Governments response. We agree that:

a. change is needed;

b. International cooperation and work sharing is essential, particularly across the EU. We agree with working collaboratively with countries within the EU even where a single agreement cannot be reached with all member states (following the recent decisions on EU wide patents);

c. The IPO should have a stronger mandate;

d. A single EU patent is essential and must be pursued vigorously;

We disagree that patent fee costs are a suitable control mechanism for patent thickets. The costs incurred in securing professional advice relating to patenting far outweigh the patent filing costs.

4) Turning to the detailed recommendations

a. **Evidence** We agree that as far as is possible the IP system should be based on objective evidence. The key words in the recommendation are “as far as is possible”. We feel that in some instances decisions on policy must follow clear principles which are then adapted in line with evidence, in the field of IPR the length of time taken to gather evidence means that the system will always lag substantially behind technological change. The pace of technological change then compounds this effect. The challenge for many is uncertainty, by providing the IPO with a stronger mandate greater certainty will ensure action and adaptability.

b. **International priorities.** The highest priority should be given to achieving a unified patent court and patent system. The IPO should lead by example in the field of work-sharing and focus on a goal which is EU wide which will in turn, in our opinion, be of the greatest benefit to UK businesses, universities and rights owners. It is essential that the pace with which patent applications are considered needs to increase and this will never be achieved at a national level without an appropriate level of resource being deployed.

c. Copyright licensing. We agree with the principle of a Digital Copyright exchange and that this should work to an agreed code of practice. Having been involved in many consultations the code of practice must be kept as simple as possible and driven by key principles on which the IPO would then have a mandate to amend in line with cases they consider. We are concerned that the ability to achieve the Exchange within a reasonable time period will be challenging, which again argues for the need for the IPO mandate to be strengthened. Collecting societies should be required by law to adopt codes of practice approved by the IPO

d. Orphan works. All copyright material should be kept available wherever possible. This is essential for the health of the UK research environment. Where IP rights owners cannot be traced then the rights should become freely available.

e. **Limits to copyright.** The Government should deliver copyright exceptions at national level to realise all the opportunities within the EU Framework. Absolute clarity on these exceptions is becoming increasingly important for the research community.

f. **Patent thickets and other obstructions to innovation.** As noted earlier work-sharing between patent offices across the world and, in particular, within the EU is essential if the patent backlog is to be tackled. Novel and innovative means must be found to ensure consistency of examination and process of patent applications, for example examination through a process equivalent to Wikipedia making the best use of modern technology. We would caution proposing a patent fee structure as the solution to patent thickets. Professional adviser costs far out-weigh patent fees. The strengthening of the IPO mandate may help in dealing with the issue of patent thickets. The challenge in many patent disputes is not the IP system but the differences within commercial legal and judicial systems across the EU which leads to considerable variability in judgements acting on the same evidence. We struggle to see a solution in this regard, other than a statutory requirement to go to expert arbitration and mediation prior to any court action – see (h) below.

g. **The design industry.** The design industry is critical to the UK and we agree that consideration should be given to the extension of the Digital Copyright Exchange in this area. But this should be done as a separate exercise in order to ensure that design is given due importance and that the time taken to establish the Exchange is not compromised.

h. **Enforcement of IP rights.** We believe that there should a radical re-think of how patent disputes are handled in the legal system. The costs involved and the length of time taken are considerable disincentives to all but those with the deepest pockets. We believe that effective systems overseen by experts with pre-determined costs and timelines as exemplified by the WIPO arbitration and mediation system should be either adopted or a national version implemented through the IPO. In our view, this will both address the concern with regard to small firms and IP addressed in the report and would also provide benefits to universities, NHS Trusts and other public sector agencies which generate IPR but who do not have deep pockets.

i. **Small firms access to IP advice.** We struggle to see how a low cost IP and legal advice system could be implemented. We believe that continuing major efforts in education are required and that the implementation of other recommendations, including strengthening the mandate of the IPO and reducing the costs of an EU wide patent, will have much more positive impact on a small firm's approach to IP.

j. **An IP system responsive to change.** This is the most important recommendation. The IPO powers must be extended by providing the ability to give statutory opinions. This should not solely relate to copyright but extend to other IP rights. The pace of technological change is so rapid that without such extended mandate we will be considering a further report in another four years time. It is essential in providing the mandate that goals of the IPO are clearly established with a strong economic focus, balanced with protecting the rights of owners (providing they are seeking to mobilise their rights for economic or societal gain) and with a major focus on international collaboration thus supporting UK businesses to act on a global platform. Oversight of the IPO then becomes an important issue and the experiences of SABIP noted in the report do not bode well.

Prepared on behalf of PraxisUnico Board and Committees by

Dr Douglas Robertson, Chair PraxisUnico and Director of Business Development & Regional Affairs, Newcastle University

Declaration of Interests

Dr Douglas Robertson is directly involved in the operations of university research commercialisation functions.

August 2011

Written evidence submitted by the Professional Publishers Association (PPA)

Professional Publishers Association (PPA) is the trade body for UK magazine, journal and business media publishers. A full list of PPA members is available at: http://www.ppa.co.uk/cgi-bin/go.pl/ppamembers/index.html.

PPA's membership consists of some 200 publisher members and affiliates who publish consumer, customer and business magazines, journals, data and directories in addition to conducting research, organising conferences and exhibitions.

PPA members offer print, electronic and online publications and services, including websites, online and electronic versions of print publications and publications and data only available online or through electronic transmission.

Publications encompass consumer, customer and business to business journals, magazines and media and increasingly involve the use of new electronic rights management systems to help improve the provision of publications and services to subscribers.

PPA welcomes Government endorsement of the Hargreaves recommendation of policy decisions to be based on economic evidence. Recognition that this is especially important at the international level is also welcomed.

However, the Government appears to have immediately disregarded its own core recommendation when addressing possible changes to the scope of the copyright exceptions permitted under the EC Copyright Directive, when addressing the issue of non-commercial research.

The Hargreaves Report states "We recognise that some publishers view the licensing of text mining as a legitimate commercial opportunity".

However, it then goes on to say (without reference to evidence that supports the claim) "we are not persuaded that restricting this transformative use of copyright material is necessary or in the UK's overall economic interest".

Text Mining

In deriving high-quality information through text mining, users of text and database already have the benefit of the current non-commercial research exception provisions (s29 CDPA). The expressions "research" and "non-commercial research" can (and should) already be construed consistently with the EC Copyright Directive.

PPA represents publishers who grant research-focused permission requests to mine data. It is a new area of business for publishers and important to future growth.

Those who seek licences often do so with a view to their own profit.

Hargreaves argues (again in the absence of evidence) that the current fair dealing exceptions under UK law will not cover use of text mining tools under the current interpretation of “Fair Dealing”.

However, this “current interpretation” is based upon UK adherence to EU law, particularly the EC Copyright Directive. Text mining cannot be divorced from the “copying” or reproduction of the works to be mined. As such reproductions are relevant to limits in scope for copyright exceptions permitted by Article 5 of the EC Copyright Directive. These limitations include only applying exceptions in special cases which do not conflict with the normal exploitation of a work and which do not unreasonably prejudice the legitimate interests of the rightsholders.

Consultation with Publishers and evidence gathering required

PPA members therefore maintain that the Consultation envisaged by Government as a prerequisite of taking forward the Hargreaves recommendation linked to text mining, will be particularly important in terms of clarifying evidence about the way in which the activity is providing opportunities for growth, rather than acting as a barrier.

Maintaining provision for “fair dealing” within the current scope of s 29 CDPA must remain one of the options within any Government consultation on this issue.

Follow up

PPA members would be happy to assist in the provision of further evidence to confirm that scope and levels of interest in licensing text mining beyond the scope of fair dealing.
They also look forward to responding to the promised Consultation on this issue before growth restricting steps are taken which may prove both damaging to the publishing sector and difficult to reverse.

6 September 2011

Written evidence submitted by Ronan Deazley, Professor of Commercial Law, University of Glasgow, with Tim Padfield, copyright advisor and author

1. EXECUTIVE SUMMARY

1.1. We endorse the aspiration set out within *Archives for the 21st Century* (2009)[1] that the archive sector within the UK should strive to increase the proportion of archival records that are available online.

1.2. We believe that proposals to reform the intellectual property regime should facilitate the policy aim by assisting cultural institutions to make their archival holdings available online within a simple, straightforward, and easily understood copyright framework. We do not believe that the copyright regime should present unnecessary barriers to making archival collections available online.

1.3. We do not believe it is sufficiently understood that library collections and archival collections are fundamentally different in nature. We believe these differences should be acknowledged and accommodated within the copyright regime.

1.4. We acknowledge that the cost of making archival collections available online typically outstrips the cost of making library collections available online. In particular, both the costs of initial digitisation as well as the costs of clearing rights (if they can be cleared at all with any certainty) are typically larger with respect to archival collections when compared to library collections.

1.5. We consider that the UK's partial implementation of the EU Copyright Term directive creates particular problems for archival material, since it unnecessarily extends copyright protection for older unpublished literary material, of any date, until 2039. The application of the standard term would deal with millions of orphan works at a stroke.

1.6. We believe that the copyright regime should provide cultural institutions[2] with a safe harbour when making their archival collections (but not published library collections) available online. In particular, we argue that this safe harbour should take the form of a limitation on liability rule.

1.7. The limitation on liability rule should provide that the remedy available against cultural institutions and their partners making archival materials available online for non-commercial purposes without the prior authorisation of a copyright owner should be limited to injunctive relief only. Damages or any other form of monetary relief should not be available.

1.8. The operation of this safe harbour provision should not apply if the cultural institution in question has received express notice from the copyright owner – either at the time of deposit or at anytime thereafter – to the effect that the material in question should not be made available online.

2. BACKGROUND

2.1. In 2009 the Labour government set out its strategic vision for the future of the publicly funded archive sector within England and Wales. *Archives for the 21st*

[1] available at: http://www.nationalarchives.gov.uk/information-management/policies/archives-century.htm

[2] in this context cultural institutions include any institution holding publicly accessible archival materials, including record offices, libraries, museums and universities

Century recognised the vital role that archives play in linking people with their communities and their heritage, and in contributing to the development of robust local democracy, social policy, education, research, history and culture. At the same time, the general trend from paper to digital record-keeping, the growing technical complexity of record keeping, and the fragility of digital information all present archives with new challenges in preserving authentic information and records in perpetuity. This new digital environment has altered society's expectations about access to and use of information generally, and archival holdings in particular: people now expect resources to be accessible online as and when it suits them. Two statistics in particular stand out: first, that in 2008-09 over 170 documents were downloaded over the internet for every one document that was requested in the reading rooms of The National Archives; and second, that images of less than one per cent of archival holdings across England and Wales were available online.[3]

2.2. One of the then government's key recommendations was to encourage greater online access to digitized archival content: "It is essential that the archives sector is able to respond to this challenge and continues to increase the proportion of records that are accessible online".[4] We unreservedly endorse that aspiration. However we do not believe that the recommendations for copyright reform set out within both the *Gowers Review* and the more recent *Hargreaves Review of Intellectual Property* are sufficient to enable archives and other cultural institutions to realise the vision set out within *Archives for the 21st Century*. Worse, we believe that the proposal in the current government's response to the *Hargreaves Review* to "widen the exception for library archiving"[5] involves a fundamental misunderstanding of the differing needs and interests of the library and the archive sector within the digital environment. There should be differential treatment of archival collections and library collections under the copyright regime – at least in relation to making collections available online. This response sets out a new approach that would greatly enhance the ability of cultural institutions to provide online access to their archival collections within a simple, straightforward, and easily understood copyright framework.

We endorse the aspiration set out within *Archives for the 21st Century* (2009) that the archive sector within the UK should strive to increase the proportion of archival records that are available online. The copyright regime should not present unnecessary barriers to this.

3. UNDERSTANDING LIBRARY AND ARCHIVAL COLLECTIONS

3.1. When considering the differences between library and archival collections with respect to mass digitisation initiatives, we take as our starting point the report produced by Nick Poole for the Comité des Sages in November 2010. In it, Poole presents data on the entirety of the collections held in Europe's libraries, museums, and archives, as well as the estimated costs of digitising these collections across

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[3] *Archives for the 21st Century* (London: TSO, 2009), 14, 18.

[4] *Ibid*., 1, 18.

[5] *Government response to the Hargreaves Review* (2011), 8, responding to I. Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011), 8

these different sectors.[6] The figures are revealing. Poole estimates that Europe's libraries hold around 130m different titles of which approximately 77m titles eligible for digitisation have not yet been digitised.[7] This in turn equates to around 1.93bn individual pages. The estimated cost of digitising this material is calculated as ranging between €0.22 and €0.68 per page.[8] Taking the lowest estimate, this would mean that the approximate total cost of digitising all 77m titles would be €4.2bn; the upper estimate produces a figure of €13.1bn. The data concerning archives is limited to material held in national, local and provincial and university archives. It excludes audio visual,[9] business, community, church and private archives.[10] Nevertheless, Poole calculates that the total number of individual pages of archival material held within Europe comes to around 26.98bn. Of these 17.27bn are eligible for digitisation, of which approximately 10.45bn have not yet been digitised.[11] Because of the complexity and fragility of the records held in archival collections, the full economic cost of digitising this material is estimated at €4 per page. And so, the approximate total cost of digitising all 10.45bn pages would be €41.8bn, considerably more than the costs that could be incurred in digitising Europe's library collections.

3.2. The important thing to appreciate about these figures is that they only concern the estimated costs of initial digitisation. That is, they do not extend to the costs of the long-term preservation and management of these materials, nor do they include the costs of clearing rights for the material to be digitised.[12] Staff time and effort will be needed to verify the copyright status of a work (including any related rights), trace the descent of title through the generations, locate and contact the rights owner(s), negotiate terms and conditions of use, and then to document all of this activity.[13] And not only do these cumulative transaction costs typically outstrip the actual cost of digitising the material in question, but they present a much heavier burden upon public sector funding with respect to archival collections when compared with library collections.

3.3. First, in terms of the sheer volume of individual items, archives tend to have much larger collections than other cultural institutions, including libraries. In this respect,

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[6] N. Poole, *The Cost of Digitising Europe's Cultural Heritage: A Report for the Comité des Sages of the European Commission* (2010).

[7] This figure does not include the digitisation of rare books, archival material, newspapers, maps, photographs and audiovisual material that might be held in libraries; Poole, 38-48.

[8] These figures include estimated costs for project management, the preparation, selection and unbinding of relevant materials, scanning costs, OCR conversion costs, PDF conversion costs, as well as the costs of simple metadata creation.

[9] These however are dealt with separately within Poole's Report at 65-72.

[10] Poole, 58. In the UK, for example, just less than 2000 archival institutions are accessible to the public. Of these, there are 161 archives in higher education, 140 national institutions, and 181 local authority archives, all of which would be included within Poole's analysis. Excluded from his report however would be the 64 company archives held within the UK, as well as nearly 1500 other archival repositories holding the records of a single body or a private family.

[11] This figure does not include photographs, microforms, or audiovisual material held in these archives; Poole, 60.

[12] *Ibid.*, 16, 31.

[13] A. Vuopala, "Assessment of the Orphan works issue and Costs for Rights Clearance", A Report for the European Commission (May 2010), 12-13.

the statistical analysis carried out by JISC in 2009 indicates that while the average library holds between 100,000 and 500,000 works, the average archive holds between 500,000 and 1m records. Similarly, whereas 29% of libraries hold more than 1m works, the equivalent figure for the archive sector is 43%.[14] The volume of orphan works that an institution holds within its collection will also increase the complexity and the cost of clearing rights.[15] And, not surprisingly, a greater proportion of archival collections are made up of orphan works, when compared with library collections. For example, of the institutions that provided JISC with an estimate as to the number of orphan works within their collections, the average proportion reported by libraries was 5-10%, whereas for archives it was 21-30%.[16]

3.4. The fact that archival collections typically contain more orphan works than library collections should not surprise, given the profoundly different nature of archival and library collections. Libraries aggregate, organise, enable access to, and assist users in navigating the world's accumulated knowledge. In this regard, library collections are primarily concerned with commercially published material. By contrast, archival collections are primarily concerned with the unique records produced by organisations, families, and individuals during their day-to-day activities or business.[17] And while these records have extraordinary social, cultural, academic and historic worth, the nature of these records is such that they are rarely created for the purposes of commercial exploitation, and few have commercial value in themselves. Indeed, it is the organic nature of the records selected for inclusion within an archive that makes these records so reliable, authentic, and trustworthy.[18]

3.5. That archival records often have little or no intrinsic commercial value means that they also typically remain unpublished at the time of deposit with an archive. Indeed, archival collections are naturally prone to the so-called *orphan works paradox*: that is, the lower the commercial value of a work the less likely it is that the rights owner can be found, which in turn means that the least commercially valuable works generate the highest transaction costs in terms of searching for the owner when attempting to clear rights.[19] Similarly, the cost of clearing rights for published

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[14] JISC, *In from the Cold: An assessment of the scope of 'Orphan Works' and its impact on the delivery of services to the public* (April 2009), 32.

[15] Vuopala, 13.

[16] JISC, 18, 35, 39. From this, JISC estimated that the total volume of orphan works held within archival collections was likely to be five times greater than for library collections; *ibid.*, 36 (the mid-range estimate of the total number of orphan works for the libraries represented in the JISC survey was approximately 2m, compared with 10.1m for the archive sector). Moreover, whereas 24% libraries indicated that the orphan works phenomenon frequently affected the fulfilment of their public service delivery, 43% of the archives indicated the same; *ibid.*, 38.

[17] The General International Standard Archive Description (the ISAD(G)) defines a record as "[r]ecorded information in any form or medium, created or received and maintained, by an organization or person in the transaction of business or the conduct of affairs"; ISAD(G), 0.1.

[18] ISO 15489-1: 2001(E), 7.2 defines the characteristics of a record as including authenticity, reliability, integrity, and useability.

[19] European Commission Staff Working Paper, *Impact Assessment on the Cross-Border Online Access to Orphan Works*, SEC(2011) 615, 26, n.71.

material is typically lower than for unpublished material and other grey literature[20] given that information about the rights owners of published work is often readily available from collecting societies and commercial publishers.[21] By contrast, collecting societies rarely carry information about grey literature or unpublished works as a result of which, even when the works are not orphaned, clearing rights tends to be a more cumbersome and labour intensive process.[22]

3.6. To summarise, the estimated costs of initial digitisation are much larger for archival collections as opposed to library collections. So too is the cost of clearing rights given: (i) the volume of unique, individual items held within archival collections; (ii) the large proportion of orphan works held within archival collections; and, (iii) the fact that archival collections predominantly consist of unpublished material with very little intrinsic commercial value. For these reasons, we believe that there is a compelling case for treating archival collections differently from library collections under the copyright regime – at least with respect to cultural institutions making copyright-protected material online for non-commercial purposes.

Library collections and archival collections are fundamentally different in nature. These differences should be acknowledged and accommodated within the copyright regime. In particular, the cost of making archival collections available online typically outstrips the cost of making library collections available online. Moreover, both the costs of initial digitisation as well as the costs of clearing rights tend to be considerably larger for archival collections than for library collections.

4. SOLUTIONS: HARMONISATION OF THE TERM OF COPYRIGHT FOR UNPUBLISHED WORKS AND A LIMITATION ON LIABILITY RULE

4.1 The number of orphan archival works could be reduced substantially by the application of the harmonised copyright terms provided for by the EU's term directive. The standard term of copyright is now the life of the author plus 70 years, but the UK has chosen to retain some earlier provisions for works that once enjoyed perpetual protection. Many of the unpublished works that are the defining feature of archival collections will continue to be protected until 2039. Is it right that unpublished works created in the 16th century should still be protected by copyright? Most such works are orphans, and the standard term would remove copyright from them with minimal impact on their unknown rights owners.

4.2 The implementation of a safe harbour for cultural institutions when making their archival collections available online would be straightforward: it should take the form of a limitation on liability rule. In particular, a statutory provision would provide that the remedies available against cultural institutions digitising and making work available online without the prior authorisation of a copyright owner should be limited

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[20] That is, material published by non-professional publishers (such as corporate publications), as well as other literary, artistic, musical and audiovisual content created by non-professionals.

[21] Vuopala, 13.

[22] As the British Library noted in its response to the Hargreaves consultation: within the UK there is effectively no tradition of the collective management of unpublished literary works; *British Library Response to Hargreaves* (2011), 22.

to injunctive relief only. Damages or any other form of monetary relief would not be available. This safe harbour provision would be subject to two important exceptions:

(i) If at the time of deposit the copyright owner expressly provides that the material being deposited should not be made available online without their consent, then the safe harbour provision should not apply.

(ii) Second, if after deposit, the institution in question receives an express notice from the copyright owner that the material should not be made available online then the safe harbour provision should not apply. If the institution in question has already made the material available online then, upon receipt of such a notice from the rightsholder, they must take down the material within a reasonable period of time.

The express notice from the copyright owner after deposit should also contain a good faith statement on the part of the copyright owner as to how and why the institution making the archival material available online for non-commercial purposes is damaging the copyright owner's interests.

4.3 The safe harbour should apply only to unpublished archival material, and so not to conventional published library material. It should apply only to archival material made available online for non-commercial purposes, and it should apply to the activities of partners of cultural institutions that are helping to make the material available.

4.4. These two proposals would remove many of the impenetrable barriers that are restricting the ability of cultural institutions to make archival materials available online. Readier access to the wealth of archival material preserved in cultural institutions aross the UK would encourage research and innovation, to the benefit to the economy and society. Moreover, the application of the standard copyright terms to archival material would have minimal impact on copyright owners while the safe harbour proposal would adequately safeguard copyright owners' economic interests in what is a largely non-commercial body of copyright-protected materials. There is no economic downside to this initiative and it would help deal with the problem identified by Hargreaves and the Government that 'valuable intangible assets are simply going to waste.'[23] Finally, we should stress that the safe harbour would not extend to subsequent users of material made available online. Where copyright continues to apply, the economic interests of copyright owners would not be compromised in relation to any subsequent commercial use of their material: their prior authorisation would still be required.

The copyright regime should provide a safe harbour to enable cultural institutions to make their archival collections available online. This safe harbour should take the form of a limitation on liability rule. This safe harbour provision should only extend to making archival material available online for non-commercial purposes. The standard copyright terms should apply to archival materials.

[23] *Government response to the Hargreaves Review* (2011), 6

Written evidence submitted by PRS for Music

Summary

1. *PRS for Music* is pleased to offer input to the BIS Select Committee. Throughout our paper we underline the importance of copyright to the earnings of creators and to the creative industries but as importantly to the wider economy. The decisions taken by Government following the review will shape the potential for the growth of the creative economy for the next 10 years. Copyright is the mechanism by which creators earn a living and provide for their pension and is the means by which producers and publishers of creative works earn a return, allowing them to invest in the creative talent that will provide further growth for the next generation. Copyright lies at the heart of the United Kingdom's balance of trade surplus in entertainment and it is in Britain's national interest, as a net exporter, to ensure a fair valuation of copyright throughout the world. The full social and economic impact of any changes that may arise from the Hargreaves review must be properly understood in order to avoid damage to existing growth businesses in order to speculate on potential growth elsewhere that might either not arise or merely represent a transfer of value to existing businesses, often based abroad and which may make a limited overall contribution to the British economy.

Introduction to *PRS for Music*

2. *PRS for Music* is the trading name for two music rights collecting societies; Mechanical-Copyright Protection Society (MCPS) and Performing Right Society (PRS) which together represent 85,000 songwriter, composer and music publisher direct members in total (including 5,000 non-UK resident members), including some of the world's best known writers. PRS represents a global repertoire of musical works for licensing to businesses, as a result of agreements with equivalent societies around the world. Our licensing activities cover multiple sectors but can be broadly summarised as business to business licensing, enabling the use of music by businesses such as broadcasters, online services, record producers, live music promoters, pubs, clubs, retail businesses and all businesses that play music to their public.

3. *PRS for Music*'s total royalties collected from licensing were £611m in 2010. All royalties, net of costs, are distributed to the members and to affiliated societies whose rights are represented under mandate. Collecting societies are private companies, owned by their members and governed by their members. The PRS and MCPS Boards are representative of the membership and approve licensing policy and distribution rules. We are pleased to be one of the world's most efficient music licensing operations with a cost to income ratio of 10.4% and offering our members more money, more often, at lower cost and its customers the most efficient means by which they can use music.

4. We have welcomed many but not all the recommendations in the Hargreaves Report, now adopted by Government. Many of these were expressed quite broadly and the Government consultation will need to provide more clarity in order that a true assessment can be made of the costs and benefits of implementation of specific proposals and whether they contribute to the interests of the UK growth agenda.
5. Our input covers four areas:

   - Copyright licensing
   - Measurement of the contribution of IP to the economy
   - International export policy
   - Consumer education

Copyright licensing

6. The copyright licensing chapter covers a wide range of connected issues, all of interest to us and we comment on the proposals for a Digital Copyright Exchange, collective licensing, pan-European licensing and codes of conduct for collecting societies.

Digital Copyright Exchange (DCE)

7. The underlying rationale from Professor Hargreaves for proposing a Digital Copyright Exchange (DCE) was in order to lead to a 'more flexible licensing system' and address 'potential inadequacies in licensing'. Any contribution to the licensing environment should build upon and add value to existing licensing offers. While there is still scope for greater growth for licensing of music rights for digital services it has been acknowledged during the Hargreaves review process that *PRS for Music* has a good record on speed to concluding licences, in taking on board the nuances of all the various different new business models and finding licensing solutions which match their needs.[1] At the lower end of the market *PRS for Music* offers automatic one click licences through its website.[2]

8. The projected costs savings for DCE are estimated by reference to costs of collecting societies and evidence on savings through digital procurement. It is not clear how this has reached £10-20M without seeing whether this looks at costs of acquiring the licence or the broader costs of supporting a licence through the relevant systems and databases for registration of works, matching, processing or producing music usage reports. A far more robust impact assessment on the costs and benefits of the DCE is clearly necessary.

9. To manage rights, collecting societies must have good quality, accurate data on all those rights, including those not managed by them. This is key to the transparency and accuracy of both rights licensing and rights management, which helps to ensure that the right people get paid for the exploitation of their works. Collecting societies are involved in the exchange and processing of this rights management data, sending it to and receiving it from partners along the value chain. Standardisation and accuracy from all actors at all points in the chain is essential. *PRS for Music* is a member of the Global Repertoire Database (GRD) Working Group, which is working on a scoping study for a central authoritative database for ownership information on copyright in musical works[3]. This project underlines the importance of comprehensive data and high data quality to support music licensing.

10. Naturally the DCE should take into account existing business critical initiatives such as the Global Repertoire Database. It should not replicate or distract from current projects but it could ensure that different sectors find solutions that revolve around industry-led database projects with common standards and with interoperability where that is needed. A forum to share knowledge and co-ordinate initiatives is achievable, does not require legislation and we would anticipate would have the support of all content industries. **We would recommend that Government convene a cross-sector Government endorsed forum, led by the industry, to consider relevant initiatives already**

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[1] Referencing comments made by a technology start up company at a Techhub seminar which was conducted as part of the review process.

[2] The Limited Online Music Licence for services which offer webcasting, streaming and downloading below a certain financial threshold and the Limited Manufacture Licence which licences the recording of CDs, again below a certain threshold.

[3] http://globalrepertoiredatabase.com/index.html

underway, to ensure that these developments are rigorously applying standards and ensure that these initiatives are interoperable as required.

Collective Management

11. The Report acknowledges 'the valuable role of collecting societies in licensing markets, reducing transaction costs by enabling 'many to many' licensing'. Collective licensing of rights is a benefit to rightsholders where they cannot license rights directly or individually and it is a benefit to users who can have access to a large volume of rights and works in one licence. The ability of collective management to lower transactional costs for the market is acknowledged but we are disappointed at the quality and scope of the other data the Economic Impact Assessment (Annex EE) which is provided in that report to support the comments made about collective licensing.

12. What is regrettable is that most of the section in Annex EE on the collecting societies is generally negative.

    a. There is a reference to avoidable deadweight losses and inefficiencies, which is mentioned without any information or example which could allow a defence to be put.
    b. It makes the assumption that there is a natural monopoly situation acr for all rights and all societies. This is not true in the case of online music rights where competition for mandates has been opened up since the European Commission's Recommendation on cross border collective management of online rights in musical works.
    c. Annex EE claims instances of price discrimination and opaque financial reporting. No evidence has been provided to illustrate these claims.
    d. It proposes that licence fees could be set in a more transparent manner. However, in practice, most tariffs are negotiated on behalf of small businesses by their representative trade body. All rates for small businesses are publicly available to view on the *PRS for Music* website. In our view, these accusations are unjustified.
    e. Annex EE states that music collecting societies were amongst the more unpopular 'regulatory cost' faced by small businesses. *PRS for Music's* licences to small businesses can be as low as £44 per year. *PRS for Music* research indicates that once businesses understand that we pay individual composers and songwriters they show a far higher willingness to pay a small fee. We accept we could probably do more to increase understanding about copyright licences.
    f. The report draws some conclusions based on aggregate data for all the UK collecting societies. Collecting societies are in fact very different from each other and we would advise extreme caution in generalising from a data pool. Each society is set up by its members to manage rights in a specific sector for specific purposes. In *PRS for Music*'s case, the rights conferred by members for management form the predominant source of their income. The way they take decisions and how the governance is managed in that case, and the costs, scope and controls on the organisation, might be very different from a society managing secondary exploitation of works where collectively managed income may be marginal. A music publisher could earn 80% of their revenues from collectively managed rights. A book publisher may earn less than 5% of their revenues from collectively managed rights.

13. **We believe it is reasonable and fair to request that any recommendations on collecting societies which are developed during and after the consultation process are based on a more detailed and rigorous impact assessment.**

Pan European Licensing

14. We note that the Government response indicates it will work with the European Commission and UK interests to develop proposals that are compatible with effective licensing models. *PRS for Music* is already active in pan-European licensing of music rights which is part of the framework for cross border licensing of music to all the major multi-national digital music services to operate across Europe. We believe there will be a number of consolidated hubs across Europe that support the collective licensing and processing of rights. 'Hubs' would be voluntary and offer data, processing and licensing services to the network of collecting societies in Europe. They would support a transition from territorial to multi-territorial licensing and help us realise economies of scale to the benefit of rightsholders. We believe that this consolidation is necessary and desirable. A key question to pose to Government is whether the UK has the right corporate environment, incentives, regulatory and fiscal system (VAT, withholding tax) to be attractive as the location for an IP hub.

Collecting Society Governance and Transparency

15. Professor Hargreaves recommended that collecting societies be required by law to adopt codes of practice and the Government is due to publish minimum standards for voluntary codes in early 2012. PRS welcomes the principle of self regulation and has led the way by adopting a Code of Practice for public performance licensees, which has been in place for nearly two years, with complaints referred to an independent ombudsman. We also introduced a Code of Practice for members in 2011, also overseen by the ombudsman. We have selected to work with Ombudsman Services, which handles consumer dispute resolution for communications, energy and property services.

16. In general we acknowledge that collecting societies can show their commitments to good practice through the adoption of Codes and this can have a positive impact. But we also highlight the importance of the commitments to improved services throughout the business. PRS has taken action at an operational level to ensure that customers are served better, and this includes recording calls, ensuring that performance of our sales team is scored on quality of service, improving systems so that calls are dealt with more quickly, and in general identifying issues as early as possible, supported by further in-house training. Total complaints in 2010 fell from 225 to 208, down 8%, representing 1 complaint in 4000 customer contacts (0.025%).

Measurement of the contribution of IP to the economy

17. We welcome the recommendation that policy decisions must be based on good evidence.

18. The measurement of the contribution of creative industries to GDP is currently stated to be around 7% of GDP. This makes the sector a significant contributor to the economy but it is also accepted by industry and Government that the contribution to the national accounts may be understated currently and until changes to the methodology are made. We welcome the commitment from Government to change the measurements of the investment by intellectual property industries and their contribution to the national accounts and we look forward to a future announcement in due course. The methodology will provide a more robust baseline from which both Government and industry can together measure the current value of sectors and therefore more effectively understand the viability and impact of specific policy interventions. Our chief economist has contributed directly, working closely with Imperial College's IP Research Centre, with the support of IPO and Copyright Expert Advisory Panel, to verify and validate a methodology for measuring the contribution of music to GDP.

19. It is also critical that Government's evidence to support the changes they propose in the forthcoming consultation is published, with sources, so that appropriate review and comments can be made. We share the widespread reservations expressed about the quality of the supporting document accompanying the Hargreaves review, *Economic Impact of Recommendations* (Annex EE). More robust economic impact assessment with independent analysis during consultation will be essential.

Music is an export success

20. The international angle to copyright and creative industries is significant and should be a key focus of the Committee's assessment as to whether the recommendations will sustain the existing growth. The UK music industry is an export success story the country can be proud of. One third of PRS income (£180M) comes from international licensing, BPI statistics show that UK artists' share of global sales is 11.8% and that music publishers earned £33.6M from international synchronisation deals. The annual Adding up the Industry report for 2010 published by *PRS for Music* economists shows that only the US and the UK are net exporters of music, and that the UK's share of export value is even increasing faster than the US[4]. The economic success is to a large extent based on licensing copyright. *PRS for Music* has wide market access to licensing in 150 international market through reciprocal agreements with collecting societies globally, and publishers likewise have access through international affiliated companies or the sub-publishing network. The BIS Committee should ask whether the policy changes recommended for the UK will enhance our ability to earn copyright licensing income from abroad or inhibit it.

21. Maintaining today's inward income flows and securing the commercial potential for licensing in new markets can be assisted by Government acting both to reduce such barriers and strengthen the international copyright system to protect the rights and royalties which can be paid to British creators. We highlight to the Committee there are other regulatory tools, such as competition, trade and fiscal policy, that the Government can use in order to increase the level of growth from copyright licensing in international markets. Of specific relevance to copyright earning industries are the framework and processes for paying income tax at source (withholding tax). Delays and costs to recovery of tax can be very onerous for UK creators who are earning considerable proportion of income from copyright licensing abroad. It is in UK plc interests to look at whether the system can be speeded up and made clearer. **We recommend HM Treasury / HMRC commission a review to examine the impact of withholding tax rules on the wider creative sector.**

Consumer education for online markets

22. The Hargreaves report states: that "consumers are confused" and 'it is not always obvious whether a music service is providing copyright material illegally". This assertion is supported by recent Harris Interactive research in which 75% of the survey said they were uncertain about whether sites they accessed were legal or not.

23. *PRS for Music* has been actively working to develop a solution 'traffic lights' that would give consumers information about whether a website or link to content is legal or illegal **before** they access the files. Traffic lights would be a voluntary, industry-led consumer education initiative delivered in partnership with internet security companies and showing

[4] Adding Up the Music Industry 2010. http://www.prsformusic.com/creators/news/research/Documents/AddingUpTheUKMusicIndustry2010.pdf

the status of a site on the toolbar when a consumer conducted a search. Traffic lights would be a complementary part of the package of responses, including other systems of controlling illegal material on the internet, such as site blocking and notice and takedown, and not alternatives. They sit as part of a package of measures. **We kindly request that the BIS Select Committee consider offering its express support for traffic lights as a viable consumer education concept.**

30 September 2011

Written evidence submitted by The Publishers Association

INTRODUCTION

1. The Publishers Association ('the PA') is the representative body for the book, journal, audio and electronic publishers in the UK. Our membership of 113 companies spans the academic, education and trade sectors, comprising small and medium enterprises through to global companies. The PA's members annually account for around £4.6bn of revenue, with £3.1bn derived from the sales of books and £1.5bn from the sales of learned journals.

2. The PA greatly welcomes the Committee's timely inquiry into the Hargreaves Review recommendations and the government's proposals to implement them. We fully endorse the submissions made by the Alliance Against IP Theft and the Creative Coalition Campaign to the Committee.

3. In summary, the PA's view of the Hargreaves proposals and plans for implementation is as follows:

    (i) the Hargreaves Review is right to identify areas of copyright legislation which need to be amended so that copyright is effective in the digital age: proposals for reform on orphan works and library archiving (similar to those which had been identified in the 2006 Gowers Review) are urgently needed to ensure the continued development of the digital economy.

    (ii) we broadly support the concept of a Digital Copyright Exchange to help facilitate licensing of digital content for online services. However more detailed work is required in outlining how the DCE would operate.

    (iii) The Review's proposals for extending the scope of European legislation with regards to data and text mining ("DTM") are fundamentally flawed, would not achieve the desired effect, are unnecessary, and seem likely to be contrary to EU and international copyright law.

    (iv) The Hargreaves Review was predicated upon identifying policies which would lead to stronger growth in the UK economy. However, there is no evidence provided by the Review to support the belief that a DTM exception would do this.

4. More generally, we maintain that:

    (i) Copyright underpins the creative and knowledge economy. It is recognised by the UK High Court as a fundamental property right. Copyright ensures there is a reward to creators and an incentive to investors. It provides the legal foundation to the ability of companies to sell and licence works and to innovate in new products and services.

    (ii) If the British publishing sector were languishing at the bottom of international league tables, routinely failing to make an impact on the global stage, it may be possible to sustain a case for amending the copyright regime. However, the converse is true. British publishers are world class. The sector exports more as a proportion of its output than any other country's publishers. And the following statistics tell a further positive story:

- Science, technical and medical (STM) journals employ over 10,000 people in the UK and generates over £800m of annual export revenue.
- 70% of revenues are from electronic products.
- Globally, STM publishers receive 3 million article submissions a year.
- 1.5 million articles are accepted, reviewed, edited, produced, disseminated and preserved.
- The worldwide audience is 30 million researchers, downloading over 2 billion articles a year.
- The UK accounts for a 6% share of articles published and for 14% of the world's most highly cited articles.

(iii) Publishing companies have as their *raison d'etre* the dissemination of knowledge and they do this by investing millions of pounds in technical systems and platforms which support scientific research. Any notion that publishers are a hindrance to the development of scientific progress is a fallacy – and one which is dangerous for the future of the British economy.

(iv) Any policy proposals which seek to undermine or weaken copyright – as the Hargreaves Review does and with which the Government has said it agrees – must therefore be analysed closely to ensure that they will not limit the health and success of British companies. This is especially the case when our major competitors, notably the US and China, are taking active steps to strengthen the copyright support afforded to their creative and knowledge companies. It is concerning that the UK government appears to walking in the opposite direction to that of these major economies when it comes to copyright support.

DETAILED VIEW ON RECOMMENDATIONS

Data and Text Mining

5. Of all of the 22 recommendations made by the Hargreaves Review, it is the proposals on Data and Text Mining ("DTM") that are of the greatest concern to the publishing sector. The proposal on DTM is one of the most radical, yet it is also one of the least thought-through, being unsupported by any economic analysis. The PA believes that the introduction of a new exception to allow untrammelled DTM (either through amending the European Union Copyright Directive or as an interim measure in the UK) would be an unnecessarily blunt instrument that would not take into account complex variables which can be more appropriately dealt with by a well-functioning permissions and licensing system.
6. Hargreaves bases his argument on the statement: *"Copyright, once the exclusive concern of authors and their publishers, is today preventing medical researchers studying data and text in pursuit of new treatments."* (page 1). The Government echoes Hargreaves' sentiments by stating: *"nor does Government regard it as appropriate for certain activities of public benefit such as medical research obtained through text mining to be in effect subject to veto by the owners of copyrights in the reports of such research..."*.

7. Both the statement in the Review and in the Government Response are a gross mis-representation of the position of scientific publishing on DTM. The faulty analysis does not reflect the position of the scientific publishing community, nor does it appear to be grounded in a full appreciation of the likely future direction of DTM.

8. Copyright protects the expression of ideas and facts, not the ideas and facts themselves. Publishers lay no claim to such ideas and facts, whether they are expressed in words or as data. Scientific publishers will often provide a link to such data from articles in their journals and may even host it as supplementary data, but generally they do not claim copyright in the data themselves. However, where publishers have invested in the presentation of the underlying data (e.g. through normalisation into a standard form, the addition of controlled vocabularies, making of corrections and updates and curation) then it is entirely reasonable to expect some return on this investment.

9. In distinction to the data, the journal article which is based upon it is clearly not simply a set of facts, but an expression of those facts in a way which gives them meaning, explanation and context. It is copyrightable and reflects the investment by the author in the creation of the article and the publisher in the acts of registration, validation, certification, dissemination, navigation and preservation.

10. Put simply, DTM requires the downloading of all the content – both the data and the journal article – to the miners' systems. Thus copyright content has to be reproduced and repurposed; and these acts require the rightsholder's permission.

An Unnecessary Instrument

11. Fundamentally, publishers are fully supportive of DTM and regularly respond to requests from third parties to grant permissions or licences. There is compelling evidence to show that publishers are readily responsive to research-based DTM requests. A recent study by the Publishing Research Consortium into Journal Article Mining found that over 90% of publisher respondents report that they grant research-focused mining requests (approximately 60% of these in most or all cases, another 33% for some cases). This report was not available at the time the Hargreaves Review was collecting evidence. We believe the Select Committee would find this report of enormous interest and a copy can be accessed at: http://www.publishingresearch.net. (The author of this report, Eefke Smit, would be available to provide the Committee with further information, in either written or oral form.) It should also be noted that 100% of abstracts are available for DTM.

12. In advocating a DTM exception, the Hargreaves Review appears to rely heavily (if not solely) on the case made by the Wellcome Trust for a DTM exception in order to analyse historic data on malaria research. The Wellcome Trust states that 87% of the works in UK PubMed Central ("UKPMC") are not available for data and text mining. Whilst this statistic may be correct, it is highly misleading to use UKPMC as a frame of reference in this debate, for a number of reasons.

13. First, because the malaria example speaks more to the need to resolve the issue of orphan works than to the need for a DTM exception. In cases where there is a body of historical research which could usefully be mined, but where the details of the rightsholder are unclear, the orphan works solution as proposed by Hargreaves provides the key. Under this solution, once a work has been identified as an orphan, management of any licences associated with the work would revert to a collective management organisation, which would grant licences for DTM thus freeing up those works for analysis. A new data mining exception would not be needed to enable this to happen.

14. Secondly, UKPMC is limited to biomedical research – and only a subset of that. Focusing on this one area fails to take into account the DTM activity in other areas of academic, professional and educational content.

15. Publishers are willing to enable mining of "Gold Open Access" material (i.e. where a publication fee has been paid), and some routinely include DTM permissions in licences for non-commercial users, such as the NESLi licence available to higher education institutions via JISC Collections, or the licence to the British Library. However, for understandable reasons, publishers are not prepared routinely to license DTM for databases deriving from Green deposit (i.e. for which no payment has been made) Since a large amount of the UKPMC repository is Green Deposit, it gives rise to the figure of 13% availability for DTM. But, if the analysis was to be conducted of permissions granted to works which had been paid for – and which have gone through the full publishing quality process – then the result would be very significantly higher.

Practical Objections

16. There are important technical reasons why a blanket exception is a flawed proposal. Were there to be unrestricted access to web-crawlers and mining software to allow data to be retrieved and copied, publisher systems would crash. (In the same way that a number of heavy users on an internet connection can degrade the service for other users, so too uncontrolled downloading and copying would massively degrade the system.) This applies equally to the platforms of the individual publishing companies or UKPMC. None would be able to cope with the level of downloading which would ensue were a copyright exception to be in place. For DTM to work well, publishers would have to invest further in complex technical upgrades and reconfigurations. But in the absence of the prospect of any economic incentives or rewards it is difficult to envisage how such investment would come about.

17. Furthermore, publisher assistance is very often required by those wishing to analyse data. In publishers' experience, data and text miners want customised solutions from copyright holders, and a permissions or licence based solution allows and encourages this, in a way that a copyright exception would not. Nor would an exception address the main challenges to effective DTM which have been identified by experts already active in this field, such as the need to standardise formats.

18. In summary, it is highly misleading to characterise the relationship between publishers and data as being an effective "veto". Hargreaves and the Government seem intent on characterising publishers as hostile bouncers, bent on barring access to restricted areas. In actual fact, publishers play the role of the highly amenable *maitre'd*, guiding users in the direction they want to go and helping them use the research in the most effective way. In this role, publishers are also able to deny access to those whose intentions are not sound and who intend to use the data or text in a commercially competing use. Introducing a copyright exception would see the disappearance of this mutual relationship and would undermine the utility of the research.

Legal Considerations

19. It is widely predicted that DTM will become increasingly commonplace and part and parcel of the normal exploitation of scientific publishing, any proposed copyright exception to allow it would fall foul of the Berne Convention on Copyright, the "three step test" of which prevents any new exception which "conflicts with the normal exploitation" of a work.

20. Further, the Review is wrong to insist that "non consumptive" use should be placed outside of copyright. Such use can be seen as "machine reading" rather than human reading and to that extent it is, as Hargreaves notes, different to that which the original framing of copyright law was designed to support. However, this is not an argument for saying that copyright law should not be adapted in order that it can apply to it – copyright is routinely adapted to accommodate new technologies. Hargreaves makes no economic case whatsoever for saying that DTM technology should somehow be beyond the copyright pale.

21. A new exception could potentially lead to economic harm if it allowed a data or text-miner's commercial use to impact upon the commercial use of the publisher. Although the exception would be crafted to disallow commercial use, challenging such use would only be possible retrospectively – and would involve expensive and time-consuming legal action. The PRC research also shows that currently 47% of publisher respondents consider requests on a case-by-case basis. This evaluation of applications helps to protect publishers against content-miners developing research being used for commercial purposes. This important sifting process would not happen with an exception.

22. The competitiveness of the UK economy could potentially suffer from a DTM exception. The original PubMed Central database established in the US by the National Institutes of Health (of which UKPMC is a derivative "mirror" site) , does not routinely allow DTM activity on its service. So American publishers would not face the costs and potential losses of their British counterparts. Furthermore, a very large proportion of the scientific information used in the UK is not protected by UK copyright and so would not fall under any UK exception. This would inevitably lead to a lack of clarity as to the status of all work which would hamper the whole sector. More importantly, it would create a disincentive to publishers to publish in the UK, which would have a negative impact on economic activity.

The Way to a Better Solution

23. Publishers will work to communicate better the ease of the existing process and the high frequency with which permission is granted to relevant stakeholders. Publishers will also establish a Working Group to design a model licence for access to content for DTM purposes. DTM is an embryonic market – the development of which will be accelerated by a system of licensing that can take into account various specific requirements.

24. Work is already in hand at an international level to establish comprehensive technical standards, ontologies and rights language across the publishing industry, to enable the opportunities provided by digital technology to be fully realised. Publishers play a key role in implementing these standards and facilitating text and data mining by investing in tagging and other semantic and knowledge discovery technologies.
25. With regards to the specific issue of enabling DTM across the full content available in UKPMC, The PA would welcome the creation of a Task Group with the Wellcome Trust, the British Library and the JISC to discuss the issues and barriers around such use of the database.

Evidence

26. The importance of economic evidence is unarguable, but we would note that the Report does not fully acknowledge the economic case for the current copyright framework and has little to say about the huge levels of investment and profitability

already being derived from innovative digital products and services. Hargreaves criticises the use of "lobbynomics" rather than data from independently verified research consultants. As far as our sector is concerned, all of the data we provide to government is completely verifiable and, in many cases, generated by independent third parties. Furthermore, there is something of a deep irony to this critique from a Review which by almost common consent was inspired by the lobbying efforts of technology companies.

Copyright Licensing

27. The PA is broadly receptive to the proposal for a **Digital Copyright Exchange** and it accords with suggestions from ourselves and others that such automated licensing systems are feasible and potentially useful. The DCE must be a truly voluntary body, operated by the commercial sector, run on commercial lines and acting in response to clear commercial needs. There should be no restrictions imposed on companies or creative individuals who choose not to engage. Furthermore, there are a great many questions to be asked and issues to be worked through including:

    - Is the broad concept for the DCE to be a registry with limited trading functionality where desired by individual rightsholders, or a "rights eBay" where everything is up for trade?
    - How will the DCE integrate with existing and developing rights registries, such as ARROW?
    - How will "standard" licensing terms be negotiated – and how flexible could such terms hope to be? What about rightsholders who do not wish to apply standard terms?
    - What are the competition law implications for standardising licence terms?
    - How will the DCE increase consumer choice?

28. The PA warmly supports efforts to reform copyright law with regard to **orphan works**, an area which has long been of concern for users and publishers alike. We believe that the two-step process of diligent search and licensing is appropriate – and indeed superior to the proposal in the EU's Draft Directive which does not support licensing. We look forward to discussing further details with officials.

29. The PA requests clarity as to the full extent of the proposal to "support moves by the European Commission to establish a framework for **cross border copyright licensing** and extended collective licensing in specific areas. Nothing in the existing EU copyright acquis prevents multi-territorial licensing and indeed such licensing occurs where there is a demand for it. In this regard, and as a general principle, licensing terms should be dictated by the market not by governments.

30. With regards to the proposal to support **extended collective licensing**, again, further clarity is required as to what is being proposed here, but any proposal to expand extended collective licensing, so that mass licensing would be allowed even of rights where owners had not explicitly given permission, would run entirely counter to the normal operation of copyright and would place an intolerable regulatory burden on small rightsholders in particular.

Exceptions to Copyright

31. The PA broadly supports an exception to enable libraries to make copies for **preservation and archiving** purposes in ways not currently covered by exceptions. The definition of "non-commercial research" needs to be very carefully analysed to

ensure that there is no potential for such an exception to conflict with international copyright law. And clearly, the exception should not be capable of being misconstrued by libraries as giving them the ability to make such archives accessible to all.

32. We do not believe a **parody exception** is necessary given the incredibly high levels of successful parody works which exist in the British market. The introduction of an exception would create huge uncertainty in the marketplace and would doubtless be exploited as a loophole for those engaging in other forms of unlicensed copying.

33. The **format shifting** exception with regards to musical works would appear to be a reasonable reform. We would oppose any extension of this proposal to literary works.

34. With regards to the proposal for a further copyright exception at EU level designed to allow **new technologies** which "do not directly trade on the underlying creative and expressive purpose of the work", it is difficult to imagine a recommendation which would do more to eradicate the competitive advantage in creativity which the UK enjoys. The idea that any copying which is currently unenvisaged should be deemed lawful the moment it becomes technically possible is a clear inversion of the legally recognised operation of copyright. The Review does not provide any evidence for its assertion that the absence of such an exception is blocking innovation.

35. Hargreaves proposes that copyright exceptions be protected from **override by contract**. This recommendation would stifle the digital economy. Contracts with rightsholders not only provide for third parties to license works but allow them to do so in ways which would otherwise be infringing copyright. Most importantly, such contracts introduce greater specificity, clarity and certainty between rightsholder and licensee, providing a firm basis on which to come to commercial agreements. Copyright law is, of necessity, governed by broad and general concepts such as "fair dealing"; contracts are useful in amplifying and codifying such broad terms. It would a mistake for legislation to curtail the ability for mutually advantageous deals to be struck between rightsholders and third parties.

36. Contracts also have to work alongside copyright where international partners are entering into territories where they may be unfamiliar with law, or attempting to have one licence covering a range of uses in a number of territories. The contract can simplify this relationship by setting out the range of uses the licensee can adopt.

Enforcement of IP Rights

37. The PA is grateful to see the importance of the implementation of the DEA acknowledged and we hope that the Hargreaves Report will give extra impetus to those efforts in a cost effective manner.

Small Firm Access to IP Advice

38. The PA agrees with the assessment that small firms need IP advice to be a part of the overall business support. The PA will seek to be firmly engaged in the IPO's work in taking this recommendation forward and feeding in the perspectives from our independent publishing members.

An IP System Responsive to Change

39. Revision of the Copyright Act would create yet further uncertainty and disruption to the creative industries. We do not believe that the IPO should or could replace the judicial

system in providing the definitive voice in the interpretation of copyright law. Whilst clarification statements may be welcome and appropriate from time to time, in matters of copyright and contract rightsholders will always seek to take their ultimate guidance from the courts

Other Recommendations

40. The PA has no comment with regards to recommendations on a unified EU patent court, patent thickets, or the design industry.

41. The PA would welcome the opportunity to provide the Committee with further evidence, either in written or oral form.

9 September 2011

Supplementary written evidence submitted by The Publishers Association

I am very grateful to the Committee for the opportunity to provide oral evidence to its on-going inquiry into the Hargreaves Review on 1 November. At the end of the session the Chair, Adrian Bailey MP, suggested witnesses write to the Committee with any further points which were not covered during the conversation. The Committee already has a full response from The Publishers Association covering our views of the main areas, but there are two points I would like to highlight which we did not have time to cover last week.

The Hargreaves Review places a strong emphasis on the need for robust evidence. Indeed, it is critical of the policy debate hitherto for not being sufficiently evidence based. And yet, in making the recommendation for two new exceptions to copyright at a European level (with regards to content mining and new technology) the Hargreaves Review gives no supporting evidence whatsoever. In fact, in "Supporting Document EE" the Review admits that it has "not quantified" the impact of either proposed exception. It is remarkable that the government has given its endorsement to a policy recommendation which neither the review team nor any government official has subjected to any economic analysis. The onus must always surely be with those proposing the radical change to provide the justification for a move from the status quo, and not left to those who will be adversely affected unilaterally to provide proof of its hypothetical impact.

Secondly, in our discussion we did not have the opportunity to rehearse the range of solutions to the problems which content miners are encountering. From our discussions with the research community, it would appear that the greatest difficulties lie around the complexity of licensing and the fact that different technologies are required on different platforms. We acknowledge that these difficulties exist, and believe that the best way to solve problems of complexity is to strive for clarity and simplicity. Publishers are working to develop streamlined licensing and – as far as is possible within competition law – ensure that licensing terms are modelled and easily understandable. This simplification of licences within a managed access system is a far more proportionate policy response than their proposed eradication under Hargreaves.

Finally, in reading the transcript of the session I noticed something I did not pick up at the time. Ben White from the British Library says to the Committee at Q186: "We have an issue that, in terms of international competitiveness, very large countries with very strong tech industries have introduced an exception or already had one, in terms of the US." It may be that he has corrected this in his own review of the transcript, but it is our clear understanding that it is not fully correct to say that there is a data mining exception in the US. (As with the UK, this is not to say that data mining does not take place.)

Richard Mollet
Chief Executive

14 November 2011

Written evidence submitted by Qualcomm Inc

1.0 Executive Summary

1.1 Qualcomm Inc. is delighted to respond to the Business, Innovation and Skills Committee Inquiry, *Hargreaves Review of Intellectual Property*. As a technology company that invests over 20% of revenues year on year in R&D,[1] our submission focuses specifically with aspects of the final report related to patent rights and R&D incentives, and Government plans to implement those recommendations.[2]

1.2 Qualcomm actively supports the UK's 'Patent Box' in its aims to promote the growth and retention in the UK of high-tech companies and the valuable IP they create. We further support the long-standing European political initiative for the EU patent which should reduce applicant costs whilst maintaining quality examination.

1.3 We are also pleased to see that the Government establishing a network of IP attaches to support UK business interests, and that they will be tailoring their approach to IP policies and agreements according to individual countries' level of economic and social development. It is clear, however, that the UK's external and internal policies towards IPR need to be consistent in fostering innovation, access to risk capital for R&D projects and the protection of the fruits of these endeavours.

1.4 However, Qualcomm is concerned about assumptions in the Hargreaves Report that theories such as 'patent thickets' are credible. We are in particular concerned that policies could be elaborated to address vague theories referred to (e.g. 'patent thickets', 'hold-up', 'royalty stacking') or ill-defined 'problems' that are not supported by evidence.

1.5 In that regard, we particularly welcome the first recommendation that it is evidence that should drive policy. We look forward to the publication of the IPO research programme for the forthcoming year, alongside the publication of guidance on open and transparent criteria for sufficiency of evidence this autumn.

1.6 We firmly believe that presumptions about 'patent thickets' and 'obstructions to innovation' are unjustified, run counter to experience and indeed run counter to the current policies of incentivising dynamic innovation and efficiency, R&D investment and valuing IPR. We discuss our concerns in more detail below.

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[1] Qualcomm Inc is a Fortune 500 technology developer that pioneered core 3G and 4G technology. We invest over 20% of revenues year on year in R&D; over $16billion since our inception 26 years ago. In 2010 alone Qualcomm invested about $2.5billion in R&D. Qualcomm has championed the 'open innovation' model; not being a downstream manufacturer we licence the fruits of successful R&D to over 190 manufacturers worldwide - the widest licensing practice in the wireless industry. This has largely enabled the 3G revolution. In addition Qualcomm is also the leading supplier of the chips that power today's smartphones and other wireless devices. The 3G wireless networks powered by Qualcomm's technology enables many millions of UK citizens and over a billion subscribers worldwide to enjoy advanced, high speed and ubiquitous mobile broadband services. See Annex for further background.

[2] See the evidence Qualcomm submitted to the Hargreaves Review at http://www.ipo.gov.uk/ipreviewc4e-sub-qualcomm.pdf

2.0 Recommendation Six: Patent thickets and obstruction to innovation

2.1 Whilst the recommendation for the UK IPO to investigate on 'patent thickets' and 'obstructions to innovation' more fully is not at issue, we do not believe that the Government's current assumptions about patent thickets and obstructions to innovation are justified.

2.2 In the Government's response to the Hargreaves report, they state agreement with Hargreaves' assertion that *'patents in some business areas and concentrated 'thickets' of patents in some technologies are anti-competitive and hence anti-innovation.'*[3] As a result, the Government has instructed the UK IPO to *'investigate the scale and prevalence of issues with patent thickets, including whether they present a particular problem to SMEs seeking to enter technology sectors. IPO will then explore options for addressing any problems identified, which could include coordinated international changes to patent fee structures if the issues provide to be international in scope.'*[4]

2.3 As a preliminary point it is worth noting that the theories referred to in the Report (e.g. 'patent thickets', 'patent hold up' and 'royalty stacking') are undefined, vague and highly subjective. They tend to be used by companies which seek to persuade regulators to essentially intervene and grant easier or cheaper access to patented technologies. Indeed, Qualcomm believes that there is no empirical evidence for the existence of 'problems' highlighted in the Report, let alone regulatory intervention. As described below, it is critical that the Government understand that changing the patent system to favour one section of an industry over another would risks having significant unintended consequences where policies are based on subjectivity. As a result it is important to be clear about what practices may cause concerns and in what sectors.

2.4 We address each point in turn.

'Patent thickets'

2.5 The Government appears to subscribe to the view that 'patent thickets' exist and are anticompetitive. It is true that different IP-based industries use patents differently but in the technology sector, we have not seen any evidence that 'thickets' are used to obstruct the market or have prevented technology up-take. Certainly, there is no case-law showing anticompetitive activity or market distortion of the type alluded to. For this reason, we welcome the desire to see <u>evidence</u> driving policy in this area.

2.6 However, it is inevitable that increasingly complex technology standards involve an increasing number of patents. Yet the vast majority of patents relevant to technology areas that have been identified as subject to 'patent thickets' are licensed on a portfolio rather than individual basis. Thus, it is only necessary to identify the counterparties from whom portfolio licenses will be necessary, rather than to determine precisely which patents or claims may read on a particular product. In fact, the law of large numbers may actually *simplify* the informational problem: it might be

[3] Government Response to the Hargreaves Review of Intellectual Property and Growth, p.8.
[4] Ibid, p.8.

time consuming to evaluate whether a particular patent reads on a particular device and is valid, but almost no analysis at all is required to conclude that, if one is making 3G handsets, it will be necessary to obtain licenses from Motorola, Nokia, Ericsson, and Qualcomm. It is probably no coincidence that the record is also devoid of evidence of any greater problem of hold-up, barriers to entry, or impairment to investment and innovation in the market that is pointed to as having the thickest of the "patent thickets"—telecommunications.

2.7 The Government should therefore guard against policies that distort the market, especially where the calls for regulatory intervention are a naked attempt to increase the bargaining power of implementers over innovators (notably at a time when the UK is advocating the respect for IPR and tough IPR enforcement in its trade policy).

'Royalty stacking'

2.8 The explosion of the wireless ecosystem, its extraordinary innovation and growth is evidence of a well-functioning market. Overall in the wireless communications sector, IPR licensing costs are economically insignificant compared to the total cost of ownership to the end user.[5] Indeed, the profit margins of individual handset manufacturers and of individual network operators often exceed the entire licensing costs in 3G wireless technologies. Singling out IPRs as an obstacle to growth goes against overwhelming evidence and the UK Government's intention to foster innovation.

2.9 While licensing provisions vary between standards organisations, the prevalent approach in the wireless communications sub-sector is based on the FRAND (Fair, Reasonable and Non-Discriminatory) framework. Owners of IP-protected technology deemed essential to the standard agree to license their IP on FRAND terms, if their technology is selected for inclusion in the standard. In contrast to the concerns implied by the Hargreaves Report, we believe that the vibrancy of the market for 3G wireless communications demonstrates that the FRAND framework is fit for purpose and that the level of license fees are not an obstacle to growth, competition, low prices or continued innovation.

2.10 The FRAND framework encourages innovators to contribute high-performance technologies to standardisation, in the knowledge that the market will reward them for their endeavours. Where the best performing technologies are included in standards this often creates economic efficiencies in downstream products and services that typically greatly exceed any cost of licensing the technologies passed on to consumers through the price of the products and services.

2.11 The FRAND framework is also business model neutral and flexibly accommodates myriad business strategies for firms participating in standardisation, whether as licensors, licensees, or both. Indeed, the FRAND framework permits licensing essential IPR without financial compensation (i.e. royalty free) at the discretion of the IPR holder. In the case of vertically integrated companies, it is often the case that they license their IP to each other without payment of royalties because

[5] See for example http://ipfinance.blogspot.com/2011/06/patent-licensing-fees-modest-in-total.html

the primary concern of each company is obtaining the needed rights to make and sell their products.

Patent 'Hold-Up'

2.12 Further in his report, Prof. Hargreaves notes that *'the ability of the patent holder to obtain an injunction against infringing firms, while traditionally fundamental to the property right associated with patents, places the patent holder in a strong position in negotiations or disputes (so called patent 'hold up').'*[6] What the Hargreaves Report implies is that, in the context of technology standardisation, implementers need regulatory intervention (in this case suggesting changing the fundamental tenets of patent law) in order to have better commercial terms.

2.13 As before, Qualcomm believe that it is important to clearly identify a problem before suggesting a solution, especially one that goes to the core of the risky-taking culture of innovation. However, again there is no evidence of a patent 'hold up' crisis. From our own records, there is an absence of any evidence showing a systemic distortion or impairment of effective standardisation, competition or innovation-enhancing activities resulting from the incorporation of patented technologies in standards. Indeed, as indicated in Para 2.9 above, the extraordinary success of the markets' adoption of wireless communications shows that theories such as 'patent hold-up' are not credible and that IPRs have not impeded implementers from successfully commercializing these technologies. Proposing regulatory intervention therefore has the potential for serious distorting effects on a market that is bringing significant benefits to the UK economy and consumers alike.

Effect on SMEs

2.14 Qualcomm believes that the current standards system works well. There is ample evidence for this. The security granted by the IPR system allows innovating firms to contribute their technology to standards in the knowledge that they will receive rewards for their inventions. This in turn stimulates R&D expenditure in follow-on innovations. This system ensures that the high level of R&D funding required continues to be available. Affecting that cycle will impact the ability of technology companies to evolve new technology standards or enhance existing standards.

2.15 In our experience, smaller product companies in the wireless communications industry face no specific problems in obtaining patent licences from upstream technology licensors as a result of their size. Qualcomm's broad licensing program, with over 190 bilaterally negotiated license agreements, many of which are with small start-up companies is evidence of this. Indeed, many of Qualcomm's now successful licensees (e.g. Samsung, LG, HTC, RIM) were not, at the time, participants in the wireless industry which was dominated by a handful of industry incumbents. Licenses to Qualcomm's technology portfolio enabled those companies to develop their own products based upon Qualcomm's IP and also to differentiate their products by introduction of their own IP.[7] In fact, SMEs often make the most

[6] Hargreaves Independent Review of Intellectual Property and Growth, p.60.

[7] We do however see that smaller technology innovators may face difficulties in participating in global or international standardisation activities, due to the costs involved in attending regular working group

innovative use of a licensor's technology due to their flexibility, ability to innovate, and independence from existing commitments and biases.

2.16 Whilst the potential for smaller companies participating in complex technology standards-setting and obtaining significant numbers of patents can be costly, we do want to note that these costs are minor compared to the expenditure on R&D necessary to create such complex technology in the first place.

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meetings that will often be abroad. Also, the political or voting power of smaller companies in standards organisations is often correspondingly small as a result of the voting methodology employed by the SDO standard setting body and/or alliances amongst major incumbents.

Written evidence submitted by RadioCentre

Introduction

1. RadioCentre is the industry body for commercial radio. Formed in July 2006 from the merger of the Radio Advertising Bureau (RAB) and the Commercial Radio Companies Association (CRCA), its members consist of the overwhelming majority of UK commercial radio stations, who fund the organisation. RadioCentre welcomes this opportunity to submit further evidence on the proposed changes to the intellectual property framework set out by the Government in response to the recommendations made in the Hargreaves review.

2. The commercial radio industry depends heavily on an effective copyright framework, as this underpins the licensing of music that is essential to radio broadcasts. However, commercial radio's relationship with the music industry is not the standard rights-owner/ rights-user relationship. In addition to paying royalties, RadioCentre's members add value to music by broadcasting, discussing and promoting it. This engenders a symbiotic partnership between commercial radio and the music industry, with shared interests in developing and promoting music and artists.

Executive Summary

3. RadioCentre welcomes Government's commitment to implementing a range of changes to the existing copyright regime to enable it to be fit for the digital age and support economic growth.

4. The concept of a Digital Copyright Exchange appears to have the potential to have a genuinely positive impact for the benefit of consumers, copyright-users and producers in the creative industries. As such it should be subject to further investigation and planned with input from a wide range of industry stakeholders.

5. We welcome Government's commitment to creating new copyright exceptions as the appropriate legal response to the practice of private format shifting. We are calling on the Secretary of State for Business, Innovation and Skills to apply similar principles to private copying that takes place within the commercial radio industry.

6. RadioCentre supports the development of regulatory standards for collecting societies, rather than relying solely on codes of practice devised by the societies themselves. In order to ensure that such standards are robust and address the concerns of copyright-users, we would support a wider level of consultation and engagement across the industry.

7. The current copyright framework is not always conducive to the development of legal and viable IP-dependent business models. Therefore we welcome Government's support for cross-border licensing framework that will meet the needs of rightsholders and users. While we understand that these matters need to be addressed at a European level, the nature of the creative and digital industry means that it is a fast moving business environment. Therefore any changes must take place in a reasonable timeframe.

8. We continue to oppose 'double-charging' which the Copyright, Designs and Patents Act 1988 allows rightsholders to pursue in collecting royalties for workplace radio listening.

Commercial radio in the UK

9. Radio is a much-loved part of daily life in Britain, listened to by over 90% of the adult population for an average of 20 hours a week. The reach of commercial radio is vast with over 34 million people listening to commercial radio in the UK each week[1]. Radio's coverage is universal and mobile; radio listening is free; sets are inexpensive, and consumption requires no literacy skills. These fundamental traits mean radio can remain strong, delivering information and entertainment in a convenient and complementary way, as part of our rich media ecology.

10. Commercial radio is a crucial part of the creative economy in the UK, with over 300 licensed stations broadcasting a diverse range of output alongside national and local BBC services and community radio. Its wealth of choice and diversity of output means that commercial radio appeals to those sections of society that other media find hard to reach. A recent study by Ofcom found that 66% of respondents considered radio to be a trusted source of news, compared with 58% trust for online, 54% for TV and 34% for newspapers[2]. As well as these tangible benefits, research has also indicated that radio can play a positive role in people's lives, making them feel happier and more energetic[3].

11. Commercial radio plays a significant economic and cultural role in the UK which impacts across a number of areas:

    Creating public value - It performs a valuable function by providing local content and contributing to the plurality that is fundamental to our democracy. This is demonstrated by the fact that stations broadcast an average of around 8½ hours of public service content each week[4].

    Supporting local economies – It also plays an important economic role as a local employer, with around 8,000 people working in the industry and hundreds more involved in a voluntary capacity. Radio is a key part of the local media landscape as an affordable source of advertising for local businesses.

    Providing a platform for new talent – It performs a crucial role in discovering and nurturing new talent in both broadcasting and journalism. As well as being a valuable and widely distributed employer in the creative industries, commercial stations provide a fantastic environment in which broadcasting talent can be trained and developed.

    Building and promoting music – It is a key driver of economic growth of other creative industries, particularly the music industry. It is estimated that the UK music industry is worth around £3.8bn[5] and despite the availability of new services to purchase and access content, radio remains the most powerful promotional tool for music. It is essential to each stage of a musician's career, from

[1] RAJAR Data Q2 2011
[2] Ofcom, UK Adults Media Literacy Study, May 2011
[3] RAB, Radio: The Emotional Multiplier, 2011
[4] RadioCentre, Action Stations: The output and impact of Commercial Radio, March 2011
[5] PRS for Music, 'Adding up the Music Industry 2010', August 2011

building an initial following, to establishing mass market interest, promoting successful artists and playing back catalogue.

12. There is a symbiotic relationship between the music and radio. Despite being a relatively small industry, commercial radio injects a significant amount of its revenue into the music industry which is highly aware of radio's influence on consumer behaviour. This impact was demonstrated in a recent RadioCentre survey[6], which found:

    - 64% of people say that radio is the most important source for to find out about new music (twice as important as any other source).
    - 36% of consumers report radio as the most important influence on their recorded music purchases (compared to 16% for TV and 12% for internet).
    - On average radio listeners spend 36% more on music than non-radio listeners.

13. In addressing the impact of technological change on their respective businesses, the ongoing partnership between commercial radio and the music industry is likely to be crucial. The key challenge which commercial radio and the music industry face together is devising a licensing framework, which is economically sustainable for both parties and allows commercial radio to build upon its longstanding role as the key shop window for music.

Copyright licensing: evidence for change

14. On behalf of our members RadioCentre submitted evidence to the Hargreaves Review in March 2011. In this, we provided examples of how the current legislative framework inadequately reflects the business practices and technology changes in the radio and music industries. We proposed a number of changes to the copyright framework to foster business growth and innovation.

15. This document only expands on the previous Hargreaves submission where relevant, in order to provide supplementary detail to the Committee and respond to relevant matters outlined in the Government's response. However, should the Committee wish to examine recommendations made by RadioCentre full details can be found in our submission[7].

The creation of a Digital Copyright Exchange

16. If implemented and planned with input from a wide range of industry stakeholders, the Digital Copyright Exchange (DCE) appears to have the potential to have a genuinely positive impact for the benefit of consumers, copyright-users and producers in the creative industries. Although only a theoretical concept at this stage, it seems possible that a DCE could potentially serve as a one-stop-shop, enabling consumers to choose a variety of different rights from different copyright holders. This could be ideally placed to serve the small and medium sized users of copyright content and remove administrative barriers to accessing creative content.

17. However, there are several areas that need to be addressed. On a practical level a significant amount of interaction is required from current UK licensing bodies and industry stakeholders.

[6] RadioCentre/ Communications Chambers consumer research, May 2011
[7] http://www.ipo.gov.uk/ipreview-c4e-sub-radiocentre.pdf

RadioCentre is concerned that Government has not indicated what the relationship with current licensing bodies and if the DCE impacts on how collective licences are administered in the future.

18. The Government has not made any comment on the funding arrangements, although Hargreaves expressed a preference for it to be independent, with the Government 'bringing together all relevant interests'[8] and funding the costs of setting up the Exchange. RadioCentre welcomes further clarification and believes that a new and independent body would be best placed to undertake the operational management of the Exchange.

19. To encourage the maximum usage and buy-in from all stakeholders, the DCE model must also ensure that a full breadth and selection of copyrighted content is available. However, it is not clear whether Government has addressed these operational issues or the incentives for copyright holders to submit content the database and how this could be encouraged without contravening the Berne Convention on copyright. We would welcome clarification on how this will work in practice for both consumers, users of content and rightsholders.

Format Shifting: Implications for the commercial radio sector and licensing bodies

20. We agree with the Hargreaves report that *'Government should firmly resist over-regulation of activities which do not prejudice the central objective of copyright, namely the provision of incentives to creators. Government should deliver copyright exceptions at national level to realise all the opportunities within the EU framework, including format shifting, parody, non-commercial research, and library archiving'*[9]. In addition, we were pleased that Government appeared to accept this recommendation in stating that *'Copying should be lawful where it is for private purposes, or does not damage the underlying aims of copyright'*[10].

21. We welcome Government's commitment to creating new copyright exceptions as the appropriate legal response to this practice of private format shifting. The common practice of consumers transferring music from CD's to digital storage is an accepted and promoted practice, based on market developments and innovations, which have changed the way we purchase, listen and store audio content. We believe that similar principles apply to private copying which takes place within the commercial radio industry, and that this exception should be extended specifically to enable the storage and retention of sound recordings by commercial radio stations for broadcast use.

22. Commercial radio stations obtain the music used in their broadcasts directly from record labels, who benefit from the cost savings and convenience created by new technology by generally sending digital, rather than physical, copies of tracks to radio stations. These copies are provided on a free basis by record labels in recognition of the promotional benefit of radio airplay for both new and established songs and artists. The labels themselves invest significant sums in encouraging commercial radio stations to play their tracks through 'plugging' and other activities. This represents no loss of revenue to the rights holders, indeed most record companies now deliver music digitally so it can be incorporated directly into playout systems. These copies are provided on a free basis by record labels in recognition of the promotional benefit of radio airplay for both new and established songs and artists.

[8] Hargreaves Review, 4.30
[9] Hargreaves Review, p.51
[10] Government's Response to Hargreaves, p.7

23. Despite this the collecting society PPL (on behalf of record labels) has sought to claim a payment from commercial radio stations for retaining electronic copies of these tracks in databases ready for seamless playout in their broadcasts. In addition, MCPS (Mechanical Copyright Protection Society), part of PRS for Music, collects an annual fee on behalf of music publishers for transferring a piece of music from one format to another for broadcast.

24. We believe that this represents an attempt by rightsholders to overlook technological and practical realities in order to extract unjustifiable new revenues from users. The key right involved in commercial radio's use of music is the right to broadcast, as reflected in the payments which commercial radio stations make to secure this right. Digital databases are crucial to transmission in this digital age, but storage has no independent economic significance for commercial radio stations because the storage itself generates no additional revenue.

25. We have written to the Rt Hon Dr Vincent Cable MP, Secretary of State for Business, Industry and Skills to propose that Government extends the ephemeral right to enable digital storage for broadcast usage of sound recordings acquired via download or CD copying and storage. Digital storage of music by radio stations is an ephemeral right, but is not formally defined as such by Section 68 the Copyright Act if content is retained for more than 28 days.

26. RadioCentre believes that this change would be consistent with the proposed exception for format shifting. It would also address the outstanding ambiguity and enable digital storage of this nature to be excepted from copyright due to the fact that the copy is temporary in nature; has no intrinsic economic value (other than improving efficiency of distribution and play out that also benefits the rights holders); and is now a standard part of preparing content for broadcast use.

Collecting Societies standards and regulation

27. At present copyright users have limited recourse to challenge the charging structure and enforcement behaviour of the societies collecting income on behalf of rights holders. The Copyright Tribunal exists as the only real legal process able to regulate the behaviour of licensing bodies, which are effectively monopoly providers of access to copyright work. Yet for the majority of small and medium sized business, the cost reverting to the Copyright Tribunal is ultimately prohibitive.

28. Therefore RadioCentre welcomes Government's commitment to *'draw up proposals for a backstop power that allows a statutory code to be put in place for a collecting society that evidence shows has failed to introduce or adhere to a voluntary code incorporating the minimum standards'*[11].

29. The development of these regulatory standards for collecting societies, rather than relying solely on codes of practice devised by the societies themselves, is a positive development. However, RadioCentre believes the best way forward in developing these standards will be to conduct a wider level of engagement and consultation across the industry than is currently being proposed, with both rights holders and copyright users being involved in the creation of regulatory standards rather than consulting with collection societies alone.

[11] Government's Response to Hargreaves, p. 15

30. Any initiative that aims to increase industry transparency, standards of governance and investigate accusations of unfair practice could only benefit from this broader range of perspectives, including that of copyright-users.

Cross border licensing

31. We were pleased that Government stated that it '*welcomes the European Commission's initiative in proposing a cross-border licensing framework and will work with UK interests and the Commission to develop proposals that are compatible with current effective licensing models in the diverse industries affected*'[12].

32. While we understand that these matters need to be addressed at a European level, the nature of the creative and digital industry means that it is a fast moving business environment. Therefore any changes must take place in a reasonable timeframe.

33. UK commercial radio is currently focused on national markets. However, the costs and time involved in securing cross-border rights reduce what incentive there might be in the future for international internet simulcasting of radio programming. Cross-border licensing could also introduce competition between collecting societies in areas such as overheads, efficiency and service delivery. Competition among collecting societies is one of the most effective levers to improve operational efficiency through market forces, and would be to the benefit of all parties – owners, users and to the consumers that access the music. To function effectively, this revised competitive framework would need to provide users and rightsholders with a choice of genuine 'one-stop-shops' which can guarantee all respective rights, regardless of label or affiliation.

Workplace listening

34. We remain opposed to the 'double-charging' which currently allows rights holders to charge fees for radio listening in private workplaces. The music licensing bodies PPL and PRS for Music already impose charge significant amounts to both BBC and commercial radio stations for the rights to broadcast musical works.

35. However, an additional charge is also made directly to businesses, so their staff can listen to the radio (or other music) at work. These fees are charged whether or not these workplaces are open to the public or the business in question derives a commercial benefit from having the radio on. The evidence suggests that the effect of these charges has meant that a disproportionate number of businesses are turning off their radios. This is particularly damaging to commercial radio as workplaces make an important contribution to overall commercial radio listening (around 15% of total listening hours).

36. Audience figures suggest that radio listening in the workplace has fallen by more 8% over a 4 year period. This is against an overall increase radio listening which has demonstrated 3.4% increase[13]. RadioCentre believes the inefficiencies inherent in 'double charging' should be addressed by introducing an explicit legal exemption from a public performance fees for radio listening in the workplace.

[12] Government's Response to Hargreaves, p.6
[13] RAJAR Data, 2007-2011

Conclusion

37. RadioCentre welcomes this inquiry and the helpful scrutiny that the Committee will be able to bring to this matter. We hope that it will be able to provide a set of balanced recommendations that keep in mind the helpful proposals outlined by the Hargreaves review, which have the potential to secure a more appropriate balance between rights-holder and copyright users. We would be happy to provide further evidence or clarification to the inquiry if that was required.

9 September 2011

Written evidence submitted by Reed Elsevier plc

1. Introduction

1.1 Reed Elsevier is a world leading provider of professional information solutions in the Science, Medical, Legal, Risk and Business sectors. Our products include academic journals, books and databases, legal texts and analyses, business to business magazines and websites, information products for the banking and insurance sectors and trade exhibitions. Our professional customers use our products every day to advance science, improve medical outcomes, enable better decisions, enhance productivity, evaluate risk and gain insight. Our key brands include SciVerse ScienceDirect[1], SciVerseScopus[2], the Lancet, Cell, Brain Navigator[3], Geofacets[4], New Scientist, XpertHR[5], Lexis®PSL[6] and Lexis.com[7].

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[1] **SciVerse ScienceDirect** - http://www.sciencedirect.com - is a full text scientific electronic database offering digital content from more than 2,500 peer reviewed journals and 14,000 books. There are currently more than 10 million articles available electronically, some dating back to the 1820's, accessed by over 10 million readers across 120 countries.

[2] **SciVerse Scopus -** http://www.info.sciverse.com/scopus - is the world's largest abstract and citation database of peer-reviewed literature and quality web sources. It holds 42.5 million records, 22 million with references back to 1996 and 20 million back to 1823. It also references 24 million patents from 5 patent offices.

[3] **Brain Navigator** - http://www.brainnav.com - has revolutionised the way neuroscientists work, becoming a central hub for research. It is an online solution, based on Elsevier's vast library of brain publications that enables neuroscientists to browse and compare atlas plates, species and diagrams using 3D models which facilitate the visualization of brain structures and improve their understanding. In 2009 it won a PROSE award for best e-product in Biological and Life Sciences.

[4] **Geofacets** - http://www.info.geofacets.com - is an innovative search and discovery platform that combines a wealth of geo-referenced maps and related data, intuitive search functions and proven Elsevier content into one easy-to-use web-based tool to provide geologists with the information they need to make accurate geological assessments, and to help oil, gas and other energy companies to improve their productivity, for example, by increasing their strike rates when drilling for oil.

[5] **Xpert HR -** http://www.xperthr.co.uk - is the UK's most comprehensive online source of legal compliance, good practice and benchmarking information made available to HR professionals.

[6]. **Lexis®PSL** – http://www.lexispsl.co.uk - Content is compiled by an expert team of hundreds of solicitors and barristers who themselves have worked in every size and type of practice, who select, organise and link primary law, legal knowhow, precedents, forms and authoritative commentary for practising lawyers.

1.2 A FTSE 100 company, we employ more than 30,000 people of whom 4,600 are in the UK, delivering £6.1 bn revenue in 2010, of which £5.6m was from sales outside the UK; we are a significant exporter. We are also a major investor in technology; 86% of our science and technology revenues and 74% of our legal and professional information revenues are derived from electronic products and services. Alongside our editors, journalists and researchers, we currently employ some 4500 IT professionals.

2. Summary of Submission

2.1 The Hargreaves Review of Intellectual Property was a welcome initiative highlighting the importance of IP to the UK economy. Our response to the Call to Evidence concentrated on copyright issues. We believe that strong copyright protection and enforcement are essential to investment and growth; we disagree with the assertion that IP needs to be weakened to support innovation. Over the last decade Reed Elsevier has invested some £2.02bn to combine technology and authoritative content to deliver enhanced functionality to the user. Some of these products are digital evolutions of existing print products, some are startups. Without IP protection these investments could not have been made and the ensuing benefits for our academic and professional customers not realized. We were therefore disappointed with the outcome of the Hargreaves Review and the Government Response which, despite claiming to understand the importance of copyright, then proceeded to propose unilaterally weakening it.

2.2 In this submission we focus in particular on the proposal for new UK and EU exceptions to copyright for text and data mining[8] which we view as unnecessary, premature and potentially damaging to the future competitiveness of the information industry.

2.3 Text mining is at its simplest, machine-based bulk reading in order to process large volumes to identify and extract relevant information and relationships.

2.4 The Hargreaves Review paints a picture of publishers and other right holders blocking vital life saving research though manipulation of out of date copyright

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[7] **Lexis.com -** http://www.lexisnexis.com **-** LexisNexis® is a leading provider of information and business solutions to professionals in a variety of industries - legal, risk solutions, corporate, government, law enforcement, accounting and academic.

[8] Page 8 of the Government Response

laws. The Review omits to mention that many publishers including Reed Elsevier fully understand the value of data mining as an aid to speeding up and enhancing research and are actively supporting its development.

2.5 The issue is whether creating an exception for text mining will deliver the results that both the Hargreaves Review and the UK Government desire, and if so at what cost, or whether it will in fact have the opposite effect of stifling investment, damaging academic publishing, drive authors and publishers away from the UK and put the UK out of step with international property treaties and EU law.

2.6 Hargreaves and the Government both state that too many decisions in the past have been supported by poor evidence[9], and call for decisions to be made in future on the basis of good evidence, balancing economic objectives and the needs of various groups.[10] It is noteworthy, therefore, that while supporting document T[11] of the Review cites several examples of the benefits of text mining to organizations interrogating their own internal or third party data, when it comes to evaluating why a blunt exception to publishers copyright is the correct course, as opposed to normal licensing mechanisms, supporting document EE[12] of the Review contains no economic impact analysis of the recommendation.

2.7 Whilst we agree that technological solutions provide significant benefits to organizations, we do not consider that the conclusion to be made from such examples is that data mining as a whole should be made exempt from copyright laws. The text mining in the six case studies cited[13] as evidence of the benefits of text mining has, by definition, taken place without a copyright exemption being in place.

[9] Hargreaves Review Chapter 2

[10] Government Response Paragraph 3

[11] Supporting doc T Hargreaves Review

[12] Supporting doc EE Hargreaves Review. 3rd and 29th pages (not numbered)

[13] Supporting doc T Hargreaves Review – Marc Weeber et al, Thomas C Wiegers et al, Leach S.M. et al, Varun K Gajendran et al, Fan W Wallace et al (Dow Jones Chemicals), Ananiadou S, et al.

3. Text Mining Exception

Background

3.1 Reed Elsevier believes that text and data computer analytics are likely to become an increasingly important activity for many players in any area where large digital content sets have become available. Indeed, the Marc Weeber example[14] discussed how he used automated text mining to carry out a preliminary machine-enabled read of some 40,000 search results, which enabled him to reduce his final reading list to 20 or 30 papers.

3.2 It should be noted that it is only after the original investments to produce high quality enriched content and text delivery technologies have been made in the first place, that further value can be extracted by data mining techniques. Reed Elsevier aims to manage its content in modern digital formats in ways that facilitate the easy access, use and re-use of that content. Our policy is to enable text mining as far as possible. We are working hard to develop options to make this technically possible. We have already facilitated this service across many sectors, including corporate pharmaceutical and academic chemistry customers, index service providers and mining technology application developers.

3.3 We have also mined our own content to develop important new productivity tools that serve science research leaders in universities, funding bodies, and governments. For example, SciVal Spotlight[15] is a highly innovative product that mines Scopus[16], the world's largest database of research articles and citations. SciVal Spotlight's proprietary algorithm uses a supercomputer to process terabytes of data to generate unique maps that identify areas of research in which universities or nations are especially prolific or influential. As such, they provide much needed quantitative and objective evidence to help UK universities and funding bodies identify their unique strengths as measured by global

[14] See Footnote 14

[15] An Elsevier Product - **SciVal spotlight** - is a customised web-based mapping tool that enables institutions or countries to evaluate their research performance and set/ adjust strategies. It is designed to provide up to date to support decisions about fund allocation, staffing, and which new research areas to pursue

[16] An Elsevier Product - **SciVerse Scopus -** is the world's largest abstract and citation database of peer-reviewed literature and quality web sources. It holds 42.5 million records, 22 million with references back to 1996 and 20 million back to 1823. It also references 24 million patents from 5 patent offices.

standards, and then to focus research investments on those areas of strength. In April 2011 the UK Department of Business, Innovations and Skills commissioned Elsevier to assess the performance of the UK's research base relative to other countries. Its findings, which will be released by BIS in late September, will be used to inform the UK's research and innovation policy and strategy for years to come.

Current model

3.4 Elsevier currently has two main categories of customer who engage in data mining. *[see attached confidential client list]*.[17] The first group is primarily large research institutions or corporations seeking to roll out internal text mining solutions, such as Harvard University and major pharmaceutical companies. The motivation of this category is to secure competitive research advantage by increasing data processing efficiencies internally and unlocking new insights. The second category, smaller scale application developers, are either working in partnership with us to develop additional functionalities for our own content databases, or are creating separate identified commercial application offerings. Academics in the field of Bioinformatics also look to text mine our content to develop new tools for pure research purposes or on occasion as part of an academic qualification process.

3.5 Providing content that can be mined requires special infrastructure and dedicated support. Though it is possible theoretically to consider text mining as something done with respect to a single article, it typically occurs against a whole collection because it is more useful the bigger the collection. We have discovered that the text mining capacities and needs of our customers can vary considerably, so we have developed two delivery mechanisms to offer our customers.

3.6 The first option ConSyn[18], is designed for users using very large quantities of full text from our ScienceDirect database of electronic journal and book content, and we are shortly to launch the second, FTAPI, (full text API)[19] recommended for users accessing content in small to medium quantities (up to 10,000 articles). ConSyn allows the download of large quantities of full text in machine readable XML format. Once an entitlement is set up, customers are free to select and

[17] Confidential Customer Information – Supplied to the Committee under separate cover.

[18] An Elsevier text mining tool

[19] An Elsevier text mining tool

download content according to their preferences. Customer profiles can be based on categories, lists of journals, publication year or ranges, and content "richness" e.g. full content, abstract only, or abstract and references. FTAPI enables users to search using ScienceDirect's search syntax and then download one by one.

3.7 Customers are authorized to download the agreed required quantity of content from our server and text mine locally for their own research. Our terms provide that locally loaded content may be stored only for the period of use and not indefinitely, with limitations as to whom it should be made available within the needs of the research being undertaken. There may also be arrangements as to quantity displayed. For example, to prove a trend from large amount of content, the system often has to display snippets or larger sections of the underlying articles. Parties will agree what is necessary for the project in question.
These contractual limitations exist for two important reasons:

4. Platform stability

4.1 First, from a technology perspective, in order to text mine our content it needs to be copied wholesale and then transferred to the customer's location or crawled on our server. Current technology does not permit multiple party crawling of our host server at speeds that are necessary for efficient mining. Where contractual arrangements do exist for crawling our content on our host server such as with Google indexing, this is done in a managed way that does not jeopardize service delivery to other users.

4.2 Text mining is a continuous experimental activity that typically requires multiple runs to achieve a desired result. We are working hard to respond to increasing customer demand for text mining with tools such as ConSyn and FTAPI mentioned above. These are accessed on a managed scale as part of our overall customer offering to ensure the underlying platforms can cope and to ensure we avoid system failure. The scale of our publishing output is such that, at any one time Elsevier's core scientific publishing platform ScienceDirect, enables more than 9.5 million articles/book chapters from 2500 journals and 11000 books to be accessed by over 10 million users across 120 countries. ScienceDirect's operational service level runs at 99.6% availability, with around 1 million transactions per hour at peak times. To maintain this level of service is a major infrastructure challenge. Text mining is a complementary service we offer to our customers but it is important that it does not technically compromise our core publishing operation or other online services. Broad uncontrolled crawling would

be indistinguishable from a denial of service attack and cause a shutdown of the system.

5. Data Security

Second, once the content has moved wholesale to the external location out of our control, there needs to be contractual and technical protections in place to prevent onward data misappropriation. As well as protecting the platforms from which we deliver our content, it is self evident that we need to protect the content itself from misappropriation. Contractual licenses enable content owners to validate the identity and research bona fide of potential text miners and limit the risk of misappropriation. Our terms stipulate that customers authorized to mine may not perform systematic substantive extracting or harvest in a way that would compete with the value of the original journal articles. Without such practical contractual legal protection the publisher's core asset would be at serious risk of unauthorized redistribution.

6. Impact of Data Mining exception as proposed by Hargreaves

UK would become an unattractive location for copyright

6.1 Licenses are necessary to address legitimate technical and data security concerns about protecting our core publishing operation. A text mining exception which required us to give unlimited unfettered access and right of reproduction to anyone that claimed a text mining purpose would be unmanageable and unpoliceable.

6.2 Furthermore as well as the practical, commercial and technical objections, the proposed UK interim exception would put the UK out of step with international intellectual property treaties and EU law. The UK will be alone in the European Union in allowing data mining without permission. Since other Member States will be able to rely on more robust protections against unauthorized reproduction for right holders under their implementation of EU copyright law, this will result in the UK becoming an unattractive location for copyright. It could discourage right holders from undertaking publishing operations in the UK and instead provide opportunities to competitor nations who enjoy more robust copyright protections.

Risk of adverse consequences for UK based readers

6.3 Rightholders who do not want to risk their protected works becoming the target of unrestricted data mining without protection may seek to ensure such works are not accessible in the UK. As English law will apply regardless of the origin of the work, it is foreseeable that the owners of foreign copyrights could set up firewalls preventing access by users located in the UK. Whilst the UK is an important producer of high quality academic content, producing 6% of scientific articles published and accounting for 14% of the world's most highly cited articles, UK e-sales only represent approximately 3-5% of total STM global e-revenue. Some content owners may choose to forgo the UK market to avoid the downside risks outlined above, thereby depriving UK users of access to valuable content.

6.4 In addition, if the proposed contractual override bar were to be implemented on top of the exception, there would not even be any safe harbour by which UK customers could agree to disapply the exception. This could have the unintended effect of limiting access even to those UK based customer users who had no interest in availing themselves of the data mining exception, because they could not by agreement contract out of the exception. This is a major restriction on the freedom of independent parties to contract as they wish.

Uncertain that UK developers would benefit the most

6.5 It will be argued that the exception could create opportunities for UK SME application developers and other technology players. Our experience to date after opening up our ScienceDirect platform to application developers worldwide, is that out of 20 developers taking up the opportunity, 11 were from the US and others from China, India, Germany and Australia. None came from the UK. It is not a given that it will be UK operators who will mostly benefit from any such growth opportunity. It could just as easily be developers from China, India or the US.

Unfair burden likely to breach international treaties

6.6 Due to current EU law, which the Government seeks to amend,[20] the UK interim exception would apply only to text mining for non commercial use. We do not believe this to be sustainable in practice. Due to the mass reproduction required in order to undertake data mining it will be virtually impossible to distinguish

[20] Paragraph 7, page 8 Government Response

between commercial and non commercial purposes. We would contend that due to the added value attributed to content derived from data mining; this will invariably nearly always be commercial in nature at some point. Science is full of cases of pure research which ended up having a commercial impact - indeed the Government's declared policy is to increase the quantum of publicly funded research which does eventually result in commercial benefit to UK plc. An additional factor will be the number of instances of mixed funding for research projects, where some of the interest is commercial and some purely academic.

6.7 It is unreasonable to expect publishers worldwide to be able to police after the fact who has text mined in the UK for what purpose, with the only redress available being a case of copyright infringement though the courts post hoc. By seeking to broaden EU and UK law to give copyright exception to commercial users, the UK Government appears to favour removing the right for UK publishers to consent to global technology companies being able to profit from the use of copyright work, without provision for fair compensation. To quote: "the amount of fair compensation provided would be zero"[21]

6.8 It is not clear that the proposed exception would satisfy the International Berne Convention test whereby exceptions must not conflict with the normal exploitation of the work nor unreasonably prejudice the rights of the author. If it is true that data mining is the new reading and the likely future mainstream method of consumption of information, then it is set to become 21st century "normal" exploitation and any exception would be contrary to the treaty.

Proposal is premature – No market failure

6.9 This highlights the fundamental problem with the exception proposal. Text mining is still in its infancy. No one yet knows how it will develop. But this is not a case of market failure – indeed as we have demonstrated above, quite the opposite. We are investing heavily to provide facilities for customers who want to text mine. But even the most technologically advanced publishers like Reed Elsevier are still feeling their way. Data mining poses considerable risks to data and platform security which need to be managed. For real progress, issues such as standardization of formats will also need to be addressed. The obstacles to further advances are not legal barriers that a blunt exception would solve. Indeed we have outlined some of the damaging unintended consequences that could result from such a step.

[21] Government Response page 8, first bullet point

7. Conclusion

- Text mining is an exciting new development in improving discoverability of research. We share the Government's objective in encouraging greater use of analytics to deliver innovative products and increase knowledge, and Reed Elsevier is actively investing in tools to enable this facility.

- However we believe that there is a misconception as to the technical, practical and legal impact of the proposed text mining exception to copyright which has led to incorrect conclusions as to the best way to achieve the objective.

- The proposals are premature, and in our view would be counterproductive, detract from the objective and dissuade existing investment. Far from delivering growth, they risk prejudicing the domestic professional publishing industry, currently a market leader in its sector, against foreign competitors. They should be reconsidered.

Written evidence submitted by David Reid

I am a creative, artist and photographer.

I have been in the publishing industry for more than 20 years and had been unemployed since 2009 over copyright rights issue with my previous business partner and am now suing over a legal battle over rights just so this person will pay me the money I am owed for working with him.

So far this cost me my livelihood, business and home and is still ongoing and this is all being personally funded.

To make ends meet I have lucky enough to get a job with a digital company in London and am barely making ends meet.

The move from hard copy to digital has meant to me the proliferation of global companies and individuals to steal an original creatives work for creative commercial benefit with no compensation to the original owner.

I have seen this first hand and as a artist with a website have seen my own work stolen more than once by individuals and larger corporations, My only recourse, to write a strongly wording email to the offending company/individual.

I am very concerned that with the rights issue under question at present that anyone would be able to steal my work and recreate it, packaging with their own name and sell it without any reward or recognition to myself.

As a struggling artist, my rights appear to be trampled on by anyone who feels they could do a better job at selling my work than me.

This is not fair.

British Industry has been built around art creative innovation and industry only to have it stolen by other people.

As Eric Schmidt pointed out recently, after attacking the educational system, he said Britain should look to the "glory days" of the Victorian era for reminders of how the two disciplines can work together.

"It was a time when the same people wrote poetry and built bridges," he said. "Lewis Carroll didn't just write one of the classic fairytales of all time. He was also a mathematics tutor at Oxford. James Clerk Maxwell was described by Einstein as among the best physicists since Newton – but was also a published poet."

Schmidt also added, "Britain invented computers in both concept and practice" before highlighting that the world's first office computer "was built in 1951 by the Lyons chain of teashops".

Also he said, "The UK is the home of so many media-related inventions. You invented photography. You invented TV," he said. "Yet today, none of the world's leading exponents in these fields are from the UK." He added: "Thank you for your innovation, thank you for your brilliant ideas. You're not taking advantage of them on a global scale."

Our rights should just be handed away to global companies or individuals just because we are not able to market them correctly or more efficiently than the other company up the road.

Our rights should be protected for this very reason. Globalisation and the digital age is ruining the small industry, something that this country built and appears to be throwing it away.

I object to my rights being eaten up by the Googles, Tesco, Facebooks etc of this world and would like tighter controls over copyright and better sanctions to protect us artists in future.

7 September 2011

Written evidence submitted by the Research Councils UK (RCUK)

CONTEXT

1. Research Councils UK (RCUK) is a strategic partnership set up to champion the research supported by the seven UK Research Councils. RCUK was established in 2002 to enable the Councils to work together more effectively to enhance the overall impact and effectiveness of their research, training and innovation activities, contributing to the delivery of the Government's objectives for science and innovation. Further details are available at www.rcuk.ac.uk.

2. This evidence is submitted by RCUK on behalf of all Research Councils and represents their independent views. It does not include or necessarily reflect the views of the Knowledge and Innovation Group in the Department for Business, Innovation and Skills. The submission is made on behalf of the following Councils:

   Arts and Humanities Research Council (AHRC)
   Biotechnology and Biological Sciences Research Council (BBSRC)
   Engineering and Physical Sciences Research Council (EPSRC)
   Economic and Social Research Council (ESRC)
   Medical Research Council (MRC)
   Natural Environment Research Council (NERC)
   Science and Technology Facilities Council (STFC)

3. This response addresses the issues raised by the Review only where relevant to the remit and activities of the Research Councils.

4. The Research Councils are supportive of the Review's recommendations and the focus on new knowledge areas and digital copyright and copyright in datasets/orphan works (http://www.rcuk.ac.uk/media/news/2011news/Pages/110518.aspx) together with the Government's broad acceptance of its recommendations and proposals to act on them.

5. RCUK considers that the implementation of the review's recommendations will help to remove potential barriers to creativity and innovation and, by contributing to the UK's attractiveness as a base for discovery, will enable UK Research to further contribute to growth, prosperity and wellbeing of the UK.

6. RCUK welcomes the recommendations that will allow greater mass digitisation. This will allow digital preservation of our cultural and scientific output, and enable researchers to use data and text mining to deliver new discoveries in medicine and other areas of research. The Councils endorse proposals to clarify and make access to and use of data easier for the researcher.

7. Implementation of the Review recommendations in relation to changes in copyright law would build on the significant work already carried out by the Research Councils and other funders, for example: through implementing Open Access policies; developing a sustainable corpus of medical literature in UK PubMed Central (UKPMC) and developing new tools such as text mining to support the discovery needs of researchers.

8. The Councils strongly support the recommendation to extend the current exemption for "non-commercial research" to include the use of text mining or other computer search and analysis techniques on data and text and highlight the increasing importance of text mining as a research methodology in its own right, with the potential to lead to new discoveries in medicine and other areas of research. This change is possible within the

remit of the current EU Directive and would for example enable UKPMC to deploy existing text mining tools on a much larger corpus of literature. The Councils also support proposals to lift the current restrictions placed on orphan works. Currently millions of orphan works cannot be licensed at all, or cannot be digitised and made available. The Councils also endorse the need for greater clarity of licensing terms and more particularly for the Government to legislate to ensure that the exceptions are protected and cannot be overridden by contractual terms.

9. With regards to Recommendation 6 that relates to patent thickets, the Councils are supportive of the proposals put forward and recognize there may be a need to tighten up existing practices and be clear about methods of implementation. The Review recommends work-sharing and focuses on the need for more trust by national patent offices in the PCT international searching authorities. It is not clear what innovation and growth goals will be with respect to establishing a fee structure. The implication is that patent fees in the UK could be increased at later stages in the patent life cycle but recognises that this should not be such that it becomes a disincentive. If any increase is to be suggested, the Councils agree that implementing it at the later stages is a better strategy than at filing stage or within the first few years post filing.

10. The Councils support the general recommendation that the proposed changes take place as quickly as possible, particularly for those which are already possible within existing legislative framework, and that the UK takes a lead in modifying those aspects of legislation which have to be agreed with the rest of the EU. The Councils are working closely with counterparts across the EU and internationally on Open Access initiatives. Such collaboration, which identifies shared goals and priorities, could be beneficial in influencing and responding to changes in legislation.

11. The Councils endorse the Report's recommendations that relate to enforcement and support the recognition in the Government response that intellectual property rights cannot fulfill a useful function unless they are enforceable. Proposals to introduce (subject to establishing the value for money case) a small claims track in the Patents County Court for cases with £5000 or less at issue are to be welcomed.

12. The Councils also welcome the recommendation that "Government should ensure that development of the IP System is driven as far as possible by objective evidence" and the Research Councils are taking specific steps to enhance the evidence base through the establishment of a new 'Centre for Copyright and New Business Models in the Creative Economy', with potential funding from the AHRC, EPSRC and ESRC, with support from NESTA, IPO and the Technology Strategy Board and which will focus on the creative economy in the digital age. Also welcome is the call in the report to modernise copyright licensing to enable the UK's world-leading achievements in creative content and creative industries to continue to flourish, bringing the UK global competitive advantage.

5 September 2011

Written evidence submitted by Research Libraries UK

Business, Innovation and Skills Select Committee: Digital Opportunities: A review of intellectual property and growth - by Professor Ian Hargreaves

1. Research Libraries UK (www.RLUK.ac.uk) is a consortium of 30 of the largest research organizations in the UK and Ireland, including the three UK national libraries. Founded more than 25 years ago, RLUK is dedicated to ensuring the highest standards of research library support.

2. RLUK is a member of the Copyright for Knowledge alliance and we strongly endorse and support the submission that Copyright for Knowledge has made to the Business, Innovation and Skills Select Committee regarding Professor Hargreaves' review of intellectual property and growth.

3. RLUK members are particularly keen to see a positive response to the problem of orphan works. We also wish to see the adoption of the exceptions for text and data mining and for library archiving recommended by Professor Hargreaves in support of education and research in the UK. We also support the vitally important recommendation that contractual terms should not be used to trump legitimate exceptions.

4. RLUK members see great potential in text and data mining to advance scholarship and promote innovation. The ability to make connections across and within distinct corpora of knowledge will become an increasingly vital part of the research landscape. We have a unique opportunity to ensure that copyright legislation does not become an inadvertent barrier to effective data and text mining.

5. Without a clear exception for text and data mining there is a danger that vendors will use the copyright regime to create new monopolies - only allowing researchers to mine content using tools supplied by that content provider. Copyright legislation should not be used to create new service-provision monopolies.

6. Such monopolies would be especially problematic as the great power of text and data mining comes from the very ability to interrogate a range of material from a range of content providers.

7. RLUK is hugely encouraged that the Government has accepted all of the Hargreaves recommendations and is planning on moving forward with a more open intellectual property system. The library community works hard to ensure that it respects copyright and the rights of creators. However, the current regime is far from optimized for the needs of 21st Century researchers and students. By accepting the recommendations of the Hargreaves Review the Government will help to create a modern IP environment that will bring great benefit to scholarship for many years to come.

5 September 2011

Written evidence submitted by the Royal National Institute of Blind People (RNIB)

1. About us

As the largest organisation of blind and partially sighted people in the UK, RNIB is pleased to have the opportunity to respond to this consultation. We are an active member of the World Blind Union (WBU), and support its Right to Read campaign as one of our principal concerns in both UK and international arenas. We are a member of the Right to Read Alliance, which endorses this response. RNIB is also a publisher of accessible formats such as Braille, Daisy audio and large print.

We are a membership organisation with over 10,000 members who are blind, partially sighted or the friends and family of people with sight loss. 80 per cent of our Trustees and Assembly Members are blind or partially sighted. We encourage members to be involved in our work and regularly consult with them on government policy and their ideas for change. Through our open governance process we represent the interests of the 370,000 registered blind and partially sighted people in the UK.

As a campaigning organisation of blind and partially sighted people, we fight for the rights of people with sight loss in each of the UK's countries. Our priorities are to:

- Stop people losing their sight unnecessarily
- Support independent living for blind and partially sighted people
- Create a society that is inclusive of blind and partially sighted people's interests and needs.

We also provide expert knowledge to business and the public sector through consultancy on improving the accessibility of the built environment, technology, products and services.

2. Executive summary

2.1 The "book famine"

Blind, partially sighted and other people with print disabilities such as dyslexia read books using "accessible formats" such as audio, braille or large print. However, only a small percentage of books are ever made available in accessible formats – a situation RNIB refers to as a "book famine". Indeed, these barriers extend beyond books to areas such as educational and vocational training materials and accessible online newspapers.

There are various reasons for this "book famine", and some can be addressed through licensing and improvements in technology. Nevertheless, some significant access barriers are to be found in an outdated national and international intellectual property (IP) system.

2.2 Disabled people's rights

The UN Convention on the Rights of Persons with Disabilities[1] , which the UK has ratified, makes explicit disabled people's right to accessible information, and requires governments to ensure that intellectual property law does not constitute a barrier to disabled people's enjoyment of culture.

2.3 Contracts should not negate copyright exceptions

We agree with Hargreaves and the Government response on the need to ensure that contracts do not negate the enjoyment of copyright exceptions such as the 2002 Copyright (Visually Impaired Persons) Act.

2.4 Private copying / format-shifting

Blind and partially sighted people need to be able to format-shift to fully access published works. We support moves to ensure such action is made legal.

2.5 Technological protection measures

RNIB believes there is scope to improve the legal situation whereby the onus is on an individual to complain if TPMs block his or her legal access to a published work.

2.6 Need for an international copyright treaty for print disabled people

RNIB supports efforts at the World Intellectual Property Organisation to agree a binding international treaty to improve access to published works for blind and other print disabled people. We urge the UK Government to support a binding treaty, and to work within the EU to achieve EU backing for such a treaty.

2.7 Economic growth / participation of disabled people

RNIB believes that appropriate copyright law which improves disabled people's access to published works will help strengthen the UK's economy.

[1] http://www.un.org/disabilities/

3. Why the Hargreaves review matters to RNIB

3.1 The “book famine”

Blind, partially sighted and other people with print disabilities such as dyslexia read books using “accessible formats” such as audio, braille or large print. Though it is possible to produce any book in an accessible format for a print disabled person, most are never published in such formats. Ideally, RNIB would like to publishers to publish their books in accessible formats. However, the work of transcribing accessible books is mostly left to charities such as RNIB. As a result, only a small percentage of books are ever available in accessible formats – a situation RNIB refers to as a “book famine”.

It should be noted that these barriers extend beyond books to areas such as educational and vocational training materials and, “apps” to access online newspapers.

There are various reasons for this “book famine”, and some can be addressed through licensing and improvements in technology. However, some significant access barriers are to be found in an outdated national and international intellectual property (IP) system.

RNIB has focused its response to this inquiry on those areas where the revision of the intellectual property system, as envisaged by the Hargreaves review, could help to improve access to published works and IP protected material for print disabled people.

3.2 Disabled people’s rights

Disabled people have legally recognised rights that RNIB believes should be accommodated by the modification of the IP system. In particular, the UN Convention on the Rights of Persons with Disabilities[2] , which the UK has ratified, makes explicit disabled people’s right to accessible information, (Article 21) and that 'laws protecting intellectual property rights should not place unreasonable or discriminatory barriers in the way of access to cultural materials” (Article 30).

3.3 Contracts should not negate copyright exceptions

In the UK RNIB campaigned for an exception to copyright law which became the Copyright (Visually Impaired Persons) Act 2002. The Act provides a legal right to access where a license is not available, and a platform upon which blanket licensing can be built. It allows visually impaired individuals to make accessible copies of copyright works that they legally own. It also enables organisations such as RNIB to do the same, or to describe or enhance a work to render it accessible, without falling foul of copyright law.

[2] http://www.un.org/disabilities/

With the proper working of this copyright exception in mind, we agree with Hargreaves and the Government response on the need to ensure that contracts do not negate the enjoyment of copyright exceptions such as the 2002 Act (see page 8, section 6 of the Government response

"that unnecessary restrictions removed by copyright exceptions are not re-imposed by other means, such as contractual terms, in such a way as to undermine the benefits of the exception")

3.4. Private copying / format-shifting

We agree with Recommendation 5 on private copying. New "access technology" such as text-to-speech screen-readers can open new ways to access information for blind and partially sighted people. However, to take full advantage of this technology, blind and partially sighted people often need to be able to move an electronic work from one device to another. For instance, a blind user might want to download an ebook from their PC to a portable "Braillenote" machine which provides a refreshable Braille display. Such legitimate activity should not be criminalised by the IP system when carried out with a legally acquired work and for personal use.

3.5 "Widest possible exceptions"

The Government response to Hargreaves states that "the Government agrees with the Review's central thesis that the widest possible exceptions to copyright within the existing EU framework are likely to be beneficial to the UK" (point 6, page 7).

RNIB is not ideological about copyright exceptions. We do, however, believe they have a place in helping to alleviate the "book famine", and we look forward to hearing more about how the Government will further this objective.

3.6 Technological protection measures

We believe that the UK should consider ways to more effectively implement Article 6(4) of the EU Information Society directive ("Directive on the harmonisation of certain aspects of copyright and related rights in the information society (2001/29/EC)") which allows EU Member States to ensure that Technological Protection Measures ("TPMs") do not block blind and partially sighted people's access to legally-acquired content. [3]

At present some TPMs which are designed to prevent unlawful copying also affect lawful uses of the material. Many publishers lock their accessible e-books inside TPMs to prevent unlawful copying. In many cases, the particular TPM applied also locks out access by screen reader "access technology", so that the TPM stops a blind person from being able to read a book that they have legally bought.

[3] Article 6(4) of the InfoSoc Directive addresses the interaction between the legal protection of technological measures for protection of copyright and the need for users to be able to take advantage of certain exceptions which are allowed by Article 5 of the Directive.

The present system in the UK puts the onus on an individual to make a complaint to the Secretary of State should their lawful access to a work under a copyright exception or limitation be impeded by a TPM. (See the Copyright and Related Rights Regulations 2003, SI 2003/2498 section 296ZE). RNIB believes this is not a practical remedy. We would like to see more emphasis put on service providers to ensure that TPMs do not disable screen-reading access technology.

3.7 Improving international IP law

The Government report acknowledges the need to work internationally in order to improve IP law and to achieve reforms at key international IP institutions. It is worth noting that no less a figure than Francis Gurry, Director General of WIPO said this year at the London Book Fair that a global economy requires global intellectual property laws. We agree, and feel that this applies to copyright exceptions as much as to enforcement.

3.8 Need for an international copyright treaty for print disabled people

RNIB believes there is a need for an international copyright exception for accessible information for blind and partially sighted people and others with a print disability. In the UK the Copyright (VIP) Act 2002 is working very well. Similar legislation exists in other countries. However it is not possible for those countries to share accessible books made using these national exceptions. This wastes scarce resources that could be better used to make accessible books available.

For example, when Harry Potter and the Chamber of Secrets (Book two) by J.K. Rowling was published the English speaking blind people's organisations around the world had to produce five separate national braille master files and eight separate national Daisy audio master files. With an international copyright exception for print disabled people, these organisations could have avoided the unnecessary use of financial and production resources for this duplication, by sharing a master file. That would have allowed them to produce a further four Braille titles and a further seven Daisy audio titles for sharing around the world.

The World Intellectual Property Organisation (WIPO) makes treaties and other international laws on intellectual property rights such as copyright and patents, and is the body that could solve this legal problem. To that end, the World Blind Union, assisted by copyright experts, drafted a proposal for a treaty to provide better access to published works which Brazil, Ecuador and Paraguay tabled at WIPO in 2009.

The WIPO Standing Committee on Copyright and Related Rights (SCCR), which meets twice a year, have in the last two years considered this and other proposals to address the matter. At its latest meeting in June 2011, various WIPO Member States including the EU devised a consolidated draft text ("SCCR22/16/PROV.1") which RNIB believes could, subject to some minor modifications, be a good basis for a new international copyright treaty.

An international copyright exception, embodied in a WIPO treaty, would increase the total amounts of works available to blind, partially sighted and print disabled people

living in the UK. For example, the organisation Bookshare in the USA[4] has roughly 100,000 accessible books which registered print disabled readers can access in the USA. Bookshare's titles are accessible here through Bookshare's UK internet portal. However, half of Bookshare's titles were made in the USA thanks to its national copyright exception for print disabled people. That exception –like all copyright exceptions –is national and therefore stops at the USA's borders. Blind members of Bookshare in the UK cannot therefore currently access the half of Bookshare's titles made thanks to the USA copyright exception. If the treaty were law now, they would be able to do so immediately and have access to around another 50,000 titles.

Despite the benefits of the proposed treaty, and the fact that over 100 WIPO Member States support it, the EU has been opposed to a binding treaty at WIPO, calling instead for a soft law "recommendation". This contrasts with its support for treaties to further protect copyright holders, and seems to indicate a willingness to offer a second class solution to disabled people. RNIB urges the UK to play a leading role within the EU Council in calling for the EU to fully respect the UN Convention on the Rights of Persons with Disabilities and support a binding treaty at WIPO for print disabled people.

3.9 Economic growth / participation of disabled people

RNIB notes that a key aim of the Hargreaves review was to see how Intellectual Property law could be improved to better support a flourishing UK economy. RNIB would like to underline our belief that the UK needs all parts of society to have full access to information in order to benefit fully from a good education and to be able to contribute to the economy. At this time of economic hardship the UK can least afford to exclude people from playing their part to revive the economy. RNIB therefore believes that addressing the concerns we outline above is not just a matter of social inclusion, but one of relevance to the UK's future economic wellbeing.

[4] See Bookshare.org

Written evidence submitted by Scotland's Colleges

Scotland's Colleges is the agency that represents the 41 colleges in the Further Education sector in Scotland. We would like to submit the following points in relation to the Government's response to the recommendations of the Hargreaves Review, published in May 2011.

Summary of main points

- The cost of a licence should reflect value for money for the service being paid for.
- All societies should offer searchable databases of their licensed materials so that it is easier for users to determine rights status.
- No one society can provide a blanket service. Societies therefore have a duty to make the seeking of rights transparent and easy to understand and use.
- Digital Copyright Exchange would make it easier for both creators and users to establish rights and pay the correct fee, for actual usage, not assumed usage.
- There are a number of agencies most of who impose charges without negotiation. These 'monopolies' are unfair.
- There is overlap in the services of the agencies dealing with print, music and the moving image.
- Digitisation has caused a separation of platforms and a raft of new terms and conditions: consistency is required in the way in which rights are administered.
- Copyright can be a complex area and it is easy to unintentionally infringe. It would be helpful if the codes of practice were easier to understand and in forms that are readily disseminated to both users and potential users. This is an area of concern in our sector for students who fall under the Creative Industries subjects.

Introduction and background

Scotland's Colleges wishes to give positive support to the recommendations of the Hargreaves Review, in particular those relating to Copyright Licensing: we agree that 'evidence should drive policy'.

Member colleges have supported the various collective licensing schemes which operate in the educational sector throughout the analogue age and continue to do so in the digital age. They feel, however, in agreement with The Review, that the time has come to analyse the work of the collective societies, consider their monopolistic positions and drive forward a comprehensive and effective digital licensing exchange.

1. Costs
2. Content
3. Number of Licensing Societies
4. Relationships of Licensing Societies
5. Complexity of licences/terms and conditions
6. Education of future creators
7. Conclusion

1 Costs

1.1 The current costs of licences do not reflect value for money in our opinion. In an age when it was relatively simple to determine a per-page cost to photocopy from licensed materials, it was equally simple to determine what value the licence provided. As we have moved into the world of e-books, e-journals, on-line resources and a separation by authors and publishers of the various rights to their works, it has become increasingly difficult for member colleges to understand the pricing rationale behind some of the collective licences

2 Content

2.1 Since collective licensing societies cannot deliver any form of “blanket” cover, member colleges find it very difficult to determine the rights status of much of the content which their staff and students might choose to use for the creation of teaching and learning materials. Some societies are unable to provide a searchable database of their licensed material, which further complicates the process. We do appreciate that one of the major licensing societies is in process of introducing such a database and this is to be welcomed.

2.2 Such a database helps give content a digital identity which can be used for recording usage and determining payments. At the same time it shows that no society can provide a blanket service, proving that member colleges still have to spend time identifying rights holders and seeking permissions – both of which can be lengthy and time-consuming exercises, and put strain on already reducing budgets.

2.3 With a Digital Copyright Exchange, creators, content and users can be easily identified and if the software is created, a seamless acquisition and payment system can be devised – both parties will have access to precise records of both actual usage and appropriate payments. Member colleges who acknowledge the usefulness of collective licences, will then be able to see exactly what they are paying for, rather than have fees based on a somewhat amorphous premise.

3 Number of licensing societies

3.1 Member colleges may currently deal with up to ten collective licensing societies each of whom operates in a different way. Only two of these societies carry out any form of negotiation with the licensees – the remainder imposes non-negotiated fee structures which the colleges regard as unfair, given that there are no alternative sources for the content and this means they are dealing with monopolies.

4 Relationships of licensing societies

4.1 In the review of the licensing societies, member colleges would encourage study into the need for the variety of societies – there is considerable overlap (and gaps) in print, music and moving images. We appreciate that over the years, different societies have emerged to deal with different content, but we question if there is a need for three

principal music licensing societies, three print societies (two major and one lesser) and two dealing with television broadcasts.

5 Complexity of licences/terms and conditions

5.1 The introduction of the digitisation has lead to further separation of platforms and introduced a wide variety of ways in which content can be delivered and accessed. With each method of delivery comes a new contract with new terms and conditions – leading to confusion and the potential for the licensee to make mistakes. It is currently the situation that a publisher may make a title available both in print and digital formats. Copying and scanning of the print version (subject to the publisher awarding the mandate) is managed by the terms and conditions of the Copyright Licensing Agency. The e-book version is controlled on-line, directly by the publisher. We would ask for consistency.

6 Education of future creators

6.1 As our capital economy has moved to become more of a knowledge economy, as recognised by this and previous reviews into Intellectual Property, it is essential that our student creators – photographers, illustrators, designers, programmers, musicians, actors, choreographers, architects, – have a good understanding of the IP structure in which they will be operating when they leave college and are either employed or self-employed in the industry of their choice. Staff in colleges have difficulty enough in understanding the complexity of the current IP structure as it affects the creation of their teaching materials, without trying to convey this complexity to the students.

6.2 This is where codes of practice, as suggested in The Review, would be extremely helpful – if the licensing societies can act in a codified manner with transparent interaction between them, then this can be more easily understood by college staff and conveyed to their students.

6.3 Modernisation and simplification of the copyright licensing system is essential for the generations of creators coming through the education systems at all levels. These are the students who are digitally literate and have been brought up in the “copy culture” which has given rise to the need for this review. There is an expectancy that works are readily and freely available to them – if our economy is to progress, this attitude needs to be addressed.

7 Conclusion

7.1 *Scotland’s Colleges* is very keen to encourage both the creation of a digital copyright exchange and the review of the licensing societies. A copyright exchange, if it can be created and then sustained, would be seen to be much fairer to both creators to users and may remove some of the negative feelings towards the current intermediaries, the licensing societies

7.2 Scotland’s colleges pay out just over £1,000,000 annually to all the agencies for copyright licences. Due to the constantly changing nature of technology and methods of

teaching and learning, the colleges feel that the licences are no longer fit for purpose, nor do they provide value for money

7.3 Scotland's colleges re-iterate that they respect copyright – without the licensed use of third party materials for the creation of learning objects, the teaching and learning systems could become unworkable. However the licences continue to be expensive, complex, non-inclusive and administered by monopolistic agencies who do not take the time either to negotiate or find out whether or not their licences fit the needs of the licensees.

We look forward to further progress in achieving the recommendations of The Review

2 September 2011

Written evidence submitted by Carol Sharp

I am a renowned commercial photographer of some 25 years specialising in flowers. My income comes from licensing my images and those of 80 other photographers through Flowerphotos Ltd, a Rights Managed Stock Image Library I own. I also do commissioned work, for which I always issue a licence to use.

My concerns are the following matters in Professor Hargreaves review of copyright that will adversely affect my ability to make a living:

1. The moral rights of authors are not automatically granted as in other EU countries.
2. Moral rights have still not been made unwaivable as in other EU countries.
3. No sanctions are proposed for the removal of digital copyright information from digital works.
4. The review proposes allowing orphan works to be used for commercial purposes.
5. That remedies for unauthorised use are restricted for those who have not registered their works.
6. Artists rights have not been recognised as human rights by the IP review.

1&2. The moral rights of authors are not automatically granted or unwaivable as in other EU countries.

Why do we in the UK have to assert our moral rights? This should be an automatic right granted to all UK citizens. A creator should not be asked to waive their moral rights and find their image used on something they morally object to.

3. No sanctions are proposed for the removal of digital copyright information from digital works.

Why would anyone want to remove my copyright information unless they intended to use the work without my permission?

4. The review proposes allowing orphan works to be used for commercial purposes

There is no published evidence that shows that UK industries are disadvantaged through being unable to commercially exploit orphan works. There may be a case to permit orphan works to be used for cultural purposes, such as in libraries or museums, providing that a precise definition of cultural use can be defined and agreed.

5. Remedies for unauthorised use are restricted for those who have not registered their works.

If I had to register all my thousands of works in every country in the world and, as seems likely, pay to do so, I would have even more problems finding time

to pursue my profession. A universal system such as that in use by the PLUS Coalition (of which I am a member) should be used.

6. **Our copyright and moral rights are artists' human rights, guaranteed by the Universal Declaration of Human Rights and piracy of copyright work is a breach of the copyright holder's human rights.**

Furthermore, a **law** which enables commercial use of our work in any way without our knowledge or permission, including by wide-ranging Extended Collective Licensing (ECL), would breach our human rights as well as international copyright law, and such law is forbidden by the Human Rights Act 1988 unless the breach is in the 'general interest'

It is not in the 'general interest' to make such exceptions, as majority of the population will be negatively affected, they are all ‘photographers’ and completely unaware their images could be exploited.

5 September 2011

Written evidence submitted by Andrew Shaylor

My name is Andrew Shaylor. I am a working commercial photographer and have been so for the past 20 years. I earn my living as a photographer, from magazine commissions, contract publishers and occasionally from advertising commissions. I would like to illustrate my concerns for the future of my livelihood in relation to Hargreaves Review inquiry.

Here are three examples of recent experiences I have had in relation to my rights as a creator:

1. A magazine published by a Formula One racing team asked me to visit their headquarters to make some photographs. The fee was reasonable. However, they insisted that I should sign over all my rights to them if the commission was to go ahead.

2. I visited several people at a very large television broadcaster with a view to gaining a commission from them. It was indicated to me by some that they would like to give me some work but that I would need to sign away all rights for that particular commission and any future commissions. I also note here that the this company as well as a number of large magazine publishers also ask those who have worked for them in the past, to sign away their rights retrospectively, and that if they do not, they will be offered no more work.

3. I was recently alerted to an exhibition in Belgium by a very well known conceptual artist, that included an image he had created using two of my images.

The first two points are basically the same. If I don't sign away my rights, I don't get the work. The third point is interesting, because I would never have known about this infringement had I not been told by someone who knew my work. The artist 'stole' my images from a photographic book I had made, that contained the usual copyright information from my publisher. Yet he still went ahead and copied the images, and changed them as well. I have also had my images used for tee shirts and badges, with no recourse to me.

Nearly all of my clients are reasonable people and have an understanding and respect for the present law. But, I have recently become aware that some of my clients are looking into changing their commissioning contracts in a way that would have a negative effect on my earning power. If I stick to my principles, and refuse to work for companies who insist on me waiving my rights, I'll soon have no work offered to me.

The UK is well known and highly respected around the world as a leader in the creative industries. Therefore, I think we need to approach the issue of copyright and IP on a global basis. My case in point 3 would mean that the artist in question would have been very clear that what he was doing was wrong and that there are consequences to this 'stealing' and abuse of someone else's creation. It need not be complicated, and I believe that the Plus Coalition is a long way down the road to achieving this goal.

The need for clarity and strong, robust guidance on what is right and wrong with relation to IP is desperately needed. I find that many of my smaller clients are confused about the law in this area, and look to people such as myself to guide them. It would be much better for everyone if there was clear guidance.

The stripping of metadata should be an offence, because it takes effort to strip this information and it takes no effort to leave it alone. There has to be a proper deterrent in place to stop this widespread practice.

In particular, I would like the implementation of inalienable copyright concerning contract law in the new copyright legislation. This would hopefully stop the present problem facing many creators of 'if you do not sign, we will look elsewhere'.

To paraphrase Professor Hargreaves, ‘The release of a vast treasure trove of images has no economic downside’ is simply wrong. Consumers may benefit, but the creators will not as their work will be available at no or very little cost.

Please take my views into consideration, as your decision will have an impact on my life.

2 September 2011

Written evidence submitted by Skyscan

I take the opportunity to place before you facts about the *real* world of photographers in the UK and about the fears many of us share for our livelihood and futures with respect to the erosion of the Intellectual Property rights in our artistic works. Photography has changed out of all recognition in the last decade with the introduction of digital imaging and with it has come the need to address problems which are happening NOW in our industry.

I give a brief history of our company as a background to our concerns.

1.0 ***Skyscan Aerial Photography & Photolibrary***

1.1 Skyscan is a husband and wife partnership offering aerial photographic services since the early 1980's.

1.2 One of those services is an aerial photographic library representing the work of 40+ international aerial photographers in addition to ourselves.

1.3 Our own Skyscan ™ photographs are captured from a remotely controlled camera platform suspended beneath a tethered barrage balloon. We developed this system to capture an unusual birds-eye viewpoint which is higher than mast borne cameras and much lower than aircraft are usually permitted to operate.

1.4 We also distribute the mapping aerial imagery found on Google Earth™ and Bing.com/maps™.

2.0 ***Concerns : Orphan Works***

2.1 In common with most other UK photographers, we are monitoring with growing alarm, the passage of legislation at home and abroad which affect not only photographers and photo-users local to the country but all such interested parties all over the World. **The world is now a global Internet village and it is no longer possible to restrict legislated use to the borders of individual countries** when the internet gives instant access to the intellectual content and property of those inhabiting a particular country…..to anyone else in the World.

2.2 Therefore, those involved in making legislation about IP matters MUST be aware that the consequences will also affect those outside their borders who may be unable to appeal or influence their decision. This realisation does not appear to have been appreciated in the US in particular.

2.3 **The movement of digital images around the world and the ease of manipulation of the images make it extremely easy to lose track of the identity of the original creator; and therefore lose the route to the proper payment of reproduction fees and copyright credit to the artist.** I have had a Skyscan image used in an amusing advertising campaign where the final image was sent to me twelve months later by a Canadian friend. He in turn had received it through a chain of international friends and at no stage was there mention of the original image creators ….. nor even of the product it advertised.

2.4 There are large internet image specific search engines which garner photographs from all over the internet world and which facilitate the loss of accreditation of IP. **Sometimes the embedded copyright information is stripped out as part of the collection process providing an immediate detaching of the image from it's Creator. This produces what is known as 'Orphan Works'.**

2.5 Once a Work is orphaned from it's Creator on the internet it is often innocently 'stolen' for use by those naïve in the ways of commercial photographic copyright and who do not appreciate the effect on the photographer's livelihood. In my experience, those in the academic world both young and old are particularly prone to this failing… and are often those most likely to search for and use a copyright protected image. The following

example was used in a 'spoiler' after an illegal download of the image *(courtesy www.Stop43.org.uk)*[1]

3.0 ***Suggested Actions : Orphan Works***

3.1 There should be global harmonisation on copyright laws including consideration for the interests of those IP holders outside the national borders. There should be discussions with legislators in other countries at early stages in reviews of laws to assess the impact on IP providers in other countries and legal frameworks created on a global basis to ensure the corporations applying these methods (which are usually large and multinational) are forced to work in a fair and proper manner to the rights of Creators..

3.2 Research studies (and finance) should be provided into watermarking technologies, image tracking systems and image recognition technologies for digital imagery so that information containing the name of the creator can be embedded into a piece of copyright work or digital file, similar to an artist signing a painted canvas. This can then stay within the file and provide easy identification of the IP owner. Such systems exists but many users .... and legislators .... are unaware of them. One example is the technology available on www.TinEye.com which claims to trace where an image comes from and how it is being used**. This system and others like it could surely be the basis for a global image database linking Creators with images lacking copyright accreditation.**

3.3 The US has a copyright system requiring every image to be lodged with the Department; this is so cumbersome that inevitably many photographers and many images fail to be registered. As an owner of a photolibrary, for our company the time and beauracracy involved frankly would put us out of business.

3.4 **However, the creation of an international register of copyright owners where such identification marks can be lodged by the copyright owner and which can be researched by those picture users seeking to locate an artist for permission to reproduce his image would be much more workable.** A similar system exists with internet domain names and should not be difficult to instigate; this provides for single place of enquiry for those seeking to locate a Creator.

3.5 Similarly**, the UK legal system should support the right of the Artist to set a value on his work and receive what he decides is proper reward for his own creativity**, with appropriate penalty where such breaches of his copyright are found. Some misguided proposed legislation in the US has suggested the *user* to decide what he considers a reasonable fee and also to decide what *he* thinks constitutes "reasonable effort" to find the Artist. This goes against all natural justice and undermines the value of IP. Lack of legislation to punish blatant misuse diminishes the rights of Creators.

4.0 ***Concerns : Rights of Creators***

4.1 As enshrined in the United Nations Universal Declaration of Human Rights Article 27(2) **There should be an immediate, absolute and inalienable right to be identified as the Creator of a Work from the moment of it's creation. Furthermore for that right to persist in moral and property terms for a stated – long – period.** The Creator may waive such rights, for example under terms of a commission or contract of service, but that would then be governed by commercial law.

4.2 My husband and I have a family and would wish to leave an inheritance to them of the rewards from the artistic work which we have created over the years. That being the case, we feel the minimum term for copyright should be **"life of the artist plus 50 years"**. If a person's talent can create an artistic collection of value then it is only proper that their heirs should benefit from that legacy and this allows a just and sufficient time for that to occur. The photographers we represent and many other artists feel the same.

[1] http://www.stop43.org.uk/pages/pages/viralimages/illegal_ads.html

Summary

I represent over 40 aerial and aviation photographers all of whom are greatly concerned by any erosion of their IP rights as creators of artistic works which ultimately must provide them with a livelihood.

However just as the misuse of photographs is not restricted by international borders neither is it restricted to photographic professionals as the example in Appendix One makes clear. Put yourself in the same situation as that family; would you like your young children displayed in that way without permission?

I earnestly ask you to consider ways in which the intellectual property rights in photographs and other Artistic Works can be protected and valued so that the creators themselves have the legal authority to set the value, compensation and penalties which should be applied where those rights have been flouted whether innocently or by design.

It is difficult and daunting for individuals such as myself to make an impression on legislators by submissions like this but I know from discussions on several professional email forum how great is the concern throughout the photographic industry that decisions you are taking now could erode IP values and further destroy the livelihoods of photographers in a difficult economic time when half the world has a camera and most of the world wants to use digital images for free.

I therefore ask that any reviewers of legislation have representatives from our trade associations[2] on their review panel. The associations are actively concerned in the day to day fears and concerns of their members and, more than most, they can give well considered opinions as to what would be good legislation for the protection of IP in the photographic industry.

I have previously been involved in workshops run by the IPO and have for many years collected a series of web links, examples and stories about the horrors for photographers which can arise from copyright infringement.[3]

I would be happy to provide further details or clarification on any of the above points if required

Mrs Brenda L Marks
Partner, Skyscan

4th September 2011

[2] Trade organisations : British Association of Picture Libraries & Agencies; Association of Photographers: Pro-Imaging.org; National Union of Journalists.

[3] http://photobusinessforum.blogspot.com/2008/05/orphan-works-and-licensing-exclusivity.html and http://news.bbc.co.uk/1/hi/8094420.stm

Written evidence submitted by Jon Sparks

Big companies and organisations can play an important role in nurturing creativity and bringing the results to a wider audience but creativity itself is largely the domain of individuals and small teams. Copyright and Intellectual Property legislation must give priority to the rights and interests of creators or, ultimately, creativity itself will suffer. The interests of those who package, market and distribute creative content, though important, cannot be allowed to take precedence.

In this submission I'd like to focus on key issues, relating to the interests of the creative community, which have been ignored or under-valued in the Hargreaves process.

Creativity counts

The creative sector is a mainstay of the UK economy, quite possibly more so than in any other major economy. And the creative sector depends in the final analysis on those who actually create words, images, music and other media. Those who package, market and distribute creative content cannot exist without creators. The relationship between the two should be organic and symbiotic but many creators feel that it is often parasitic and feel a real fear that it could become more so.

Let us remember this when considering submissions from companies which operate in areas such as internet search engines. They don't create the material that the search engine displays; they just help people find it.

It is vital for the British economy, and for our cultural and political health, that creators continue to be able to survive as independent professionals. The rights of those who actually CREATE must come first.

Everyone is a creator

New media allow every citizen to create words, images, music and other creative work and to distribute it without reliance on traditional publishers. This is both a great opportunity and a challenge. Most of this work will be of limited public interest but some, not always produced by those who consider themselves 'professional', will have significant commercial value. It is vital that those who create such work are enabled to obtain fair remuneration for it.

The proposed "Digital Copyright Exchange" threatens to undermine this, by limiting protection for those who do not register their work with it. This will effectively disenfranchise aspirants, amateurs, young people, in fact any who are not fully aware of their rights or have difficulty in accessing the proposed system. The fairest and most equitable way to protect the rights of creators is to maintain the present position that copyright (with all its protections) exists automatically in any creative work.

Moral rights

Moral rights principally consist in the legal and enforceable right to be identified – i.e. to receive a credit or byline. This is an essential element in protecting the rights of everyone

who creates, whether it's a photo on Flickr, a blog, or a song. Moral rights also allow creators to defend the integrity of their work. There are far too many examples already of abuse in relation to copying, manipulation and out-of-context use.

This leads directly to the question of "orphan works" – creative works whose authors cannot be readily identified. The right of the creator to be identified is the only way to prevent an explosive growth in the volume of such orphans, especially when some online services automatically strip identifying information from works distributed through them. Every photographer who takes the time to search can already find examples of their work being reproduced and republished on the Internet without their name attached. Strong Moral Rights protection would reduce this problem, while without it the abuse will grow out of hand. Ultimately this threatens the ability of any photographer to make a living.

I would be happy to expand on this submission at the Select Committee's convenience.

6 September 2011

Written evidence submitted by Sybille Sterk

I am a freelance artist and poet, showcasing my art in web portfolios and my personal blog and website.

Summary

- Artists should have the right to profit from their own work
- Artists should have the moral right to their work
- Copyright should automatically be assigned to the artist
- Due diligence should be a matter of course for orphan works
- Art should be protected in the same way and manner as music and writing
- Instead of curtailing artist's right to their own work, education about copyright and copyright infringements should take place
- The government should not bow to the pressure of Google or other interested parties that want to steal artist's right to their own work.
- The UK should assimilate its copyright and intellectual property laws with the rest of the EU
- Considering that the internet is already facilitating a 'take what you want' attitude the government surely should not support and sanction this attitude
- Loss of revenue due to the fact that artist are not 'allowed' to profit from their own work.

Detailed argument

According to the following laws:

> United Nations Universal Declaration of Human Rights Article 27 (2) states:
>
> 1 Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
>
> 2 EVERYONE HAS THE RIGHT TO THE PROTECTION OF THE MORAL AND MATERIAL INTERESTS RESULTING FROM ANY SCIENTIFIC, LITERARY OR ARTISTIC PRODUCTION OF WHICH HE IS THE AUTHOR.
>
> NOTE ALSO THAT A RECENT UK COURT RULING (20THC FOX VS 'NEWSBIN2') ESTABLISHED THAT -
>
> COPYRIGHTS ARE PROPERTY RIGHTS PROTECTED BY ARTICLE 1 OF THE FIRST PROTOCOL OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS, AS ALSO EXPRESSED IN ARTICLE 1 OF THE FIRST PROTOCOL OF THE HUMAN RIGHTS ACT 1998;
>
> PIRACY OF COPYRIGHT WORK IS A BREACH OF THE COPYRIGHT HOLDER'S HUMAN RIGHTS;
>
> THE COPYRIGHT HOLDER IS THEREFORE ENTITLED TO LEGAL REDRESS;
>
> AND, BECAUSE 'SO FAR AS POSSIBLE, PRIMARY LEGISLATION AND SUBORDINATE LEGISLATION MUST BE READ AND GIVEN EFFECT IN A WAY WHICH IS COMPATIBLE WITH HUMAN RIGHTS', LEGISLATION DRAFTED AND ENACTED SUBSEQUENT TO THE ENACTMENT OF THE HUMAN RIGHTS ACT 1998 MUST ALSO BE READ AND GIVEN EFFECT IN A WAY WHICH IS COMPATIBLE WITH HUMAN RIGHTS.

The attempt to relieve artists of their rights is unlawful and unjust. The moral right of an artist to his/her own work should be unwaivable and copyright automatic as it is in current UK copyright

law, EU and UN law.

For any artist who tries to make a living from his/her art, this new law would make it impossible to make a living as it does not take into consideration the needs of the artist as a business. From web portfolios to personal websites, blogs, print on demand art sites etc to licensing and commissioned work, the artist cannot rely on word of mouth alone but has to make use of the internet to promote his/her work. However, inherent in this kind of promotion is the danger of art being stolen and/or plagiarised. This doesn't just take place with the odd person lifting an image for a party invitation, but includes big businesses taking advantage of artists, point in case, *Paper Chase*. The details of this can be read here:http://www.guardian.co.uk/artanddesign/2010/feb/11/paperchase-design-hidden-eloise

Most artists cannot afford big corporate lawyers to deal with such infringements and are therefore relying on the law to be clear and just so these cases can be dealt with quickly and efficiently.

For artists who license their work additional issues become a problem. For example, if an artist issues an ‘exclusive license’ this means that the art cannot be used for anything or anywhere else. If the art is used, e.g. because it is stolen, the artist is in breach of contract and can be sued for damages through no fault of his/her own.

Visual artists are separated from performance/music artists and writers and copyright seems to apply to one but not the other. Detailed information about automatic copyright for music artists (creators of literary, dramatic, musical, artistic works, sound recordings, broadcasts, films and typographical arrangement of published editions) here:http://www.copyrightservice.co.uk/copyright/p01_uk_copyright_law

These rights include the artist however, the new law would separate artists from other creators don't and not be applicable to artists in the same way as copyright laws are for musicians and writers. Copyright should not be a matter of lobby but a matter of just laws.

There is no due diligence or ‘evidence’ expected for anyone wanting to use 'orphan works' commercially. On the internet images can be copied and pasted and then copied and pasted again, cropped, the colour changed, etc until the original source of the image gets lost in translation, which will make it difficult although not impossible to find the creator of any works. However, unless there is logged evidence of a company actually looking for the originator and looking hard, it will mean that any image can be used by anyone claiming they 'thought' it was an orphan work. This is unacceptable for art as a business.

In cases of copyright infringement the law should be clear and just and allow for damages to the artist's business. Currently there is no need to register your copyright as it is automatically granted, although there are companies offering a free registration that logs the time and date of the copyright. See, for example, http://www.cdateit.com/, http://myfreecopyright.com/, http://www.freecopyrightregistration.com/ however, requiring artists to pay for the registration of their work is only viable for those artists who already have a profitable business, for start up artists this would be an impossible expenditure. In which case, with the new law these artists would have no protection against copyright infringements.

Instead of loosening up the IP laws and allowing big companies to profit from artists' work, the law should tighten up the law and make it easier for artists to enforce their copyright and hold on to

their moral rights.

The new law would be the equivalent of someone going to a supermarket, taking what they want and leaving the store without paying. When reprimanded the customer could say, but you didn't register your right for me to pay. Theft is theft and stealing someone's art is just as wrong as taking anything else that doesn't belong to you.

There is far too little information about copyright and copyright infringement being made public or taught at school. Pupils are encouraged to copy/print art and photography from the internet and use in their school work. There are more cases than I care to remember where art is stolen from the net and then used to make a profit. I am happy to provide details of several such cases.

I am happy to provide further information.

7 September 2011

Written evidence submitted by Steve Atkins Photography

1.1 My name is Steve Atkins : UK professional photographer for over 15 years. I provide freelance stock photo images to Alamy and The National Trust Picture Library. I also provide fine art prints and carry out commissioned works.

1.2 As an artist I monetise my work in order to make a living and pay my taxes. This source of income also gives me enough funding so I can offer my services probono, for charity & to help small business startup from within my network.

1.3 The majority of my income is made via licensing images for specific uses. The highest % of my photography income arises by providing exclusive image licenses to the advertising industry.

1.4 For my business model to work, it depends on having control over how I choose to make my images available. Managing Copyright (license & control over image use) & maintaining my moral rights (ensuring integrity of use) are a crucial part of the process.

1.5 10% of my image sales are licensed from abroad *(10% average over recent 7 year period)*. Images are licensed for a range of uses including editorial, bill boards, websites, blogs, mobile phone applications, etc.

2.1 Summary of main points: My submission requests that the Committee safeguards the protection of copyright and moral rights for individuals producing creative material as this will incentivise further creative works and encourage growth of the sector. A softening of copyright legislation would damage the ability of photographers to make a living, thus shrinking the UK's creative economy.

3.1 Copyright enforcement case study: A property developer used a number of my images in slide show presentations and website without my permission. I issued an invoice for payment (a license to cover the images used within the period of use). They refused to pay. Following this I received help & advice from the NUJ (National Union of Journalists). It took huge amounts of my time & energy to gather evidence. I had a very strong case but at the time could not afford to front the money to take them to court for compensation; I reluctantly decided to drop the case.

3.2 Points for the Committee to consider:

a) There is no point in having copyright law without a clear cut and affordable method for dealing with those that choose to operate outside it. I recommend the Committee considers mechanism through which copyright challenges can be made.

b) There is currently no deterrent to dissuade people from stealing images. I recommend introduction & publicity of more appropriate penalties for copyright infringement, including costs.

4.1 Stripping digital copyright information: When I place my images on the internet they are secured by the metadata (metadata is digital information in a text format). This includes copyright data embedded within each image. If any of my images are copied illegally and stripped of metadata they would appear to be orphaned and might be repeatedly shared amongst those that think digital images are a 'free for all'. I would not be able to offer exclusive licenses to my clients for these images.

4.2 Large companies are already stripping metadata from any images copied into their systems whether these images are posted voluntarily by copyright holders or illegally by others. This is creating orphaned images which might actually be stolen images.

4.3 I have concerns that providing an exclusive license could put me in a breach of contract if an illegally 'orphaned' image (of the same image) also exists.

4.4 Points for the Committee to consider:
a) Will the UK Government cover me for all of the costs arising from breach of contract on exclusive licenses where the breach is due to 'orphaned works' ?

b) The Committee should recommend to Government that stripping of copyright data becomes illegal, as is the case in USA.

5.1 Time spent researching rights grabbing terms: An increasing amount of my time is spent tracking down images used without permission (stolen images). Much of this time policing use of my images could be greatly lessened by a suitable deterrent that dissuades people from stealing images in the first place.

5.2 Many people do not understand copyright and the associated legal terms; how can children be expected to understand such complicated adult invented systems? Children can also be photographers, film makers, musicians. Did you understand all of this copyright stuff when you were young?...

5.3 UK based; websites, businesses, charities, local authorities have been taking advantage of peoples lack of understanding about their rights (this includes children). Many websites actively encourage image uploading but have terms worded to sub-license to 3rd parties, gain the right to use images in perpetuity forever and/or run competitions to harvest free images (rights grabbing).

5.4 Frankly, this disgusts me. We now find ourselves in a position where the corporate world and local government are able to steal images from anyone, including children. There's a "*can do this and get away with it, so we will do this and get away with it"* mentality. This certainly does not mean it is right. Copyrights are property rights protected by Article 1 of the First Protocol of the European Convention on Human Rights.[1] This states *"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."*

5.5 Points for the Committee to consider:
The Committee should recommend to Government that image 'harvesting' (inviting submission of images to then be used or sold without payment to the copyright holder) and 'rights grabbing' terms & conditions are made illegal.

1 September 2011

[1] http://www.hri.org/docs/ECHR50.html#P1

Written evidence submitted by Stop43

EXECUTIVE SUMMARY

This submission consists of:

- A description of the human rights obstacles to the commercial use of orphan works and Extended Collective Licensing of works
- Brief introductions to copyright, moral rights, orphan works, digital file metadata, and Extended Collective Licensing (ECL)
- New evidence of the scale of the piracy problem for photographs
- Observations on nature of those pressing for commercial use of orphan works and ECL and their reasons for doing so; that legalised piracy is theft; the problems of commercial use of orphan photographs; parody; format shifting; fair contract law; and the Intellectual Property Office.
- It concludes with a list of Recommendations.

ABOUT STOP43

Stop43 is composed of members of Artists' Bill of Rights, The Association of Illustrators, The Association of Photographers, The British Institute of Professional Photography, The British Press Photographers' Association, Copyright Action, EPUK, The National Union of Journalists, and Pro-Imaging: professionals who were sufficiently concerned and motivated by the threat that Digital Economy Bill Clause 43 posed to our livelihoods that we took direct action. We had the support of the 16,000 members of the ten organisations listed on our website, and that of **thousands of photographers**, as proven by their direct lobbying action that resulted in Clause 43 being removed from the Digital Economy Bill. Since then we have been joined by professional illustrators and members of the cultural heritage sector who understand and support our position and have contributed to this submission. **Stop43 have a mandate to lobby for our 8 tenets from the 2,100+ members of our Facebook Group.**

HUMAN RIGHTS

1. **Authors' Moral Rights and Copyright are human rights, guaranteed by and enshrined in international, EU and UK laws including:**
   - The Universal Declaration of Human Rights, Article 27[1];
   - The International Covenant on Economic, Social and Cultural Rights, Article 15[2];
   - The Charter of Fundamental Rights of the European Union, Article 17[3];
   - Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Article 1[4];
   - The European Convention on Human Rights, Article 1 of the First Protocol[5]; and
   - Article 1 of the First Protocol of the Human Rights Act 1998[6].

2. **The Human Rights Act 1998[7] restrains the Government from introducing legislation that is not compliant with human rights legislation**, and indeed reading

[1] http://www.un.org/en/documents/udhr/index.shtml#a27
[2] http://www2.ohchr.org/english/law/cescr.htm#art15
[3] http://www.europarl.europa.eu/charter/pdf/text_en.pdf
[4] http://conventions.coe.int/Treaty/en/Treaties/Html/009.htm
[5] http://www.hri.org/docs/ECHR50.html#P1
[6] http://www.legislation.gov.uk/ukpga/1998/42/schedule/1/part/II/chapter/1

Section 6[8] it may be unlawful for civil servants even to draw up such legislation.

3. When asked at a pre-consultation meeting on 23rd August 2011 attended by Stop43, among others, Matthew Cope of the Intellectual Property Office confirmed that new UK legislation must be compliant with the Human Rights Act 1998.

4. Any exception to a human right must be limited, in the 'general interest'[9], and proportionate[10].

5. For an exception to be proportionate it must be demonstrated that the means used to impair the right or freedom are no more than is necessary to accomplish the objective[11].

6. All UK legislation must comply with human rights legislation.

7. **Any legislation which would breach human rights disproportionately would be illegal under the Human Rights Act 1998.**

8. Commercial use of so-called 'orphan works', and blanket Extended Collective Licensing of works, would breach authors' human rights unless an exception is made 'in the general interest'. It would also breach international and EU copyright law.

9. In the Facebook and Twitter era in which anyone with a smartphone is an author and rights-holder of copyright works the majority of the population will be negatively affected, therefore it is not in the 'general interest' to create exceptions to human rights to facilitate such use and such licensing. Rather;

10. The 'general interest' can be served by strengthening authors' Moral Rights and Copyright; introducing 'effective, proportionate and dissuasive' remedies for copyright infringement as required by EU Directive 2004/48/EC[12]; legalising the digitisation of all works for preservation and cultural access (non-commercial use of orphan works can stimulate economic growth)[13]; and the legislative creation of a Digital Rights Registry which can also serve as the basis for new markets for digital rights, and thereby stimulate economic growth, by:

    - being a free, online machine-searchable metadata registry to facilitate Diligent Search for rights-holders that by way of a revokable statutory licence also makes cultural digital Intellectual Property including so-called 'orphan works' freely available to the public for their Cultural Use;
    - enabling rights-holders to find and readopt their 'orphan works' and make them commercially licensable;
    - educating the public about Intellectual Property Rights and enforcing digital copyright law;
    - streamlining the licensing process; and

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[7] http://www.legislation.gov.uk/ukpga/1998/42/contents
[8] http://www.legislation.gov.uk/ukpga/1998/42/section/6
[9] http://www.legislation.gov.uk/ukpga/1998/42/schedule/1/part/II/chapter/1
[10] http://regulatorylaw.co.uk/Proportionality.html
[11] http://regulatorylaw.co.uk/Proportionality.html
[12] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:195:0016:0025:en:PDF
[13] Stated by Matthew Cope of the Intellectual Property Office at a pre-consultation meeting held on 23 August 20011 and attended by Stop43, amongst others

- acting as a market-making infrastructure strengthening the entire cultural Intellectual Property sector, self-funded by levies on licensing transactions that it facilitates.

11. Stop43 described such a registry in our submission to Hargreaves[14], which we called the National Cultural Archive. Hargreaves took this proposal and used some of it as the basis of his Digital Copyright Exchange recommendation. In its Response the Government accepted this recommendation, with crucial caveats.

12. However, the Intellectual Property Office has stated that the Government does not intend to legislate for the creation of a Digital Rights Registry/Digital Copyright Exchange[15]. In so doing it will not include vital facilities and structure including 'diligent search' facilities necessary in the networked digital era to protect the Moral Rights and Copyright of rights-holders, and therefore their human rights, in forthcoming legislation.

13. In light of the above, **any proposed legislation to enable the commercial use of Orphan Works, and blanket Extended Collective Licensing of works, would fail the legal three-stage test of proportionality, breach authors' human rights disproportionately, and therefore be illegal under the Human Rights Act 1998.**

COPYRIGHT

14. Copyright consists of human rights, moral rights, property rights and economic rights.

15. As well as being conferred by the human rights laws, charters and treaties mentioned above, Copyright and Moral Rights are granted automatically and without formality to authors by international, EU and UK laws including:

    - The Berne Convention for the Protection of Literary and Artistic Works[16]
    - WTO TRIPS[17]
    - The EU Copyright Directive 2001/29/EC[18]
    - The Copyright, Designs and Patents Act 1988[19].

16. Any exceptions to copyright must pass the Three-Step Test[20] incorporated into the Berne Convention and WTO TRIPS.

17. **The fundamental purpose of copyright is not, as some assert[21], to incentivise the creator for the public good, or to 'promote innovation'. It is to protect the creator's human, moral, property and economic rights**[22].

18. It is in this form, and for this purpose, that Authors' Moral Rights and Copyright are established as universal, fundamental human rights and intellectual property rights by the treaties mentioned above, and which oblige their signatories to implement their

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[14] http://www.stop43.org.uk/proposals/ipreview/ipreview/nca.html
[15] Stated by Matthew Cope of the Intellectual Property Office at a pre-consultation meeting held on 23 August 20011 and attended by Stop43, amongst others
[16] http://www.wipo.int/treaties/en/ip/berne/
[17] http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm
[18] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML
[19] http://www.legislation.gov.uk/ukpga/1988/48/contents
[20] http://en.wikipedia.org/wiki/Three-step_test
[21] http://www.ipo.gov.uk/ipresponse-international.pdf
[22] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML

provisions in domestic law.

MORAL RIGHTS

19. The Authors' Moral Rights consist as a minimum of the right to assert authorship of work and the right to object to derogatory treatment of work[23].

20. In the Copyright, Designs and Patents Act 1988 four distinct Moral Rights are recognised[24]:

- The Right to be identified as author or director;
- The Right to object to derogatory treatment of work;
- The Right to object to false attribution of work;
- The Right to privacy of certain photographs and films.

21. The Moral Rights are not automatic but must actively be asserted by the author[25]. Not only is this a breach of the author's human rights but it also allows for the assumption that without evidence to the contrary, the Moral Rights have *not* been asserted for any particular work. This assumption facilitates misuse of the work.

22. The Copyright, Designs and Patents Act 1988 lists specific exceptions to Moral Rights[26],[27]. In particular, these exempt newspapers, magazines and periodicals, and some books from the legal requirement to respect photographers' Moral Rights. These exceptions clearly breach creators' human rights, are an important factor in the orphaning of photographs, therefore do not operate in the 'general interest', and in the modern digital world are obsolete and should be repealed. Hargreaves ignores this.

ORPHAN WORKS

23. "Orphan work" is a misleading, emotive and ill-defined term which implies that an artistic work has no author and has been "abandoned". It is of course absurd to assert that an artistic work 'has no author': someone, somewhere, created it. Deliberate abandonment of work is rare, especially for 'born-digital' orphan photographs.

24. There is no reliable permanent definition of an orphan work. Its definition is slippery and varies according to the definer, ranging from being an absolutely anonymous work about which nothing at all is known, to a work of which absolutely everything is known except how to contact the revenant rights-holder, after a 'diligent search' has been carried out for that rights-holder.

25. An orphan work only remains so while the rights owner cannot be located by a specific intending user at a specific point in time. Therefore:

26. An orphan work is classified as such by the quality of the search systems that exist at the point the 'diligent search' is made.

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[23] http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html#P123_20726
[24] http://www.legislation.gov.uk/ukpga/1988/48/part/I/chapter/IV
[25] http://www.legislation.gov.uk/ukpga/1988/48/section/78
[26] http://www.legislation.gov.uk/ukpga/1988/48/section/79
[27] http://www.legislation.gov.uk/ukpga/1988/48/section/81

27. It follows that any attempt by the Government to create a commercial orphan works scheme that does not incorporate adequate search facilities to prevent the deliberate orphaning of works by pirates, or for creators to claim their lost property, would be a deliberate attempt to divorce rights-holders from their property and therefore illegal under the Human Rights Act 1988.

28. A digital orphan work is not a physical object. It can be copied infinitely, and so it is the rights to the work that are traded, not a physical item that can be sold only once. With no statutory register to record the sale of those rights they may end up being sold multiple times. An orphan works scheme with no concomitant register will generate multiple and conflicting rights holders, creating a minefield of legal claims in the market place.

29. Nonetheless, the IPO proposes to make a new definition of the term and has stated its intention to include this in its consultations on implementing Hargreaves' recommendations[28].

30. In practice the term 'orphan work' actually means 'an in-copyright work for which the revenant rights-holder cannot *at present* be found or contacted for permission to use the work *by its custodian or potential user'.* In most cases the work's rights-holder knows exactly who he is and where his work is. **Most so-called 'orphan works' are nothing of the kind: there is simply no extant link between rights-holder, custodian and potential user.**

PRESERVATION OF DIGITAL FILE METADATA

31. Digital files can contain 'metadata', literally 'data about data' in which information such as the author's name, rights-holder's contact details, licence terms, caption, and other information can be stored. This metadata is widely used in professional processes such as newspaper, magazine and book publishing, stock image licensing, and so on[29]. It is the primary means by which a rights-holder of a digital file may be traced and licence terms established.

32. It is trivially easy to strip this metadata from all digital image file formats in widespread use.

33. Such metadata stripping is illegal under the Copyright, Designs and Patents Act 1988 Section 296ZG[30]. However, to mount a successful prosecution it is necessary to prove that the data was removed 'knowingly and without authority'. In practice it is almost impossible to prove this and Stop43 know of no cases brought to court under this Section.

34. Given that metadata stripping is extremely widespread, is carried out as part of the process of posting images to websites run by the BBC[31] and Facebook, among many others, and is acknowledged to be a primary means by which born-digital files become orphaned, it must be concluded that CDPA1988 Section 296ZD is neither effective,

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[28] Stated by Matthew Cope of the Intellectual Property Office at a pre-consultation meeting held on 23 August 20011 and attended by Stop43, amongst others

[29] http://en.wikipedia.org/wiki/IPTC_Information_Interchange_Model

[30] http://www.legislation.gov.uk/ukpga/1988/48/section/296ZG

[31] http://www.stop43.org.uk/proposals/ipreview/ipreview/ipreview/evidence.html#Metadata_Stripping_by_the_BBC_W

proportionate nor dissuasive; but that in fact it is entirely ineffectual.

35. To introduce commercial use of orphan works without effective sanctions against their deliberate orphaning would be like introducing a law allowing you to take any car without a number plate but no balancing law preventing number plate removal. Hargreaves ignored this.

EXTENDED COLLECTIVE LICENSING (ECL)

36. Collective Licensing is the process by which a 'collecting society' negotiates and grants usage rights for the intellectual property of its members. An example is PRS[32], which sells Licences to play music in public to bars, restaurants and shops, and divides the licence fee equally between its members. It is a system which works well for 'secondary licensing' in circumstances in which it is impractical for a rights-holder to negotiate individual Licences to Use with users.

37. *Extended* Collective Licensing allows collecting societies to license works belonging to rights-holders who are not members of those societies, have not granted permission for such licensing, may not have heard of the societies' existence, and do not receive payment of any licence fees.

38. Any collective licensing scheme that extends the licensing of works beyond those of authors who have voluntarily placed their work under the control of a collecting society breaches international copyright[33] and human rights law.

39. WIPO[34], which is responsible for administering the Berne Convention, TRIPS and other international IP treaties, appears to turn a blind eye to existing extended collective licensing schemes such as DACS' photocopying licence[35] and the Nordic Kopinor[36] ECL scheme in which the vast majority of authors can be expected to be professional, aware of the existence and function of the relevant collecting society, be members of that society, and properly receive remuneration from it for secondary uses such as photocopying that cannot practically be licensed in the normal way.

40. The British Screen Advisory Council's Orphan Works and Orphan Rights paper's Annexe D[37] provides a clear and succinct description of Kopinor ECL, from which it can readily be concluded that the 'collateral damage' of illegal orphan works licensing is small, and in practice acceptable in relation to the benefit enjoyed by the vast majority of properly registered authors, as is the 'collateral damage' similarly caused by DACS' schemes.

41. Hargreaves' ECL proposal is the diametric opposite of Kopinor: the vast majority of works will be orphan, not registered with the Digital Copyright Exchange (should it exist), and collecting society members will be reimbursed disproportionately at the expense of the absent orphan authors. No matter how you try to finesse the argument, this is clearly in breach of both the spirit and the letter of the Berne Convention and of

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[32] http://www.prsformusic.com/Pages/default.aspx

[33] http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html#P140_25350 Article 9 (1) states: *Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.*

[34] http://www.wipo.int/about-wipo/en/core_tasks.html

[35] http://www.dacs.org.uk/index.php?m=2&s=2&c=12

[36] http://www.kopinor.no/en/home

[37] http://www.bsac.uk.com/files/orphan%20works%20paper%20-%20june%202011%20_2_.pdf

authors' human rights.

42. Hargreaves' clear intention in his ECL recommendation is for it to supplant primary licensing carried out in the normal way between rights-holder and intending user, in order brutally to enable 'mass digitisation projects' by the Cultural Heritage Sector, and 'innovative Internet startup companies' to offer 'new services' to consumers[38].

43. ECL attempts to redefine copyright from being the right of the creator to control the making of copies to a right to be paid something for the use of that copy, if he or she is lucky. Creators do not want this: they wish to retain the rights Berne confers upon them, to manage their own copyrights, or negotiate with agents of their choice to do it for them. They do not want the whole process taken out of their hands. It disempowers them, and it will undermine what they get paid, and kill this country's cultural industries.

44. The British Screen Advisory Council's Orphan Works and Orphan Rights paper's Annexe C[39] describes eight possible means by which the commercial use of orphaned works might be legislatively enabled. Of these eight, **six definitely breach international law, EU law, or both; one probably breaches Berne; and the remainder only avoids breaking these laws by removing any practical legal remedies against infringement, inviting massive piracy, destroying creators' and rights-holders' livelihoods, and of course breaching their human rights.**

45. Hargreaves says that ECL:

4.51 …should not be imposed on a sector as a compulsory measure where there is no call for it, and individual creators should always retain the ability to opt out of ECL arrangements[40].

46. Who constitutes a 'sector'? Who will make the call? How will it be made? What happens if aggregators and marketers 'call' for it, but creators and rights-holders do not? Must the call be unanimous, or will large vested interests prevail?

PIRACY OF PHOTOGRAPHS: NEW EVIDENCE OF THE SCALE OF THE PROBLEM

47. **The recent introduction of Google Image Search,** by which a photograph can be uploaded to Google, analysed by image recognition software, and online uses of that image displayed in search results, **finally allows photographers to get a proper understanding of the scale of piracy to which they are subject. This facility was not available for public use when Hargreaves conducted his review. *The results are shocking and entirely contradict Hargreaves' assertions.*** Hargreaves says:

8.19 Another way of looking at economic impact of copyright infringement is to calculate it with regard to the creative industries, rather than to the whole economy, in order to assess the sectoral point of view. A study conducted for Business Action to Stop Counterfeiting and Piracy (BASCAP) puts a value on losses from piracy equivalent to 1.24 per cent of the contribution that the core copyright industries make to the UK economy. We have examined this frequently cited study and found a number of methodological limitations, which together indicate likely overstatement of the extent and impact of piracy. This suggests that the 1.24 per cent figure is also at the upper

[38] http://www.ipo.gov.uk/ipreview-doc-ee.pdf
[39] http://www.bsac.uk.com/files/orphan%20works%20paper%20-%20june%202011%20_2_.pdf
[40] http://www.ipo.gov.uk/ipreview-finalreport.pdf

end of probability.

8.23 What conclusions can we draw from these wildly differing perspectives? Certainly that many creative businesses are experiencing turbulence, which translates into fears about the further, future impact of copyright infringement on sales, profitability and sources of investment. However, at the level of the whole economy or even at the level of whole creative business sectors, the measured impacts to date are not as stark as is sometimes suggested by the language used to describe them.

48. **In *just one day*, photographers posted this evidence to EPUK[41], a professional photographers' email list:**

'I have just done a quick Google Image search on my 'most popular' image and got 173 hits. I reckon out of all of these only a couple are properly licensed. This image was a problem from day one. As soon as it was published in the Sun and then on the Daily Mail website, it was stolen immediately. The agency tried to follow up the usages but it just got out of control very quickly. The agency is no more so I do follow up on the odd infringement where I can trace the website. If I could trace down all of the usages and get paid for them, then I would be a very rich man'.[42]

'I have dropped about 20 images into GIS. Four of those images have thrown up numerous unauthorised web uses. For example, I dropped an image into GIS and got 103 uses, probably 80% blogs (?) 10% foreign language russian, japanese, anyway stuff I couldn't understand and at least 5 commercial websites of which 4 were small UK websites and one London travel booking agency Another image produced 30 + uses, everything ranging from newspapers websites that have forgotten to pay Alamy to UK, US on line magazines, Doctors healthcare websites. Some online game website.'[43]

'Just done the same for one of my Two Fat Ladies pics.....70 GIS hits. Some [photo agency] REX and [photo stock library] Alamy sales which have been paid for but MOST are from Greek and Turkish web sites....from looking at the pics used it looks like someone has scanned a newspaper repro, you can see back to front print text showing through the image, and then just bunged it up and now everyone is using the pics.....do I spend time chasing the southern european blaggers for tuppence, ignore and only go for the thieves most likely to pay, such as The Irish Medical Times.....as well as Greek-Turkish there seems to be Hungarian (I think) and mis use in the far east as well.'[44]

'Well, do you remember the stolen picture on the University crime fighting page[45] ... I've just done a search for images like it and there are 153 results. I'm not sure if that's 153 users or 153 pages of users, all I know is its almost all the same image, its my image and few or none of them have paid for it. There are hundreds of them.

I have just run my calculator across those 153 stolen images from the image results. If they had bought through my shopping cart at my standard price that would be 300 pounds each..... 153 x300 is £45,900! That's absolutely staggering .... £45,900 just

[41] http://www.epuk.org/
[42] Photographer contact details available on request. Google Image Search results page: http://bit.ly/p7ztkV
[43] Photographer contact details available on request. Google Image Search results pages: http://bit.ly/mTEQbq, http://bit.ly/qsOtpm, http://bit.ly/pUpX2s, http://bit.ly/qJj4zh
[44] Photographer contact details available on request. Google Image Search results page: http://bit.ly/pS9zXQ
[45] http://www.research.salford.ac.uk/page/crime_security Unlicensed use of image in academic report on human rights; will probably be removed shortly

for one image and the results from just one image search!

I have clearly had more stolen than ever paid for and I am owed much more than I have ever earned, *certainly 100s of thousands and maybe millions if it were possible to trace every stolen image. It explains how I have 1.3 million visitors to my main website in a year but only sell one or 2 images a week! Since my nightmare experience of actually taking somebody to court I have pretty much ignored theft and only contacted less than half a dozen infringers who have particularly hacked me off.* ***I knew the problem was widespread but not this widespread. Its no wonder I live in poverty despite being reasonably successful in my field.'***[46] (our emphasis).

49. **It is clear from this evidence that piracy of photographs, including commercial piracy, is a much larger problem resulting in far greater loss of earnings for photographic rights-holders than Hargreaves asserts. To paraphrase Hargreaves, the measured impacts to date are far more stark than is sometimes suggested by the language previously used to describe them.**

50. **Furthermore, this is a loss for the UK economy as a whole, as a significant proportion of unauthorised uses are non-UK. Just look at the search results.**

[46] Photographer's website http://www.webbaviation.co.uk/. Google Image Search results page: http://bit.ly/oTb7VK

WHO IS PRESSING FOR COMMERCIAL USE OF ORPHAN WORKS AND ECL?

51. **In the private sector, many 'Web 2.0' companies are predicated upon the assumption of free commercial use of other people's property without payment to them**:

    Colbert:"[laughing] The hybrid economy is where everybody else does the work and Flickr makes the money!"
    Lessig: "Don't tell anyone!" - Creative Commons[47] founder, Harvard academic and outspoken critic of copyright Lester Lawrence Lessig III[48], interviewed on the Colbert Report, 8th January 2009[49]

52. *The basic principle of the 'hybrid' economy is that the general public (lawfully or unlawfully) creates content and posts it [to the website of a Web 2.0 company], or gives up its privacy to enrich the Web 2.0 company. The company gets rich and the users who create the content do not.*

    *Who would do this? Maybe those who [Facebook founder] Mark Zuckerberg apocryphally[50] referred to "Dumb F***s"? Let's call them "Zucks". So maybe it is about the Zucks. Lessig pretty much says this to Colbert's great amusement...*

    What does free content mean to Web 2.0 companies? Profit. Imagine the board room conversation: "So if we could just find a way to get these Zucks to create the content for free and then we sell it!"

    ...there isn't enough advertising money to pay arms-length licensing fees for all that content—and then, of course, you'd have to take the time to negotiate the licenses.[51]

53. **The Cultural Heritage Sector (CHS)** is intent on undertaking 'mass digitisation projects' of traditional works in its custody. It does not wish to bear the cost and disruption of locating and contacting rights-holders to obtain their permission for this. It also does not wish to bear the costs of digitisation; rather it wants to be able to contract the private sector to do this work on its behalf[52],[53]. Naturally the private sector wishes to make a return on its activities; to do so the CHS must be able to offer commercial exploitation of the resultant digital facsimiles. It also wishes to exploit them commercially itself[54].

54. **In essence the CHS, largely funded from the public purse, cannot be bothered to seek permission from property-owners to use their work or pay them for such use. Instead, it seeks broad exceptions to human rights and copyright so that it no longer has to.** It justifies this stance in 'independent' reports[55] that overstate its case via selective and partial use of statistics, many of them wildly exaggerated,

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[47] http://creativecommons.org/
[48] http://en.wikipedia.org/wiki/Lawrence_Lessig
[49] http://www.colbertnation.com/the-colbert-report-videos/215454/january-08-2009/lawrence-lessig
[50] http://gawker.com/5538216/facebook-ceo-slammed-dumb-users-who-trusted-him-in-college
[51] http://musictechpolicy.wordpress.com/2011/08/22/creative-commons-corporation-because-it-sure-seems-to-cost-a-lot-of-money-to-give-things-away-for-free/
[52] http://pressandpolicy.bl.uk/Press-Releases/The-British-Library-and-Google-to-make-250-000-books-available-to-all-4fc.aspx
[53] http://pressandpolicy.bl.uk/Press-Releases/British-Library-and-brightsolid-partnership-to-digitise-up-to-40-million-pages-of-historic-newspapers-271.aspx
[54] http://www.stop43.org.uk/proposals/ipreview/ipreview/ipreview/bl_scenarios.html
[55] http://www.jisc.ac.uk/media/documents/publications/infromthecoldv1.pdf

extrapolated as they are from notional and questionable starting points.

55. However, **its legal needs as public guardians of the Nation's cultural heritage can be met simply by amendment of Section 42 of the Copyright, Designs and Patents Act 1988**[56]:

'Section 42 of the act restricts use of a preservation copy to preserve a fragile item or to replace a lost item. ***If Section 42 were extended to cover all types of work, whether orphan or not and in any medium, but these use restrictions continued, libraries and archives should be content.****' - Professor Charles Oppenheim*[57]*, member of JISC Working Group on Intellectual Property Rights*[58]*, commenting on Will Gompertz' blog, 16 May 2011*[59] (our emphasis).

56. **The CHS knows that its demands are controversial:**

We have received the following report from Tim Padfield of The National Archives and Sarah Fahmy of JISC regarding a meeting they and a representative from the British Library, Ben White, had with staff from the UK Intellectual Property Office: [They were] at pains to ensure we understood that nothing has yet been decided on what orphan works legislation will finally look like nor how it will work. ***They also said that there was a serious risk that the clause on the subject in the Digital Economy Bill would be removed if there was any suggestion that it was controversial.*** **We were asked not to make a lot of noise about the issue.**[60] (our emphasis).

57. **The IPO grossly overstates the case for commercial use of orphan works and ECL.** The Economic Impact of Recommendations supporting document to Hargreaves' report [61] is largely a work of fiction, little better than schoolboy economics. *'The "economic justification" is full of such dubious calculations – many numbers have been plucked out of the air at random – and loaded statements.'*[62] **Despite Hargreaves' call for IP policy to be 'evidence-driven' the IPO's economic case remains entirely unproven, and it is upon this case that any 'general interest' exception to human rights must be based.**

58. **Notably, the EU is much more circumspect in its proposed Orphan Works Directive**, limiting use to non-commercial use by the Cultural Heritage Sector, with few, tightly-defined exceptions[63]. The EU approach is not without its problems but is largely acceptable to authors and rights-holders, **and does not appear to require the wholesale breach of human rights to achieve its ends**.

LEGALISED PIRACY IS THEFT

59. The Theft Act 1968 Section 3[64] and Section 6[65] make it clear that copyright infringement (a.k.a. 'piracy') is appropriation, and therefore theft.

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[56] http://www.legislation.gov.uk/ukpga/1988/48/section/42
[57] http://www.naomikorn.com/about.htm
[58] http://www.jisc.ac.uk/aboutus/howjiscworks/committees/workinggroups.aspx
[59] http://www.bbc.co.uk/news/entertainment-arts-13388167?postId=108826263#comment_108826263
[60] http://www.jisc.ac.uk/media/documents/projects/ipr%20newsletter%2041.doc
[61] http://www.ipo.gov.uk/ipreview-doc-ee.pdf
[62] http://www.theregister.co.uk/2011/08/24/ipo_economic_justification_of_hargreaves_wtf/
[63] http://ec.europa.eu/internal_market/copyright/docs/orphan-works/proposal_en.pdf
[64] http://www.legislation.gov.uk/ukpga/1968/60/section/3

60. The recent ruling in 20C Fox vs. BT[66] has established in UK case law that:

- copyrights are property rights protected by Article 1 of the First Protocol of the European Convention on Human Rights, as also expressed in Article 1 of the First Protocol of the Human Rights Act 1998;
- piracy of copyright work is a breach of the copyright holder's human rights;
- the copyright holder is therefore entitled to legal redress;
- and, because 'so far as possible, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with human rights', legislation drafted and enacted subsequent to the enactment of the Human Rights Act 1998 must also be read and given effect in a way which is compatible with human rights.

61. It follows that **any proposed legislation to enable the commercial use of orphan works or the extended collective licensing of copyright works, which is intended to result in a copyright holder in practice being 'deprived of his possessions' without his knowledge or consent (which Mr. Justice Arnold has judged to be the consequence for rights-holders of piracy of their copyright work) would breach Article 1 of the First Protocol of the Human Rights Act 1998**.

PROBLEMS OF COMMERCIAL USE OF ORPHAN PHOTOGRAPHS

62. ***The Privacy and Exclusivity Problems:*** Can a photograph legally be published or used commercially? In many cases it cannot[67]:

Q: Is this girl…

- ☐ an MP's daughter?
- ☐ a professional model?
- ☐ a Ward of Court?
- ☐ on the *At Risk* register?

A: Any of the above. There is no way to tell - this photo is an orphan work.

Q: Is this photo…

- ☐ a press photograph (*£65 – £150*)?
- ☐ a PR shot for an events company (*£75 – £150*)?
- ☐ a privately-commissioned portrait, not legally publishable without the commissioner's consent (*£250 – £450*)?
- ☐ a commercial catalogue shot, using a professional model, for exclusive use by the client (*£650 – 1,500*)?

A: Any of the above. There is no way to tell - this photo is an orphan work.

http://www.legislation.gov.uk/ukpga/1968/60/section/6

[66] http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/28_07_11_bt_newzbin_ruling.pdf

[67] http://www.stop43.org.uk/pages/pages/news_files/2c56f3d59e0e31a68845f7c210854973-28.php

[68] http://www.stop43.org.uk/pages/pages/news_files/86e0a3ac8f8b3c99299bdf258a183ca5-27.php

65. Consequently, what can be deemed an orphan work is a subjective judgement. As search systems refine, what may today be classed as a derivative work may not be tomorrow, or classed as a derivative work using one set of search criteria, will not be when using another. The reverse may be true when the same is done with a different work. Therefore, using automated systems, there can be no definitive method to establish whether one work is a derivative of another, and so they cannot be used consistently and reliably to define what is an orphan work. Currently such judgements are made by the human eye, and in some cases settled by a court judgment.

66. ***Foreign Rights-holders:*** By definition, any commercial orphan works scheme will end up licensing works belonging to foreign authors and rights-holders.

67. If such as work is licensed to a user with US assets and that work is registered with the US Copyright Office (whose registry is not machine-searchable), that user will be liable under US law to pay statutory damages of up to $150,000 per infringement to the rights-holder[70].

68. In the case of works involving multiple secondary rights to models, models' agents and so on, the potential liability becomes huge. Hargreaves is silent on this problem.

69. ***Misrepresentation:*** What if the proposed use misrepresents people depicted in the image and breaches their rights, including their contractual rights to exclusive use if the image was commercially produced?[71]

71. By not breaching human rights or copyright law, Stop43's proposals for cultural preservation and use of orphan works avoid this problem whilst meeting the Cultural Heritage Sector's needs, and also stimulating economic growth[72].

72. Under the auspices of the British Copyright Council the community of photographic creators has produced a list of six caveats prerequisite to any orphan works licensing scheme.[73] Stop43 are signatory to it.

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[69] http://www.stop43.org.uk/pages/pages/news_files/877a6f69aa6b2c1cf86e30d508cdbe2c-26.php
[70] http://en.safecreative.net/faqs/the-u-s-copyright-office-registration/
[71] http://www.stop43.org.uk/pages/pages/news_files/30e7c6ca8c5a3b56e38e0454f11eb7f0-44.php
[72] http://www.stop43.org.uk/proposals/ipreview/ipreview/nca.html
[73] http://www.ipo.gov.uk/ipreview-c4e-sub-bcc.pdf

PARODY

73. A parody is not the same thing as a ‘mash-up’: it must be an original work throughout. Taking a copyright photograph and changing it slightly is not parody.

74. Neither Hargreaves' Report nor the Government's Response have explicitly considered the interaction between fair dealing for parody and the Moral Right to object to derogatory treatment of work[74], one of the IP rights guaranteed as a minimum[75] by our membership of the Berne Union[76].

75. Authors must retain the right to object when 'parodic' use becomes derogatory.

76. The recommendation for fair dealing in parody does not discriminate between different media, dealing with each appropriately. Altering a photograph without permission for the purposes of parody infringes the copyright holder's moral right of integrity. This is particularly important as authenticity is the very essence of a photograph, especially a documentary or news photograph, and it is fundamental to an author's reputation.

77. Hargreaves instances the Newport State of Mind case. He neglects to mention the crucial legal mistake those parodists made: to use the original meolody (or something very close to it) without applying for a Licence to Use it. Parodying the words to a song does not confer an automatic right to use the same tune, little-changed.

78. A photograph incorporated unaltered into a work of parody should command a reproduction fee in the normal way.

FORMAT SHIFTING

79. The Cultural Heritage Sector somewhat disingenuously likes to plead that current law prevents it from digitising cultural artefacts rotting in its basements, and that they will be lost forever[77]. In fact they won't; the CDPA 1988 already allows copying for preservation purposes of most kinds of media[78]. As we have said earlier on the subject of Orphan Works, and as JISC advisor Professor Charles Oppenheim[79] advocates[80], Stop43 recommend that CDPA 1988 Section 42 be extended as a matter of urgency to allow the digitisation of any work strictly to preserve it, and where appropriate make it publicly available for cultural use.

80. Many social and wedding photographers and portrait houses base their businesses on print and album sales. In doing so they guarantee quality products for their clients and maintain their professional reputations. A general Home Copying exception would not only endanger a major income stream, but also catastrophically undermine reputations for quality. While Stop43 are careful to avoid special pleading, any proposed Home

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[74] http://www.legislation.gov.uk/ukpga/1988/48/part/I/chapter/IV/crossheading/right-to-object-to-derogatory-treatment-of-work

[75] http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html#P123_20726

[76] http://www.wipo.int/treaties/en/ShowResults.jsp?country_id=ALL&start_year=ANY&end_year=ANY&search_what=C&treaty_id=15

[77] http://www.jisc.ac.uk/media/documents/publications/infromthecoldv1.pdf

[78] http://www.legislation.gov.uk/ukpga/1988/48/section/42

[79] http://www.naomikorn.com/about.htm

[80] http://www.bbc.co.uk/news/entertainment-arts-13388167?postId=108826263#comment_108826263

Copying Exception must take particular note of these consequences and include appropriate and effective safeguards**.**

FAIR CONTRACT LAW

81. Hargreaves' remit and the the Government's intention is to boost economic growth by increasing the value of the IP sector, and yet IP is specifically excluded from UK fair contract law by Schedule 1, clause 1(c) of The Unfair Contract Terms Act 1977 (UCTA)[81]:

    Sections 2 to 4 of this Act do not extend to-(c) any contract so far as it relates to the creation or transfer of a right or interest in any patent, trade mark, copyright [or design right], registered design, technical or commercial information or other intellectual property, or relates to the termination of any such right or interest;

82. Sections 2 to 4 of the Act deal with Negligence Liability, Liability arising in Contract and Unreasonable Indemnity Clauses. These subjects are the real financial killers for creators. Schedule 1, clause 1(c) effectively deprives creators of protection under UCTA and leaves us prey to oligopsonistic market bullies.

83. The Cultural Heritage Sector and academia both complain that they are subject to onerous licence terms and conditions by corporate rights-holders. Stop43 have described how several of the photographic markets have failed as a consequence of endemic predatory contract terms and rights-grabs[82].

84. This situation can only be improved, and proper, tax-yielding growth stimulated in these markets, by the repeal of Schedule 1, clause 1(c) of The Unfair Contract Terms Act 1977 and the introduction into contract law of inalienable copyright, so that contract terms demanding the assignment of copyright become unfair under the Unfair Contract Terms Act 1977. Inalienable copyright must still allow for voluntary assignment.

THE INTELLECTUAL PROPERTY OFFICE

85. The IPO is an Executive Agency run as a self-supporting business charged with achieving a return on capital employed of 4%, which at some indeterminate point was made responsible for developing UK copyright law but makes no money from copyright, has offered the use of its £55 million surplus as seed capital for the establishment of the DCE (and presumably requires a 4% return on it), and according to Hargreaves' report wishes to be the source of 'statutory opinion' on copyright matters[83]. **It appears to want to be the prosecutor, judge, jury and financial beneficiary of all things copyright**.

86. **Such an entity cannot by any stretch of the imagination be considered disinterested or impartial.** It is evidently riven with conflict of interest and Stop43 has little faith in it.

87. Given the nature of copyright, encompassing as it does human, moral, property and economic rights, and given that copyright artefacts are almost all primarily *cultural* artefacts, **responsibility for developing UK copyright law and policy should be**

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[81] http://www.legislation.gov.uk/ukpga/1977/50
[82] http://www.stop43.org.uk/proposals/ipreview/ipreview/ipreview/markets.html
[83] http://www.stop43.org.uk/pages/news_and_resources_files/fb435cc00dc81a126f89bcd395c8ee2a-104.php

removed from the IPO and placed with the DCMS, which can be expected to have a better understanding of the interplay of these rights.

88. Hargreaves' proposed DCE Champion must be entirely detached from the IPO or he will utterly lack credibility with creators.

RECOMMENDATIONS

89. Incorporate into UK law automatic and unwaivable Authors' Moral Rights, as the UK is obliged to under the international human rights treaties and EU Charters referred to earlier, in a way that also allows an author voluntarily and without coercion to remain anonymous;

90. Repeal the Moral Rights Exceptions in Chapter IV of the Copyright, Designs and Patents Act 1988;

91. Extend Section 42 of the Copyright, Designs and Patents Act 1988 to cover all types of work, whether orphan or not and in any medium;

92. Legislate for the creation of a Digital Rights Registry/Digital Copyright Exchange;

93. Legislate for the creation of a revokable Statutory License enabling the Digital Rights Registry/Digital Copyright Exchange to make available orphan works to the general public for their Cultural Use;

94. Introduce properly effective, proportionate and dissuasive legal remedies for copyright infringement, deliberate metadata stripping and deliberate orphaning, as the UK is required to do by EU Directive 2004/48/EC;

95. Introduce the IP Small Claims track in the Patents County Court as initially recommended by Lord Justice Sir Rupert Jackson and endorsed by Hargreaves;

96. Repeal Schedule 1, clause 1(c) of The Unfair Contract Terms Act 1977;

97. Make copyright inalienable in contract law, so that contract terms demanding the assignment of copyright become unfair under the Unfair Contract Terms Act 1977, but allow for voluntary assignment;

98. Appoint an IP Ombudsman to arbitrate unfair contract disputes involving IP;

99. *Do not* introduce any scheme legalising the commercial use of orphan works beyond those defined in the EU proposed Orphan Works Directive, or any Extended Collective Licensing scheme that would in practice supplant primary licensing by rights-holders to users;

100. *Do not* introduce a two-tier copyright system into the UK as a result of any copyright registration scheme.

Supplementary written evidence submitted by Stop 43

EXECUTIVE SUMMARY

This submission consists of evidence concerning:

0. Moral rights
1. Attitudes to Copyright in Academia
2. Orphan Works
3. Mass Digitisation
4. Extended Collective Licensing in other jurisdictions
5. Extnded Collective Licensing in general
6. Content and Data Mining
7. Preservation of Digital File Metadata
8. Fair Contract Law
9. Small Claims Track in the Patents County Court
10. Ombudsman for IP
11. Differences between the National Cultural Archive and the Digital Copyright Exchange concepts
12. Misrepresentation.

It is supplementary to and should be read in conjunction with Stop43's primary submission to the Committee.

ABOUT STOP43

Stop43 is composed of members of Artists' Bill of Rights, The Association of Illustrators, The Association of Photographers, The British Institute of Professional Photography, The British Press Photographers' Association, Copyright Action, EPUK, The National Union of Journalists, and Pro-Imaging: professionals who were sufficiently concerned and motivated by the threat that Digital Economy Bill Clause 43 posed to our livelihoods that we took direct action. We had the support of the 16,000 members of the ten organisations listed on our website, and that of **thousands of photographers**, as proven by their direct lobbying action that resulted in Clause 43 being removed from the Digital Economy Bill. Since then, professional illustrators and members of the cultural heritage sector who understand and support our position have joined us and contributed to this submission. **Stop43 have a mandate to lobby for our 8 tenets from the 2,100+ members of our Facebook Group.**

MORAL RIGHTS

1. Apart perhaps from databases, copyright works are primarily *cultural* artefacts. Almost all copyright works are expressions of their creators' likes or dislikes, wishes, beliefs or opinions. They express their creators' personalities.

2. At Q177, Paul Ellis invited the Committee to consider that in creating works that are meaningful to them, authors and creators know this intuitively and do regard their creations as expressions of their personalities: *'Again, bringing it back to the idea that all of us are amateur photographers, you take your photographs: how do you feel about your photographs? Do any of you enter your photographs into photographic competitions? If so, why do you do it? If they win or if they are published, do you not feel a certain amount of pride that you, as a photographer and creator, have been validated? Your work has been found to be good enough to be used in this way. I certainly do as a photographer. I therefore propose that authors and creators do feel that their creations are an expression of their personality.'*

3. It is for this reason that Moral Rights exist: to allow a creator to assert his authorship and ownership of this expression of his personality, his reputation; and to protect it from derogatory treatment. It is in this way, as well as physically, that amateurs feel that they 'own' the things which they create.

4. It is for this reason that the Moral Rights exceptions in Chapter IV of the Copyright, Designs and Patents Act 1988[1] should be repealed, and it is for this reason that the commercial use of orphan works and extended collective licensing of any works breach the authors' moral rights, and because they are

[1] http://www.legislation.gov.uk/ukpga/1988/48/part/I/chapter/IV

enshrined in international Human Rights treaties and laws, their human rights. Such breach is *serious*, and this problem must be treated *seriously*. Hargreaves ignores it.

5. **Perhaps because of the veil of euphemism and jargon in which it is wrapped, the general public appears largely to be blissfully ignorant of what is being proposed to do with their expressions of their personalities. Stop43 put it to you that if the general public properly understood what was being proposed for their rights, their outcry would be deafening and their resistance implacable.**

6. Some of this informed opposition was demonstrated by the successful campaign against Clause 43 of the Digital Economy Bill, led in large part by Stop43.

ATTITUDES TO COPYRIGHT IN ACADEMIA

7. At Q203, Jim Killock stated: *'there is a lot of academic study globally around questions about copyright infringement' and 'The academics … show very different sort of pictures often than the copyright owners show'.*

8. **With regard to copyright, academics have distinct interests of their own.** The system for publishing academic research is notoriously dysfunctional. Journal publishers accept research papers on condition that the author signs over the copyright for nothing. Meanwhile institutional libraries are compelled to pay out for very expensive subscriptions so that academic staff can access the latest research.[2],[3],[4] Accordingly, **academics are inclined to view copyright chiefly as a barrier to access. They typically show little interest in the economics of small creative businesses or the crucial role of copyright in sustaining the markets in cultural products.**

ORPHAN WORKS

9. A JISC study in 2009 found that the average proportion of orphan works estimated to be in public collections in the UK was between 5% and 10%[5]. The figure was higher in archives, as high as 21% to 30%, because of the much higher percentage of unpublished material they hold. In other words, most so-called 'orphans' are works that have never been published.

10. Note that these are *estimates*, but they sound more plausible than other figures being touted. The British Library has stated[6] that it 'estimates that well over forty percent of all creative works in existence are potentially orphaned.' 'Estimates' – or speculates? 'Potentially' – it really has no idea. This figure of 40% has been widely quoted. Stop43 think it is meaningless.

11. At Q161, Ben White said: *'The economic benefits of mass digitisation are enormous. We have just published a study ourselves, where 43% of books from 1870 to 2010 were orphan works. In any large scale projects, orphan works will be an important part.'*

12. He is referring to a study by Barbara Stratton, 'Seeking New Landscapes: A rights clearance study in the context of mass digitisation of 140 books published between 1870 and 2010', British Library, Sept 2011.[7] For key findings see p. 5.

13. **He did not mention that of the rights-holders traced, more than half did not want their work digitised:**

- Permission to digitise was sought for 73% of the books in the sample. Of these:
- rights-holders gave permission for just 17% of the books to be digitised;
- **permission was not granted for 26% of the titles.**

14. 56.5% of books in the sample were published by non-mainstream publishers such as professional associations, institutions and political organisations. The type of publisher had a large impact on whether works were orphaned, with self-published works accounting for 51% of all orphan works in the study.

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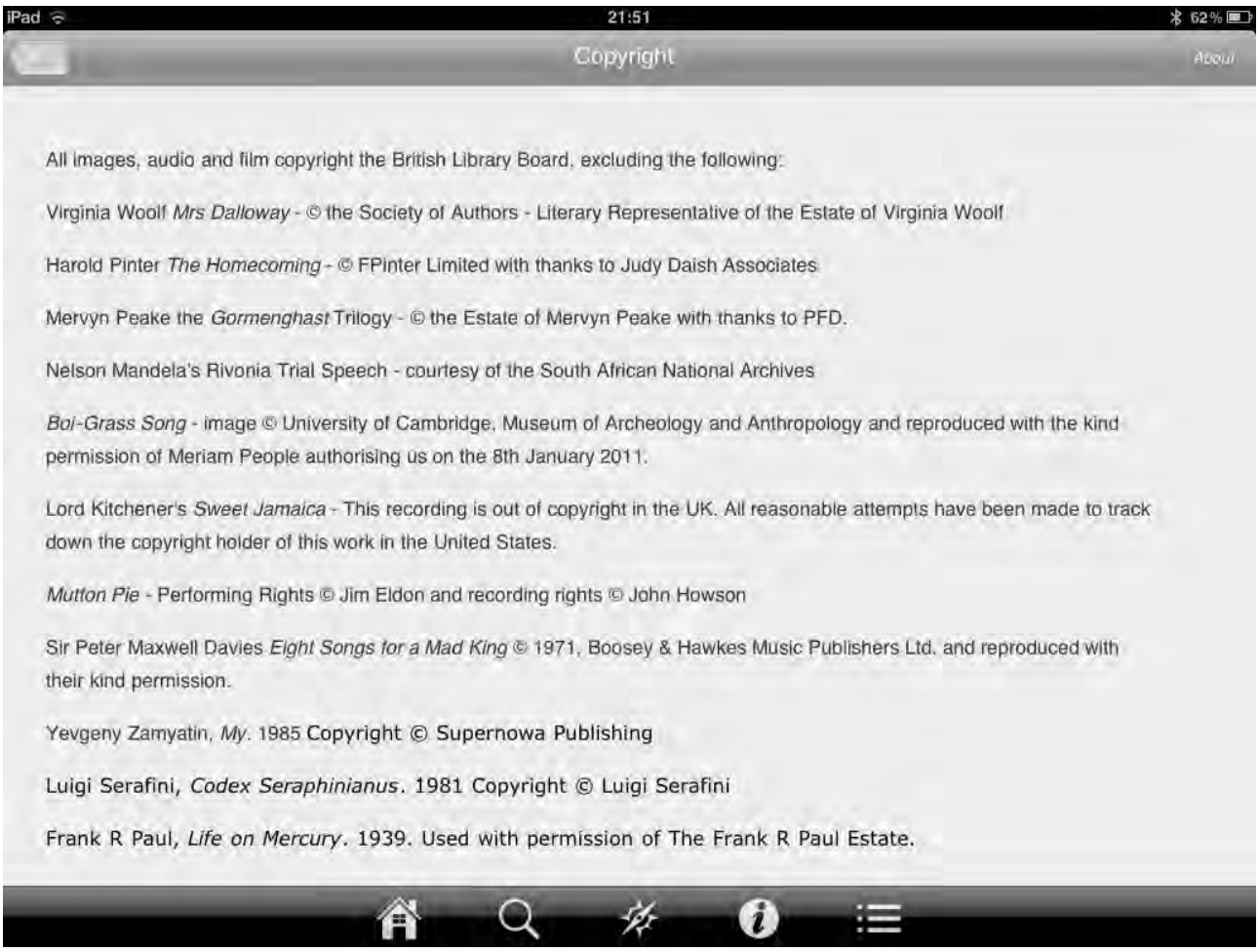
[2] http://www.economist.com/node/18744177
[3] http://www.guardian.co.uk/commentisfree/2011/aug/29/academic-publishers-murdoch-socialist
[4] http://www.timeshighereducation.co.uk/story.asp?storycode=417576
[5] http://www.jisc.ac.uk/media/documents/publications/infromthecoldv1.pdf p. 18
[6] http://web.archive.org/web/20100827021717/http://www.bl.uk/news/pdf/ipmanifesto.pdf
[7] http://pressandpolicy.bl.uk/imagelibrary/downloadMedia.ashx?MediaDetailsID=1197

15. On average it took 4 hours per book to undertake a 'diligent search'. This involved clarifying the copyright status of the work and then identifying rights-holders and requesting permissions. From a rights-holder's perspective this does not appear to be excessive.

16. **Is it really worth disrupting the functioning market in rights to make these self-published and institutionally published 'orphans' more widely available? What are the justifications, cultural and economic? What is the value of this material? And to whom the profit, if any? Is this *really* a 'treasure trove', as Hargreaves and British Library CEO Dame Lynne Brindley insist?**

17. At Q167, Ben White said: *'One thing again we have to be very mindful of here is that there is a lot of demand for English language material abroad. We have worked with Apple and have put on the iPad some 19th century books. It was the third most downloaded app in the UK in June, and now there are 250,000 subscribers globally.'*



18. This is the Copyright screen of the British Library's iPad app[8]. Stop43 note that the British Library has asserted copyright over digital facsimiles of work that is out of copyright and in the public domain, and that one work included with this app, Lord Kitchener's *Sweet Jamaica*, appears to be orphan:

19. **We cannot imagine that the British Library was unable to compile a selection of works that was wholly in the public domain or rights-cleared and we wonder at the inclusion of this item.**

MASS DIGITISATION

20. **Mass digitisation is touted by its proponents as an unalloyed good. Few things in life are, and this is no exception.**

21. In October 2011 the US Office of the Register of Copyrights produced a study entitled 'The Legal Issues in Mass Digitisation: A Preliminary Analysis and Discussion Document'[9].

[8] http://itunes.apple.com/gb/app/british-library-19th-century/id439911364?mt=8

22. *'In most countries where it exists, extended collective licensing only applies to limited types of works and uses, such as the use of published works for educational and scientific purposes, or the reproduction of works within an organization solely for internal use. Applying extended collective licensing to a mass digitization project that provides access to a wide range of works would be a dramatic extension of the concept.'* (p. 36)

23. At Q 174, Ben White said: *'What we have seen more recently is that extended collective licensing has been adapted to facilitate mass digitisation. Again going back, I have been part of stakeholder discussions all last year in Brussels. There is an MoU [Memorandum of Understanding], which the publishers, the collection society sign, that essentially envisages extended collective licensing for what are known as "out of commerce works", so again in our case millions of works across the 20th century.'*

24. **This is a blueprint for a forced collectivisation programme.**

25. We have seen the results of previous forced collectivisation programmes. In the Soviet Union, Stalin collectivised the farms and expropriated the kulaks - independent peasant farmers. This did severe damage to agricultural production, resulting in widespread famine. One can also consider the farm 'reform' in Zimbabwe, the result of which is similar: the transformation from a country once called 'The Breadbasket of Africa' into one that is almost entirely reliant on humanitarian aid, as most of its farming expertise has gone.

26. **Western market economies no longer look to nationalisation, the public collectivisation of work and property, as an efficient solution to structural economic problems. It is a last resort.**

27. Of course there is also such a thing as corporate collectivisation. The Google Book Settlement was an attempt to get the state, in the shape of the US courts, to enable the collectivisation of book copyrights by and in favour of Google Inc.

28. **Forced collectivisation of our culture and the destruction or severe weakening of the market economy that supports freelance creators will lead inevitably to a deterioration in the quality and quantity of our cultural products, and lead to market distortion.**

29. We don't want a market economy that is completely unfettered: we want the government to retain control, as it should, and ensure that contracts are both fair and enforceable, and unauthorised use without payment is discouraged - but we don't want to see the markets for creative works:

● stifled by gargantuan public (or public-private) projects (like the mass-digitisation schemes plugged by the BL and JISC)
● burdened by unnecessary bureaucratic requirements (like having to find out about and opt out of such schemes)
● undermined by legislation designed to favour big technology companies such as Google at the expense of creators and media companies.

30. At Q161, Ben White asserted: *'The economic benefits of mass digitisation are enormous.'* **Not only is this assertion entirely unproven, it rests upon the IPO's risible 'Economic Impact' document[10], which has comprehensively been discredited not only by UK Music in their submission to this Committee[11], but also Sir Robin Jacob in his oral evidence**[12], in which he says at Q86:

'There are some amazing numbers in the Government's response, and I do not believe that there is any reliable basis for any of those, I am sorry to say. I can remember when the Trade Marks Act was introduced in 1994. The Minister said it was going to save British industry £30 million a year. I shouldn't think there is a single trade mark department in any company that is smaller now than it was then. I think they are all bigger. Somebody gave the Minister that figure. I said at the time I did not believe it and I am afraid some of these numbers in Hargreaves I do not believe. I do not know whether you have probed into where those figures came from and how robust they are-to use another modern word-but I cannot prove it and I do not believe anybody can prove it.'

On this basis the British Library would deprive the general public of their human rights.

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[9] http://www.copyright.gov/docs/massdigitization/USCOMassDigitization_October2011.pdf
[10] http://www.ipo.gov.uk/ipreview-doc-ee.pdf
[11] http://www.publications.parliament.uk/pa/cm201012/cmselect/cmbis/writev/1498/m68.htm
[12] http://www.publications.parliament.uk/pa/cm201012/cmselect/cmbis/uc1498-ii/uc149801.htm

31. Ben White promotes the requirement for diligent search, and then contradicts himself when complaining of the costs and delays occasioned by such diligent search. He can't have it both ways. The British Library obviously wants a form of commercial ECL that bypasses the need for diligent search.

32. **Stop43's Cultural Use concept obviates the need for diligent search, without harming creators and rights-holders.**

EXTENDED COLLECTIVE LICENSING IN OTHER JURISDICTIONS

33. At Q161, Ben White asserted: *'What the Government is suggesting in terms of a licensing solution is pragmatic, sensible and of course something that exists in Canada, Japan, Scandinavia and Hungary. There are many countries that are doing this.'*

    At Q166, he asserted: *'In Scandinavia, this has been going on for 50 years; it has not really been an issue.'*

    These assertions paint a highly inaccurate and somewhat misleading picture of the nature and purpose of ECL schemes in those countries. None of those schemes are designed to facilitate mass digitisation and the kind of mass use of orphan works and mass ECL that Hargreaves envisages. Most appear to be little-used.

34. CANADA: scheme running for around 20 years. **Only 249 licenses have been granted in twenty years.**

35. **JAPAN**: scheme running since 1970. **Only 82 licenses have been granted since 1972** for recording, publishing (print and digital) and ringtones[13]. Of the 82, seven applications were made by the National Diet [Parliament] Library for their Digital Library[14].

36. New rules came into force last year[15] allowing applicants to make use of orphans while their applications are pending[16]. Application must be advertised. **At the time of writing, only three advertisements for orphan work usage licences are published there**[17] [link to translation[18]].

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[13] http://www.bunka.go.jp/1tyosaku/c-l/results_past.html

[14] http://kindai.ndl.go.jp/information/shiryo_arekore/shiryo_arekore_10.html

[15] http://www.cric.or.jp/cric_e/clj/cl2_2.html#cl2_2+S8

[16] The main points of the Japanese scheme are:

0. The scheme is administered by the Commissioner of the Agency for Cultural Affairs
1. The work must have been previously published
2. There must be a diligent search for the copyright owner
3. Compensation for the copyright owner 'corresponding to an ordinary rate of royalty in the case' must be deposited
4. The intended means of exploitation must be set out in the application to the Commissioner
5. Any copies of the work made under this licence must carry a notice to the effect that it has been licensed in accordance with the relevant paragraph of the law. This is to include the date when the licence was issued.

1. On issuing a licence the Commissioner must publish a notice in the Official Gazette.
2. Article 68 appears to authorise a compulsory licensing scheme for previously broadcast works;
3. Article 69 covers 'commercial phonograms': audio recordings.

These are the only cases in which non-orphans are to be subject to compulsory licences: broadcast works and previously issued sound recordings.

[17] http://www.cric.or.jp/c_search/c_search2.html

[18] http://translate.google.co.uk/translate?sl=auto&tl=en&js=n&prev=_t&hl=en&ie=UTF-8&layout=2&eotf=1&u=http%3A%2F%2Fwww.cric.or.jp%2Fc_search%2Fc_search2.html

37. Rather alarmingly, there appears to be no straightforward way for revenant rights-holders who discover their property being used under this scheme to claim royalties owed to them for use of their work. Stop43 have been unable to discover any single point of contact.

38. **HUNGARY**: scheme running for only one year. Commentator Aniko Gynge writes: *I have to admit that although under certain circumstances a single licence can be requested for multiple orphan works, the scheme is not fully suited to deal with mass-scale digitisation projects involving a large number of works. Nevertheless – as far as I know –* ***the Hungarian Patent Office has received a serious request from the National Audiovisual Archive to license 370 works and one other from the Library of the Hungarian Parliament for about 1000 works.***..[19]

39. ...***As a final remark I have to emphasise that a new legal regime in its first working year should not be adjudicated upon. We cannot yet judge its effectiveness.****' - 'Aniko GYENGE: The Hungarian model of licensing orphan works Presentation at the ES Presidency conference on „Digitisation of cultural material. Digital libraries and copyright" 14 March 2010, Madrid*[20]

40. This web page[21] contains a form in English for searching the Hungarian orphan works register. There is no facility provided for browsing the list, but use of the wild card token * in author and title returns **a list of 16 applications which appear to have been granted to date.**

41. **SCANDINAVIA**: see BSAC Orphan Works paper Annexe D[22]. Scandinavia is obviously a unique situation: *'The broader cultural background may … be said to be small homogenous societies built on a high degree of trust and transparency. – Thomas Riis and Jens Schovsbo, 'Extended Collective Licenses and the Nordic Experience' (January 2010)*[23]

42. [The Nordic countries that developed extended collective licensing have relatively small populations. The largest is Sweden, with a population of nine million. As a comparison, Greater London has a population of 7.75 million.]

43. 'The system [of extended collective licensing] is best suited for countries where rights holders are well organized.' – World Intellectual Property Organization (WIPO) and International Federation of Reproduction Rights Organisations (IFRRO), April 2005[24]

44. 'In Sweden, the ECL regime covers several types of works, including:

● *certain reproduction (including digital reproduction) for educational purposes;*
● *governmental, municipal, business and organization reprographic reproduction of published literaryworks (including works of fine art within such literary works) for internal purposes;*
● *archival and library use to provide works to the public; and*
● *certain retransmission of broadcasts.' - 'The Legal Issues in Mass Digitisation: A Preliminary Analysis and Discussion Document', US Office of the Register of Copyrights*[25]

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[19] Hungary appears to be a unique situation:

...in Hungary there was another and perhaps more important argument... and that was the legal situation of our national film heritage. Most of the rights of the older Hungarian films are owned by the state, thanks to a nationalization during the communist area. The nationalization covered all the rights which were guaranteed by the 1969 copyright act. Nevertheless the digital rights (and especially the right to make the work available to the public online) remained behind with the original right holders who are mostly unknown or we do not know where they can be found. This was due to a very old principle of Hungarian law, namely that no licence can be validly granted for a means of use that is unknown at the time a contract is concluded... - Aniko Gynge, op. cit.

[20] http://www.mcu.es/principal/docs/MC/PresidenciaUE2010/Aniko_Gyenge_presentation.pdf
[21] http://epub.hpo.hu/e-kutatas/?lang=EN
[22] http://www.bsac.uk.com/files/orphan%20works%20paper%20-%20june%202011%20_2_.pdf
[23] http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1535230
[24] http://www.ifrro.org/upload/documents/wipo_ifrro_collective_management.pdf
[25] http://www.copyright.gov/docs/massdigitization/USCOMassDigitization_October2011.pdf p. 93/ Appendix p.3

45. If the British Library thinks these schemes provide important evidence for its case it should provide detailed information about them, with references, rather than the vague statements it has made thus far.

46. ECL for repeat broadcast rights, photocopying, etc has certainly been around for quite a while - in Scandinavia. It apparently works well in those small countries, and is not so different to the voluntary collective licensing schemes that operate in the UK.

47. ECL in respect of primary publishing rights and to facilitate mass-digitisation schemes is another matter. There is *no* report that we can find anywhere of a scheme of that kind that has advanced far enough to review and report on how well it works, and its economic impact on the creative industries.

48. The KOPINOR scheme[26] is a pilot, and limited in scope. It has only been running since 2009. **It terminates at the end of this year.**

49. Regardless of the British Library's claims, we are in largely uncharted territory, both with regard to mass-digitisation of in-copyright works for access and also with respect to the use of ECL schemes to facilitate it.

50. At Q166, Ben White said: *'I would like to make two points: one is again to stress that in Japan, Canada and Scandinavia, where they do have solutions for orphan works, photographs are not treated any differently from any other work.'*

51. Stop43 have detailed at great length the reasons why each medium must be assessed, treated and regulated for on its own merits. These reasons include the specific and unique problems consequent on the commercial use of orphan photographs[27], and the different usage and value chains characteristic of each medium[28]. **One size does not fit all**. In their evidence, Chris Marcich representing audiovisual rights-holders, Richard Mollet representing text rights-holders and Robert Ashcroft representing musicians and composers all agreed with this point. **The creator and rights-holder community is unanimous.**

52. At Q166, Ben White asserted: *'The other important thing to understand is that, from the cultural sector, what we are talking about is putting up books, photographs or artistic works of about 500 kilobytes. I used to run the picture library at the British Library. Nobody approaches us for 500kilobyte web resolution photographs or artistic works; it is 50 megabytes. It is 100 times larger. We need to make a clear distinction between webready and commercially viable photographs. There is a huge difference. We need to look in the details of this.'*

53. This assertion is demonstrably absurd.

54. Most commercial websites feature photographs and other visual imagery. Look at this list[29] of the world's 15 most-visited news websites. By definition, this imagery is 'webready'; each image typically has a filesize of less than 100 kilobytes. Does Mr. White seriously expect us to believe that such images are not 'commercially viable'? They are clearly of such commercial value to those publishers that they are allowed to occupy space on those highly valuable web-pages.

55. **White conflates the technical demands of print publishing with the main aim of mass digitisation, which is to enable the use of imagery on websites.**

56. As Robert Ashcroft said at Q207, many collecting societies are monopolies. They are mature businesses. For most of them, one of the few remaining ways to expand their business is to extend the rights they license beyond those assigned to them by their memberships. Consequently they tend to be in favour of ECL.

57. It is therefore unsurprising that photographers' and illustrators' interests have been sold out by the collecting societies under the recent EU Memorandum of Understanding on Key Principles on the

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[26] http://www.ifla.org/files/rare-books-and-manuscripts/rbms-newsletters/rarenewsletter-jan2010.pdf
[27] http://www.stop43.org.uk/orphan_works/orphan_works_problems.html
[28] http://www.stop43.org.uk/proposals/ipreview/ipreview/ipreview/use.html
[29] http://www.ebizmba.com/articles/news-websites

Digitisation and Making Available of Out-of-Commerce Work[30] in order to facilitate mass digitisation projects. Authors can opt out. Illustrators and photographers cannot. That's a very big deal.

EXTENDED COLLECTIVE LICENSING IN GENERAL

58. The UK has limited scope within which to legislate. It cannot introduce exceptions that go beyond those are specifically allowed under article 5 of the EU InformationSociety Directive, clause 5 of which states:

(5) The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.

59. **No matter what others might assert, Extended Collective Licensing is not a normal exploitation of the work**. Primary licensing, and the voluntary and specific assignment of rights to collecting societies to carry out secondary licensing, are the normal exploitation of the work. Because of this:

60. Commercial use of orphan works and ECL will distort the market, conceivably leading to market failure, when it becomes uneconomic for creators to continue to produce.

61. The Government acknowledges publicly that market distortion is to be avoided:

'We believe compulsory participation could be contrary to the Berne Convention and, more importantly, distort the market.' - Response to Hargreaves, p. 5

62. **Under such schemes the market value of the individual work would be ignored; charges for use would be made at a predetermined flat rate. This is anti-competitive.**

63. **They may well undercut sales of new works, imposing an effective price ceiling across the board.** This is particularly likely in areas where there is high substitutability, such as stock photography. This would be anti-competitive and likely to lead to market failure. Costs could easily be brought down to the point where continued professional creative production is uneconomic.

64. Hargreaves acknowledges this, and thinks it doesn't matter. [Review 4.58] The Government has more sense: they say OW legislation would include 'licensing at market rates for commercial use' [Response to Hargreaves, p. 6]. But it is easier to promise this than to fix a 'market rate'. A fixed market rate, indeed, is not a market rate. The promise, we are sure, was made because **to undersell licences for orphan works would be transparently non-competitive and would distort the market.**

65. **OW and ECL would impose an unprecedented burden of administration on many creators as the price of continuing to control and exploit their works; as a cost of doing business, in other words.**

This would involve:

• keeping a close eye on 'orphan' registers
• registering opt-outs from ECL schemes: this will be more or less burdensome, depending upon how these opt-outs are managed.

66. 'The right holder to whom it is crucial that her works are not exploited under an E[xtended] C[ollective] L[icensing scheme] has to establish mechanisms for monitoring the market and bear the costs associated with such efforts of monitoring' – Thomas Riis and Jens Schovsbo, 'Extended Collective Licenses and the Nordic Experience' - Jan 2010[31]

67. **Any new regulatory burdens imposed on creators should be fully proportionate to the social and economic benefits likely to flow from the schemes that these regulations facilitate.** We have heard far too little justification for the mass-digitising of in-copyright works: it has simply been taken for granted as a self-evident and indispensable good. Some "treasure troves" can cost far more to exploit than they are worth.

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[30] http://ec.europa.eu/internal_market/copyright/docs/copyright-infso/20110920-mou_en.pdf
[31] http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1535230

68. **Commercial use of orphan works and ECL would undermine intellectual property rights by making it harder for creators to control the use of their work**. (See 3. above.) Textual works, photographs, films and recorded music are all very easily copied these days, whether or not they are 'born digital'. If IP rights were not recognised and (to some extent) protected, no one working in these media would be able to participate in any sort of market. **Anything that weakens property rights is a threat to the continued existence of the markets in those properties.**

69. **Orphan works legislation would facilitate the illegal use of some works. Theft is inherently anti-competitive and if not kept under control, leads directly to market failure.**

70. **Big mass-digitisation schemes run under ECL will stifle emerging digital markets and will become effective monopolies in the areas they cover, which will hold back innovation in digital publishing.**

71. They will also very likely become monopsonies. Authors who elect to opt out of ECL schemes and seek alternative publishing opportunities for their out-of-print works may find themselves unable to find a publisher who wants to license them; there might simply be no market, except through monopsony ECL schemes paying a flat rate.

72. Which publisher is going to take the risk of bringing out e-editions of out-of-print books if there is a huge digital repository of scanned copies run under the auspices of the BL (or Google) that is known to customers as the cheap go-to place for such works? This is a problem for publishers in that it removes useful publishing opportunities; but it is also an issue for writers and illustrators. This is a threat to continued innovation.

73. Note that in the past reprint editions have often had new introductions, etc, and sometimes illustrations, whether stock or newly commissioned, that were not in the original publication. Scanned versions of old editions will not contain new commissioned or bought-in content. They will also not be the innovative e-book formats we should be seeing: they will just be a set of scans and/or more or less badly OCR'd epubs. such as those typically available from Google Editions.

74. Finally, for photographers and illustrators in particular, there is the fact that under the EU MoU there would be no opt-out for work published previously in printed publications. Once sold, then out of your control; flat rate fees only, paid through DACS.

75. ECL is largely irrelevant to out-of-commerce books now that authors and/or publishers can re-publish at minimal material costs electronically, and without capital outlay through print on demand. Creators should be incentivised to take their futures, and indeed our cultural heritage, into their own hands.

76. Stop43 fully endorse Richard Mollet's statement at Q176: *'...in a conversation about extended collective licensing, it is always blithely said, "Oh, well if you do not like it, you can opt out."... Not all rights holders, especially small rights holders, will know that they have been opted in.'*

77. **In order to opt out, rights-holders must register. The requirement to register in order to avoid one's work being used under ECL breaches Berne Article 5 (2)[32].**

CONTENT AND DATA MINING

78. **Stop43 agree in general with the statements made by Richard Mollet on this subject**.

79. His statements appear to assume that the 'content' to be 'mined' has already been digitised, but there is also the question of mass-digitising material that is not currently in digital form specifically in order to mine it. This was apparently Google's main aim with its Google Books library project; selling books was an afterthought. This is part of the 'justification' for mass-digitisation projects: that they will facilitate data-mining.

80. Of course, this is one of the risks: that data-mining may be used as an excuse for mass-digitising large bodies of work, which would then most likely be put to other uses.

[32] http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html#P109_16834

81. Stop43 note that in lacking any form of search save for title or author, the British Library's iPad app is almost *entirely useless* for data mining.

82. There are good arguments in favour of data mining. Photographers using automated systems to search for infringing uses of their copyright work could be considered to be data mining.

PRESERVATION OF DIGITAL FILE METADATA

83. At Q161, Ben White said: *'At the moment, the problem that Paul and has colleagues perhaps have with the BBC and Facebook is they need to take these organisations to court; there needs to be an injunction to stop the use.'*

84. The Copyright, Designs and Patents Act 1988 Section 296ZG[33] states that an offence has been committed:
- where [person] D knows, or has reason to believe, that by so doing [removing metadata] he is inducing, enabling, facilitating or concealing an infringement of copyright.

85. **In practice this offence is almost impossible to prove. Stop43 know of no action brought under Section 296ZG.**

86. Copyright Law of the United States of America and Related Laws Contained in Title 17 of the United States Code, Chapter 12, Section 1202 (b)[34], states:

(b) Removal or Alteration of Copyright Management Information. — No person shall, without the authority of the copyright owner or the law —
(1) intentionally remove or alter any copyright management information,
(2) distribute or import for distribution copyright management information knowing that the copyright management information has been removed or altered without authority of the copyright owner or the law, or
(3) distribute, import for distribution, or publicly perform works, copies of works, or phonorecords, knowing that copyright management information has been removed or altered without authority of the copyright owner or the law,
knowing, or, with respect to civil remedies under section 1203, having reasonable grounds to know, that it will induce, enable, facilitate, or conceal an infringement of any right under this title.

87. A US Lawyer brought this to our attention, stating that stripping copyright management information is illegal in the US but continues because it goes unchallenged. Given that Facebook and Twitter are amongst the prime culprits, as with the BBC and national newspapers it would take deep pockets to challenge these behemoths.

88. **The UK could easily solve the metadata stripping problem by giving a regulatory authority the power to order an organisation to cease such a practice, and effective, proportionate and dissuasive penalties with which to do so.**

89. Put such a provision into any proposed legislation and you can be sure that corporations whose businesses benefit from metadata stripping would mount a huge challenge to it, as it would affect their worldwide operations in that it is unlikely they could cease metadata stripping on a country by country basis. How would they be able to do that with any certainty?

90. However, their problem is their problem. **It is right that such a provision be legislated for to protect the moral, property and economic rights of creators, to prevent the orphaning of their copyright works, and the ensuing market distortion and market failure such orphaning facilitates.**

91. That said, Stop43 favour market solutions which overcome in practice the consequences of metadata stripping, such as the capabilities demonstrated by the Picscout[35] system.

FAIR CONTRACT LAW

92. Stop43 provided Hargreaves with clear evidence of the market failure consequent upon oligopsonies in photographic markets and the onerous contracts they impose upon suppliers. More examples appear

[33] http://www.legislation.gov.uk/ukpga/1988/48/section/296ZG
[34] http://www.copyright.gov/title17/92chap12.html#1202
[35] http://www.picscout.com/imageexchange/

daily. The five-employee-or-less micro-businesses that comprise nearly 90% of the creative sector, create its primary value, and pay most of the tax, require Government to carry out its duty and redress this power imbalance.

93. Alongside remedial legislation, this would be a suitable task for an IP Ombudsman.

SMALL CLAIMS TRACK IN THE PATENTS COUNTY COURT

94. Stop43 wish to comment on the following exchange:

Q139 Katy Clark: '*So what do you think of the Government's proposals for a small claims track in the Patents County Court?'*

Sir Robin Jacob: '*Well, it is a small claims track. That is what the PCC is. Very small claims-£5,000, £10,000-clearly are not worth worrying about from the point of view of the economy of the country. They are almost certainly unimportant.'*

Katy Clark: '*They may be important for the individuals, of course.'*

Sir Robin Jacob: '*Well, if it is only £10,000, is it? It is going to be more about, "Oh, you have pinched my right. I hate you. You are my brother and you stole it," or whatever it is. I am afraid it is apt to be obsessive or hate litigation.'*

Q140 Katy Clark: *'Yes, I suspect many of our constituents will think it is quite important when they come to see us.'*

Sir Robin Jacob: '*I dare say they will. They do. There are people who pursue the smallest claims. The courts are all vexed by vexatious litigants. It is a huge problem. There are now more people in the courts who have not got lawyers who are not vexatious-who simply have not got lawyers and are reasonable people. But I am afraid there are some people who are unreasonable too. The Patents County Court under Judge Fysh was quite vexed with some really ludicrous claims.'*

95. Lord Justice Jackson spoke of 'unmet need for justice' in his report calling for the institution of a small-claims track for IP cases[36], saying:

'4.3 Unmet need for justice. In my view there is an unmet need for justice in this regard. One can cite many other examples beyond those mentioned by the FSB 0Federation of Small Businesses]. For example, a journalist whose articles have been reprinted without permission might have a claim for a few hundred pounds. A photographer whose photographs have been downloaded from the internet and reproduced without permission might have a claim for a few hundred pounds. It may be difficult for such claims be pursued at the moment. There is no small claims track in the PCC and there is little IP expertise in most other county courts.'

96. According to research conducted by the British Photographic Council, the typical value of a photographic infringement claim ranges from £50 - £350[37]. Are we to assume that all such claims are 'vexatious'? If we do we will remove any chance of legal redress from the plaintiffs and in effect remove copyright protection from photographs, in clear breach of the Berne Convention and the Human Rights Act.

OMBUDSMAN FOR IP

97. To alleviate problems with metadata stripping, onerous contracts and vexatious legal cases, an Ombudsman should be appointed who has the powers to penalise companies stripping metadata, operating in the same way as Ofcom, the Information Commissioner, etc. and to arbitrate contractual disputes under Fair Contract law, for which we call and which should unburden the Courts.

DIFFERENCES BETWEEN THE NATIONAL CULTURAL ARCHIVE AND DIGITAL COPYRIGHT EXCHANGE CONCEPTS

98. Hargreaves' DCE is intended to have two primary functions:

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[36] http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/jackson-final-report-140110.pdf

[37] http://www.british-photographic-council.org/survey/2010

● to enable the mass-marketing of works commercialised under ECL; and
● to force corporate rights-holders to licence their rights to Internet startup companies more cheaply and quickly.

99. Stop43's National Cultural Archive concept is by definition far less coercive. It is described in detail here[38], but in brief it is intended to be:

● a machine-readable online metadata repository for all suitable kinds of cultural digital intellectual property, both orphan and non-orphan, that is free to submit to and use and which makes its contents and the digital objects to which it refers freely available to the public for its Cultural Use;
● created by a simple redefinition of existing digital infrastructure, technology, products and services such as broadband, search engines, image search software, digital registries, libraries and collections and established by defining a common framework of legal, technological and administrative requirements with which affiliated custodians of cultural digital intellectual property must comply;
● a practical means of educating the public about intellectual property rights by automatically interceding in potential breaches of copyright at the point of potential breach, and of enforcing copyright in the digital domain whereby creators and rights holders can reassert their rights and reestablish control over unauthorised or orphaned copies of their work, thereby preventing the future creation of orphan works;
● a market-maker and engine of economic stimulus, connecting all other intending extra-Cultural users to the revenant rights holders of its registered non-orphan cultural digital intellectual property in a quick and simple way and enabling creators and rights holders to conclude equitable licensing transactions with prospective users by way of impartial template-based advice, standard machine-readable licenses and agreements, and facilities;
● financially self-supporting by means of a small percentage levy applied to each successfully concluded license agreement that it facilitates.

100. Its intended frictionless licensing and de-orphaning characteristics can be demonstrated simply with a combination of the Picscout browser plugin[39] and Google Image Search[40].

● Install the Picscout browser plugin.
● Direct your browser to Google Images and search for 'dolphin'.
● Click on the Picscout button in your browser toolbar. The Picscout software displays a selection of thumbnails of licensable images. In our test, stop43 chose an image of two dolphins jumping.
● Picscout led us to its page on image library SuperStock[41].
● Click 'Add to Cart'.

101. This process takes as long to carry out as to read these instructions.

102. Stop43 then went back to Google Images and followed our chosen image thumbnail on that page to its originating site, which happened to be the Telegraph[42], copied the image to our computer's Desktop and opened it in Phase One MediaPro[43] (any software that can display image metadata will do) to reveal its total lack of metadata. Picscout had not only de-orphaned that file, it had led us straight to a commercial source from which to license it, and proved metadata stripping by a national newspaper.

103. Stop43 then re-uploaded the image to Google Image Search, which revealed a page of results that included a selection of similar, alternative images[44].

104. This procedure demonstrates:

● The ability of current software systems to lead a prospective user to a source from which to license that image for use, even if its metadata has been stripped; and
● Provide a selection of alternative images which might be functionally equivalent to the first image for the intending user's purpose.

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[38] http://www.stop43.org.uk/proposals/ipreview/ipreview/nca.html
[39] http://www.picscout.com/imageexchange/
[40] http://images.google.co.uk/imghp?hl=en&tab=wi
[41] http://www.superstock.com/preview.asp?image=1848r-337487
[42] http://www.telegraph.co.uk/health/7269309/AAAS-Study-on-dolphin-ability-to-switch-on-and-off-diabetes-could-lead-to-human-cure.html
[43] http://www.phaseone.com/media-pro
[44] http://bit.ly/teEj8U

105. This is the heart of the National Cultural Archive proposal, intended to work with *any* image, and not just those that have been 'fingerprinted' by commercial image libraries.

MISREPRESENTATION

106. At Q163, Paul Ellis stated: *'Recently we have just seen a poster in Camden of Boris Johnson apparently endorsing a website that facilitates extramarital affairs. Now, Boris's private reputation and, indeed, his public reputation notwithstanding, I am quite sure that Boris did not choose to endorse that website. He has been misrepresented. This will be a consequence of the commercial use of orphan works.'*

Here is that poster.

Misrepresentation

You think you own your own photographs? Think again.

The UK Government wants to introduce a law to allow anyone to use your photographs commercially, or in ways you might not like, without asking you first. **www.stop43.org.uk** 43

Written evidence submitted by Villayat Sunkmanitu

1. I wish to make a submission to the select committee responsible for conducting the Hargreaves Review of Intellectual Property.

* No protection against 'metadata' stripping

* No protection of moral rights afforded by the two Human Rights Acts relevant to us. Proposed scheme contravenes existing legislation.

* Any global scheme must be internationally recognised and enforceable by international law

* Awareness of the needs of disabled artists

2. I am a photographer poet and writer and I run an independent stock image library and I publish my poetry and other works. I am a disabled artist. I earn by selling prints and licensing images for magazine, book and website usage (see www.wolf-photography.com). It is becoming increasingly difficult to make a living as an artist and legislation which fails to adequately protect artists' rights is one of the issues contributing to the situation.

3. I am deeply concerned about the proposed changes to take place in the areas of copyright and orphan works.

4. The Information Technology age has given us more access and versatility in the way that we work as creative people but has also opened a lot more routes to those people that would seek to profit from the hard work of others and abuse their rights by breaching copyright laws.

5. It is right that my work should be protected by the law. United Nations Universal Declaration of Human Rights Article 27 (2) states:

'Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary
or artistic production of which he is the author.' Please click here for more information on this subject
http://www.stop43.org.uk/pages/news_and_resources_files/9f95e713e47225fa4d19f9a80ee738a2-107.php

It follows that any proposed legislation to enable the commercial use of orphan works or the extended collective licensing of copyright works, which is intended to result in a copyright holder in practice being 'deprived of his possessions' without his knowledge or consent (which Mr. Justice Arnold has judged to be the consequence for rightsholders of piracy of their copyright work) **would breach Article 1 of the First Protocol of the Human Rights Act 1998.**

The Human Rights Act 1998 restrains the Government from introducing legislation that is not compliant with human rights legislation, and indeed reading Section 6 it may be unlawful for civil servants even to draw up such legislation. When asked at a pre-consultation meeting on 23rd August 2011 attended by Stop43, among others, Matt Cope of **the Intellectual Property Office confirmed that new UK legislation must be compliant with**

the Human Rights Act 1998.

6. I believe that France and other European countries have an exemplary attitude towards this issue in line with the Human Rights Act. As another European country that prides itself on being fair to its citizens, we should be doing the same.

7. Moral rights are of fundamental importance to artists, such as the right to be credited. It is through this right that my work becomes known, my name is my brand. Yet UK law does not enforce an automatic right to be credited, nor has Professor Hargreaves proposals remedied this deficiency.

8. My images have digital copyright information embedded within them (metadata) so that should anyone wish to license use of the image from me they are able to contact me. Yet there is no law that prevents organisations from stripping digital copyright information from my images, this is known as metadata stripping, thus rendering them orphans. I have to prove that they 'had an intent to infringe my copyright', something that is impossible to prove in most cases, yet my image has now been rendered an orphan. This happens to untold millions of images every day, all created as orphans, yet there is no legislation planned that would criminalise such an act.

9. If the proposed changes to Orphan works go ahead, I foresee a huge increase in the abuse of copyrighted material being legalised for use by the commercial sector to the detriment of the creative person, this is clearly immoral. If a proposed piece of legislation seems immoral, it needs to be stopped and changed until it resembles something workable. Laws should be just and fair towards all, not just the well off or those in positions of influence, otherwise they become discriminatory. Large scale commercial use of orphan works will seriously damage the interests of independent creative businesses throughout the UK.

10. The legislation should be addressing basic requirements, eg every artist whose work is used anywhere, in a book on a website, on the radio etc, must be appropriately credited. This puts the responsibility on the user to ensure that they have acted legally and sought appropriate permissions and, where required, paid the licence fees.

11. Any scheme to force artists to register their art digitally must be free or for a one off minimal charge otherwise it's an immoral tax on the artist; because of the global nature of internet communication and practises, the scheme must also be global and legally enforceable worldwide or there's no point. What would be the point of having your work registered here in the UK, only to have someone in the USA, China or India abuse it through internet access because they're not part of the same scheme or not subject to the same legislation? Creative people that do business on the internet, deal with the whole world - not just the UK.

12. The scheme would also need to take account of access issues for the disabled. Under the Disability Discrimination Act, access goes beyond physical entry. It looks at whether a scheme, programme or service is accessible in other ways. It's really difficult to assess how the scheme might impact the disabled as the vast range of disabilities would have different difficulties. Careful thought would need to be put into making it accessible for anything like this to work. This goes beyond large print and a dark typeface as it's also to do with the language used and cost. If the charge for the

system isn't a one off minimal charge for the disabled, how are they supposed to be protected? You then have the issue of people with serious visual impairment that work through touch alone. Mental health difficulties present particular hurdles on accessibility - will the scheme be easily understood, easy to use and not cause frustration and antagonise existing mental health difficulties that could worsen behavioural problems? One must also be aware that people with long term physical disabilities may well have some mental health difficulties too as part of living with their existing conditions.

13. If someone used a Canon camera and took the logos off and tried to pass it off as their own product, Canon would have recourse to legal remedies. Why aren't artists protected in the same way?

2 September 2011

Written evidence submitted by TalkTalk Group

1 TalkTalk Group (TTG) is one of the UK's largest ISPs and provides broadband to over 4 million residential and business broadband customers under the principally TalkTalk and AOL brands. Our perspective on IP issues comes largely from our position an ISP who is being coerced or forced into a position of policing the Internet and being an 'IP enforcer'[1].

2 Though TTG are sometimes portrayed as being anti-copyright this is not correct. We recognise and respect the economic role that copyright has in creating incentives for investment and production. We do not condone or encourage infringement. Rather our opposition to the various measures to reduce copyright infringement contained in the Digital Economy Act 2010 (DEA) is founded on profound concerns regarding its legality, effectiveness and proportionality.

3 In respect of the Hargreaves review and the Government's plans for its implementation our views focus on recommendation 1 regarding the need for evidence to drive policy (rather than lobbying or *lobbynomics*). We are pleased this was recommended in the review and has been adopted by Government.

4 Much of the Government's response to this recommendation focuses on the need for unbiased and reliable research and evidence around the prevalence and impact of copyright infringement. However, evidence-based policy is not merely about the underlying data – it is also about the overall analytical process, in particular properly taking into account all factors that affect whether a policy option is desirable and weighting these up objectively.

5 This was particularly wanting in the development of the DEA in 2010. Evidence and reasoning that did not fit the Government's desired policy was ignored – for instance, the likely ineffectiveness of the proposals, the significant implementation costs and the harm it would cause to innocent subscribers were all brushed aside since 'something must be done'.

6 The development of section 17 and 18 in the DEA regarding web blocking measures was particularly lacking in evidence-based policy making. Web blocking options were not consulted on at all. The initial web blocking amendment (introduced in the Lords) was drafted word-for-word by the BPI. The amendment then got substantially modified in the wash-up process without any Parliamentary scrutiny. Through this there was never any proper process to gather and understand relevant evidence or assess whether web blocking would be effective. And now the Government has effectively abandoned these sections because they would be unworkable.

7 Though the Government has supported recommendation 1, its proposals for implementation appear weak. Getting the implementation right is important since it is likely that measures to tackle copyright infringement will continue to

[1] For example, the DEA imposes (or could impose) obligations and liabilities on ISPs to help address illegal filesharing such as sending warning letters, disconnecting subscribers and blocking sites

considered and may figure in the upcoming Communications Act. Two key aspects will be important for the implementation to be effective.

8 First, is ensuring evidence plays its rightful role. It is not enough just to bolster the IPO with economists (though this is a welcome and necessary step). There must also be a change in the approach of Government of listening to the evidence and reason before coming to a policy decision. The role of the economists and other staff must not be merely to post-rationalise the policy that the Government has already decided on.

9 Second, is proper consultation. Open and transparent consultation is essential so the full range of evidence and views can be taken on board. Consultation is also particularly important where powerful lobbyists are in play else public confidence in policy will be low. Thus, Government must also commit to clearly laying out and consulting on the evidence and reasoning that it is using to support its policy approach.

10 It is only through these analytical and institutional changes that the danger of over-reliance on lobbying can be counterbalanced and be seen to be counterbalanced.

11 The other aspect of the Hargreaves review that we welcome was recommendation 8 which highlighted that tackling infringement was not merely about stronger enforcement but also needed more effective markets, copyright modernisation and education to build respect and legitimacy for copyright. What was notable about the DEA in 2010 was the wholesale absence of any of these other measures – the Act only included enforcement measures (such as letter writing, disconnection and web blocking). We hope that any new policies in this area are suitably holistic and balanced.

Written evidence submitted by Chris Terry

I have been a professional photographer for 15 years. I work in the mainly in the editorial field of photography and would like to explain why the protection of my IP is crucial to my business.

I am a one man band and what I earn comes directly from the commissions I secure from my clients and the re-license of the images via my library. My business is extremely competitive and constantly under pressure from the same clients that commission me. This pressure comes in the form of reduced fees, 90 days to get paid irrespective of what my terms are and a greater demand on the rights to my images. This includes the forced waiver of Moral Rights. The deal is simple for them, agree our terms or don't work for us. These include large corporations such as the BBC.

So with work already hard to come by, negotiate and sustain, the Hargreaves IP review suggestions would potentially help to drive it under.

My moral rights are not automatically granted in the UK, this should be an automatic assertion and unwaivable as in other EU countries. The right to be identified as a UK citizen and creator, I should have these rights granted automatically as they help to protect my only asset, my archive of work, by identifying me as author.

Introducing legislation to allow the licensing of Orphan Works before the legal framework asserting an authors Moral rights in being identified is plain daft. It will create more Orphan Works.

Artists rights have not been recognized as human rights by the Hargreaves IP review where as the UN and EU human rights act have:

- Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

- These rights are also attacked by the lack of legal consequence for the removal of digital identifiers and metadata in images.

I ask you to look more closely at the IP review and please speak to the people most affected by any great changes, namely the creators.

5 September 2011

Written evidence submitted by Derek Thompson

I am writing to express my deep concern at proposals to erode the rights of creative professionals.

The UK has a proud tradition of innovation and creativity, but the proposals will undermine the right of creators to protect their work and put us as a disadvantage in comparison to other parts of the world.

As a freelance writer, I encounter many clients who see writing as something that anyone can do and which consequently is of little economic worth. Your proposal does little to address this issue. In addition, I have personal experience of my online work being appropriated by someone else and the onus being on me to prove ownership and seek redress. That time it was my entire blog; next time it could be a novel or a work of non-fiction.

My other concerns are about the way this Intellectual Property Review has been approached. From the information provided, none of the panel have specific experience or relevance in the Arts field. Also, this review has not been widely promoted and the timescale is very constrained.

5 September 2011

Written evidence submitted by B M Totterdell

I have been working as a photojournalist for 22 years largely specialising in an Olympic sport and I would like to express my concerns with the Hargreaves review.

1. Moral rights e.g the right to be credited are not automatically granted and indeed can be waived by certain sectors e.g. newspapers. This coupled with the ability to remove all digital information attached to photographs leaves the proposed orphan works open to abuse - and it will be abused by many commercial organisations such as publishers, web companies as well as businesses - the review is heavily weighted in their favour and ignores the interests of the creator.

2. I dislike the idea of orphan works - my images are never orphans unless created as explained in paragraph 1. This is for three reasons.

a. The photographer needs to know who is using their work and for what purpose. We have a right to choose where and how it will be used. As someone whose work includes working with young people and women, I cannot allow my images to be in a place where they can be described as orphans and used how the exploiter wishes. That place if the government goes ahead with the Hargreaves review without making very important changes will be one that the Government will have created - and the image could be of someone close to you.

b. To be offered after the event a small token payment for images that have been expensive to produce (with very expensive photography equipment, computers, software, insurances, travel etc) is both a recipe for closing many small businesses for the benefit of large commercial companies quite able to include photographs within their project budgets. Further any register created would need to have global reach and would also put the cost back on to the creator in both time and money.

c. This represents a total lack of respect for creators, a respect offered to the baker when bread is bought, to the taxi driver when a fare is paid, to the consultant and accountant for the work they have done. Why is this respect not offered to the visual creator, the writer etc who provide something obviously wanted and valued and something that enriches our society?

3. Of course, if they can get away with it, commercial companies want the freedom to use images and words to add value to their product at low or no cost. They will be encouraged to continue believing that photographers and other creative workers are not to be respected. Encouraged to hope that their use is not found out and even if it is they will have got away with a small fee far less than the real value - restaurants only being paid £4.00 for a meal costing £8.00 to make will soon go out of business to the eventual detriment of society.

4. I also believe that artists rights to have their work protected has not been recognised by the review.

6 September 2011

Written evidence submitted by UK Music

1. From its inception, the Hargreaves Review of intellectual property was aligned very publically, intrinsically and explicitly to economic growth.

2. In our submission to the Hargreaves Review, UK Music applauded the focus on economic growth as the driver for any change, and set out the contribution that the music sector could make to economic growth in the future. However, we also expressed regret that the call for evidence started with the premise that the copyright framework is an inhibitor to growth. We believed this to be an incorrect and therefore unsafe premise upon which to launch a policy review.

3. The Hargreaves Report made 10 recommendations which, it asserted, would add between 0.3 and 0.6 percent to annual GDP growth.

4. In accepting these recommendations, Government seized on this assertion and repeated that the 10 recommendations could add up to £8 billion to the economy, and cut over £750 million of 'deadweight' costs.

5. UK Music has now had the opportunity to study Supporting Document EE, *Economic Impact of Recommendations*, which details how the £8 billion growth figure is calculated and identifies the £750 million savings from deadweight costs.

6. We note that recommendations relating to the copyright framework and the infrastructure for trading in copyright content (which is our members' area of expertise) amount to some 45% of the cost savings identified, and between 60 and 72% of the growth projections identified.

Table 1

Recommendation	**Cost saving p/a**	**Growth impact p/a**
Digital Copyright Exchange	£10 m - £20 m	£2.2 bn
Format shifting	£0.5 m	£0.3 bn - £2.0 bn
Parody and pastiche	£1 m	£0.1 bn - £0.6 bn
Orphan works	£320 m	£0.1 bn - £0.3 bn
Cross border licensing	£10 m	£0.6 bn
Total	**£341.5 - £351.5 m**	**£3.3 - £5.7 bn**
	44 to 45% of savings	60 to 72% of growth

7. Insofar as we have been able to calculate in the very limited time available to us, UK Music believes that these growth projections and cost savings are overstated and unrealistic, and are based upon underlying assumptions and extrapolations that are facile and deeply flawed.

8. We devote the remainder of our submission highlighting extracts from Supporting Document EE, *Economic Impact of Recommendations,* showing why we do not consider them to be credible or reliable. In the short time and space available, we focus on growth projections and cost savings arising from the recommendations relating to a Digital Copyright Exchange, an exception for private copying, and an exception for parody. However, we have similar concerns with projections relating to other recommendations such as orphan works and cross border licensing.

Digital Copyright Exchange:

9. The Digital Copyright Exchange is identified by Document EE as the single greatest contributor to economic growth projections, adding up to £2.2 billion to the UK economy by 2020.

10. Document EE seems to arrive at the £2.2 billion figure in a roundabout way. It takes as its starting point a report entitled *The Economic Impact of a European Digital Single Market* published by economics consultants Copenhagen Economics. Copenhagen Economics were commissioned to write the report by the European Policy Centre, whose partners are Vodafone, Microsoft, Nokia, Ericsson, Intel, Sitra (the Finnish Innovation Fund) and the Central Denmark Region.

11. The purpose of the Copenhagen Economics report was to provide an initial assessment of the economic benefits of a "European digital single market". The report estimates that the net impact of an acceleration of the digital economy on the EU27's GDP would be around 4 percent over a 10 year period. Whilst UK Music offers no critique of the Copenhagen Economics report, we observe that the focus of the report and its recommendations spanned issues such as investment in infrastructure, harmonisation of legal frameworks, skills and training in ICT, as well as consumer attitudes towards privacy and security in the online market. The report's projection that GDP across Europe could grow by 4% was predicated on concerted action across all of these fronts.

12. Document EE seizes on the 4 percent growth projection for the whole of the EU, and attempts to apply it directly to the impact of a Digital Copyright Exchange in the UK, in complete isolation of all of the other factors considered in the Copenhagen Economics report. It appears to do this simply by applying 4 percent growth to the 4 percent of the UK's economy which is 'copyright intensive', which apparently yields £2.2

billion.[1] As the focus of the Copenhagen Economics report is cross-border market unification -- and not a study of how changes in the UK market can improve growth and productivity in the UK – it would be impossible to extrapolate the impact of a digital copyright exchange.

13. UK Music is well-placed to question the growth projections related to the creation of a Digital Copyright Exchange. The UK's commercial music industry is at the forefront of developing a database of copyright ownership information for both music recordings and musical works, with support from the European Commission and with partners from the technology sectors who would make use of such a facility. This database of ownership information would be the first step to any Digital Copyright Exchange, as Government correctly acknowledge. Innovation by rights holders (in terms of licensing structures) and online services (in relation to new business propositions) can only occur if the data and data exchange standards necessary to ensure the smooth administration of agreed licences have been put in place. To fail to resolve these issues ahead of any other aspect of licensing is to put the cart squarely in front of the horse.

14. The experience of our members is that the key challenges in the context of multi-territorial digital licensing lie in the urgent identified need for (1) the unique identification of all entities involved in any individual transaction (2) a centralised authenticated global database for each type of creative work which identifies all works in that category (with metadata linked to the unique identifier), the creators of those works, all rights associated with that work and the identity of the owner of the rights in those works by rights type, by usage type, by territory and by exploitation date and (3) the development and adoption of technical standard message formats for the exchange of information and standard protocols for the exchange of those messages to support the high volume transactions. Only when these three challenges have been successfully addressed can there be any prospect of investigating the scope for automated licensing processes.

15. The time and resources already invested by the commercial music industry into these efforts have been considerable, and yet Document EE takes little account of the time, effort, complexity and costs involved in this 'first step.'

16. We note that it is contemplated that the DCE could become a functioning cross-sector licensing platform mandated to represent rights holders of the worldwide repertoire for licensing of services in the UK and for other territories. It appears from Document EE that the growth projections relating to the DCE would arise from this function as a licensing platform. We have identified a quagmire of legal, commercial and political obstacles which lead us to view this ambition

[1] We are trying to identify the source of this statistic that the UK's copyright intensive industries account for 4% of the economy. It is not referenced in Document EE.

as unrealistic and not something which would have the support of the content industries. In summary these hurdles include:

- Any reference to a one stop shop implies a monolithic structure raising a number of challenging and complex competition, governance and "incentive" issues.

- A voluntary platform could not expect full aggregation and especially not if it has multi-territory ambitions (some of the most important assets would be owned by entities outside of the UK)

- Licensing solutions cannot be viewed in isolation from the European and international context so to introduce a new structure which could be at odds with recommendations pending from Europe and elsewhere would put the UK content industries in an impossible position

- The content industries are necessarily focussed on stripping out additional cost. Any layering of a new platform over existing platforms is unnecessary and would cause duplication between this UK initiative and the existing collecting societies who are currently evolving to provide streamlined aggregated licensing hub solutions which are consistent with the way the industry does business in Europe and the world

- The lack of data standards make this cross-sector initiative impossible in the medium term.

17. We now turn our attention to the cost savings identified in this section. These are estimated by reference to the costs of collection societies. The document states that transaction costs for rights users are the order of £50 to 100 million every year. It is not clear how this figure is calculated but we assume it is based on the differential between collections and distributions in 2008-9 for the 12 licensing bodies listed on p.19 of Document EE. The text accompanying that table refers to £900-£950 million collected in 2008-9, and £844 distributed, which gives a total running cost of £56 - £106 million.

18. The obvious flaw here is that it is fundamentally wrong to assume that 100% of a licensing body's running costs are transaction costs with rights users. The reality is that a substantial proportion of those running costs actually relate to the cost of the distribution process to members. Moreover, it is very superficial to make an "analysis" based on collections and costs which does not take into account the material differences in the scale and nature of the different licensing bodies' activities, and which are in any case based on the position several years ago.

19. The document also works on the assumption that the transaction costs between collecting societies and licences are likely to be mirrored at

least 1:1. We do not know on what basis this assumption is made. However, even of the running costs which do relate to transaction costs with users, only a fraction will relate to transaction costs of digital licensing. Therefore, we believe the conclusion that "digital procurement in these types of industries can save up to 20% in terms of productivity over a relative short period, suggesting cost savings for rights users of £10 to 20 million annually, " to be incorrect.

20. Document EE suggests that a Digital Copyright Exchange will most benefit the types of businesses "aiming to introduce new services using new devices or software systems which present content to consumers in new ways." A significant element of the transaction costs associated with clearing rights for new and innovative uses arise instead from the complexity in assessing what the value of those rights are in the first place, when the services are completely unknown and untested in the market. By way of example, Committee Members may be aware that Apple, Amazon and Google are currently looking to develop a cloud based music service, each offering different features and specifications. What is the market value of such services? No one really knows. And yet, once precedents are set for new digital services, it is very difficult to recalibrate them in the future, even if, in hindsight, it becomes clearer that the initial prices set were off the mark. A Digital Copyright Exchange will never be able to mitigate the inherent complexities in valuing and pricing innovation.

21. Document EE make a number of statements more generally about licensing body efficiencies and regulation. UK Music would refer Committee Members to the submission from PPL and *PRS for Music* which we support, which provides greater detail on the role and function of licensing bodies.

Format-shifting:

22. A format-shifting exception for private use is identified in Document EE as the second greatest contributor to growth, adding up to £2 billion per annum to the UK economy by 2020.

23. Document EE arrives at this figure by surmising that the absence of a private copying exception has been responsible for restraining UK technology firms from developing innovative new products and services such as MP3 players over the past decade.

24. Further, Document EE predicts that a private copying exception will provide the springboard for UK firms to create new products and markets over the next decade worth up to half the size of the iPod market over the last decade.

25. It is apparently nothing more than this simplistic two-step reasoning process which forms the entire basis for how the £2 billion per annum figure is calculated.

26. We ask the Committee to carefully question whether the absence of a private copying exception played any role at all, much less a significant one, in restraining UK technology firms from developing new products such as MP3 players. In the late 1990s and early part of the new millennium, a number of different companies around the world were experimenting with the technology that led to MP3 players, including British firms. Apple's eventual dominance in the market can be attributed to a number of factors but it is perhaps unsurprising that the biggest rivals to the iPod in the early days of the MP3 market were manufactured by technology firms (such as Creative, iRiver and Rio) based in Singapore, Korea and Japan – countries defined by their high-tech industries. The UK's manufacturing base lost ground to global competitors some years ago and this decline had nothing to do with copyright but rather capital investment into new tech companies and cheaper labour elsewhere. We expect the Committee would be hard-pressed to find any convincing evidence that the UK technology sector felt inhibited from developing a digital music device because of concerns over private copying restrictions.

27. We also ask the Committee to question the second assumption – that should the UK introduce a private copying exception, UK technology firms will create an explosion of new products and markets worth up to half the size of the iPod market over the last decade. We point out that there is already a healthy market for digital products that incorporate legal format shifting under licence, for example, digital downloads are licensed for format shifting up to 10 devices, and sales of digital downloads for singles are now running at 99% of all single sales. In any case, the MP3 market appears to have peaked, while mobile phones and other devices such as tablets have MP3-enabled players embedded in them, for which they pay a patent fee to the patent-holders of the MPEG format.

28. Whilst UK Music hopes that the UK technology sector grows and flourishes, we would suggest that other factors will have a much greater impact on the size and shape of the market over the next decade. The influence of dominant players in the market is one of them. We refer the Committee to recent announcements by Hewlett Packard, another established technology 'giant' – that it is withdrawing from the tablet market. Many market analysts suggest that this is due to the dominance of the iPad as the consumer's choice[2]. Other crucial factors that will affect the growth potential of the UK's technology sector are the availability of finance, particularly the ready supply of investment to develop innovative new products and services.

29. We now turn our attention to the cost savings identified by the introduction of a format shifting exception. Document EE calculates

[2] See, for example, RIP, TouchPad. *Can any non-iPad tablet survive, ever?* http://money.cnn.com/2011/08/22/technology/ipad_forever/

that £500,000 can be saved each year from a reduction in complaints to the Advertising Standards Agency and IPO from fielding complaints arising from private copying restrictions.

30. The Document makes specific reference to the "Brennan" case. The Brennan is a "CD jukebox" which enables consumers to load their CDs, records and cassettes onto the machine for playback. An unidentified complainant referred an advertisement for the Brennan player to the Advertising Standards Authority, alleging that the advertisement incited consumers to break the law. The ASA found that the ad breached the advertising code and ordered the makers of Brennan to amend the ad.

31. This case strikes us as very odd. To our knowledge, the Advertising Standards Authority never received a complaint against Apple for any of its MP3 devices over the past decade, yet it received a lone complaint against the manufacturer of the Brennan device. The complaint was seized upon by the Hargreaves team to serve as an example of how the lack of a private copying exception has hampered the development of products and markets. Document EE notes that "Brennan was forced to amend its advertisements, causing potential damage to its business, as the normal operation of the product as thought to breach copyright law. It is worth nothing that of all the major players who produce and design devices which make use of format shifting, none of them appear to be British, and when a young innovative firm comes along, like Brennan, the law works against them."

32. If the ASA has received only 1 complaint relating to private copying restrictions over the past decade, it is difficult to see how a private copying exception will generate a savings of £500,000 per year for the ASA. As a comparator, we note that the average cost of cases heard by CISAS and the Ombudsman Services: Communication is around £400 per case.

33. We must therefore assume that the majority of the cost savings will come from a reduction to complaints or questions directed to the Intellectual Property Office relating to format shifting. However, Document EE offers no documentation as to the costs incurred to IPO to date from such questions or complaints.

34. As this submission is focused entirely on the projections for economic growth and cost savings identified by the Hargreaves Review, we restrict ourselves to questioning the prejudices in those assumptions. However, we feel it worth noting that Document EE is littered with other prejudices and assertions which mean that the costs of some recommendations are not identified and so not factored in to the overall estimates. For example, *"Given that the Review recommends a limited private copying exception corresponding to the expectations of buyers and sellers of copyright content, compensation is already priced into the purchase."*

We wholly and absolutely refute that compensation is already priced into the purchase and will continue to press the case that a private copying exception without compensation in the UK will result in economic harm. The point in raising this issue here is to show that there are not only weaknesses in the growth projections and cost savings identified, there are weakness in what has been left out and avoided.

Parody:

35. An exception for parody is identified in Document EE as adding up to £.6 billion per annum to the UK economy by 2020.

36. Document EE arrives at this figure by taking the value of the global entertainment market which it reckons is approaching $2 trillion, and estimating that the UK's share of this market could growth by up to .05% from a parody exception, translating into annual growth of £130 million to £650 million. Document EE goes to surmise that if the comedy market is worth 1% of the $2 trillion market, ($20 billion), a parody exception might enable the UK to gain from 1 to 5% ($200 million to $1 billion).

37. The increase in the UK's share of this market would arise directly as a result of a parody exception, but it is difficult to understand how or why. Document EE states that UK comedy programmes "appears to be losing ground [in the global entertainment market], as programmes cannot use copyright content without long clearing processes." The document also states that today, the chance of a British comedy show becoming a global success "is zero". We are perplexed by these statements. British comedy has been enjoyed and admired around the world for decades and British formats are enjoying a period of outstanding success in many foreign territories. Sales of UK finished programmes to international broadcasters are a source of growth in overseas markets and, according to PACT, are up 24% to £87 million[3] for the independent television production sector alone. No statistics are provided by Document EE to indicate that the UK comedy is losing ground in the global entertainment market.

38. As the growth projections are entirely dependant upon the benefits to be derived from a parody exception, far greater analysis is required. To put growth projections in context, the annual survey of television sales produced for UKTI found that sales of finished programming accounted for £549 million of export revenue. Document EE forecasts that a parody exception might benefit the economy by up to £600 million. This is more than the current entire UK TV programme export revenue.

[3] PACT's Independent Production Sector Financial Census and Survey 2011, a report by Oliver & Ohlbaum Associates Ltd for PACT, August 2011

39. Document EE refers to “Weird Al’ Yankovic as an example of how parody can be profitable. Weird Al Yankovic sought and received permission from the copyright owners of the works he parodied, he is signed to Universal Music Publishing as a creator of copyright works himself, and his success was not predicated on a parody exception. The existing system works and enables profitable creativity.

40. In the view of UK Music no evidence has been adduced to support an economic case for a parody exception; against this the fact that such an exception would ride roughshod over the very limited moral rights which were given to creators under the 1988 Act – moral rights which of themselves provide an incentive to create.

Conclusion

41. UK Music and its members are keen to play our part in growing the economy and believe we have much to contribute. As economic growth is stated as the driver for changes to the IP framework, we believe that it is important to raise concerns about how realistic these growth projections are. We fear they betray an ideological approach to the review, and will ultimately disappoint a Government which is (rightly) focused on economic growth.

42. We hope for the opportunity to discuss with the Committee any point raised in this paper.

5 September 2011

Annex A

UK Music is an umbrella organisation representing the collective interests of the UK's commercial music industry - from songwriters and composers, artists and musicians, to studio producers, music managers, music publishers, major and independent record labels, music licensing companies and, now, the live music sector.

UK Music exists to understand, explain, promote, protect and nurture the UK's commercial music sector so that its inherent value grows and its positive knock-on effects reverberate ever further and ever deeper.

UK Music's membership is comprised of:

- AIM – Association of Independent Music - representing over 850 small and medium sized independent music companies;

- BASCA - British Academy of Songwriters, Composers and Authors – with over 2,000 members BASCA is the professional association for music writers and exists to support and protect the artistic, professional, commercial and copyright interests of songwriters, lyricists and composers of all genres of music and to celebrate and encourage excellence in British music writing

- The BPI is the representative voice of the UK recorded music business

- MMF - Music Managers Forum - representing 425 managers throughout the music industry

- MPG - Music Producers Guild - representing and promoting the interests of all those involved in the production of recorded music – including producers, engineers, mixers, re-mixers, programmers and mastering engineers

- MPA - Music Publishers Association - with 260 major and independent music publishers in membership, representing close to 4,000 catalogues across all genres of music

- Musicians' Union representing 30,000 musicians

- PPL is the music licensing company which, on behalf of 47,500 performers and 6,300 record companies, licences the use of recorded music in the UK

- PRS for Music is responsible for the collective licensing of rights in the musical works of 75,000 composers, songwriters and publishers and an international repertoire of 10 million songs

- UK Live Music Group, representing the main trade associations and

representative bodies of the live music sector

Written evidence submitted by Virgin Media

Virgin Media welcomes the opportunity to participate in the Business, Innovation and Skills Committee's inquiry into the Hargreaves Review of Intellectual Property issued in May 2011 and the Government's response to that Review.

Given the tight timeframe which stakeholders have been given to respond, our comments focus on the following recommendations:

- Recommendation 1: Evidence.
- Recommendation 5: Limits to copyright.
- Recommendation 8: Enforcement of IP rights.

In summary, Virgin Media broadly supports the above recommendations and, furthermore, makes the following suggestions to Government for implementing the recommendations:

- work with industry to conduct a controlled pilot which may provide evidence as to how the availability of legitimate sources of content (and the means to access such content) can reduce instances of piracy;
- implement a 'personal use' exception to copyright which appropriately balances the interests of copyright owners and the legitimate expectations of consumers in the digital age;
- focus on incentivising the development of new, compelling content services which address consumers' desire for high quality and affordable services, and therefore provide consumers with meaningful alternatives to illegitimate services; and
- ensure that the copyright regime in the UK is flexible enough to underpin the transition through evolving phases of the digital revolution to catalyse – rather than prevent - the UK digital market emerging as one of the most competitive and innovative digital markets.

Evidence

The Hargreaves Review rightly highlights the difficulty of obtaining objective evidence on the impact of online copyright infringement on the creative industries. Virgin Media strongly endorses the view set out in Hargreaves that some of the data published by the rights owner community was inaccurate and unhelpful for the development of a reasoned and balanced public debate on the issue of piracy. The confluence of data models and lobbying has made it extremely difficult to quantify the scale of loss to copyright owners, or equally to demonstrate the positive impact of technological innovation and the digital age on the distribution of copyright works. Virgin Media strongly believes that a focus on understanding behaviours and incentives is essential to developing a sustainable solution to the issue of piracy.

Virgin Media suggests that in order to understand the extent of online infringement and its impact on the creative industries, Government needs to work with ISPs and copyright owners to acquire meaningful data and information on the behaviour and demands of consumers. For example, the behaviours of different groups of consumers could be observed in a controlled test environment by giving one group access to legitimate services which offer a full range of content at affordable price points, and restricting the other group access to such services. This experiment could show the extent to which consumers are enticed away from illegitimate services by legitimate, paid-for services which meet their demands.

Furthermore, such an experiment could show differences in consumption habits and trends between various consumption models – for example, streamed content vs downloaded content vs traditional physical products. A live, controlled experiment would fundamentally enable a real-world view of customer behaviour and commercial realities, and therefore provide more accurate data than estimates and statistics which are largely collated in the abstract. Virgin Media is discussing the possibility of such an experiment with DCMS officials in the context of a larger piece of work on the benefits of superfast broadband connectivity.

Limits to copyright

The digital revolution must be recognised

The emergence of the digital age has prompted numerous reviews into the statutory copyright regime, such as those conducted by Mr Gowers and Professor Hargreaves. Virgin Media welcomes these reviews, but is aware that the 'digital revolution' is now entering its second phase. Accordingly, the reviews and – in particular – Government's response to such reviews, need to be considered in this context.

Phase one of the revolution gave consumers digital downloads, the ability to copy files from physical materials (such as CDs) to electronic devices such as personal computers and iPods and the ability to record television programmes to the hard drive of personal video recorders (PVRs). These practices are now well established in the UK marketplace and the digital revolution has moved into phase two. Phase two practices, such as the ability to stream audio-visual content and access cloud-based music lockers on multiple devices via widely available and location-agnostic wi-fi connectivity, have the potential to offer UK consumers even more flexibility and portability in relation to their use of content. The challenge to harnessing this potential is an overly restrictive copyright regime which acts to block these sorts of innovations, inhibiting the UK's digital development and expansion.

The emergence of phase two of the revolution is evident in the growing prevalence of smart phones, tablets and on demand services which have changed the way consumers access content. For example, whilst the majority of people continue to access BBC iPlayer on their PCs, access via mobile devices has increased 46%[1] in the first half of 2011 and there are now 200,000 views of BBC Online per month via tablets and 400,000 views per month via smartphones[2]. Further, the arrival (or, in some cases, imminent arrival) of propositions such as Sky Go, Slingbox, Apple TV and Spotify demonstrate that full flexibility and portability are today expected by consumers as standard.

Virgin Media supports this kind of innovation and has contributed to it in a number of ways. For example, Virgin Media launched its TiVo set top box in 2011 which has the potential to provide customers with (amongst other things, some of which are discussed below) the ability to stream recordings that are made to the hard drive of the living room set top box to the set top box in the bedroom. Further, Virgin Media has responded to growth of simultaneous multi-device use in the home with investment in faster broadband speeds, including the continuing roll-out of our 100Mb residential connection to our entire network. Virgin Media is also developing a Metro Wi-Fi proposition that delivers connectivity across an entire geography, not just in one or two coffee shops, enabling consistent, 360-degree connectivity and a level of performance that consumers are beginning to expect.

The recommendations in the Hargreaves Review and Government's response give recognition to the reality of content delivery and usage during the first phase of the digital revolution. However, Virgin Media submits that the measures implemented by Government to expand exceptions to copyright should be broad enough to be able to cater for the second, third and later phases of the revolution, such that they offer consumers maximum flexibility as to how they may view, use and access legitimately obtained content. In short, the Government should adopt measures that are able to satisfy consumers' appetite for entertainment anywhere, so long as the content in question has been legitimately obtained. If it fails to do so, Virgin Media believes that consumers may satisfy their appetite through illegal, rather than legitimate, avenues.

Virgin Media's recommendation

Acknowledging where we are in the digital revolution, Virgin Media strongly submits that the Government should implement statutory exceptions to copyright that go further than simply legalising format shifting but extend to enabling the consumption of legitimately purchased content via the device of their choice. Therefore Virgin Media contends that Government

[1] http://www.ft.com/cms/s/2/36e40472-c0df-11e0-b8c2-00144feabdc0.html#axzz1X4tps2N0
[2] http://www.silicon.com/management/public-sector/2011/06/20/bbc-online-the-future-is-one-service-four-screens-10-products-39747599/

should develop a 'personal use' exception to copyright to give UK consumers freedom to use lawfully-obtained content in any manner they wish, provided that such activity is undertaken solely for personal purposes in order to enjoy the content in the most convenient way.

Such a personal use exception would go beyond legalising current, accepted (albeit unlicensed) uses of copyright material such as the copying of CD files to MP3 format, but would also legitimise the consumption of that digital content in ways (such as content 'side-loading', discussed further below) that may not fall within the ambit of a narrow format shifting exception. Further, by implementing an exception to copyright that does not simply legitimise a particular, currently-known activity (i.e. format shifting) but recognises as lawful a class of generic activities (i.e. 'personal use activities'), Government will future proof the legislation and give technology developers the legislative certainty they require in order to ensure that the functionality offered by future innovations are consistent with the principles of copyright law.

Virgin Media refers to its recently-launched TiVo set top box, which represents an example of how a personal use exception to copyright could benefit UK consumers without prejudicing the central objectives of copyright law. TiVo offers set top box functionality which is new to the mainstream marketplace in the UK. Amongst other features, TiVo provides customers with the ability to make recordings of broadcast recordings that have been made (pursuant to section 70 of the Copyright, Designs and Patents Act) to the hard drive of the set top box in common with other PVRs in the market, and additionally the potential to stream such recordings to other devices such as personal computers and tablets. It is also technically possible to move content from a PVR device and store on another for viewing later. This functionality (known as side-loading) enables customers to watch the recordings that they have legitimately made at a more convenient time and in a more convenient place on a device of their choice.

TiVo and side-loading functionality has been available in the United States for many years. Despite this, TiVo has only recently been introduced into the UK mass market by Virgin Media[3] and Virgin Media is yet to enable TiVo's side-loading functionality. Accordingly, it is in the interests of UK consumers that an exception to copyright which permits practices such as side loading is introduced, especially considering that such an exception would not prejudice the interests of copyright owners for the following reasons:

- the relevant content is legitimately received and recorded by the customer;
- consumers have historically been able to lawfully achieve the same end result by making a copy of a broadcast on a DVD or VHS tape and watching that disk/tape in a place of their choosing;
- the practice of recording programmes onto physical materials such as VHS tapes is dated, and the VHS recorder is now a defunct technology. It would be non-sensical for consumers to be more restricted now than they were in the age of VHS recorders; and
- the practice of side-loading is a species of format shifting, as both involve the transfer of legitimately obtained files from one medium to another to facilitate more convenient use. If format shifting is to be legalised, there is no justifiable reason as to why side loading should not also become lawful.

In addition to enabling side loading, a personal use exception to copyright would enable UK consumers to enjoy other technological innovations of the second phase of the digital revolution, such as the ability to store and access content from a remote location (a "cloud").

Music cloud services enable consumers to access their legitimately-obtained library of music wherever they are and regardless of the device they are carrying at any particular time. Google, Amazon, Apple and other smaller providers (such as MP3tunes) have launched music cloud services in the United States, many relying on the fair use provisions contained in the US copyright legislation to do so. It is notable that no such service has yet launched in the UK. One can only presume that this is the case due to the UK's stringent copyright

[3] Although in the early 2000s, TiVo was available under a retail model in the UK

regime which arguably would require cloud service providers to enter into licence agreements with the music labels to be able to launch a consumer proposition[4].

In addition to music cloud services, UK consumers are suffering an opportunity cost in relation to other cloud-based services that could be available but for the current copyright regime. For example, Virgin Media would like to be able to allow subscribers to record programmes from broadcast channels in the cloud rather than on the hard drive of the set top box. While not conceptually different to traditional time-shift recording, it may be argued that the recording in this instance would not be 'made in domestic premises' and therefore not fall within the current section 70 exception. Nonetheless, if Virgin Media were to offer this functionality to subscribers, it would give subscribers true freedom with regards to the use of the relevant content as, without having to copy the recording in advance from one device to another, they could access it at any time, on any device and in any place, as long as they can access the cloud.

Virgin Media contends that there is no justification for preventing the availability of cloud services (such as those described above) in the UK through copyright legislation. It would not be prejudicial to the interests of rights owners for consumers to use a cloud service and, indeed, customers expect to be able to listen to or watch content that they have paid for and are lawfully entitled to access in any way they wish, including by storing or recording it in a cloud so that they may be accessed at any time and on any device. Without having the ability to gain such flexible access, consumers may be dis-incentivised from lawfully obtaining content and may instead opt to access illegally distributed material. Accordingly, Virgin Media submits that it is likely to be in the interests of both copyright owners and copyright users that a significantly more liberal approach to copyright is adopted.

Virgin Media acknowledges that Government needs to balance the interests of copyright owners (and preserve their incentives to create copyright material) against those of UK consumers and developers who ought to be able to enjoy the opportunities offered by the digital age. Virgin Media is mindful of the Government's considerations in this regard, but strongly believes that a personal use exception to copyright – more so than a limited format shifting or private copying exception – would strike this balance. Virgin Media is similarly mindful of the security concerns that copyright owners may have if consumers are able to use digital means to freely transfer and copy content between devices and access content from the cloud, but considers that these concerns can be addressed by the private sector by implementing technical measures to prevent hacking or other misuse of content. Ultimately, Virgin Media believes that it is in the interests of both copyright owners and users that the law permits lawfully obtained content to be used in whatever manner is most convenient to the end user and therefore submits that a personal use exception is worthy of serious Government consideration.

Access to quality content

As a final comment in relation to limits to copyright, Virgin Media also notes the ever-increasing importance to consumers of having access to the widest possible choice of high quality content. While emphasis is placed by consumers on the content delivery mechanism, ultimately, quality of content is the key driver of consumer interest in a particular device or platform.

Whilst clearly beyond the immediate scope of the Hargreaves Review, Virgin Media encourages Government to ensure that all relevant stakeholders are able to make quality content (such as public service broadcaster content and premium pay TV content) available to consumers. Any restriction in stakeholders' ability to access quality content from rights owners would have the same effect as overly restrictive legislation in stifling technological development, as smaller parties would be dis-incentivised from creating innovative products due to the lack of material with which to support the innovation.

[4] Virgin Media notes Google's position that it is easier to launch businesses like Google in the United States (as opposed to Europe) due to the fair use provisions in US copyright legislation. Virgin Media assumes that this logic applies to both Google's search engine functions as well as its music cloud service.

Enforcement of IP rights

Virgin Media recognises the challenges faced by copyright owners in terms of the long term decline in the value of content in a digital age and the challenge of moving from analogue distribution to digital. Virgin Media therefore supports the Hargreaves Review's recommendation that a combination of education, effective markets, modern laws and appropriate enforcement is likely to be the most effective in preserving the value of intellectual property rights.

In particular, Virgin Media strongly supports Professor Hargreaves's recommendation that the Government should focus in particular on strengthening and growing legitimate markets in copyright in conjunction with education and enforcement measures.

In that context, in 2009 Virgin Media announced a partnership with Universal Music to offer consumers the world's first unlimited "all you can eat" DRM-free music download service. In parallel, the two companies agreed to work together to protect Universal Music's intellectual property and drive a material reduction in the unauthorised distribution of its repertoire across Virgin Media's network by implementing a range of strategies to educate file sharers about online piracy and to raise awareness of legal alternatives. The measures were intended to include, as a last resort for persistent offenders, a temporary suspension of internet access. No customers were to be permanently disconnected and the process would not have depended on network monitoring or interception of customer traffic by Virgin Media.

Due to a number of challenges, Virgin Media has not yet launched the unlimited download service. Virgin Media has however recently announced a partnership with Spotify to bundle its popular streaming service with Virgin Media broadband, television and mobile products. Virgin Media believes that the bundling of services such as Spotify, which gives consumers excellent range and quality of content, with broadband and other services could improve the take-up of legitimate services and therefore help reduce online infringement.

Furthermore, Virgin Media strongly believes that the rapid development of compelling subscription video-on-demand premium movie services is critical to facilitating sustainable monetisation of the digital entertainment economy. For example, in the United States the rapid development and adoption of the subscription VoD service Netflix is having an impact on traffic types available on networks and on usage of illicit services[5] - it now accounts for 29.70% of peak period downstream traffic.[6] Even when measuring total traffic and averaging over 24 hours, Netflix, with 22.2% of traffic, has overtaken BitTorrent (21.6%) as the largest component of Internet traffic on North America's fixed access networks.[7]

However, until distortions in the UK digital rights market - such as Sky's monopoly over subscription video-on-demand movie rights for premium Hollywood movies - are resolved, neither policy makers nor industry players will be in a position to understand the potential impact of comprehensive legitimate streaming services on the issue of online infringement.

In terms of enforcement measures to prevent digital piracy, in parallel with the Coalition Government's recent decision not to invoke at this stage sections 17 and 18 of the Digital Economy Act 2010 relating to site blocking, the successful judgment in favour of the MPAA in the recent Newzbin2 case in the High Court demonstrates that rights holders do have recourse under existing legislation to seek court orders to block websites, the primary purpose of which is the hosting of links to illicit content. Virgin Media believes that the Newzbin2 judgment demonstrates that rights holders can access existing legal processes to make major-in roads into the blocking of such illicit websites in the future. With this legal recourse in place there is a reduced requirement for further intervention and legislation by the Government.

Virgin Media agrees with the Hargreaves Review and Government that ultimately rights holders must continue to take responsibility for the exercise and protection of their rights and

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[5] http://gadgetwise.blogs.nytimes.com/2011/04/28/will-netflix-curb-movie-piracy/

[6] http://www.sandvine.com/downloads/documents/05-17-2011_phenomena/Sandvine%20Global%20Internet%20Phenomena%20Spotlight%20-%20Netflix%20Rising.pdf

[7] http://www.wired.com/images_blogs/epicenter/2011/05/SandvineGlobalInternetSpringReport2011.pdf

to educate and guide consumers. As Virgin Media's partnerships with Universal and Spotify demonstrate, however, ISPs and other industry players can play a strong role in supporting the rights holders to facilitate new commercial models for distributing content, as well as educating consumers and enforcing those rights where appropriate.

20 September 2011

Written evidence submitted by John Walmsley

I have been a freelance photographer my whole working life, since 1968, and my income derives almost entirely from licencing my own images. Because I've always worked in education, my income has never been above the national average and last year was just £16k. In recent years I've seen the number of IP infringements increase and my income decrease. They are connected events in my view.

1. No effective recourse against IP infringers.

A shoplifter is caught with the stolen goods. He gives them back and that's the end of the matter. I don't think parliament would ever pass laws which would allow this outcome. But they have. This is exactly how the law applies to IP infringers. If someone infringes my IP, which is theft, all I can claim is the original fee.

An EU Directive requires UK law to be "...effective, proportionate and dissuasive...". The bad news is, at present, our laws do not meet this requirement. The good news is we do now have an opportunity to put it right. If someone infringes my IP by using my photos without permission or payment, the law allows me to charge only the fee they would have paid if they'd asked in the beginning. So, from the infringers point of view, they really have nothing to lose. It is to their clear benefit and my clear loss. Hardly dissuasive. Newspapers now adopt this approach en masse. In previous times they would tell you when they'd used a photo so you could invoice. Now nearly all of them don't tell you. The photographer is left to find about it. If you don't notice the use, you can't invoice. They've been told by the courts this is illegal but they quietly ignore it.

The result is what so many IP holders face today, an avalanche of IP infringements. I spend at least half a day a week chasing infringers, a complete waste of my time. This week I'm chasing seven cases, one may be someone who just didn't think but the others are all commercial companies who I think would have known what they're doing. Two have stolen the image from another website (which has permission) and have used it on theirs. The image contains my visible copyright information (Education Photos (c) John Walmsley) within the image area and they have both displayed the image with this information clearly visible so they do know it's copyrighted material. It's a flagrant IP infringement. They know what they're doing and know there's no dissuasive sanction I can take under the present laws. They're laughing at all of us, photographers and politicians.

In many other countries, the States and Germany to name just two, there are substantive laws which allow the IP holders to chase infringers for proportionate and dissuasive redress. The EU requires we also have that in the UK so we must do it.

2. Orphan Works for non-commercial use only.

Orphan works is fine for non-commercial use when applied to university libraries' collections of old manuscripts and images etc.. It is wholely inappropriate to even think of applying it to modern day photographs all of which are within copyright (death plus 70 years). Modern day photos are all owned by someone. They are certainly not orphans.

First, we need a law which makes it a clear criminal offence to strip metadata. Metadata is necessary to identify who owns the IP. If metadata is present in all photos, OW would not apply to them. So, retaining metadata is absolutely and fundamentally crucial. Outlawing metadata stripping is the rock on which all other provisions rest. Unless parliament produces a law to guarantee this, we would continue with the present thieves' charter. Not parliament's finest hour. Three of my present cases come from people stripping metadata, using the photo on their site and then others copying it. Those who have copied it could easily claim they had no idea who owned the photo as there's no metadata. It's a ridiculous situation.

The other reason, as I see it, that OW must never be applied to modern day photos is for the sake of the people in the pictures especially if they're minors (under 18 years of age). I take lots of photos of young people usually in schools and colleges. They are taken with the young people's and their parents' permissions. They go in my library and are used in school textbooks, government departments publications and on websites to do with education. Each use is OKed by me personally. If I don't like the context, the photo is not used. This helps guarantee the wellbeing of those young people in that they're not embarrassed or ridiculed by an inappropriate use. If someone strips the metadata and passes one of these photos around, the next person has no idea who owns it and cannot contact me for permission. Under OW proposed legislation, they would be free to use those images as they wish. The outcome for the people in the photos could be dreadful. You cannot seriously consider allowing this sort of legislation. Imagine if your young son or daughter were in those photos. How would you explain why you voted for it?

Written evidence submitted by Jonathan Webb

If the Hargreaves report on copyright is acted upon as recommended my business will no longer be viable and I will be forced to close to relocate to a country with stronger copyright protection.

I am an aerial photographer and my business involves chartering an aeroplane or helicopter, taking aerial photographs and then either selling them over the internet or publishing them in books.

The Hargreaves report recommends allowing the licensing of images whose author is unknown through a “digital copyright exchange”. These works with unknown authors are referred to as Orphan works. The problem is with a quick click of a computer mouse almost any creative work can have the name of its creator removed.

Currently if somebody wishes to use one of my photographs, for example as a brochure illustration or in a book, they must buy a licence from me. If they are tempted to be dishonest and simply save the picture from my website and cut off my name, then I can take the matter to court.

Under the Hargreaves proposal, less than honest customers will be able to copy a picture from my website, cut off or paint out my name and then licence it perfectly legally as an “Orphan Work” at a tiny fraction of my normal price.

There has been talk of these orphaned works being licenced at either a nominal rate or at “market rates” However neither of these will come anywhere close to the price I need to charge to cover the cost of chartering a helicopter or aeroplane. Currently “ Market rates “ at http://www.istockphoto.com/ appear to be around £8 for an aerial photograph. Now you do not need to be an aviation expert to realize you cannot charter a helicopter for £8. The big photo agents work by selling large quantities of images. I cannot do that as despite the beauty of my work I cannot envision selling thousands of aerial photographs of, say Wigan.

Currently my business works by me selling my images directly to the customer in small quantities at very high prices, typically £150.00 for a licence to use an image. If customers can buy my images from Professor Hargreaves’ Digital Copyright Exchange for £8 then it does not take a degree in advanced mathematics to work out that I am stuffed!

Not only will the Hargreaves proposals prevent me from making a living from future work but it will also take from me the rewards I have earned from the last 20 years of work and investment. I have been spending up to £25,000 per year chartering aeroplanes and helicopters plus I have invested in about £30,000 worth of Camera equipment. These investments should be providing me with an income into the future, up to and including supporting my retirement. All this will be lost if my customers can buy my work cheaply from somebody else.

It should also be noted that like most UK creative small businesses I pay UK taxes (National insurance, 20% Vat and 20% income tax) The people who will gain most from the Hargreaves proposals will be mainly large overseas corporations who pay little or no UK tax.

Although I have written the above concerns in the context of my small aerial photography business, my concerns will be mirrored by tens of thousands of creative people working in all sorts of medias from photography to video and from writing to painting. My business on its own may be insignificant but put together the many thousands of creatives who will suffer a loss of income will have a noticeable effect on the UK economy which will not be made up by the advantages for the large overseas media concerns. There will also be a tremendous cultural loss from not having the creative work which would otherwise be produced.

20 August 2011

Written evidence submitted by the Wellcome Trust

Summary

The Wellcome Trust strongly supports the recommendations of the Hargreaves Review of Intellectual Property to update the UK's copyright legislation and to address the barriers it creates for research and innovation. We are calling on the Government to implement these much-needed reforms without delay.

1. The Wellcome Trust is pleased to respond to the BIS Committee's call for evidence on the Hargreaves Review of Intellectual Property. We are a major funder of biomedical research, dedicated to achieving extraordinary improvements in human and animal health, and we also provide the Wellcome Library – one of the world's foremost resources for research and understanding on the history of medicine. It is therefore of vital importance to us that the UK's intellectual property framework supports researchers in maximising the value of published outputs to advance knowledge and its application to improve health.

2. In this light, we are fully supportive of the recommendations of the Hargreaves Review in relation to reform of the UK's copyright legislation. We agree with the review team's conclusion that copyright provisions have failed to keep pace with developments in the digital age, and are now serving to inhibit potentially valuable avenues of research and innovation.

3. In particular, we strongly endorse the call for an exception in copyright legislation to enable text and data mining in the context of non-commercial research. We believe that through the use of these tools researchers will be able to generate vital new insights from the huge wealth of valuable information contained in published works – stimulating discovery and its application to generate new health and economic benefits.

4. We also strongly support the Review's conclusions in relation to orphan works – which are essentially locked from use because rights holders cannot be located. We believe that the development of a system to enable access to these potentially valuable resources under license is long overdue. The Government has already signalled its intention to address this problem in the Plan for Growth published in March 2011.

5. In addition, we welcome other key recommendations of the Hargreaves review – in particular:

   - the introduction of other key exceptions to copyright – including format shifting and copying in the context of library archiving;
   - the adoption of legislation to ensure that valid exceptions to copyright cannot be overridden through contracts;
   - the formation of a digital rights exchange – which should simplify the processes of identifying rights holders.

6. In relation to this final point, the Wellcome Library is currently working with the Authors' Licensing and Collecting Society (ALCS) and the Publishers Licencing Society (PLS) to identify rights holders for printed works so that permission can be sought to digitise their works and make them freely available on the Internet. Although this example is format specific (i.e. printed works), it provides an example of a working system that aims to simplify the process of identifying rights holders.

7. In light of our strong support for the Review's recommendations, we were very pleased that the Government accepted all of the key proposals in its August 2011 response. We look forward to seeing the detailed proposals for the extension of copyright exceptions and for a new orphan works scheme that the Government will publish in the Autumn. We hope that the Government

will move thereafter to implement these much-needed measures as rapidly as possible, and that the BIS Committee will support reforms to the copyright system that are required to ensure that the UK is able to grasp new opportunities for research and innovation in the digital age.

6 September 2011

Written evidence submitted by Andrew Wiard

I am a freelance photographer. In the days of the 1956 Copyright Act I sat on the British Copyright Council, helping to plan essential photographic reforms. I am now a founder member of the campaigning group Stop 43.

The main points I wish to make, as a photographer, are as follows:

- The economics of Intellectual Property cannot be dealt with in isolation from moral and human rights, or contract law.
- Moral rights should now be implemented in full
- Cultural use of orphan works, and digitisation for archival purposes, should be permitted
- Commercial use of orphans, and the Extended Collective Licensing of works without the author's permission should not be permitted
- A Digital Copyright Exchange should be established to facilitate the identification of creators, and the licensing of IP by creators and rights holders
- A Digital Copyright Exchange should not establish two-tier justice
- An IP Small Claims fast-track should be introduced, and the anomaly whereby Intellectual Property is excluded from fair contract law should be removed.
- Copyright should be an inalienable right

1) Professor Hargreaves was asked to focus on the economics, but it is neither right nor practical to ignore moral and human rights, and contract law. Copyright and moral rights are artists' human rights, guaranteed by the Universal Declaration of Human Rights (" *Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author ")*, and it is right that they should be respected. Anyway all IP legislation in the UK now has to be compatible with the UK Human Rights Act. The practical point is that the IP economy is unworkable if IP creators cannot be identified. Or as Hargreaves put it in connection with the proposal for a Digital Copyright Exchange, " ownership information is clearly a prerequisite for the marketplace ". It is also difficult to see how the market can function properly if IP transactions are not subject to fair contract law.

2) The crucial moral right here is the right of paternity - the right for the creator of a copyright work to be identified. This together with the other moral rights was first introduced into statute law by way of the Copyright, Designs and Patent Act

1988. However what one hand gave, the other in large part took away. According to the CDPA moral rights are not automatic but have to be asserted, and are altogether excluded from newspapers, magazines and periodicals. Furthermore moral rights are not unwaivable, as they are in other European countries. Until authors of copyright works have the absolute, and enforceable, right to be identified the licensing of these works cannot be straightforward and may even prove impossible. The seemingly intractable problem of orphans makes the point. Full moral rights would go a long way to prevent the future creation of orphans, reducing them to a historical problem. Prevention is better than any conceivable cure.

3) There can be no objection to the copying of works of unknown origin for archival and preservation purposes. Cultural use of such works - non commercial display - should in my opinion also be permitted, even though there are clearly circumstances in which the unidentified author might strongly object to any publication at all.

4) However commercial use without the author's permission of a copyright work, whether declared an orphan, or by way of extended collective licensing, should not be permitted. Not only is it difficult to see how this would be compatible with our international obligations under the Convention of Berne. It is also a direct contravention of the author's human rights. Millions of UK citizens own cameras and/or smart phones. We are all photographers now. While exceptions to human rights may be permitted in the general interest, it cannot possibly be in the interest of the public to strip the public of their human rights. Moreover the thousands of so-called orphans being created daily are only orphans to the one who cannot readily trace the creator. In the case of photography, they are copies of originals still held by the creator who, especially if a professional, will still be marketing other copies. The authorship, in other words, is only unknown to the holder of a copy which - for whatever reason - does not carry the author's name. The most obvious way of avoiding this problem is, as stated above, legislating full moral rights onto the UK statute book.

5) There are other ways. The most important of which would be a Digital Copyright Exchange, and/or other registries which connect copyright works to their authors, as well as making them available for licensing. It is regrettable that it is now being proposed to proceed with legislation for the commercial use of orphans - in any case in breach of our human rights - without ensuring that the protection of a Digital Copyright Exchange is available first. Properly implemented, it should anyway obviate the need for commercial orphan works legislation.

6) Provided, that is, it does not instead become a walled garden within which works there registered receive higher legal protection than those outside. Two tier justice would be wrong in itself and there are better incentives for creators to take part, identification as the author, and commercial opportunities. The government made clear in its reply to Hargreaves that the DCE should be free at

the point of use, running costs to be met by a charge on transactions. This is greatly to be welcomed, and essential if the idea, which has such great potential, is to take off.

7) The other steps in my view essential to the smooth running of a market in Intellectual Property are an IP Small Claims fast-track, as recommended by Hargreaves, and fair contract law - available to all, it seems, except IP creators. This clause of the Unfair Contract Terms Act 1977:

" Sections 2 to 4 of this Act do not extend to-(c) any contract so far as it relates to the creation or transfer of a right or interest in any patent, trade mark, copyright [or design right], registered design, technical or commercial information or other intellectual property, or relates to the termination of any such right or interest;"

- must be repealed.

8) Finally, the copyright of the creator should be inalienable. Fair contract law, which does not yet apply to IP, would not in itself be sufficient protection against the demands of corporate clients for individual creators to surrender their copyright. Which is, I repeat, a human right. The only sound equitable basis for creators to trade in their intellectual property is as owners of inalienable copyright, licensing their IP according to fair contract law. Such a system already exists, works, and can be seen to work in Germany today. It is time to introduce this system here.

Recommendations:

1) Implementation of automatic full unwaivable moral rights without exceptions in UK law.

2) Legalising digitisation for archival purposes and the cultural use of orphan works.

3) Rejection of commercial use of orphan works, and extended collective licensing of authors' works without their permission.

4) Establishing a Digital Copyright Exchange, with equal rights for creators both in and outside the DCE.

5) Introducing an IP Small Claims fast-track procedure.

6) Repeal of Schedule 1, clause 1c of the Unfair Contract Terms Act 1977

7) Making copyright the inalienable right of the creator.

5 September 2011

Written evidence submitted by Janine Wiedel

I am writing to you as a photographer and a photolibrary. I have been in the business for 40 years and have many concerns about the protection of my images with regard to the Hargreaves review

The following points are of particular concern to me as a photographer:

1. Under UK law I have to assert my moral rights. This should be an automatic right to all creators.

2. Hargreaves does not make it an offence to remove digital copyright information from photographs. This is happening all the time making these images into Orphan works. Hargreaves goes further by recommending the commercial exploitation of these works. This will result in a huge resource of Orphan works and will then make it impossible for creators to carry on a successful business.

3. In the UK it should be that the creator of the work has absolute right to be identified as such. No organization should be prohibited by law from forcing the creator to waive this moral right

4. It would be totally impractical to have to registering creative works. It will lead to infringement being compromised if the work were not registered. If every country were to go down that road, as could happen, creators would be in an impossible situation, needing to register their work in every country. Few could afford the time and expense of doing this.

5. Whilst there may be a case to permit orphan works to be used for cultural purposes, such as in libraries or museums, there is need to commercially exploit orphan works.

Copyright data can currently be striped from creator's work, not credit them, require creators to waive their moral rights or risk losing a contract, assign their copyright or lose a contract. This soon becomes impossible for the creator to carry on in the industry.

Hargreaves did not recognised Artists rights as human rights. Both the UN and EU Human Rights act have declared that artist's rights are also human rights.

United Nations Universal Declaration of Human Rights Article 27 (2) states:

1 Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

2 Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Note also that a recent UK court ruling (20thC Fox vs 'Newsbin2') established that -

Copyrights are property rights protected by Article 1 of the First Protocol of the European Convention on Human Rights, as also expressed in Article 1 of the First Protocol of the Human Rights Act 1998;

Piracy of copyright work is a breach of the copyright holder's human rights;

The copyright holder is therefore entitled to legal redress;

and, because 'so far as possible, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with human rights', legislation drafted and enacted subsequent to the enactment of the Human Rights Act 1998 must also be read and given effect in a way which is compatible with human rights.

7 September 2011

Written evidence submitted by Peter Wood

My objections to the proposals of the Hargreaves Review of Intellectual Property and the Government's response to that Review.

1. Introduction:

- 1.1 I am concerned that the members of the Intellectual Property Review Committee Members do not at all understand the meanings of: 'Moral Rights', ''Copyright', 'Orphaned Works' ... and the concerns of creators about these subjects.

- 1.2 None of the 11 member MP's of the committee have expressed any political interest in or commitment to the arts, intellectual property law, copyright, orphan works, or the particular concerns of small creative or on-line businesses. So are they the right people to judge these proposals, on our behalf, in representation of creative businesses.

- 1.3 It is my opinion based on the results proposals, and the content therein, that many on the receiving end of this report, who will make decisions on my behalf, have no real appreciation or understanding of the effect these changes will have on both myself as an UK based aerial photographer, as well as the many other photographers, creative artists and producers of material - in our endeavors to make a living, particularly in the ever evolving digital era.

- 1.4 I consider that the proposals are unfair and will damage the already fragile business prospects for the UK's creative citizens and small businesses.

- 1.5 I believe that there should be MORE law on OUR side, not less, so that we as creators retain both copyright, so our works generate a livable income and not for others to steal our efforts.

- 1.6 Essentially the proposal is robbing Peter to pay Paul, where Peter is the creator. This is unjust and unfair.

2.0 My concerns with the Hargreaves Review of Copyright, can be summarised as follows:

2.1
a) The moral rights of authors are not automatically granted as in other EU countries.
b) Moral rights have still not been made unwaivable, as in other EU countries.
c) No sanctions/fines, are proposed for the removal of digital copyright information from digital works.
d) The review proposes allowing orphan works to be used for commercial purposes.
e) That remedies for unauthorised use, are restricted for those who have not registered their works.
f) Creators are not given a level playing field with industry.
g) 7 Artists rights have not been recognised as human rights by the IP review
h) There is already blatant IP infringement at the present time, which under these proposals, will only increase, to the disadvantage to may creators.

3.0 My own business, Hawkeye Elevated Photography:

3.1 Hawkeye was established in 1996, as a sole trader, to provide both low level elevated mast photography & Video in addition to traditional aerial photography from aircraft, as a business based in SE England. Clients range from Large blue chip construction company's down to local small builders, private individuals, surveyors and solicitors.

3.2 I have invested a great deal of money, time and effort in both developing / using my apparatus, vehicles and cameras that I use to capture these photographic and video images.

3.3 My business also involves costs of chartering either an airplane or helicopter, taking aerial photographs either as commissions to companies or by direct selling to the public, via various both traditional means including the Internet.

3.4 The income I derive is to pay my household bills and to provide a living for both my family now and in my future retirement via means of me licensing my images.

3.5 As a construction and aerial photographer I must both sell my images for a fee to cover the above costs, as well as all the costs involved to actually conduct my business (incl. various Taxes), consequently, selling at a 'nominal' sum is not an option.

4.0 Factual Information

I (and many other creative artists) already spend a great deal of time tracking down images used without permission (i.e. stolen images). Much of this (often wasted) time tracing use of my images could be much reduced, by enforcing both existing and introducing further laws on OUR side, not less.

So that as creators, we retain both copyright, to generate a liveable income, so as to introduce a much more obvious deterrent that stops this theft, backed up with ways that make it much easier for us creators to obtain recompense for copyright infringement At present, too many people, whether individuals, corporate or local government are able to steal images from anyone. There's a 'can do, will do' attitude to this blatant theft.

4.1.0 Illegal uses

4.1.1 Commercial financial exploitation of Orphan Works removes my human right to control my creative works

4.1.2 Commercial use of Orphan Works risks possible breaches between my clients and myself, as well as those third parties through whom, I redistribute their works under licence.

4.1.3 The restriction of court enforceable realistic punitive damages for copyright infringement impedes the profitability and growth of creative businesses.

5. 0 The moral rights of authors are not automatically granted, as in other EU countries.

5.1 It should not be necessary to assert your moral rights as at present under UK law, this should be an automatic right granted to all UK citizens.

6.0 Moral rights have still not been made unwaivable, as in other EU countries.

6.1 The right to be identified as the creator of a work should be absolute, the law should prohibit any person or organisation from requiring that the creator to waive their moral rights. It is illogical to bring forth legislation for the licensing of orphan works when the law as it stands has no provisions which will prevent or significantly reduce the creation of orphan works

7.0 No sanctions are proposed for the removal of digital copyright information from digital works.

7.1 At present it is necessary to show that removal of digital copyright information has been done with intent to infringe, before it can be recognised by the courts as an offense under current UK legislation. Yet worldwide, every day, millions of digital works are having their digital copyright information stripped rendering these works as orphans, including even a well known international earth mapping company.

7.2 Other large companies do already purposely strip metadata (text based data about that image) from any images uploaded to their systems whether submitted legally or by others, illegally, which in turn creates orphaned images, some of which may be stolen images.

7.3 This is morally wrong, it is the equivalent of physically removing a signature from a painting, an act that all would agree was reprehensible. Yet Professor Hargreaves, knowing this, has recommended the commercial exploitation of orphan works. This will only make it more difficult than ever for creators to make a successful business when there is huge resource of orphan works to exploit, a situation which will only get worse as time passes.

8. The review proposes allowing orphan works to be used for commercial purposes.

8.1 There is no proven need for orphan works to be commercially exploited, and Professor Hargreaves said that copyright law should be evidence driven. There is no published evidence that shows that UK industries are disadvantaged through being unable to commercially exploit orphan works.

8.2 There is no doubt a desire with many sectors of the UK industry, such as publishing, to have commercial access to orphan works at a price and on terms below what the rightful owner would require. This is robbing Peter to pay , where Peter is the creator. This is unjust and unfair. There may be a case to permit orphan works to be used for cultural purposes, such as in libraries or museums, providing that a precise definition of cultural use can be defined and agreed.

9.0 That remedies for unauthorised use are restricted for those who have not registered their works.

9.1 Registering creative works at a national level is completely impractical in a global market. It will lead to anomalies of the type already exposed by the US system of copyright registration where a creators remedies for infringement are compromised if they have not registered that work in the USA.

9.2 If every country were to go down that road, as could happen, creators would be in an impossible situation, needing to register their work in every country, but unable to afford the time and expense of doing so. If registration has to come into the equation it should be a global system. Such a universal system already exists and is supported by the PLUS Coalition.

10.0 Creators are not given a level playing field with industry.

10.1 Industry at present can strip digital copyright data from creators work, not credit them, require creators to waive their moral rights or risk losing a contract, assign their copyright or lose a contract, all of which impose grossly unfair terms on the creator.

10.2 Artists rights have not been recognised as human rights by Hargreaves IP review.

10.3 Both the UN and EU Human Rights act have declared that artists rights are also human rights.

11.0 Recommendations to be considered by the committee:

11.1 Recommend to Government that stripping of copyright data (metadata) is illegal, as in the USA.

11.2 Recommend to Government that both 'image harvesting' (enticing image submissions to then be used or sold without payment to the 'original' copyright holder) and that 'rights grabbing' methods, terms and conditions used by many company's to generate unethical income for their own greed, are made illegal.

12.0 The following information has been published by Stop43 on their campaign website -

12.1 United Nations Universal Declaration of Human Rights Article 27 (2) states:

a) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

b) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

13.0 Note also that a recent UK court ruling (20thC Fox vs 'Newsbin2') established that -

13.1
a) Copyrights are property rights protected by Article 1 of the First Protocol of the European Convention on Human Rights, as also expressed in Article 1 of the First Protocol of the Human Rights Act 1998;

b) Piracy of copyright work is a breach of the copyright holder's human rights;

c) he copyright holder is therefore entitled to legal redress;

d) because 'so far as possible, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with human rights', legislation drafted and enacted subsequent to the enactment of the Human Rights Act 1998 must also be read and given effect in a way which is compatible with human rights.

14.0 Conclusion

14.1 The Hargreaves review is seriously flawed, in that it takes away any legal recourse that creative artists have against illegal theft of images, material or creations, due to not only existing illegal practices but the introduction of the badly thought out recommendations in the review will enhance more illegal practices.

14.2 Making it illegal to strip Metadata from imagery is the essence of IP copyright protection, and unless government properly considers and introduces 'just and fair' laws to protect work of creative works, and to guarantee this protection, we will continue with the present totally unacceptable, immoral and illegal theft by the many 'copyright infringers', including several of the 'stakeholders' met during the preparation of this IP report.

20 September 2011

Written evidence submitted by Adam Woolfitt

I am a freelance photographer of some 55 years standing having been active with magazines such as National Geographic , Fortune , Newsweek, Travel and Leisure, The Weekend Telegraph, and many companies including Kodak UK, Fuji UK and The British Tourist Authority.

As a photographer close to retirement I am dependant on continuing Royalties from the sale of my stock of existing images, built up over fifty five years of hard work.

These sales constitute my 'pension' and represent my 'life savings'.

So I think it is very important to draw your attention to the apparent bias and many anomalies contained in the Hargreaves Review of Intellectual Property. Many of these risk becoming enshrined in future legislation and all of them if so enshrined , could threaten my livelihood.

1) The Moral Rights of Authors enshrines the right of an Author to be named as the author of their works. (N.B. Photographers <u>are</u> Authors) **But the Moral Rights of Authors are not going to be automatically granted, as in OTHER EU countries.**

Why not ?

2) In an age dependant on digital distribution it is now necessary to mark images with the name and contact details of their author by embedding this EXIF data in the digital files.
However it is also very easy for an unscrupulous person or organisation, who wish to use images without payment or acknowledgement, to strip this information out, **thereby creating 'orphan works"**

The Review proposes NO sanctions against those who steal and exploit works by this method.

Why not? All other forms of theft attract the sanction of the Law.

3) The Review proposes allowing **'orphan works'** to be used for commercial purposes (even if an 'orphan work' has been deliberately created by stripping out the embedded author information)
This effectively creates a licence for organisations (Publishers, Design Groups, Broadcasters) to steal photography at will and without rewarding the legitimate authors.

Is it really the intention of your Committee to encourage large Groups to steal work, at will, from individual artists and authors ?

4) The Report demonstrates great bias in favour of the Publishing and Broadcasting Industries at the expense of individual authors and their basic human rights.

Why ?

I do hope that Committee members will reconsider very seriously the implications behind these questions and ask themselves **what are the motives of the vested interests, so eager to legalise theft from small creative producers**, one of the most vibrant sectors of Great Britain's economic life?

Thank you for your time.

Adam Woolfitt
3rd September 2011