House of Commons
Business, Innovation and Skills Committee

The Hargreaves Review of Intellectual Property: Where next?

First Report of Session 2012–13

Volume I: Report, together with formal minutes, oral and written evidence

Additional written evidence is contained in Volume II, available on the Committee website at www.parliament.uk/bis

Ordered by the House of Commons to be printed 21 June 2012

HC 367-I
(incorporating HC 1498-i, ii, iii, and iv of Session 2010-12)
Published on 27 June 2012
by authority of the House of Commons
London: The Stationery Office Limited
£20.00
**Business, Innovation and Skills Committee**

The Business, Innovation and Skills Committee is appointed by the House of Commons to examine the expenditure, administration, and policy of the Department for Business, Innovation and Skills.

**Current membership**

Mr Adrian Bailey MP (Labour, West Bromwich West) (Chair)
Mr Brian Binley MP (Conservative, Northampton South)
Paul Blomfield MP (Labour, Sheffield Central)
Katy Clark MP (Labour, North Ayrshire and Arran)
Julie Elliott (Labour, Sunderland Central)
Rebecca Harris MP (Conservative, Castle Point)
Margot James MP (Conservative, Stourbridge)
Simon Kirby MP (Conservative, Brighton Kemptown)
Ann McKechin (Labour, Glasgow North)
Mr David Ward MP (Liberal Democrat, Bradford East)
Nadhim Zahawi MP (Conservative, Stratford-upon-Avon)

The following members were also members of the Committee during the parliament.

Luciana Berger MP (Labour, Liverpool, Wavertree)
Jack Dromey MP (Labour, Birmingham, Erdington)
Dan Jarvis MP (Labour, Barnsley Central)
Gregg McClymont MP (Labour, Cumbernauld, Kilsyth and Kirkintilloch East)
Ian Murray MP (Labour, Edinburgh South)
Nicky Morgan MP (Conservative, Loughborough)
Chi Onwurah MP (Labour, Newcastle upon Tyne Central)
Rachel Reeves MP (Labour, Leeds West)

**Powers**

The Committee is one of the departmental select committees, the powers of which are set out in House of Commons Standing Orders, principally in SO No 152. These are available on the Internet via www.parliament.uk.

**Publication**

The Reports and evidence of the Committee are published by The Stationery Office by Order of the House. All publications of the Committee (including press notices) are on the internet at www.parliament.uk/parliament.uk/bis. A list of Reports of the Committee in the present Parliament is at the back of this volume.

The Reports of the Committee, the formal minutes relating to that report, oral evidence taken and some or all written evidence are available in a printed volume. Additional written evidence may be published on the internet only.

**Committee staff**

The current staff of the Committee are James Davies (Clerk), Neil Caulfield (Second Clerk), Peter Stam (Inquiry Manager), Josephine Willows (Inquiry Manager), Ian Hook (Senior Committee Assistant), Pam Morris (Committee Assistant), Henry Ayi-Hyde (Committee Support Assistant).
Contacts

All correspondence should be addressed to the Clerk of the Business, Innovation and Skills Committee, House of Commons, 7 Millbank, London SW1P 3JA. The telephone number for general enquiries is 020 7219 5777; the Committee’s email address is biscom@parliament.uk
# Contents

## Report

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>1 Introduction</strong></td>
<td>3</td>
</tr>
<tr>
<td>History</td>
<td>3</td>
</tr>
<tr>
<td>Evidence-based policy</td>
<td>4</td>
</tr>
<tr>
<td><strong>2 Copyright</strong></td>
<td>7</td>
</tr>
<tr>
<td>Concepts</td>
<td>7</td>
</tr>
<tr>
<td>Proposals for new copyright exceptions following Hargreaves</td>
<td>8</td>
</tr>
<tr>
<td>Format shifting</td>
<td>8</td>
</tr>
<tr>
<td>The legal position on a copyright exception for format shifting</td>
<td>9</td>
</tr>
<tr>
<td>Evidence from the music industry and open rights groups</td>
<td>10</td>
</tr>
<tr>
<td>Options proposed by the Intellectual Property Office</td>
<td>11</td>
</tr>
<tr>
<td>Conclusion</td>
<td>11</td>
</tr>
<tr>
<td>Parody</td>
<td>12</td>
</tr>
<tr>
<td>Comparison with sampling</td>
<td>12</td>
</tr>
<tr>
<td>Hargreaves on parody</td>
<td>13</td>
</tr>
<tr>
<td>Relevance of moral rights and reputation</td>
<td>13</td>
</tr>
<tr>
<td>Free speech arguments</td>
<td>14</td>
</tr>
<tr>
<td>Intellectual Property Office proposals</td>
<td>14</td>
</tr>
<tr>
<td>Conclusion on parody</td>
<td>14</td>
</tr>
<tr>
<td>Content mining</td>
<td>14</td>
</tr>
<tr>
<td>What is content mining</td>
<td>14</td>
</tr>
<tr>
<td>The legal issue</td>
<td>15</td>
</tr>
<tr>
<td>The proposals</td>
<td>15</td>
</tr>
<tr>
<td>The arguments for and against</td>
<td>15</td>
</tr>
<tr>
<td>Possible solutions</td>
<td>17</td>
</tr>
<tr>
<td>Public access to publicly funded research</td>
<td>18</td>
</tr>
<tr>
<td>Conclusion</td>
<td>19</td>
</tr>
<tr>
<td>Orphan works</td>
<td>19</td>
</tr>
<tr>
<td>Background</td>
<td>19</td>
</tr>
<tr>
<td>The issue of misidentifying works as &quot;orphan&quot;</td>
<td>20</td>
</tr>
<tr>
<td>A new copyright statute</td>
<td>21</td>
</tr>
<tr>
<td>EU draft Directive</td>
<td>22</td>
</tr>
<tr>
<td>Intellectual Property Office proposals</td>
<td>23</td>
</tr>
<tr>
<td>Conclusion</td>
<td>23</td>
</tr>
<tr>
<td>Orphan works and moral rights</td>
<td>24</td>
</tr>
<tr>
<td>The proposed Digital Copyright Exchange</td>
<td>24</td>
</tr>
<tr>
<td>Overview and status</td>
<td>27</td>
</tr>
<tr>
<td>Collecting societies</td>
<td>29</td>
</tr>
<tr>
<td><strong>3 Designs and patents</strong></td>
<td>31</td>
</tr>
<tr>
<td>Designs</td>
<td>31</td>
</tr>
<tr>
<td>Patent thickets</td>
<td>32</td>
</tr>
<tr>
<td>The proposed unified patent and patent court system</td>
<td>34</td>
</tr>
</tbody>
</table>
The Hargreaves Review of Intellectual Property: Where next?

Present system 34
Contrast with other jurisdictions and obstacles to a proposed supranational patent 35
The current proposals and concerns about them 35
European Scrutiny Committee review 36
Summary 38

4 Enforcement 40
   Enforcement of copyright 40
   The Digital Economy Act 42

5 Advice for SMEs 43

6 Conclusion 46
   Annex: Glossary 47
      Glossary of abbreviations 47
   Conclusions and recommendations 48

Formal Minutes 52
Witnesses 53
List of printed written evidence 53
List of additional written evidence 54
List of Reports from the Committee during the current Parliament 57
1 Introduction

History

1. The Hargreaves Review of Intellectual Property was commissioned by the Prime Minister in November 2010 to consider whether the UK’s intellectual property framework was up to the task of supporting innovation and growth. Its findings were contained in a report entitled Digital Opportunity, published in May 2011. Many of these findings recommended further investigation before determination of policy: first, because the inquiry panel had had only six months in which to produce its report; and secondly because one of the most significant findings of the Review was the need for more evidence to support policy making in the field of intellectual property.

2. Following the Review, the Government published a response in August 2011 which largely endorsed Professor Hargreaves’ recommendations and set out a programme of consultation and policy development to take place over the following year. The programme contained an impressively detailed set of timescales for developing individual strands of policy, and it is commendable that those timescales have been adhered to.

3. Witnesses to our inquiry were invited to submit evidence on the recommendations of the Hargreaves Review and the resulting Government response, with particular reference to the overall strategic direction taken by the Hargreaves Review and the practicability of its proposals. We held evidence sessions on the proposals made in the Review in the latter months of 2011, following which, in late December 2011, the Government produced a Consultation on Copyright with a large number of greatly more detailed proposals. Responses to the Consultation were received in March 2012, and the Government is at the present time considering how to finalise policies in light of those responses. As they are current, we have taken the options presented in the Consultation as the main starting point for discussion of copyright matters in this Report.

4. Also in the period since our oral evidence sessions, the European Scrutiny Committee held its own set of evidence sessions on the proposed Unified Patents Court. As this was one of the topics we addressed, we have taken that Committee’s more recent evidence into account in reaching our conclusions on the Unified Patents Court.

5. As well as inviting written evidence to our inquiry, we held four oral evidence sessions: with Professor Hargreaves; with Professor Sir Robin Jacob, former Court of Appeal judge and Queen’s Counsel at the intellectual property bar; with representatives of industry bodies and interested organisations; and with the Minister and representatives of the Intellectual Property Office. The Intellectual Property Office also very helpfully briefed us on the background to the subject matter in a preliminary private session. We are grateful to all those who gave their time to contribute to the inquiry.

---

1 www.ipo.gov.uk/ipreview.htm
2 www.ipo.gov.uk/ipresponse
6. In line with the Hargreaves Review’s recommendation of more evidence-based policy, we have confined this Report to areas on which we believe we can usefully comment based on the evidence available to us. In particular, we looked at the Review’s proposals for opening up copyright exceptions as a means to stimulate growth, for new modes of copyright licensing, and at the position on matters relating to patents, enforcement and small and medium sized enterprises. In some instances it has not been appropriate for us to anticipate a detailed policy process based on full consultation and economic data. That is not to say, however, that we might not wish to scrutinise such policies at a later stage of their development.

**Evidence-based policy**

7. The Hargreaves Review acknowledged that there were obstacles to greater use of evidence in the formation of intellectual property policy, identifying three main problems:

- there are areas of intellectual property rights on which data is simply difficult to assemble; while patents are well documented, and traceable to their owners, unregistered design rights and copyright use are not;

- the most controversial policy questions usually arise in areas (such as computer programs, digital communication and biosciences) which are new and inherently uncertain because they involve new technologies or new markets whose characteristics are not well understood or measured;

- 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.\(^4\)

The Review went on to refer to

> The need for any machinery in this area of policy and public administration to be robust. This matters because there are strong and divergent interests in play and with some of the most skilful and influential lobbyists on the UK political scene.\(^5\)

8. We put this point about so-called lobbynomics to our witnesses. Sir Robin Jacob agreed that there were strong influencing bodies in the sector:

> **Nadhim Zahawi:** Professor Hargreaves described IP as containing “some of the most skilful and influential lobbyists in the UK political scene and referred to ‘lobbynomics’. From what I hear you are agreeing with that?

> **Sir Robin Jacob:** Yes.\(^6\)

However, John McVay of Creative Coalition Campaign disagreed that lobbyists had too much influence, and argued that lobbyists in the sector played an important role in

---

4 Review, paragraph 2.13
5 Review, paragraph 10.9
6 Q 87
informing “Government policy and, indeed, regulators’ policy on various issues. We do that in good faith; we do it with a rigorous and transparent methodology.”

PRS for Music believed that an answer lay with more peer review:

One of the things we welcome in Hargreaves’ suggestions was that [...] evidence should be peer-reviewable. We work pretty hard ourselves to try to do objective research. There is no such thing as an objective choice of words; humans always come from a point of view. If it is peer-reviewable, then at least it can stand scrutiny.

9. Adrian Brazier, Head of Digital Economy Act implementation at the Department for Culture, Media and Sport acknowledged that there had been problems with the availability of evidence in connection with that Act:

It was somewhat opaque; the impact assessment was not based upon new evidence or new research that had been commissioned by us; we had no independent source of information. I think it would also probably be fair to say of the evidence that we had been offered by rights holders that they were unwilling, essentially, to lift the bonnet and let us see the engine: their workings and methodology.

He added that “this was not a comfortable position for us necessarily to be in and if we essentially had to commission proper evidence first, we probably should have done so.”

10. The Head of the Intellectual Property Office, John Alty, made the point that much of the evidential work on developing further policy was yet to come:

Inevitably the estimates that the Hargreaves Review produced were broad-brush. Where we are now taking forward the recommendations, we are in any case required to produce much more detailed impact assessments. That is what we have been working on over the last few months and so our plan, for instance, in the copyright area will be to publish a consultation with much more detailed costs and benefits. Obviously, part of the point of that is to consult people on the policy, but it will also be to get people’s opinion on the strength of the analysis and of the cost benefit.

11. The Hargreaves Review has itself been criticised for lack of robust data to support some of its economic forecasts, notably in relation to the proposed Digital Copyright Exchange. UK Music was one of several bodies questioning the methodology of the predicted £2.2bn benefit to the UK economy from the Exchange, and it would appear from the lack of corroborative data that there was indeed an element of optimism in such estimates. However, it should be noted that Professor Hargreaves’ panel had only a short time in

---

7 Q 203 [McVay]
8 Q 203 [Ashcroft]
9 Q 224 [Brazier]
10 Q 225
11 Q 227
12 Ev w165
which to produce its conclusions. As acknowledged by the Intellectual Property Office, it will be an important task of those taking the work forward to provide that more extensive analysis. From that point of view, we welcome the Intellectual Property Office’s confirmation that, “All the regulations and all the policy proposals for legal changes are going through the Regulatory Policy Committee.”

12. We welcome the Hargreaves Review’s recommendation of a more evidence-based approach to intellectual property policy development. Although we agree that certain estimates used to support recommendations in the Hargreaves Review might be criticised as optimistic, the Review itself acknowledged that further economic analysis would be necessary. We welcome the Intellectual Property Office’s reassurances that more detailed analysis is on-going and trust that it will pursue that work and act on external criticism of data and methodologies. We also agree that the involvement of the Regulatory Policy Committee as an independent auditor of economic analysis is a sensible policy development.
2 Copyright

Concepts

13. Copyright is a property right, created by statute. It gives to the authors of various types of work—including literary, musical and artistic works—the exclusive right to their exploitation. Broadly speaking the term of copyright runs for the life of the author plus a further 70 years. To qualify for copyright, a work must be original. Furthermore, copyright does not protect ideas, but only their particular expression. Thus, a modern-day John Bunyan writing the story of a pilgrim’s progress for the first time would have exclusive rights in the text of the story and be able to prevent copying of anything more than an insubstantial extract, but he would not be able to prevent someone writing a different version of a story about a pilgrim’s spiritual journey. There would, however, certainly be a point at which a somewhat different but too similar version would infringe copyright in the original tale.

14. Likewise, copyright does not protect facts, even if they are newly discovered. The data in a scientific article is therefore not protected by copyright, although the way in which it is presented and edited will prevent copying of the article itself.\(^\text{14}\)

15. The Berne Convention of 1886 introduced substantial uniformity to the international copyright system, providing for reciprocal recognition of copyright between signatory countries. Notably, it required copyright to arise automatically, without the need for registration, although when the United States joined the Convention in 1988 the US retained the right to restrict damages and attorney fees to parties who had registered their copyright; a noteworthy precedent for incentives toward registration in the form of differing remedies, and one which will be relevant to the discussion of the proposed Digital Copyright Exchange.

16. The Berne Convention contains the so-called 'Three-Step Test' for defining permissible copyright exceptions:

   It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works 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 author.

17. The three tests are therefore: (i) that exceptions should be special; (ii) that reproduction does not conflict with a normal exploitation of the work; and (iii) that it does not unreasonably prejudice the legitimate interests of the author.

18. The current principal UK copyright statute is the Copyright, Designs and Patents Act 1988, which replaced the Copyright Act 1956. This Act has been amended substantively on at least three occasions.\(^\text{15}\) It was amended in 2003\(^\text{16}\) to cover the so-called Infosoc Directive.

---

\(^{14}\) New facts with a useful application might well, however, be the basis of a valid patent application

\(^{15}\) In relation to the Database Directive, the Term (i.e. copyright duration) Directive, and the Infosoc Directive

\(^{16}\) By the Copyright and Related Rights Regulations 2003
an EU directive which came into force in 2001 and was designed to update copyright for the digital era.\textsuperscript{17} Notably, the Infosoc Directive allows for copyright exceptions covering parody, certain temporary electronic copies, and (with certain provisos) private use format shifting (such as copying from CD to PC).\textsuperscript{18} Whether and how to introduce these exceptions into UK law was a major part of Professor Hargreaves’ deliberations, which we consider in the following sections.

19. Moral rights are a form of right broadly related to copyright and introduced into UK law for the first time in the 1988 Act. They include the right to be identified as an author, unless that right is waived, and the right to object to derogatory treatment of a work.

20. A feature of intellectual property is that the creation of a new work, while it may well give rise to an independent new IP right, does not negate the rights in any work from which the new work draws inspiration. Where there is a very long gap between original work and secondary work, that is not necessarily a problem. On the other hand, works drawing heavily albeit with fresh creative input on several layers of copyright material can require multiple consents for that material’s use.

21. Finally, the US concept of ‘fair use’ of copyright allows for use of works without permission of the author depending on various factors, broadly including: the nature and character of the use including whether it is commercial; the nature of the work; the proportion of the copied material to the whole; and the effect of use on the potential market for and value of the work. Examples of fair use include commentary, criticism, news reporting, research, teaching, library archiving and scholarship. The exception was previously one of US common law but became statutory with the US Copyright Act of 1976. Somewhat similar if narrower UK copyright law exceptions exist,\textsuperscript{19} but they are essentially limited to the exact terms of the exception rather than being capable of judicial development.

**Proposals for new copyright exceptions following Hargreaves**

**Format shifting**

22. Format shifting is about transferring copyright works between different media, such as from a CD to a personal computer, from a PC to an mp3 player, or from a DVD to a tablet device. Currently, such transfers generally infringe copyright through the making of copies without authorisation. Deletion of the original copy is not a defence.

23. The old practice of transferring vinyl recordings to cassette tape was another form of format shifting but it was limited by the need to create a physical copy. There was much talk in the 70s and 80s of imposing a levy on either cassette recorders or cassette tapes to compensate for such copying, but the House of Lords case of *CBS v Amstrad*\textsuperscript{20} established that the sale of a cassette recorder did not of itself constitute infringement even when the

\textsuperscript{17} See Glossary in Annex

\textsuperscript{18} Infosoc Directive, Article 5

\textsuperscript{19} These include an exception for acts done for the purposes of parliamentary proceedings; section 45 CDPA 1988

\textsuperscript{20} [1988] AC 1013
The Hargreaves Review of Intellectual Property: Where next?

The recorder was designed to record a playing cassette onto a blank cassette, and levies were never imposed.

24. Technology has clearly advanced considerably since the era when making a home-use copy involved an hour of time spent with a turntable and a cassette recorder. Digital copying can now be accomplished at very high speed and multiple copies can be created and transmitted almost instantaneously. There is a widespread perception that purchase of a recording should at least carry the right to use that recording in typical environments and through commonly used outlets such as in family cars, on personal music players and computers, and through different media around the home. This may partly be a reflection of the fact that many consumers invested considerable amounts in re-establishing their music collections in CD form when CD replaced vinyl. The music publishing industry benefited substantially from that, and customers obtained the benefit of a much more durable format. However, customers do not necessarily feel that they should have to pay again so soon, particularly given the pricing of CDs at the time when collections were being replaced. In any event, according to the Consultation on Copyright:

A recent Consumer Focus survey found only 15% of consumers knew that copying a CD that they had bought onto their mp3 player was illegal, and only 9% thought it should be.21

25. The Hargreaves Review reasoned thus on why an exception should be created:

Digital technology has enabled use and reuse of material by private individuals in ways that they do not feel are wrong—such as sharing music tracks with immediate family members, or transferring a track from a CD to play in the car. It is difficult for anyone to understand why it is legal to lend a friend a book, but not a digital music file. The picture is confused by the way some online content is now sold with permissions to format shift (iTunes tracks) or to “lend” files (Amazon ebooks) at no extra cost. This puts the law into confusion and disrepute. It is not a tenable state of affairs.22

26. We accept the main thrust of this argument although we disagree with Professor Hargreaves on the distinction between lending of books and music. We suspect most people do grasp the difference between the lending of a book, with its intrinsically limited capacity for being circulated and copied, and the lending of a music file which can be copied to hundreds of people within seconds. In oral evidence to us, Sir Robin Jacob agreed, saying that there was “a huge difference between the two.”23

The legal position on a copyright exception for format shifting

27. The Infosoc Directive permits copyright exceptions for format shifting, but provides that where an exception is created, rightsholders should receive fair compensation, depending on the circumstances of the individual case.24 According to judicial
interpretation of the Directive, however, compensation should be assessed on the basis of whether there has been actual harm, rather than, for instance, a lost opportunity for further revenue. This permits the argument that private copying, while it might in theory undermine the opportunity for a further sale, does not merit compensation, because no such actual further sale would have been made in the majority of cases, and/or because the pricing of the content already builds in the expectation of a certain amount of copying. The ‘no additional sale’ argument applies most strongly to copying for personal use. It applies progressively less strongly to copying within the private sphere and unrestricted private copying.

28. Nevertheless, it is true that the majority of EU countries impose some kind of levy with the intention of compensating for such copying. One problem with these levies, however, is that there is no consensus on the appropriate levy rate, so levies are inconsistent between member states, leading to a risk of skewed markets.

**Evidence from the music industry and open rights groups**

29. Nevertheless, Pete Wishart MP, who gave evidence to us in his capacity as a former professional musician and as Vice-Chair of the All Party Group on IP, was strongly of the view that an exception should give rise to levies:

   In 22 out of 27 European states we do have an exception for format shifting, often a levy on the hardware, for the musicians. Again, it is the musicians that this levy goes to. What is going to happen when this exception goes through is there may be the arrival of all these new hardware devices, which are going to be playing this music, which are going to be playing this content. What would be wrong, if there is going to be a growth in this type of equipment, with some of that money going back to musicians?\(^25\)

30. Jim Killock of Open Rights Group put the counter-argument that:

   Of course they are getting something back in the payment for the original music.\(^26\)

31. Mr Wishart has a valid argument; notwithstanding *CBS v Amstrad*, it would be disingenuous to suggest that mp3 players (and indeed cassette players before them) have not been used frequently as a means of copying copyrighted content. On the other hand, it is probably a fair point that pricing of content now includes an expectation of personal use extending beyond the original medium, for very practical reasons. Robert Ashcroft of PRS for Music pointed out one such reason, namely that without format shifting it is becoming impossible to play certain content at least through certain (portable) media:

   You can barely go into an electronics shop and buy a portable CD player these days. You cannot make it illegal for people to go and buy a CD and then get it on to the only device that they have that plays music. Where you draw the line is the question.\(^27\)

\(^{25}\) Q 210 [Wishart]

\(^{26}\) Ibid. [Killock]

\(^{27}\) Ibid. [Ashcroft]
Options proposed by the Intellectual Property Office

32. In the Consultation on Copyright the IPO is proposing a number of options for changing the law to provide for a copyright exception. These are:

i. unrestricted private copying, covering copying of loaned works (this occurs in a number of European states although accompanied by a levy; it is not the Department’s proposed choice);

ii. copying within the private sphere (including the family and social circle);

iii. copying for personal use (covering individual personal use only);

iv. copying only when the harm caused is minimal.  

33. The Department’s preferred option is the narrow one of personal use, but it is also examining the evidence on whether creative content is, or could be, priced to take account of use in a wider sphere and has solicited views on this option in the Consultation on Copyright. The consultation also invited views on the fourth option although, as it conceded, the difficulty with that option is in defining ‘minimal’. To be workable, this option would need to be applicable by a simple test that users could apply themselves.

34. One way of embodying the ‘private sphere’ option in a workable form would be to put a numerical limit on the permitted number of copies, to reflect typical shared family use. Apple Corporation already permits use of apps on up to five devices, and an exception that mirrors commercial practice and accords with the reality of actual usage of would appear sensible.

Conclusion

35. We have previously expressed our support for the creative industries in our reports Rebalancing the Economy: Trade and Investment and Government Assistance to Industry. If the recent consultation produces real evidence of actual lost sales then policy should be determined accordingly. However, there needs to be pragmatism about both the pricing of content and the reality of expectations of personal use. On balance, we believe that the options of permitting personal use or use within the personal sphere are the most realistic.

36. We endorse the approach taken in the Consultation on Copyright to the issue of format shifting. We expect this issue to be an early opportunity for a greater degree of evidence-based policy-making in the intellectual property area. Without wishing to anticipate the outcome of that process, we suspect that a copyright exception based on personal use or use within the private sphere might prove most practicable and justifiable.

28 Consultation on Copyright, paragraph 7.39ff
29 Seventh Report of 2010–12, HC 735–I, paragraph 41
30 Third Report of 2010–12, HC 561–1, paragraph 123.
Parody

37. The introductory section of this report referred to the US doctrine of fair use of copyright. One area in which this concept has produced divergence between UK and US copyright law is with works which are ‘transformative’ of earlier works—examples of which include numerous episodes of ‘The Simpsons’ such as those which parodied ‘Citizen Kane’, ‘Psycho’ and ‘The Longest Day’. An entirely different type of transformative work is David Hockney’s re-rendering in modern form of Claude Lorrain’s ‘Sermon on the Mount’, (although in that case, since the original work was created in the mid-17th century, any copyright in the painting itself is long expired). A blog with the title ‘Remake/Submissions’ features similar sometimes tongue-in-cheek reworkings of artworks such as, for example, a Mondrian reinterpreted as the contents of a suitcase in primary colours.31 This illustrates the depth and extent to which those in the creative sector are constantly borrowing from and reusing works that already exist; a process that is a vital element in creativity and not necessarily harmful to the overall cultural landscape. As a Guardian piece on the ‘Remake/Submissions’ blog observed:

Artists have played this game for centuries because it is one of the most intimate relationships you can have with a work of art. That was why again and again Picasso travestied Manet’s Déjeuner sur l’herbe, which is itself a playful, mocking restaging of Titian’s (or maybe Giorgione’s) Concert champêtre.32

38. Fair use takes a liberal view of on how copyright applies to such works, whereas UK law would often require the user to obtain a licence from the owner of any extant copyright. This carries with it transaction costs, and probably inhibits a certain amount of creative activity.

39. There is value in encouraging creativity drawing inspiration from the world’s cultural heritage,33 but three questions arise: to what extent the resulting works may harm the reputation of or cause offence to the original owner, whether the copyright owner should retain an ultimate right of objection to subsidiary use, and whether money should change hands. Of relevance to the latter issue is that derivative or transformative works may in certain cases result in increased revenue for the owner of the original copyright, such as when a music sample used in a remix revives interest in the original track.

Comparison with sampling

40. A solution to these questions has evolved with music sampling (that is, the use of small fragments of existing music in a new track). It involves payment of royalties for use of samples through collecting societies, a situation which came about largely because of a shift in the US law of fair use in 1991, when Bridgeport Music Inc v Dimension decided that samples rising to a level of “legally cognizable appropriation” needed to be licensed, although de minimis sampling remained within fair use. There are arguments, however,
that this decision closed down the level of creativity in, for instance, the hip-hop genre after the early 90s.

**Hargreaves on parody**

41. The Hargreaves Review has been criticised for lack of robust economic analysis on the advantages and disadvantages of creating an exception in this area. The Review acknowledged that certain issues such as parody as a satirical instrument were outside its terms of reference, but nevertheless recommended an exception, as permitted by the Infosoc Directive, on the basis of the potential economic benefits. However, both UK Music and the Authors’ Licensing and Collecting Society were among those pointing to lack of precision in the impact assessment.34

42. Given the consensus that policy in the area of intellectual property should move forward on the basis of a better evidence base, we believe that before proceeding with a potential policy exception for parody there should be a closer examination of certain economic issues including, possibly: (i) the actual transactional costs involved in negotiating licences; (ii) the comparison between those costs and the anticipated benefits; (iii) how much creative activity is actually stifled by the current legal situation; and (iv) what proportion of parody cases might lead to an allegation of moral rights infraction, and what the costs of resulting disputes would be.

43. In its review of responses to the Consultation on Copyright, we recommend that the Government give due weight to economic data on the potential benefits and disadvantages of implementing a parody exception and take such data into account in its eventual decision.

**Relevance of moral rights and reputation**

44. Creation of an exception for parody would remove the right of authors to refuse licence permission but need not leave copyright owners entirely unprotected with respect to reputational damage. Moral rights exist precisely to afford protection in this area; as the Consultation states, “Moral rights therefore clearly place limits on the extent of any parody exception.”35 However, the relevant right—the integrity right—allows objection only to treatment which “amounts to distortion or mutilation or is otherwise prejudicial to the honour or reputation of the author”.36 There is a high threshold for meeting this test, as demonstrated in the case of *Confetti Records v Warner Music UK Ltd*,37 which failed to find infraction of the integrity right even though the original version of a music track had been overlain with rap words containing repeated references to violence and drugs. Furthermore, we would be concerned if a change in the law merely shifted the focus of dispute from one potentially expensive IP issue (infringement) to another (infraction of moral rights).

34 Ev w14; Ev w168
35 Consultation on Copyright, paragraph 7.105
36 CDPA section 80(2)
37 [2003] EWHC 1724 (Ch)
Free speech arguments

45. Those favouring a parody exception cite its important role in supporting free speech, and the potential reluctance of copyright owners to give permission to satirists. Citing the case of campaigning action groups, Jim Killock argued that effective deployment of free speech sometimes necessitates the use of copyright content:

That is what they [parodists] do: they parody [corporations] in order to show the brand up for not living up to the values it espouses. In doing that, they are going to breach the copyright ownerships of those corporations and that puts them in legal jeopardy. The result is that lots of these campaign organisations have to take legal risks in order to challenge those brands, and that is a serious impediment, to my mind, to their freedom of expression and on political dialogue. That is ultimately why the parody exception is extremely important.38

Intellectual Property Office proposals

46. The Consultation on Copyright observes that UK law previously “provided greater flexibility for works of this nature” but that “by the 1980s this parody defence had been extinguished.”39 The Government has indicated that its preferred route forwards is to implement a “fair dealing” exception to cover parody, meaning that “commercially competing uses of copyright material (those capable of substituting for the original) are not allowed.” The Consultation clarified this:

The use of the parody exception to make a straightforward cover version would be ruled out. A parody that is likely to unfairly damage the reputation of a creator would also be ruled out by a fair dealing exception.”40

Conclusion on parody

47. On a possible exemption for parody, we are inclined to agree with the Government’s proposal for a fair dealing exception, but with disapplication of the exception where there is reputational damage and subject to a robust assessment of the economic benefits. We recommend that the definition of unfair reputational damage should make provision to protect (within the exemption) genuine political and satirical comment supportive of free speech.

Content mining

What is content mining?

48. The Consultation on Copyright defined content mining as:
Automated analytical techniques such as text and data mining work by copying existing electronic information, for instance articles in scientific journals and other works, and analysing the data they contain for patterns, trends and other useful information.\(^{41}\)

49. By facilitating the very rapid automated trawling and cross-referencing of scientific papers, content mining has already led to successful advances in areas such as Alzheimer’s disease research.

**The legal issue**

50. Because such techniques involve the making of electronic copies—even though such copies may on occasion be temporary—under the current law they infringe the copyright in the trawled articles including the publishers’ copyright deriving from their editorial input into the publication process.

51. The Berne Convention permits copyright exceptions consistent with the three-step test and, pursuant to that, the Infosoc Directive authorises Member States to legislate for exceptions to permit non-commercial, scientific research.\(^{42}\) The Hargreaves Review recommended implementing such permission but went further, recommending extension to commercial use:

We therefore recommend […] that the Government should press at EU level for the introduction of an exception allowing uses of a work enabled by technology which do not directly trade on the underlying creative and expressive purpose of the work (this has been referred to as “non-consumptive” use).\(^{43}\)

**The proposals**

52. The Consultation proposes introduction of an exception applying “only to uses of technology that do not unduly prejudice the primary market for or value of the copyright works being copied.”\(^{44}\) Given the constraints of the Infosoc Directive, it would apply initially only to non-commercial use, but negotiations at EU level to permit extension into commercial use is contemplated—indeed, active.

**The arguments for and against**

53. One argument in favour of less restricted content mining is the “non-consumptive use” argument, which is that automated copying does no more than could be done lawfully by an army of readers working on individual papers. As Professor Hargreaves put it:

The idea is to encompass the uses of copyright works where copying is really only carried out as part of the way the technology works. For instance, in data mining or search engine indexing, copies need to be created for the computer to be able to

---

41 Paragraph 7.84
42 Article 5(3)(a)
43 Paragraph 5.24
44 Paragraph 7.97
analyse; the technology provides a substitute for someone reading all the documents. This is not about overriding the aim of copyright – these uses do not compete with the normal exploitation of the work itself – indeed, they may facilitate it. Nor is copyright intended to restrict use of facts.  

54. This is an enticing approach, although it is arguable that if content mining is to become a widespread tool for research, it will become a form of normal exploitation in itself, and hence protected by the Berne Convention. Furthermore, the assertion that copyright does not restrict the use of facts overlooks the point that scientific papers are not merely presentations of fact; they are interpretations of fact which have typically been peer reviewed and edited, with a substantial contribution to the editing process usually deriving from publishers. On the other hand, content mining at least at present appears to search within the factual realm of publications rather than in their expressive realm and to that extent appears concerned more with the researchers’ original work rather than the publishers’ edited version.

55. Other areas of argument include the scope of existing licences and the technical demands imposed by unrestricted content mining. Thus, universities and libraries argue that they already have licences to read scientific papers. However, historically such licences have assumed human readership. Publishers have a legitimate argument that a licence for human readership is a different legal and technical animal from one that permits wholesale computerised reading, not least because a degree of investment may be needed to support the data-feed for computerised trawling or the extra downloading demand. Richard Mollet of the Publishers Association summed up the publishers’ overall position, beginning by stating that the publishing industry recognises the value of content mining:

Content mining is something that publishers wholeheartedly and fully support, and indeed we are fundamental to the development of the technology. It is still a very nascent technology, and 88% of large publishers across Europe take only about 10 mining requests a year. This is still something that is in its infancy. What is vital to acknowledge here is the investment that goes on from publishers in the development of infrastructure and ongoing support to allow mining to happen. It is not just the case of having the data out there and letting a crawler go and look at it; it has to be prepared in a way that crawling tools can understand.

56. He pointed to the risks associated with unrestricted access. We set out his arguments at some length because, while complex, they were well expressed:

There are a number of risks if one were to take away the management of that access, as Hargreaves suggests, and say, “Well, let us just have an exception.” […] One is the technical risk that such untrammeled mining would, to the publishers’ platforms, look like a denial-of-service attack. All of the technologists who work in the publishing companies will tell you their systems would fall over; they just would not be able to cope, rather like a broadband connection being overwhelmed or the degradation of use by overuse. There is a technical risk, which means that access...
needs to be managed, but there is a commercial risk too. Publishers have to know that the person who says they want to come mining are who they say they are, and that they are going to use it for non-competitive use. Of course, there is no way of managing that if you have taken away any need for managing access.

Finally, there is a competitive risk to the UK because if, as Hargreaves suggests, we were the only country in Europe and, indeed, the world that did not have any management of access, you are basically saying to anybody, “Come on in and get our data. Get our text. You can do what you want,” there will be no revenues going to anybody at all. Of course, in every other country in the world there will be. If you are a publisher, why would you want to come to a country where you are exposing yourself to technical and commercial risks; you would go to a country that did not have an exception. That is why we support mining but think that access needs to be managed.47

57. Ed Quilty of the IPO acknowledged that this commercial risk could be a problem if access became a free-for-all:

We have heard people say that the opening up of their databases to the access required to do data and text mining will overload the servers and make it impossible to operate. At the moment I do not know how far that is true or not, but it does suggest that there may be costs associated with opening a service. That is something we need to look at.

There is certainly also this question about abuse: how do you arrange things so that the copies in question that are made do not find their way into other areas. That is something that we would have to consult people on and I think the publishers have views on that, and we will have to take their views in designing a system.48

58. Reed Elsevier’s evidence picked up on the point that publishers’ servers cannot currently handle uncontrolled data trawling, and explained that the current solution is to permit wholesale temporary downloads of data to licensed users.49 However, this highlights the risk that might apply in the event of unrestricted downloading; unscrupulous downloaders might find means to override usage restrictions and obtain permanent access to the data, or use it for onward transmission to third parties. If such third parties were situated outside of UK jurisdiction there could be significant problems in enforcing copyright.

Possible solutions

59. We believe that the solution on costs should take account of the publishers’ contribution and increased burden of technical support while recognising also that the core creative content in scientific publications derives from academic and other researchers whose principal form of recompense is recognition. Such a solution should probably
therefore be based on reasonable recompense for investment either by way of negotiated licence fees or fees set by an external body such as the Copyright Tribunal.

60. The licence option is the one currently being developed by publishers. The Association of Learned and Professional Society Publishers and Reed Elsevier made this point, the latter referring to its substantial ongoing investment in developing new systems. The Publishers Association pointed also to current developments in creating model licences. This suggests that the market might not yet be considered as having entirely failed.

61. Publishers have argued that they can play a crucial facilitative “maitre d’” role in the content mining process. On the other hand, there was anecdotal evidence that publishers struggle to handle the volume of requests for conventional access let alone for data mining, which raises the question whether they have, or will have, adequate resources to cope with a further influx of requests. The Consultation on Copyright referred to the potential difficulties of handling large volumes of such requests. If publishers want to be able to claim to offer the sophisticated, facilitative “maitre d’” service to which they referred, they will need to divert adequate resources from revenue to support that service. Any extra licence fee payable for content mining needs to be seen to have a tangible benefit in facilitating access. The alternative would be a royalty rate set by the Copyright Tribunal.

Public access to publicly funded research

62. In May 2012, the Minister of State for Universities and Science highlighted the success of the UK scientific publishing industry which publishes 5,000 of the world’s 23,000 peer-reviewed journals, and set out the Coalition’s commitment to public access to publicly funded research:

The evidence underpinning our ambition for public access is compelling. For example, publicly funded and freely available information from the Human Genome Project led to greater take up of knowledge and commercialisation than from earlier protected data. To date, in fact, every dollar of federal investment in the Human Genome Project has helped generate $141 for the US economy.

63. The Minister challenged the industry to adopt new models:

I realise this move to open access presents a challenge and opportunity for your industry, as you have historically received funding by charging for access to a publication. Nevertheless that funding model is surely going to have to change even beyond the positive transition to open access and hybrid journals that’s already

---

50 Ev w142
51 Ev 86
52 Ev 88
53 Paragraph 7.93
54 Ev 88
55 www.bis.gov.uk/news/speeches/david-willetts-public-access-to-research?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+bis-speeches+%28BIS+Speeches%29
56 Ibid.
underway. To try to preserve the old model is the wrong battle to fight. Look at how the music industry lost out by trying to criminalise a generation of young people for file sharing. It was companies outside the music business such as Spotify and Apple, with iTunes, that worked out a viable business model for access to music over the web. None of us want to see that fate overtake the publishing industry.

Conclusion

64. It seems to us that the Minister was making a valid argument. Content mining is essentially about a desirable widening of access to the factual element of scientific literature rather than the edited contribution, although publishers have an important potential role to play in enhancing the search process. There are issues around technical feasibility and security which need to be resolved, but we believe that content mining should be opened up by way of managed but nevertheless readily accessible licensing processes.

65. We believe that policy on content mining should have regard to potential risks. Revenue might not provide the necessary investment to support data access and the successful UK scientific publishing business might be disadvantaged. However, policy should also recognise the potential benefits of content mining, the core contribution of researchers and the need for ready access. We believe that publishers should seek rapidly to offer models in which licences are readily available at realistic rates to all bona fide licensees and we encourage the Department to promote early development of such models.

Orphan works

Background

66. Orphan works can be defined as works in which copyright subsists but which do not have an identified author or creator. Unlike familial orphans, however, they can reacquire a parent if their creator is identified, such works being described as ‘revenant works’. A large quantity of orphan works exists for which the prospects of reidentification are slim, however, and the Hargreaves Review pointed to the creative opportunities that would arise were such works to become available for use. Current copyright law prevents their exploitation because of the lack of legal sanction for their use from an identified or identifiable rights holder.\(^5\) Archives can therefore be required to preserve works which they cannot actually use to recoup the costs of preservation. 20 to 30\% of material in archives is estimated to be orphan material.\(^5\) In evidence, the British Library went further, claiming that some “43\% of books from 1870 to 2010 were orphan works” and arguing that the “economic benefits of mass digitisation are enormous.”\(^6\)

67. Bodies representing rights holders, however, particularly those in the photographic sector such as Stop43, have argued vociferously against wide-ranging orphan works

\(^5\) There is a limited exception for copies of performances sanctioned by the Copyright Tribunal; section 190 CDPA.

\(^5\) Consultation on Copyright, paragraph 4.5

\(^6\) Q 161 [White]
provisions on the basis that they would not comply with the three-step test, and in particular step three—unreasonable prejudice to the legitimate interests of the rights holder.\footnote{Ev 95}

68. There were some radically different perspectives on how to resolve the tension between the rights of revenant orphan works owners and those wishing to exploit the relevant works. Arguing from a pragmatic approach to the scope of the legal remedies that should apply, Sir Robin Jacob told us:

\begin{quote}
I think we do need a reasonably good orphan work provision that says something along the lines of, “All right, you didn’t look after it. You can’t expect an injunction now and all you can have is reasonable compensation, and since you have basically abandoned it we are not going to give you a lot.”\footnote{Q 117}
\end{quote}

69. Not surprisingly, Stop43 disagreed, arguing:

\begin{quote}
Most orphans are the result of illegal digital copies or scans of prints and postcards. [...] I think you will find that most rights holders have a pretty clear idea of where their property is; they do not know that illegal copies have been made. That is where I would dispute Sir Robin’s opinion of what orphans are.\footnote{Q 159}
\end{quote}

We suspect that Stop43 has a point in terms of the underlying position on awareness and custodianship, in particular where photographs are concerned. Equally, we agree with Sir Robin’s pragmatic approach to the application of legal remedies where there is proof that an owner failed to prevent loss of their work and/or that they would suffer no real harm in the absence of an injunction.

**The issue of misidentifying works as “orphan”**

70. The photographic industry has been particularly exercised about orphan works provisions for two reasons: first, the potential competition from a sudden release of previously unavailable photographic material; and secondly the ease with which ownership data (metadata) could be stripped away from a digital photograph to give it the appearance of being an orphan work, which could facilitate its illegitimate use.

71. The Consultation on Copyright acknowledged the different circumstances that might apply to photographs:

\begin{quote}
The Government also recognises that photographs often lack any information about rights holders or about the photograph’s age, original purpose, subject matter or country of origin.\footnote{Consultation on Copyright, paragraph 4.15}
\end{quote}

72. However, Ed Quilty of the IPO explained how an orphan works registry could address concerns about works being wrongly designated as orphan:
Today, their photographs are often routinely infringed, metadata stripped off, etc and people sell them masquerading as orphan works on websites. There is very little they can do about it. At least if you had an orphan works registry, they would be able to go to the registry and if they could find a licence there for the use of the orphan works they could say to the person, “Why aren’t you selling this in accordance with the regime we have devised?”

One of the anxieties that I have heard expressed by photographers frequently seems to me to be based on the notion that as soon as we put this orphan works system in place there will be widespread and complete abuse and infringement of it. I do not think that is going to be the case. There will be some, but it should be controllable and we have to build the system to avoid it.64

73. Ben White of the British Library told us why the material available in a registry need not itself present a threat:

You are not putting 50-megabyte images up on the web; you are putting up things that are a hundred times smaller, which pixelate if blown up.65

74. The Government is proposing to define orphan works in a way that requires a diligent search to be conducted before a work is identified as ‘orphan’ and therefore available for use. The Consultation on Copyright set out various options on this,66 and in evidence to us Ben White of the British Library neatly articulated a common-sense approach to defining due diligence:

I do not think there is a “one size fits all”, but there is an understanding of what “diligent” and “reasonable” mean. What we are envisaging here is always third-party oversight of that process, whether that is by Government, of the library directly or, for example, the collecting society again being monitored by Government to see if they have actually done a diligent search.67

**A new copyright statute**

75. It is important to note that it is already unlawful to remove metadata.68 However, the fact that knowledge of removal and intention to make commercial gain are requirements to establish an offence might make prosecution difficult. Furthermore, the relevant statutory provisions are overlaid on a 24-year old Act of Parliament and demonstrate the lack of transparency consequent on a statute of that age that having been amended so significantly.69 They do not lend themselves to ready application.

76. The Hargreaves Review endorsed the submission made by the patent judges, which recommended a comprehensive review and redrafting of the Copyright Act 1988 on the

---

64 Q 245
65 Q 176 [White]
66 Paragraphs 4.36ff
67 Q 172
68 See Consultation on Copyright, paragraph 4.48; section 296ZG, CDPA 1988
69 We heard strong support for a new statute: see for example Ev 72 and Ev w97
basis that “it is not an overstatement to say that the period since [the 1988] Act has coincided with a revolution in the way that literary, artistic and musical and other works are created and exploited. Both technology and business models have changed radically during this period. It would therefore be surprising if the legislation was still framed in terms which are appropriate to this era. We do not think it is.”

77. We did not hear any arguments in favour of retaining the UK’s copyright statute in its current form. This legislation was enacted before computers became commonplace, and needs rewriting. We recommend that the Government put measures in place for bringing up to date and consolidating the UK’s principal copyright statute and related legislation at the earliest opportunity notwithstanding the likely need for earlier measures to reflect the recommendations of the Hargreaves Review.

78. The Enterprise and Regulatory Reform Bill paves the way for certain reforms to copyright including through secondary legislation. We understand that there is also a possibility of further measures requiring primary legislation being introduced in this parliamentary session, but that others might be delayed. We urge the Government to press ahead as soon as possible with measures to reform copyright where the case is made out for urgent change to support growth in the economy. We recommend that the Government set out a clear timetable for all such measures covering both primary and secondary legislation.

**EU draft Directive**

79. Ed Quilty of the IPO explained what was happening on orphan works at EU level:

The European community is looking at an orphan works scheme. If that orphan works scheme does introduce a new exception, then we would be able to use that exception, provided it goes far enough. From the signs of what is happening at the moment in Brussels, the sort of exception that they may be using for orphan works may be quite narrow and restricted to cultural-only uses, which may mean it is not possible to use it beyond some fairly limited ways. It is an evolving picture at the moment; we have to wait and see how that all shakes out.71

80. Stop 43 liked the approach taken by the draft Directive but had its own concept which it termed the National Cultural Archive:

We could envisage an online gallery, in which orphans could be presented simply for people to look at, in the way that you go and have a look at a painting on a wall in an art gallery, or indeed that painting on the wall in this room. I can sit here and look at it, but I cannot copy it, take it away or scribble on it. That is our concept of cultural use.72
**Intellectual Property Office proposals**

81. The Consultation on Copyright invited views on how broadly the proposed provisions should be expressed and canvassed the option of confining the proposed scheme to published and broadcast works.73 It also mooted the idea of giving the Copyright Tribunal jurisdiction over authorising use, subject to increasing the tribunal’s resources to allow it to meet the task.74

82. Stop43 argued against intervention of that sort, suggesting that appropriate compensation required a face-to-face negotiation:

> The commercial use of an orphan in which the rights holder is not present of course cannot compensate for that lack of primary negotiation.75

However, on balance the weight of evidence suggested that the Copyright Tribunal has a good reputation in similar areas already within its purview, and that a solution employing Copyright Tribunal might therefore be sensible.76

**Conclusion**

83. We recognise that industry bodies such as those representing photographers have legitimate concerns on licensing of orphan works. On the other hand, the problem of stripping ownership data from photographs already exists. A properly run orphan works scheme has the capacity to improve matters by requiring due diligence searches and by pointing potential users to legitimate sources. Combined with sanctions (preferably strengthened ones) against stripping of data we believe that such a scheme has the potential to be workable and beneficial.

84. We remain concerned, however, that there are a few places in which difficulties are being glossed over. This is illustrated by passages in the Consultation, referring to the permitted use of an orphan work by an authorising body:

> What can a user of an orphan work do with the work once it has been authorised?

> The use will be circumscribed by the authorising body. *It will not interfere with any future uses that the revenant owner may make, even while they do not know of its orphan status* (emphasis added).77

85. This statement that there is no possibility of interference with the future wish of a revenant owner to use their work as they wish is presented without justification. We believe this might need reconsidering, and one way to address it might be to give the Copyright Tribunal discretion to refuse licences in instances where there might be

---

73 Consultation question 7
74 Paragraph 4.34
75 Q 164
76 Qq 97, 98, 118, 120; 207 [Ashcroft]
77 Consultation on Copyright, paragraphs 4.52–4.54
particular harm to the revenant owner or potential (that is, yet to be identified) revenant owner.

86. We support the development of an orphan works scheme provided that appropriate protection for rights holders is included. We agree that the Copyright Tribunal should have jurisdiction over licensing but we recommend that it, or an alternative body with appropriate powers, be given authority to block usage in instances of particular potential harm to rights holders or where monetary compensation might not suffice.

**Orphan works and moral rights**

87. The concept of moral rights was outlined in paragraph 19. The Consultation on Copyright stated that there was no need to alter the UK’s moral rights regime to accommodate an orphan works scheme. However, Paul Ellis of Stop43 argued:

> Under the CDPA, our moral rights are not automatic; they must be asserted. This gives rise to the situation in which someone wishing to use an orphaned work can assume that the author did not assert their moral rights. We need the law changed so that moral rights are automatic and unwaivable. Such rights are automatic and unwaivable in Germany and, notably, Germany has a thriving publishing sector. It seems not to be suffering from this.

88. We think there is a point that needs addressing here. When authors sign a contractual waiver they are not necessarily envisaging what might happen if their work later appears on an orphan works registry and they subsequently wish to re-identify themselves on that registry for purposes that might be entirely different from that envisaged by the waiver. In principle, contractual waiving of moral rights therefore should not conflict with an author’s right to be identified on an orphan works registry.

89. We recommend that evaluation of a potential orphan works registry include consideration of the need for author’s rights of identification to persist over and against any waiver that has previously been made contractually. This might take the form of a presumed right of identification on the registry (notwithstanding any previous waiver) unless other factors apply such as the scope of the waiver itself.

**The proposed Digital Copyright Exchange**

90. The Hargreaves Review focused strongly on recent failings in, for instance, the sphere of music commercialisation where changes in market dynamics have overtaken the industry and produced a collapse in value. The Review argued that although part of the solution lay with enforcement (to which we return below), there was an additional need for new models of copyright licensing and marketing. The Review noted that the technological and market challenges were not confined to the music industry but extended to newspaper publishing and book publishing, commenting further that:

---

78 Paragraph 4.51
79 Q 177
Television, film and video games have suffered less disruption to date only because broadband speeds and earlier generations of mobile phones were not hospitable to large video files, but this too is rapidly changing, as the internet matures as an audio visual network.\(^{80}\)

91. The Review argued convincingly that there were problems not only with models of supply but also with the complexity of obtaining copyright clearances:

The BBC has said that it took nearly five years to assemble the rights necessary to launch its popular iPlayer service. Among a group of young technology SMEs the Review met at a meeting at TechHub, half claimed to have had difficulty licensing others’ IP across all rights. One SME, providing on demand streaming of radio shows and DJ mixes, reported it took about nine months of lobbying music collecting societies to make any headway on licensing.\(^{81}\)

92. As a solution, Professor Hargreaves offered the concept of a Digital Copyright Exchange, which he compared to Amazon:

Where very large numbers of different merchants sell goods through an electronic trading system, where it is quick and easy to pay, and quick and easy to get delivery of the goods.\(^{82}\)

93. Ed Quilty of the IPO used the analogy of telephone directories with bodies such as the Performing Rights Society as the provider of one directory:

In a sense, what the DCE would do is first of all bring all these digital telephone directories together so they would be interlinked and you would have a better chance of finding the rights you want.\(^{83}\)

94. There have been three main criticisms of the Digital Copyright Exchange proposal, however:

- That the potential benefits claimed by the Hargreaves Review were overstated;
- That it might be unnecessarily bureaucratic or might replicate other structures wastefully; and
- That if it were made compulsory it would contravene the Berne Convention and lose credibility. (Equally, there was a counter-argument that if there were no incentives to participate it could lose credibility in that way too.)

95. On the first of these, that benefits have been overstated, Professor Hargreaves believed that if anything the opposite might be the case.\(^{84}\) When asked about the potential benefits,
the Minister and the IPO were equivocal, believing it was too early to say. Ed Quilty saw the main potential benefit as a reduction in transactional costs:

The advantage of that is that you should not need a lawyer for every single transaction and every single rights holder. That would be the benefit of the DCE.

96. He stressed that the model need not be complex, universal and bureaucratic:

Some people, for example, assume that the exchange must mean one single, vast database that spans the globe. There is no reason why it necessarily should be like that; it could be an interlinking of databases. It might even just be a protocol that regulates the way the databases interact.

97. Professor Hargreaves likewise did not believe that costs should be excessive:

There is no reason why this should be frighteningly expensive. This is not setting up the NHS patient records system; this is about securing agreement and technical capability of interoperability between systems that are currently not interoperable.

98. There was dispute as to whether there was market failure from existing provision, with Creative Coalition Campaign citing a recent example to support its position that the situation is not broken:

We worked recently with Microsoft Networks when they launched their own video-on-demand service. It was not about licensing. What they wanted to do was come up with a pro forma standard licence to reduce transaction costs, which we did with them and that was made available to every single independent production company in the UK to sell their works at minimal transaction cost to MSN.

99. But Jim Killock of Open Rights Group argued:

The market is not entirely functional and that is why the Digital Copyright Exchange has been suggested. There is absolutely no question but that content is being licensed; the question is whether it is being licensed sufficiently and quickly [...].

100. Pete Wishart summed up some of the concerns on potential compulsion to participate:

I think it is right that we do have a look at what is going on, in terms of what already exists. If the Digital Copyright Exchange is to be successful, a) it has to be voluntary, b) it has to be business-led or interest-led, and c) we have to see what is going on already. The first step going towards creating that Digital Copyright
Exchange is to have a proper audit of all the databases that exist across all sectors to see what is actually required in order to try to deliver a proper Digital Copyright Exchange.91

101. The Minister and the Department confirmed that participation in the DCE would not be compulsory.92 As Ed Quilty put it:

It is something that people could use if they want to, in the same way as if you wanted to put your works on Amazon to sell them or if you wanted to sell them through a distributor, you are not forced to do it, but you can use it as a mechanism; that is how we should look at it.93

102. Despite its misgivings about other aspects of Hargreaves Review, Stop43 was enthusiastic about the DCE:

To overcome the problem of digital copyright infringement, which is of course a problem with machines, the solution must in large part rely on machines. That implies a rights registry. This is of course where we are all in agreement.94

103. This might well have been because, as was pointed out by the IPO, the DCE could operate as a very effective part of the due diligence checks for orphan works.95 Ed Quilty told us:

It may be that we have that happy coincidence of legal progress or change in this area accompanied by the technical ability to do something about it. If, for example, we had an orphan works registry, then every photograph and any other work could be put up on the registry and it would enable people who were photographers, for example, to look at what is there and see if they think their stuff is there even if it had been stripped of metadata, which it should not be. It would also mean that you could use technical abilities to find the stuff.96

**Overview and status**

104. The Digital Copyright Exchange was among the proposals which Professor Hargreaves envisaged as particularly crucial:

The Review’s judgment is that the Government has a severely time limited opportunity to bring about in the UK the best copyright licensing system in the world. To achieve this will require firm, even inspirational leadership, given the high commercial stakes for a large number of competing firms. The prize is to build on the UK’s current competitive advantage in creative content to become a leader in licensing services for global content markets; in short to make the UK the best

---

91 Q 205
92 Q 235
93 Q 238
94 Q 168
95 Q 237
96 Q 245
place in the world to do business in digital content. *It is not fanciful to suggest that such a development would be of comparable importance over time to the UK’s position as the leading service support centre in the European time zone in financial services.*\(^{97}\) (emphasis added)

105. On 22 November 2011, the Department announced the appointment of Richard Hooper, former Deputy Chairman of Ofcom, to lead on the digital copyright exchange project. In January 2012, a feasibility study was launched to consider options and recommendations “for a workable licensing solution by 2012 summer parliamentary recess”.\(^{98}\) There was a call for evidence by 10 February 2012 on two questions: whether respondents agreed with the Hargreaves hypothesis that the current copyright licensing system was fit for purpose, and whether respondents agreed with the proposed definitions including market definitions. Richard Hooper has stressed the need for hard evidence. An interim report has been published following the collection of evidence.\(^{99}\) It remains the expectation that a further phase will be completed before the summer parliamentary recess.

106. On the claimed potential benefits of the DCE, it will be important for Richard Hooper’s review to consider the potential costs and benefits of new copyright licensing models to a greater extent than was possible in the time available to Professor Hargreaves. Any new systems need to be demonstrably financially sustainable in order to achieve buy-in from the relevant industries.

107. The principal incentive to participate in a digital copyright exchange should lie in the scope for greater commercialisation of copyright works together with the creative opportunities that an exchange may offer. It might also be that some legal incentive is appropriate in the form of greater availability of legal remedies to those participating in the network. This may require negotiation to fit within the constraints of Berne and may indeed at a future stage require participation of foreign partners. However, Sir Robin Jacob, a former Court of Appeal judge with decades of experience in IP, was among those who believed that incentives to participation might validly include restricting injunctive relief to participants in a scheme, with others receiving monetary remedies.\(^{100}\) This might be an area where again an appropriately resourced Copyright Tribunal could intervene in cases where real harm from lack of an injunction is demonstrable.

108. *We can see many potential benefits in principle to a digital copyright exchange provided that it makes best use of technology to avoid bureaucracy and the replication of existing systems.* We conclude that Richard Hooper’s review of copyright licensing options and a possible digital copyright exchange is an important stage in policy development and it is critical for that review to examine the costs and benefits of the possible models fully so that policy proposals are credible.

---

97 Paragraph 4.29  
98 www.ipo.gov.uk/hargreaves-copyright-dce  
100 Q 101
Collecting societies

109. Collecting societies act as brokers between users of copyright material and rights owners, collecting standard royalty payments which permit the right to use, for example, recorded music in shops. This system has the benefit of simplicity for the user and a guaranteed royalty stream for rights holders. As the controllers licensing of vast collections of works, however, the societies are in a powerful position.

110. The UK is one of only three EU member states that do not regulate royalty collecting societies; the others being Ireland and Poland. All other member states have a system of regulation by licence, codes of practice or ongoing scrutiny. Evidence to the Hargreaves Review revealed issues regarding fair treatment and lack of transparency on costs. Open Rights Group summarised some of these grievances:

We were talking earlier about the rights of artists and the importance of artists to this debate. A lot of artists feel they do not get enough information about how their royalties are calculated, what percentage of the fees that they get has been deducted for administration and so on.

111. In contrast, Mr Wishart had no complaints about the societies:

I have to say that I have never had one issue when it has come to understanding and appreciating where these royalty payments come from. If I ever have any difficulty, it is very easy to get in touch with PRS for Music.

112. The societies have accepted need for change, however. The PRS acknowledged that its monopoly position produced obligations:

We are deeply concerned and respectful of the fact that, in that part of our business, we are a monopoly. We are very concerned to be efficient, fair and transparent and, frankly, we welcome the oversight by the Copyright Tribunal.

113. The Consultation on Copyright pointed to the need for collecting societies to retain credibility on regulation if they were to be involved in making the Digital Copyright Exchange a success, setting out a plan of action with possible legislative action as an incentive toward better compliance:

The Government has therefore proposed that collecting societies self-regulate by way of voluntary codes for the time being, with an Ombudsman to regulate the codes and the prospect of legislative action as a long stop. The Government has proposed an implementation timescale for the voluntary codes of a year following publication.

114. We agree that statutory regulation of collecting societies should be a last resort. The collecting societies have accepted the need for change. We support the proposal to
introduce regulation by way of a voluntary code backed up by the establishment of an ombudsman.
3 Designs and patents

Designs

115. The Hargreaves Review concluded that the role of IP in supporting the design industry has been neglected and recommended that the Intellectual Property Office conduct an evidence-based assessment of policy in this area including whether access to the proposed Digital Copyright Exchange would assist creators and users.

116. Sir Robin Jacob set out his views on the UK system of design protection:

Now, nobody in their right mind would have such a complicated system. Personally, I would get rid of the British design right and the British registered design right, which has not been used a lot. The European one is very cheap, and can be sued upon in this country, so I do not really see the point of the complexity. But the underlying question, which is the really important one, is: is this helping designers or is it not helping designers? [...] Take a simple thing: one of the great cities of design in Europe is Milan. Historically, the law courts in northern Italy did not work at all for practical purposes but it did not stop the design industry being great.

Somebody ought to go out and talk to design schools and designers and say, “What commercial problems are you finding?” If they are not finding any or anything significant, and the litigation patterns you are seeing do not suggest there are any, maybe it is not such a big problem except it is frightfully untidy.105

Interestingly, however, the Forum of Private Business told us that patents and designs were of more concerns to its SME members than copyright issues.106

117. Pursuant to Professor Hargreaves’s recommendation, the IPO in December 2011 published an assessment of the possible need for a reworking of UK design law based on business survey data, economic research and an earlier call for evidence which had identified several key findings, including that:

- few firms register designs;
- a very high proportion of respondents had personal experience of designs being copied (59%), but only a few of these claimed to be more likely to register a design as a result; very few of the firms that had experienced designs being copied took successful action in defending against this copying;
- some firms however noted their view that it is increasingly sensible to register through the EU, for the immediate benefits of wider coverage, despite a marginally higher cost;

105 Qq 125 and 126
106 Q 156
• procedural issues such as cost, time or complexity of registering did not appear to be strong disincentives for registering a design amongst any of the firms;

• there was some anecdotal evidence that firms are a little confused by the range of options available for protecting their designs; this includes the UK, EU and International options for registering designs, as well as the UK and EU non-registered rights. But, significantly, protection might also be provided under other modes of intellectual property (trade marks and copyright). Given this complexity, the specific benefits of registering a design are not sufficiently transparent.

118. Since then, the IPO has announced a consultation to be launched in June 2012. This will be a further opportunity to ‘go out and talk to design schools and designers’ as counselled by Sir Robin Jacob.

119. We welcome the review of UK design law being undertaken by the Intellectual Property Office. The present complexity of the design protection system in the UK might be acting as a disincentive to use and hence as a brake on innovation. If a revision of the law is called for by the industry, the Government should press forward with proposals for implementing a new and simplified structure of design rights following that review.

Patent thickets

120. The Hargreaves Review heard evidence that many aspects of the patent system are functioning well. However, it observed:

The most striking aspect of the patent system in recent years is the worldwide increase in the number of patent applications […] causing delays in the granting process. These delays have led to backlogs at patent offices. Meanwhile, in some business sectors patent proliferation is causing regulatory blockage in the form of “thickets” of pre-existing patents and pending patents which impede genuine innovators wishing to enter markets.

121. The Review noted:

There is no single solution to the growing problem of patent thickets. The market itself has already devised partial solutions in the form of standards, patent pools, and the like. These enable players in a particular area of patenting to set terms for access to each others’ patents. Government can take three further steps to resist the growing damage of patent thickets by:

i. preventing the extension of patenting to business sectors where the incentive effect of patents is low compared with the overheads imposed;

ii. resetting financial incentives for assessing whether to renew patents;

iii. and ensuring that only high quality patents are granted.107

107 Paragraphs 6.16–6.20
122. The Review recommended evaluating whether graduated scales of patent fee might provide incentives for patent owners to weed out their less valuable patents, or to license them, commenting in particular on the disadvantages suffered by SMEs:

The evidence shows that SMEs suffer disproportionately from the effects of patent thickets. Given their importance to innovation it would be logical to explore the potential for differentiating the patent fee structure in favour of smaller companies. The current UK patent framework includes a provision for a reduction in renewal fees for patents endorsed with a Licence of Right (which means anyone may obtain a licence at a reasonable rate). These provisions could be built upon as an additional means to reduce renewal costs while having the added benefit of encouraging patentees to make their patents available to third parties, subject to an appropriate royalty fee.\(^{108}\)

123. However, Professor Hargreaves told us:

We were deep into an examination of the potential for differential fees, especially differential renewal fees, in the patenting process, which we thought might shift the balance of incentives and give people an incentive to get rid of patents at the elderly end of their holding. We were not able, in the end, to establish with sufficient evidential clarity that that would work.\(^{109}\)

124. In November 2011, in accordance with the timetable set out in the Government Response, the IPO published an interim study of this issue.\(^{110}\) The study stated that it had three key aims:

(i) to begin to take the debate around patent thickets away from anecdotal and micro-study approach, toward a more generalised methodology by providing a general taxonomy for discussing patent thickets;

(ii) to generate an automated methodology for detecting patent thickets in published patent data; and

(iii) to assess whether or not patent thickets present a barrier to entry for companies, particularly SMEs, in the UK.

125. The study concluded:

This report has raised more questions than provided answers. It can be seen that there is no clear consensus on terms used to describe patent thickets and the entities involved with them. By applying these terms consistently it is hoped that further debate on any issues can be conducted on a level playing field.

The indicators appear to show that there is a possibility of different forms of thicket occurring where there are different types of technology linked to the degree of maturity of that technology space. These potential types can be subdivided into

\(^{108}\) Paragraph 6.38

\(^{109}\) Q 52

\(^{110}\) www.ipo.gov.uk/informatic-thickets.pdf
areas where there are large numbers of small patent holdings, or areas where there are small numbers of big players, each of which creates a thicket that any new entrant will have to negotiate in order to be able to operate. Additional research into more technology areas will serve to elucidate this possible link.

Is there a barrier to entry, in particular for SMEs? Again, the analysis work is not conclusive and further work is required.\textsuperscript{111}

126. Following the November study, the next step will be a research project to look at impacts of patent thickets for which tenders were submitted in March. The commission to undertake the project has been won by NIESR group which will report back by September 2012. We understand that the Government will share the results in due course with international bodies (USPTO, EU, Competition authorities). Picking up on Professor Hargreaves’ observation, we suggest that the study consider whether part of the increase in patent filing numbers over recent years is attributable to businesses wishing to establish large patent portfolios as a negotiating platform.

127. Patent thickets are clearly an area that requires in-depth analysis. We therefore applaud the level of detail as well as the alacrity with which the IPO approached its initial study. Further work needs to be done to establish whether a proportion of increased patent filings has derived from the wish to support negotiating strategies. We look forward to hearing more on this from the further studies being conducted on behalf of the IPO.

The proposed unified patent and patent court system

Present system

128. At present, there are essentially three routes available to UK inventors to obtain patent protection:

- a national application via the UK Intellectual Property Office (the IPO);
- a European application via the European Patent Office (EPO); or
- a World Intellectual Property Organisation (WIPO) application via one of WIPO’s designated offices (which include the IPO and the EPO).

Each process has its benefits and disbenefits including on matters such as cost, speed and scope. Provided the application is successful, however, all three routes end in the grant of national patents; there being as yet no such thing as an EU patent. Instead, in the case of a European patent application, applicants specify in which of the EPO contracting states they would like protection, and on successful granting of a European patent they obtain a bundle of individual, national rights in the designated territories.

129. These national rights are enforceable only in the relevant country. Notably, there is no supervening European patent tribunal with authority to determine whether a patent is

\textsuperscript{111} ibid., section 4
infringed across the EU or in multiple EU member states. Rather than bring legal actions everywhere, litigants therefore often resort to filing claims in the countries of major markets, endeavouring to persuade their opponents to follow the eventual result in other territories by using the deterrent effect of the cost of parallel litigation as leverage toward settlement in those territories. The UK, Germany and the Netherlands as well as France and to some extent Italy and Spain are among such lead territories. However, this does not entirely avoid parallel litigation and its concomitant costs. Nor does it rule out conflicting decisions between states.\textsuperscript{112}

\textit{Contrast with other jurisdictions and obstacles to a proposed supranational patent}

130. By contrast, US patents apply throughout the US, and although there are different court circuits for litigating them, the ultimate result is definitive for the whole United States. It has long been argued, therefore, that Europe is disadvantaged by the need for costly parallel litigation to enforce patents over EU states despite those states together having a population and spending power similar to that of the US.

131. A further complication is that patent litigation frequently involves two issues: whether the patent is infringed,\textsuperscript{113} and the additional question of whether it is valid.\textsuperscript{114} Traditionally, UK (and US) courts have examined these issues together, seeing it as potentially unjust to grant relief against infringement of what later transpires to be an invalid intellectual property right. German courts on the other hand have often considered infringement and validity separately, not least because historically the validity of a patent was a federal matter in Germany whereas infringement was dealt with by the courts of the different Länder. Dealing with the two issues separately is known as ‘bifurcation’. It can seem attractive to patent owners, because it leads to speedy infringement findings, but ultimately it may be of questionable merit, since a subsequent validity challenge tends to lengthen litigation and make it costlier.\textsuperscript{115}

132. Some type of supranational European patent has been seen as desirable for decades,\textsuperscript{116} but obstacles have arisen in, for example, the form of the permissible languages of the patent, the permissible languages of the litigation, the location and jurisdiction of the court (or courts), who should pay for it (or them), the issue of whether to permit bifurcation and the need to build consensus around pan-European enforcement of patent rights based on a experienced, reliable and trusted court system.

\textit{The current proposals and concerns about them}

133. The current proposal is for a non-EU international agreement for a patent covering 25 of 27 EU Member States, which would be obtained in English, French or German.\textsuperscript{117} The
court system (collectively known as the Unified Patents Court or UPC) would consist of local, regional and central courts, with an appeal court. The central court would hear cases concerning only validity. The local courts would be free to hear infringement and validity issues if both came before them, but controversially they would also be free to bifurcate. Other controversial issues relate to: the funding of the court (as EU funding will seemingly no longer be available); language issues, including the operational language of the court, the language of proceedings, the language of court documents, and the language of judgments; and the question of whether judges will have sufficient expertise.

134. An additional concern is the risk of so-called ‘forum shopping’, whereby a litigant chooses the location of litigation deliberately so as to disadvantage its opponent. This is often a risk in litigation, but the additional worry with the UPC is that rather than the result being confined to the relevant territory, businesses could be sued in remote jurisdictions (with all the resulting costs of hiring lawyers to defend themselves) and find that the result applied throughout Europe.\(^{118}\)

135. Sir Robin Jacob expressed concern to us that the current proposal could do disservice to British business:

> The plan as it currently stands is not to have one court in which you sue, and where it is held and what languages are used is decided depending on who the parties are, but to have regional divisions. If you do that, the immediate consequence is the plaintiffs will choose to find a division where they think they are going to win, which is called forum shopping \([…]\). So the whole system will not achieve what it is intended to achieve, which is a uniform position all the way across Europe. If you watch what is happening in the United States, the same thing has happened there with all their uniformity, because they have got differences in different places.\(^{119}\)

136. Sir Robin preferred the idea of a more regionally focused system with a small number of courts each with parallel jurisdiction, not least because they would be easier to populate with suitably trained intellectual property judges.

**European Scrutiny Committee review**

137. When she came before us, Baroness Wilcox updated us on the Government’s negotiating position in relation the UPC.\(^{120}\) However, since our evidence sessions with Sir Robin and the Minister, the European Scrutiny Committee has examined the UPC proposals, held a short series of evidence sessions in January to March of this year and published a subsequent report on 3 May 2012. That Committee referred to the extensive concerns that had been set forth in evidence submitted to it.\(^{121}\) Submissions had been made by a number of specialist organisations, including the European Patent Lawyers Association, the Intellectual Property Bar Association, the Chartered Institute of Patent

---

\(^{118}\) HC 1799, Ev 38, 44  
\(^{119}\) Q 141  
\(^{120}\) Q 256ff  
\(^{121}\) See footnotes 14 and 15 of HC 1799
Attorneys, and the Intellectual Property Lawyers Association. Importantly, concerns were not confined to UK representative bodies.122

138. Forum shopping was cited as a particularly important issue. As was pointed out by Henry Carr QC in evidence to the European Scrutiny Committee:

There is a real fear in some quarters that SMEs will fold because they are unable to get themselves properly represented in a distant European division.123

139. Asked about forum shopping, the IPO argued in the case of, say, an Estonian court issuing an injunction against a UK company throughout Europe, that the court would not be Estonian but “a local division of the unified court.” As the European Scrutiny Committee pointed out, that was simply cavilling. The IPO’s responses on this issue seem to have irked at least one member of the European Scrutiny Committee greatly.

It is very irritating. All of you have been doing it. You never answer questions straightforwardly. It is shocking.124

We agree that the approach that was being taken seems somewhat disingenuous.

140. There was a certain amount of complacency about funding. One of the officials giving evidence commented that the funding mechanism “does not make a lot of difference in terms of how the money gets there.”125 However, the European Scrutiny Committee observed that:

It does if it bankrupts small and medium enterprises that cannot afford to use this court because it is going to be funded by them and it seems to be a much more expensive structure than the one that exists at the moment within the UK.126

141. On the issue of why London should have the central court, the Minister commented:

You can imagine that we are hoping very much that the central court will be in London; and Paris is hoping that it will be Paris; and Munich is hoping that it will be Munich. This will make a decision.127

142. Earlier, she argued that London was the right choice because, “We have a brand-new building.”128 When pressed, the level of detail that emerged was:

We think that we have the best facilities; we think the country has a wonderful situation here; we know pretty well how much it will cost to run it per year—about £1 million—and we know the amount of money that it will bring to London.129

---

122 See footnote 15, op. cit. The only evidence broadly in favour of the current proposals was from one German lawyer.
123 HC 1799, Ev 51
124 HC 1799, Q 119, Mr Connarty
125 HC 1799; Q 77 [Coleman]
126 HC 1799; Q 78
127 HC 1799, Q 138
128 HC 1799, Q 85
129 HC 1799, Q 156
143. There was no rehearsal of other arguments such as the high regard for the UK’s patent judges, the strength of the IP bar in London, or the historical depth of UK experience in patent litigation.

144. It is fair to say that the Minister did not convince the Committee Members of the merits of the UPC proposal, of the strength of the departmental line on it or of the thoroughness with which the Committee’s concerns were being addressed. The Report commented: “We found her responses formulaic, or based on aspiration, and oddly detached from the practitioners’ perspective.” \(^{130}\)

145. The European Scrutiny Committee also believed that there were issues on which the Government should have negotiating ‘red lines’, such as on avoiding European Court of Justice involvement in appeals. \(^{131}\) Asked about this, however, the Minister said:

We are negotiating at the moment and, as you will know, negotiations change and they go along. There is no line in the sand. \(^{132}\)

146. This apparent lack of clear desired outcomes was one reason why the Committee ultimately concluded that the UPC should not be proceeded with in its current form, stating:

We conclude overall that the draft agreement on the Unified Patent Court is likely to hinder, rather than help, the enforcement of patents within the European Union. This will particularly be so for SMEs, the intended beneficiaries. \(^{133}\)

**Summary**

147. In some circumstances we might have concluded that the apparent absence of negotiating “red lines” could be attributed to a desire not to give away the Government’s negotiating position, but combined with the overall vagueness about direction and the lack of command of detail, the impression was instead of a lack of firm direction. The depth and range of concerns that have been expressed, from such a wide constituency of interested parties, leads us to conclude that the Government should resist the temptation toward the “need a win” argument in favour of proceeding with the UPC. This is especially so as there are options that would not involve such an irrevocable commitment to an untested idea. For instance, one possible compromise would be to set up the new court system with non-exclusive jurisdiction and let businesses become convinced of its merits over time. This would also allow the court to compete with the newly reinvigorated UK Patents Country Court.

148. **It is clear to us and the European Scrutiny Committee that the Government’s current negotiation strategy for a Unified Patents Court is not fit for purpose. As a matter of urgency the Government needs to take a firmer stand for UK interests in the UPC negotiations than was manifested in the recent evidence session held by the**

\(^{130}\) HC 1799, paragraph 183

\(^{131}\) For example, see HC 1799; Q123; on the ECJ see HC 1799, Q 147

\(^{132}\) HC 1799, Q 145

\(^{133}\) HC 1799, paragraph 187
European Scrutiny Committee. In particular, it needs to set out clearly defined options for outcomes acceptable to the UK and a robust strategy on how to translate those options to an acceptable overall solution. Such a strategy has to clearly state the Government’s position on avoiding European Court of Justice jurisdiction, avoiding the risk of remote and costly litigation for UK business, and neutralising or mitigating the effects of any bifurcation regime. Furthermore, that strategy should include a cogent argument for locating the central court in London and not one that relies upon hope and aspiration. Anything less runs the risk of undermining the competitiveness of British industry.
4 Enforcement

Enforcement of copyright

149. In Professor Hargreaves’ view, successful enforcement depends on the quality of the legislative framework:

Get the law into a place where people respect it, where it fits with what most people think is fair and reasonable, get the market working in an open way that is delivering quality services in the way that consumers are entitled to expect, and, in those circumstances, it will be a lot easier to have an enforcement regime around that law that will both command respect and, crucially, from business’s point of view, be effective.\(^{134}\)

150. Current failures in enforcement were cited by the rights holders who gave evidence to us. Chris Marcich of the Motion Picture Association said:

For example, you will find that, if you do a search for a particular audiovisual work, you will be referred, more often than not, to a long list of illegal sources for the content before you ever get to a legal source.\(^{135}\)

Richard Mollett took up the argument:

I would agree with Chris that part of the consumer confusion […] is that illegal sites look professional. One of the reasons they do is because they often have advertising down the sides of them. That is why we are asking online advertising providers like Google—and to be fair to them, they are acting on this—to take away the adverts from sites that they know to be infringing, so at least the consumer is not presented with what looks like a professional site. It is one of the ways in which we can get rid of some of that consumer confusion.\(^{136}\)

151. While referring back to the need for ready access to legitimate content, John McVay of Creative Coalition Campaign pursued the theme of advertising as a problem:

You will never end all illegal copying. Anyone who suggests that is not living in the real world. The best way to do is to get legitimate services to the market at a broad range of price points for a broad range of uses, and that is what we are seeing emerging across all the content industries. You can get free television; you can get paid download to own; you can get free music. There is a whole range of different business models for the consumers that are delivering high-quality, verifiable legitimate content, without any viruses or problems, under an appropriate licence. The big problem we have, in investing in those services and trying to develop those

---

134 Q 11
135 Q 165 [Marcich]
136 Q 165 [Mollett]
services, is if we are always competing against free illicit services, which can use advertising.\textsuperscript{137}

152. Jim Killock of Open Rights Group also argued that there was still work to be done on making legitimate content available:

We did a quick study of what film was available in the UK, and we found something like half the UK’s top films over the last 20 or 30 years are not available online. We found that most of the content, where it was available for download or streaming, cost more online than it did to buy the physical product.\textsuperscript{138}

153. On the possible solutions, Professor Hargreaves told us that

IPO and DCMS, with Baroness Wilcox and Ed Vaizey in the lead, are looking at a number of ways in which we can tackle online infringement, in particular how we can facilitate industry-led solutions rather than waiting for the big stick of legislation, which does not always necessarily precisely hit the target. One of those areas is certainly engaging with search engines, which tends to mean, very largely, Google, to be perfectly honest with you.\textsuperscript{139}

154. PRS for Music set out its views on the problem and a possible way forward:

It is very clear that, if you put a search term in the Google search engine, you will get, first and foremost, a list of unlicensed sources, and we think that they should be marked as such. We have, as PRS for Music, been working with some of the intermediaries, notably the antivirus companies, to see whether it would be possible to identify sites as being unlicensed in a similar way to their being identified as carrying viruses or other malware. It is technically possible. We think that it would be helpful. We have had some consumer research conducted that suggests that 75\%\textsuperscript{140} of internet users would welcome it and so we think that it should be done.\textsuperscript{141}

155. Sir Robin Jacob similarly favoured taking a look at methods of enforcement that would work through bringing pressure on large intermediary providers:

Where the banks and the credit card companies get involved, they are all taking money on transactions involving the sale of counterfeit goods. There is a possible target there—I am not saying they should be made a target, but it should be looked at. They would pick their customers more carefully.\textsuperscript{142}

156. We endorse the approach of encouraging intermediate content providers to take more responsibility for the legitimacy of content. This is a way to bring pressure to bear at the right point in the system. We support too the endeavours being made by the Government

\textsuperscript{137} Q 211
\textsuperscript{138} Q 196 [Killock]
\textsuperscript{139} Q 261 [Brazier]
\textsuperscript{140} Note by witness: Correction: the figure is actually 91\% (based on Harris Interactive Research, conducted Sept 2011)
\textsuperscript{141} Q 196 [Ashcroft]
\textsuperscript{142} Q 73
and the Intellectual Property Office to improve the copyright observance position in relation to advertising and other revenue streams.

**The Digital Economy Act**

157. The Digital Economy Act 2010 followed the *Digital Britain* report of 2009. It aimed to facilitate the identification of and action against persistent copyright infringers. Sections 3 to 16 went beyond the recommendations of *Digital Britain* and allow ISPs to impose “technical measures” to reduce the quality of, or terminate, infringers’ internet connections. These provisions have been criticised for incorporating inadequate standards of proof and lack of oversight of rights holders, although unusually the burden of proof on appeal remains against the rights holder. The policy as a whole has been criticised on the basis that levels of lost profit from infringement are not as great as alleged.\(^\text{143}\)

158. Open Rights Group was among those who found the provisions of the Digital Economy Act putting the enforcement burden on intermediary providers of internet content objectionable, but we were not convinced by its Open Rights Group’s arguments in this area, particularly in relation to the costs of enforcement letters and customer monitoring.\(^\text{144}\) It seems to us that if proportionally managed this system should be a useful method for of achieving greater compliance, but a review following implementation would be a means of confirming this.

159. A judicial review of the provisions brought by BT and TalkTalk failed at first instance in April 2011 and leave to appeal was subsequently refused\(^\text{145}\) clearing the way for the provisions to be brought into force. However, we understand that a number of stages yet remain before implementation is possible and that the notifications system is not likely to be up and running until early 2014.

160. **We applaud the work that is being done by way of informal approaches to intermediaries to discourage pirated content. Furthermore, the recent April 2012 decision of the High Court to insist that internet service providers block file-sharing by pirated content sharing sites is to be welcomed. We encourage the Government to press forward with bringing sections 3 to 16 of the Digital Economy Act fully into force, subject to proper review after implementation.**

---

\(^{143}\) LSE report of March 2011: *Destruction and copyright protection: regulatory responses to file sharing*

\(^{144}\) Q 215

\(^{145}\) See: www.guardian.co.uk/technology/2011/jun/21/bt-talk-talk-digital-economy-act
5 Advice for SMEs

161. The Hargreaves Review identified an advice gap in awareness of intellectual property for SMEs. The Review recommended:

The IPO should draw up plans to improve accessibility of the IP system to smaller companies who will benefit from it. This should involve access to lower cost providers of integrated IP legal and commercial advice.\textsuperscript{146}

In oral evidence, Professor Hargreaves explained that SMEs needed advice that combined legal and commercial help but that the IPO was constrained, not least by resources, on what it could advise on itself.\textsuperscript{147}

162. Sir Robin Jacob agreed that there was an issue with availability of advice from patent attorneys:

The British patent attorney profession is probably one of the best, if not the best, in the world. They are well trained and they are better than they were when I was younger. The only complaint I have of them is they do not take enough students on and I think they should be bigger. But they do not; they keep themselves about the same size […] Probably there are not enough of them.\textsuperscript{148}

However, unlike Professor Hargreaves, he did not think that the answer lay with creating a new professional layer.\textsuperscript{149}

163. John Alty of the IPO explained his perception of the gap in the market:

The system works well when you know what you want to do and you know that you have something valuable worth investing in to get the returns. What does not work so well is when you are not quite sure what the value of what you have is and you do not really understand the IP system. That is the area that we want to focus on. We are not talking about trying to disrupt the attorney market; we are talking about whether we can find some other way prior to getting to a point where you know you need an attorney. One way that people have described this is the difference between a GP and a specialist. If you need a specialist that is fine and you may even be paying for it, but you want a GP who can help you diagnose the problem.\textsuperscript{150}

164. Expanding on the theme of combined advice, the Federation of Private Business pointed to the contrasting needs of start-up businesses and more mature businesses:

Of course our members would value the opportunity of a one-stop shop, if you will, where they can get financial, legal, commercial and regulatory advice on IP, but I
think that is going to be much more useful to the start-ups or businesses that are new to IP, rather than those that have been in the market for a while, which might require slightly more specialised services.¹⁵¹

The Federation of Private Business also extolled the virtues of the British Library’s advice service for small businesses.¹⁵² We had the opportunity to see that service for ourselves on a visit to the British Library on 9 February 2012 and were similarly impressed.

¹⁵¹ Q 190
¹⁵² Q 189

155. In April 2012, the IPO published From ideas to growth: helping SMEs get value from their intellectual property.¹⁵³ This proposed a number of solutions to address SME needs, including:

- Awareness raising seminars organised by the IPO in partnership with bodies such as the Institute of Directors;
- More online tools from the IPO;
- IPO-funded masterclass training for business advisors within other public sector business support schemes, such as Business Coaching for Growth, the Technology Strategy Board’s Catapult Centres and the Patent Library network;
- An IPO partnership with the British Library to extend the model used at the Business and IP Centre in London to six regional patent libraries; and
- Working with universities to help students understand intellectual property to benefit their future careers and the wider economy.

The paper suggested scope for further outreach:

We are also considering further options to create new networks across the country to reach out to SMEs: first, working with the Local Enterprise Partnerships to offer tailored local advice to businesses in different regions and second stimulating the creation of business and IP advice networks across the UK.¹⁵⁴

¹⁵³ www.ipo.gov.uk/business-sme.pdf
¹⁵⁴ Page 5

156. It is encouraging that the IPO has so comprehensively researched the gaps in the market for IP advice required by different business categories. From ideas to growth is a well argued and impressively detailed paper on which the Minister is to be congratulated. We are pleased that the options being proposed work largely within existing systems rather than envisaging new layers of professional advice which might make the market in IP advice less, rather than more, transparent.

157. We are impressed with the range of solutions that the Intellectual Property Office has developed to address SME needs in the area of intellectual property. This is an important area to address to support growth in the economy and we recommend that
in its Response to this Report the Government set out in detail its commitment to this service in terms of money and resources.
6 Conclusion

168. A considerable amount of high-quality work on policy development has been undertaken in the year since the Hargreaves Review. It will be important to maintain that momentum alongside the more rigorous approach to policy formation that Hargreaves recommended. Conclusions are near to formation in many areas, and the Government should press ahead with measures to implement new policy in those areas as soon as possible. We recommend that the Department act swiftly to bring in legislation to that effect.

169. While we recognise that the Government is undertaking a major reform in a complex area, changes are both necessary and urgent. We therefore will expect the Government to set out its road-map for implementation, including a timetable for legislative action, in its Response to our Report.

170. We have major concerns about the proposed Unified Patents Court treaty. The treaty has the potential to offer great benefits to the UK but only if UK interests are protected. The Government’s current approach does not provide a robust defence of those interests. We believe that the Government needs to reconsider its strategy and the capability of the negotiation team as a matter of urgency.
# Annex: Glossary

## Glossary of abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Berne</td>
<td>The Berne Convention for the Protection of Literary and Artistic Work, 1886</td>
</tr>
<tr>
<td>CDPA</td>
<td>The Copyright, Designs and Patents Act 1988</td>
</tr>
<tr>
<td>DCE</td>
<td>Digital Copyright Exchange (proposed)</td>
</tr>
<tr>
<td>DEA</td>
<td>Digital Economy Act 2010</td>
</tr>
<tr>
<td>Infosoc Directive</td>
<td>EU Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society</td>
</tr>
<tr>
<td>IP</td>
<td>Intellectual Property</td>
</tr>
<tr>
<td>IPO</td>
<td>Intellectual Property Office</td>
</tr>
<tr>
<td>IPR(s)</td>
<td>Intellectual Property Rights(s)</td>
</tr>
<tr>
<td>ISP(s)</td>
<td>Internet service providers(s)</td>
</tr>
<tr>
<td>Three-step test</td>
<td>The test for an acceptable exception to copyright under Berne, set out in paragraphs 16 and 17 of this Report</td>
</tr>
<tr>
<td>SME(s)</td>
<td>Small and medium-sized enterprise(s)</td>
</tr>
<tr>
<td>UPC</td>
<td>Unified Patents Court</td>
</tr>
</tbody>
</table>
Conclusions and recommendations

Evidence-based policy

1. We welcome the Hargreaves Review’s recommendation of a more evidence-based approach to intellectual property policy development. Although we agree that certain estimates used to support recommendations in the Hargreaves Review might be criticised as optimistic, the Review itself acknowledged that further economic analysis would be necessary. We welcome the Intellectual Property Office’s reassurances that more detailed analysis is on-going and trust that it will pursue that work and act on external criticism of data and methodologies. We also agree that the involvement of the Regulatory Policy Committee as an independent auditor of economic analysis is a sensible policy development. (Paragraph 12)

Format shifting

2. We endorse the approach taken in the Consultation on Copyright to the issue of format shifting. We expect this issue to be an early opportunity for a greater degree of evidence-based policy-making in the intellectual property area. Without wishing to anticipate the outcome of that process, we suspect that a copyright exception based on personal use or use within the private sphere might prove most practicable and justifiable. (Paragraph 36)

Parody

3. Given the consensus that policy in the area of intellectual property should move forward on the basis of a better evidence base, we believe that before proceeding with a potential policy exception for parody there should be a closer examination of certain economic issues including, possibly: (i) the actual transactional costs involved in negotiating licences; (ii) the comparison between those costs and the anticipated benefits; (iii) how much creative activity is actually stifled by the current legal situation; and (iv) what proportion of parody cases might lead to an allegation of moral rights infraction, and what the costs of resulting disputes would be. (Paragraph 42)

4. In its review of responses to the Consultation on Copyright, we recommend that the Government give due weight to economic data on the potential benefits and disadvantages of implementing a parody exception and take such data into account in its eventual decision. (Paragraph 43)

5. On a possible exemption for parody, we are inclined to agree with the Government’s proposal for a fair dealing exception, but with disapplication of the exception where there is reputational damage and subject to a robust assessment of the economic benefits. We recommend that the definition of unfair reputational damage should make provision to protect (within the exemption) genuine political and satirical comment supportive of free speech. (Paragraph 47)
Content mining

6. We believe that policy on content mining should have regard to potential risks. Revenue might not provide the necessary investment to support data access and the successful UK scientific publishing business might be disadvantaged. However, policy should also recognise the potential benefits of content mining, the core contribution of researchers and the need for ready access. We believe that publishers should seek rapidly to offer models in which licences are readily available at realistic rates to all bona fide licensees and we encourage the Department to promote early development of such models. (Paragraph 65)

Orphan works

7. We did not hear any arguments in favour of retaining the UK’s copyright statute in its current form. This legislation was enacted before computers became commonplace, and needs rewriting. We recommend that the Government put measures in place for bringing up to date and consolidating the UK’s principal copyright statute and related legislation at the earliest opportunity notwithstanding the likely need for earlier measures to reflect the recommendations of the Hargreaves Review. (Paragraph 77)

8. The Enterprise and Regulatory Reform Bill paves the way for certain reforms to copyright including through secondary legislation. We understand that there is also a possibility of further measures requiring primary legislation being introduced in this parliamentary session, but that others might be delayed. We urge the Government to press ahead as soon as possible with measures to reform copyright where the case is made out for urgent change to support growth in the economy. We recommend that the Government set out a clear timetable for all such measures covering both primary and secondary legislation. (Paragraph 78)

9. We support the development of an orphan works scheme provided that appropriate protection for rights holders is included. We agree that the Copyright Tribunal should have jurisdiction over licensing but we recommend that it, or an alternative body with appropriate powers, be given authority to block usage in instances of particular potential harm to rights holders or where monetary compensation might not suffice. (Paragraph 86)

10. We recommend that evaluation of a potential orphan works registry include consideration of the need for author’s rights of identification to persist over and against any waiver that has previously been made contractually. This might take the form of a presumed right of identification on the registry (notwithstanding any previous waiver) unless other factors apply such as the scope of the waiver itself. (Paragraph 89)

The proposed Digital Copyright Exchange

11. We can see many potential benefits in principle to a digital copyright exchange provided that it makes best use of technology to avoid bureaucracy and the replication of existing systems. We conclude that Richard Hooper’s review of
copyright licensing options and a possible digital copyright exchange is an important stage in policy development and it is critical for that review to examine the costs and benefits of the possible models fully so that policy proposals are credible. (Paragraph 108)

Collecting societies

12. We agree that statutory regulation of collecting societies should be a last resort. The collecting societies have accepted the need for change. We support the proposal to introduce regulation by way of a voluntary code backed up by the establishment of an ombudsman. (Paragraph 114)

Designs

13. We welcome the review of UK design law being undertaken by the Intellectual Property Office. The present complexity of the design protection system in the UK might be acting as a disincentive to use and hence as a brake on innovation. If a revision of the law is called for by the industry, the Government should press forward with proposals for implementing a new and simplified structure of design rights following that review. (Paragraph 119)

Patent thickets

14. Patent thickets are clearly an area that requires in-depth analysis. We therefore applaud the level of detail as well as the alacrity with which the IPO approached its initial study. Further work needs to be done to establish whether a proportion of increased patent filings has derived from the wish to support negotiating strategies. We look forward to hearing more on this from the further studies being conducted on behalf of the IPO. (Paragraph 127)

The proposed unified patent and patent court system

15. It is clear to us and the European Scrutiny Committee that the Government’s current negotiation strategy for a Unified Patents Court is not fit for purpose. As a matter of urgency the Government needs to take a firmer stand for UK interests in the UPC negotiations than was manifested in the recent evidence session held by the European Scrutiny Committee. In particular, it needs to set out clearly defined options for outcomes acceptable to the UK and a robust strategy on how to translate those options to an acceptable overall solution. Such a strategy has to clearly state the Government’s position on avoiding European Court of Justice jurisdiction, avoiding the risk of remote and costly litigation for UK business, and neutralising or mitigating the effects of any bifurcation regime. Furthermore, that strategy should include a cogent argument for locating the central court in London and not one that relies upon hope and aspiration. Anything less runs the risk of undermining the competitiveness of British industry. (Paragraph 148)
Enforcement

16. We applaud the work that is being done by way of informal approaches to intermediaries to discourage pirated content. Furthermore, the recent April 2012 decision of the High Court to insist that internet service providers block file-sharing by pirated content sharing sites is to be welcomed. We encourage the Government to press forward with bringing sections 3 to 16 of the Digital Economy Act fully into force, subject to proper review after implementation. (Paragraph 160)

Advice for SMEs

17. We are impressed with the range of solutions that the Intellectual Property Office has developed to address SME needs in the area of intellectual property. This is an important area to address to support growth in the economy and we recommend that in its Response to this Report the Government set out in detail its commitment to this service in terms of money and resources. (Paragraph 167)

Conclusion

18. A considerable amount of high-quality work on policy development has been undertaken in the year since the Hargreaves Review. It will be important to maintain that momentum alongside the more rigorous approach to policy formation that Hargreaves recommended. Conclusions are near to formation in many areas, and the Government should press ahead with measures to implement new policy in those areas as soon as possible. We recommend that the Department act swiftly to bring in legislation to that effect. (Paragraph 168)

19. While we recognise that the Government is undertaking a major reform in a complex area, changes are both necessary and urgent. We therefore will expect the Government to set out its road-map for implementation, including a timetable for legislative action, in its Response to our Report. (Paragraph 169)

20. We have major concerns about the proposed Unified Patents Court treaty. The treaty has the potential to offer great benefits to the UK but only if UK interests are protected. The Government’s current approach does not provide a robust defence of those interests. We believe that the Government needs to reconsider its strategy and the capability of the negotiation team as a matter of urgency. (Paragraph 170)
Formal Minutes

Thursday 21 June 2012

Members present:
Mr Adrian Bailey, in the Chair
Ann McKechin Rebecca Harris

Draft Report (The Hargreaves Review of Intellectual Property: Where next?), proposed by the Chair, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 170 read and agreed to.

Annex agreed to.

Resolved, That the Report be the First Report of the Committee to the House.

Ordered, That the Chair make the Report to the House.

Ordered, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

Written evidence was ordered to be reported to the House for printing with the Report in addition to that ordered to be reported for publishing on 13 September, 11 October and 1 November 2011.

[Adjourned till Tuesday 26 June at 9.00 am]
Witnesses

Tuesday 13 September 2011

Professor Ian Hargreaves, author of Digital Opportunity: A Review of Intellectual Property and Growth

Tuesday 18 October 2011

Rt Hon Professor Sir Robin Jacob, Sir Hugh Laddie Chair of Intellectual Property Law and Co-Director, Institute of Brand and Innovation Law, University College London

Tuesday 1 November 2011

Ben White, Head of Intellectual Property, British Library, Alexander Jackman, Senior Policy Advisor, Forum of Private Business, Chris Marcich, President and Managing Director, Motion Picture Association, Richard Mollet, Chief Executive Officer, Publishers Association, and Paul Ellis, Co-founder, Stop43

Pete Wishart MP, John McVay, Creative Coalition Campaign, Chief Executive of Producers Alliance for Cinema and Television, Jim Killock, Executive Director, Open Rights Group, and Robert Ashcroft, Chief Executive Officer, PRS for Music

Tuesday 15 November 2011

Baroness Wilcox, Parliamentary Under-Secretary for Business, Innovation and Skills, Minister for IP, John Alty, Chief Executive and Comptroller-General, Intellectual Property Office, Ed Quilty, Copyright and IP Enforcement Director, Intellectual Property Office, and Adrian Brazier, Head, Digital Economy Act Implementation and Creative Industries, Department for Culture, Media and Sport

List of printed written evidence

1. British Library Ev 61: Ev 67
2. Creative Coalition Campaign Ev 69
3. Forum of Private Business Ev 72
4. Motion Picture Association Ev 74
5. Open Rights Group Ev 79
6. PRS for Music Ev 82
7. The Publishers Association Ev 85: Ev 90
8. Stop 43 Ev 91: Ev 101
List of additional written evidence

(published in Volume II on the Committee’s website www.parliament.uk/bis)

<table>
<thead>
<tr>
<th>No.</th>
<th>Author/Group</th>
<th>Ev</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Action on Authors' Rights</td>
<td>w1</td>
</tr>
<tr>
<td>2</td>
<td>Kevin Allen</td>
<td>w4</td>
</tr>
<tr>
<td>3</td>
<td>Alliance Against IP Theft</td>
<td>w4</td>
</tr>
<tr>
<td>4</td>
<td>Association of Colleges (AoC)</td>
<td>w7</td>
</tr>
<tr>
<td>5</td>
<td>Association of European Performers' Organisations (AEPO-ARTIS)</td>
<td>w9</td>
</tr>
<tr>
<td>6</td>
<td>Association of Learned and Professional Society Publishers (ALPSP)</td>
<td>w9</td>
</tr>
<tr>
<td>7</td>
<td>Association of Photographers Limited (AOP)</td>
<td>w11</td>
</tr>
<tr>
<td>8</td>
<td>Authors' Licensing and Collecting Society Limited (ALCS)</td>
<td>w13</td>
</tr>
<tr>
<td>9</td>
<td>B3ta.com</td>
<td>w14</td>
</tr>
<tr>
<td>10</td>
<td>BECTU</td>
<td>w15</td>
</tr>
<tr>
<td>11</td>
<td>BioIndustry Association (BIA)</td>
<td>w18</td>
</tr>
<tr>
<td>12</td>
<td>Peter and Georgina Bowater</td>
<td>w20</td>
</tr>
<tr>
<td>13</td>
<td>Richard Brine</td>
<td>w22</td>
</tr>
<tr>
<td>14</td>
<td>The British Beer &amp; Pub Association, Association of Licensed Multiple Retailers</td>
<td>w23</td>
</tr>
<tr>
<td>15</td>
<td>British Equity Collecting Society Limited (BECs)</td>
<td>w26</td>
</tr>
<tr>
<td>16</td>
<td>British Film Institute (BFI)</td>
<td>w27</td>
</tr>
<tr>
<td>17</td>
<td>British Video Association (BVA)</td>
<td>w29</td>
</tr>
<tr>
<td>18</td>
<td>Simon Brown</td>
<td>w31</td>
</tr>
<tr>
<td>19</td>
<td>Peter Carroll</td>
<td>w32</td>
</tr>
<tr>
<td>20</td>
<td>CBI</td>
<td>w37</td>
</tr>
<tr>
<td>21</td>
<td>Channel 4</td>
<td>w38</td>
</tr>
<tr>
<td>22</td>
<td>Norman Childs</td>
<td>w39</td>
</tr>
<tr>
<td>23</td>
<td>Coalition for a Digital Economy (Coadec)</td>
<td>w39</td>
</tr>
<tr>
<td>24</td>
<td>Consumer Focus</td>
<td>w40</td>
</tr>
<tr>
<td>25</td>
<td>Copyright for Knowledge</td>
<td>w45</td>
</tr>
<tr>
<td>26</td>
<td>Creators’ Rights Alliance</td>
<td>w48</td>
</tr>
<tr>
<td>27</td>
<td>William Cross</td>
<td>w50</td>
</tr>
<tr>
<td>28</td>
<td>Nick Daly</td>
<td>w51</td>
</tr>
<tr>
<td>29</td>
<td>Charlotte Davies</td>
<td>w51</td>
</tr>
<tr>
<td>30</td>
<td>Ronan Deazley, Professor of Commercial Law, University of Glasgow, with Tim Padfield, copyright advisor and author</td>
<td>w54</td>
</tr>
<tr>
<td>31</td>
<td>Design and Artists Copyright Society (DACS)</td>
<td>w57</td>
</tr>
<tr>
<td>32</td>
<td>Directors UK</td>
<td>w58</td>
</tr>
<tr>
<td>33</td>
<td>Nick Dunmur</td>
<td>w60</td>
</tr>
<tr>
<td>34</td>
<td>Equity</td>
<td>w62</td>
</tr>
<tr>
<td>35</td>
<td>Joseph Ford</td>
<td>w63</td>
</tr>
<tr>
<td>36</td>
<td>FremantleMedia Group</td>
<td>w65</td>
</tr>
<tr>
<td>37</td>
<td>Getty Images</td>
<td>w67</td>
</tr>
<tr>
<td>38</td>
<td>Malcolm Hardie</td>
<td>w72</td>
</tr>
<tr>
<td>39</td>
<td>Andrew Harrington</td>
<td>w72</td>
</tr>
</tbody>
</table>
40 David Hoffman  
41 Independent Film & Television Alliance (IFTA)  
42 Initiative for a Competitive Online Marketplace (ICOMP)  
43 Intellect  
44 Internet Services Providers Association (ISPA) UK  
45 Anita Inverarity  
46 Darrin Jenkins  
47 Pete Jenkins  
48 Joint Information Systems Committee (JISC)  
49 Gavin Kemp  
50 Richard Kenward  
51 Peter Kindersley  
52 Jonathan Knowles  
53 Eileen Langsley  
54 David Levine  
55 Libraries and Archives Copyright Alliance (LACA)  
56 Graham Linehan  
57 Julian Love  
58 Scott MacGregor  
59 Bob Marchant  
60 Conor Masterson  
61 Tom Miles  
62 Graham Mitchell  
63 Jeremy Moore  
64 Tim Motion  
65 Music Managers Forum (MMF)  
66 Musicians’ Union  
67 National Library of Wales  
68 National Union of Journalists (NUJ)  
69 News Corporation  
70 Deborah Padfield  
71 Sebastian Pearson  
72 Tim Platt  
73 PPL  
74 PraxisUnico  
75 Pro-Imaging  
76 Professional Publishers Association (PPA)  
77 Qualcomm Inc  
78 RadioCentre  
79 Reed Elsevier plc  
80 David Reid  
81 Research Councils UK (RCUK)  
82 Research Libraries UK  
83 Royal National Institute of Blind People (RNIB)  
84 Scotland's Colleges
<table>
<thead>
<tr>
<th>Page</th>
<th>Name</th>
<th>Ev</th>
</tr>
</thead>
<tbody>
<tr>
<td>85</td>
<td>Carol Sharp</td>
<td>w153</td>
</tr>
<tr>
<td>86</td>
<td>Andrew Shaylor</td>
<td>w153</td>
</tr>
<tr>
<td>87</td>
<td>Skyscan</td>
<td>w154</td>
</tr>
<tr>
<td>88</td>
<td>Jon Sparks</td>
<td>w157</td>
</tr>
<tr>
<td>89</td>
<td>Sybille Sterk</td>
<td>w158</td>
</tr>
<tr>
<td>90</td>
<td>Steve Atkins Photography</td>
<td>w160</td>
</tr>
<tr>
<td>91</td>
<td>Villayat Sunkmanitu</td>
<td>w161</td>
</tr>
<tr>
<td>92</td>
<td>TalkTalk Group</td>
<td>w162</td>
</tr>
<tr>
<td>93</td>
<td>Chris Terry</td>
<td>w163</td>
</tr>
<tr>
<td>94</td>
<td>Derek Thompson</td>
<td>w164</td>
</tr>
<tr>
<td>95</td>
<td>B M Totterdell</td>
<td>w164</td>
</tr>
<tr>
<td>96</td>
<td>UK Music</td>
<td>w165</td>
</tr>
<tr>
<td>97</td>
<td>Virgin Media</td>
<td>w169</td>
</tr>
<tr>
<td>98</td>
<td>John Walmsley</td>
<td>w173</td>
</tr>
<tr>
<td>99</td>
<td>Jonathan Webb</td>
<td>w174</td>
</tr>
<tr>
<td>100</td>
<td>Wellcome Trust</td>
<td>w175</td>
</tr>
<tr>
<td>101</td>
<td>Andrew Wiard</td>
<td>w176</td>
</tr>
<tr>
<td>102</td>
<td>Janine Wiedel</td>
<td>w177</td>
</tr>
<tr>
<td>103</td>
<td>Peter Wood</td>
<td>w178</td>
</tr>
<tr>
<td>104</td>
<td>Adam Woolfitt</td>
<td>w181</td>
</tr>
</tbody>
</table>
List of Reports from the Committee during the current Parliament

The reference number of the Government’s response to each Report is printed in brackets after the HC printing number.

**Session 2010–12**

**First Report**

The New Local Enterprise Partnerships: An Initial Assessment

HC 434 (HC 809)

**Second Report**

Sheffield Forgemasters

HC 484 (HC 843)

**Third Report**

Government Assistance to Industry

HC 561

**Fourth Report / First Joint Report**


HC 686

**Fifth Report**

Government Assistance to Industry: Government Response to the Committee’s Third Report of Session 2010–11

HC 1038

**Sixth Report**

Is Kraft working for Cadbury?

HC 871

**Seventh Report**

Rebalancing the Economy: Trade and Investment

HC 735 (HC 1545)

**Eighth Report**

Trade and Investment: China

HC 1421 (HC 1568)

**Ninth Report**

Time to bring on the referee? The Government’s proposed Adjudicator for the Groceries Code

HC 1224-I

**Tenth Report**

Pub Companies

HC 1369-I/II (Cm 8222)

**Eleventh Report**

Time to bring on the referee? The Government’s proposed Adjudicator for the Groceries Code: Government Response to the Committee’s Ninth Report of Session 2011-12

HC 1546

**Twelfth Report**

Government reform of Higher Education

HC 885-I/II/III (HC 286)

**Thirteenth Report**

Pre-Appointment Hearing: Appointment of Director of the Office for Fair Access

HC 1811

**Fourteenth Report**

Debt Management

HC 1649 (HC 301)

**Fifteenth Report**

Stamp Prices

HC 1841-I/II
Oral evidence

Taken before the Business, Innovation and Skills Committee
on Tuesday 13 September 2011

Members present:
Mr Adrian Bailey (Chair)
Mr Brian Binley
Katy Clark
Margot James
Ian Murray
Mr David Ward
Nadhim Zahawi

Examination of Witness


Q1 Chair: Good morning and welcome, Professor Hargreaves. We were just getting concerned; we thought you might have been either arrested or, shall we say, dragged into the Home Affairs inquiry. Professor Hargreaves: I could easily have got lost, but I am sorry if I required a louder call than some witnesses. It was not because of an unwillingness to appear before you.

Q2 Chair: It is 10.29 am. If, for our transcription purposes, you could introduce yourself, that would be helpful.
Professor Hargreaves: Yes. My name is Ian Hargreaves and I am Professor of Digital Economy at Cardiff University, and I led the review commissioned by the Government into intellectual property and growth.

Q3 Chair: Thanks very much. I will open the batting with a fairly general question. Your report says that our IP framework is “falling behind”. Where do you think the main problems lie, and what categories of rights, available with enforcement, or what sort of areas would you say we are particularly behind with?
Professor Hargreaves: I think that the main problems lie in the area of copyright. The evidence to the review on patent was much less contested, although we do identify issues in patent that I think require continued close observation and thought. But in the area of copyright, I think it is clear—it is certainly clear in my judgment—that the way that UK copyright law is working and, indeed, is drafted in law predates the arrival of the commercial internet, and it has been overtaken by digital circumstance and urgently needs to be revised.

Q4 Chair: Do you think that the recommendations you make are enough to fix the system, or would you actually prefer to go further but find that you are constrained by other factors?
Professor Hargreaves: I set out to write a review that would be useful to this Government at this time. Actually, from the beginning, I said to the team that was supporting me, “I want to produce no more than 10 recommendations, and I want them to be practical and implementable”. This is a controversial area. There are very important contending interests at stake, and my goal was to produce something that Government would be able to act upon with a reasonable level of support across a range of stakeholders, rather than a continuation of the polarisation on some of these issues, which I think is causing increasing damage to the British economy and will cause cumulatively further increased damage to the British economy if we don’t do something about it.

Q5 Chair: Essentially, the Government have accepted your argument, and they have a timetable to take action on many of the points by next year. Given the fact that there are, if you like, international ramifications of your policy—and, obviously, this is an area of law that varies from country to country, and some countries may be perceived as ahead and others as way behind—how realistic do you think that timetable is?
Professor Hargreaves: I think the timetable is realistic, because there are very important elements in my recommendations that require no legislation at all. An example—perhaps we will come to it, if members are interested—is the digital copyright exchange. There are also a number of legal options, open to the UK within the framework of the current EU law, that the UK has chosen not to take up, and I make the recommendation that the UK should take up those exceptions or liberalisations of the law. It is also, however, fair to say that the most ambitious aspects of the review require action, certainly at the European level, and require understanding and a favourable climate at the global level. It is very difficult to predict what is realistic and what is not realistic in those international time frames.

Q5 Chair: Fair enough. But you said that the UK was out of the game and that the G8 countries have all established a digital copyright exchange. Does that not suggest that the UK is behind in the game?
Professor Hargreaves: It does suggest the polarisation that I referred to in my previous answer, that there are some countries who I think are lagging behind, and other countries which I think are some way ahead. But I think that there will be an international consensus on this, because I think that there is a strong sense of the need to have a digital copyright exchange, for example, which is something that is not just the UK but Asia, and Europe and North America are all interested in. I think there is a strong sense that it needs to be implemented, and it needs to be done at the speed that we need to be operating on.

Q5 Chair: You think that the Government has accepted your argument and is working to implement it.
Professor Hargreaves: Yes, and I think that the Government would be able to act upon the recommendations in the way that I think they should. I think that the facts that we have before us indicate that there is a strong interest in these issues and that there is a strong interest in making sure that the UK is not left behind on these issues.
Q6 Chair: Your last comments really anticipated what I was going to ask—whether you think international reaction has helped or hindered—but I think you have probably covered that. Can I bring in Nadhim Zahawi?

Q7 Nadhim Zahawi: Thank you very much. Welcome, Professor. How do you respond to the criticism that you have been too quick to dismiss the so-called “lobbyonomics” evidence presented by what you described as “some of the most skilful and influential lobbyists on the UK political scene”?

Professor Hargreaves: I know a skilful lobbyist when I see one. I have spent a lot of time understanding how lobbying works in my career. The remarks that you quote are not in any sense made dismissively or contemptuously. Business interests are entitled to organise to advance their point of view with Government. That is part of the way that the system works. What I do observe—and I think it is very clearly set out on pages 70 to 71 of the review—is, if you look at the results of some of the evidence-based analysis that different parties bring to questions about “Is piracy getting worse?” or “Is the following set of works. What I do observe—and I think it is very clearly set out on pages 70 to 71 of the review—is, if you look at the results of some of the evidence-based analysis that different parties bring to questions about “Is piracy getting worse?” or “Is the following set of

Q8 Nadhim Zahawi: It would be very useful for the Committee to have some specific examples of evidence that has been self-serving, if you could provide that.

Professor Hargreaves: I would be happy to draw that together for you.

Q9 Nadhim Zahawi: If you can, yes, please, in writing, that would be very, very useful. As the Chairman has quite rightly indicated, the Government have accepted your view that better evidence is needed, but have said that there are issues in persuading business to impart good-quality data. I think you refer to that. How do you suggest that the Government proceed on this?

Professor Hargreaves: One would hope that the Government will be able to proceed by voluntary means. It is in the interests of everybody that data are better, and there are a number of initiatives that have been tried over the years. Following the Gowers review, a research body was created, and that was not judged to have been a success and has been abandoned. There is currently a move by the university research funding councils to create a new IP research centre in the UK. So, there are various contributory factors that one could imagine.

It is also the case that, where one is talking about a part of the market that is subject to regulation, audit or oversight of some kind, the regulator or auditor often, in many circumstances, has powers to obtain information, and that might be an appropriate element in the mix as well, but I have not worked that thinking through to a level of detail such that I have, as it were, a recipe to recommend to the Committee.

Nadhim Zahawi: Chairman, do you want to come in?
Chair: I was just going to change the emphasis for a moment and bring in Brian.

Q10 Mr Binley: Thank you very much, and welcome, Professor Hargreaves. I am one of those laymen who found your report difficult to understand. You are delving into areas that many people get very confused about and, indeed, it was interesting to note that, of the many responses to the call for evidence, many of them identified enforcement as the most serious weakness in the UK’s IP framework, and it is that area that I want to touch on, if you wouldn’t mind. Can I just take the specific situation of search engines? Many search engines actually direct people automatically to free download sites rather than to sites where artists can get some reward for their work. Can you tell us how you feel that people can be paid in that situation, and can you tell us what you think we could do, in legislative terms, to correct what I see as a sizeable area of concern?

Professor Hargreaves: I sympathise with your comment about the complexity; in some respects, you approach it from a certain angle and it looks reasonably black and white, and then you pull back a bit and look at a broader landscape and it is complicated. I did not take on this review as a lifelong project or IP lawyer or IP economist; I took it on as a sizeable area of concern?

Professor Hargreaves: I sympathise with your comment about the complexity; in some respects, you approach it from a certain angle and it looks reasonably black and white, and then you pull back a bit and look at a broader landscape and it is complicated. I did not take on this review as a lifelong project or IP lawyer or IP economist; I took it on as a sizeable area of concern?

Professor Hargreaves: I sympathise with your comment about the complexity; in some respects, you approach it from a certain angle and it looks reasonably black and white, and then you pull back a bit and look at a broader landscape and it is complicated. I did not take on this review as a lifelong project or IP lawyer or IP economist; I took it on as a sizeable area of concern?

Professor Hargreaves: I sympathise with your comment about the complexity; in some respects, you approach it from a certain angle and it looks reasonably black and white, and then you pull back a bit and look at a broader landscape and it is complicated. I did not take on this review as a lifelong project or IP lawyer or IP economist; I took it on as a sizeable area of concern?

Professor Hargreaves: I sympathise with your comment about the complexity; in some respects, you approach it from a certain angle and it looks reasonably black and white, and then you pull back a bit and look at a broader landscape and it is complicated. I did not take on this review as a lifelong project or IP lawyer or IP economist; I took it on as a sizeable area of concern?
unlawfulness of any of us—and I confess I have done it—shifting a file from a CD that I have bought to a computer that I own, and then to an MP3 player that I like to walk around with, and listening to it. This is unlawful, but most people do it. So, that is one respect in which the law for which greater enforcement is called does not make sense to people.

Then there is a somewhat more complex point than that, but not very much more complex. In the move from selling analogue entertainment—music, video, books and all the rest of it—to digital, an earthquake has been experienced in the industries that are affected by that, and that has not settled down yet. It will in time, but it has not settled down yet. It is very, very important that consumers feel that they are able to buy the goods and services that they want to buy, at what seem to them to be reasonable prices, under reasonable conditions. A lot of what the review says is focused upon that. It is not focused on that because I am, in some sense, denying the importance of the enforcement piece; I am trying to contextualise where enforcement fits in.

So, get the law into a place where people respect it, where it fits with what most people think is fair and reasonable, get the market working in an open way that is delivering quality services in the way that consumers are entitled to expect, and, in those circumstances, it will be a lot easier to have an enforcement regime around that law that will both command respect and, crucially, from business’s point of view, be effective. I am strongly in favour of effective enforcement of copyright law, but at the moment the conditions are not there for that to be simply achieved.

Mr Binley: Thank you. I hope that you are covered by parliamentary privilege.

Chair: I was going to say that this Committee has many roles, but it has never played the role of a confessional.

Q12 Mr Binley: Rather brave of you, I thought. Let me move on, because I want specifically to probe your thoughts about the Government’s proposals for a small claims track in the patents county court, and how you think that they should be renamed the intellectual property county court. Could you give me your reaction to that, and did you feel it was a bit premature?

Professor Hargreaves: I do not feel it is premature, but I understand why you ask the question. Renaming things unnecessarily is to be avoided, but the big renaming decision was taken a few years ago when the Patent Office was renamed the Intellectual Property Office. Intellectual property may not be an area, before we go into the details of questions, which I am happy to delegate to Nadhim, who I think knows?

Chair: In a moment, I will bring Nadhim Zahawi back in on the digital copyright exchange. Before I do so, I must admit that I am having difficulty grasping just exactly what it is. Could you explain the concept to people like me, who are laypersons in this area, before we go into the details of questions, which is as open and contestable as possible. That is the key bit. Open and contestable markets are what lead to innovation, and set out. It will produce a market that is as open and interoperable.” That will then encourage the formation of a trading space between them that is more accessible, and that can be run according to a few simple rules, which can be discussed, negotiated and set out. It will produce a market that is as open and contestable as possible.

Q13 Mr Binley: Do we understand that this could create a massive new area of court work? I just wonder whether it has been thought through as well as it ought to have been.

Professor Hargreaves: That is also a very good question, and I am not sure that I am qualified to make a sensible prediction about that. I do not see anything in what I have recommended that will produce some sort of litigation explosion around copyright. I would hope—in fact, I believe—that the measures that I have set out in the review, and which the Government have now largely adopted, will make this a less contentious area, because, as I have explained, I think that market behaviour and business practice will be more closely aligned with consumer expectations, and there will be less to litigate about in the copyright area. But this is a litigious zone. The number of patents is growing exponentially, largely as a result of activity in the telecommunications and computer software field, and that is another set of issues touched on in the review.

Mr Binley: Thank you.
because they allow small companies to get in and challenge established businesses with new ideas and new ways of doing things. This is all about improving the way that markets work in favour of innovative players, and that, in my view, is the key to securing the additional growth that reform in this area is capable of delivering here.

Q15 Chair: Thank you. Can I just put it to you that what you are effectively saying is that for anybody—either a company or an individual—who wishes to market something that has been created by somebody else, but does not know how to get a licence to do so, this will be a portal that would enable them to access that information and presumably pay a licence or whatever in order to carry out the marketing function that they wish to do? Is that a reasonable summary?

Professor Hargreaves: It is. I would not use the word “portal”, just because that is associated with a particular kind of platform. If you want an analogy, think of the analogy, say, of Amazon, where very large numbers of different merchants sell goods through an electronic trading system, where it is quick and easy to pay, and very quick and easy to get delivery of the goods. It is not a perfect analogy, that, so I do not want to give the impression it is. However, it is that sort of thing, but with some public value and public regulation attached to it to ensure that it is fair, and to ensure that it can do a good job, not only for commercial sellers of books and songs and films, but for the very large amount of public material that is available to be traded in this area if only we can unlock it. The BBC itself is sitting on copyright material of vast proportions; it simply is unable to tackle the job of releasing it, because the copyright constraints are too complicated, too onerous, and take too long, and so it will not be done.

Chair: Can I bring in Nadhim Zahawi? Now we are going into some more detailed questions.

Q16 Nadhim Zahawi: Thank you, Chair. Professor, you have made the claim that the digital copyright exchange’s development is comparable in importance to the UK’s position in European financial services. That is a big claim, and I think you have talked us through what I think is an exciting project. Obviously, with these things, the devil is in the detail. There are some concerns around it. You mentioned the rules; can you talk the Committee through who will set the rules for the exchange?

Professor Hargreaves: How I have invited the Government to approach this indicates, I hope, a level of humility about the genuine challenge of making this in such a way that it works. I strongly believe that it can be done, but I have advised the Government to appoint somebody to lead this process, and that person needs to be a convenor of interests in order to find the right detailed answers to these detailed questions. I have not yet heard an objection in detail that has made me think, “Yes, actually, this is the wrong idea.” When I hear the objections of detail, or the points of detail, my reaction is that, actually, I can imagine how that might be dealt with.

An interesting analogy is the so-called Google Books agreement, which flopped in the United States after several years of trying to put it together, and which was, in effect, a digital copyright exchange for books that Google proposed and a large part of the American publishing industry said it would go along with. If you look into that—it can be inspected online—it is very, very complicated. They have dispute resolution procedures, they have codes of practice, they have governance. You would need all those things in a digital copyright exchange, but you would not run into the problem that the Google Books agreement ran into in the court, where the judge threw it out in the end and said, “This gives Google too much power.”

What we want in the UK is a digital copyright exchange that reflects fairly the balance of interests. That is why I think Government have a role in convening it and ensuring that it is set up in the right way. I think that that can be done. I actually think that, if it is done, it alone will not, as it were, deliver the equivalent value of the financial services sector, but when I discussed this idea internationally, before the review was published, what was said to me was that there have been a number of attempts to do something like this, but nobody has yet tried this at the level of a national jurisdiction in the way that is proposed. If it happens, I tell you that the UK’s competitors will be rushing to create something similar faster than you can say “digital copyright exchange”.

I describe it in the review as a severely time-limited opportunity. It is that. Why is it severely time-limited? It is severely time-limited because, if Government do not convene a publicly minded, or publicly referenced, solution to this, the market will deliver one, but it will be delivered by the most powerful player in the market, and that is what will happen.

Q17 Nadhim Zahawi: You quite rightly pointed out that it is hugely complex. Let me put it to you through an example, because you mentioned what I think is a very positive outcome of a successful exchange, which is the BBC archive being leveraged much more widely. Take premiership football: that copyright is very valuable to the UK. The premiership is the equivalent of the size of a Facebook operation; i.e. £700 million-worth of business to the UK. The concern there would be that, if you set up this exchange, the rules could lead to the lowest common denominator driving the price of that copyright, which means a destruction in value to UK plc. Have you thought those sorts of things through?

Professor Hargreaves: Yes, I have. It is a very good point, but I think an incorrect assumption—or an incorrect fear—lies behind the point. It is true that premiership rights are of enormous value. It is true that we know where they are owned and how they are managed. It is also true that you want, to the maximum extent possible, for there to be competitive forces at play in the way that those rights are creatively used, and in the services that are provided on the back of them and so on. There is nothing about the digital copyright exchange that says anything about who should own the rights or how they should be owned, but it does say something about what kind of market we want in digital content.
To use the financial services analogy—riskily, because it is a highly imperfect analogy—you want a banking market that delivers loans to families and businesses, but you also want a market that is competitive, where you have different services that you can choose from, and you also want it to operate in a way that is structurally sound. It is about the structural soundness and openness of the market. At the moment, there are all kinds of indications that competition is not working well enough in digital content markets, and I personally think that that is damaging and I think it can be remedied.

Q18 Nadhim Zahawi: Competition on which side—on the rights ownership or the bidding side?
Professor Hargreaves: On both, I think. Where you have markets where information is obscured, and it is possible for established players to use their market power to deny legitimate information and opportunity to innovate and bid to new players, that is a matter of public concern. That is what the competition authorities partly exist in order to counter. I think that there are some unaddressed problems of a competition kind in the markets that we are talking about.

Q19 Nadhim Zahawi: Do you see that as the main challenge? What would, in your own mind, be the biggest challenge to making this a reality?
Professor Hargreaves: The biggest challenge is leadership and determination—whether we have the political determination, which the Government have committed themselves to, and whether we now can put the leadership in place. I have talked to a lot of people about this idea, including major rights-holders in the UK, and the idea, to a large extent, comes from them. I am not the author of this idea, I have not plucked it from some brilliant academic text that I read. I talked to people and I heard what they were saying about what the problem is in their own business area. Of course, they are now concerned, if it is done, that it should be done right, so it is leadership and then detail. Let us get the leadership; if we get the leadership right, we will get the detail right.

Q20 Nadhim Zahawi: Do you think it is possible to set up a system capable of coping with all copyright works, back to the complexity challenge?
Professor Hargreaves: Yes, I do. I also think that a digital copyright exchange will be a vehicle of enormous value to the thousands of small businesses that operate in this area, including very many micro-businesses, and even freelance sole-trader businesses. The creative economy is a habitat for companies of that kind—you have created the odd one yourself—and I see them being able to address international markets, to sell things in new markets that would be impenetrable to them without this kind of mechanism. Regarding the official economic impact assessment that was done on the review—I am not an economist, so what right have I got to say this?—my guess is that the estimate of the effect on UK GDP for the reform package here, 0.3–0.6% additionally on GDP, is probably understated.

Q21 Nadhim Zahawi: Let me just press you a little bit further, because you compare the system to the managing of domain names, but you know that managing domain names is a far simpler process, what with the complexity and plethora of copyright. That comparison is sadly misleading.
Professor Hargreaves: It is a comparison that is cited from the people who made the comparison. I think that was News Corp.

Q22 Nadhim Zahawi: Fair enough. Just thinking about copyright itself, do you not think that, effectively, the system becomes a registering of copyright, at odds with the idea of having minimal or zero formalities around copyright ownership?
Professor Hargreaves: Copyright is an unregistered right, and there are issues around the Berne Convention. The legal advice that the review took about all of that was that this was not problematic, but it is voluntary, so nobody is going to be required to register their work. If you want to be an author absolutely in control of every aspect of your work, and you do not care about selling it, you can be master of all you survey. But if you want to sell it in international markets, this will be very helpful to you.

Q23 Nadhim Zahawi: Then the criticism of the digital copyright exchange becomes that you are creating a two-tier system—that is, non-participants will be unfairly discriminated against.
Professor Hargreaves: I don’t think anybody would really argue that we should force people to sell things they don’t want to sell. You are entitled to withdraw a work that you are the copyright owner of from circulation. That has to be a reasonable right. I do not think that that argument holds up.

Q24 Nadhim Zahawi: You have encouraged the Government to fund the start-up of the digital copyright exchange from IPO reserves of £55 million. How much will the start-up costs be, and how will the system fund itself in the longer term, do you think?
Professor Hargreaves: I do not know what the start-up costs will be. That is a level of work that has not yet been done. There is no reason why this should be frighteningly expensive. This is not setting up the NHS patient records system; this is about securing agreement and technical capability of interoperability between systems that are currently not interoperable. That is not a trivial problem but—again, an analogy that is not perfect—if you imagine where we were on consumer finance and banking, it was unimaginable that you would be able to solve the problem of being able to go to a hole in the wall in some faraway country and get your cash out of it, or that you would be able to pay all your bills through your computer. These changes have occurred in other sectors. This sector is one that is ripe for some creative innovation.

Q25 Nadhim Zahawi: I do not disagree with you, except—back to the practicalities—how would a one-click digital copyright exchange licence deal with all the details of where and when a licence is applied, whether it can be sub-licensed or assigned, which publications it could be used in and so on? There are
complexities here, and there are costs associated with those.

Professor Hargreaves: Yes. Nobody is—i am certainly not—suggesting that there is a uniform licensing process that will apply to all items of digital content. If you want the right to broadcast the Olympics, you are unlikely to achieve it with a one-click transaction on a digital copyright exchange. Of course, that is true, but it is also true that there are a lot of already standardised and very standardisable products that are susceptible to one-click and automated consumption. Many people in the content sector—the rights-holders—agree with that, but in more complex cases it will remain the case that all the digital copyright exchange will do will enable you to establish who you should be talking to, and complex transactions will remain as human-to-human things that require a lot of negotiation.

Q26 Nadhim Zahawi: Back to the international context of all this stuff, I hear what you say about the contacts you have had internationally since publication, and I also hear what you say about first-mover advantage, which is the opportunity. Could first-mover advantage end up being the Betamax of digital copyright, with the second mouse getting the cheese?

Professor Hargreaves: I do not see why that would be the case. It seems to me, from that point of view, relatively low-risk. This is not groundbreaking technology; there are massive, global, interoperable IT systems and databases and transaction platforms. These things exist. That, then, does not seem to me to be a risk, and I have not, actually, heard anybody say that that is the risk. The difficulty here is political, not technological. This is not a Betamax risk; it is a politician risk.

Q27 Nadhim Zahawi: Fine. Let us take that a step further. Political risk comes from somewhere; this does not just arrive because politicians think, “This is not something we understand” or “This is a bad idea”. It comes because there is economic risk associated with it, which politicians get lobbied on. There is, then, risk associated with the digital economy, and that is something where we could end up leading the way but failing, and letting someone else then win the overall game.

Professor Hargreaves: Yes, I suppose we could. There is no reason why we should. The digital copyright exchange does not involve an invention, a piece of completely unknown ground—that is all I am saying, really. I did not express it well in my previous answer. I think that the operational and technical risk is manageable. When I use the word “political”, what I really mean is the politics of the industry. Can we get enough of the right players to generate a critical mass and some momentum? Because without momentum, the biggest risk is that you have a go at this and it just fizzles out and who cares? It is just one of those things that did not work: “All rather disappointing to me, but who cares about that?” You can imagine that scenario—yes, I can imagine that scenario.

Q28 Margot James: Just a quick question: did you consider making it compulsory, or is that just not possible?

Professor Hargreaves: In so far as I considered it, I did not consider it for long. I do not think that it would be acceptable either in terms of the framework of international law or the practical reality of dealing with the business interests that we are talking about to frogmarch people into something of this kind. Also, the design of the digital copyright exchange depends upon substantial voluntary engagement.

Q29 Chair: Just before we move on, could I raise an issue? You have mentioned—I think I am quoting you correctly—a Government-appointed digital champion, but the report itself seems to point to an industry-led champion. There does seem some confusion here. Should it be Government-appointed or industry-led? Can you clarify that?

Professor Hargreaves: I will try to, yes. What I mean is that I think that Government is the place where the convening power initially sits, so I think it is the Government’s job, on the basis of a lot of consultation and conversation—which is going on right now—to identify the right person to do this, but that person has to be somebody who commands the respect of the players involved in this and, therefore, it will be industry-led. I do not imagine that the Government will ask someone to do this job who is not a respected figure in the business landscape that we are talking about, although there are important non-private business issues at stake here as well. It is not my job and I do not want to narrow down that search, but that is what I was getting at. The Government should do the choosing and the appointing, and framing the mission, and then the individual chosen—no doubt with some support—will need to get on with it.

Q30 Chair: Given the level of controversy that there seems to be within the industry, do you not think it would have been better for the Government to have, first of all, if you like, agreed that there should be a digital champion, but then set up a mechanism within the industry by which it could be appointed by players within that industry?

Professor Hargreaves: I think that there is a mechanism. It is a rather informal mechanism, but it is currently active.

Q31 Chair: Sorry, I am not sure if I understand that at all.

Professor Hargreaves: Government, as I understand it, are currently seeking to identify the right person to do this job, and they are doing that in the way that Government often appoint people to time-limited missions—for example, conducting a review of intellectual property and growth; they appointed me to do that.

Q32 Chair: Are you trying to say that the Government are taking soundings from the industry?

Professor Hargreaves: Yes. Sorry, I am not making myself clear. I am not privy to exactly what the Government are doing, but I imagine that they are examining the options, talking to people, taking
soundings, and that this will eventually lead to the emergence of an appointment.

Chair: Perhaps we could ask the Government. Can I bring Ian in on licensing orphan works?

Q33 Ian Murray: Thank you, Chair. Good morning, Professor. If I may, I should like to ask you a few questions on orphan works. I suppose the main overarching question is: what would be the incentive for someone who wants to use an orphan work, or suspects that a work is an orphan work, to do any sort of proper diligence?

Professor Hargreaves: It would be set out in the law what the level of diligence required is. That is a very important point of detail for the law when it is drafted.

Q34 Ian Murray: But who would enforce that, if the person who wanted to use the orphan work—or the suspected orphan work—claimed that the work was an orphan work? Who would then police that particular aspect of it?

Professor Hargreaves: It would be policed in the way that this type of law is currently policed. It would be ultimately subject to adjudication by the courts, whether there was a dispute. I am not sure whether you are suggesting a likelihood of significant numbers of disputes.

Q35 Ian Murray: How would the system then guard against misidentification?

Professor Hargreaves: Sorry—misidentification by whom?

Q36 Ian Murray: Say, for example, there was a photographic work that was identified, or misidentified, as an orphan work, would there be a risk that the creator of that work might never be aware of that work being used for profit? Maybe I could give you an example: if that was the case, could the user of misidentified orphan work potentially be insured against the creator becoming available at a later stage and wishing to participate in the profits that had been made from them?

Professor Hargreaves: The law, as drafted, will need to speak to the issue of the owner turning up later. A diligent search is satisfactorily completed and a work is declared orphan, and then the work is obtained and put to use by the person who has it, and then, at some point in the future, the legitimate owner of that work emerges. The law, as drafted, will need to speak to what happens in those circumstances, and that is a level of detail that probably would be better pursued with Ministers and their officials than with me, since they are now actively engaged in the business of that kind of detail, which I did not go into in the review.

Q37 Ian Murray: Would you see a role for insuring against that particular issue occurring, not just to protect the misidentification but also to protect the creator, in terms of future profits?

Professor Hargreaves: There are arguments around in the IP world in general about insurance, in which I claim no expertise, really. There are some advocates of compulsory insurance schemes, and compulsory insurance schemes have the benefit of providing a safety net for a whole class of people, but they also involve a cost, which then has to be borne somewhere in the system. Whether there is a case in this for a compulsory insurance scheme—a safety net for everybody—or a more voluntary and selective scheme is a level of detail into which I have not gone, being completely frank about it. But I am aware of these issues and these are very much the kind of issues that are going to have to be grappled with in detail at the next stage of this process.

Q38 Ian Murray: That is very useful. Your proposals obviously sit alongside the new EU directive and proposals on orphan works; it has not been enacted by member states, so the EU Commission has taken that forward. How do they sit next to each other?

Professor Hargreaves: The EU process is in progress, so these things do develop all the time. My current understanding is that the approach being taken by the EU is less far-reaching and ambitious than what I have proposed in the UK, but that it is not, I believe, necessarily inconsistent with what I have proposed in the UK. The EU sets a sort of general benchmark on orphan works here, and there is permission within different national jurisdictions for additional features of a law at the national level. My understanding is that is the way it is going at the moment.

Q39 Ian Murray: Your recommendations and features would go beyond the EU directive and proposals.

Professor Hargreaves: They would, yes.

Q40 Ian Murray: Finally, professor, how do you respond in general to the disapproval that has been shown by, in particular, the professional photographic associations about your orphan-works proposals?

Professor Hargreaves: I am saddened by it, because I have spent most of my working life in journalism and in the media. I know a lot of photographers. They are my friends. I think that some of the things that representatives of the photographers have said involve significant misunderstanding of what is proposed. The photographers, I believe, have a very large amount to gain from the package of measures in this review. I do understand, however, that there is one aspect of reform that concerns them; I understand why they are concerned and I cannot address it. That is that releasing orphan works—in my view an absolutely essential thing to do in terms of economic and cultural value, and unlocking economic and cultural value is a very, very big gain—will result in there being available on the market a lot of old material. That old material will compete with new material in some respects. That is a market fear that photographers have. They will, I am sure, in practice deal with it with customary brilliance and cunning, but I understand why they are concerned about it; I do understand that.

Q41 Chair: Why do you think the wholesale release of orphan photographic works is so economically necessary?
Professor Hargreaves: If you have an archive—I imagine the Committee will meet some of the librarians, archivists and archive-keepers—the frustration that you feel at witnessing the physical decay of the archives for which you are responsible is one fact. That does not speak to the release of them, but it speaks to the preservation of them. The release of them, I think, has unknowable value. There are many, many examples that one could give, from Shakespeare’s plays onwards, of how old texts inspire new creation and are taken into new creation. I spent some time yesterday with a group of people who are responsible for running our big art galleries and other institutions of that sort, and they are very frustrated at the position that the law has put them into. It is impossible to do sound mathematics on this, so I cannot claim sound mathematical calculations about economic benefit, but it really does not make sense to me to lock away a century of created work, simply because we are not able to say or even have a mechanism for establishing who the author is; that just seems to me, frankly, bonkers.

Q42 Chair: As a qualified librarian, I instinctively understand your position. However, you have admitted yourself that it is almost impossible to quantify the benefits. How can you justify your position in the context of saying that it will benefit growth and innovation? It does seem to me that your approach is rather subjective on this.

Professor Hargreaves: It is an approach that has been subject to analysis by economic expert impact assessors, and you can see in the supplementary paper that was published alongside the review detailed economic calculations about all of this.

Chair: I am actually going to raise that later, but I will bring in Katy Clark now, because I know you have to go, Katy.

Q43 Katy Clark: Thank you very much. Your report recommends wholesale revision of the 1998 Copyright Act. Could you explain to the Committee when you think that should happen and why?

Professor Hargreaves: That was called for by judges and senior lawyers who work with the text of this Act day in, day out, in their own practices—not an experience I have personally had. They say it is becoming not fit for purpose in terms of a piece of drafting. It sounds to me plausible, indeed likely, that that would be the case, given that it all predates the internet, and given that the internet has changed so much in the businesses and areas of cultural activity that we are talking about. I am convinced at that level that this seems to be a good idea, and in the soundings that I took when doing the review, I did not find anybody contradicting that. As to precisely when it fits into the legislative process that the Government have set out, I would imagine that it is an outcome that emerges at the relatively far horizon part of this, because first the Government have to work out the precise text on orphan works and the other changes, so I would think it would be a relatively late-arriving piece of the picture, but I am swimming out of my depth at this point.

Q44 Katy Clark: That is alright, thank you. Can you explain the concerns about text mining and medical research that have led to your recommendations on copyright exceptions?

Professor Hargreaves: Yes. I was not aware of this before I took on the review. I was aware of what text mining is, but I was not aware of the extent to which our science community and our research community feel very strongly about this. Data and text mining is the use of computers to stitch together facts from multiple data sources or documents or published works in a way that enables you to make connections. So if you are researching a particular disease or a particular structure or sub-component of the human body, you can find out what has been said about it in thousands of publications and databases in a way that human beings would struggle to do without computers. It therefore came as something of a surprise to me to find scientists and other academics saying that copyright law is getting in the way of them doing that kind of work. The Wellcome Trust told the review that 87% of the data in the main medical publishing database in the UK are currently not available for these research techniques. I know that the publishers, some of them at least, have got a contrary point of view to that, but that was why I thought it was an important issue. Since getting to that point of understanding, I have heard a great deal more, and I think the Committee may hear more, because it is a subject that is being uncovered at the moment. I regard it as being of very high importance in the reform agenda.

Q45 Katy Clark: Are you content with what the Government are saying and what their position is on opening up further exemptions at the European/EU level?

Professor Hargreaves: Yes, I am content that they pretty closely reflect what I recommended, and I think that they represent in total a balanced and reasonable way forward that I do not think will cause insuperable difficulties for some of the parties that do not exactly like them and would not have proposed them quite this way themselves. I think they strike a reasonable balance, yes.

Q46 Katy Clark: So to what extent do you think there is room for progress at a national level? What do you think the balance is?

Professor Hargreaves: The review sets out the things—the exceptions—that we can pursue because they are already permitted at the European level, and the UK has simply failed to take them up. Examples of that would be personal format shifting and the use of a copyright exception for parody. Those are two examples under that heading. The most ambitious proposal in the review is to try to futureproof copyright law by creating at European level a copyright exception that would be designed to permit further exceptions to copyright that do not interfere with the core expressive use of the work involved, whether that is a book, a film or whatever. This is really a different business that these new users of the internet are in. They are about stringing
Professor Hargreaves: I am not in favour of limiting these extensions of permission to non-commercial use. Non-commercial use of copyright is an important category in the copyright world. I think it is right that, in a number of respects, we think of that as being open to freedoms that you would not want to afford commercially. But I certainly would not want to be restricting bio-technology companies and their researchers, or pharmaceutical companies and their researchers, from this; nor, to be honest, is it realistic or desirable in the world of the university. We want our universities to be sources of research and knowledge that can be successfully commercially exploited by successful British companies. We want the knowledge to transfer into the commercial world. That is what our knowledge economy depends upon, and the argument in the review is that we are in serious danger of allowing a frozen copyright regime to get in the way of the future of Britain’s knowledge economy more broadly, rather than just the creative industries, which is what most of the argument tends to focus on.

Q48 Katy Clark: As you will appreciate, we have already received a large body of evidence in this inquiry, and we will be seeing witnesses and no doubt getting further evidence. If we were to come back with more detailed questions to you, would you be willing to deal with them? Would you be agreeable to that?

Professor Hargreaves: I certainly would, yes.

Q49 Margot James: Is the idea of setting lower patent filing and renewal fees for small and medium-sized businesses something that is just going automatically to take off, or might there be competition law issues against it?

Professor Hargreaves: It is an attractive idea to have differential fees for small companies. We talked about it quite a lot during the review. You will see in the patent section of the review that we did a lot of exploration about the relationship between fees and the problem in some cases of there being too many patents, some of them put in place in order to block the market opportunity of others rather than to protect genuine inventions. We did not in the end recommend firmly anything in that area because—

Q50 Chair: Sorry, could I just interrupt you there? Could you just explain how this does block the market opportunities of others? I did not quite follow that.

Professor Hargreaves: Yes. This is the subject of patent thickets. So, classically, what is a patent about? If somebody invents something genuinely new, they are entitled to seek a patent on it to prevent anyone else using the idea for a specific period of time. Like copyright in its origins, it is a noble and a highly economically important incentive for people to invent and to innovate. The risk, especially in the area of telecommunications, computer software and computers, is that the scale of patenting is now so large that holdings of patents are accumulated by all kinds of players, and indeed are traded on the market by the corporate interests that hold the patents, and some people argue that this is done in a way designed not to encourage innovation in the market but to block it—to make sure that nobody else can get in—in a way that is not legitimate to the protection of a genuine innovation. It is a piece of bluffing and generating of smoke around the system.

Q51 Margot James: It is a way of trying to create a monopoly and hang on to it. It is quite a recognised business defence mechanism. How optimistic are you that there would be a solution possible?

Professor Hargreaves: We have not proposed a solution to it, so I had better not say that I am optimistic that a solution can be found.

Q52 Margot James: Did you, in your investigations, find that the obstacles to the solution were so great, or was there another reason why you backed off from making a recommendation?

Professor Hargreaves: No, we backed off because the clock stopped on us. We were deep into an examination of the potential for differential fees, especially differential renewal fees, in the patenting process, which we thought might shift the balance of incentives and give people an incentive to get rid of patents at the elderly end of their holding. We were not able, in the end, to establish with sufficient evidential clarity that that would work.

Let me go back to the question that you asked me: did we think about offering small companies lower patent fees to make it easier for them to innovate and to counter the risk that they are being blocked by big players? That runs into the objection that it is quite easy for big corporates to form small corporates that turn out to be the holders of the patents. Experience counsels against seeing that as the attractive remedy that it sounds like. It is quite a tough area and the review really ends up by saying this is an area of continuing concern. This cluttering up, and the market-obscuring effect of patents, are a real danger; there are definitely real examples of it out there. We did not find a firm idea of reform that I felt the review was in a position firmly to recommend. That is why the review is where it is on that.

Q53 Margot James: That is very interesting, and it leads me to ask you about the old patent opposition system that was in place prior to 1977. Were there
benefits to that system? Should all or part of it be revisited?

Professor Hargreaves: I am not dodging your question, but I do not know enough to give you a proper answer on that question. Members of the IPO and Ministers, I am sure, will be able to deal with that in writing, and if you want me to ask for that, I am happy to do that.

Margot James: We might revisit it, thank you.

Q54 Mr Ward: Good afternoon, professor. You have already made a few references to small businesses and differential fees; how did you actually obtain their views? There were some criticisms made in various places about the failure to engage with small and medium-sized enterprises. How did you obtain the views of small businesses?

Professor Hargreaves: We went to some lengths to ensure that we heard from them, because it is a well-known problem, I think, in the policy world that smaller businesses are not organised to lobby and put their views forward in the way that bigger corporate entities are. We were particularly keen to hear from the small technology companies—a particular sub-breed of SMEs. We worked with an organisation called TechHub in London to ensure that we got some direct, face-to-face engagement with that group of SMEs. Other organisations representing SMEs volunteered their views. I do not have it in my head, but the facts about numbers of submissions and so on are a matter of public record. Perhaps I should leave it at that and invite your next question.

Q55 Mr Ward: I guess I am asking if you are comfortable that the response and the views of small and medium-sized enterprises were sufficiently taken on board.

Professor Hargreaves: “Comfortable” sounds like “complacent”. You can always find out more. We also did a survey of SMEs, the results of which are reported in the review. We did not do a survey of anybody else, SMEs were right in the mandate of this review, so I would certainly be disappointed if members of the Committee felt that the review had not done a good, fair and balanced job of getting the views of SMEs, which, of course, are not identical. Certainly, I would also add that the conclusions and recommendations of the review, I think, will be of enormous importance for SMEs. Most of the innovation in an advanced economy comes from particular sets of SMEs, and everything from the recommendations on things like the unitary patent system in Europe right through to the digital copyright exchange will, in my view, be of exceptional value to SMEs, because these are the companies that are trying to get into markets that can be blocked by some of the things that we have been talking about—that are friendly to larger and more established interests. In addition, we asked ourselves the question about the provision of IP advice services and so on to smaller companies. The going-in assumption of the review was that was not satisfactory. The work we did, including the survey we did, confirmed it was not satisfactory, and the IPO is charged under the terms of one of these recommendations now adopted by Government to take action to produce a better state of affairs on that front.

Q56 Mr Ward: You have anticipated the next question, which is about whether there is a case for expanding the IPO’s provision of support and advice, and you clearly think there was a case for doing that and a need to do that.

Professor Hargreaves: Yes. I would only hedge that in one way—I think this may have caused a little bit of confusion among some of those who have looked at the review and made comments about it—which is to ask: should it be the IPO that is doing this? I was a little wary of saying it should be the IPO that does it. There is a quote from somebody who runs a small company in here that came out of one of the TechHub meetings, I think, where he generously thanks the IPO for the fine job they are doing; he says that they have helped him “in a Government sort of way”. What comes through from the SMEs, I would say, is that they are wanting advice that combines legal advice and commercial advice. They are not feeling they are necessarily getting that from the lawyers, the patent attorney system, and they are not necessarily quite getting that from the IPO, because the IPO is particularly constrained on what it can advise in legal terms. It looks to me like there is an opening here for a new kind of intermediality, but we have not—I certainly have not—bottomed out to my own satisfaction the exact prescription of what that might be or ought to be. So it is left in the review with urging the IPO to ensure that the space is well filled, which is not quite the same thing as saying to the IPO, “Here is a space. Please fill it.”

Q57 Mr Ward: Presumably it is a competitive world. Are there any barriers stopping the IP practitioners being involved in providing low-cost advice to small businesses?

Professor Hargreaves: The answer is, I guess, no; there is not a barrier as such. There is not a legal barrier or any formal kind of barrier. The barriers would be the difficulty of doing the work well, the difficulty of getting into the market, and the impact on the market of the other players who are active in the market. That is something that requires a further and more detailed level of reflection than we had done by the time we were timed out on the review. It is definitely a piece of work that is needed, in my view.

Q58 Margot James: Given the fact that they are in competition with each other, is it realistic to expect these IP practitioners to help each other?

Professor Hargreaves: I am not an expert in SMEs and business advice, but the experience I have had is that there is quite a lot of evidence that peer-to-peer support in business does work, but it clearly has to be structured in the right way. There is clearly a role for Government, and there is clearly a role for the IPO here. It is about sorting out who does what. One of the things we did not go into particularly in the review, but which I noticed when we were doing the review, was that it coincided with the relatively early months of the then new coalition Government. One of the things the Government were keen to do was to
stop what they saw as wasteful marketing expenditure by arms of Government or semi-autonomous public bodies and so on. So whilst we were going around asking SMEs what they wanted and could more be done and so on, at the same time the budget was being cut for the outreach to SMEs that the IPO was doing because it was all part of that. Now, I am not making a big point about that; I am just observing that there are a number of different forces in play here. If this is a high priority, and I think the Government think it is a high priority, it needs to be taken seriously in terms of the approach taken and the resources available to make that approach work.

Professor Hargreaves: It is a 60 or 70-page document, if I recall. It is not a trivial piece of work; it is a serious piece of work.

Q64 Chair: Just going on to the IPO and the changes you are proposing for it, there are, shall we say, rather mixed assessments of the IPO, which are not totally supportive of it, but you are proposing changes; could you tell us a little more?

Professor Hargreaves: Yes. The case for change arises from what the Government are indicating they want IP policy to achieve. It reflects the emphasis that the Government are placing upon the economic importance of IP. That requires an Intellectual Property Office that is economically highly literate, and it is a matter of fact that the IPO employed its first economist in, I think, 2008. That is not unusual among international patent offices. Much the same is true of the American patent and trademark office. That struck me as surprising but what it tells you is that the debate, the issues of concern, have moved. The IPO now has a substantial and skilled economics unit within its operation.

What I said to the Government in the review is: “If you think you are going to continue to hold a view that IP and the regulatory effects it has are of material economic importance to the UK”—having looked into this, I do think that, and I think the Government think that—“then you need to make sure the IPO is mandated to do what you want it to do.” At the moment the IPO does not have a formal mandate so it is not required to take into account the economic impact of all of the activities it is involved in. That reflects the institutional character and history of the IPO. The patent office was doing a particular kind of thing for a very long time, pretty much satisfactorily I think, but the game has changed. Copyright has become a major issue in advanced knowledge economies. It used not to be the case. It is now; it is going to be more so. We are not halfway through the digital revolution yet.

Q65 Chair: What do you think the role of Government is in changing that culture and fine-tuning the IPO to deliver on the economic objectives there? Do you think it will involve legislative changes?

Professor Hargreaves: It involves changing the rules.

Q66 Chair: What rules?

Professor Hargreaves: The rules about what the IPO is there for, what it does. The review says the IPO needs to be able to express opinions about copyright matters that will help to guide the litigation process, and also provide greater reassurance to users of copyright that they are not doing the wrong thing about it. That is an example. Even more important than that, in my view, although less publically visible, is the relationship between the IPO and the UK competition authorities. I am not suggesting the IPO needs to turn into a competition body itself, but I have had personally a lot of experience of Ofcom. I was a member of the Ofcom board, when it was created, for five or six years. Ofcom is a body that has got powers under the Competition Act, and the IPO is not a body...
that has got locus in that way under the Competition Act. I think all of that needs thinking about very carefully because the competition authorities need to be well informed—authoritatively informed—where there are issues of concern arising about uncompetitive practices in IP markets. In my view, either the IPO needs to be the body that is empowered to raise the flag about that, and attention should be paid when it does, or another body needs to have that responsibility. What the review says, and what the Government’s response has subsequently said, takes you into the territory of: “Let us give the IPO an additional flag or two for its locker.” I think there is every reason to think that could work, but it is a very important issue because, if we do not have this institutional adaptability in the system, we will end up with further repetitions of this cycle of perception of policy failure, review, difficulty getting anything done, review, which has gone on back since the 1970s.

Q67 Chair: You have already touched on it in some respects, but in a number of areas you have referred to, effectively, more work needing to be done, or to the fact that you were timed out on particular issues. I can understand that when you do research there is an almost infinite potential for doing more research, but it is obvious there are still crucial issues that further work needs to be done on. Where does this report sit within the total context of the work that needs to be done? What further areas do you think are absolutely essential for the success of this report?

Professor Hargreaves: My answer to that question is that, when I took the review on and had had the opportunity to think about it for a few weeks, it felt to me as if what was needed was not a report with 75 recommendations but a report that would enable the Government to adjust the strategic course that we are taking on these issues. The strategic course adjustment—let us say it is a 25-degree adjustment, not a 45-degree or 90-degree adjustment—is material, but it is not a complete turning inside out of everything. So the most important thing is that the course adjustment is made. On that new course it will then be possible to pick up further reform as we move forward, because there is no doubt at all that market and technological circumstances are going to continue to throw up new things that will require appropriate thought and reaction by the UK’s intellectual property authorities.

To try to answer the question the way that you put it, as a quantum of the to-do list that we got through, we got through 10. How many should we have got through? Well, in every area there is more work to be done. The digital copyright exchange has to be imagined in detail and delivered. The SME assistance and support programme has to be refreshed and probably a new set of players encouraged into the market in some way. There is nowhere that the thing has ended, but I think we did succeed in the review in getting across the strategic issues here. I think the call we have made, for a 25-degree course adjustment, is about right. It is easy to say I believe it will be right and robust for the future. Of course I cannot prove that; that is an instinct, it is a judgment. But I think that is about right.

I do not think we need to be scared to death of these changes. I think we can make them, and if we make them there will be significantly more economic growth and jobs in the UK than would otherwise be the case. If we do not make them, we will find ourselves really in trouble in a world of cloud computing, where copyright regulates everything from data transactions in the insurance industry to the way that the internet is mapped and deployed as a business tool. It is very, very important, in my view. I think that the review was well timed. I think the mandate given to the review by the Government, which surprised most people at the time it was given, was well judged. When you have had the chance to reflect further on all the evidence that you will get, I hope that you will agree with that assessment.

Q68 Chair: Thank you very much, Professor Hargreaves. It has been, shall we say, quite a steep learning curve for us, and I am sure we are only halfway across it. That is a helpful start to our report. If you feel on reflection you might like to elaborate on any of the responses you have given to any of our questions, then please feel free to do so, and of course we may well come back to you for clarification on points as the inquiry proceeds. Thank you very much.

Professor Hargreaves: Thank you.
Tuesday 18 October 2011

Members present:
Mr Brian Binley
Paul Blomfield
Katy Clark
Rebecca Harris
Mr David Ward
Nadhim Zahawi

Examination of Witness

Witness: Rt Hon Professor Sir Robin Jacob, Sir Hugh Laddie Chair of Intellectual Property Law and Co-Director, Institute of Brand and Innovation Law, University College London, gave evidence.

Q69 Chair: We are a couple of minutes early so perhaps I can take a couple of minutes to formally welcome you, Sir Robin. We appreciate you giving your time. For voice transcription purposes, so that we can get the right level, could you introduce yourself?
Sir Robin Jacob: Good morning. I am Robin Jacob. You probably know what I did once: I was a barrister for a long time at the Intellectual Property Bar, as it is now called— we used to call it the Patent Bar. I became a judge in 1993; First Instance Judge for 10 years, some of which was concentrating on IP, and four years off to Birmingham, Bristol and Cardiff doing more general commercial-type cases. Then I became a member of the Court of Appeal until last May when I made a big decision—I had another five years theoretically—that I could take on this job at University College. I miss the Court of Appeal. I have missed every job I have ever stopped doing, but I am loving my new job and I think there is quite a lot to be done in teaching—not just teaching people from the United Kingdom, because these days the subject is very much international. Many of our classes have hardly any Brits in them at all. That is how it really is: there are many from China, America and continental Europe.

Q70 Chair: Good, and if it is any consolation, one benefit of your new post is that you have the opportunity to be interrogated by a Select Committee, an experience that perhaps is not universally loved.
Sir Robin Jacob: Well, I remember being interrogated by Law Lords in time past.

Q71 Chair: Right. Yes, I am sure if there is anybody capable of handling interrogations, it will be you. Anyway, I will start with a couple of very general questions. Can you tell us about the particular perspective that you feel that you can offer on intellectual property law and strategy?
Sir Robin Jacob: I suppose partly because I have been around in it for such a long time, one of the things you get to feel is that some of the problems that are said to be so new are not actually that new. They have been around in one form or another for centuries—patent thickets, for example. Boulton, driving the company of Boulton and Watt, surrounded himself with a patent thicket. Edison surrounded himself with a patent thicket: over a thousand patents; they were not all for good inventions or useful inventions. We went back to that later, no doubt, but I can bring you a perspective from when I was a young barrister seeing small companies, middle-sized companies, big companies from the inside, being with their management, from doing the big cases as a QC, and from seeing many different sorts of cases as a judge, with big people and little people. That is what I have done.

Q72 Chair: What is your general observation and assessment of the Hargreaves report and the Government response to it?
Sir Robin Jacob: I will start off with the Hargreaves report. I must say I was astonished when it was announced; we had a similar report done only two years earlier. The first observation I would make is that increasingly there has been a tendency by Governments and non-lawyers to think of all intellectual property as the same sort of thing, all coming under the same label. That was not the pattern in the past; you would have somebody looking at copyright law or patent law or trade mark law or design law, and they were seen for what they actually are: quite different subjects. All sorts of things follow from that. They have one thing in common: they are all laws about stopping people doing things, and it is not self-evident in a competitive economy that you want laws stopping people doing things. But the things you are stopping people doing are quite different sorts of things.

So I was astonished that Professor Hargreaves was asked to do the whole of IP in six months. It was not possible, and the consequence has been—although I think he has done a pretty good job considering the constraint, particularly the time constraint—that the level of discussion has been a very general one. It is a bit like the centipede with 100 legs and arthritus who goes to all the animals in the forest saying his pain is very great, and they all say only the fierce and wise owl can help. So he goes to see wise owl: “Wise owl, I’ve got pain in all my 100 legs.” “Simple: turn yourself into an insect.” And he turns, turns back: “Wise owl, how do I do that?” “Don’t trouble me with detail.” The Hargreaves report is very much on that level. I thoroughly think that we should, and we should have had some time ago, a serious review of what we can and should do about the breakdown of copyright caused by the internet.

Q73 Chair: Following on from that, the implication is that it was too big a field. From your perspective,
if you were asked to produce your own review, what
would you have focused on?
Sir Robin Jacob: As Professor Hargreaves has
done, I would have said, “I am not going to touch
patents.” If I want a review of patents, that is now a purely
European question. The UK has almost no room to
manoeuvre in patents. We will come back to the
subject of a possible patent court for Europe. As regards
trade marks, the position is much the same,
although I am rather unhappy about the way things
are going, but I will come back to that.
The one area where we may have some room to
manoeuvre and where attention is needed—on a
worldwide scale, not just in this country—is the
problem of the internet and copyright, and the future
problems of that because we have only just begun. My
sons run a small record business. I said to my son,
“What shall I say to this Committee about what we
should do about copyright?” He said, “It destroyed the
music industry 10 years ago.” We are now looking at
what we should be doing about it—or we were
looking at it—and I am not sure that much can be
done.
Professor Hargreaves does not really deal with what
can be done about it at all. The one area where one
might be looking, but it may have to be international,
is if you cannot shoot the man who posted the letter,
you may have to shoot the postman—that is to say the
ISPs and other people involved, particularly where the
money transactions are concerned, because the
internet has also affected counterfeiting of goods, not
just copyright; now we are into trade marks. Where
the banks and the credit card companies get involved,
they are all taking money on transactions involving
the sale of counterfeit goods. There is a possible target
there—I am not saying they should be made a target,
but it should be looked at. They would pick their
customers more carefully.

Q74 Chair: Could I just pick up there, because in
response you said that Hargreaves had focused, I got
the impression, on what you would have, but you then
went on to say that you would have concentrated on
future problems, internet and so on.
Sir Robin Jacob: Existing and future problems;
problems that have come up since the last Copyright
Act. Copyright has always been a response to
technology. You do not need laws about stopping
people copying when they have to write it out one by
one as in medieval times. The first modern copyright
act was a British Act, the Statute of Anne, in response
to the great increase in engravings, and the technology
was engraving. It was the early equivalent of our
digital position now. Hogarth, who was the great
promoter, thought he was being ripped off something
terrible and he wanted a law to stop it, and he
managed to persuade Parliament to do it.

Q75 Chair: The implication of what you are saying
though is that, in effect, Hargreaves has addressed past
problems but not adequately advised on future
problems.
Sir Robin Jacob: No, I do not say that. We cannot
tell where everything is going to go—the way
technology is going to go. He does talk about trying
to make copyright law future proof. I do not
understand what he means. I think it is floating some
general idea that the courts would have some general
discretion to say, “No, this is no infringement”—the
American approach of fair use; you leave it to the
judges to decide what is fair use. Well, that is a pretty
rough and ready test. Americans themselves find it a
very difficult area because they do not know what fair
use is. There is a lovely cartoon of a young man
climbing up some mountain in the Far East upon
which sits a guru with a loincloth. His question to the
guru is: “What is fair use?” I think the approach that
we have had historically of identifying uses that we
are going to exempt from copyright infringement is
useful.
It is worth remembering that all these rights line up in
parallel and can be fired at potential defenders.
Anybody who wants to do anything has to think of all
the different people who might want to shoot at him
using one of these guns. One of the troubles of some
areas of copyright in particular is that it is too
powerful. There ought to be cases where the answer
is some money, not an injunction—it may not
necessarily be a lot of money. You can find this
problem existing in patents. There are huge quantities
of mobile telephone patents at the moment, many
of which are invalid. People are buying up the patents
in order to sue the big telephone makers, and as you
probably read in the papers, there are mobile phone
wars going on around the world. Some of it is caused
by the fact you can get an injunction, and there is
nothing like negotiating with somebody with your foot
on their neck after you have got an injunction.

Q76 Mr Ward: Before we get into detail, you said it
is about laws about stopping people doing things. Is
there an argument that they are laws about
encouraging people to do things?
Sir Robin Jacob: Yes, there are two ends of the
telescope. One end of the telescope is called
monopoly. Monopoly sounds bad. The other end of
the telescope is called protection. That sounds good.
The truth is it is bad for the economy if it is too
powerful one way or the other. You do need
protection; there are no two ways about it. If you
create something, you need an incentive to do it. That
is why we have copyright, at least that is the British
view as to why we have copyright, because there are
more complications coming yet in this subject.
A more continental, particularly French view, would
be that we have copyright because it is actually part
of your personality, the thing you have created. The
French view of copyright is more restrictive than our
view precisely because of that. I think quite a good
example is a John Huston movie that was in black and
white, and somebody produced a colourised version.
Huston had been dead for a number of years. His heirs
brought an action in France to stop that colourised
version being put out, because that is, they said,
something he would not have wanted.
That is quite a restrictive view and done on the basis
of personality and creativity and not, as the more
common law—English, or American also—view
would be, that copyright is essentially an economic
tool, encouraging people to write things, encouraging
publishers to publish things. It is not much good publishing a thing if you get copied straight away, as Dickens was and as all our authors were in the nineteenth century in the United States. Dickens never got a penny from the United States and was always very angry about it, because they had a rule that you can only have copyright if you first printed in the United States, to encourage the national printing industry.

Q77 Mr Binley: It is a very general point but one that has confused me. In the report there is a particular paragraph on not seeing a difference between the printed word and recorded music or whatever, and in fact the report says, "It is difficult for anyone to understand why it is legal to lend a friend a book, but not a digital music file." But are we not talking about a different history for both of them, and should they be placed together in that way, because it seems to me that at some stage somebody has bought a book, but very often there is hardly any price to be paid for recorded music, for instance?

Sir Robin Jacob: I think you are right and it is not as simple as that. You do not lend somebody—

Mr Binley: That is exactly it.

Sir Robin Jacob: They make another copy and then they lend it to somebody else, whereas the book is physically limited. There is a huge difference between the two.

Q78 Mr Binley: So that is a rather odd thing to say then, in this context?

Sir Robin Jacob: It is. You are quite right.

Mr Binley: Okay.

Chair: Can I bring in Nadhim Zahawi on the UK IP framework and whether it is falling behind? You have touched on this already.

Q79 Nadhim Zahawi: Professor, you have touched on it and your views are pretty forthright on these things and very helpful, so thank you. Professor Hargreaves’ report says that the UK intellectual property framework is falling behind.

Sir Robin Jacob: He says it generally, but it is not true—it is not true of patents.

Nadhim Zahawi: Right.

Sir Robin Jacob: I do not agree with the way that trade marks is going, but it is not falling behind at all. He is thinking about copyright only. He is worried about designs; he has not much to say about designs except something ought to be done about them, but he has not got any evidence of any kind whatever that suggests it is falling behind in any way, except in the area of copyright.

Q80 Nadhim Zahawi: Interesting. He told us that the direction needs a 25-degree adjustment, not a complete turning inside out. Presumably that is where you are headed?

Sir Robin Jacob: I would not say it was as bad as that. I think there are huge problems about industries that can be readily copied on the internet. That is where the problem is and that is what needs to be looked at as a whole. It needs to be looked at from the point of view of who can be liable—as I mentioned, possibly shoot the postman; what we should allow because people are doing it anyway, such as format shifting; what the implications of all this are, because this is such an international business now, and the internet is international, that the idea the UK can do its own thing is past it.

Q81 Nadhim Zahawi: I was going to bring you on to the supplementary. What you are saying, if I am understanding you correctly, is the problem is with enforcement—

Sir Robin Jacob: Yes.

Q82 Nadhim Zahawi: —because of new distribution platforms. It is not so much with the categories of rights available?

Sir Robin Jacob: Yes. No, it is not.

Q83 Nadhim Zahawi: Right. Well, that is clear.

Sir Robin Jacob: That is why Professor Hargreaves has got this idea of the digital exchange.

Q84 Nadhim Zahawi: We are going to come on to that.

Sir Robin Jacob: We will come to that later.

Nadhim Zahawi: We would like to probe a little further.

Sir Robin Jacob: Okay.

Q85 Nadhim Zahawi: Professor Hargreaves and the Government are agreed that the evidence should drive policy to a greater extent than has been the case—evidence-based policy.

Sir Robin Jacob: Can I butt in there because I have some considerable—

Q86 Nadhim Zahawi: Well, I was going to ask you what the challenges are for that.

Sir Robin Jacob: Well, they all talk about evidence-based policy; it is an "in" word. Everybody says they want evidence-based policy for absolutely everything these days, but I am not sure I know what evidence is. I mean as a trained scientist I know what it is; you measure things, and if you want to know how long this thing is here, you measure it. The rule you are taught about is: measure it 100 times and you will get a better result than if you just do it once. You take an average. But you cannot do that sort of thing here. The suggestion is that somehow economists would be able to help a lot on this. 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.
Some of the law of intellectual property is done by gut instinct or feeling. I spent all my life wondering whether the patent system is horribly wonderful. We have got it. It is certainly good for some. Is it good for everybody? I do not know. The Silicon Valley grew up in the United States with nobody enforcing any patents at all. It was just who could run fastest. So there are real difficulties about concrete evidence as opposed to the lobbying of interest groups.

Q87 Nadhim Zahawi: That was my supplementary. Sir Robin Jacob: If somebody said to me, “Please distinguish between evidence and the lobbying of interest groups,” I cannot help you.

Q88 Nadhim Zahawi: Professor Hargreaves described it as “some of the most skilful and influential lobbyists in the UK political scene” and “lobbynomics”. From what I hear from you, are you agreeing with that?

Sir Robin Jacob: Yes.

Q89 Nadhim Zahawi: I take your point on board that we should be cautious when we look at economic modelling, and I think you are quite right in many areas of policy. I think one can show as many pieces of evidence that show economic modelling going haywire—

Sir Robin Jacob: Quite so.

Q90 Nadhim Zahawi: —as actually being true to the claims. So thank you for that, Professor.

Sir Robin Jacob: I think the Government should be very careful about looking at any numbers anyone puts forward for anything. As a scientist, you say, “Well, where did you get the number from and how did you measure it?”

Q91 Nadhim Zahawi: Can I just ask you one last question on this? On your point about looking at very specific areas, which is the internet, because there lies the problem—

Sir Robin Jacob: There lies the problem.

Q92 Nadhim Zahawi: —should Government be looking at criminal legislation, rather than civil, because one of the ways you can protect consumer versus business or the abuse of rights with such a powerful distribution platform—where anyone can essentially break rights; the whole world can—is by looking at some form of criminal reprimand.

Sir Robin Jacob: Well a certain amount of copyright infringement is already criminal. It has never been very successful. Putting it bluntly, Inspector Plod is not very good at copyright law. Years ago I went down and assisted in a case of prosecution of a famous comedian and somebody else, and they were dealing in films. They were actually just film buffs really, but they were dealing in old films and they got themselves prosecuted for dealing in copies. Of course, the prosecution failed to prove there was any copyright, so the whole prosecution collapsed midstream.

More recently I sat in the Court of Appeal: a three-day prosecution had been conducted in Bristol against a young man who upstairs in his parent’s house was converting X boxes so that they could read games without having to pay. He was prosecuted, and the prosecution failed to prove a simple, essential fact: namely that this little device enabled people to make copies that appeared on their computers at home. They were running a much more general case, and this young man was let off on the grounds he would not do it again, roughly speaking. A three-day prosecution and, because it was technical, they got it wrong. So I am not in favour of criminal prosecutions at all.

There has been some pressure in Europe—a more Southern Europe attitude that you should have criminalisation—so there has been talk of criminalising patent infringement in Spain. We have not had criminal infringement for patents since the 17th century. The last criminal prosecution for patent infringement was in the middle of the 17th century, and it broke down: the prosecution of a chap called Hugh Middleton for some patent on a particular method of making gold chains.

Q93 Nadhim Zahawi: No relation to the Duchess of Cambridge, I hope.

Sir Robin Jacob: No. [Laughter.]

I do not think we are going to get anything useful by making things criminal. People underestimate just how powerful the civil law is, and there is another reason why civil law is useful. The details of the case will always lie with the owners of the copyright. They are in the best position to find the pirate, and they are in the best position to move, and the civil courts, frankly, move much faster. I spent a lot of time chasing record pirates in the early ‘70s, when pirates first started. For some reason that I have never understood, there was a lot of piracy in Victorian times—counterfeiting, trade mark infringement—and then it roughly speaking died away. My dad bought a counterfeit Parker pen in the Forum in Rome when we were on holiday in the early ‘50s, but really it did not happen. It started in the late ‘60s with some counterfeit pharmaceuticals, and then it moved into the record industry and then it rushed off into perfumes and other things too. But the civil remedy was much the most effective.

Q94 Mr Binley: Sorry, could you just allow me to jump in? I am going to go back again, because it seems to me that Hargreaves wrote the report the Government wanted, and if that is the case were the terms of reference correct in the first place? Is this the way to deal with this particular subject?

Sir Robin Jacob: I have not read his terms of reference, but I think asking anybody to look at the whole of intellectual property itself is a ridiculous thing to be doing, frankly, and asking anybody to report in six months, particularly from a standing start—Professor Hargreaves is not a lawyer—was an impossible task. I think we were going about it the wrong way.

Q95 Mr Binley: Can I read you the sentence? “The Review will develop”—this is the terms of reference—“proposals on how the UK’s intellectual property framework can further promote
entrepreneurialism, economic growth and social and commercial innovation."

Sir Robin Jacob: "Pretty ambitious, wasn't it?"

Q96 Mr Binley: I just wonder whether you think that was direction beyond the call of what a report of this kind should be about?

Sir Robin Jacob: "The Review will develop" is going too far. Being asked to see if there are ways of doing it was not an unreasonable request.

Mr Binley: Okay.

Sir Robin Jacob: But saying you will do it—there may be nothing that can be done. Not everything can be fixed.

Q97 Margot James: You have given us an idea of some of your views on the Digital Copyright Exchange. We had evidence in one of our earlier sessions about the huge volume of, for example, archive material that the BBC has in its possession. Because some of it is without a clear owner, it is felt that they cannot use it, and that seems to me to deny the public a great galaxy of interesting material. The same goes for the British Museum. Do you think this Digital Copyright Exchange will do anything to help that?

Sir Robin Jacob: I doubt it—and as such almost certainly not. Whoever are the owners the BBC are worried about will not put anything on the Digital Copyright Exchange. Either they are dead or they have forgotten they own the thing.

Q98 Margot James: Could there not be a time limit? Could it not be announced that this thing will go live within 12 months, for example, and if you want to protect your work you need to notify them, and then after that it is a free-for-all? What is wrong with that?

Sir Robin Jacob: Not least that it is contrary to the Berne Convention. You are turning the copyright system into a registration system, which is contrary to the fundamental idea of the Berne Convention—which we have gone along with for ever and with which I agree—that copyright should arise automatically. What I do think, however, is that there are other ways of skinning that particular cat. There are other ways of dealing with it that Hargreaves had not fully considered.

If you think about a putative intellectual property right, it can fall into three boxes. One is it should not exist: people should be allowed to do it; it is in the public domain; that is the end of it. The other extreme is you cannot do it without permission. In between, which I believe ought to be expanded, is the idea you can do it, but you must pay. In the case of orphan works—it is really a variety of orphan work question—maybe you should pay. It may not be very much. The BBC wants to put a lot of stuff on archive. They are rightly worried that someone is going to come along, get an injunction and mess their archive about, and it is potentially possible that that could happen under the current law. I would say we should change the law and that in certain cases, particularly where a copyright owner has effectively abandoned it, like a piece of abandoned land, the Court should have a much greater power to withhold an injunction and not to award damages but to send the matter, if it was necessary, to the Copyright Tribunal for an assessment of an appropriate royalty. I think that is a much more powerful way of dealing with it, and I would not think those royalties, in the normal case, would be very much. I do not think people should be able to abandon copyrights and then resurface 20, 30 years later. Remember we have this ridiculously long period for copyright: 70 years from the year of death of the author. Nearly everything you read—unless you go right back—is in copyright. You do know the ridiculous story of how we got to 70 years?

Q99 Chair: We do not, but I am sure you are going to enlighten us.

Sir Robin Jacob: There are two things. I wrote a piece a few years back for the general public about intellectual property—it was the Grays Inn Reading at the Gresham College. It contained some huge quotations, which you will love, from the debates about the copyright term in the House of Lords, with Lord Macaulay calling copyright a tax on knowledge. That is why I am saying nothing is new. The copyright term was generally agreed internationally to be 50 years from the year of death of the author, which is pretty long already. It had crept up over the 19th century, and settled at the beginning of the 20th century to about 50 years from year of death. There was a European Court of Justice case where it turned out that Germany had 70 years. If you asked the Germans why, it was something to do with the First World War, and the father had been killed in the war and the idea was to benefit the grandson. Anyway, they had 70. This was thought to be untidy by the European Commission and so everybody went up to 70.

We have just done it all over again with copyright in sound recordings, for the same reason: because it is untidy. It benefited this country hugely financially, as indeed this recent one will have done, because we have proportionately more important copyrights than most other European nations. But a piece of rational legislation it is not and was not. So, going back to where we are, nearly everything is in copyright, anything that matters.

Q100 Margot James: Can I just bring you back to the Digital Copyright Exchange for a minute? The idea of different legal remedies depending on whether a work is registered: is that a runner?

Sir Robin Jacob: I think it might not be. We do have sufficient discretion in this country to say we do not have to enforce a copyright and we can award damages instead. I have not looked into the fine detail of this, I confess. One thing you would have to look at is whether we could say, "Right, well if you have not registered you cannot have an injunction." That is a pretty big question and it would need to be answered.

Q101 Margot James: But it is a reasonable hypothesis?

Sir Robin Jacob: It is a reasonable hypothesis.
Q102 Margot James: Okay. Do you think there is a problem with the Digital Copyright Exchange creating a two-tier system and penalising people who do not take part unfairly?

Sir Robin Jacob: That is what might be said. We are now moving into very complex areas of law, because you have got to ask yourself how this stands within European Union law, and again you might be bumping up against the French view that this is an extension of personality and you cannot take it away without the permission of the person or their heirs. It needs looking at in detail, which is why the Hargreaves recommendation that we should have a copyright review —which he accepted from the judges— is one I think we should be getting on with right now.

Q103 Margot James: You mentioned Europe. Professor Hargreaves said the idea was comparable to European financial services in terms of its importance and how that is regulated. Would you agree with that?

Sir Robin Jacob: I do not think I am going to put it in the same box as European financial services. It is a pretty important subject and it is important that Europe gets its act together. I have to say I am not at all happy about the way that European IP law is drafted. It is done by Commission officials, none of whom, as far as I know, have got any IP qualifications. We have bitter experience of the position as regards the Trade Marks Directive and regulation, where we have a massive amount of litigation in trade marks across Europe. It has been a bonanza for the lawyers like you cannot believe. Quite a lot of that litigation is not about whether this mark is too close to that one—you can understand how you could have different views on the facts—but about various legal principles, which are getting more and more abstruse. I am seriously worried about the way that has been going.

Q104 Margot James: So do you think this idea of a digital exchange would alter the legal landscape positively by clarifying ownership rights at an earlier stage?

Sir Robin Jacob: I cannot say that it necessarily would. Quite a number of industries are beginning to develop their own exchanges, as I understand it, just hearing anecdotally, for different types of right. In this all-embracing exchange you will be worrying about performance rights, literary copyrights, music copyrights, sound recording copyrights, film copyrights—remember how they all lay one upon the other. Sometimes a particular thing you want to do will involve all those kinds of rights. How it would work out I am not sure. It is a very ambitious idea to do it as a total copyright thing, and whether it can be worked out I am not sure. It is a very ambitious idea to create. But I am more interested in the idea of withholding injunctions. I think that would be a much more powerful tool and a much more flexible tool than creating anything too elaborate.

Q105 Margot James: My last question is just a question of principle: do you think it is realistic for the UK to develop this entity independent from the rest of Europe?

Sir Robin Jacob: No.

Q106 Margot James: Why not? I know you have mentioned the cultural difference and the legal difference between us and France, but could it not at least apply to material originating in the UK for use in the UK?

Sir Robin Jacob: It would be, but I doubt the usefulness to industry of developing something UK-specific. Very few people write music or write books with a simple UK audience in mind.

Q107 Margot James: You do not think the idea could be applied across Europe?

Sir Robin Jacob: I do. I think that is where we should be pushing. A European idea would be a much better idea to create. But I am more interested in the idea of withholding injunctions. I think that would be a much more powerful tool and a much more flexible tool than creating anything too elaborate.

Q108 Nadhim Zahawi: I just want to pick up, Professor, on the legal implications of the copyright exchange, because we hear that the Premier League is very concerned about having such an exchange. The way they would frame this is that they deliver about £750 million worth of revenue to the UK coffers through selling the rights to the Premiership across the world. I would love to get your view on the recent case where the pub landlady was able to challenge—

Sir Robin Jacob: The Greek decoder card?

Q109 Nadhim Zahawi:— that is right, the Greek decoder card—and the implications of that around this idea of an all-encompassing exchange, and who would decide what the value is for a copyright and so on?

Sir Robin Jacob: Well it depends quite on what this exchange is meant to do. If it is merely meant to put owners of copyright in contact with would-be licensees and would-be licensees in contact with copyright owners, which is a more “how do I find somebody I need permission from” operation, then it would not affect the Premier League or anybody else at all. If it is going to start imposing tariffs, then of course it will have a huge impact and I do not think Professor Hargreaves was going so far as to suggest that.

Q110 Nadhim Zahawi: Or imposing that the authority to allow people to use it—

Sir Robin Jacob: I do not think he was even suggesting that this go so far as to require you to license. I do not think he was suggesting that at all, and if the Premier League is worried about that, I think they should not be.

Q111 Nadhim Zahawi: So you think their concerns are misplaced on that.

Sir Robin Jacob: As regards decoder cards, it is quite comic really. There are various possibilities that are going to be the consequence. One is that the Premier League will simply charge Greece the same amount as they charge everywhere else—it is only within the
European Union. The alternative: they will not sell them at all in Greece; there is not a big enough demand. I understand on the grapevine that actually the real problem now is Albanian cards, which are coming into this country from outside the EU, and that may be a different matter altogether. Of course, decoder cards themselves are almost, probably, going to be technical history before long. Then you may have to type a code in instead or something like that.

Q112 Nadhim Zahawi: But it is an issue.
Sir Robin Jacob: Oh, yes.

Q113 Nadhim Zahawi: It essentially reduces the value. They cannot sell it at the same price everywhere for economic reasons, so it reduces the value of rights.
Sir Robin Jacob: Yes, it did. It has. If the current position continued it would reduce the value of the Premiershiop broadcasting rights.

Q114 Nadhim Zahawi: Should Government be doing anything about it or worrying about it?
Sir Robin Jacob: There is not much Government can do about it because it is a question of European law.

Q115 Nadhim Zahawi: Or European government then?
Sir Robin Jacob: The best thing the Government can do is to worry about it, but could the government in Europe be worrying about it? Well, to some extent you are now up against a big historical question of how much should the law force Europe to become a common market, which has been a driver of European Union law since its inception, so as to make us more like America, which has never had a driver to make it a common market, because it is a common market. We have never had a driver to make our own country a common market when we were, relatively speaking, a huge country. We have never had a law saying things should be different in Yorkshire from elsewhere, or that what they have done in Yorkshire is special and it should not be allowed, which is roughly speaking an analogy.

Mr Ward: I agree with that.
Sir Robin Jacob: There was one ridiculous case. My head of chambers used to swear that there was case where there was a patentee for the London Borough of Dagenham, and he said it was the Ford Motor Company. You could, in theory, break a patent up into bits of the UK. You cannot do that any more.

Q116 Rebecca Harris: How do you view Professor Hargreaves’ specific proposals on orphan works, and do you think there are any legal obstacles?
Sir Robin Jacob: I could not quite follow what his specific proposals were. It was all such a level of generality, I confess, I could not figure out exactly what he was proposing. I will tell you what I would propose.
Rebecca Harris: Okay.
Sir Robin Jacob: There are two sorts: there is the problem of the BBC, which you have mentioned—hundreds of orphan works—but let us take a specific one to start off with. There is some picture that has come from the 1950s and you have no idea who took it; you want to print it. You cannot at the moment because it might be in copyright—probably will be. I think the law should be something along the following lines: you make a reasonable search—

Q117 Rebecca Harris: How do you define what a reasonable search is?
Sir Robin Jacob: I will come to that. If you cannot find it, then you can go ahead and print it, and the owner, if ever he or she turns up, can come along and claim a reasonable amount of compensation, which will not be a lot of money. Now then, how do you define a reasonable search? Well, you cannot actually define it. It depends what use the man wants to make of the photograph. If he wants to put it all the way across a national newspaper for some reason or another that is a quite different thing from wanting to put it up for the village fête. You cannot expect those running the village fête to do much at all. Perhaps there should be no search for such a person. On the other hand, if you want to make a lot of money out of it, you have to do a more diligent search, but there will be ways of doing this. We have had laws for land—what happens when people abandon land. In fact, we have changed the rules slightly now, but if people do not make any use of their land—do not protect it, do not fence it off—and it gets occupied by other people, then you get what used to be called, eventually, squatters’ rights. Now, we have changed the rules slightly, but you can still get them. Now you have to make a claim to squatters’ rights after 10 years of squatting and send it to the owner, and if you hear nothing, roughly speaking, you get it, unless there has been an accident; such as he never got the letter. It is something of the same thing. It has happened with other kinds of property, why not with copyright? So I think we do need a reasonably good orphan work provision that says something along the lines of, “All right, you didn’t look after it. You can’t expect an injunction now and all you can have is reasonable compensation, and since you have basically abandoned it we are not going to give you a lot.”

Q118 Rebecca Harris: What would happen in the occasion when an orphan work suddenly became an international bestseller and made a huge amount of money?
Sir Robin Jacob: I think then you would look at the compensation and say, “Well, he has made a lot of money; this one’s made a lot of money,” and you would get more. Legislating for the really odd cases is quite dangerous.
Rebecca Harris: Right.
Sir Robin Jacob: I do not see why the author should not get in those circumstances quite a reasonable amount of money. Any publisher should make a reserve for that. If I hypothesise they will be making a few bob out of it, so they can make the reserve. But that is a one-off; it does not solve the problem of mass digitisation with no particular known use when it is done, and that one I think has to go to the Copyright Tribunal or somewhere like that. But there is insufficient address in Hargreaves of the work of the
I am sure, yes.

Q119 Mr Ward: I assume insurance could be taken out in those circumstances?

Sir Robin Jacob: They are always talking about intellectual property insurance—how would the insurance companies fix the rates? I think it is better if there is a six-year limitation period for people to sue. They cannot get damages going back beyond six years, so you put the money in reserve and if nobody turns up after six years you hang on to it.

Q120 Chair: Could I just intervene on one point that you raised just now that intrigues me? In the context of orphan works, you talked about the difference between a photo being in a village fête and a photo being in a national newspaper in terms of potential income generation. How would you deal with it in the context of somebody picking up a photo at a village fête and then getting it into a national newspaper?

Sir Robin Jacob: Well, that would work, you see, because the village fête people would have to pay a few bob. If it is still an orphan work and nobody has complained, so the newspaper picks it up and runs with it, but then the photographer turns up, or possibly the photographer’s heir, and says, “My dad took that,” the newspaper will have to pay more, because they have used it more. But it will be determined by the Copyright Tribunal. I very much favour that sort of approach.

Q121 Chair: Is there adequate redress at the moment, do you think?

Sir Robin Jacob: Well, at the moment if a newspaper picked it up and ran with it, they would be taking a chance and they could be sued for infringement or not. I suppose some of them do take a chance. If it is still an orphan work and nobody has complained, the newspaper picks it up and runs with it, then the photographer turns up, or possibly the photographer’s heir, and says, “My dad took that,” the newspaper will have to pay more, because they have used it more. But it will be determined by the Copyright Tribunal. I very much favour that sort of approach.

Q122 Chair: I am sure, yes.

Sir Robin Jacob: I am sure they do. The real worry is that people do not take a chance, curiously. If the BBC decided, “Right, we are going to put our archives online, that’s that. Good afternoon. If anybody sues us we will see what to do about it when they sue us,” I expect they would get away with 99.9% of everything straight away, and the other 0.1% would not affect them; they would buy their way out or just take it off. But they cannot really do that. They cannot actually say, “We are going to infringe copyright on a large scale.”

Chair: I was going to say; an institution of the status and the symbolism of the BBC deliberately breaking the law obviously has implications in itself, but I do not want to get diverted down that track.

Q123 Rebecca Harris: In some of the written evidence to the Committee—we already discussed whether it was evidence or lobbying—there was a certain amount of lobbying for the idea of stronger law on moral rights to allow clearer identification of authors. What is your view on that and of working practice?

Sir Robin Jacob: Put on one side whether I think it is useful, which I do not really. It is not going to affect the position for the next 100 years as regards all the copyright works we are talking about now, which will be running in copyright for 100 years from now at least, because it is too late for them. As regards the moral right more generally, we call it a moral right but it is not really a moral right at all. It has got nothing to do with morals, but it comes from the French, “droit moral,” and there it is seen as the extension of the personality again. But what kind of strengthening has anybody got in mind? I cannot see. At the moment you have the right to be named as the author, which is the one you are really talking about, and that can be waived. Are you really saying it is not waivable, even when you want to waive it? I cannot see it working.

Q124 Rebecca Harris: Thank you. My last question to you, though, is: what is your view about the draft EU directive on orphan works, which might be a more modest proposal?

Sir Robin Jacob: Again, that is probably under some French influence—I think it is too modest. I think it ought to be wider, to start, but it does not really solve the problem. A lot of the EU has not been thought through in intellectual property. So I do not think it is big enough and I would have it much wider. Then, roughly speaking, you would make your reasonable search; if you cannot find it, you can go ahead and do it, and if he ever turns up within six years you pay him. If he ever turns up after that, it is too late—a time limit on that too.

Q125 Chair: Just on this issue of complexity—I was going to ask this question later, but since you have raised it—design law has been identified as particularly complex. What do you see as the main problem with the law of designs and how would you address them?

Sir Robin Jacob: Let us give you a bit of history first. We once had a system of registered designs and you were protected for things that had visual eye appeal for 15 years, and it was used but not very greatly. In the late ’60s, early ’70s, people realised that there was a huge gap in the copyright law, in that if you made a drawing of something, or something you were going to make, it was an infringement of the copyright in the drawing to copy the article that would have been made from the drawing. That applied to pretty much everything that was made from drawings, and nearly everything is made from drawings. Copying, basically, became illegal in this country and what is more, the copyright term, except for things that could have been registered as designs, was going to be the copyright term of
ordinary copyright—50 years, as it was then, plus life of author. You could not copy anything in this country. Nobody knew what the effect of that law was, except it was jolly good for lawyers. Whether it was good for the country, or bad for the country, nobody knew. A big case went up about spare parts, which you had to copy, to the House of Lords, and they finally said, “We are going to allow special exception for spare parts.” Whether it was a legally sound piece of reasoning is open to question. It does not matter; they could not bear the idea that you could have copyright in an exhaust pipe for a M arina. Then we changed the law in 1988 to say, “Oh, no, we are not going to have this copyright running like this. We will make a new right that we have invented, the unregistered design right,” which is if you design something you get five years from the time you first market it plus another five years when nobody can get an injunction but you can get damages or an assessment of an appropriate royalty, and that is the unregistered design right. We still have elements of copyright floating around. It is not a very well drafted piece of legislation.

The European Union then invented its own design right, both registered and unregistered. The unregistered one is for three years, which means you can put a thing on the market, see how it goes. If it is going reasonably well and you want to protect it, you can register it, under a grace period. So we now have, in this country, four kinds of specific protection of designs: unregistered design right and registered design right, UK and European. They are not all quite the same. On top of that you can sometimes go and try to register designs as trade marks. You can see how there is an overlap there. Every logo has got something about copyright in it too, and sometimes, very oddly, if a particular design has developed a huge reputation, such as the plastic lemon, you can sometimes protect that by the English law of passing off. That is seven rights.

Now, nobody in their right mind would have such a complicated system. But does it matter? That is something I do not know the answer to. How much is it actually affecting designers, one way or the other? I do not know the answer to that, and I do not think anybody does anyway. It does not matter at all that it is frightfully complicated; it just makes it more expensive when you go to see a lawyer. Personally, though, I would get rid of the British design right and the British registered design right, which has not been used a lot. The European one is very cheap, and can be sued upon in this country, so I do not really see the point of the complexity. But the underlying question, which is the really important one, is: is this helping designers or is it not helping designers? I do not know the answer to that. Take a simple thing: one of the great cities of design in Europe is M ilan. Historically, the law courts in northern Italy did not work at all for practical purposes but it did not stop the design industry being great. So I do not know some of the answers to some of the questions you ask.

Q126 Chair: Do designers know?
Sir Robin Jacob: No. What you want to know is whether there is a problem—whether they are facing problems in their design work because they are fearful of rights of others because they borrow from other people. Nobody comes up with a totally new design; everything has got shades of the past in it. On the one hand, is it affecting the design process adversely? Secondly, are they facing being copied? Now, there are two sorts of copying: there is counterfeiting, where nearly always there will be some sort of right knocking around that you could use legally, and then there is the much more legally complex sort, when somebody comes close. Where is the line between coming too close and being inspired by? That is a line nobody can ever precisely draw.

Somebody ought to go out and talk to design schools and designers and say, “What commercial problems are you finding?” If they are not finding any or anything significant, and the litigation patterns you are seeing do not suggest there are any, maybe it is not such a big problem except it is frightfully untidy.

Q127 Paul Blomfield: Sir Robin, we have talked a lot about orphan works, but orphan works aside—and I guess your son’s answer, from your earlier remarks, is that it is probably too late—how do you think copyright law should be changed to accommodate the digital environment?

Sir Robin Jacob: That is a very huge question, which I think requires a more specific inquiry than it has been possible for Professor Hargreaves to deal with. One of the questions I said is whether we start looking at the providers, saying, “Well, we cannot shoot the chap who sent it from somewhere else in the world, but we can make the providers check.” You may have to register your copyright work through the provider. I think this is not only a legal question but a technical question as to what, physically, is possible. You can make it a legal question. Sometimes providers say, “We cannot do it,” but the answer is they can do it but they cannot do it without it costing them some money. It would be interesting to know how the liability of eBay for counterfeit goods, which the French courts have announced, is working. But I do think this is something that really ought to be looked at not from the point of view of a general study, which is what Hargreaves was, but specific proposals and draft legislation. Doing it too generally is not helping anybody.

Q128 Paul Blomfield: I think you have made that point very powerfully. Were that study to take place, from your enormous experience, what would be top of your list for the areas to be looked at or the potential areas for future action?

Sir Robin Jacob: I think if I were dictating terms of reference I would say: a review of the Copyright Act with particular emphasis on the effect on copyright owners of the internet and what changes in the law specifically should be made. I would expect anybody conducting such an exercise to actually draft the changes. I do not believe this is an exercise that would be useful at too general a level, and bitter experience suggests that unless you draft it, it does not work out too well.

Q129 Paul Blomfield: If you were invited to give evidence to that inquiry, what would be top of your
list in terms of the changes to the law that you would suggest?

**Sir Robin Jacob:** I think before suggesting anything I would like to know much more about the position of internet service providers and what, technically, they could be required to do, because we are talking about what is practical. If you cannot do it, it is no good making the law. So I think that is what I would really want. I would like to know the technology before I did anything else—if it were practical, for example, to say, “You have got a sound recording; you send a copy to the ISPs or to some central source, and they must then borrow from it and check everything they are sending down is not pirated.” That itself may be a technically difficult proposition. They may not know whether it is or isn’t, but something along those lines, I suspect, is the only way you can maintain copyright for sound recordings, music, and probably books and everything before long. At the moment books are just about under control, but I do not think it is going to last much longer.

Q130 Paul Blomfield: If we do move down that road, how much room do you think there is—and this question echoes points colleagues have made at different stages of our discussion this morning—for the UK to make progress at a national level?

**Sir Robin Jacob:** Not at all that much. The European copyright position is now terribly complicated. A recent article of the Lisbon Treaty provides that there can be action at European union level, that is, the creation of intellectual property rights. I think realistically we have got to work on the European basis. We should spend a lot more time with our colleagues in other countries working out policies that can work and legislation common to all our countries, and not legislation of the kind of the Trade Marks Act, which is so unintelligible that it ends up with nothing but references to the European Court of Justice. There have been about 100 references to the European Court of Justice from national courts since the implementation of this system of trade mark law in 1994—100 cases, let alone the appeals from Alicante. I am an honorary editor of the textbook on trade marks. I have to say I have done no work on it whatever for this latest edition, but the authors tell me it is 60% rewritten since the last edition five years ago. Trade mark law is like standing on quicksand.

Q131 Paul Blomfield: I think you have probably answered my next question. Hargreaves recommends that there should be a wholesale revision of the 1988 copyright Act. Do you agree?

**Sir Robin Jacob:** Yes. I think what one needs is to put a tough chairman in—I have him in mind; I will not name him now. He should be given a lot of time and he should be required to do this, and unless you are depriving anybody of anything, which I cannot think you are, it should be basically free, yes.

Q132 Paul Blomfield: Thank you. My last question: you mentioned earlier the issue of future proofing, and Hargreaves suggests and talks about copyright as the right to core expressive use. Is it possible to move in that sort of direction?

**Sir Robin Jacob:** It is so woolly that I do not know what he is talking about. I am not sure he does either. One of the troubles is this debate is going on at such a general level as opposed to looking specifically: “I want to stop this; I want to stop that; I want to stop the other. I want to allow that.” It is no good doing it at that level. So I do not think it is possible to describe. That is of a generality that does not help us—it is a bit wishy-washy.

Q133 Mr Binley: Professor, can I ask what your instinctive views are about whether content mining should fall within an exception?

**Sir Robin Jacob:** Yes, I do have views about that, and I have had some discussions within college about that. It is a matter of huge concern for you. Plainly, there are patterns that you can discern by going across lots and lots of different data banks and research reports and the like, which you need to copy in order to be data mining. Some of the medics at University College are saying this is actually a huge problem. There are things they want to do: they could treat patients better and they could do medical research better if the law was not getting in the way or was not perceived to be getting in the way. That needs to be looked at very specifically and I think we need to create an exception. A lot of these copyright works are not inherently valuable copyright works in the sense of copyright works that are going to make a fortune. If you are bringing in hundreds of scientific papers and the data in different bits of them, they will all be copyright or subject to protection under database rights, which is another complicated right the European Union introduced. People are frightened of doing it or do not know whether they can do it, and that is an area that I think should be looked at as a matter of utmost urgency.

Q134 Mr Binley: So you would free that whole area?

**Sir Robin Jacob:** I would certainly make it possible to do this, and unless you are depriving anybody significant of any money, which I cannot think you are, it should be basically free, yes.

Q135 Mr Binley: Politicians would be affected if it were not, wouldn’t they?

**Sir Robin Jacob:** Yes.

Q136 Chair: I was going to ask about patent and design but I have pre-empted my questions on design. I would just come in now on patents. What do you think are the defects of the current patent system and how would you deal with them?

**Sir Robin Jacob:** Right. Well, first of all the current patent system—you need to know a little bit of law—was set up not by the European Union but by the
European Patent Convention, the European Patent Union, which has 38 members now, including Switzerland, Turkey, Norway—non-European Union members. There is a basic treaty that sets out the substantive law that every country is meant to have, and has enacted. There is a Patent Office in Munich at which you can get a European Patent, as it is called. In fact, it breaks out into a bunch of national patents once it is granted. There are problems with the procedures in Munich in what is called opposition. This is the first thing I would want to look at.

Once the patent has been granted it can be “opposed”—which means they apply to revoke; it is not “opposed” at all; it has already been granted—within nine months. But the procedures that go on there are not satisfactory. Not everybody in this industry is prepared to say so. We thought the patent was a good one; there was this patent—could they make it? Yes, it is asserted all the time: little companies cannot afford to litigate, and so on, but I have never actually seen it. The only experience I had years and years ago was—and you have touched on it a little bit already, Yes, what I was going to ask was— and you have touched on it a little bit already, but perhaps you could expand—do you think enough has been done to make litigating intellectual property easier and more cost-effective?

Sir Robin Jacob: By and large probably we cannot change much in this country. We have reduced the time we spend in a court over the years. Big cases are going to cost a lot of money anyway, but it is not too bad when they are two big guys fighting. It is when you have a big guy fighting a little guy that you have the problem. Two little guys can, with a tough judge, run in the Patents County Court, which is what we have got now. He will kick it into order. The problem is little guys often have very misconceived ideas about the extent of their rights. They are more likely to get it wrong than big guys. “Oh, you have pinched my invention. My invention is the most important invention,” and they see themselves out of perspective.

As regards the big litigation, I would not want to change much we do in this country. There are big questions that I want to come on to about the potential European Patent Court, but may I put that on one side for the moment—please let us not forget it. But for the little guys I think what is being done in the Patents County Court is pretty good at the moment. There are suggestions that the Patent Office could produce an advisory service analogous to that which they are doing in patents, which has been—not a failure—not a huge success, but you can send your dispute and say, “What do you think, Patent Office?” and it is helping some people to solve some minor cases and at very little expense indeed. The suggestion is in Hargreaves that the office should do the same for small copyright disputes. That would have resource implications for the office because they do have hearing officers to decide patent disputes and trade mark disputes; they do not have hearing officers to decide copyright disputes, because they do not decide copyright disputes. Copyright arises automatically.
Sir Robin Jacob: Of course, individuals. I was going to ask how you Q141 Katy Clark: Ludicrous claims. Judge Fysh was quite vexed with some really people. But I am afraid there are some people who Q142 Sir Robin Jacob: Yes, you find legal executives, but they are normally working in firms of solicitors. Licensed conveyancers— Q144 Sir Robin Jacob: Well, it is not going to happen, is it? Who is going to regulate them, who is going to run them? Sir Robin Jacob: Yes, the British patent attorney profession is probably one of the best, if not the best, in the world. They are well trained and they are better than they were when I was younger, partly because there is a lot more continuing education going on, and their own journal looks a lot better than it did 35 years ago. I think they are pretty good. So the answer is there is very good advice available in this country. The only complaint I have of them is they do not take enough students on and I think they should be bigger. But they do not: they keep themselves about the same size.

Q143 Chair: Do you agree with Hargreaves that there is a role for lower-cost advisers in the field, provided that they are regulated appropriately? Sir Robin Jacob: Well, I do not know who they are. If they are not solicitors and they are not barristers and they are not patent attorneys, I am not at all clear who they are. He has not any idea.

Q144 Chair: Could not a profession be, shall we say, devised? Sir Robin Jacob: Well, it is not going to happen, is it? Who is going to regulate them, who is going to run their exams, what are they going to be examined in? It is not going to happen. He is just wishing for something—it if only lawyers were cheaper. We can all wish that.

Chair: Yes, I am sure we will all endorse that. Sir Robin Jacob: That is a wholly impractical piece of Hargreaves.

Q145 Chair: Are there any other areas of law where there are lower-cost advisers? Sir Robin Jacob: Yes, you find legal executives, but they are normally working in firms of solicitors. Licensed conveyancers—
Q146 Chair: Why can they do it in other areas but not this?
Sir Robin Jacob: This is a hugely technical area. Licensed conveyancing, if you are conveying registered land, is a very limited and very narrow area. People do wills, which is not all that successful, but he has gone further and said there should be business advisers too. It is just not going to happen.

Q147 Chair: Interesting. Right. What do you believe is stopping IP practitioners from competing to provide lower-cost advice to SMEs?
Sir Robin Jacob: Probably there are not enough of them. The only way you bring cost down is to increase the supply. But you have got to realise that, if you are to give patent advice to an SME, patents are expensive business. You only have to read a patent—or try and read a patent, because they are written in some kind of language that no human being normally talks—to realise how difficult it is. Then you see the claim has been granted by the Patent Office, and you have to look at the chap’s device and see whether he can make it or not. It is almost easier for him to apply for the patent than it is to find out whether his patent is safe from other people. One of the things I wanted to mention is the effect on the costs of the new system—comparatively new system—of lawyers being able to act on a no-win, no-fee basis. We had a case in the Court of Appeal about three years back about a bolt. It was a simple patent case, all over in a day. Quite a good invention, I thought, and the patent was an SME. He financed it on a no-win, no-fee basis. That would not have happened before, so although I rather have reservations about this, this was a real case of that system working. He did not have to pay his own lawyers unless he won, and under the system then, they could get double fees, or up to double fees, from the other side. There have been schemes over the years for insurance; you insure your patent against being infringed but I do not think it has been hugely successful. I do not know how it is working now. The idea is you get counsel’s opinion that this is a good case and then the insurance company will pay.

Q148 Chair: Yes. I am tempted to ask how the new proposals on no-win, no-fee would affect that, but perhaps that is an area we do not want to go down.
Sir Robin Jacob: I agree, I do not think we can go down it here. It is beyond your remit, anyway.

Q149 Chair: Yes. I just ask a last supplementary from me: is it realistic to expect competing IP practitioners to provide buddy services, particularly if there is a shortage of them, as Professor Hargreaves suggests?
Sir Robin Jacob: Buddy services?
Chair: Yes, mentoring.
Sir Robin Jacob: No.

Q150 Chair: You do not think it is realistic.

Sir Robin Jacob: No. What the patent attorneys do from time to time, and have done this year, is a World Intellectual Property Day.
Chair: The nation is enthused, yes.
Sir Robin Jacob: Walk in: half an hour’s free advice. It is a way of drumming up clients, I suppose, but it would have been useful to some people I imagine.

Q151 Chair: Yes, I can see. Well, may I thank you? That concludes our questions. Is there anything that you would wish to say to us that our questions have not covered and you think perhaps they should have covered? I may add that you can always submit further written comments.
Sir Robin Jacob: I tell you what, I will send you for your own amusement the Gresham College lecture with quotations from Lord Macaulay in it, which gives you a feeling of the IP system at work. I think you have not mentioned collecting societies at all.

Q152 Chair: Collecting societies. Yes, I am very vague as to what they are.
Sir Robin Jacob: Well, there are certain societies, basically only in the field of copyright, to which rights owners assign all their rights or the right of administering their rights. For example, the right of public performance of music belongs to thePRS, and they go round making sure that hairdressers who are playing the radio pay a fee. There are different collecting societies collecting different rights: one is the PRS; one is the McPS—they want a fee for the music, as opposed to the copyright on the sound recording. There are different societies across Europe charging different rates for different things, and it is all very complicated. I do not think people know too much about them. Sometimes the competition authorities look at them, and I would have thought that a little review of the function Europe-wide of the collecting societies is well worth while. I have seen them in action; I sat as the Copyright Tribunal before I was a judge and there were huge differences between what was going on in France and what was going on here, which do not make much sense in a modern European Union. I am not suggesting that you do anything more than flag it up as something that ought to be looked at, from both the competition point of view and the copyright point of view.

Q153 Chair: Right. Can I thank you very much? As I say, if there is anything further that you would like to send us, we would be very grateful. It really has been very helpful and can I thank you for illuminating what is potentially a very dry subject with the sort of anecdotal evidence that you have provided?
Sir Robin Jacob: Once you have got into it, you find it comes alive.

Q154 Chair: Yes. I think you have helped to convey that this morning. May I thank you very much?
Sir Robin Jacob: Thank you very much.
Tuesday 1 November 2011

Examination of Witnesses


Q155 Chair: Good morning and thank you very much for agreeing to attend this session. I apologise for the slight delay in starting; we had some urgent private business that we needed to get out of the way, but we will bat on very quickly. Could you just introduce yourselves, starting with you, Alexander, for voice-transcription purposes?


Chris Marcich: My name is Chris Marcich. I am the Managing Director of the Motion Picture Association’s European office.

Ben White: Benjamin White, Head of Intellectual Property at the British Library.

Richard Mollet: Richard Mollet, the Chief Executive Officer of the Publishers Association.

Paul Ellis: Paul Ellis, Co-founder of Stop43, the photographers’ campaigning group.

Q156 Chair: Thanks very much. Could I just, before we start, say we will obviously be asking you questions; do not feel obliged, every one of you, to answer every question if somebody has covered the points that you would like to make, otherwise we could be here for a very long time. Brevity, from both questioners and responders, would be very welcome. Can I start off with a very general question? What is your overall view of Professor Hargreaves’ recommendations and the Government’s response? If you can put it in a very pithy way that would be helpful.

Alexander Jackman: Overall, the Forum welcomes the report. Our message to Government really is: it is the fourth report in six years, and we would like to see some of the recommendations implemented as soon as possible. A couple of brief comments: I guess: we felt there was a slight imbalance within the report towards issues surrounding copyright. Many of the issues our members have are predominantly around patents and designs. The second comment I make: we welcomed the presence of small business considerations throughout the report, rather than just in a specific chapter. That fact that it was threaded throughout the report is of immense benefit to our members.

Q157 Chair: Is there anybody who wishes to add to that or contradict it?

Richard Mollet: I would agree with some of that. Among the 21 recommendations, there were a number of good ideas to improve copyright. The Digital Copyright Exchange, the orphan works proposal and the idea not to go to fair use were welcome. However, throughout the review there is a negative view of copyright—one that sees it as obstructing growth, when actually it is the main driver for growth in the creative and knowledge industries in our economy. Also, I think Hargreaves takes a very economic perspective of copyright, when it ignores and never anywhere says that copyright is actually a fundamental property right to rights holders, recognised by British and European law. That is a big lacuna.

Also throughout the report, a lot of times we see “copyright is not there to regulate the digital economy”. Of course, that is trivially true, but copyright is a technologically neutral framework, which is there to stop unauthorised copying, be it 18th century printing presses in London or indeed on computers. That very indifference to technology is absolutely the strength of copyright, its very flexibility. Hargreaves almost turns that on its head and uses it as a stick to beat copyright with, and says, “We have to change it.” For that reason, as I am sure we will go on to, some of the recommendations that flow from that analysis seem to our members to be wrong.

Chris Marcich: I would just add that some interesting ideas are put forward by the Hargreaves report, including the Digital Copyright Exchange, which could be useful, depending on how it is developed. I would also add that, in some of the areas where there are recommendations advocating additional exceptions, there is an absence of evidence to support the need for the exceptions. I think that copyright has a proven track record of adapting and enabling change in areas such as non-consumptive use. You have players that have emerged in the market that are doing quite well in the present environment. Before we go too much further in looking at exceptions, we should look at the achievements of the copyright legislation that you have put in place, as legislators, and its accomplishments in terms of job creation, and
promoting creativity and innovation, in making this country one of the prime resources for inspiration and economic activity in our sector.

**Ben White:** Certainly the British Library would welcome many of the recommendations that, for the first time, seek to solve many of the issues that the research sector faces. Again, there is slight IP fatigue that there have in the last six years been four reviews, and we would very much like to see implementation of many of the recommendations. It is also very important to put this in an international context. Many of the recommendations around the flexibilities, limitations and exceptions already exist in America, Canada, the European Union and Japan, so actually are not that radical. It is entirely appropriate that, 33 years since the last legislation was even written—well with new technology comes new opportunities. I think it is absolutely appropriate that the Intellectual Property Office looks at something that is 33 years old.

**Q158 Chair:** Did you wish to say anything, Paul? **Paul Ellis:** I do have a slight dissenting opinion. I am afraid I do not believe that the Hargreaves report is largely a digital land grab that will do little to stimulate the growth we actually need, which is that of tax receipts to reduce the public sector borrowing requirement. It is a classic example of attempted regulatory capture by vested interests. Copyright is an automatic right conferred upon creators by the Berne Convention, and consists of human rights, moral rights, property rights and economic rights. Hargreaves’ remit was limited to economics; consequently, it is not surprising that his recommendations involve breaches of human rights, moral rights and property rights. In detail, the recommendations breach Berne Article 9, fails Berne’s three-step test and breach the human right in copyright and moral rights conferred by the Universal Declaration of Human Rights Article 27, and the European Convention on Human Rights Article 1 first protocol, among others.

In our view—that is Stop43—to reduce the public sector borrowing requirement we need a growth of tax receipts from those who pay the most tax as a proportion of total tax receipts of individuals and micro-businesses that make up 90% of the economy, not corporations. Hargreaves wishes to stimulate start-ups, which, according to a recent Demos report, pay little tax, enjoy tax holidays and, in general, eventually become bought out by US corporations that pay little tax, enjoy tax holidays and, in general, start-ups, which, according to a recent Demos report, make up 90% of the economy.

**Q159 Margot James:** What are your views on Professor Hargreaves’ treatment of orphan works and how could that be made to function effectively? **Chair:** Again, I would repeat my original strictures: it appears to me, rather like trying to prove a negative. An orphan work is only characterised by the fact that, at the moment you are searching, you cannot find the rights holder, but tomorrow you may be able to. Therefore, the search is only as good as the tools available with which to carry out the search. I would note that, whereas the Government intends to legislate for commercial use of orphan works and extended collective licensing, which we will come on to later, I am told it does not intend to legislate for the Digital Copyright Exchange, which might prove to be the database necessary to finally carry out a diligent search to confirm that a work, for the time being, is orphan.

**Q160 Chair:** Could you keep your comments as brief as possible? We only have a limited time span.

**Paul Ellis:** I will; sorry. Of course.

**Q161 Margot James:** Mr White, might you have another view, coming from the British Library? There are a lot of orphan works there, aren’t there? **Ben White:** I have a slightly different view, yes. We have been very much involved at a European level in discussions on orphan works since 2006, and there are a number of issues here. Whereas I sympathise with many of the issues that Paul has raised, I sometimes feel that the issue has been looked at through a slightly different lens. 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. 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 the moment, I hear the concerns from the photographers, but I actually think it will put them on a stronger footing for two reasons. One is we are the UK lead for something called ARROW, which is essentially a federated database and processes in and around clearing rights. The European Visual Artists and also CEPIC, which are the European picture industries, are now part of ARROW, so they will be feeding their databases of visual photographs and artistic works into ARROW.

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. What we are taking about here is a licensed approach. Therefore, if they find that their work, after a diligent search, has been used, then they approach either the Government or the collecting society and have the right to remuneration. There will be diligent search up front, and nobody needs to be taken to court downstream. They can approach the collecting society or the Government and say, "My work has been used. I do not want it to be used," or actually, "I want fair remuneration." To me, that seems a very pragmatic solution that exists in many other countries already.

**Chris Marchich:** We are also involved in work on this issue at the European level and in other countries. It is fair to say that the situation varies from sector to sector in the content industry. A sectoral approach is warranted here. There may well be an orphan works issue for certain sectors. On the audiovisual side, diligent search will identify the authors and the rights holders of audiovisual work, so there is no problem and therefore there is no need to legislate for the audiovisual sector.

**Q162 Margot James:** Would anyone else like to comment on the effective functioning and the economic side, and also the EU Orphan Works Directive? Does that not already go far enough?

**Richard Mollet:** That is in the process of being done. I will not say this often, but I agree with Ben on the orphan works proposal that Hargreaves has. The Directive we agree with as well; it goes slightly less far than Hargreaves. It does not necessarily imply a licensing system and we would like to see that. Both the Directive and the British framework that will plug into it are the right way to go for rights holders. Paul’s issues are valid. I am sure they can be worked through, but publishers suffer from wanting to use works that are orphan as well. It is a position where rights holders themselves want to see a solution to this. Either the Directive and/or the Hargreaves proposal will solve it.

**Q163 Margot James:** When you come back, Paul, could you say why you think or do you think that photographic works require special treatment? If you do, could you give us your reasons?

**Paul Ellis:** By all means. Before I do that, to touch on the EU Directive briefly. Stop43 believes it is largely very sensible. It is conservative; it is cautious. To begin with, it does not include visual works such as photographs and graphic works, and there are good reasons. Its only real problem, as we see it, is that it intends to have a work declared orphan in one country therefore declared orphan across the EU. We wonder how it might be possible for us to question Albanian collecting societies or whatnot. There is a language problem there that needs to be dealt with.

Specifically the problems with photographs, which I have included examples of in the evidence we gave to you, are the privacy and exclusivity problems. You cannot tell, just by looking at a photograph, why it was taken and what the internal contractual structure might be. It might be a news photograph; it might be a PR shot; it might be a commercial photograph for exclusive use by the client. There is the market rate problem. Obviously a news photograph has a very different value from a commercial advertising photograph. The costs of the production of the photograph are brought to bear, as they are with any other kind of property, in terms of the licensing fee that you might charge for it. There is the problem of misrepresentation. 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.

Foreign rights holders: inevitably the photographs of rights holders living in other countries will end up being declared orphan in this country, and will be licensed for commercial use in this country. We can quite easily see a circumstance in which one of those photographs might belong to a person who has registered it with, for example, the US Copyright Office. For a registered image, each breach can be worth up to $150,000 in damages, and we have heard no word from Hargreaves or anybody else about how people who license orphans here in good faith but who have US assets might be protected from action brought by foreign rights holders. For all of these problems, we feel that there could be no legal certainty over the use of orphan photographs. No matter how much people might like that legal certainty—I know that many people in this room dearly wish for the legal certainty—we fail to see how legal certainty can be provided.

**Q164 Julie Elliott:** The Government has said that commercial rates will apply to commercial use of content. What do you see as the issues around that?

**Chair:** Who wishes to lead on that one?

**Paul Ellis:** I do not wish to hog the proceedings here, but in the normal terms of negotiating a primary contract, the rate is negotiated between the vendor and the licensor. That negotiation is based on many factors. The normal way of licensing intellectual property, as I am sure the pharmaceutical industry will agree, is by its value to its user. This is why photographs are granulated in their usages and why each form of usage is charged for. There is a benefit from that for the user: they do not have to pay for more uses than they actually need. Of course, for this to happen there has to be a primary negotiation. The commercial use of an orphan in which the rights holder is not present of course cannot compensate for that lack of primary negotiation. Let me also point out that a primary negotiation between vendor and rights holder will result in a licence fee that is equitable to both and a commensurate tax take from that licence fee. Right now, it strikes us that the Government needs as much tax as it can possibly raise.

**Julie Elliott:** Would anybody else like to comment?

**Chair:** I know Brian had a supplementary to this. Could I just bring him in before you ask your next question?
Q165 Mr Binley: It gives me the opportunity to bring it in earlier than I might have been able to. Hargreaves states that consumers are currently confused between legal and illegal music when they go online. Can I ask what you see? It particularly affects the cinema industry, I assume. I am not sure Hargreaves has an answer to this, and I wonder whether you think that is right. If that is right, what do you think an answer is?

Chris March: I think that there is increased awareness of the distinction between legal and illegal. There are causes for confusion and I do not think the Hargreaves report goes to those issues. For example, you will find that, if you do a search for a particular audiovisual work, you will be referred, more often than not, to a long list of illegal sources for the content before you ever get to a legal source. That issue of how content is indexed goes both to the point that there is a lot of freedom in terms of indexing right now in so-called “non-consumptive use”, and also an absence of responsibility around how these services are provided to consumers. There is room for improvement there.

Richard Mollet: I would agree with Chris that part of the consumer confusion, and this goes for literary works as well, is that illegal sites look professional. One of the reasons they do is because they often have advertising down the sides of the them. That is why we are asking online advertising providers like Google—and to be fair to them, they are acting on this—to take away the adverts from sites that they know to be infringing, so at least the consumer is not presented with what looks like a professional site. It is one of the ways in which we can get rid of some of that consumer confusion. There are so many great legal services for published works, but they are being infected, if you like, by the presence of illegal sites, which are very readily findable on search engines.

Q166 Julie Elliott: This is to Paul at Stop3: what solution would you propose for the treatment of amateur photographs?

Paul Ellis: Everyone is an amateur photographer in the modern world. Everyone sitting in this room is a photographer. All of us have cameras. Those of us who have blogs and Facebook pages are published photographers. A mate work can match, in terms of aesthetic quality, the work of professionals. It is often argued that, because amateur work is not made for commercial gain, it should be free game for commercial exploitation. It strikes me that capitalism is based on the strong enforcement of property laws and property rights, and that, under capitalism, anything can be of potential commercial value. If one of you sat here took a photograph that ended up on the front page of a national daily newspaper, then I think you would understand that front page daily newspaper space is of great commercial value to its publisher. Why should you not participate in that value? I think we are going to come on to the Digital Copyright Exchange National Cultural Archive idea.

Chair: We are going to deal with that in a moment.

Paul Ellis: Of course. I simply say that, in the context of that idea, we can fairly deal with amateur photography in a similar way to professional photography, and protect all photographers, including everyone sitting in this room, from unfair exploitation and from the breach of their human and copy rights.

Ben White: 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. They found a solution in all those countries. In Scandinavia, this has been going on for 50 years; it has not really been an issue. A gain with the licensing solution, if people find their work has been used, if they have not opted out, they can ask for fair compensation or for the work not to be used. There are mechanisms to ensure that we have a pragmatic solution.

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 500-kilobyte web resolution photographs or artistic works; it is 50 megabytes. It is 100 times larger. We need to make a clear distinction between web-ready and commercially viable photographs. There is a huge difference. We need to look in the details of this.

Chair: Can we go on to the Digital Copyright Exchange? Nadhim is going to come in on this.

Q167 Nadhim Zahawi: Thank you very much, Chairman. I think Paul just touched on it, but what are your overall views on the proposals to create a Digital Copyright Exchange?

Chair: Again, I would be grateful if everybody did not repeat at length. Who is going to lead? Chris, you looked as if you were.

Chris March: I am happy to. The answer is that it depends on what it is. If it is an answer to some of the issues that are out there now in the area of information to consumers and potential users, so that they know where to go to clear rights, there could be a contribution made by the Digital Copyright Exchange. We see the potential for a useful tool to evolve, so long as the involvement with that tool is voluntary and so long as those who are stakeholders have a chance to prove input, and so long as it does not become a system that effectively becomes one that facilitates mandatory collectivisation of rights management. Those would be our preliminary remarks on that.

Richard Mollet: I would agree with all of that and say that the Hargreaves review and the Government response both envisage this happening rather quickly. There is an indication in the Government response that they would have a convener of this appointed by the end of 2011 to say how this is going to move forward. We want it to move forward; the Government has not yet appointed that convener and I think that they need to get on with doing that. Otherwise, this is just going to be a Hargreaves pipedream.

Ben White: From our perspective, again we think the recommendation is extremely appropriate. We have been the UK lead on ARROW, which I referred to earlier on, and that was actually the result of EU funding and EU incentives to actually ensure that different stakeholders pool databases and information.
I do think that there is some kind of room for incentives here. Again as an organisation that spends hundreds and hundreds of hours looking for rights holders trying to clear rights, anything that can un-chill the chilling effect, i.e. facilitate rights clearance, is only going to be good for UK plc. 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. That is a huge print run. There are real strong economic reasons for why we need to facilitate things like the Digital Copyright Exchange, extended collective licensing and orphan works.

Q168 Nadhim Zahawi: Paul, Ben has told us about the ARROW project. How are Stop43 proposals for the National Cultural Archive different from that?

Paul Ellis: They are rather more ambitious, to be honest. Our proposal was gone into in detail in our submission to Hargreaves, and I have given you a precis of it in our submission to you, but it intends to do rather more than simply just be a digital market. In large part, it is based on the concept we came up with of cultural use. As I have said, we believe, in fact we are very sure, that the commercial use of orphan works and extended collective licence of works breach Berne, largely because they breach the Berne three-step test in Article 9 of Berne, in that they interfere with the normal exploitation of the work. We tried to find a way around that and we came up with the idea of cultural use, real strong reasons for why we need to facilitate things like the Digital Copyright Exchange, extended collective licensing and orphan works.

Therefore, we came up with the idea that perhaps we could envisage an online gallery, in which orphans could be presented simply for people to look at, in the way that you go and have a look at a painting on a wall in an art gallery, or indeed that painting on the wall in this room. I can sit here and look at it, but I cannot copy it, take it away or scribble on it. That is our concept of cultural use. We move beyond that based on facilities that are becoming available—this is for photographs specifically with picture search—to use orphans as a lead to equivalent visual works. That implies a rights registry. This is of course where we are all in agreement.

Q169 Nadhim Zahawi: I guess what you are saying is that you are against the Digital Copyright Exchange?

Paul Ellis: No, not in the slightest. We are for the Digital Copyright Exchange, so long as it works in a neutral way.

Q170 Nadhim Zahawi: How does it help photographic businesses over and above what Getty Images does?

Paul Ellis: You can go to Getty Images and you can put in keywords and you can search for a picture that suits your keywords. Alternatively, you can do what my daughter does. She goes on Google Images and looks at pictures of dolphins. She loves them; a screen full of dolphins comes up. There is the perfect picture for your photograph for your travel company organising swimming-with-dolphins trips. Would it not be nice if one could click on that Google Images picture and get a link straight through to the rights holder and license it with automated licensing facilities? In fact, you can right now. There is a Getty company called PicScout that offers software that does exactly that. That is the basis upon which we have rested our entire National Cultural Archive proposal. This is how we envisage licensing at this low level generating new licence transactions, bringing transactions in from the black economy to the white economy where they can be tracked, and from where tax receipts can therefore be generated.

Q171 Nadhim Zahawi: Can I just move on to the diligent search idea? How would you define a diligent search of orphan works?

Richard Mollet: Consensually, both rights holders and would-be users would have to pre-agree what counted, and it would depend on the different works. In our case, the ARROW database that Ben has referred to would be one place to look and the licensing societies that exist would be another. What is crucial, howsoever it is defined, is that both sides have to agree and, when the person has done the diligent search, they have to say to the collecting society, “I have had a good look and I could not find it.” The detail of that would be worked out according to different works and different countries, indeed.

Q172 Nadhim Zahawi: Could the law require the use of automated technology, do you think?

Richard Mollet: I would be surprised if the law required it but, yes, if that technology existed, it would be hard to say you were being diligent if you did not use it, I suspect.

Ben White: Terms like “diligence” and “reasonable” are well-understood legal principles, so I would agree with Richard that diligent search is clearly needed. Actually, what constitutes diligent search would vary depending on what you are potentially digitising, I will give you a couple of examples of the kinds of things that we do. For example, for the 140 books, of which 43% were orphan works, there we did a Google search. We approached the author society; we approached the Publishers Licensing Society; we went through old trade directories; we wrote to the
descendants; we have advertised in the past. About half of those were commercially produced books. Another example is of sound recordings that we have digitalised en masse. One of the collections that we have done is traditional music from the British Isles. Something like 98% of that was unpublished sound recordings. In that instance, we essentially engaged with the community, so we spoke to people at the English Folk Dance and Song Society in Camden; we wrote to some of the people who we knew because they had deposited with us the sound recordings at the BL. This is not commercially produced material; this is stuff that just sits on reels. Therefore, a book you would do through ARROW. For unpublished sound recordings, you would have to find other mechanisms to do diligent search. I do not think there is a “one size fits all”, but there is an understanding of what “diligent” and “reasonable” mean. What we are envisaging here is always third-party oversight of that process, whether that is by Government, of the library directly or, for example, the collecting society again being monitored by Government to see if they have actually done a diligent search.

Q173 Nadhim Zahawi: Paul, what do you suggest should happen legally if the author of an orphaned photograph were to come to light at a later stage? Could insurance play a role—i.e. the user can insure against such an action?

Paul Ellis: As far as insurance is concerned, I simply do not know, because the use of an orphan is a breach of Berne, as we say. It is also a breach of the rights holder’s human rights. In our proposal, we propose that all works, whether orphan or not, should be registered—because of course the content of some images is not appropriate for public viewing, for various reasons—be made available for the public to see. If the public can see them, the rights holders stand a chance of coming across their photographs or their works and being told that they exist, and therefore reclaiming them. We think that, as far as orphan works are concerned, for the public edification this is sufficient, especially when tied in with means whereby they can be used to switch commercial users to equivalent works for their uses.

Q174 Nadhim Zahawi: Can I just move on to extended collective licensing? The Government has said that extended collective licensing will apply to sectors that choose to adopt it. What are your respective positions on extended collective licensing?

Richard Mollet: I will be very brief. For the published sector in the UK, we would not want extended collective licensing other than in the orphan works scenarios we have already been discussing.

Ben White: Extended collective licensing started in the early 1960s in Scandinavia. Essentially it is that, for certain specific uses, a collecting society, which is deemed to be representative of a particular sector, can extend its mandate to not only those individuals who are registered with them but to all creators of that sector. It is used for certain specific uses, such as broadcast radio and certain educational purposes. 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 Moll, 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.

France is currently preparing legislation to allow mass digitisation of French-language material as an economic stimulus package. By definition, if you are digitising a large bulk of material, there will be orphans, there will be registered rights holders and there will be rights holders that do not register with collecting societies. I write on copyright issues; I am not registered with a collecting society. My brother is a doctor; he does not register with a collecting society. He is not an author in that sense. What it does provide is a legal basis for this extension effect, which has been in operation for over 50 years in Scandinavia.

Chris Marcich: I would just like to add that, for the audiovisual sector, including in Scandinavia, these systems operate on the basis of an opt-out clause, and so it is possible to opt-out and preserve the commercial relations that exist. It is a fallback solution where other solutions do not pertain. That is extremely important to keep in mind in looking at extended collective licensing. It is a second-best solution to the extent that you want to look at it at all as a solution. We do not think that, in the audiovisual sector, there is a need to go there.

Q175 Nadhim Zahawi: Ben looks slightly puzzled by that answer. Do you want to come back on that?

Ben White: Yes. Again, it is for specific uses only. In Denmark, for example, the Government has to agree that specific use is essentially an instance of market failure. It is often mass usage. How can you clear many rights in hundreds of hours of film for every single rights holder or every single rights holder in a book? It is very, very complex. What extended collective licensing does is, in the case where it is accepted by Government that individual right by right by right is not practical, make it acceptable for certain specific uses in cases of market failure.

Q176 Nadhim Zahawi: This is to both Ben and Paul. Just thinking about the photographic market, what effect would there be on the professional photographic market if an organisation such as yours, the British Library, was to mass-digitise all photographs with an internet start-up in a similar sort of way that deals were struck with Amazon and with Google? What would happen to the industry?

Ben White: Nothing. As Chris said, this is not an activity that goes on behind closed doors. The collecting societies have to advertise their activities. Government regulates what the usage is and rights holders can opt out. Again I go back to the point that you are not putting 50-megabyte images that pixelate if blown up. This is well-regulated; there is intervention by Government. Essentially, it is very unlikely that we are going to approach each and every photographer, so their direct
business, their day-to-day busines being commissioned to do something for a magazine or a newspaper, is not of that ilk; it is a different kind of usage.

Paul Ellis: It is the thin end of the wedge. If you are going to legislate for orphans, you cannot just legislate for past orphans but you also have to legislate for current and future orphans. The legislation that Ben is proposing for dealing with past orphans will destroy the markets for professional photography, because of present and future orphaning. Extended collective licensing is illegal under Berne. It strikes us, and we have been well advised, that WIPO turned a blind eye to the Scandinavian and other systems of extended collective licensing because, in general, they do a great deal of good. As we said in our evidence, the Nordic extended collective licensing and also the DACS Payback scheme here, which is also illegal, appear to be tolerated because they have almost 100% professional uptake.

Earlier on I mentioned, in the context of orphan works, that we are all amateur photographers. How is an amateur expected to know that a collecting society exists, and either join it or opt out from it? Hargreaves' view of orphan works usage and extended collective licensing is, in effect, enabling the commercial use of user-generated content, so-called, including your photographs. Will you all know to opt out? Two weeks ago, Sir Robin Jacob here expressed his confusion at the meaning of moral rights, which I hope we will come on to.

Chair: We are dealing with that next.

Paul Ellis: The fact is this: I think a collective licensing scheme, such as Kopinor, which extends in certain ways to encompass the works of authors who are not members, as DACS Payback scheme does, is acceptable when it does a great deal of good, when what you might term its collateral damage to non-members is small and when most of the players in that market, in that industry, being professional, can be expected to understand the structure and the rules of their industry, be a member of the collecting society and know to claim. This is entirely reasonable. Hargreaves reverses this position and the ECL is intended, it seems to me, to facilitate the use of uncounted amateur works, the authors of which cannot be expected to know this structure and to act appropriately.

Richard Mollet: Just to come in on that, in a conversation about extended collective licensing, it is always blithely said, “Oh, well if you do not like it, you can opt out.” This was the crux of the Google Books settlement in the United States. Even there, with a much looser copyright regime than ours, a US judge, Judge Chin, threw out that settlement. He said it is not good enough to say to an author you can opt out. “It inverses the normal operation of copyright,” was the phrase he used in his judgment. We have to be very careful when we blithely say, “Oh, it’s okay; if you don’t like it, you can opt out after the fact.” Not all rights holders, especially small rights holders, will know that they have been opted in.

Chair: Can I bring Katy Clark in now on moral rights?

Q177 Katy Clark: How would you like to see the law on moral rights adjusted to support the identification of orphan works? Also, do you think there should be a residual right to identify a work on the Digital Copyright Exchange that has been proposed, even if other rights have been waived? How do you see that working?

Richard Mollet: I think it would be good to have good recognition of moral rights. There is a line in Hargreaves where he says in terms, “Well, you know, concepts of justice, fair reward and moral rights have weighed too heavily in this debate, and I want to talk more about the economics.” I think that is wrong. Yes, of course you have to have the economic debate, but you cannot jettison the moral right. The right to attribution and the right to object to use of the work absolutely have to be apparent. It is part of copyright being a property right that you can say, “No, I am sorry; I wrote that. You have to notice that I wrote it and I do not like you using it.” It could be a picture of Boris Johnson on a poster or whatever it is. The ability of the owner of the copyright to say no is absolutely fundamental.

Paul Ellis: And, 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. I was having this exact discussion in a pub last night with a barman, who agreed with me, which was very nice of him.

Chair: We will not ask after how many pints.

Paul Ellis: It was mild. Therefore, when people see their work misused, as rather amusingly happened to the wife of an anti-copyright campaigner called Cory Doctorow, whose work was used by the Daily Mail without permission, we have a valuable anti-copyright campaigner suddenly reaching for the CDPA in order to try to get his rights. This is the point about a moral right: how can you trade your property if you do not have the right to assert your ownership of it? The CDPA at the moment includes two clauses that are very problematic for us. The first is Chapter 4, the exceptions to moral rights, in which newspapers, magazines and some books are exempt from moral rights provisions. It is well recognised, and I am sure that Ben will agree with me because he has done the research, that this is a major conduit through which photographs are orphaned. It may have been justified on economic grounds in 1988, but digital networking, all the logging and use of metadata that goes along with that in the modern world mean that these rights are obsolete and should be repealed, in our view. Secondly, under the CDPA, our moral rights are not automatic; they must be asserted. This gives rise to the situation in which someone wishing to use an orphaned work can assume that the author did not assert their moral rights. We need the law changed so
that moral rights are automatic and unwaivable. Such rights are automatic and unwaivable in Germany and, notably, Germany has a thriving publishing sector. It seems not to be suffering from this.

Q178 Katy Clark: What about the Digital Copyright Exchange? Do you think it has got a role?
Paul Ellis: Most certainly it has a role. It has a role not only in being a register of metadata, of authorship and rights; in fact, there are various models around the world that I think I have alerted the Committee to and which I would be very happy to discuss in greater detail.
Chair: We are just coming on to metadata.
Paul Ellis: Of course it has a role and, furthermore, it has a role insomuch as, if an orphan work is exhibited in the so-called National Cultural Archive for cultural purposes and a rights holder therefore discovers it, they should be able to re-adopt it. That again brings moral rights into play. Lastly, of course, there is the right to object to derogatory treatment, which is a vital right and one that cannot be exercised if the rights holder does not know that their work is being used in ways with which they may not agree. I think we can all envisage circumstances, just as those I have described for Cory Doctorow’s wife.

Q179 Chair: Before Katy comes back, you use “CDPA”. Forgive our ignorance on this, I have just been prompted by what it is, but perhaps you would like the Committee records to say so.
Paul Ellis: I am sorry about the acronym. It is the Copyright, Designs and Patents Act 1988.

Q180 Katy Clark: What sanctions would you like to see against those who do strip metadata from photographs to remove traces of ownership, and how would you enforce them?
Paul Ellis: There are two problems here. First of all, certainly as far as photographs are concerned, all of the digital photographic file formats in widespread use—all of them—have no means of maintaining their metadata. It can very easily be stripped and there are billions of these things floating around, with many millions of devices that make many millions more photographic files every day. That horse has bolted. I think it is necessary to have sanctions whereby organisations that deliberately and knowingly strip metadata on a regular basis can be brought to heel. The BBC and Facebook are two of these. Ben suggested we should take them to court. We are private individuals; we cannot afford to take the BBC to court, unfortunately. No one supports our campaign financially; this is all voluntary work.

Having said that, there are ways of reuniting an orphaned digital file with its missing metadata. This is a vital role that the Digital Copyright Exchange National Cultural Archive should play. I mentioned the PicScout system before. There are other systems, but the PicScout system very elegantly manages to re-attach missing metadata to an otherwise orphaned image and, therefore, bring it back into play and potentially make it commercially viable with concomitant tax receipts.

Q181 Katy Clark: So what sanctions would you have?
Paul Ellis: Sanctions? I will confess I have not specifically thought this question through, so I am on the hop here, but I see no reason why deliberate removal of metadata should not be treated as flagrant copyright infringement, because it is, and that properly effective, proportionate and dissuasive remedies should be available for this. I should stress that, under the current copyright regime in this country, it is our belief that the remedies available are not effective, proportionate or dissuasive, as is required by the EU Copyright Directive.

Katy Clark: If a member of the panel wanted to get back on that, please do so in writing.
Chair: I always conclude my session by saying if, in retrospect, you feel there is additional information that you would like to give the Committee that you did not think of when you were actually responding to our question, then please feel free to do so. Equally of course, we may suddenly think of a question we did not ask that we should have, and we will write to you. Can I bring in Ann now, please?

Q182 Ann Mckechin: Can I move the panel on to the issues around format-shifting and content-mining? Chris, perhaps I could ask you first of all: in your written evidence to the Committee you said that format-shifting exceptions should only apply to music. Why do you think that music and not audiovisual is distinct?
Chris Marcich: The concept of format-shifting in our sector is being accommodated by market solutions basically. Technology is now being made available that will enable consumers to legally acquire content, to store it on the cloud and to move it around on platforms of their choosing in their home environment. You have the marketplace delivering technology-based solutions to the issue of format-shifting to meet consumer demand. Beyond that—it is for other sectors to speak about whether they think it is a solution for them or not—there is also the issue of how far you can go in stretching the private copy exception without really triggering the need for levies. Here in the UK, we are in that grey area now where it is still possible to say that the levies are not necessary but, if the exception were extended beyond the current situation, I believe that levies would be required. That is a decision that policymakers have to take of course but, to us, it does not seem like a necessary step to take.

Q183 Ann Mckechin: How do you respond to the criticism in some parts that digital rights management prevents legitimate activities such as research and new product development? Are you really saying that the development of cloud technology will be a solution to that type of restriction?
Chris Marcich: Cloud technology will enable consumers to do certain things that they have not been able to do to date, and will enable them to do them more easily. In terms of research, there are exceptions now that allow for certain types of research. We are perfectly willing to look at the exceptions that are non-commercial and that might be needed for a film
You argued against permitting non-consumptive use, but you said just a few minutes ago that there is a grey area around this issue about domestic consumption. If people use it within their house, among their family members or give it to their neighbour, is that a legitimate use without requiring levies or licences?

Chris March: The way the technology is evolving now, yes, it will be a legitimate use of legally acquired content to move it around platforms in the household. The non-consumptive-use issue goes beyond that; it is really about how far you go beyond private copy exceptions and so forth in creating a whole new exception that really amounts to a much wider fair use exception, which would enable certain types of activities that are unforeseen in terms of their consequences right now. It is perfectly possible that an exception of that sort would provide a new subterfuge for rogue sites to be able to justify their activities. They could argue that they are non-consumptive and that they simply are a facilitator, an enabler, and that is a problem. We have seen those sorts of arguments used already today and, if we were to widen the exceptions in this area, without really looking at the need for it, we would run the risk of creating new and unintended problems, and solving a problem that does not exist.

Ben White: If I could just move on to Q185 Ann McKechin: You argued against non-consumptive use, but you said just a few minutes ago that there is a grey area around this issue about domestic consumption. If people use it within their house, among their family members or give it to their neighbour, is that a legitimate use without requiring levies or licences?

Chris March: The way the technology is evolving now, yes, it will be a legitimate use of legally acquired content to move it around platforms in the household. The non-consumptive-use issue goes beyond that; it is really about how far you go beyond private copy exceptions and so forth in creating a whole new exception that really amounts to a much wider fair use exception, which would enable certain types of activities that are unforeseen in terms of their consequences right now. It is perfectly possible that an exception of that sort would provide a new subterfuge for rogue sites to be able to justify their activities. They could argue that they are non-consumptive and that they simply are a facilitator, an enabler, and that is a problem. We have seen those sorts of arguments used already today and, if we were to widen the exceptions in this area, without really looking at the need for it, we would run the risk of creating new and unintended problems, and solving a problem that does not exist.

Q184 Ann McKechin: You argued against permitting non-consumptive use, but you said just a few minutes ago that there is a grey area around this issue about domestic consumption. If people use it within their house, among their family members or give it to their neighbour, is that a legitimate use without requiring levies or licences?

Chris March: The way the technology is evolving now, yes, it will be a legitimate use of legally acquired content to move it around platforms in the household. The non-consumptive-use issue goes beyond that; it is really about how far you go beyond private copy exceptions and so forth in creating a whole new exception that really amounts to a much wider fair use exception, which would enable certain types of activities that are unforeseen in terms of their consequences right now. It is perfectly possible that an exception of that sort would provide a new subterfuge for rogue sites to be able to justify their activities. They could argue that they are non-consumptive and that they simply are a facilitator, an enabler, and that is a problem. We have seen those sorts of arguments used already today and, if we were to widen the exceptions in this area, without really looking at the need for it, we would run the risk of creating new and unintended problems, and solving a problem that does not exist.

Q185 Ann McKechin: If I could just move on to Ben and Richard, could you outline your views on content-mining, which is arguably a type of this non-consumptive use that we have just mentioned?

Richard Mollet: Content-mining is something that publishers wholeheartedly and fully support, and indeed we are fundamental to the development of the technology. It is still a very nascent technology, and 88% of large publishers across Europe take only about 10 mining requests a year. This is still something that is in its infancy. What is vital to acknowledge here is the investment that goes on from publishers in the development of infrastructure and ongoing support to allow mining to happen. It is not just the case of having the data out there and letting a crawler go and look at it; it has to be prepared in a way that crawling tools can understand.

In the same way that you could not walk into Ben’s library and just see a room full of books that had not been sorted according to languages or subject areas, so too online, publishers have to invest in making sure that the works are ordered in a way that technology can understand. That only comes with investment and with working in partnership with the would-be miner. Again, it is not a case of just saying, “Come on in and look for what you want.” It has to be provided for the searcher in a way that they want. For instance, what subject area are they looking at? In what format do they want the work? That requires the investment of the publisher.

To build on Chris’s point, there are a number of risks if one were to take away the management of that access, as Hargreaves suggests, and say, “Well, let us just have an exception.” In other words, you never have to ask; you can just go on in. There are three very big risks. One is the technical risk that such untrammelled mining would, to the publishers’ platforms, look like a denial-of-service attack. All of the technologists who work in the publishing companies will tell you their systems would fall over; they just would not be able to cope, rather like a broadband connection being overwhelmed or the degradation of use by overuse. There is a technical risk, which means that access needs to be managed, but there is a commercial risk too. Publishers have to know that the person who says they want to come mining is who they are going to use it for non-competitive use. Of course, there is no way of managing that if you have taken away any need for managing access.

Finally, there is a competitive risk to the UK because if, as Hargreaves suggests, we were the only country in Europe and, indeed, the world that did not have any management of access, you are basically saying to anybody, “Come on in and get our data. Get our text. You can do what you want,” there will be no revenues going to anybody at all. Of course, in every other country in the world there will be. If you are a publisher, why would you want to come to a country where you are exposing yourself to technical and commercial risks; you would go to a country that did not have an exception. That is why we support mining but think that access needs to be managed.

Q186 Ann McKechin: Ben, do you have an alternative viewpoint on this?

Ben White: I do. Richard raised quite a few issues. First of all, it is important to say that, again, it is very right that the Government is looking at this. New technologies provide new opportunities. Copyright law was really framed around piracy of books—Charles Dickens’ work being pirated in the States—i.e. a work being substitutable for another work. What we are talking about here is the extraction of information and nuggets of knowledge. In the States, search engines as well as organisations like IBM and Hewlett-Packard assert fair use—that fair use allows text and data mining.

In Japan in 2009, they introduced a raft of copyright law amendments, because they felt that they were really losing out in terms of the internet economy. One of the exceptions that they introduced was for text and data-mining, because they argued that copyright covers the creative expression. There are many statements in international instruments that make it very clear that copyright is around creative expression, not facts. We are talking about words like malaria and mosquito being extracted. 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.

What we are talking about are two things. One is facilitating innovation for technology companies. Particularly what we are interested in is facilitating...
medical research. What we are talking about is an act for material for which you have licensed access. The National Health Service and universities spend hundreds of millions of pounds a year on scientific information. A scientist could make notes from a book and extract the facts; that is not a copyrightable act. It is simply because technology copies that we are and extract the facts; that is not a copyrightable act. It is simply because technology copies that we are having this discussion.

**Q187 Ann McKechin:** Obviously the UK has a proven world record in terms of scientific and medical research, so it is in a particularly special position. Richard is talking about some degree of control. If universities and researchers— bioscience has expressed an interest in this—come from an authoritative source, clearly for reasons of research, that is a way in which you could potentially control the data management. You do agree that there needs to be some control of people's access.

**Ben White:** What we are talking about here is legal access to the material that you mine. In terms of scientific material, that is material you have bought that you licence, which as a country we spend hundreds of millions of pounds a year on, in order to extract a protein that appears to be linked to this particular cancer. It is extracting the nuggets of knowledge. This is surely a very good thing that we as a country, given our strong research sector and also our strong pharmaceutical sector, need to support. What it will do is speed up medical discovery and scientific innovation.

**Chair:** We are running over time and I have another panel to interview, so can you make your contributions as brief as possible? I want to bring David Ward in on SMEs in a moment. Richard did just indicate, but make it very brief.

**Richard Mollet:** Thank you, Chair. As Ben was saying, this is as if we were trying to copyright facts. No, we are not. Of course copyright does not protect facts. Machine reading involves a reproduction and copyright allows for publishers to manage reproduction of their works. I cannot say strongly enough: we support content mining. It can only work if we are involved in the process and managing the access.

**Q188 Mr Ward:** I do not think it is betraying a secret to say this has proved a difficult area for some Members of this Committee. It is quite a technical area for many of us, but it has been very useful to listen. At a personal level, we are all photographers; we are all authors in many ways as well. There was a criticism that the panel did not represent and therefore possibly did not take into account enough the views of small businesses. Really it is that particular question: do you think that the overall review took sufficient account of the views of interests other than the big business corporations and so on?

**Alexander Jackman:** From the Forum's point of view, we came across the review, we believed it to be of significant interest to our members and we responded. I certainly do not recall being specifically invited to contribute our views. If you look at the list of submissions on the review website, you may find one from the CBI, but otherwise there is a bit of a lack of submissions coming from business rep bodies although, conversely, there are a number of contributions from small businesses directly themselves. Whether or not these have been invited or whether it is just by chance that they have come across this review because they have an interest in IP, I am not sure, but certainly I think more could have been done to garner SME views.

**Chair:** Can I move on, because we have a couple of questions now from Paul Blomfield on IP and SMEs? Yes, Brian, just make it quick.

**Q189 Mr Binley:** Does not the view of the British Library, which seems to be really very liberal on this issue, help SMEs? Does it not give them more information than they might otherwise have to use in building their businesses?

**Alexander Jackman:** The British Library as an example is an extremely good source of IP for small businesses. I was saying before I came into the Committee, I spend quite a lot of time in the IP research centre in the Library itself. It is almost a home from home for me, so it is a very valid point. It is expressing an interest in this—come from an authoritative source, clearly for reasons of research.

**Chair:** Would members, on this issue, if they feel they have anything to add, just submit it to the Committee in writing afterwards, please? I will just bring in Paul on IP and commercial advice to SMEs.

**Q190 Paul Blomfield:** When we met Robin Jacob, he certainly gave us the impression that this is an area of very specialist law. I wonder whether you feel that patent attorney and specialist IP legal providers are really set up to deal with the need to help SMEs to innovate and grow.

**Alexander Jackman:** I will be as brief as possible. Of course our members would value the opportunity of a one-stop shop, if you will, where they can get financial, legal, commercial and regulatory advice on IP, but I think that is going to be much more useful to the start-ups or businesses that are new to IP, rather than those that have been in the market for a while, which might require slightly more specialised services. From our point of view, we would quite like to see the IPO establish a few more sectoral specialists for those more established IP businesses to go to for information.

**Ben White:** We run courses on intellectual property—so trademarks, copyrights, registered rights, etc—and we are in the process of joining up with Newcastle City Library for them to run similar courses in Newcastle. I have been on some of these courses. Probably what Robin Jacob is talking about is the cutting edge—very large companies with large budgets. IP is, as we know, a very complex area, and certainly the organisations that we work with tell us it needs to be simple. Before we even speak to a lawyer, we need to know what the questions are, because they are going to charge us whether we ask the wrong questions or the right ones. Actually, pretty simple targeted SME training goes an awfully long way to make companies feel solid and able to navigate this complex area.

**Q191 Paul Blomfield:** I can see the value in that, but I wonder if there is any intermediate level between
training and supporting the new set-ups, and then the higher-level legal support. Is there a role for lower-cost providers to offer more integrated IP legal and commercial advice?

**Richard Mollet:** It is certainly something trade bodies do up to a point. We have 117 member companies and most of them are small businesses. We do run legal helplines and provide copyright advice for those companies. That is one way in which you can get this halfway house. What those businesses want is certainty; they want to be able to trade on their property rights and not to be told that, because Google wants to do something with them, sorry, you have to give them up.

**Chris March:** It is also important to recall that, for copyright, there are no formalities and requirements for registration. The task is different for small- and medium-sized enterprises in copyright from what it would be in other areas of intellectual property, there being no mandatory registration requirement for copyright.

**Alexander Jackman:** I guess I can give you a very brief example from one of our members—a tool manufacturer that employs around 40 people and has, I think, 10 active patents in the UK and across Europe at the moment. The big problem they face is with an importer. The importer has had the product made abroad and shipped it in a lot quicker. The member is taking them to court. They are facing in the region of £250,000-plus costs already, and the importer will not give in. It should be an open-and-shut case. They looked into it. The Russian body had hacked into the system and found out how to work it, so it clearly breached the copyright. The company had to take a number of factors into account—a complex Russian legal system, the size of the company that had hacked into the system—and they decided against pursuing it, because it would simply be a Pyrrhic victory. From their point of view, and there are many other examples, some kind of strengthened legal advice, either within the embassies or without, but certainly to support SMEs abroad, would be of immense help.

**Q192 Paul Blomfield:** That leads me into my next question, which was: what disadvantages do SMEs have in enforcing intellectual property overseas?

**Alexander Jackman:** I will give you a very specific example again: a company that specialises in creating conference call and voicemail facilities had a Russian contractor that took over the service and provided it to 10 carriers across Russia. It was a yearly subscription. One year, the subscription did not come in. They looked into it. The Russian body had hacked into the system and found out how to work it, so it had clearly breached the copyright. The company had to take a number of factors into account—a complex Russian legal system, the size of the company that had hacked into the system—and they decided against pursuing it, because it would simply be a Pyrrhic victory. From their point of view, and there are many other examples, some kind of strengthened legal advice, either within the embassies or without, but certainly to support SMEs abroad, would be of immense help.

**Chair:** If any other members have got any specific other examples or solutions and they would like to write to the Committee on that, that would be very helpful. On that, can I thank you and welcome the next panel. I shall just repeat that we have had to move things along a little quicker than I would have liked, but do feel free to submit any supplementary evidence to us. Thanks very much.

---

**Examination of Witnesses**

Witnesses: Pete Wishart MP, John McVay, Creative Coalition Campaign, Chief Executive of Producers Alliance for Cinema and Television, Jim Killock, Executive Director, Open Rights Group, and Robert Ashcroft, Chief Executive Officer, PRS for Music, gave evidence.

**Q193 Chair:** It is still just morning. Good morning and welcome. Thanks very much for agreeing to speak to us. Again, for voice-transcription purposes, could you just introduce yourselves, going from Robert to my left?

**Robert Ashcroft:** Good morning, Chairman. I am Robert Ashcroft. I am the Chief Executive of PRS for Music.

**Pete Wishart:** Pete Wishart MP.

**John McVay:** John McVay, Chief Executive of PA CT but here speaking for the Creative Coalition Campaign.

**Jim Killock:** Jim Killock from the Open Rights Group.

**Q194 Chair:** Again, a fairly general question: what are your observations about the Hargreaves report and the Government’s response to it? Again, I would say, perhaps somebody could lead on it and then others just express either an addition or a contradiction, if they feel inclined to. Who is going to lead? John?

**John McVay:** Yes. I represent the Creative Coalition Campaign. It is a sector that is in growth. The CBI predicts that the creative industries will be growing by 4% per annum, which, depending on what the Treasury reports, might be eight times the growth in the general economy. While we welcome the Hargreaves review, I think it is important to look at copyright, its role in society and its role economically. There is a number of things that were discussed in the previous session that we do think need to be resolved, particularly around orphan works and strengthening IP enforcement, but critically, and this goes to the heart of Hargreaves, coming up with a real evidence-led approach to issues around use of copyright and the creative industries. We welcome it overall. I would caution that, even in the best of times, copyright is a very sensitive thing to mess around with but, in the worst of times, it is something that Parliament should consider very carefully.

**Q195 Chair:** Thank you very much. Any additions or contradictions, Pete?

**Pete Wishart:** As you know, Chair, I led the debate on this in Westminster Hall a few months ago and, since then, I have had a very good look at the review
and the Government response. It is a bit of a curate's egg, with some really almost nutty economic assumptions that I hope this Committee will have an opportunity to challenge, particularly issues to do with the Copyright Exchange and format-shifting. I looked through the review and there are probably about four or five mentions of the word “artist” or “creator”. There is no mention in the Government response of the words “artist” or “creator” at all. It is as if artists, creators, musicians and inventors are a grudging afterthought. They should be central to the process. This is the second review that we have had on intellectual property copyright where the artist’s rights are almost completely disregarded. I hope this Committee will have a proper look at the role of the artist when it comes to the creative industries.

Q196 Mr Binley: I want to pose the question I posed to the first panel and remind you that the Hargreaves review states that consumers are currently confused between legal and illegal music when they go online. I have always felt there are easier solutions than the techies suggest actually, and very often the techies never see the wood for the trees. Do you think that there are ways of doing this that are simpler and could be more effective? Robert Ashcroft: Yes, I do. Thank you very much. It is very clear that, if you put a search term in the Google search engine, you will get, first and foremost, a list of unlicensed sources, and we think that they should be marked as such. We have, as PRS for Music, been working with some of the intermediaries, notably the antivirus companies, to see whether it would be possible to identify sites as being unlicensed in a similar way to their being identified as carrying viruses or other malware. It is technologically possible. We think that it would be helpful. We have had some consumer research conducted that suggests that 75% of internet users would welcome it and so we think that it should be done.

Jim Killock: I did mean to just start by saying that we welcome Hargreaves. We thought it was a really interesting report and we also thought that it took exactly the right approach in stating, to start with, that this all needs to be based on evidence. However, I think that message has not permeated through the whole of policymaking yet. For instance, we put in a freedom of information request a few months ago asking whether the DCMS had asked for any evidence on precisely this question of website blocking or what to do about illegal content on the web. We asked them if they had a full idea of the range of options, and whether they had any studies or evidence from industry. They came back and the precise line was: “We can confirm we do not hold the information you requested.” I think the idea of evidence being at the root of Government thinking is yet to permeate through the Department, but it was absolutely the right place to start.

On this question of consumers, legal and illegal, I do not think there is a huge problem for end users really understanding whether things are licit and illicit at all times. There are times when they might find that difficult, but there are other times when it is more transparent. It is a mixed picture. What is very clear generally is when a legal service is promoting itself; it clearly is legitimate and clearly is a good option. What we have seen around the world in the last couple of years is, when legal services launch, promote themselves and advertise themselves—we can think of services like Spotify, and Netflix in the United States—we see legal consumption rise dramatically and infringement reduce. That is to say, whatever else we think about enforcement, the basic question of market-led solutions driving demand really does seem to work; it seems to be exactly the right way to go, independently of what might be thought of with enforcement.

John McVay: I would agree with legal services. In fact, the UK is one of the leading countries in the world in terms of legitimate video-on-demand services, which we started both with PACT and the broadcasters in 2006. Indeed, the BBC iPlayer is one of the most successful VOD services globally, and we should be proud of that. However, the iPlayer has a particular window for how long content remains on it for, for very good licensing purposes for the BBC and BBC Worldwide. You can see Doctor Who for the window it is in, which is 30 days, which I would say is plenty of time to catch up on the episode you missed. In fact, the series will be stacked so you can watch the whole series. The problem comes when you actually do a Google search for Doctor Who. You cannot find Doctor Who on the iPlayer, and you find an episode on The Pirate Bay two months after it was transmitted. That is the problem, because there are legitimate services. Those services are free: the iPlayer is free; 4 on Demand is free; ITV is free. Those are all free services for content in the UK. The problem comes when, out of the legitimate free window, people want to take the content and own it themselves. That is where the issue about Google listing is a problem, but I would agree with Jim that the UK does lead the world in terms of legitimate services and we have to have the space to do that.

Chair: We have a lot of other questions and I do not want to open up a large debate. Pete, and then come back if you wish, Jim, but make it very brief, will you?

Pete Wishart: We have to end this. If we do not, we can continue to give away recorded works, the works of the film industry, for nothing. That is unsustainable and we have to go forward. One good thing about Hargreaves is that he suggested we should get on with implementing parts 5 to 15 of the Digital Economy Act. That is the one thing that we could do to address this to ensure that there is a sanction for those who continue to illegally download. Send notifications—nice letters to the ISP account holder telling them, “There is something going in your internet service account. Do something about it. Get it resolved and fixed.” We have to end this. If we do not, we can forget about growing our businesses.

Chair: That is nice and decisive, yes.

Jim Killock: As I say, I think that is an entirely relevant approach and that has been shown many

Note by witness: Correction: the figure is actually 91% (based on Harris Interactive Research, conducted Sept 2011)
times. I just wanted to highlight that we did a quick study of what film was available in the UK, and we found something like half the UK’s top films over the last 20 or 30 years are not available online. We found that most of the content, where it was available for download or streaming, cost more online than it did to buy the physical product. I would remind everyone as well that Netflix, which has decided on countries to expand into, chose not to expand into the UK because of the difficulties in licensing, and instead opted to sell into Latin America and Spain, so our digital market in film is falling behind Colombia.

Q197 Chair: Can I come back to a more general question? Some of you may have seen the contribution that Sir Robin Jacob made when he came before the Committee. He said the failure to address copyright issues destroyed the music industry 10 years ago. Do you agree with that assertion and, if so, what should be done or what can be done about it? Please briefly, Robert and then left.

Robert Ashcroft: I can certainly agree that, 10 years ago, the music industry received a massive shock. I cannot agree that it has been destroyed, and we remain optimistic about the future, but we do need to create a better climate for copyright on the internet, so that these new digital services can thrive.

Pete Wishart: Just to say briefly, the UK music industry is in great health just now. It is probably the most successful period that we have had in UK music for about 10–20 years. The issue with the music industry was that it was at the forefront of digital innovation and technology so, of course, it was always going to be first there and first to suffer the issues and problems. What the music industry has done is come up with some very sustainable working models in the past few years, and all credit to them: they have tried to build a legitimate market, even though the market for illegal downloads is still absolutely massive.

Jim Killock: I would just observe a few things about the music industry. Obviously it is doing a lot now to rectify the problems. As the first, it was very slow in trying to adapt and it did a number of things that really worked against it. Particularly it tried to build markets on top of digital rights management, which put off a lot of people who wanted to invest in digital music, because they were having to buy protected copies that they had no guarantee would work in a number of years’ time. A number of people who invested in those sorts of music formats have got their fingers terribly burnt. We also see that the companies that did most of the innovation were companies like Apple. They were not from within the music industry; they were from outside of it. The music industry itself has found it very difficult to get itself together and to innovate. In the UK, we have seen internet service providers like Virgin repeatedly trying to make deals with music companies to license and provide material. Two or three years after Virgin has announced that sort of deal, they still have not actually managed to implement it. There are some really big structural problems. Maybe one of the biggest structural problems the music industry has is actually the way they portray themselves and lobby. They come to Committees like this saying, “The only way they we can solve our problems is to get people to legislate.” Now, any business that tells you that legislation is the answer to their problems has a serious problem in the way that it is thinking about itself. I have no proof of this but it is my suspicion that the way that they present themselves as being decimated by online piracy is actually having an impact on venture capitalists’ attitude to them and dissuading people with the money to actually get involved with them. I would contrast that sort of approach to the approach we have seen from industries like the book industry particularly. Books are small files; they are easily distributed. Why is the book industry doing really well and managing to create markets where the music industry has had so many problems? I think it is about the way that the marketing and the development of that industry has pushed itself forward.

Chair: Books may be unurt. Bookshops, not so much. I do want to get on actually. Yes, Brian, you are indicating.

Q198 Mr Binley: I was slightly taken aback by the ferocity of that particular contribution, quite frankly, because all the evidence I have received is in the opposite direction. I think we need just to note that, because I do feel that our music industry especially is of massive importance to Britain, both culturally and economically. They are being hampered. I repeat: there are simple ways of dealing with the issue of piracy, which none of us want. I just wondered if we might hear one or two of those to get them on record, because that sort of attitude is harmful and it needs correcting.

Robert Ashcroft: Brian, thank you for raising that. The UK music industry is an incredibly successful exporter. We know from looking back at Government statistics that it is quite hard to get a handle exactly on what it is worth. The DCMS itself used to publish an estimate of the value of the music and audiovisual arts combined. They published a figure in 2005, which said it was worth £180 million. This year we will raise £185 million from international copyright value alone. Just to put that into perspective, if you were to ask what the value is of the author’s copyright in the total value chain, it might average somewhere around 6% across the different usages. That would mean that our music export industry is worth about £3 billion to this economy every year, and I think we should be very cautious about abandoning that.

John McVay: The point about investors is investors find it hard to invest in something if they do not think they will get a return. You will not get a return if your assets are being taken from you for free. It is a simple economic truth for all investment.

Q199 Margot James: Leaving aside the law for a minute, should creators and innovators be able to build on the work of others, provided they are paying an appropriate fee to do so? Has no one got any problem with that?

Robert Ashcroft: There are two rights that we are talking about. There is the economic right and the moral right. One of our board members quipped the
other day at a board meeting, "I will take the money every time." Others might feel differently. It depends upon the association. I think there should be a moral right; on the other hand, it is quite easy to obtain the rights if you but ask the publisher. There is a healthy market in clearing those rights.

John McVay: In television, we do have a familiar term called "fair dealing", where I am allowed to make a programme that critiques other people’s programmes. I can make the top-50 best singles, the top-50 Google clips, and you are allowed to use that; that is legitimate, but the rights owners still retain a right to take you to court if you defame them or use their work inappropriately. It is not a barrier to innovation.

Q200 Margot James: How do you respond to the argument that some copying, like music sampling, can actually generate more interest in the original version, which would have a value?

Robert Ashcroft: Once again, there is a market for music samples. I know that the record labels are involved in that market. There is another interesting one, particularly a case that was cited by the Open Rights Group in their submission, where a rapper said that he owed his success to a parody that had been made of his work. As it happens, that parody had been rejected the evidence from elsewhere. Hargreaves has used to support some of his recommendations is, at best, flimsy, while he has rejected the evidence base that Hargreaves is pretty cavalier when it comes to issues to do with evidence. He has rejected all the evidence that was provided to him by the industry, even though the industry was charged by Government to go away and tell us what is exactly going on. That is rejected in Hargreaves as what he calls lobbynomics. When it comes to evidence for the creation of the Digital Copyright Exchange with £2.2 billion of value, based on a report by Copenhagen Economics, he makes fantastic assumptions about harmonisation of European law and about investment into resources and infrastructure. Format-shifting is to be worth something like £2 billion for allowing the transfer of private copy in your home. The evidence base that Hargreaves has used to support some of his recommendations is, at best, flimsy, while he has rejected the evidence from elsewhere.

Jim Killock: The problem we have here is that the industry tends to be the people who produce the evidence. They have a particular view of the way that their industries function. They have a particular desire to monetise as much activity as possible. In a digital age, that actually becomes a lot easier than in a pre-digital age. If you were reading a book, for instance, and you wanted to re-sell that book, there was no chance that a copyright owner would start to say, “Right, second-hand book market. Every second-hand bookshop is now going to have to pay something like £0.2 billion economic activity. I can make the top-50 best singles, the top-50 Google clips, and you are allowed to use that; that is legitimate, but the rights owners still retain a right to take you to court if you defame them or use their work inappropriately. It is not a barrier to innovation.

Chair: Hargreaves laid great stress on policy being driven by evidence. I want to bring Nadhim Zahawi in.

Q201 Nadhim Zahawi: Chair, that is exactly right. Hargreaves and the Government, as John quite rightly pointed out, are agreed that evidence should drive policy to a greater extent than has been the case previously. What do you see as the principal challenges to that?

John McVay: We have a very good evidence-based regulator called Ofcom, which produces a number of very critical reports about our communications industries every year, which is taken as leading the world in many respects—one of the world’s leading regulators in terms of data and statistics, which informs Government, industry and investors’ views. If there was a commitment from Government for the IPO to produce regular research that is open in its methodology, which people contribute to, then clearly as an industry we must welcome that. That is a good thing for everyone concerned. If it helps investment, it helps politicians come up with sensible informed policies, that has to be good for everyone.

Q202 Nadhim Zahawi: You mentioned the IPO. Does the panel have any other comments on the IPO’s Crime Strategy analysis of what needs to be done to improve the evidence base?

Chair, that is exactly right.

John McVay: Only to agree with it—I think it is fine.

Pete Wishart: The evidence base is absolutely critical and I think Hargreaves is pretty cavalier when it comes to issues to do with evidence. He has rejected all the evidence that was provided to him by the industry, even though the industry was charged by Government to go away and tell us what is exactly going on. That is rejected in Hargreaves as what he calls lobbynomics. When it comes to evidence for the creation of the Digital Copyright Exchange with £2.2 billion of value, based on a report by Copenhagen Economics, he makes fantastic assumptions about harmonisation of European law and about investment into resources and infrastructure. Format-shifting is to be worth something like £2 billion for allowing the transfer of private copy in your home. The evidence base that Hargreaves has used to support some of his recommendations is, at best, flimsy, while he has rejected the evidence from elsewhere.

Jim Killock: The problem we have here is that the industry tends to be the people who produce the evidence. They have a particular view of the way that their industries function. They have a particular desire to monetise as much activity as possible. In a digital age, that actually becomes a lot easier than in a pre-digital age. If you were reading a book, for instance, and you wanted to re-sell that book, there was no chance that a copyright owner would start to say, “Right, second-hand book market. Every second-hand bookshop is now going to have to pay
me when you resell those books." They would not be able to do that.

In a digital age, every single copy can potentially be monitored. You can certainly license and say, "You cannot re-lend. You cannot leave these things in your will. You cannot transfer them to a third party." You can even make claims about the acts of data-mining, which, to my mind, are rather like saying, in certain circumstances, people are not really allowed to analyse and read the text that they have paid for.

You have a range of activities that are quite marginal to the core business of copyright owners, but potentially they can charge for them if legally allowed. The Committee has to think about that balance, and ask: with these sorts of activity, do they challenge the copyright owner's business of providing the material and is it more to the benefit of the public for these activities to take place? Whether it is format-shifting, which frankly everybody does and nobody would ever pay for, is it better to just say, "Right, okay, that is a legitimate activity. People, as part of their digital works, the things that they pay for, of course they are going to put them on a number of machines of course that is going to be legal. Of course they should be able to back them up. That is actually part of the value of digital goods, so we should make that legal." That is the sort of approach that we have to think about.

The alternative is to say, any time a copyright work is used, no matter what the circumstance, a copyright owner should be able to charge for it. That is quite an extreme position, but it is the default legal position without copyright exceptions and flexibility. I would just say: think about the public interest and where the copyright owner's real interest lies. If they are producing music, their real interest is being paid for producing music. It is the same with film. It is not around these relatively benign activities like format-shifting or text-mining.

The parody debate is a very interesting one, because for our thinking it is a question of free speech. If you say to somebody, "You have to get permission before you can make fun of them," they are not going to get permission. They are very frequently not going to get permission.

**John McVay:** Spitting Image.

**Chair:** Well, as politicians, we thought you may be inclined to support that.

**John McVay:** I do not think they ever sought permission from anyone for that.

**Jim Killock:** Absolutely, but with copyright works, if you are taking part of that copyright work in order to make fun of it, then you are potentially breaching copyright. Without an exception to allow you to do that, you are effectively restricting people's ability to make fun of certain people.

This becomes particularly important when you are talking about corporations. We spoke to a number of campaign groups from ActionAid, through Greenpeace and Church Action on Poverty, and they come across this problem time and time again. They want to make fun of a company like Volkswagen, for instance, or Apple or something like that. They want to say, "These people are doing a bad thing and we are going to parody them." That is what they do: they parody them in order to show the brand up for not living up to the values it espouses. In doing that, they are going to breach the copyright ownerships of those corporations and that puts them in legal jeopardy. The result is that lots of these campaign organisations have to take legal risks in order to challenge those brands, and that is a serious impediment, to my mind, to their freedom of expression and on political dialogue. That is ultimately why parody exception is extremely important.

Q203 **Nadhim Zahawi:** John, you were shaking your head but, before you answer that, I was going to ask my supplementary, which Pete has already responded to. Do you agree with Hargreaves that the intellectual property policy has been susceptible to the so-called lobbyingism? Hargreaves described it as "some of the most skilful and influential lobbyists in the UK political scene". I think we already know where Pete is at on that one, but I would love to hear the view of the rest of the panel.

**John McVay:** I think it is quite right and proper for Parliament and Government to call on a range of different sources to provide evidence to their own money. I do it on a regular basis to inform Government policy and, indeed, regulators' policy on various issues. We do that in good faith; we do it with a rigorous and transparent methodology. We publish everything. It is then your job, and indeed that of Parliament and Government, to analyse that evidence and decide what you make of it. I do not think that all the reports that were submitted to the Hargreaves review were totally one-sided, open and transparent. I just do not accept that. From my own position, we produce a regular census of the independent film and TV sector in the UK, every year, which Ofcom incorporates into its annual Communications Market Report, so I would not say that lobbyingism is always somehow venal or one-sided. That is not my experience.

**Robert Ashcroft:** One of the things we welcome in Hargreaves' suggestions was that that sort of evidence should be peer-reviewable. We work pretty hard ourselves to try to do objective research. There is no such thing as an objective choice of words; humans always come from a point of view. If it is peer-reviewable, then at least it can stand scrutiny. We have certainly been working with others to try to improve the quality of information around this industry. We are working with the Imperial College IP Research Centre; we are working with the copyright expert advisory panel; we are working with the IPO itself. I am talking about our chief economist, who is working with those other bodies to try to get a handle on the size of the music industry as part of our GDP. We just do not have the data. Yes, it is in our interests to get a handle on the size of it, but that does not make it lobbyingism.

**Jim Killock:** I would just draw attention to the evidence that was submitted and used to produce the Digital Economy Act. There was an underlying assumption in that Act that the cost of infringement to the economy was around £400 million. It is a figure we regularly hear quoted today to justify continuing with that process. Those figures were quoted in the
impact assessment presented to Parliament, and they were based on industry research, the methodologies of which were not entitled or legally able to examine. The industry said, "Here is our research. Here is how we came up with the figures." Rather, they did not to the public. They said, "The research methods are proprietary. We are not going to publish them; we will show them to Government privately, but they are commercially confidential and we will not allow anybody else to see how we came up with those figures."

In doing that, the previous Government accepted those figures and allowed those to be used in the impact assessment to justify that Act and that Bill, but we, the public, cannot actually challenge those figures, because we are not entitled or able to see the methodologies. I completely agree that we need more evidence. I certainly think we need to see more independent evidence. I would also note that, in most of these debates, there is a lot of academic study globally around questions about copyright infringement. Generally, it is ignored in these debates. The academics have some very subtle and interesting arguments around exactly how these things interact. They show very different sorts of pictures often than the copyright owners show. The current approach that the IPO and Hargreaves have pushed forward for both more independent evidence and better evidence is exactly right. I would just really caution against assuming that industry evidence has always been clear and transparent. It just simply, as a matter of record, has not been.

Q204 Rebecca Harris: I was also going to ask about the potential implementation of the EU Information Society Directive on parody, but I think we have covered that quite well. If there is anything that has not been covered, perhaps you can write in. We are going to talk now about the Digital Copyright Exchange, your views on it and the idea that different legal remedies could be available, depending on whether work is registered. Could you just flesh out your views on how workable you think this idea is?

John McVay: With a digital copyright information exchange, the public can find the databases where works are held, and particularly for audiovisual works it is relatively easy to find who owns the work and where you might be able to license it. There is certainly some scope in creating a probably public portal that might link you to various other databases that are privately run. The collecting societies have been doing a lot of work on this, and I am sure my colleagues from music will talk about that. From where I sit, it is relatively easy to find who owns Have I Got News for You. The name of the company is at

Q205 Mr Binley: I am concerned about replicating information that already exists. It just seems to me to be loading another potential cost at the end of the day on to Government, if we are not careful. I just wonder whether, in certain areas, picking up on what John McVay said, I can be assured that information does exist out there that we could use in this respect with just a little more thought.

Pete Wishart: Mr Binley is quite right to be concerned about that very issue. I think it is right that we do have a look at what is going on, in terms of what already exists. If the Digital Copyright Exchange is to be successful, a) it has to be voluntary, b) it has to be business-led or interest-led, and c) we have to see what is going on already. The first step going towards creating that Digital Copyright Exchange is to have a proper audit of all the databases that exist across all sectors to see what is actually required in order to try to deliver a proper Digital Copyright Exchange. This was the big issue; this was the big idea in the Hargreaves report. I think it was the thing that most people got exercised and excited about. It seems to have dropped off the Government’s agenda just a little in the course of the past few months. I think there are issues to do with leadership. I do not know if there was a candidate who was perhaps approached to take over the Digital Copyright Exchange and, for whatever reason, this did not materialise. The Government has to be a bit clearer about what they intend for a DCE. They have to tell us a little bit more about what they envisage as a proper Digital Copyright Exchange as we go forward with this. As long as we take it easily and as long as we take it sensibly, and do not try to upset too many apple carts, a Digital Copyright Exchange could be delivered.

Jim Killock: I would just make a couple of observations. We do not have a view about how the Digital Copyright Exchange may or may not function because we are not an industry body, but I would just say: why has this idea come up? Why has Hargreaves said, "We need a Digital Copyright Exchange"? He has not done it because it is just a good idea plucked out of the blue. It was a potential thing that maybe it would be nice to have. He has done it because he thinks the resale of copyright licensing in the UK is not functional and that economic opportunities are being lost because businesses are not able to get the licences they require for the sorts of businesses that they want to put online. He has proposed it as a solution because he wants to ease that situation up and to make that happen. That is a really crucial point for this Committee to look at.

John McVay: I get approached every day by tech companies and IPTV channel start-ups that would like to license my members’ works. We work with them. In fact, we worked recently with Microsoft Networks when they launched their own video-on-demand service. It was not about licensing. What they wanted to do was come up with a pro forma standard licence to reduce transaction costs, which we did with them and that was made available to every single independent production company in the UK to sell
their works at minimal transaction cost to MSN. I do not accept that this is not fixable; it is fixable and there are plenty of organisations in the creative industries that are wide open to approaches from technology companies that would like to acquire their members’ rights.

**Robert Ashcroft:** PRS for Music is in the business of licensing. This is what we do. The first online licence that we signed was in September 2001. The most recent one was with Apple for their very innovative iCloud service. They approached us in July of this year, and by the first week of October, had a licence for what is an absolutely groundbreaking fork in the road. I would absolutely dispute that you cannot get licences for internet music services.

**Jim Killock:** That is not what I said. What I said is the mistake that we are extremely worried about is that, in the Digital Copyright Exchange, there is absolutely no question but that content is being licensed; the question is whether it is being licensed sufficiently and quickly enough, whether the conditions are reasonable and whether the sorts of business that we might expect to be being created are actually being created. I do think that the Competition Commission would be investigating the film industry and I do not think that Netflix would have decided not to come to the UK if everything was completely rosy.

**Q206 Rebecca Harris:** It is quite an interesting debate. Hargreaves himself said he made the claim, and I know Pete Wishart said that some of the claims that we were hearing were perhaps not based on evidence, that the Digital Copyright Exchange could be comparable in importance to the UK’s position in the European financial services sector. Clearly there is a dispute about the potential benefits of that.

**Robert Ashcroft:** Certainly we need the infrastructure if we are going to develop a healthy online market. One of the things that we are very concerned to do is develop a pan-European market, because we need scale in this business. That necessarily involves working with other countries and partners. We are involved in a very, very complex project to merge the copyright databases of European collecting societies. It takes time; it takes money; it takes a lot of working with other countries. It is not something that, if we signed an agreement today, we feel the UK could just go it alone on. Picking up the point about the possible waste of Government money, we should build on existing initiatives rather than trying to create a competing initiative.

**Pete Wishart:** It is a very good point, because some of the economic assumptions are totally and utterly bizarre and spurious when it comes to what has been suggested if everything was accepted in full. I think Hargreaves said it could add something like 0.3% to 0.6% to GDP if all the 10 recommendations were implemented. Some of the evidence to back this up I think this Committee seriously has to challenge, particularly when it comes to the Digital Copyright Exchange and format-shifting. If you go through, it unravels immediately. The Digital Copyright Exchange is based on the Copenhagen Economics review, and I think the assumption about format-shifting was based on Apple being allowed to be manufactured in the UK. Somehow this would add up to £2 billion of economic activity, because format-shifting seemingly stopped Apple coming to the UK and developing the iPod. It is nonsense. If this Committee were to do any reasonable job, it would be to look at some of these spurious economic assumptions and debunk them. Get Professor Hargreaves back here. I note in his evidence that he got too light a ride when he was sitting here about some of these economic assumptions. Bring him back and challenge him on some of these things, because they would fall apart immediately.

**Chair:** We will be questioning the Minister on this.

**John McVay:** One final point: Netflix is coming to the UK. I worked for three years to try to get Hulu, the American VOD service, to launch in the UK, which failed because of shareholding issues. The reason why all these companies do come to the UK is not because of copyright. In fact, Google’s own report said that only 7% of the respondents thought copyright was a barrier to delivering services in the UK. The reason why they do come is we are one of the most important audiovisual entertainment markets in the world. Our consumers like lots of content. This is where everyone launches. This is why we have Warner here, why we have Universal here. The UK is a very important creative industry economy and, going back to my opening statement, copyright lies at the heart of that. People will invest here because of our copyright laws.

**Robert Ashcroft:** May I just add to that? 170 million downloads year to date in Europe and 47% of them were here in the UK.

**Q207 Paul Blomfield:** I just wanted to ask a couple of questions of Robert on collecting societies. Hargreaves, the Government and Sir Robin Jacob, when we met him, all agreed that collecting society practices need reform. Do you?

**Robert Ashcroft:** I think that what we need is a common code. Just to explain, we are really in two businesses. In all our businesses, we represent our members; there are other collecting societies representing theirs. We represent the authors, the composers and the music publishers, and they live by copyright. We have 83,000 members ourselves; we represent 1.5 million in societies around the world. We have 337,000 premises that are licensed so, in that very many-to-many complex market, the efficient way of making sure you clear rights is through a monopoly. We are deeply concerned and respectful of the fact that, in that part of our business, we are a monopoly. We are very concerned to be efficient, fair and transparent and, frankly, we welcome the oversight by the Copyright Tribunal. There is another part of our business and this is the business that is the concern of growth in digital services, and that is highly competitive. It is pan-European. We are competing in a number of different ways on a number of different fronts. That falls outside the scope, if I have understood your question. The most important thing we could do is not so much to reform; we certainly welcome scrutiny and we would welcome a voluntary code that was common across other collecting societies.

**Jim Killock:** We were talking earlier about the rights of artists and the importance of artists to this debate.
A lot of artists feel they do not get enough information about how their royalties are calculated, what percentage of the fees they get has been deducted for administration and so on. From those points of view, it would be very helpful for the centrality of artists in the copyright debate to have the sort of information that Hargreaves was talking about. There is also a case for more information from an economic point of view. If the collecting societies are publishing information very fully about what licences are commanding what sort of royalties, what sort of negotiated licences are commanding what sort of revenues, then you as a Committee and the Government in general have more evidence to actually say what is working in the copyright market. Collecting society transparency or improved collecting transparency has benefits, both for your analysis and understanding of what is going on and the power of individual artists to know how the royalties they are getting are properly calculated.

**Q208 Paul Blomfield:** Do you want an opportunity to respond to that point?
**Robert Ashcroft:** I would appreciate that. I certainly understand the point. Many of our members, and particularly the major writer members, will come to me and say, “Robert, I need to know what I am getting from Spotify.” I will say, “I am sorry; I cannot tell you, member that you are. There is a commercially confidential negotiation and we do not represent all you, member that you are. There is a commercially confidential negotiation and we do not represent all rights in it.” It is well known that the major publishers have actually withdrawn their mechanical rights from the collecting societies and negotiate those separately. That creates the need for commercial confidentiality. I do not want to bore the Committee with some of the arcane details of it. We are not an agency; we are not an administrative department. We are a business and a lot of our negotiations are commercially confidential. Within the scope that we have, we are as transparent as we possibly can be. We publish our accounts; we publish our distribution rules. We obviously have published tariffs where they apply and where they are governed by the Copyright Tribunal. There is a mix of things. I would certainly share your aim of being as transparent as we possibly can. We have absolutely nothing to hide in that regard.

**Pete Wishart:** I should have declared this interest; I do receive royalty payments fromPRS for Music on a quarterly basis. I have to say that I have never had one issue when it has come to understanding and appreciating where these royalty payments come from. If I ever have any difficulty, it is very easy to get in touch with PRS for Music. Not only do they have the offices in London but they have an office in Scotland that we can get in touch with. It is one of the little things. One of the most powerful contributions I saw in the written report to Hargreaves was from the Musicians’ Union, which restated this fact that the average musician earns less than £20,000 per year. The little scraps that they get from collective licensing, through PPL and things that they may get from PRS if they are registered are immensely important to that individual musician, because they do add to their income over the course of the year.

What I detect in Hargreaves is, once again, a begrudging attitude towards the collection societies, as if they act as a monopoly, as if they act not in the interests of their members: they definitely do not act in the interests of trying to develop and grow this economy; they must be curtailed; they must be tamed—something must be done about them. I think it would have been good if he had turned round and recognised the value and contribution that the collection societies do make to the income of musicians. Unfortunately, it is not really there and there is, once again, this grudging attitude that goes through it all. Effectively, a lot of Hargreaves is not in the interests of the musician and the creator; it is all about economic growth, and he has forgotten about the central component in all this, which is the artist, the creator, the inventor—the people who bring the content to the content industries, the people who bring the creativity to the creative industries. That should be at the heart of the process.

**Q209 Paul Blomfield:** As somebody who certainly has a number of small bands in his constituency, I very much accept that point, Pete, so thanks for that. If I can just ask one further question to Robert, perhaps leading on from that, what is your view, as a society, on extended collective licensing, where licensing extends to the work of unknown rights holders?

**Robert Ashcroft:** I was listening carefully to the British Library earlier on and obviously we have a lot of sympathy for that. It is obviously a technical area, and there is definitely scope for an extended collective licence that is focused on orphan works. You need to be very careful in drafting it. The combination of extended collective licensing and some pan-European aspects of online licensing could cause some unintended consequences but, subject to careful drafting and review, we would be very supportive of the concept.

**Q210 Chair:** Earlier we had considerable discussion on format-shifting, downloading, etc. One issue that I want to take up that I do not think was adequately covered is the Information Society Directive exception on format-shifting. Do you think we should implement it and, if so, do you think a levy is needed? Who would like to run with that one?

**Jim Killock:** Yes, we should implement it. It is probably one of the biggest anomalies in the UK’s copyright law at the moment. People buy iPods; they buy iPads; they have computers where their digital music and other files are stored. Backing up copies and putting copies of the things that you have paid for on multiple devices is just a fact of life. It is part of the value of buying digital rather than physical. If you make that illegal or allow it to remain illegal, what we are basically saying to every consumer in the UK is copyright law may be there, but you are going to break it. You are going to break it at some point just through your normal everyday behaviour that you would expect to do. That makes a mockery of copyright. For that reason alone, format-shifting needs to be brought into UK law.
The question of levies is a simple one: is there economic harm? For individual consumers format-shifting for their own purposes? I cannot see any economic loss being made that needs to be compensated for by a levy. What I see is people buying stuff, thinking that part of the value is putting it on multiple devices and simply paying a price that reflects the value that they get. Putting levies on to devices in order supposedly to compensate for that can only reduce consumption of devices, and all that can do is reduce consumption of content. It is a bad way to go. It will have innovation impacts and impacts on consumer products, and therefore should be avoided. But the copyright situation absolutely does need to be resolved.

Chair: John, you were shaking your head, so I will take you first.

John McVay: Particularly for audiovisual works, Chris Mairch spoke eloquently about what the industry is doing, in terms of giving multiple use for legal format-shifting through the price of the product, through things like ultraviolet and other technologies that will be arriving. The point here is not about the loss per se. The point is that the UK opted out of the Directive in 1988. Other European territories do have levies on blank tapes and format-shifting so, if you are going to go down an exception, you should apply a levy to make sure that UK rights owners and investors are not put at a disadvantage to the rest of Europe. You cannot have one without the other would be my view.

Robert Ashcroft: I actually would like to go on the record as saying I agree with much of what Jim said. The first thing that I would have to agree with is that you can barely go into an electronics shop and buy a portable CD player these days. You cannot make it illegal for people to go and buy a CD and then get it on to the only device that they have that plays music. Where you draw the line is the question. It has been said by some that the only difference between storing on a hard drive to have a backup copy and storing it in the cloud is the length of the wire, but you soon get into a situation where you are missing licensable opportunities. We would much rather license than levy. Where you have a commercial entity that is providing a service, then we license them. As I said a little while ago, we recently licensed Apple for their iCloud service. That is something we would like to preserve. If there is to be an exception, then we think it should be drawn narrowly. There in the boundary lies the question of whether or not a levy should apply, and I think that European law is clear on the matter: where there is a format-shifting exception, there needs to be fair compensation. I think it is for debate to determine what is fair.

Pete Wishart: Everybody can agree that there is an anomaly here when it comes to the private copying of CDs or whatever you have already bought, but it is a bit more complicated than that. We heard from the previous session about issues for the film industry when it comes to all of this. Should there be a levy? Of course there should be a levy. In 22 out of 27 European states we do have an exception for format-shifting, often a levy on the hardware, for the musicians. Again, it is the musicians that this levy goes to. What is going to happen when this exception goes through is there may be the arrival of all these new hardware devices, which are going to be playing this music, which are going to be playing this content. What would be wrong, if there is going to be a growth in this type of equipment, with some of that money going back to musicians? Other European nations recognise that should be the case. If we are going to go down the road of having an exception on this, the UK should similarly give a reward to the musicians whose content is being played on these devices, remember. These devices are not created for their own use; they are created to play the works of people who made this music—for the creators. It is absolutely right that they should get something back if this exception were to go through.

Jim Killock: Of course they are getting something back in the payment for the original music. I would just like to make a particular comment on the film industry. The film industry actually has two rights that it is using to restrict format-shifting. The first is a lack of a format-shifting exception, so you are not legally allowed to format shift. The second is about digital rights management. It is illegal in the UK to break the encryption used for digital rights management. They already have that protection. Because the film industry, ultraviolet and all of these technologies are based around digital rights management, there is a legal protection stopping people from breaking it, so a format-shifting exception, even if it applied to film, would not currently apply to the film industry, given the technologies that they use.

Q211 Chair: How would you suggest that rights owners protect their content from illegal copying?

John McVay: You will never end all illegal copying. Anyone who suggests that is not living in the real world. The best way to do is to get legitimate services to the market at a broad range of price points for a broad range of uses, and that is what we are seeing emerging across all the content industries. You can get free television; you can get paid download to own; you can get free music. There is a whole range of different business models for the consumers that are delivering high-quality, verifiable legitimate content, without any viruses or problems, under an appropriate licence. The big problem we have, in investing in those services and trying to develop those services, is if we are always competing against free illicit services, which can use advertising. Indeed, there was a service that was closed recently by the BBC and Channel 4, which, for the pricey sum of £12 a month, allowed anyone living outside the UK to access BBC, Channel 4, ITV and Five through a VPN. You paid a subscription. The guys who set it up pocketed all the money, did not give any money back to the BBC or the rights owners and were making very good money out of it. That is clearly not a legal service. We should be looking at those sorts of things. I think cloud technology will give users a great variety of uses from the type of content, depending on what they pay for, whether it is a rental, an own or a stream. All those business models will be available.
Q212 Margot James: I wonder what the panel thought of tactics like Apple’s decision to ban users of the iPad from being able to use Flash, which means that you cannot download lots of films.

Jim Killock: That is a really interesting question for this panel, because a lot of the members on this panel, or at least the organisations behind some of them, will be using exactly those restrictive technologies in the background to control their content in different circumstances. They are all labelled as a whole “digital rights management”, and those technologies are then used essentially to stop users from doing what they would like and to put the power over how that content is used into the hands of the company. With Apple that has happened with music; it happens with their devices. What you can do with your devices is not up to you; it is up to Apple. The reason they do that, in our view, is not about stopping people from copying, which is the alleged reason. The alleged reason is that Apple does not want people ripping off its software, so it is going to protect its software in its machines to the maximum degree, which is going to prevent you from doing things like installing Flash.

The real reason they do it, of course, is to control the market. What they want to do is to control the device market, to decide what can and cannot go on to their device, and then give rights holders and publishers the mark-ups that Apple chooses to charge their customers. Essentially the technology digital rights management is being used to carve up markets: it is being used in anti-competitive ways. To be honest, I cannot think of a single instance of digital rights management when that has not been the purpose of that technology’s use. The film industry will tell you it is to stop copying. The music industry in the 1990s or 2000s would have told you that it is to stop consumers from copying. I say it is always used to price fix, to control the market and to lock consumers into particular technologies and devices. Then the competitive and market distortions that follow are completely obvious.

Chair: Any addition or disagreement? John and then Robert.

John McVay: One brief point: I do not understand the technical issues around Flash and Apple, but you cannot blame Apple for coming up with products that people want to buy. Other people should come up with products that will compete against them.

Robert Ashcroft: I would suggest that Jim is not going to be one of those people. He might want to buy a Samsung Galaxy tab and get his Flash that way.

Jim Killock: The point is, if I want to hack my Apple that I have paid for, I should be able to and that should not be a problem.

John McVay: Why?

Jim Killock: Because I have bought it.

John McVay: You say you are allowed to hack the underlying software, which is copyrighted. Is that the point?

Mr Binley: Chairman, can you tell me what Flash is later?

Chair: I think we might be, shall we say, straying off the subject slightly. Just finish off, Ann, quickly.

Q213 Ann McKechin: Thank you very much, Chair, before we go in to Flash and Flickr. We have obviously touched on this question about intellectual property enforcement in the advancement of technology, which is proceeding at an incredibly quick rate. Perhaps the comments you have made, Jim, is that technology in fact overtakes and people are trying simply to preserve what copyright they can during that short period of time when they can try to get a market advantage. What are your views on the way that intellectual property rights should be enforced in the current environment, given that the technology is changing very rapidly?

Pete Wishart: There is always going to be a tension, and that is the difficulty with intellectual property rights. We have got a culture just now that thinks and believes they can access any amount of content for nothing. That culture has grown up with the digital environment and the way that people now access and download. What intellectual property law and copyright law continually have to do is reinvent themselves almost yearly to try to ensure that we are on top of it.

The one thing that Hargreaves says that I agree with wholeheartedly is the need for further education and enforcement. Now education is critical in all this. If people can understand and appreciate that copyrighted material is the work of somebody else—somebody has put effort and time into creating this piece of work that is original and unique—we can get this message through that it is valuable. I think Jim is a little bit guilty of this from some of the things he has been saying—that somehow it is all right for all this wonderful work to be given away for nothing, to be almost labelled as valueless, which defeats that educational exercise that we need to try to get through. One of the big challenges that we have is how that is communicated: how we try to encourage people to value intellectual property and copyright. I do not think we have been fantastically successful in that in the course of the past 10 years. We have to move forward with that, but we have to make sure that people, when they do access this wonderful material, understand that it is the works of others, it has value and it is something that should be respected.
parents should be asking that question generally. The tools are there. You pass legislation; let us get on and implement it.

**Robert Ashcroft:** We certainly welcome the Digital Economy Act, particularly because it makes certain other technology partners party to the whole business, the ISPs in particular, but, if you think about the roundtable discussions that the Minister Ed Vaizey has organised trying to find solutions and trying to get voluntary action, what has emerged is a suite of measures. We have talked about the credit card companies not taking money for unlicensed sites; site re-ranking, site delisting, site blocking, traffic lights, the role of the antivirus companies and many different things that could and perhaps should be done, which can be done on a voluntary basis, to improve the climate for copyright on the internet. It is not a question of one single measure in my view; it is a question of a series of actions. The Secretary of State mentioned this at his speech at the Royal Television Society back in September, and this is the way that we need to go, with the concerned parties sitting around the table and working out what can reasonably be done to make it better for the creative industries.

Q214 **Ann McKechin:** Jim, do you think there should be any copyright enforcement?

**Jim Killock:** Absolutely. The question is where you place it. There may be three places where copyright enforcement duties and so on can go. The first is around private enforcement. A number of people today have spoken about some problems. The fact that there is no copyright small claims court or equivalent, although hopefully that is coming, is a problem because it means smaller individuals cannot get their copyright enforced. Generally, because copyright is a private right, the expectation is that the people who own those rights make that enforcement, and that is the most efficient way to do it generally. Somebody whose copyright is affected is the one who can make the judgment about whether to enforce that or not. The problem we have now is that the copyright enforcement agenda is moving towards being pushed on intermediaries, whether they are internet service providers, Google, BT or whoever, or it is being pushed towards Government. When these are civil actions and civil offences, that does not seem to me to make sense. The whole scheme is not operational yet. The letter-writing scheme and the monitoring of customers come at a cost.

**Chair:** Thank you very much. I would stress, as I stressed to the previous panel, that if you feel that there is anything that you have not said that you would wish to say in response to any questions that we have asked, please feel free to do so. Indeed, if you feel you wish to say anything about any questions that we did not ask but you think we should have asked, then also feel free to do so. Thanks very much. We could have had quite a long debate about some of the issues, but thank you for being suitably disciplined.

**Jim Killock:** The letter-writing scheme and the monitoring of customers come at a cost. It must be pretty minimal.

**Jim Killock:** No, because there are software and databases that have to be put in. There are a number of things. The Government’s figures, as I say, were looking at putting costs on to broadband sufficient to knock 40,000 families out of the market. We are not talking about insignificant amounts of money. The second thing that it does, because of the legal framework, is place great legal uncertainty on many people, particularly small businesses operating independent Wi-Fi. What Ofcom has been telling small businesses and what they are telling us is that, when the Digital Economy Act is operational, if you are a small café and you operate open Wi-Fi for your customers, and if you receive letters from BT saying, “Somebody at your café has infringed copyright, please tell them to stop it,” you will have to write back. In fact, you will have to assert that your café is operating as an internet service provider, not as a customer of an internet service provider and, because you are an internet service provider with a relationship with your customers, you do not need to receive these warnings. You are going to have to defend the position to a court potentially, if you have been taken to court, that you, a café, are in—

Q216 **Ann McKechin:** Have any of these cases gone to court?

**Jim Killock:** The whole scheme is not operational yet. Basically the Digital Economy Act allows people to be either a customer or an internet service provider. If you are an internet service provider, you do not have to worry about warnings, as long as you do not have too many customers—around 600,000 or something like that. These poor cafés, hotels, bed and breakfasts, landlords, are going to have to argue to courts that they are internet service providers in order to make the Digital Economy Act workable. That is the problem with placing these sorts of enforcement burdens in the wrong place.
Tuesday 15 November 2011

Members present:
Mr Adrian Bailey
Mr Brian Binley
Paul Blomfield
Julie Elliott
Margot James
Simon Kirby
Ann McKechin
Mr David Ward

Examination of Witnesses

Witnesses: Baroness Wilcox, Parliamentary Under-Secretary for Business, Innovation and Skills, Minister for IP, John Alty, Chief Executive and Comptroller-General, Intellectual Property Office, Ed Quilty, Copyright and IP Enforcement Director, Intellectual Property Office, and Adrian Brazier, Head, Digital Economy Act Implementation and Creative Industries, Department for Culture, Media and Sport, gave evidence.

Q217 Chair: Good morning, Minister, I welcome you and the other interviewees and thank you for agreeing to speak to the Committee. We are a minute or two ahead of schedule, so I will use the minute, if I may. For voice transcription purposes, could you introduce yourselves and then we will get into the questioning proper?

Baroness Wilcox: Adrian Brazier is the Head of the Digital Economy Act, Implementation and Creative Industries, Department for Culture, Media and Sport. Next to me is Ed Quilty, who is Copyright and IP Enforcement Director for the Intellectual Property Office, and then John Alty, who is the Chief Executive and Comptroller-General of the Intellectual Property Office. I am Judith Wilcox and I am the Minister for Business, Innovation and Skills; I also have the joy of being the Minister for Intellectual Property. That’s my own bit.

Q218 Chair: First of all, I think we can start with a very general question. The Hargreaves Review said the UK’s IP framework was “falling behind” but that much of the system is actually working satisfactorily. What is the Government’s position six months after the publication of the Review?

Baroness Wilcox: I wonder if just for the first minute you would allow me to say quite how this came about. The Prime Minister, brand new in post, was looking for his first speech and asked each Department if there was anything happening in their Department that was going to come forward as part of the new adventure. There was I with just the intellectual property as my particular brief and, lo and behold, they were bringing out the thing called a fast-track green patent just at that moment. It was a new concept for the new world of green issues to see if they could fast-track through to get some of the smaller businesses going, so he put it in his first speech. It has now been copied by the Americans and other countries because it was a world first. That explains why the Prime Minister has had intellectual property well within his sights from the beginning. It is somewhat the case that as the world is growing so all of this becomes far more important. Therefore, the Prime Minister quickly asked, “Can the intellectual property system do more to help the economy grow?” Therefore, we asked Professor Hargreaves to take a look at what we should consider and what we might do. He did not conclude that the IP system is in crisis in any sense, but he did say that it needs to adapt and that it needs to be more adaptable in the future. As you know, the Government have, in broad terms, accepted all the recommendations that Professor Hargreaves made. If you like, I will just outline what it is that the Government thinks it has accepted.

Chair: Okay, please do.

Baroness Wilcox: The UK will lose out on some of the benefits of technology unless we can adapt our copyright system. The system should support activities that help growth and do not undermine creativity. For instance, it should support new research opportunities. The patent system works well for most businesses and the UK is considered to have one of the best systems in the world, but there is room for improvement. We want an effective unitary patent in the European Union to streamline the system across Europe. The intellectual property system has to work for all businesses and we want to ensure that small businesses get the opportunities and support they need to make good use of the intellectual property system. On enforcement, clearly we have an issue. Intellectual property rights must be enforceable if they are going to be of any value. That adds up to what the Government feel that they are supporting at this time. I had hoped this morning to be able to tell you who is going to take the piece of work forward for the next six months, but unfortunately we haven’t yet got final clearance to be able to do that.

Q219 Chair: At the time, there were assertions that companies such as Google would not start up in this country because of the UK copyright law. Do you still hold that theory now and will Government policy reflect that or accommodate Google?

Baroness Wilcox: We certainly don’t hold that theory.

Chair: You don’t hold it.

Baroness Wilcox: Nor did we hold that theory. Somebody spoke to the Americans, who said on a day in summer when everybody was on holiday, “We’d never have started here. You can’t start here.” If you report that to a new Government, they will be terribly worried, but the truth of the matter is that the Americans were arguing for a thing called “fair use”. Fair use is a system that they use; we have a system
In the European Union and, obviously, within Britain that is not fair use but it is good. That does not mean to say that we will not look at it to see if there are areas within fair use that we could adapt for us, but there would be no point in our changing completely to the American fair use system. John, do you wish to add to that?

**John Alty:** That is a pretty comprehensive answer. As the Minister said, one of the questions that Ian Hargreaves was asked to look at was whether the fair use system for copyright in the US could and should be transplanted into the UK. As Baroness Wilcox said, his conclusion was that that was not practical, but he did make recommendations to try and achieve some of the benefits of that system; that really goes to the balance between the ability of companies and businesses to make use of copyright material without undermining the original incentives to creativity.

**Q220 Chair:** Have you come across any evidence either from Google or any authoritative source that would substantiate this allegation that without a fair use regime in this country, companies such as Google would not invest or start up here?

**Ed Quilty:** The way to look at it is more about where the companies concerned would want to start. One of the advantages of the fair use system is that you can get something going and then you can test it out later on in the courts. If people challenge what you are about to do, you can go to the courts and if you win then you can take the stuff forward. Under what the Minister described as the European system, which is a fair dealing system, the uses you can make of copyright in the exception form are set out in statute, so there is more clarity.

If you were setting up something new, you may well choose to do it in a regime like the US and then see where it got to. If you are asking what the things are that the US system offers but ours does not, because of fair use, one example is parody; there is more freedom to use parody. Another example is the Google Books settlement issue where you could get the stuff going in the US because of the legal system there. Whether or not you could do it in the EU is a different question, but certainly it may be a more propitious climate in which to start it. The other thing to say is that there are other factors that you have to bear in mind. For example, in the US there are different approaches to research—Silicon Valley, the people and so on—that might make it more attractive to start somewhere else. It is more complicated than just copyright or IP.

**Q221 Chair:** Given the fact that you just announced the non-announcement of somebody to take this forward, do you think the timetable to get the policy of this Review implemented by mid-2012 is realistic anymore?

**Baroness Wilcox:** As a politician, my answer is yes. I do think it is. Everything we have done here with this work done by Hargreaves was done quickly because we need the answer quickly: “Yes or no? Do we need to do something?” In the next session, particularly for the digital copyright exchange, we have to have somebody who will bring people together, see if they can agree on a way forward and, if there is a good, tight timescale on it, we have far more chance than if you allow things to drift. Obviously, as you know because you have had evidence before this Committee from different stakeholders, different people—Sir Robin Jacob, and so on—have views on how this should be done, so the idea is to get all their views, get everybody agreed that we will agree to do something and then get on and do it. We really do not have any time to lose on this.

**Q222 Chair:** I can understand why, politically, you need to say that.

**Baroness Wilcox:** Now I’ll let you have the other answer.

**Chair:** I can also understand the difficulty because, as a Minister, obviously you cannot be involved in the detail of the implementation of it, but you do not have anyone in place to actually bang those heads together and put the different things in place yet. How can you be so confident that you will keep to timetable?

**Baroness Wilcox:** Maybe you would like to hear an official answer then in that case.

**John Alty:** Since the Government response was published we have not been idle; we have been talking to the industry. We are confident that very shortly we will have someone to lead that work. The first piece of work that person will do will be a six-to-eight-month project. As the Minister said, they would be looking at the feasibility of this and talking to everybody. There is a lot of interest in this topic from all sorts of stakeholders, as you have heard, so we do think there is quite a lot of interest and enthusiasm. There are different views about how it should best work and how it links to other initiatives, but we would hope that before next summer we would have a clear way forward and then that could start to be implemented. I think Ian Hargreaves hoped to see something up and running or in place by the end of 2012, so I don’t think we are off-track from that yet.

**Q223 Chair:** It does seem to me that words like “We would hope” and so on, hardly give the ring of authority and it will be up and running. Can you be a little more upbeat?

**John Alty:** Yes, as I said, we have a plan for delivering the feasibility study by next summer. Clearly, what happens after that depends on what has come out during that study, but you were talking about the timetable and I cannot see any reason why we cannot stick to the timetable on the basis of where we are now.

**Ed Quilty:** It may be worth just adding to that that digital copyright exchange as a concept is essentially breaking new ground; it is something going beyond what most people in the industry have looked at. There are lots of people out there who will say, “You can’t do it; it can’t be done”, but whenever you hear people say, “It can’t be done” you ought to say to yourself, “Well, maybe there are others who say it can”. As John says, we can certainly assume the feasibility study can be delivered on time, but whether or not this quite ambitious project can be taken through to completion depends upon what the
feasibility study tells us and how much more work there is. This is a journey and we do not know quite how quickly the end will come and exactly how far along the road we will get.

Baroness Wilcox: May I just add to that that this is very new thinking? This is a commodities exchange. People have been tinkering at it and trying to do bits to see if they can make something like this work but have not managed it yet. If we can do this, then Great Britain will be the first. If we are the first it will mean that we will write the rules in the way that we want them to be written. Our caveat in working on the single patent with the European Union is the Court: we must have the Court to suit our way and the way that we feel will be honest and true, straightforward and not complicated, and we can all be doing it together. It is the same with this, but we really do feel that we should try. Even if we cannot get this to work, we think we should try, if we can be first with this.

Q224 Ann McKechin: Professor Hargreaves spent quite a bit of time and attention on the quality of the evidence, and he seemed to have some difficulty in ascertaining whether he could get good quality evidence. In the Government’s own response you talked about evidence not being “sufficiently open and transparent”. Open Rights Group told us that when they had asked DCMS for evidence on what to do about illegal web content they were told it was not available. They had a similar experience with the Digital Economy Act methodology. Do you actually put into practice what you preach? How would you comment on their assertions and how is it consistent with basing policy on evidence?

Baroness Wilcox: If I may, I will make a few comments and then I will pass to DCMS because Adrian will be able to answer the detail of your question. Hargreaves rightly attached high importance to a good evidence base for policy making and IPO has been strengthening its research and evidence capability because, as you say, it is important that we should have that. Hargreaves did some broad-brush on this, but that is all he could do in the short time that he had. The idea of doing it quickly this way was for him to see the opportunities, and he could see that this was going to be very important, so he only signposted it. Now I will pass it to Adrian and see if he can go further on your question.

Adrian Brazier: Thank you, Minister. I think it would be only reasonable to acknowledge that Open Rights Group has something of a point about the evidence that was used for the Digital Economy Act. It was somewhat opaque; the impact assessment was not based upon new evidence or new research that had been commissioned by us; we had no independent source of information. I think it would also probably be fair to say of the evidence that we had been offered by rights holders that they were unwilling, essentially, to lift the bonnet and let us see the engine: their workings and methodology.

Q225 Ann McKechin: Can I just clarify that? Open Rights Group made the point that they had not seen the methodology and you would not make it public, but you are now saying that you had not seen the methodology either.

Adrian Brazier: That is correct. Essentially, we were left with trying to make the best brick we could with what straw we could find in those circumstances. However, I would say that we were always very clear—or at least I hope we were always very clear—about the provenance of the figures that we quoted. We never claimed that they were Government figures; we always made it very clear that these figures were published with something of a health warning. These were figures that had been provided by rights holders. We were as transparent as we could be in those circumstances, even if we could not be transparent about the workings themselves because we did not have that information ourselves.

I would also say that in many ways our experience in terms of the Digital Economy Act underlines the importance of Professor Hargreaves’ first recommendation—that this was not a comfortable position for us necessarily to be in and that if we essentially had to commission proper evidence first, we probably should have done so. I think it is also fair to say that evidence of the Digital Economy Act—if one can defend an Act in that sense—it contains within it a recognition that there needs to be clear and independent evidence going forward. Indeed, that is reflected again in Professor Hargreaves’ eighth recommendation about our Government not hanging around and waiting for the whole thing actually to start before collecting that information.

Q226 Ann McKechin: In particular, I think Open Rights Group were looking at this claim about the cost of infringement to the economy. The figure of around £400 million was mentioned. Would you agree that the economics of infringement are not always about losses? Their assertion was that infringement can spark renewed interest in a copyright work, for example, which had been lost. It might also be for the benefit of the original owner if it is actually revived at some point.

Adrian Brazier: A gain, I would accept that they have a fair point. I am not too sure whether we would necessarily go quite as far as they would wish on that, but certainly there seems to be industry evidence—and this is not necessarily something that they would quote in their favour—of a certain amount of tasting before you buy. There seems to be some evidence of people using download sites and file-sharing sites to sample music and then essentially pay their money for a ticket or whatever it might be. It is certainly fair to say that one needs to look at something of a broader picture here.

Q227 Ann McKechin: Minister, you mentioned that Professor Hargreaves had taken a rather broad-brushed approach. There has been criticism that his economic impact assessment has been over-simplistic. As individual policy items go forward, are you reviewing the credibility of the supporting data?

John Alty: Absolutely. As Baroness Wilcox said, inevitably the estimates that the Hargreaves Review produced were broad-brush. Where we are now taking forward the recommendations, we are in any case
required to produce much more detailed impact assessments. That is what we have been working on over the last few months and, for instance, in the copyright area will be to publish a consultation with much more detailed costs and benefits. Obviously, part of the point of that is to consult people on the policy, but it will also be to get people’s opinion on the strength of the analysis and of the cost benefits. For reasons you have just been exploring, in many of these areas there is not a huge, good database or set of evidence.

Q 228 Ann McKechin: If I could take the recommendation Professor Hargreaves made about the benefit of a digital copyright exchange, he exchange a rather bold figure, not even a range: £2.2 billion. That is a very big figure and has obviously been used in terms of the Government saying, “This is how much the advantage would potentially be to the economy”. Would you agree with me that the Government really should consider a range of figures rather than one bold figure based on one study that looked at the European content and not the UK itself?

John Alty: You can debate whether it would have been a good idea to produce a range or have one figure. As you say, the derivation of the figure is from quite a high-level study looking at the costs of barriers to digital licensing. Because of the way it was done, there was no particular reason to go for an upper and lower figure, but how it was derived was set out pretty clearly, and that is probably the most important thing at this stage.

Q 229 Ann McKechin: Can I just press you a little bit further about that? That is fair enough, but there is no corroboration of this figure; it is taken from a bit further about that? That is fair enough, but there is no corroboration of this figure; it is taken from a quite a high-level study looking at the costs of barriers to digital licensing. Because of the way it was done, there was no particular reason to go for an upper and lower figure, but how it was derived was set out pretty clearly, and that is probably the most important thing at this stage.

Ed Quilty: If I could just make a comment on that. We are in a situation in this industry where the evident have been weak to non-existent for a very long time. Only a year or so ago there was a report that said there is very little evidence of the benefits of copyright. We have now moved to a situation where Hargreaves has put a lot of new thinking down. That has actually been an opportunity for lots of people to criticise the thinking and to say they disagree with it. However, it has opened up a debate about what the right evidence should be and that is the most important conclusion from all this. We can now start debating. As for the Government, when the digital copyright exchange project gets going those questions will have to be looked at, but there will be something that gets that debate going and we should welcome that.

Q 230 Ann McKechin: I have just one further question: do you consider that there is a case for this economic impact assessment to be peer-reviewed by an outside body such as the Regulatory Policy Committee and for those recommendations to be made public so people can then carry on this very interesting and important dialogue about what the benefits actually might be?

Ed Quilty: Absolutely. 

Q 231 Paul Blomfield: To almost take a step back, as you will probably be aware, we have had the point made to us that bodies such as Getty Images and PRS for Music already provide licensing options. Mr Quilty, you have talked about the digital copyright exchange as breaking new ground and the question might be: do we need to break new ground? Could theould the DCE be criticised as a solution waiting for a problem?

Ed Quilty: When the concept of the digital copyright exchange was first mooted, the telephone started ringing and many people said, “There’s no need for the Government to do this; we already have a digital copyright exchange, thank you, so you can park that recommendation and move on”. We started talking to the various people and it is true that PRS, PPL and others have big databases. They are databases of records of their members, the licensing rights and entitlements, and they can be characterised as a digital telephone directory. Right across the copyright industries there are these digital telephone directories and if you look them up, they will effectively tell you who owns the rights and who to go to to negotiate about the use of those rights. I would regard that as a step one in this process of building the exchange. Using these cups as an aid, imagine that you have a telephone directory here and a telephone directory here. If you know which rights you need in order to develop a new proposition you can go and say, “Well, I need only number one and number two. I don’t need number three, so I will talk to these two and I’ll get the rights”. If you do not realise you need right number three and you do not get it, when you launch a business model you are in trouble; you could be sued by the owner of this right. In a sense, what the DCE would do is first of all bring all these digital telephone directories together so they would be interlinked and you would have a better chance of finding the rights you want. Then it would build on top of it—this is where it becomes dangerous—the second layer, which is the commercial exchange, or commodity exchange that the Minister talked about. It would then be possible for people to interact with the system and actually buy the rights or the bundle of rights they need without needing to go to each individual rights owner or database, and without needing to go to each individual solicitor.

The advantage of that is that you should not need a lawyer for every single transaction and every single rights holder. That would be the benefit of the DCE. It is true that there would be very big rights for which this system is very unlikely to be relevant. For example, I cannot imagine at the moment the rights to sell a new Harry Potter novel ever being traded on the DCE, but there probably are—this is something the project needs to do—a large number of rights that are not necessarily profitable to exploit because of the
legal costs and the overheads associated. That is where the DCE might make a big benefit. That is what that project needs to look at.

**Q232 Paul Blomfield:** As you explained it, and indeed illustrated it, the advantages seem very clear. However, there does still remain concern—apart from that of the lawyers who would lose out—within the industry, why do you think that concern is still there?

**Ed Quilty:** There is some concern because Professor Hargreaves talked about ways of bringing this about with incentives. In his Review he mentioned a number of incentives and a lot of people who read that Review took this to mean that the Government were going to legislate these things into place in order to make the exchange work. Our current view is that the exchange will work best if it can be run as something for the industry and, probably, by the industry.

**Baroness Wilcox:** Exactly. If I can just follow that, that is why I was so annoyed at not being able to have the introduction this morning of somebody who is going to come and bring these people together. What we need is for people to come into the room to express their common difficulties amongst themselves and with each other; this is not the heavy hand of Government. We need to get as far back from this as possible to allow the industries to talk to each other and to find out how best they can have something that suits them all. It would be great if we can do it. We do keep stressing there is no guarantee this can be done, but there are parts in it that have already been done quite successfully. We need to be able to get growth, access and a way in that does not cost a fortune for maybe some of our newer companies coming through, so that our universities can teach that this is a good thing to our engineers. I was a governor of Imperial College until I had to give everything up to have my current good job. One of the things we did there was to embed a business school within the college so that the engineers, scientists and those with all the brilliant ideas could realise quite what it was they had hold of. We need these helps all the way along the road. One of the things we did was just trying to illustrate the sorts of things that happen. Although we will do our best to make incremental, such as work arising from some of the businesses that are currently operating in this sphere, happens. Although we will do our best to make estimates, and so did the Review, inevitably we are talking about trying to set up a framework that the market and businesses will try to use. It is quite difficult to predict how that will develop.

**Q234 Paul Blomfield:** Can I just follow that up? If you are even now, with all the work you have done, not in a position to make an estimate, on what basis did Hargreaves pin a growth figure down to 0.3% to 0.6%? Are you questioning the credibility of that?

**John Alty:** No. You asked whether it could be more than that or you were asking how we would feel about the proposition that that might be an underestimate. I was just trying to illustrate the sorts of things that might happen. What we are saying is that broadly we think that that range is reasonable; we certainly see benefits coming out of these recommendations and that is why we are taking them forward, but it is inevitable that there will be some areas where we can be more confident and clearer and others where we will probably always have a range of possibilities.

**Q235 Margot James:** Is the idea for a compulsory exchange definitely rejected, even for broadcast content?

**Baroness Wilcox:** As far as I know, yes.

**Ed Quilty:** The Government’s policy at the moment is to press ahead to see if we can develop the thing as a proposition that is commercially interesting for the parties concerned. The Government have no plans to make that compulsory.

**Baroness Wilcox:** Just to emphasise again: the Government are trying to stay as far back as possible. The whole idea is to see if industry out there will work best if it can be run as something for the market and businesses will try to use. It is quite difficult to predict how that will develop.
Stop43 told us that the Q237 Margot James: those sorts of questions have to be answered and we and how they evolve, and who is going to use it. All products on the exchange are, how they can be made to see what rights holders and content holders are who actually want this to happen. Then you will have nothing to do with it”. In a sense, to get the thing say, “This really is not going to work and I want of the willing. There will be plenty of people who will at the beginning it would really need to be a coalition to get the thing up and running. To make this work, a series of really quite important questions about how the thing would be set up, structured and managed. What sort of legal or corporate form does it take? Is it a company? Is it a trust? Is it something else? What do we need to do to address any competition concerns there may be in it? Does the governance need to reflect that? Then I think on top of that there are a series of really quite important questions about how you get the thing up and running. To make this work, at the beginning it would really need to be a coalition of the willing. There will be plenty of people who will say, “This really is not going to work and I want nothing to do with it”. In a sense, to get the thing moving you are going to have to work with the people who actually want this to happen. Then you will have to see what rights holders and content holders are prepared put their rights into an exchange, what sort of arrangements have to be made to define what the products on the exchange are, how they can be made and how they evolve, and who is going to use it. All those sorts of questions have to be answered and we hope the forthcoming study will address that territory.

Q237 Margot James: Stop43 told us that the proposal for the exchange will not be consulted on and that there will not be any legislative framework defining the due diligence. Do you think those concerns are justified in any way? Ed Quilty: There may be two separate issues there. When we talk about due diligence, we are talking generally about the orphan works problem, which is a slightly separate problem from the DCE. The DCE is essentially about monetising better the rights that already exist and allowing us to know who the owners of those rights are. That is how a properly functioning DCE would work. If you had an orphans works scheme, which is separate, it was suggested that the DCE might be the place to check whether those rights had been placed on the DCE. The reason you might do that is that as part of an orphan works scheme you would need to check in various places to try and establish the owner of those rights. An exchange that had rather a lot of rights on it, accessed in an easy, one-click way, would be part of those checks.

If we had an orphan works scheme, and that is one of the recommendations in Hargreaves that we need to pursue, and it is something the European Commission are pursuing as well, then—Chair: We are going on to orphan works in a moment. Ed Quilty: Okay, fine. I hope I have answered your question then so far.

Q238 Margot James: Yes, thank you. I will look forward to hearing what you have to say about orphan works later. Could I just ask you about whether you have reached a conclusion on whether restricting remedies to those who participate in the exchange complies with the Berne Convention on not having formalities for copyright and ownership? Ed Quilty: The simple answer to that question is if we develop the exchange as a purely commercial project and we do not need legislation in there, then people who will put their rights on the exchange will have put them on voluntarily and there should be no conflict with Berne. It is important to understand the exchange is not a compulsory vehicle. It is something that people could use if they want to, in the same way as if you wanted to put your works on Amazon to sell them or if you wanted to sell them through a distributor, you are not forced to do it, but you can use it as a mechanism; that is how we should look at it.

Margot James: We have already had very clear answers to some of my other questions, Chairman, so I think we can move on.

Q239 Julie Elliott: What is the evidence that a wholesale release of orphan photographic works will have the massive impact on growth and innovation predicted by Professor Hargreaves? Baroness Wilcox: One estimate suggests that between 30% and 40% of the British Library’s collections could be orphan works. They are very excited by an idea like this.

Ed Quilty: If I am right, the question about the release of photographs reflects the anxieties being expressed by photographers about the release of large numbers of orphan works that they regard as being potentially in conflict with photographs they have taken, in offering a substitute. There have been discussions with photographers for a long time on this and I think a lot of photographers would want, in an orphan works scheme, to see some guarantee that the prices at which substitutable photographs were available were not such as to undercut their own products. In principle, that may well be a way to go. If we go down the orphan works route, we will need to consult on it and we will need to talk to people, but that is not necessarily an option we would rule out. There may be some attraction to it if it is possible to establish a market price for the works in question. In some ways, that should deal with the issue. The other point to make is that photographs as a whole are not necessarily substitutable for modern photographs. Old photographs are not a substitute for modern news and other photographs. It may be possible that there is substitutability in some areas, but
I do not think it is necessarily the case that we will have large numbers of orphan work photographs released into the public domain in a way that inhibits photographers from current-day activity. It seems unlikely.

Q240 Julie Elliott: We asked Professor Hargreaves to explain why releasing orphan works was economically necessary and he referred to the benefits of releasing archive material. Why not just create an exception for archiving alone, along the lines that the EU Directive proposes?

Ed Quilty: We currently do not have an exception in the Info Soc directive that allows you to deal with orphan works, so you cannot actually create an exception that would allow you to put those on the market. The previous Government looked at it in the Digital Economy Bill, as it was, and what they became the notorious section 43, and the legal principles behind it were more based upon bona vacantia; that is to say these works were rather like an empty house where the owner has disappeared and the abilities to operate in that context were considered. That is how we got that in the legislation. That is something we would need to look at if we had an orphan works scheme in the UK based on our own statutes now.

At the same time, it is worth saying that the European community is looking at an orphan works scheme. If that orphan works scheme does introduce a new exception, then we would be able to use that exception, provided it goes far enough. From the signs of what was happening at the moment in Brussels, the sort of exception that they may be using for orphan works may be quite narrow and restricted to cultural-only uses, which may mean it is not possible to use it beyond some fairly limited ways. It is an evolving picture at the moment; we have to wait and see how that all shakes out.

Q241 Julie Elliott: Stop43 gave us a lot of evidence and their proposals for a national cultural archive would allow viewing of works but not copying. Have the Government given any thought to those proposals?

Ed Quilty: I expect that when we begin the consultation Stop43 will make their proposals to us. We are very happy to listen to everybody; we understand photographers have serious concerns. Where those concerns are real and justified, we should try and do something about them; where it is just misunderstanding about the system, we should also try and make sure that we have explained it properly. I would envisage in the consultation process we would take up those sorts of suggestions.

Q242 Mr Binley: Good morning, Minister. It is a pleasure to see you again. Can I ask you whether the Government believe that extended collective licensing schemes and schemes exploiting orphan works can be compatible with existing law, including the minefield of human rights?

Baroness Wilcox: Oh dear. Gosh, human rights: that’s really moving it. I think you have covered some of the explanation on the very first part of that question, Ed, so maybe you would like to continue, as human rights is a delicate area.

Ed Quilty: On human rights, I was at a symposium a few weeks ago and someone asked me the same question. My initial reaction was to think, “How was it Government lawyers had missed this point for so long if it was so important?”

Baroness Wilcox: Avoid it.

Ed Quilty: But the answer is actually that human rights in this case are a balance. Our legal advice has been that nothing that we would be doing here would actually impact on those. If you want me to give you more, I am quite happy to put a note in it because I cannot claim to be an expert in the area, but I think the human rights problem about orphan works scheme that has been expressed, again largely by photographers I think, is not one that would necessarily stand in the way of doing extended collective licensing. More to the point, the extended collective licensing system has been practised in the Nordic countries for many years and there are other countries in the EU that have taken it up. There are a lot of practical advantages to it, not least that it makes the operation of collecting societies, who would be the people who would benefit, a lot easier with ECL in place. To give you an example, at the moment PPL, PRS or any of the other societies collect revenue on a very large-scale area and the legal theory is that they can only collect it for people who are mandated members of the society. Many of the societies have to collect revenue without necessarily being clear at any given moment who is the owner or beneficiary of the rights, so to that extent they appear to be collecting on the basis of people who are not in their mandate. An extended collective licensing system actually would make it easier to regularise that situation. It would mean their business models were more consistent with the legal framework they were operating in, and it would also perhaps bring in revenue to people who did not know.

Q243 Mr Binley: Do I detect just a little more hope rather than expectation by the Government in this area at the moment?

Ed Quilty: You should always detect hope, I hope.

Baroness Wilcox: This is groundbreaking work. When you first read Hargreaves it looks a bit dry: “Intellectual property? I don’t know if I know all about that”. However, it is a very exciting field because if we are looking at it from growth, we are trying to open doors where we can. At the same time, it is absolutely essential that we protect the rights of people who have already had the initiative and have already done what they should. So there is a delicacy between these things and that is why it does not sound as if we are being very definite on some things. A lot of it needs good discussion and I think it will bring people together in a way that these organisations have not, which is why some of the assumptions they make are wrong. It is only because they have not had access to the information to be able to get it right, and some of this is really getting people to get better access, particularly as we think, for the people who are coming through from the small and medium-sized companies that we really do need.
Schools and universities all would very much like to be able to use the orphan works to see the things they need to record. I was just thinking when we were asking the question earlier: "Why can't you just leave them there and everybody go and look?" To take a whole school in to look at one thing is not very easy, but from my involvement in the past 18 months, I know that photographers in particular have been very worried that people do not understand their circumstances.

Mr Binley: I understand that.

Baroness Wilcox: A apologies if we are sounding a bit more hopeful than confident.

Mr Binley: I just wish you well through the minefield.

Baroness Wilcox: I am hoping very much that you will be travelling along with us.

Mr Binley: No, following at a distance behind, I might say.

Baroness Wilcox: I know you have a report to write at some stage and I hope that we will be as helpful as we possibly can.

Q244 Mr Binley: Can I ask if photographs and audio-visuals represent a special case in this respect? Do you see any special concerns there?

Ed Quilty: The one thing about photographs, which makes them different from some other types of work, is that they can often increase in value as they get older, whereas for many other works the value tends to reduce. In my conception of the thing, that is something we need to watch to make sure that the system takes account of that. The legal points about who owns it, the protection of the rights and avoiding abuse are exactly the same for photographers as any other form of work. I feel there is a bit of an education campaign to be done to make sure that everyone understands what the proposals are, so that we have a debate on what the proposals actually are rather than what people think they are, which is often a slightly different thing.

Q245 Mr Binley: There is a need to guard against misidentification of photographic works as orphan works and especially the deliberate stripping of metadata intended to demonstrate ownership. That is a particular concern; how do you guard against that?

Ed Quilty: If we had had this discussion five years ago the answer might have been different, but what is happening as technology goes on is that it is becoming increasingly possible to look at visual images and identify where they have come from. It may be that we have that happy coincidence of legal progress or change in this area accompanied by the technical ability to do something about it. If, for example, we had an orphan works registry, then every photograph and any other work could be put up on the registry and it would enable people who were photographers, for example, to look at what is there and see if they think their stuff is there even if it had been stripped of metadata, which it should not be. It would also mean that you could use technical abilities to find the stuff.

For photographers, you have to think, 'Where are the photographers today and where can they be tomorrow?' Today, their photographs are often routinely infringed, metadata stripped off, etc and people sell them masquerading as orphan works on websites. There is very little they can do about it. At least if you had an orphan works registry, they would be able to go to the registry and if they could find a licence there for the use of the orphan works they could say to the person, "Why aren't you selling this in accordance with the regime we have devised?" If there is no sign of an orphan work and they were able to prove that the thing was an orphan work, using the technology I have described, then you have a very strong case when you turn around to the bogus seller and say, "Why are you selling this stuff? There is an orphan works registry. If you thought this was an orphan work, why aren't you putting it on there? Why isn't it registered?" The business of pursuing infringements for photographers in particular ought to become easier as a result of this.

One of the anxieties that I have heard expressed by photographers frequently seems to me to be based on the notion that as soon as we put this orphan works system in place, there will be widespread and complete abuse and infringement of it. I do not think that is going to be the case. There will be some, but it should be controllable and we have to build the system to avoid it.

Q246 Mr Binley: You have been very helpful. I rather wish we had had you earlier in our review, quite frankly. That's a compliment, isn't it? Can I move on to the question of books? Lending a book is not the same as lending a digital MP3 file; the second can be copied and then transmitted much more easily. I think you know that Sir Robin Jacob told us that there was a huge difference between the two. How does the Government plan to translate that distinction into workable law?

Ed Quilty: My answer to that is in a sense is that I think it has already been done. It may not have been done enough or well enough, but the Info Soc Directive, which was the EU’s Directive on the digital area, was actually a way of recognising that the digital world needed slightly different rules than the online world did. Your point about the books is perfectly right. If you buy a book you actually do not have to concern yourself overmuch with copyright, licences or anything; the rights are exhausted when you purchase it, so you can lend it to your friends and so on, and you are not engaged by the sort of copyright problems that typically dog the digital age.

The Info Soc Directive is there and a lot of our law is based upon it and as Hargreaves identified, we do not always use the flexibilities as fully as we might. However, as the digital world goes on, we will have to keep a constant eye on the law and make sure that the law stays up-to-date to reflect the way the digital property is evolving. To some extent, the Digital Economy Act was an illustration of that and there may be more to come. Who knows?

Q247 Mr Binley: I talked about minefields and we are now going into EU law, which impacts upon this very sizeably. I wonder what the maximum and minimum options are, with regard to what EU law
would permit, on format shifting, and why does the Government believe that levies on recording equipment are necessary?

Baroness Wilcox: The law is out of step with what people think is reasonable. We have done research into this and it undermines public confidence in law; it is not good when the law looks to be—

Q248 Mr Binley: Can you explain what you mean by, “What the public thinks is reasonable”? I apologise for pressing you.

Baroness Wilcox: Can I talk about iPods on this? I suppose the most obvious example to me is when they went out and asked about iPods. You asked youngsters with iPods, “Do you download music onto your iPod?” They say, “Yes”. You say, “Do you know what you are doing is illegal?” “Yes” “Do you think that you’re going to be prosecuted?” “No”. When the law gets to that point, it is unenforceable.

Mr Binley: I understand.

Baroness Wilcox: That means that you need to go back to the industry and say, “We’ve outgrown that one. You’re going to have to find another way of making your living”. We cannot have a situation whereby that happens. It is going to happen more and more because everything is advancing so quickly. This is not like growing corn in a field where you can actually see it happening. It creeps up behind you and suddenly you realise quite what you have hold of there. I use the iPod example because it makes it easier for me to explain it.

Mr Binley: It is very helpful to us too, I might add. Thank you.

Baroness Wilcox: Of course, that is the problem. Do you want to continue that?

Ed Quilty: It is worth saying, of course, not every download is always illegal.

Baroness Wilcox: No, that’s right.

Ed Quilty: There are a lot that are and there are a lot that aren’t. When you buy them in online stores that will give you a certain amount of copies.

Baroness Wilcox: But the general public does not know which is what.

Mr Binley: I understand that point.

Baroness Wilcox: This is the problem.

Mr Binley: I do understand.

Baroness Wilcox: Once you get to the consumer angle.

Ed Quilty: It’s true. I do not know how many people here have—

Q249 Margot James: Chairman, could I just clarify something? I was very surprised at our initial hearing when Professor Hargreaves told us that it was illegal to download onto your computer a CD that you had purchased some years ago, and then download the content onto your iPod. I did not know that.

Ed Quilty: It is certainly true. The one thing I would say on that is I would distinguish between unlawful and illegal, although they are not necessarily terms of art. If you buy a CD, for example, and then you format-shift the stuff onto some other piece of equipment you have at home that is generally unlawful, if you use “unlawful” to mean that you have committed an infringement and you are liable to pursue by the owner in the civil courts. If you buy a CD and make lots of copies for commercial purposes you are never enough to cause a loss of sale—

Margot James: And go down the market.

Ed Quilty: Yes, that may engage criminal liability. When people talk about it being illegal, they are technically right but I think it would be easier if we talked about that being unlawful, and used “illegal” to mean criminal, I wonder if that helps.

Margot James: It’s some relief.

Mr Binley: I found that very helpful, thank you.

Q250 Simon Kirby: Data mining: if an exception were created for data mining, how would publishers monitor that the users were not illicitly copying?

Baroness Wilcox: We do not yet know enough about this area, but I think supporting research is a priority. That includes ensuring we do not seriously damage our research publishers, so we need to find out more about this through public consultation.

Ed Quilty: The Minister is quite right. The publishing industry has expressed their concerns about it and we have heard the concerns expressed in different ways. We have heard people say that the opening up of their databases to the access required to do data and text mining will overload the servers and make it impossible to operate. At the moment I do not know how far that is true or not, but it does suggest that there may be costs associated with opening a service. That is something we need to look at.

There is certainly also this question about abuse: how do you arrange things so that the copies in question that are made do not find their way into other areas. That is something that we would have to consult people on and I think the publishers have views on that, and we will have to take their views in designing a system. However, it is worth saying that under our own law at the moment, the data and text mining or the exceptions that we could do within the Info Soc Directive would be for non-commercial research.

The big gain there would be if you could persuade the European Union to open up an exception for commercial research and then you would be in a different place. There is what you can do domestically and there is what more you could do with a European system.

Q251 Simon Kirby: If I may say so, that sounds in its formative stages. What is the status of the current review? W here are you in it?

Ed Quilty: As John Alty mentioned, we are working on impact assessments to look at what widening all our exceptions to the fullest extent possible within the EU-level Info Soc Directive would mean. Obviously, that would be one of them. If you take the question to Brussels and say, “What do you think about widening out the research exceptions to make data and text mining possible?” The answer you will get is, “Well, that would require re-opening the Info Soc Directive and that is quite a big project in itself, and so that might be something we have to think about.” At the European level we have to work on Brussels and other member states to raise some interest in the subject and to raise some political head of steam behind it.
Baroness Wilcox: I wouldn’t like you to think that we don’t already. I spend a lot of time in the European Union, at the moment trying to get a single patent, but we do spend a lot of time there trying to see if we can bite away at the edges of these things and see if we can get a move. If it comes to opening a Directive, then the Commission is always very nervous about doing that because it opens such an enormous thing, so we just have to keep at it.

Q253 Simon Kirby: My final question: Sir Robin Jacob suggested that review of the 1988 Copyright Act should start right now and he reckoned it should take 18 months. Does the Department agree with his view?

Baroness Wilcox: I spoke to Robin Jacob; he came and had a long morning with me and there is a lot of what Robin Jacob says that I agree with. In principle, we agree with Hargreaves and Robin Jacob together, but we are not convinced that things can be done that quickly; the review of company law took 10 years. It is one thing for a legal expert to draft an Act, but it is quite another thing for it to pass through Parliament. To pass through Parliament, of course, there are experts in both Houses and, as we have just said, the Company Law Act took 10 years to get through, so I think he is being very optimistic if he thinks that it can be done in 18 months. As far as we are concerned, the immediate priority is to act where change is needed now in order to support growth and that is what we are looking at first. That does not say that we do not think that in principle we should be looking at it. Yes, we should, but we think we should be doing the growth work first. I know he will push for this, but I certainly do not think that it can be done within 18 months.

Q254 Simon Kirby: So you agree with some of the urgency, but you think the timetable is unrealistic.

Baroness Wilcox: I agree with that; yes, of course. However, it will take time to achieve and in the meantime we must act where change is needed and that is now for growth, so we will be acting there first, and then when we have the moment to do so we will move straight on. I am going to continue to speak with Robin Jacob on this. I know that he is now very engaged; he is free to speak. He has been a judge for a very long time and has not been free to say anything, so he has let loose now like some great bird, and he is so clever. It is just wonderful to have him around, so I would like to see him every week really. We will come to it, I am sure. He is great company.

Q255 Ann McKechin: Another pearl of wisdom from Sir Robin Jacob was that he told us patent thickets are like the poor: they will always be with us. How optimistic are you, Minister, that the solutions can be found to over-patenting?

Baroness Wilcox: We agree with Hargreaves that the patent system works well overall. Looking ahead, following Hargreaves, our top priority is, obviously, the development of the European Union patent. When it comes to patent thickets, Hargreaves identifies some potential competition problems with the so-called patent thickets and we have launched a research programme to try and clarify this. We will publish a report by the end of November, which will start to answer some of the questions that you are asking now that we are not able to answer at the moment. Unless you would like more detail—

Ann McKechin: No, I think we can probably await that report.

Baroness Wilcox: Wait for the end of November, which is only a couple of weeks away, so we will come back with that.
Baroness Wilcox: European law then that would potentially go to the biotechnology and if there was an issue of interpreting there are certain European laws in this field on there were an issue of European law. For instance, appeals system. The ECJ would only be involved if wide-ranging way because there would already be this would not be involved very often or in a very expectation is that the European Court of Justice

John Alty: We are mind-readers, clearly. Yes, we do understand the industry’s concerns about forum shopping or consistency in the way that the court operates across the European Union. The reason that they have particular concern is clearly that, instead of the situation where if you lose a case in the UK, you have lost it in the UK but you still have coverage in the rest of Europe, once we set up this unitary patent and we have the new single court system, once you decide a case then it will be valid through the whole EU. That is a big commercial issue for businesses. Some of the things that we have already seen in the agreements to try and ensure that there is this consistent application of laws and quality in the courts. We first to make sure that we do not just leave it to national judges, so there will always be a mix of judges to make sure that different legal traditions are represented. Secondly, we need provisions to ensure that there is proper training and the judges who are sitting are qualified. There are other areas that we are still discussing with our partners to try and make sure that as you change to this new system— as I have said, one can understand why industry is concerned that it works—it is going to work as well as possible. This ranges from the way appeals are handled to the way that the different parts of the court—

Q256 Ann McKechin: Can I just ask where the ultimate appellate court would be? If we took a case in the United Kingdom would that be the Supreme Court or would there be a further right of appeal to the European Court of Justice?

John Alty: It is quite a complex answer, but it is not a national court; it is an international court, so the appeals will go to a court of appeal that will be set up as part of the international court. On the whole, our objective and— again to use that word—hope and expectation is that the European Court of Justice would not be involved very often or in a very wide-ranging way because there would already be this appeals system. The ECJ would only be involved if there were an issue of European law. For instance, there are certain European laws in this field on biotechnology and if there was an issue of interpreting European law then that would potentially go to the ECJ.

Baroness Wilcox: And if I may repeat what I said at the beginning, it is 42 years since we have been trying to get a single patent in the European Union; it is the disunited states of Europe as far as this is concerned. As you know, it is very dangerous with China out there slamming out 100 patents a week and everyone else doing it, so it is very important for us to try and get that single patent, but we did put down the caveat that we really want the court to be right. We do not want this single patent to go forward at all until we are satisfied.

Q258 Ann McKechin: So you’re not happy with regional divisions then?

Baroness Wilcox: No. We want one court; we want one set of rules—

Ann McKechin: And one appeals court.

Baroness Wilcox: We want everybody trained for it. I do, anyway.

John Alty: But there needs to be consistency—

Baroness Wilcox: Across it and particularly in the training and particularly the point you have made about the appeals, where it would go and how it would go. Obviously, industry is very worried that some countries have ways of doing things that we maybe would not be too happy to be part of. As you know, this is one of the few times when Great Britain has agreed to this as a majority vote. Normally we do not like that system; it has not worked that well for us in the past because it is usually us outside the door saying that we do not like what is going on. In this case though, it is so important for us that we have agreed to do it and we have led on it. We did of course have Spain and Italy that will not sign at the moment and so there are the two countries that are sitting outside this. However, if it does go through, I believe that the industries in those two countries will say, “Well, look, this is an access that we need”. At the moment, all the rest of us seem to be together and so if we can get the court system sorted it may be of great advantage to our people with their patents.

Q257 Ann McKechin: Sir Robin Jacob also told us of industry concerns about forum shopping if the European Patent Court operates with regional divisions, and it will basically be people picking and choosing what they thought would be the best quote for them. What is the UK Government’s negotiating position on this particular point and has account been taken of these concerns?

Baroness Wilcox: We expected this question and John Alty is going to answer it.

John Alty: We are in progress. We published some research on designs a little earlier in the autumn, which we’d already got in the pipeline, but specifically in response to Ian Hargreaves’ recommendation on design laws being changed, said a review would be published. Obviously, industry is very worried that some countries have ways of doing things that we maybe would not be too happy to be part of. As you know, this is one of the few times when Great Britain has agreed to this as a majority vote. Normally we do not like that system; it has not worked that well for us in the past because it is usually us outside the door saying that we do not like what is going on. In this case though, it is so important for us that we have agreed to do it and we have led on it. We did of course have Spain and Italy that will not sign at the moment and so there are the two countries that are sitting outside this. However, if it does go through, I believe that the industries in those two countries will say, “Well, look, this is an access that we need”. At the moment, all the rest of us seem to be together and so if we can get the court system sorted it may be of great advantage to our people with their patents.

Q259 Chair: Earlier you referred to the report on patent thickets, which I think you said was to be published at the end of November. The Government also, in response to Hargreaves’ recommendation on design laws being changed, said a review would be put in place and announced by the end of the year. Where are we on that?

John Alty: We are in progress. We published some research on designs a little earlier in the autumn, which we’d already got in the pipeline, but specifically in response to Ian Hargreaves’ Review we put out a call for evidence on how well the design system was working. I think that that call for evidence is just about concluded in terms of the timetable for people to submit, and we will indeed be looking at that response in the run-up to Christmas. Absolutely we do think, at least prima facie, that there is a good case for simplifying the design system. There are UK rights, European rights, unregistered rights and registered rights.

Q260 Chair: Are we going to have it by the end of the year?

John Alty: Yes, our intention is to reach conclusions by the end of the year.
Q261 Paul Blomfield: I wonder if I could ask some questions about issues of enforcement. Minister, I guess you would agree that search engines need to be directing searches towards legitimate sites so that the paid-for, proper downloading sector can profit and compete effectively with pirating sites.

Baroness Wilcox: Yes, I want to make some broad views on enforcement in a minute, but maybe you would answer that first, Adrian.

Adrian Brazier: Indeed. IPO and DCMS, with Baroness Wilcox and Ed Vaizey in the lead, are looking at a number of ways in which we can tackle online infringement, in particular how we can facilitate industry-led solutions rather than waiting for the big stick of legislation, which does not always necessarily precisely hit the target. One of those areas is certainly engaging with search engines, which tends to mean, very largely, Google, to be perfectly honest with you. Certainly, rights holders have considerable concerns about the way in which search engines facilitate people finding illegitimate sites, which the consumer may well not know are illegitimate sites. Certainly, you can put in almost any particular search term; for example—perhaps it is relevant to this Committee—if you put in “M P3”, essentially the first page at least would show you MP3 converters and unfortunately would have nothing to do with the Palace of Westminster at all.

Search engines respond with a certain amount of hurt feelings, I think, that they are already working on a number of things here. They have certainly put a lot of effort into making sure that when rights holders notify them that there is something that needs to be taken down, they take stuff down. In examples such as YouTube it is extremely quick. They have worked on predictive text, but perhaps not as well as they might have done bearing in mind my previous example, and they are prepared to discuss how they might work to tackle the top 20, 30, 40 or 50 sites, which are causing most economic damage. Where they are continuing to be extremely resistant, certainly for the time being, is on making any radical change to their natural search algorithm, for which they do not see justification until other things have been explored. We actually have a meeting in 12 minutes’ time, which Ed Vaizey is hosting, where the main rights holder organisations, and Google and Bing, are meeting to start discussing how we might approach this.

It is probably worth just adding that there are other strings to this particular bow because Baroness Wilcox and Ed Vaizey have met together with credit card companies and payment facilitators such as PayPal, who are already working closely with the music industry and the City of London Police to identify those particularly serious sites: the ones that make no make no bones about the fact that they are there to make money from infringing copyright. They often present themselves extremely slickly and it is very difficult to tell that in fact they are infringing sites. One of the reasons why consumers might legitimately feel that the sites are kosher is that they can simply use their MasterCard, Visa or whatever it may be to pay. If there is a clear case to answer, and the City of London Police tend to agree that there is, then the credit card companies will withdraw those facilities. Not only does it cause the sites themselves a headache because it withdraws direct income, it also removes that appearance of legitimacy.

We have also been working with online advertising bodies to see if a similar sort of approach might be reached and, again, from the meeting that Ministers had with them they are very keen to work closely with us and industry to see if they can essentially attack those key sites of concern. I would guess—and this is perhaps pre-empting the meeting later this morning—that search engines will again wish to focus down on the small number of sites, almost certainly no more than 50-odd, which are causing a great deal of the economic damage. There might be work that can be done with them in that particular area.

Baroness Wilcox: If I can just add to this, Chairman, we really do IP enforcement well in this country; we do really. We get a lot of cases to court and we get a lot of wins. We have the Americans coming over to watch what it is we are doing and how we are doing it. We are really on top of this and it has been very good to work together across the two disciplines to see if we can get the industries themselves to actually form up as to how they can deal with this. Everywhere we can, obviously, that is what we would prefer to do.

Ed Quilty: I just wanted to say: if we had had this sort of conversation a year ago the question you might legitimately have asked is, “Aren’t you playing Whac-a-Mole?” You try and stop a site here and it pops up somewhere else. This approach of trying to throttle off the revenue to the site is actually international in sense because if the site cannot get the money it does not matter which country it is in.

Chair: Okay, I am conscious that we are running out of time.

Q262 Paul Blomfield: I just briefly on enforcement, I wondered whether the issue of major companies advertising on pirate sites is something on which we could take reasonably easy action to discourage those sites.

Adrian Brazier: Yes, that is so and I think the advertising industry is well aware of it. Very few of such companies wish to have their brands associated with infringing sites. Quite often, they either have material or their own trademarks that they are very keen themselves to protect. Yes, there is a lot to be done and we are suggesting that we need to look at this in terms of an industry-led initiative, certainly before looking at anything that might be more legislative.

Q263 Mr Ward: Just quickly: the Review acknowledged that “over the last decade the majority of productivity growth and job creation has come from innovation, primarily by small and young firms”. Minister, you were talking earlier on about people going around with things in their heads but no patents to cover them at all. There was a criticism made that there was no one from the small business sector on the panel. How do you respond to criticism that not enough weight was given by the Review to the concerns of small businesses?
Baroness Wilcox: First of all, when Professor Hargreaves was asked to do the work and, given the short timeframe that he was asked to do it in, he decided that rather than having a big Committee, which included everybody, he would not opt for that. He would gather with him a group of experts who could hear and take on board the evidence and work through the evidence, which is exactly how they got the SME evidence that they did. You can imagine the big pharmaceutical companies all expected that they personally should be on this Committee; everybody thought they should be on this Committee, so at the end of the day nobody was. He put together a group of people who he knew could get through the piece of work with him rather than just playing their own game. This was an advantage to SMEs, of course, who just have to stay running their businesses and cannot send people off to keep giving evidence. In that regard, I think Hargreaves was right.

We have actually had complaints from some of the companies that gave evidence to this Committee saying that Hargreaves was anti-large business and too pro-small business. There you are: that is how some people read it, but the Government, the Prime Minister and everybody is aware of the fact that the new businesses coming forward, particularly the engineering, technical, scientific—the sorts of things that are intellectual property—are the businesses that we need to help grow. We need to make it possible for them to access things like trademarks, patents, etc. We have to say that just about everything is geared towards it. I’m sorry if small businesses feel at this moment that they are not being helped. You will know that the banks are being spoken to firmly to make sure that they will lend. It is often difficult for these tech companies to describe to banks what it is they actually need the money for. Everywhere along the line we are trying to help the small businesses.

Q264 Mr Ward: Let me give you something more to look at, which is an argument that many different forms of advice are required. There is obviously the legal and regulatory advice, which is available through practitioners in abundance and to a high level of expertise. Then there is the commercial advice and it was the Forum of Private Businesses that suggested this one-stop shop, where all forms of information could be made available.

Baroness Wilcox: Business Link, of course, is—

Mr Ward: Gone.

Baroness Wilcox: It is gone in the form in which it was known, but it is going to continue to be there available as a signpost for people to be able to access.

John Alty: Just briefly: you are right. Indeed, that is what the Hargreaves Review found: that there was a gap in the market. You can go to the attorneys and get excellent advice.

Baroness Wilcox: Expensive.

John Alty: Yes, it can be quite expensive. We give a certain amount of advice and we put out information on our website that can help people. The challenge was: could we encourage the development of a market or a sector to give this commercial and basic IP advice. That is what we are now working on and thinking about. Quite recently, we have done one or two things we may be able to build on. For instance, one of the problems that small firms said was not only was there a lack of this sort of advice, but where it was available they did not really know whom to trust and who was reliable. We did work with the British Standards Institute to develop a British Standard covering commercial IP advice and that is quite new. It only came out at the beginning of this year, but we are now looking very much picking up that Hargreaves recommendation, to see whether we can encourage, either ourselves or by working with others—which is probably more likely—the development of that market in a better way.

Q265 Mr Ward: And is the buddy idea realistic?

John Alty: Yes. Again, you heard from Sir Robin Jacob about that. That is probably more likely—the idea of a small business or a specialist that is fine and you may even be paying for it, but you want a GP who can help you diagnose the problem.

Baroness Wilcox: A lot of it is of course education. We even have something called Cracking Ideas at the Intellectual Property Office, which is for children to come along with their good ideas. We had 9,000 apply last year and Wallace and Gromit gave the prices for something. We said we would do it during the autumn, and that is running out now.

John Alty: That is an IPO service and, again, we are constantly looking at what more we can do. Perhaps the most helpful way to finish this is to say that we have committed to bringing forward some proposals in the light of Hargreaves and we will be planning to do that pretty shortly. We said we would do it during the autumn, and that is running out now.

Q266 Mr Ward: Half under your breath, you mentioned how expensive the IP attorneys could be. I think it was Sir Robin who told us some of those are without a doubt the best in the world, but they are very expensive. Is there anything that can be done and is there enough competition there?

John Alty: That system works well when you know what you want to do and you know that you have something valuable worth investing in to get the returns. What does not work so well is when you are not quite sure what the value of what you have is and you do not really understand the IP system. That is the area that we want to focus on. We are not talking about trying to disrupt the attorney market; we are talking about whether we can find some other way prior to getting to a point where you know you need an attorney. One way that people have described this is the difference between a GP and a specialist. If you need a specialist that is fine and you may even be paying for it, but you want a GP who can help you diagnose the problem.

Baroness Wilcox: A lot of it is of course education. We even have something called Cracking Ideas at the Intellectual Property Office, which is for children to come along with their good ideas. We had 9,000 apply last year and Wallace and Gromit gave the prices for them coming up with these whiz-bang ideas. I would be very keen to see the organisations who represent small businesses—the Federation of Small Businesses, Chambers of Commerce, etc.—all understanding quite what it is to go forward for a patent, what it is to go forward for a trademark and...
making sure that schools educate children when they are about to leave to let them know what their possibilities are. We need people better informed on what it is they can do. I come from a small business background and usually you are all working very hard and you do not have time for all this. Very often, with a small business you are walking out the door with the most valuable thing in the place and you are doing nothing with it because it is your idea and it is in your head. We need to say to people that there is a safe way of taking this out of your head and putting it somewhere you can protect it.

I had an experience with my own medium-sized business. We thought we would do a new range of things; we decided on a name and we started to go forward and thought, "Oh, we mustn’t do that"—

Q267 Chair: Sorry to interrupt you, Minister, in full flow. I’m sure it’s fascinating.

Baroness Wilcox: Sorry, I got excited; it’s terrible. They are forever telling me, “Don’t get excited about this subject”. Sorry.

Chair: However, we really do have to bring proceedings to a close because we now have Questions in the House and Members will be involved. We do have a couple more questions, but they can be answered in written form, so we will send them to you. I thank you for your contribution. We have fleshed out a whole number of issues. We will look at the evidence in some detail and be coming forward with our recommendations fairly shortly. Thank you very much.

Baroness Wilcox: Thank you very much.
Written evidence

**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 million 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% 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, 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 research4 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 1,000 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.

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); and
   - aside from copyright, ethical considerations such as reuse of forms of traditional cultural expression5 also exist and should be part of any solution.

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
5 http://www.wipo.int/bl/en/folklore/
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:

<table>
<thead>
<tr>
<th>Proposed usage of digitised orphan work(s)</th>
<th>Quantity of works</th>
<th>To be published</th>
<th>Purpose for which work was produced</th>
<th>Proposed solution</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) An academic requests that a library supplies digitised copies of multiple copyright works to enable remote research and teaching.</td>
<td>Item by item clearance/ diligent search possible</td>
<td>N</td>
<td>Non Commercial (eg unpublished plays) Commercial (eg fanzines)</td>
<td>Copyright Exception Copyright Exception</td>
</tr>
<tr>
<td>(2) Local history society wishes to use maps and pamphlets as information resource on their website.</td>
<td>Item by item clearance/ diligent search possible</td>
<td>Y</td>
<td>Non Commercial (eg unpublished sketches by local resident) Commercial (eg published book from 1930s on local landmarks)</td>
<td>Special Governmental Licence Expanded Collective Licence</td>
</tr>
<tr>
<td>(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.</td>
<td>Multiple works—Item by item clearance not possible</td>
<td>Y</td>
<td>(a) Non Commercial (eg ethnomusicologists recordings) (b) Commercial (eg performers are subject to record company contracts)</td>
<td>Special Governmental Licence Expanded Collective Licence</td>
</tr>
<tr>
<td>Mass digitisation of out of commerce 20th century novels.</td>
<td>Multiple works—Item by item clearance not possible</td>
<td>Y</td>
<td>Commercial</td>
<td>Expanded Collective Licence</td>
</tr>
<tr>
<td>Mass digitisation by library/archive of works in different formats (magazines, letters, pamphlets, photos) relating to WW1 for educational resource.</td>
<td>Multiple works—Item by item clearance not possible</td>
<td>Y</td>
<td>Non Commercial (eg letters, drawings, brigade newsletters) Commercial (eg magazines)</td>
<td>Special Governmental Licence Expanded Collective Licence</td>
</tr>
<tr>
<td>Mass digitisation by library/archive of conference proceedings (so called “grey literature”) for research resource.</td>
<td>Multiple works—Item by item clearance not possible</td>
<td>Y</td>
<td>Non Commercial (eg research reports issued by charity/research institution)</td>
<td>Special Governmental Licence</td>
</tr>
<tr>
<td>Publisher wishes to commercially publish rare early 20th century novel which has been out of print for 60 years.</td>
<td>Item by item clearance/ diligent search possible</td>
<td>Y</td>
<td>Commercial</td>
<td>Expanded Collective Licence</td>
</tr>
<tr>
<td>Digitisation of historic newspapers by a commercial publisher for a pay per view service.</td>
<td>Multiple works—Item by item clearance not possible</td>
<td>Y</td>
<td>Commercial</td>
<td>Expanded Collective Licence</td>
</tr>
</tbody>
</table>

---

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.
<table>
<thead>
<tr>
<th>Proposed usage of digitised orphan work(s)</th>
<th>Quantity of works</th>
<th>To be published</th>
<th>Purpose for which work was produced</th>
<th>Proposed solution</th>
</tr>
</thead>
</table>
| Commercial use of an illustration.        | Item by item clearance/ diligent search possible | Y | Non Commercial (eg 1950s documentary photograph taken by unknown member of the public) | Special Governmental Licence
|                                           |                   |                | Commercial (eg modern professional photograph) | Extended Collective Licence |

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 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 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 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 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 10 in the United States.

---

9 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).
10 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.
11 http://www.europeana.eu/portal/aboutus.html
12 http://sounds.bl.uk/About.aspx
Example of successful use of this kind of licence include:

- Kunstindeks Danmark (Art Index Denmark)\textsuperscript{14} 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; and

- Danish sheet music index\textsuperscript{15}—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.\textsuperscript{16}

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.

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”\textsuperscript{17} 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\textsuperscript{18} 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:\textsuperscript{19}

- 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.\textsuperscript{20}
  (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;

\textsuperscript{14} https://www.kulturarv.dk/kid/Forside.do
\textsuperscript{16} Stratton, Barbara (2011)
\textsuperscript{17} http://intranet.bl.uk/newsevents/archive/2010/drivingukresearch.pdf
\textsuperscript{18} http://pressandpolicy.bl.uk/imagelibrary/downloadMedia.ashx?MediaDetailsID=563
\textsuperscript{19} cf CDPA paras 29, 38
\textsuperscript{20} 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.
(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 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 (eg AstraZeneca) and technology companies (eg 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; and
   — 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

Supplementary written evidence submitted by the British Library

TEXT AND DATA MINING

Text and data mining relates to two activities—one is the mining of facts that libraries and organisations have already purchased, while the other is mining publicly available factual information on the web. The bullet points below focus mainly on purchased information but not exclusively.

— By not permitting text and data mining, research is not happening that could be happening.

— Due to the vast number of publishers around the world, negotiating effective licensing terms for text and data mining is essentially an impossible task and is currently acting as a barrier to scientific and academic progress. For example there are over 6000 scientific publishers currently active and the British Library alone has over 260,000 journal titles in its collections. There are of course billions of websites. The largest single UK database of scientific material is UK PubMedCentral and none of the content from publishers, other than those that have been paid for by the research sector in advance in order to be published, are available for text and data mining (so-called “open access.”)

— Talking to the National Centre of Text Mining who have said that given the difficulty of negotiating licences, the vast array of publishers to approach, combined with academics not being lawyers, most scientists simply don’t start the process. Of course the process of data analysis takes place horizontally across a specific field of research and not in vertical silos of medical information produced by a specific publisher.

— American researchers and companies assert “fair use” in this area and Japan has introduced an exception for data analytics, recognising that the extraction of facts does not trade on the creative expression of a work.

— Text and data mining involves analysis by researchers of material that has already been purchased by their institution—for example UK universities spend over £250 million a year on acquisitions, mainly journals. Annual purchases by the NHS would also increase this figure significantly. An exception, to allow further usage of the material, will create greater justification for organisations to continue subscribing to content in a period of pressured budgets and rising prices. Universities and pharmaceuticals have been subscribing to electronic journals from the advent of e-publishing in the mid-1990s. Onward access to scientific material is central to a university or a pharmaceutical company’s own reputation and scientific standing and therefore they would not do anything to jeopardise this. It is important to draw a clear distinction in behaviours between the use of academic electronic resources by research institutions, universities, pharmaceutical companies, NHS etc and individuals who file share illegally online in this area.

— The intent of text and data mining is to extract the facts within text and datasets to progress scientific and cultural understanding, not to make copies and distribute the material in its original form. Text and data mining, by its very nature, is trying to find relationships and information between facts expressed across disciplines to material to which one has lawful access, and does not result in anything that is substitutable or bares any resemblance to the original published work. Copyright law is designed to protect creative expression, for example in a novel or a painting, and not prevent researchers extracting facts to progress science. The purpose of text and data mining is not the appreciation or utilisation of creative expression, but factual extraction and therefore the results of the process (no more than a hypotheses/proof of a relationship) should not accidentally be covered by copyright law.

— Text and Data mining will also allow research that is not currently happening, due to cost restrictions, to take place—through text mining, research can be conducted at a reduced cost as text can be searched rather than expensive laboratory experiments being set up.
Business and IP Support

The British Library Business & IP Centre supports innovators and entrepreneurs from that first spark of inspiration to successfully launching and developing a new business.

Entrepreneurs’ views on the IP process

In February 2011 the British Library ran an online survey to ask users of its Business & IP Centre their opinions of the IP process, innovation and their plans to grow. The survey showed that the biggest barriers that SMEs face in protecting and exploiting their IP are around finding affordable services, knowing where to go for advice and support, and the feeling that the IP system favours large companies.

What issues do you have, if any, in accessing intellectual property support and services generally?

Respondents were also asked what improvements or new services they would like to see in the future. They were most interested in having more affordable support and advice, a faster and simpler process to register IP and a unified patent application across the world, or at least across EU markets.

Which of the following improvements/new services, if any, would you like to see?
How the British Library Business & IP Centre has helped entrepreneurs with their IP

The online survey showed that over a third of respondents had used the British Library’s IP-related services. The chart below shows the Centre and its services have made a real difference in helping people to understand about IP, shown them how to do their own searches on IP and has saved them time and money.

What can be done to overcome barriers?

Improving upon such services across the country and online would be a major step in supporting innovation in the UK. Eg the British Library has developed a number of IP learning tools that could be useful for an online learning environment. As the Business & IP Centre survey shows, start-ups and SMEs rated affordable support and advice services to be the most needed change to the current SME landscape. The Centre does this by providing free access to its unrivalled business and intellectual property (IP) collections, workshops, networking events and 1:1 advice sessions. Since March 2006, the Business & IP Centre has welcomed over 250,000 people through its doors.

We are unique in that—as the national library of the UK along with the Intellectual Property Office—we hold the largest collection of published business and intellectual property information in the UK (if not the world). We make available thousands of market research reports, which gives small businesses access to the same resources as those within a major multinational company. We make the link between IP and business information so that we can support users through the whole innovation cycle—from idea to market.

November 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”. 22 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 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”. 22 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.” 23

11. In particular we are concerned at the manner in which the Report dismisses 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 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.

---

22. p. 20 Hargreaves Review of Intellectual Property
23. p. 18 Hargreaves Review of Intellectual Property
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).25 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.”26

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 Member 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.

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.27 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”.28 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.29 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.30

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
Business, Innovation and Skills Committee: Evidence

Supplementary 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 achieved, many businesses feel that a large company can still get their idea anyway.

Case Study 3

A chemical manufacturer has various utility patents but 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—we hope 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. The 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 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 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.

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&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&D Tax Relief. A Deloitte Survey, Entrepreneurship UK: 2011–12—Is collaboration the key to success? 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 three 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 eg 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.

9 November 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 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 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 nature 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,31 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.

**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) 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 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.

- 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 of the Digital Libraries Initiative.32

— 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,33 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.

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

32 http://ec.europa.eu/information_society/activities/digital_libraries/other_groups/hleg/meetings/index_en.htm
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 have to come at the expense of creators’ well-being or their right to remuneration for their work.

— The Government should follow through on its 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.

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” or the 2009 Dutch government funded IVIR study on the Economic and cultural side effects of file-sharing on music, film and games.”

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/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.”

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, the Chief Executive of Featured Artists’ Coalition Mark Kelly, Chair of the Adelphi Charter John Howkins, and Director of Government Relations for Ericsson Group Rene Summer. (The full set of contributions is available on the Open Rights Group website). 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 vast 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 Chamillionaire 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” 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.41 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
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 £611 million 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. At the lower end of the market PRS for Music offers automatic one click licences through its website.

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 £10-20 million 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. 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 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 across 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

34 Referring comments made by a technology start up company at a Techhub seminar which was conducted as part of the review process.
35 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.
36 http://globalrepertoiredatabase.com/index.html
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 4,000 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 £33.6 million 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. 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 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 £4.6 billion of revenue, with £3.1 billion derived from the sales of books and £1.5 billion 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 three 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 two 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'être 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 (eg 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 the miners’ systems. Thus copyright content has to be reproduced and repurposed; and these acts require the rightsholder’s permission.

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 (ie 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 (ie 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 maître 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. Moreover, 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 erode 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 be 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 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;38

— The International Covenant on Economic, Social and Cultural Rights, Article 15;39

— The Charter of Fundamental Rights of the European Union, Article 17;40

— Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Article 1;41

— The European Convention on Human Rights, Article 1 of the First Protocol;42 and

— Article 1 of the First Protocol of the Human Rights Act 1998.43

2. The Human Rights Act 199844 restrains the Government from introducing legislation that is not compliant with human rights legislation, and indeed reading Section 645 it may be unlawful for civil servants even to draw up such legislation.

3. When asked at a pre-consultation meeting on 23 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”,46 and proportionate.47

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.48

6. All UK legislation must comply with human rights legislation.


39 http://www2.ohchr.org/english/law/cescr.htm#art15
42 http://www.hri.org/docs/ECHR50.html#1
43 http://www.legislation.gov.uk/ukpga/1998/42/schedule/1/part/II/chapter/1
46 http://www.legislation.gov.uk/ukpga/1998/42/schedule/1/part/II/chapter/1
47 http://regulatorylaw.co.uk/Proportionality.html
48 http://regulatorylaw.co.uk/Proportionality.html
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; legalising the digitisation of all works for preservation and cultural access (non-commercial use of orphan works can stimulate economic growth), 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 revocable 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
— 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, 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. 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:
— WTO TRIPS.
— The EU Copyright Directive 2001/29/EC.

16. Any exceptions to copyright must pass the Three-Step Test incorporated into the Berne Convention and WTO TRIPS.

17. The fundamental purpose of copyright is not, as some assert, 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.
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 obligate their signatories to implement their 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.\(^{60}\)

20. In the Copyright, Designs and Patents Act 1988 four distinct Moral Rights are recognised:\(^{61}\)
   - 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.\(^{62}\) 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.\(^{63,64}\) 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.

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.\(^{65}\)

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.

---

60 http://www.wipo.int/treaties/en/lp/berne/trtdocs_wc001.html#P123_20726
65 Stated by Matthew Cope of the Intellectual Property Office at a pre-consultation meeting held on 23 August 2011 and attended by Stop43, amongst others
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. 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. 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 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, 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, 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 and human rights law.

39. WIPO, 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 and the Nordic Kopinor 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 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 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

66 http://en.wikipedia.org/wiki/PTC_Information_Interchange_Model
68 http://www.stop43.org.uk/proposals/preview/preview/preview/evidence.html#metadataStrippingByTheBBC
69 http://www.wipo.int/trademarks/en/p/berne/ttdocx_w001.html
70 http://www.wipo.int/treaties/en/p/berne/ttdocs_w001.html#140.25350 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.
72 http://www.kopinor.no/en/home
73 http://www.bsac.uk.com/files/orphan%20works%20paper%20-%20june%202011%20_2_.pdf
projects” by the Cultural Heritage Sector, and “innovative Internet startup companies” to offer “new services” to consumers.

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 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.

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% 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% figure is also at the upper 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, 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”.

“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 five commercial websites of which four 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.”

“I 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

75 http://www.ipo.gov.uk/ipreview-finalreport.pdf
76 http://www.ipo.gov.uk/ipreview-doc-ee.pdf
77 http://www.epuk.org/printer-friendly.html
and now everyone is using the pics......do I spend time chasing the southern european blagger 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.”

“...there isn’t enough advertising money to pay arms-length licensing fees for all that content—and...”

“... So if we could just find a way to get these Zucks to create the content for free and then we sell it!”

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!”

Who would do this? Maybe those who [Facebook founder] Mark Zuckerberg apocryphally 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!”

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.

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!”


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...”

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. 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.

82 http://www.research.salford.ac.uk/page/crime_security Unlicensed use of image in academic report on human rights; will probably be removed shortly
83 http://www.stop43.org.uk/proposals/preview/preview/preview/b1_scenarios.html
84 http://creativecommons.org/
85 http://en.wikipedia.org/wiki/Lawrence_Lessig
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\(^92\) that overstate its case via selective and partial use of statistics, many of them wildly exaggerated, 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:\(^93\)

> “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,\(^94\) member of JISC Working Group on Intellectual Property Rights,\(^95\) commenting on “Will Gompertz” blog, 16 May 2011\(^96\)

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.\(^97\)

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\(^98\) 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.”\(^99\) 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.\(^100\) 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\(^101\) and Section 6\(^102\) make it clear that copyright infringement (a.k.a. “piracy”) is appropriation, and therefore theft.

60. The recent ruling in 20C Fox vs. BT\(^103\) 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 licensing 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.

---

\(^92\) http://www.jisc.ac.uk/media/documents/publications/infromthecoldv1.pdf
\(^94\) http://www.naomikorn.com/about.htm
\(^95\) http://www.jisc.ac.uk/aboutus/howjiscworks/committees/workinggroups.aspx
\(^96\) http://www.bbc.co.uk/newssentertainment-arts-13388167?postid=108826263\&comment_108826263
\(^97\) http://www.jisc.ac.uk/media/documents/projects/pr%20newsletter%202011.doc
\(^98\) http://www.ipo.gov.uk/preview-dbc-ee.pdf
\(^99\) http://www.theregister.co.uk/2011/08/24/ipo_economic_justification_of_hargreaves_wtf/
\(^100\) http://ec.europa.eu/internal_market/copyright/docs/orphan-works/proposal_en.pdf
\(^101\) http://www.legislation.gov.uk/ukpga/1968/60/section/3
\(^102\) http://www.legislation.gov.uk/ukpga/1968/60/section/6
\(^103\) http://news.bbc.co.uk/1/shared/sps/pdf/26_07_11_bt_newzbin_ruling.pdf
62. The Privacy and Exclusivity Problems: Can a photograph legally be published or used commercially? In many cases it cannot.104

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.

63. The "Market Rate" Myth: What is an appropriate licence fee for commercial use? For an orphan work there is no way to tell. There is certainly no such thing as a "market rate" for an orphan work.105

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.

64. "Diligent Search": There is no reliable automated search system available to carry out a "diligent search" for graphic works such as photographs.106

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 a 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.107

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?108

---

104 http://www.stop43.org.uk/pages/news/files/2c56f3d59e31a66845f7c210854973-20.php
105 http://www.stop43.org.uk/pages/news/files/86e699e8f8b2c392999b02f56a123-26.php
106 http://www.stop43.org.uk/pages/news/files/87af6f9a6b2c1f66e3d0d508c0be2c-26.php
108 http://www.stop43.org.uk/pages/news/files/30e7c6c6a8c5a3b56e38e045f11eb7f0-44.php
70. Lack of Legal Certainty: for all of the reasons described above there can be no legal certainty to the use of an orphan work. This despite the fact that along with free use of content, legal certainty is the overriding priority of commercial orphan works enthusiasts including the Cultural Heritage Sector and “entrepreneurial” Internet companies such as Google.

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.109

72. Under the auspices of the British Copyright Council the community of photograhic creators has produced a list of six caveats prerequisite to any orphan works licensing scheme.110 Stop43 are signatory to it.

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,111 one of the IP rights guaranteed as a minimum112 by our membership of the Berne Union.113

75. A 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 melody (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.114 In fact they won’t: the CDPA 1988 already allows copying for preservation purposes of most kinds of media.115 As we have said earlier on the subject of Orphan Works, and as JISC advisor Professor Charles Oppenheim advocates,116...
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 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):[^118]

> 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.[^119]

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.[^120] 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 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.立法 for the creation of a Digital Rights Registry/Digital Copyright Exchange;

93.立法 for the creation of a revokable Statutory Licence enabling the Digital Rights Registry/Digital Copyright Exchange to make available orphan works to the general public for their Cultural Use;

[^119]: http://www.stop43.org.uk/proposals/preview/preview/preview/markets.html
[^120]: http://www.stop43.org.uk/pages/news_and_resources_files/fb435cc00d81a126/89b3d95e8e2a-104.php
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.

5 September 2011

Supplementary written evidence submitted by Stop 43

Executive Summary
This submission should be read in conjunction with Stop43’s primary submission to the Committee.

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 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 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. 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%. 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 that it “estimates that well over 40% 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. Stop thinking 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. 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; and
     - 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.

15. On average it took four 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.”

---

122 http://www.economist.com/node/18744177
123 http://www.guardian.co.uk/commentisfree/2011/aug/29/academic-publishers-murdoch-socialist
124 http://www.timeshighereducation.co.uk/story.asp?storycode=417576
127 http://pressandpolicy.bl.uk/imagelibrary/downloadMedia.ashx?MediaDetailsID=1197
18. This is the Copyright screen of the British Library’s iPad app. 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.


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—indepedent 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); and
   - 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,130 which has comprehensively been discredited not only by UK Music in their submission to this Committee,131 but also Sir Robin Jacob in his oral evidence,132 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.

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 20 years.

35. Japan: scheme running since 1970. Only 82 licenses have been granted since 1972 for recording, publishing (print and digital) and ringtones.133 Of the 82, seven applications were made by the National Diet [Parliament] Library for their Digital Library.134

130 http://www.ipo.gov.uk/ipreview-doc-ee.pdf
131 http://www.publications.parliament.uk/pa/cm201012/cmselect/cmbis/writev/1498/m68.htm
132 http://www.publications.parliament.uk/pa/cm201012/cmselect/cmbis/uc1498-ii/uc149801.htm
133 http://www.bunka.go.jp/1tyosaku/ci-i/results_past.html
36. New rules came into force last year \(^{135}\) allowing applicants to make use of orphans while their applications are pending.\(^{136}\) An application must be advertised. At the time of writing, only three advertisements for orphan work usage licences have been published \(^{137}\) (link to translation).\(^{138}\)

37. Rather alarmingly, there appears to be no straightforward way for rights-holders to 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 1,000 works... \(^{139}\)

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 effectivenss.— “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\(^{140}\)

40. This web page\(^{141}\) 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 BSA C Orphan Works paper Anneeke D.\(^{142}\) 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)\(^{143}\)

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), A pril 2005\(^{144}\)

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 literary works (including works of fine art within such literary works) for internal purposes;
— archival and library use to provide works to the public; and

\(^{135}\) http://www.cric.or.jp/cric_en/cjic12_2.html\#c12_2+58

\(^{136}\) 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.
6. On issuing a licence the Commissioner must publish a notice in the Official Gazette.
7. Article 68 appears to authorise a compulsory licensing scheme for previously broadcast works.
8. 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.

\(^{137}\) http://www.cric.or.jp/cic_search/c_search2.html


\(^{139}\) Hungary appears to be a unique situation: ...”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 profits 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.


\(^{141}\) http://epub.hpo.hu/e-kutatas/clang=EN

\(^{142}\) http://www.bsac.uk.com/files/orphan%20work%20paper%20-%20June%202011%20_2_.pdf


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 is a pilot, and limited in scope. It has only been running since 2009. It terminates at the end of this year.

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, and the different usage and value chains characteristic of each medium.

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 500 kilobyte 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 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 Digitisation and Making Available of Out-of-Commerce Work 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 Information/Society Directive, clause 5 of which states:

59. (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.

---

147 http://www.stop43.org.uk/orphan_works/orphan_works_problems.html
148 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.
149 http://www.ebizmba.com/articles/news-websites
150 http://ec.europa.eu/internal_market/copyright/docs/copyright-infso/20110920-mou_en.pdf
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; and
— 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 [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

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.

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 monopolies. 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 ebooks, 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 Q 176: “...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).152

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.

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 Q 161, 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 296ZG153 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)154, 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.

152 http://www.wipo.int/treaties/en/ip/berne/trtdocs_w001.html#P109_16834
154 http://www.copyright.gov/title17/92chap12.html#1202
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 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 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, 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 (Federation 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. 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:
- 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, 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 and Google Image Search.

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, copied the image to our computer’s Desktop and opened it in Phase One MediaPro (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.

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
- provides a selection of alternative images which might be functionally equivalent to the first image for the intending user’s purpose.

158 http://www.stop43.org.uk/proposals/i/preview/i/preview/nca.html
159 http://www.picscout.com/imageExchange/
160 http://images.google.co.uk/imghp?hl=en&tab=wi
161 http://www.superstock.com/preview.asp?image=1848r-337487
163 http://www.phaseone.com/media-pro
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](poster.png)

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](http://www.stop43.org.uk)