BRITISH COPYRIGHT COUNCIL
response to HM Government Consultation on Copyright

The British Copyright Council represents those who create, hold interests or manage rights in literary, dramatic, musical and artistic works, performances, films, sound recordings, broadcasts and other material in which there are rights of copyright and related rights.

Our members include professional associations, industry bodies and trade unions which together represent hundreds of thousands of authors, creators, performers, publishers and producers *(see attached list)*. These right holders include many individual freelancers, sole traders and SMEs as well as larger corporations within the creative industries. Our members also include collecting societies which represent right holders and which enable access to works of creativity.

The creative industries are second only to the financial sector in terms of their contribution to UK GDP and it is a growing contribution. As providers of content, the creative industries are an essential driver for the development of the digital economy with copyright providing a system by which creative content can be accessed and paid for and which recognises and rewards creativity and encourages appropriate remuneration for creators and performers. Anything else risks a reduction in the quality and quantity of new creative output and, over time, will diminish the value of the creative industries.

Most creators and performers operate on a freelance basis i.e. as individual small businesses. The advent of digital media platforms and breakdown of traditional media structures is likely to expand that freelance pool even further with websites, blogs, Apps, providing new and innovative routes for those individuals to get their content direct to market. They will only succeed if supported by a strong copyright law. It is the work of these authors and performers as creative individuals which enables and supports the growth which is at the heart of Government proposals in the consultation document.

The incentives which copyright offers are not merely economic, but also guarantee the author's rights of attribution and the integrity of their work, and sustain the objective of producing creative material to the benefit of the public as a whole. Para.7.87 of the consultation paper states that "The Government is committed to maintaining the incentives that copyright offers to authors and publishers…." Disappointingly, there are few other references to authors.

BCC Approach to this Consultation Response

- The BCCs response is a high level one, that is, we leave it to our members to provide detailed responses on technical and practical issues arising from this consultation.
- The BCC has chosen to respond only to those questions where it feels it can contribute to IPOs legislative approach/thinking.
- The BCCs response makes no attempt to contribute hard evidence. Our members will contribute such evidence where it is appropriate.

Preliminary Comments

- **Change of philosophical approach to copyright and related rights**

This consultation indicates a change in Government's philosophy towards copyright and related rights. Copyright and related rights are property rights and it is for the author, performer or other right holder to decide whether or not to approve use of their work and the cost of that use. There is no "right" to access such works.

Of course creators and performers also see themselves as users of copyright material and so recognise the need for a fair and balanced approach to the provision of access to works while desiring the recognition and fair reward from making their works publicly available which copyright makes possible.

That balance has worked well, but now, from a position where the copyright exceptions were simply a defence to a claim for infringement, we are in danger of moving towards a different approach, that is, one where anyone has an absolute right to use the work or performance sometimes subject to there being a payment mechanism in place, but often without. Added to this, Government is now considering a significant increase to the number of payment-free exceptions.

This unjustified ideological shift is most apparent in relation to the proposed changes to educational exceptions even though there are already successful licensing structures in place. While the Hargreaves Review said "Government should firmly resist over-regulation of activities which do not prejudice the central objective of copyright, namely the provision of incentives to creators" the Government instead suggests that these could be swept away completely, to be replaced by exceptions, unless authors and performers can provide evidence that the revenue resulting from such licences will help them to continue creating (Q89 in the Consultation and at 7.9 of the consultation paper).

We understand that the many of the BCCs members will supply such evidence in their own responses, but it is unacceptable that any part of our creative industries, should be put to proof to counter a proposed change, where no evidence of the need for that change has been produced.

- **IPO Evidence Base**

This change of policy approach has resulted in a series of proposals that are in many cases, based on no evidence, or at best on incomplete or insufficient evidence.

The BCC's members have been asked repeatedly over the past few years to provide evidence in support of copyright and related rights and they have done so, most recently in industry responses to the 2011 Hargreaves Review and to the 2010 BIS Digital and Creative Industries Growth Review. That evidence doesnot appear to have been taken into account.

- **Digital Innovation and Economic Growth**

One of the major concerns raised in the Hargreaves Review is that copyright may present a barrier to economic growth. The Hargreaves Review has given some weight to the assertions by new technology companies, such as Google and Facebook, that copyright in the UK (amongst other places) is a barrier to growth and that it would not have been possible to set up a business such as theirs in the UK, directly as a result of restrictive copyright laws.

Despite these allegedly restrictive copyright laws, both Google and Facebook have built very substantial businesses in the UK and the rest of Europe. When considering the contribution of these businesses to the UK economy, it is worth also looking at the tax contribution made by companies such as Google and Facebook to the UK Treasury. According to a recent article in The Sunday Times (12 February 2012 - Business Section - "The Anti-Social Network" by Simon Duke), both Google and Facebook use complex tax structures involving funnelling profits through Ireland, which is a low tax regime. According to The Sunday Times article, Google already saves an estimated $1billion a year in tax by using these tax structures. The article goes on to state that in 2010 Google paid just £1.2 million in British corporation tax, although it generated about £2.2 billion in sales in the UK, which is its largest market after the USA. The article reports that Facebook is adopting similar tax structures.

What these figures show is that both Google and Facebook are operating extremely successful businesses in the UK, despite the UK's copyright laws. Both organisations have put or are putting in place tax structures which will ensure that the UK receives very little tax from revenue generated in the UK. A further effect of the tax structures is that the main beneficiaries of additional employment by Google and Facebook are in places such as Ireland, rather than the UK. In this connection, it is worth noting that Ireland has very similar copyright laws to the UK and that has not deterred Facebook or Google in the least, which suggests that the decision by those companies about where to locate has more to do with tax and other financial considerations than copyright. We would like UK Government to concentrate on providing incentives to make the UK a more attractive place to do business rather than damaging those businesses already doing business in the UK.

It is not clear how to reconcile this with the Government's recent reaction to Barclays Bank's tax avoidance structures, which were roundly criticised and summarily outlawed retrospectively by the UK Government.

By way of contrast, the very successful UK copyright industries which are based in the UK generate substantial amounts of employment, pay substantial UK taxes and contribute very significantly to UK GDP. It is extremely counter-productive to weaken the copyright on which these industries depend.

- **Assumption that the cost to users is a loss to UK economy**

The Impact Assessments associated with the consultation paper also assume the application of costs, for example, the cost of a licence charged to digital developers, without acknowledging that this is also a crucial part of the income of creators and as much a plus to the economy as it is a cost to consumers.

We disagree strongly with the assessment of where the “value” lies in the Impact Assessments. Attaching value to something that takes account only of the potential cost or benefit to users and does not allow for its contribution to the public interest, to creativity,

culture and industry is an approach which is fundamentally flawed. For example, in the retail sector, Government does not measure every retail sale as a cost to the shopper, or every sale made by retailers as damaging the UK economy, in fact it interprets it quite differently and interprets consumer spend as a positive indicator. The cost of rights to the user, whether consumer or business to business, is income for the creative economy, an increase in GDP and an asset to UK plc.

The UKs creative industries are major contributors to our economy, our creative content is exported globally and our creative industries have a global reputation. This should be the pre-eminent value in any review, particularly one with the goals of increasing innovation and adding growth to the UK economy.

To this we would add that many of the claims of growth which will allegedly follow the introduction of broader exceptions rely on thin if not on non-existent evidence.

- **Removing choice for right holders results in market interference**

The consultation repeatedly puts emphasis around the cost of rights. Anything touching on the cost of rights, rather than the cost of administering rights could be interpreted as interference with the market and surely this is not Government's intention. This issue also arose in the Hargreaves hypothesis for the Digital Copyright Exchange.

- **Creative content to subsidise the development of the digital market**

While we acknowledge the need for "fine tuning" of the copyright system, the consultation promotes the misconception that creators and creative industries are causing a "log jam" with the result that the consultation makes repeated recommendations which will result in creative content subsidising digital content users. Surely, effort would be better placed on improving protection for the legitimate rights and interests of creators of that content, upon whom UK growth more realistically depends. This misconception is likely to lead to a transfer of wealth from the content creating industries (in which the UK has a large stake) to companies trading as digital communications service operators (in which the UK stake is much smaller).

- **Damage to existing licensing schemes and effect on creators, performers and industries**

One of our members' biggest strengths is that they are good at finding solutions including creative solutions to licensing both individually and collectively. On the collective front, the result has been a range of licensing schemes which take account of the needs of creators, performers, relevant industries and end users. We believe that such flexible licensing, based on long experience of user needs, is the key to access as well as being key to the effective development of the creative industries.

- **Contradictions and inconsistencies between proposals/questions**

When considered as a whole the proposals outlined in the consultation paper along with Government's preferred option in each case will have a huge impact on copyright law in the

UK. Dividing the consultation neatly into chapters has resulted in potential contradictions arising. For example, while Government recognises the increasing need for collective licensing of rights in certain areas and the fact that it has already provided a practical solution in others, the consultation proposes the removal of some collectively administered rights to be replaced with exceptions to copyright.

The format of the consultation has also resulted in the omission of, and little opportunity to address in any detail, the overarching responsibilities and high-level principles, such as those outlined in these Preliminary Comments.

COPYRIGHT LICENSING

The BCC values the pre-eminence of exclusive rights and believes that where licensing arrangements are already in place and work well, they should not be interfered with. This is not simply a matter of money – creators have important moral rights in respect of their works as well, preventing lack of fair attribution and derogatory treatment.

There is no "one size fits all" solution for dealing with the exploitation and protection of digitised works. Different sectors of the creative industries will respond in different ways according to a range of factors.

The BCC supports the principle of collective management and collective licensing of works where appropriate as it provides a straightforward method for accessing vast repertoires of works for large numbers of individuals. Such schemes ensure a balanced return for different right holders and exemplify the necessary balance between access and reward.

Rather than developing yet more exceptions to copyright, which will introduce yet more complexity and may deprive creators of remuneration, policymakers should rather concentrate on licensing mechanisms and effective remuneration

ORPHAN WORKS

The British Copyright Council supports a regulated approach to the licensing of orphan works and our proposal for orphan works licensing (referred to above) provides a practical and workable solution.

The British Copyright Council supports due diligence searches as a prerequisite to the implementation of any scheme for licensing orphan works.

Questions 1 to 21 of the consultation include many of the questions originally raised by Professor Hargreaves and to which we have already replied. The British Copyright Council's own proposal for the licensing of orphan works, which IPO has seen, also provides answers to a number of the consultation questions. The BCC proposal is limited to orphan works licensing and does not propose licensing of all categories of non-member works.

Before turning to the options outlined by IPO and before responding to some of the points covered in the questions, the BCC wishes to highlight two concerns. They are:-

- Issues around orphan works licensing cannot be considered without cross-referencing to the questions on extended collective licensing, on codes of conduct or without more knowledge about the form which the Digital Copyright Exchange will take, should it go forward. They also cannot be considered in isolation from any attempt by the UK Government to sweep away the right to license in the first place.
- As stated in our preliminary points, the Impact Assessment does not provide realistic costs or benefits, nor does it attach them in a balanced or proportionate way between users and the creative industries. We comment on this below.

In relation to the costs and benefits of creating a system enabling the use of individual orphan works alone (Q1) we have the following comments:-

- The financial benefit from the use of orphan works as outlined in the Impact Assessment appears to accrue 100% to the collection, i.e. as a gross figure. Nowhere in the Impact Assessment is the cost of acquiring the licence to use the orphan works mentioned, nor does it appear to have been deducted from any of the figures provided;
- The revenues from the licence are not listed as a benefit to revenant right holders or to the creative economy;
- There is no cost to users for accessing the "registry" (though it is acknowledged that there might be such a cost);
- Costs to collections are based on estimates of current time spent on rights clearance multiplied by labour costs but this must also incorporate time spent on works with known authors as well as on works which turn out to be orphan; "evidence" based on a number of hours spent to clear a single permission does not represent real life – most rights and permissions deal perfectly well with multiple permissions all the time;
- The cost of setting up and running the "registry" appears to have been apportioned wholly to orphan works, despite the fact that if the "registry" is the DCE then it is also intended to provide other services;
- The set up costs do not take account of set up costs for other authorised bodies such as collective management organisations which will need to build in costs for advertising for and checking on revenant right holders;
- No cost has been allocated for setting up an orphan works licensing scheme and then amending it to take account of the UK implementation of a Directive at European level;
- We do not understand how the likely benefit of creating new products and services using orphan works (estimated at an average of £53m to £88m p.a. for ten years) has been estimated as the cost of licences for such uses (both commercial and non-commercial) cannot be ascertained without more precise information on the type of use to be made of the individual works involved.

Like IPO, the BCC would also be interested in a clear, evidence based answer to the question of what it is that users need and want to do with orphan works (Q2). The BCC and its members have repeatedly asked for this information. As right holders it is difficult for us to better facilitate orphan works licensing when we have not been informed of the use to which such works will be put. When the intended uses are made clear, they naturally affect licence terms (and, indeed, the willingness to license at all).

It is the BCCs view that no licenses should be granted in respect of an unpublished work or performance (Q6).

The BCC would deplore any attempt to reduce term of copyright retrospectively, particularly where the only justification appears to be user convenience (Q8).

We have outlined our views on due diligence searches before (Q12). Due diligence search criteria have been put forward by a High Level Working Group under the auspices of the European Commission (DG Information Society). These criteria have been agreed by right holders such as collecting societies, as well as by users such as libraries. We agree with the Memorandum of Understanding and the Guidelines on due diligence search, subject to any search conducted being fully documented and carried out within a reasonable time frame. Due diligent searches cannot be dispensed with (Q14.)

There may be some merit in the authorising body offering a service to conduct diligent searches but the question itself is not clear (Q13). Does it refer to authorised collective management organisations offering orphan works licences, or to the Government itself. It may be that collective management organisations will wish to offer this service, since they already manage much of the rights data needed, but this would be a commercial decision for them.

Market rate remuneration for the use of orphan works i.e. charging the same rate that would be charged for a work of known authorship in the same circumstances, is appropriate in all circumstances (Q16 and 17).

The BCC favours an upfront payment system (Q18). Any other system constitutes a financial incentive to the user to employ orphan rather than identifiable works.

The BCC proposal recommends that where no right holder emerges, the collecting society holds revenue for an agreed period of time, after which it is dealt with in accordance with agreed rules for the benefit of the creative/cultural community, or perhaps to help any Digital Copyright Exchange in systematically restoring orphan works to "ex-orphan works" altogether, which would be an obvious continuing public benefit.

All schemes and licenses must include rules for the treatment of revenant right owners. Where a revenant right holder emerges, the collecting society pays over the licence fee and licence terms are confirmed or renegotiated.

By the very fact that the work concerned is an orphan work (Q19), it is often not possible to attribute the work to an author, although it may be if the author is simply not contactable. Works should perhaps be attributed to the licensing body responsible for authorising the work's orphan status which would also assist revenant authors.

Protection from derogatory treatment for the owners of moral rights should be a condition of any orphan works licence (Q20).

Regarding duration of the authorisation, the user should only be able to do what they have been licensed to do and only for as long as they have been licensed to do it (Q21).

OPTIONS

The British Copyright Council's proposal for licensing orphan works is based on the UK's established framework for collective management of rights. It is that:-

(a) where collective management (i.e. an authorised licensing body) is available regarding the relevant rights in works or performances of the same type as the orphan material concerned, a licence would be issued by the relevant collecting society;

and

(b) if no licensing body administers rights of the category involved in the desired use, an application may be made to the Copyright Tribunal in line with provisions already established in UK law.

Both the collective management of orphan works and a role for the Copyright Tribunal are referred to in the Impact Assessment, so the BCC assumes that its proposal can work in the context of Option 1.

However, the BCC finds the explanations of how the role of the Digital Copyright Exchange, or "registry" will interface with collective management of orphan works confusing, since any credible Copyright Exchange cannot operate without the rights data which collective licensing bodies already manage, and any threat to the right to license will only serve to diminish this. We hope that this will be addressed at a later stage as part of the "sub-options".

For the purpose of responding to this consultation we have assumed that the Digital Copyright Exchange could have a role in (a) of the BCC's proposal by providing signposting to the authorised licensing body, or under (b) where the Copyright Tribunal would have a function in establishing fees and terms where no licensing body existed to cover the relevant rights or works.

If this is what is being suggested in the Impact Assessment then the BCC supports Option 1, but only on that basis.

If, however, the suggestion is that the DCE as "registry" would take on the role of setting fees and terms, or in any way licensing orphan works generally (rather than supporting the Copyright Tribunal for those cases where no licensing body exists) or, if the proposal allows "self-licensing" by users, in any way, then the BCC does not support Option 1 and would support Option 0 instead.

EXTENDED COLLECTIVE LICENSING

The voluntary nature of collective rights management in the UK has resulted in a system whereby different solutions for different right holders and their markets have developed. This development reflects the specific right holders involved, the rights managed (including differences between primary and secondary rights) and the licences offered which are in

turn the result of differing business models which have emerged for each sector of the creative industries.

Some collecting societies have operated *de facto* licensing schemes with the approval of relevant right owners for a number of years for clearly defined secondary uses. The BCC welcomes, in principle, a legislative underpinning to extended collective licensing, in particular as a solution to the problems surrounding CDPA S.107A. However, caution needs to be exercised in the implementation of such a scheme, and each licence would need to cover similarly clearly defined use, ensuring that right owners remain willing to place their trust in collective management. If this trust were undermined it could damage Government's goal of a quicker easier rights clearance system.

The BCC recognises that there may be a use for some form of extended collective licensing, for example, for orphan works licensing, or for certain forms of mass clearance (where it is supported by right holders as is the case for certain non-statutory schemes already offered in the UK). However, it should not become a cheap solution developed merely to enable mass digitisation of works by bodies which argue it is uneconomic to deal with clearance of bundles of identifiable and orphan works and so just want an ability to "get on with it", or for those commercial operations which suggest there is a need for special rules for large organisations anxious to save on costs.

Whilst limited extended collective licensing mechanism has been in place in Nordic countries for some time, there is no single extended collective licensing system in place across those countries. Each country has developed its system in line with its legislation, its right holders and the needs of its users. Further investigation is needed to determine which elements of these systems the UK would find most useful and, indeed, whether they could be incorporated into UK legislation.

Codes of conduct should be a pre-requisite for any collective management organisations seeking certification to operate extended collective licensing schemes. The development of orphan works licensing under such a system, must first take account of the conditions and safeguards which right holders will expect from an orphan works licensing scheme. As stated in our comments on orphan works, the BCC orphan works proposal does not extend to licensing of all categories of non-member works.

OPTIONS

The BCC does not have a preferred option, as while recognising that Option 2 may work for some of our members it will not suit the needs of all.

CODES OF CONDUCT FOR COLLECTING SOCIETIES

The BCC supports the value of voluntary collective licensing, that is, a system based on the freedom of right holders to determine whether to exercise their rights individually or collectively. Our members recognise the value of collective management of rights and collective licensing of those rights, in situations where many right holders need to license many users. Royalties paid to right holders from collective licensing support investment in new creativity. Collective management of rights has also delivered rights management

systems and databases providing accurate information about works and rights owners linked to effective licensing and distribution systems.

Collective Management Organisations (CMOs) in the UK are set up and controlled by right holders. As such they are membership-governed. Approximately one third of the BCC's members are CMOs, the remaining two thirds are organisations which, in the main, represent right holder members of those CMOs. Therefore, the BCC has an interest in the role and function of CMOs in the marketplace and in relation to users, as well as having an interest in their internal operation, their governance and accountability to members and to other right holders.

The BCC also supports and has encouraged the development and implementation by CMOs of voluntary Codes of Conduct for Members and Users.

While Codes of Conduct governing the behaviour of collecting societies are to be welcomed, in relation to users, we would also wish to see fair and proper behavior, for example, with users volunteering to take a licence where needed and providing information about use when requested. (Q54)

The BCCs Principles of Good Practice for CMOs have been developed over a two year period, initially in support of the BCCs proposal for an orphan works licensing scheme and in response to the clause on codes (for societies certified to operate orphan works licensing schemes) in the then proposed Digital Economy Bill. Latterly work has continued in anticipation of an initiative from the EU and in response to the Hargreaves Independent Review of IP and Growth. This work has been carried out by a Working Group made up of CMO members of the BCC but in November 2011 the Principles were endorsed by the BCC itself.

The process concluded that a single joint Code for all CMOs was not feasible, given the differences between societies, their members and right holders, the rights they licensed and the markets in which they operated. Instead, it was agreed to develop a set of common Principles to be embodied in the individual Code(s) of each CMO (Q50).

These Principles are now being introduced in the form of Codes, both member and user facing, which each CMO member of the BCC will have in place by November 2012 (some already have). At this point the BCC will carry out its own review of implementation, reporting back to BCC members as a whole on the success of the process. It is likely that internal processes within each society to fully support their Codes could take longer than this. Such internal processes include staff training, customer service standards and procedures for handling complaints. (Q48)

Work did not stop in November 2011. In response to comments from members of the BCC and taking account of views expressed during the Hargreaves Review copyright consultation process, CMO members of the BCC have now added two further elements to the Principles. These are:-

- an independent external arbitration mechanism. (CMO members of the BCC have agreed to consider negotiations with a single external ombudsman for the provision of such a service);

- a triennial independent review process to be carried out by a judge or person with similar expertise. The first to take place in November 2013. (Q60 and 61)

The Principles have been amended accordingly but have yet to be presented to the full BCC for endorsement before becoming part of the public document which is currently available and has already been provided to IPO.

In the European context, the BCC looks forward to publication of the forthcoming EU initiative on CMOs which we anticipate will require greater accountability from CMO's around Europe. The BCC agrees that there is a need for the highest level of transparency and accountability between CMOs, and between CMOs, their members and other entitled right holders, given the huge success and economic importance of UK works and rights in markets elsewhere within the European Union. Greater transparency may well result in more income for UK right holders and for the UK economy.

In the context of this copyright consultation there appear to be conflicting approaches taken to the collective management of rights. While on the one hand CMOs are recognised as an essential part of the solution for licensing digital markets, including their potential in relation to the proposed Digital Copyright Exchange, on the other it is proposed to widen exceptions to copyright as far as is possible, thus removing areas of collective licensing which are already in place, function well and are a UK success story. This gives right holders and users alike a very mixed message.

A number of issues within the consultation documents and Impact Assessments which we originally wished to comment on, have been raised during meetings as part of the consultation process and we understand that these are being addressed. It is important that greater clarity and definition is achieved on these and on other similar issues. For example:-

- The definition of licensing body.
- The loose assumption that CMOs are always in a "dominant position" in the marketplace.
- The difference between a CMO's turnover (cost of operation) and its full income (which includes royalties paid to right holders).

Though issues to do with the cost of licensing and terms of licences offered by CMOs do not and should not form part of the discussion on codes, being a matter for The Copyright Tribunal, we also recognise the concerns expressed by users at the Ministerial Roundtable, about the overall cost and expense of a full Copyright Tribunal case. The fast track recently introduced into The Copyright Tribunal has the potential to solve this but it is still relatively untested and should be monitored by IPO. With such "complaints" set aside, then Government and CMOs will be able to concentrate on where the real issues lie.

OPTIONS

The BCC favours a model for collecting society codes based on its Principles and on accountability to members and other right holders. It may be that CMOs certified to provide Orphan Works licensing schemes (or extended collective licensing schemes as proposed by the consultation) should be more highly regulated than other CMOs which are directly accountable to their members.

EXCEPTIONS TO COPYRIGHT

"If it is not broken, do not fix it." Copyright has evolved and can continue to evolve to recognise developments in technology.

Any new exception that may create imbalances in the commercial market must be reviewed in light of the requirements of the Three Step Test. If the use conflicts with a normal exploitation of the work and prejudices the legitimate interests of artists, we believe there are no good grounds for the recognition of an exception or a limitation.

The BCC supports the introduction of a private copying exception in the UK only if it provides for fair compensation to rights owners.

Work on harmonisation and implementation of exceptions at Member State level, should not interfere with existing exceptions or licensing arrangements at national level where they already work well, taking into account cultural differences and market conditions.

Where exceptions or limitations on exclusive rights are necessary, we strongly support the principle of exceptions subject to licence. The UK Government's continued support for this model would be welcomed.

We support the principles behind extending S.35 and S.36 to cover distance learning over secure networks

PRIVATE COPYING

The BCC supports the introduction of a private copying exception for protected works in the UK, but any such exception should provide for fair compensation to rights owners which is limited to copying from physical products. Any exception must not include the copying of content to any online services such as "cloud" storage services irrespective of functionality.

Fair compensation is required under mandatory European rules (Article 5 (2b) Copyright Directive 2001/29). Such systems of compensation function successfully in other parts of Europe, for example, in Germany and in France. There is no reason why they should not do so in the UK.

Recent changes in the laws of individual Member States (more specifically in France with a ministerial order of 20th December 2011) clarified the scope of fair compensation. The changes in France concerned the lawfulness of the source for the private copy but also takes into account the recent CJEU decision Padawan v SGAE Case C-467/08.

It is notable that the Padawan decision (as well as the amendments proposed to the French law) does address the details of the administration of levies. The Padawan decision states that the decisive criterion for the need of fair compensation is economic harm (para 42); "Copying by natural persons acting in a private capacity must be regarded as an act likely to cause harm to the author of the work concerned."(para 44). Furthermore, there is a presumption that natural persons using reproduction equipment and media have caused

harm to the author (paras 54-56). Whereas the harm caused by individual copies may be minimal, harm caused by private copying is to be assessed cumulatively (para 46).

Professor Hargreaves and the IPO Impact Assessment rely on the study undertaken by Bournemouth University for ESCR/ IPO on private copying levies. This study mainly aims to establish that "there are dramatic differences between countries in the methodology used for identifying leviable devices, setting tariffs, and allocating beneficiaries of the levy;" it does not address other more pertinent questions.

Whilst the Consultation seems to acknowledge that fair compensation is required, the Consultation promotes the idea that the fair compensation is priced into the price at the point of sale. This is far removed from the commercial reality; the value of the transferability of, for example, music is completely removed from the price of a CD: whilst the possibilities to transfer music has increased in the last decade the price of a CD has declined over 30%. Equally, copyright owners never intended to incorporate the possibility to transfer music in the sale of the CD (as is apparent in the copyright notice on the copy of the work).

Any private copying exception cannot apply to online services such as "cloud" services; there is no practical requirement given that many BCC members offer commercial licenses for such services which cover cloud storage functions. Government interference with the nascent cloud market at this stage is dangerous. Moreover, it would be unacceptable should Government decide to treat one particular sector of business to business relationships preferentially by removing the requirement for the service provider to obtain a licence. This will not benefit the individual consumer but only one particular commercial sector.

Legally, any online service is outside the scope of the allowed exceptions of the Copyright Directive; Article 5 (2b) only allows Member States to provide for an exception to the reproduction right "in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the right holders receive fair compensation…". No parallel exception under Article 5.3 touching upon the communication to the public right is permitted, even under the optional provisions of Article 5.2 and 5.3 of the Copyright Directive. We urge Government to give close consideration as to whether the activities they intend to cover as part of the preferred option is to be considered as Communication to the public under European and international laws.

Additionally, if the exception interferes with existing licensing practice (as is the case with online services) it infringes the Three Step Test because it conflicts with a normal exploitation of the work.

OPTIONS

The BCC does not support any of the Options put forward by the Government but is looking forward to further discussions on Government's plans.

PRESERVATION BY LIBRARIES AND ARCHIVES

The British Copyright Council supports the archiving and preservation of protected works. We made this point in our submission to the 2009 consultation on Copyright Exceptions and our position on widening the exception on archives and preservation remains unchanged.

Neither the Impact Assessment or the Consultation document make reference to evidence obtained by IPO from the 2009 consultation on the widening of this exception, or the results from its stakeholder consultation on the 2010 draft Statutory Instrument. We believe this information is of real value, with the stakeholder consultation identifying much common ground on many of the issues raised then and being raised again now.

OPTIONS

The British Copyright Council does not support the widening of this exception to permit multiple copying (see our first bullet point below). Multiple copies are unnecessary for the purpose of preservation (Question 72).

The BCC supports the Government's proposal for Option 2, if it is subject to the satisfactory resolution of the following issues (including the question of multiple copies):-

- The number of copies to be limited to those needed only "as far as necessary for the purpose of preservation" and for non-commercial purposes/which are not for direct or indirect economic or commercial advantage;
- Clear demarcation between copies made for preservation purposes. That is, such copies are to be held separately from those made under the rights of libraries and archives to "make and supply" copies under library privileges;
- Any extension of the exception to cover museums and galleries must include a clear definition of "permanent collection" and in the same way that we have "Qualifying Libraries" clear definitions of "Qualifying Museums" will be needed, that is care must be taken over the status of the museums and galleries to whom the provisions apply and we would welcome further discussion on this;
- Institutions benefiting from the exception must be clear legal entities;
- Government to make a commitment to regularly review the operation of the exception to deter, identify and avoid any abuse;
- Any copy lawfully made under the exception for preservation becomes an infringing copy if dealt with improperly.

RESEARCH AND PRIVATE STUDY

BCC believes that the nature of the use of sound recordings and films by individuals undertaking private study and non-commercial research differs from the use of other copyright works (when not embedded in sound recordings or films).

In many cases viewing a film or listening to a sound recording will be the act of private study or non-commercial research, rather than the need for a copy to be made.

Usually those undertaking private study will already have a copy of the film or sound recording or be able to acquire one (including through rental or lending) from a legitimate source.

If a private individual is to format shift copies, the issues and comments raised in the context of "Private Copying" are directly relevant.

There are practical reasons why these exceptions should not be extended to recordings. As the Consultation document states, a 'fair dealing' exception would not allow individuals to copy entire works, only extracts. However, as stated above an individual undertaking private study or non-commercial research is likely to need to listen to a full recording or watch the whole of a film for context. Whereas exceptions and limitations deal with "small extracts", any extension to apply to sound recordings, or films is likely to involve copying the works in their entirety. These copies are particularly likely to substitute for sales as they would be digital copies, not photocopies.

For the purposes of "broadcasts" the Consultation does not indicate how an individual might wish to "study" or "research" a broadcast – either by watching it when made, or viewing it when a recording has been in circumstances practically serviced by s 70 CDPA. In addition, if an individual needs to access a "recording of a broadcast" for non-commercial educational purposes, the arrangements under s 35 CDPA may be relevant to support educational establishments making relevant recordings and making these available to "authorised persons" within the scope of relevant s 35 certified licence arrangements.

In any case, the suggestion that extending the exception to include sound recordings will solve a problem is incorrect. The value of underlying rights (including music included in sound recordings) must be addressed in terms of the duration of any use linked to s 29.

The Consultation does not provide evidence to support arguments that private study is really being blocked as a result of the current scope of s 29 CDPA.

It appears that the proposal to change the scope of the law here is based around old technology.

OPTIONS

The British Copyright Council supports Option 0 – do nothing.

TEXT AND DATA MINING FOR RESEARCH

The Impact Assessment states that "at this point we have not found it possible to monetise costs or benefits….". The British Copyright Council is therefore surprised that Government is considering any possibility for change, given its own lack of evidence of need.

Publisher members of the British Copyright Council, which are most affected by this proposal, have provided evidence demonstrating that there is no market failure. In fact their evidence shows the contrary, indicating quite clearly that licences are regularly being granted where there is a need.

A recent study by the Publishing Research Consortium [at http://publishingresearch.net], which has been available since June 2011, shows that 90% of research-focused requests for text and data mining are granted within a week at little or no cost to those seeking permission. Only a small percentage of requests are turned down, mainly because of

questionable bona fides of the applicant, which strongly suggests that, contrary to government assumptions, there is no market failure here at all.

Far from restricting the use of new technologies for scientific research, publishers are at the very heart of text and data mining development. As the curators and in most cases the owners of the publication rights to the journals, monographs and content databases which comprise the work to be mined, publishers are regularly investigating and investing in the technology necessary to support text and data mining, such as converting content to a format which can be understood by mining tools, maintaining the required platforms and providing on-going support to legitimate content miners.

It is this active development of an existing (but nascent) market, in line with demand, that is already providing the result that government seeks. A new exception would merely remove publisher incentive to invest and support the new technologies and processes involved, as set out above, so would have the opposite result.

The BCC has seen the detailed response produced by its member ALPSP on the proposal for a text and data mining exception and we note their concern over the lack of a clear definition with regard to the proposal for an exception as well as a lack of definition in what is actually caught by the term “text and data mining”.

Not only are publishers providing speedy clearance for research-focused requests while developing new market opportunities which will contribute to economic growth if allowed to come to fruition, they also appear to be developing rights clearance solutions through collective licensing arrangements and model licences for use by small publishers.

OPTIONS

The BCC supports Option 0.

PARODY, CARICATURE AND PASTICHE

In the following, the term "parody" embraces parody, caricature and pastiche.

Care must be taken that any parody exception does not breach the UK's obligations under the Berne Convention (1971 text) by which the UK is bound.

The exceptions and limitations permitted under the Convention are those covered by the following Articles: 2(8) (news), 2bis(2) (reporting), 9(2) (reproduction), 10(1) (quotations), 10(2) (teaching purposes), 10bis (1) (newspaper and journal articles), 10bis(2) (current events), 11bis(1) (broadcasting compulsory licence), 11bis(3) (ephemeral recording by broadcasters), 13(1) (sound recording compulsory licence). There are also implied or minor exceptions, being described as "uses of minimal or no significance to the author" (see Ricketson The Berne Convention 1987, para.9.63, and, Ricketson, Ginsburg, International Copyright and Neighbouring Rights, 2006, para.13.81).

There is no specific provision in the Berne Convention regarding a prescribed or permissible exception for parody. Any such exception must therefore be brought within the parameters of the exceptions described above.

It would, it is thought, be permissible to provide under Article 9(2) of Berne (exceptions subject to three step test) for reproduction for the purpose of parody, but such exception would be limited to the reproduction right and would not cover an exception to the authors' exclusive right under Article 12 of the Convention to authorise "adaptation, arrangements or other alterations of their works".

It is accordingly submitted that an unlimited exception permitting parody would breach the Berne Convention, since it would permit adaptations, arrangements or alterations of the parodied work which are substantial and certainly not to be classified as "minor".

It is further submitted that if a parody exception is to be adopted, then such exception must only cover use of the parodied work which does not adapt, arrange or alter such work. Furthermore, for the avoidance of doubt, the moral rights of the author should be specifically reserved in respect of any such limited use of the parodied work (see Ricketson op cit. para.9.18, Ricketson, Ginsburg op cit. para.13.30 "[Article 9(2)] does not in any way excuse the user from observing the author's moral rights in the particular use he makes of the (parodied) work".

Finally it is submitted that the consideration that legislation of another country or other countries may not as regards an exception for parody be in conformity with the Berne Convention should not provide a precedent for following the same course in the UK.

Opinion of Professor J. A. L. Sterling

As Government quite clearly states (7.100 of the consultation document) "Britain has a long and vibrant tradition of comedy and satire, and parody, caricature and pastiche" and that is without an exception for parody, caricature and pastiche. It is the BCCs view that the introduction of such an exception is unnecessary and could have a prejudicial impact on the UK economy through the loss of royalties for the original author which in some cases could

be substantial (Q80).

The Government has provided no credible evidence in support of the introduction of such an exception, and in the midst of an economic recession it would seem unwise to risk damaging normal exploitation and growth of the use of existing works.

A previous attempt (under the Gowers Review of IP) to persuade the government to introduce such an exception was defeated, on the grounds of lack of evidence, and it is difficult to see what has changed since then. The only new evidence offered now is Newport State of Mind at 7.108 and Masterchef spoofs at 7.109, both of which are YouTube parodies, which we cannot think are key to UK growth and which hardly seem a good reason to change UK law (Q78)

OPTIONS

The BCC does not support Option 1 or 2. The BCC supports Option 0 – do nothing.

USE OF WORKS FOR EDUCATION

BCC membership includes both the Copyright Licensing Agency and the Educational Recording Agency. These bodies are either closely linked with or include within their membership other members of the BCC.

As such, particular concerns have been raised about the way that the Consultation asks about the case for "removing or restricting" the licensing schemes that currently apply to the educational exceptions for recording of broadcasts and reprographic copying.

The Impact Assessment has not addressed in any detail the reasons behind the limitations applied to exceptions in the different ways relevant to each of s 35 and s 36 CDPA.

Both CLA and ERA have made detailed responses to questions 85-89 in the Consultation Document. Specific approaches are needed to the way in which licence schemes have operated under the two sections. These are fully explained in the CLA and ERA responses. The BCC supports the arguments made in the submissions.

OPTIONS

Options 5 and 6 within the Impact Assessment should be rejected. In the case of s 35, the changes outlined by ERA should be addressed and Option 0 applied concerning s 36. In the case of the proposed widening of educational exceptions, the BCC defers to and supports the submissions made by its members the Copyright Licensing Agency and the Educational Recording Agency.

COPYRIGHT EXCEPTIONS FOR PEOPLE WITH DISABILITIES

The British Copyright Council supports an exception to copyright for people with disabilities, if the exception is limited to those disabilities which are directly related to the disabled individual's ability to access the work, that is, to those who are "Reading Impaired".

Government must recognise that the value of licensing systems lie not only in the financial return to right holders (usually in this case zero) but in the management and control of such licences and the digital files which publishers now provide to Trusted Intermediaries working on behalf of those with disabilities. In a digital environment, such professional management is essential to normal exploitation.

The Copyright Directive 2001 does indeed (as the Government states) permit the UK to extend the current (2002) exception for Visually Impaired People to other categories of disability, including people with dyslexia (although they are already included in the CLA licence). However, these must be for non-commercial uses, and directly related to that disability, so that Reading Impaired might be a more accurate term.

The Consultation proposes that any extension of the current exceptions should only apply to the extent that commercially accessible copies are not available. This would be fine, were it not for the following proposal to remove rights holders' ability to license the exceptions at all. The Impact Assessment wrongly assumes that, since current licences are usually offered to Visually Impaired People free of charge, the relevant collecting societies offering these licences, and their members, will suffer zero costs or loss of revenue if the ability to license them is taken away. Licences, however, are not only important as sources of revenue, but also as legitimate means to manage and control the uses of the digital files concerned, so that only lawful copies are used and only qualifying Reading Impaired People benefit, for their own personal use. Loss of this right for rights holders to manage their digital files properly would certainly not have "zero" effect, but could be extremely damaging.

There are also two current pilot schemes (TIGAR and ETIN) for voluntary supply of digital files across national borders, managed and audited by Trusted Intermediaries such as RNIB under Memorandums of Understanding, to which rights holders are strongly committed. Removing any right to license such rights at all – as the Government seems to want – may well put at risk such voluntary schemes, which promise to give Visually Impaired People what they really want – accessible digital files as close as possible to publication date.

By way of example, the CLA scheme mentioned above operates as follows:-

> The aim of the CLA scheme was always to provide a repository of information that would assist print disabled readers. Accessible copies made under a CLA licence were to be recorded and potentially available to other institutions (i.e. Trusted Intermediaries) to avoid duplication of the creation of Accessible Copies and also would enable publishers to see where a need existed so they could create the Accessible Copies themselves in commercially available formats. The RNIB and others were keen for this to happen as it was cheaper and easier for the publishers themselves to do this as part of the production process. As the CLA has reciprocal deals with other RROs, it feels confident enough to include non-UK repertoire in its licence, including the right to send Accessible Copies abroad. This is currently limited to the EU (but that is more than any UK statutory scheme can offer) and CLA hopes in due course to extend that more widely – assuming the Government do not implement these proposals and dispense with the need, in the UK, for a licence at all.
>
> *Martin Delaney, Copyright Licensing Agency 06.02.12*

In broadening the scope of the current copyright exceptions for people with disabilities to include all types of disability, Government must ensure that the exception is limited to those disabilities which are directly related to the disabled individual's ability to access the work (Q90).

With regard to the costs and benefits of the current licensing arrangements our general comments above on the crucial (non-financial) importance of licences in the 21st century, so that irrespective of (in some cases) zero revenue, licences are still an important part of normal exploitation in enabling the management, audit and control of digital files to make sure that they are delivered to, and used by, only those beneficiaries entitled to them and solely for their personal use (Q92).

Any modifications to this exception, in order to simplify its operation (Q93) should continue to allow rights holders to offer flexible licences fit for purpose, rather than attempting to keep pace with medical, scientific and technological developments through legislation.

OPTIONS

The BCC does not support Option 2 or Option 5.

With the points made in our main comments in mind, and particularly our point about the disability being related to the individual's ability to access the work, the British Copyright Council supports Option 1.

As far as Option 4 is concerned, we understand that Publishers and Trusted Intermediaries are already working together achieving this. The BCC's support for further consideration of this option is qualified by the need to ensure that the access to digital files is managed and controlled in an appropriate way through those Trusted Intermediaries.

Regarding Option 3, please see our comments on the value of licensing above and in the section on Contractual Override.

USE OF WORKS FOR QUOTATION AND REPORTING CURRENT EVENTS

The British Copyright Council does not support any change to the use of works for quotation or reporting current events due to the difficulties in defining the length of the extract, i.e. "to the necessary extent", to be covered by the provision.

Short clips or excerpts of copyright works are often particularly valuable and are routinely licensed. Loss of such income would significantly harm copyright owners. Quotation under the existing fair dealing exceptions is limited to certain purposes, but an exception for *any* use would include many uses that are currently licensed. Making such an exception subject to fair dealing does not by itself create sufficient clarity – the factors cited in the boxed text under 7.72 of the consultation document, do not necessarily exclude licensed uses. For example, music samples may be short, previously published and not in competition with the original work. The likely result of such a broad exception is legal uncertainty and disputes. Possible additional categories such as 'information', 'analysis', 'argument' or 'comment' are also too broad and do not fulfill policy objectives in the way that the exceptions for criticism and news reporting do – while a critic may need to quote words verbatim, it is always possible to convey information using your own words. Including "quotations" within another work within a "fair dealing" exception can introduce doubt and uncertainty.

The Article 5(3)(c) exception does not apply where use is expressly reserved. Introducing such an exception will create a new administrative burden for content producers to append such reservations to all their output.

We have seen no evidence of a general need to widen the current provisions and should such a need be shown to exist, for example, within educational establishments then we believe that licensing solutions provide a better alternative for the management and control of the use of longer extracts.

On a separate note, we believe it is dangerous and confusing to mix "the human right to free expression" (7.182 of the consultation document) and "promote free speech" (7.184 of the consultation document) with a specific and limited fair dealing based copyright exception.

Indications from our author and journalist members (i.e. those with most experience of the use of these exceptions) are that the figures quoted in the Impact Assessment including cost to creators, savings on licence fees, and administration costs of licensing are insufficiently rigorous.

OPTIONS

Given the points we make above, the British Copyright Council supports Option 0, that is, do nothing. Copyright exceptions permitting use of extracts should remain limited to use for criticism, review and reporting current events.

USE OF WORKS FOR PUBLIC ADMINISTRATION AND REPORTING

While the BCC recognises that there may be a need for certain types of items to be made available between public bodies and on-line for use by the public, it is our view that works protected by copyright which are incorporated into, or submitted alongside, documents provided to public bodies, should not be made available in this way without more careful consideration and consultation with right holders.

An exception of the type proposed would not comply with the Three Step Test. As a result, the proposed exception would appear to be contrary to the UK's EU and International treaty obligations and the BCC urges Government to work with right holders and their representatives to find an alternative solution.

An exception of the type proposed is too wide and would enable members of the public, whether individuals, corporations or other entities, to obtain free of charge and without permission, copies of articles online for which they would otherwise have required a permission direct from the copyright holder or a licence from their agent. For example, for any member of the public to obtain a copy of a journal or magazine article free of charge without permission from, or payment to, the copyright owner must prejudice the legitimate interest of the copyright holder in contravention of the third limb of the Berne test.

As presently drafted, the responsibility rests on any third party copyright owner to opt out, which may have unforeseen consequences, particularly for STM journal material submitted in support of patent applications – the publisher would not want any of this posted freely on the internet, but may not know that the application is being made and so will probably not be in

any realistic position to opt out. As we have said, consultation with right holders in advance is therefore essential.

Organisations which might otherwise need a licence to obtain and use an article and to copy it further could argue that the exception reduced or dispensed with their need for a licence. As copyright owners regard secondary licensing as one of the methods by which they exploit their work, this must also conflict with the normal exploitation of the works contrary to the second limb of the Berne 3 step test.

Such an exception would also have to comply with the EC Copyright Directive (EC Directive 2001/29/EC) which provides an exhaustive list of exceptions that Member States may permit but which also requires that all such exceptions are subject to the same criteria as set out in the Berne Test.

We cannot believe the intention is that extracts from works in which copyright exists can be made so easily available in such a general manner and without any payment to the authors, visual creators and publishers involved.

The Consultation does not propose that making such works available online should be subject to any digital rights management or encryption to prevent further use (such as storage, printing out, e-mailing or posting on an Intranet or Internet); it is not even clear that the prescribed wording currently required (that copies made available may not be further copies without permission) would apply.

OPTIONS

The British Copyright Council supports Option 0.

Our members do not think that Option 1 should be considered further without detailed consultation of those right holders most likely to be affected by such an exception.

OTHER EXCEPTIONS ALLOWED BY THE COPYRIGHT DIRECTIVE

PRS for Music and PPL license the public performance of music during religious and official events and for the demonstration of equipment. These licences are well-established and efficient solutions. Introducing exceptions for uses where licensing is already established would interfere with the property rights of their members and contravene the Three Step Test – removing the rights of composers, songwriters, record companies and performers to this normal exploitation and revenue.

A new exception for use during religious celebrations or official celebrations organised by public authors would bring rigidity and uncertainty to an area where the flexibility and clarity of licensing is working well. For example, the definition of 'state occasion' is unclear; by contrast, *PRS for Music* was able to waive the licence fee for the Royal Wedding last year for certain events according to very clear criteria that were tailor-made for that occasion (Q100).

In most cases licensees have blanket licences that cover numerous events and types of use in a single or multiple venues for a whole year – the uses that would be subject to these

exceptions form only a part of licensees' needs. Therefore exceptions would not reduce transactional costs but could increase complexity.

There is no reason to expand current exceptions for the demonstration and repair of equipment. The only consequence of this would be to reduce the licensing royalties paid to rights holders. Licences for this use cost less than £2 per week from *PRS for Music* and (in the cases not falling within the current exception relating to broadcast sound recordings) £2.30 a week from PPL but cumulatively contribute to the modest income of many thousand composers and songwriters. (Q102)

OPTIONS

The BCC does not support Option 1 or 2. We are in favour of Option 0

PROTECTING COPYRIGHT EXCEPTIONS FROM OVERRIDE BY CONTRACTS

The BCC argues that no legislative changes should be made under the relevant Impact Assessment.

The BCC believes that the potential damage and disruption which could flow from this proposal fails to address the real scope of the examples cited as relevant "override clauses in UK copyright legislation".

In reality the provisions are narrowly defined and ignore the fact that, contracts aside, copyright exceptions and statutory defences remain applicable independent of contract terms.

The Consultation document's proposal (para. 7.249) describes a clause that would apply to the terms that prohibit or restrict the use of an exception. However the Impact Assessment BIS 0315 refers to licensing uses that are available under exceptions. These are two distinct concepts that should not be conflated.

Contract terms that prohibit or restrict the use of exceptions appear to be rare, not common. Where they do exist, the Copyright Directive acknowledges that they may be useful to ensure fair compensation to right holders (Directive 2001/29/EC, Recital 45). Freedom of contract is a reason why English contract law is favoured internationally which is to the advantage of UK businesses in many ways. A 'contract-override clause' would detract from this by imposing an unnecessary burden of compliance on contracting parties.

For non-monetised benefits, it is argued that allowing the full use of the force and scope of copyright exceptions established in national law will "provide savings from clarity in administering access and use, and presenting terms to users; reduction of legal risk; clarity in negotiations with suppliers".

The approach is flawed because:-

(a) it assumes that the scope for application of a specific copyright exception is "fixed" across a range of uses, usurping the right of owners and users to contract for licensing

the rights of property in copyright rights works in accordance with the fundamental rules for privity of contract.

(b) permitted acts that do not infringe copyright do not require the consent of the copyright owners as the law stands.

(c) contractual licences can provide comfort for what has been agreed for the user and can remove uncertainty and possible disputes and litigation over "permitted uses" that may not be covered by the contract.

(d) in the absence of contract (unlike the United States) no statutory criteria exist to define "fairness" under United Kingdom copyright law. Introducing a general rule that a contract agreed between two parties cannot cover what may or may not fall within an exception, as far as the two parties are concerned, will mean greater reliance on litigation to define boundaries for permitted acts linked to individual circumstances.

(e) in the absence of contracts removing need, the test of fair dealing within the United Kingdom has been judicially developed to consider (i) the degree to which an alleged infringing use competes with exploitation of a copyright work by its owner (ii) whether a work has been published or not (iii) the extent of the use and the importance of what has been taken (iv) the motives of an alleged infringer.

If the scope of "permitted exceptions" cannot be defined for all cases without judicial intervention, prohibition of parties contracting that specified uses are "licensed" as between a rights owner and user will create neither certainty nor clarity for such parties.

In addition, the concerns referred to in the Consultation Document are irrelevant for users who wish to rely upon exceptions to copyright for use without a contract with the rights owner.

Those who do not wish to contract with a copyright owner because they wish to argue that any use of copyright falls within "permitted acts" and therefore does not infringe copyright, are free to do so in any event. Option 1 will not change this.

Licences cannot not permit acts that are permitted in any event under exceptions. Any grant of a right to do something that the other party can already do by law cannot be valid contractual consideration.

In terms of assessing the Impact Assessment itself we do not understand the term "value" in relation to a copyright exception. Exceptions are subject to the Three Step Test in which case they have no financial "value" and so do not impact on economic growth

OPTIONS

The BCC supports Option 0.

COPYRIGHT NOTICES

Unlike Trade Marks, Patents or Designs, the fact-specific nature of Copyright make it unsuited to the issuing of formal Copyright Notices interpreting legislation. In any case IPOs responsibility for the development of copyright policy on behalf of Government could come into conflict with any statutory role it might fulfill or opinion service it might provide.

The BCC does not support a statutory role for IPO in relation to copyright.

We envisage considerable risk of confusion in copyright law arising, since how the courts would respond to either binding or non-binding opinions would of necessity vary according to the circumstances, leaving underlying legal principles more, not less, complex. If IPO had binding authority, it would need to be of a very high quality indeed. The cost of offering copyright Notices would involve a high level of risk, raise issues of liability for IPO and could be prohibitively expensive.

In any case there is a need for the separation of powers. There is a risk of confusion or even a clash between the judiciary and the legislative executive. The Government (through Parliament) creates the law, and the judges interpret it. A formal role for the IPO would blur that distinction.

We would add that Government, as a significant user of copyright, could be said to have a vested interest in widening the application of exceptions and minimising any fees payable. Such an approach could not be seen as impartial.

The Impact Assessment provides no real evidence of market failure arising from the lack of such services.

IPO's purpose as stated in its 5 year Corporate Strategy is to "promote innovation by providing a clear, accessible and widely understood IP system" and the consultation document itself states at 8.10 that "IPO currently receives over a thousand detailed queries each year". From the examples provided, and from the BCC's own experience, such factual questions and the enquirers who ask them, are indicative of a real need for more clear, basic information about rights. It is the BCC's view, and we understand it is also the view of other stakeholders, that a much more useful role for IPO would be to provide an educational and awareness service covering a wide range of information and general guidance on copyright and related rights aimed at all those with an interest in copyright.

OPTIONS

The BCC does not support either Option 1 or Option 2, leaving only Option 0. However, as we say above and as the very useful stakeholder meeting held on 18th January indicated, another Option is a much wider and more active role for IPO in copyright awareness and education. We would like this Option to be explored by IPO and the BCC would be pleased to work with IPO on such an initiative.

List of BCC Members:-

**Artists` Collecting Society (ACS)** Artists` Collecting Society (ACS) was set up in June 2006 to collect resale royalties (Droit de Suite) on behalf of artists in the UK. ACS was set up in response to requests from artists and from their dealers via The British Art Market Federation (BAMF) and The Society of London Art Dealers (SLAD) for artists to be provided with a choice of collecting society for the management of Artist`s Resale Right.	www.artistscollectingsociety.org.uk
Association of Authors' Agents (AAA) A voluntary body to provide a forum for member agencies to discuss industry matters, to uphold a code of good practice, and to provide a vehicle for representing the interests of agents and authors.	www.agentsassoc.co.uk
Association of Illustrators (AOI) Established in 1973 to advance and protect illustrator`s rights and encourage professional standards. It is a non-profit making trade association dedicated to its members` professional interests and the promotion of illustration.	www.theaoi.com
Association of Learned and Professional Society Publishers (ALPSP) The largest international trade association for scholarly and professional publishers, which aims to serve, represent and strengthen the community of scholarly publishers, and those who work with them. ALPSP provides information, education, representation, cooperative initiatives and guidelines for good practice	www.alpsp.org
Association of Photographers (AOP) A not for profit membership based organisation for Professional Photographers, Agents, Assistants and Students, as well as Affiliated Colleges and Affiliated Companies. Our aims are to promote and protect the worth and standing of our members, to vigorously defend, educate and lobby for the interests and rights of all photographers in the photographic profession.	www.the-aop.org
Authors' Licensing and Collecting Society (ALCS) Represents the interests of all UK writers and aims to ensure writers are fairly compensated for any works that are copied, broadcast or recorded.	www.alcs.co.uk
BCS, the Chartered Institute for IT (BCS) Its objects are to promote the study and practice of computing and to advance knowledge of and education in IT for the benefit of the public.	www.bcs.org.uk
BPI (The British Recorded Music Industry) BPI is a trade organisation protecting and promoting the UK recorded music business.	www.bpi.co.uk
British Academy of Songwriters, Composers and Authors (BACS) Support and protect the artistic, professional, commercial and copyright interests of songwriters, lyricists and composers of all genres of music and to celebrate and	www.basca.org.uk

encourage excellence in British music writing.

British Association of Picture Libraries and Agencies (BAPLA) The British Association of Picture Libraries and Agencies, or BAPLA, is the trade association for picture libraries in the UK, and has been a trade body since 1975. Members include the major news, stock and production agencies as well as Sole Traders and Cultural Heritage Institutions.	www.bapla.org.uk
British Equity Collecting Society Ltd (BECS) The only UK based collective management organisation for audiovisual performers. It represents the interests of its members in the negotiation and administration of performers` remuneration.	www.equitycollecting.org.uk
British Institute of Professional Photography (BIPP) Run by photographers, for photographers, they provide advice and support, along with a programme of training courses, the most respected professional photographic qualifications in the country and a host of regional and national events and seminars.	www.bipp.com
Broadcasting Entertainment Cinematograph and Theatre Union (BECTU) BECTU have about 27,000 members working in tv, film, theatre and new media, freelance and directly employed in jobs apart from acting and journalism.	www.bectu.org.uk
Chartered Institute of Journalists (CIOJ) Both an independently certified trade union and professional association, the CIOJ was formed in 1884 and granted a Royal Charter in 1890 by Queen Victoria. It has been serving and protecting the best interests of journalism and journalists ever since.	www.cioj.co.uk
Copyright Licensing Agency (CLA) CLA license organisations to copy and re-use extracts from print & digital publications on behalf of the copyright owners - authors, publishers and visual artists.	www.cla.co.uk
Design and Artists' Copyright Society (DACS) Established by artists for artists, DACS is a not-for-profit rights management organisation providing three rights management services for visual artists: Payback, Artist`s Resale Right and Copyright Licensing.	www.dacs.co.uk
Directors UK (DPRS) Directors UK is the professional association of directors working with the moving image in the UK. Directors UK exists to ensure that the importance and centrality of directors is recognised, and to give directors a powerful and united voice at the centre of the industry. Directors UK works with directors to: protect and enhance directors` creative rights; negotiate, collect, and manage the right to receive payment; represent directors and directing to Government in the UK and in Europe; and provide valuable services and benefits to members.	www.directors.uk.com
Educational Recording Agency Ltd (ERA) On behalf of its Members, ERA is a copyright collecting society which operates a	www.era.org.uk

Licensing Scheme for educational use of copyright protected material. Uniquely serving the UK education sector, ERA is one of a range of collecting societies which help copyright owners and performers derive an income from the licensed use of their works. ERA Members include broadcasters, authors and artist collecting societies, performers` unions and representative bodies for owners of copyright films and sound recordings.

Equity The main function of Equity is to negotiate minimum terms and conditions of employment throughout the entire world of entertainment and to endeavour to ensure these take account of social and economic changes.	www.equity.org.uk
Incorporated Society of Musicians (ISM) The Incorporated Society of musicians is a UK professional body for musicians. They champion the importance of music and protect the rights of those working within music services, campaigns, support and practical advice. The ISM offers peace of mind with their high quality legal expertise, casework and comprehensive insurance; it is proud of the support it has given to its members since 1882.	www.ism.org
Music Publishers Association (MPA) The MPA exists to safeguard the interests of music publishers and the writers signed to them. It provides them with a forum and a collective voice, offers them a range of practical services, represents their interests to the wider music industry, the media and the public and works to inform and to educate the wider public in the importance and value of copyright.	www.mpaonline.org.uk
Musicians' Union (MU) The Musicians` Union represents thirty thousand musicians working in all sectors of the music business. As well as negotiating on behalf of its members with all the major employers in the industry, the MU offers a range of services for self-employed professional and student musicians of all ages. Visit the MU website and find our how the Union can help you with your career, whether you work in the live arena, the recording studio, in education or as a writer/composer.	www.musiciansunion.org.uk
National Union of Journalists (NUJ) The voice for journalists and journalism. An active campaigning organisation seeking to improve the pay and conditions of their members and working to protect and promote media freedom, professionalism and ethical standards in all media.	www.nuj.org.uk
Phonographic Performance Ltd (PPL) The London based music licensing company which licenses recorded music on behalf of 3,400 record companies and 39,500 performers in the UK.	www.ppluk.com
Professional Publishers Association (PPA) The trade association for publishers and providers of consumer, customer and business media in the UK.	www.ppa.co.uk

PRS for Music PRS for music represents the rights of 85,000 songwriters, composers and music publishers in the UK. As a not-for-profit organisation it ensures creators are paid whenever their music is played , performed or reproduced; championing the importance of copyright to protect and support the UK music industry.	www.prsformusic.com
Publishers' Association (PA) The leading trade organisation serving book, journal, audio and electronic publishers in the UK. Its core service is representation and lobbying, around copyright, rights and other matters relevant to members, who represent roughly 80% of the industry by turnover.	www.publishers.org.uk
Publishers' Licensing Society (PLS) The Publishers Licensing Society (PLS) represents the interest of publishers in the collective licensing of photocopying and digitisation. Established over 30 years ago, PLS is a not for profit organisation owned and directed by the Association of Learned & Professional Society Publishers (ALPSP), the Periodical Publishers Assocation (PPA) and the Publishers Association (PA). Its role is to: oversee a collective licensing scheme in the UK for book, journal and magazine copying; stimulate innovation and good practice in rights management, and clarify the relationship between traditional copyright management practices and those needed in the digital age.	www.pls.org.uk
The Royal Photographic Society (RPS) The Royal Photographic Society was founded in 1853 to `promote the Art of Science of Photography`, a mission it continues to this day.	www.rps.org
The Society of Authors An independent trade union, representing writers` interests in all aspects of the writing profession, particularly publishing, but also broadcasting, television and film, theatre and translation.	www.societyofauthors.org
The Writers' Guild of Great Britain The Writers' Guild of Great Britain is the trade union representing writers in TV, radio, theatre, books, poetry, film, online and video games.	www.writersguild.org.uk