



**INTELLECTUAL**  
PROPERTY OFFICE

# **Rights and Wrongs**

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**Is copyright licensing fit for purpose for the digital age?**

**The first report of the Digital Copyright Exchange Feasibility Study**

## Acknowledgements

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I would like to thank Dr Ros Lynch, head of the DCE Feasibility Study secretariat, who has led the management of the process and the team, and taken a major part in the analysis behind, and creation of, this report. Thanks are also due to the members of our team – Jo Sampson (who left us in January) and Esther Bernaldo de Quiros for efficiently scheduling a large number of face to face meetings, Gavin Miller for his thorough analysis of the responses to the Call for Evidence and Ben Mitra-Khan (an IPO economist) for his help with the analysis of responses and the market definitions.

I would also like to thank John Alty, Ed Quilty and many of their colleagues at the IPO in London's Bloomsbury Street, where the Study is based, for all their help and guidance in this complex and contentious world of intellectual property. Charlotte Heyes who heads up the implementation of the Government's response to the Hargreaves Review, including the parallel copyright consultation into orphan works, extended collective licensing and exceptions to copyright has always been accessible and helpful to us. Nadia Vally who heads up the Collecting Societies Team provided useful comments, particularly in relation to collective management organisations.

I would like to thank the twelve members of the Advisory Panel who have worked with us on this first diagnostic report – Paul Brown, Sarah Faulder, Spencer Hyman, Simon Juden, Anthony Lilley, Jeff Lynn, Richard Mollet, Najma Rajah, Sophia Robb, Geoff Taylor, Jon Webster and Ben White. The members of the Panel were asked to act in the best interests of the creative industries as a whole rather than in the somewhat narrower interests of their own organisations. They did. When we move on in April 2012 to Phase 2 of the work, some of these Advisory Panel members will stand down to make room for the different skills required in Seeking Solutions.

Finally, thanks to all the 117 organisations and individuals who took the time to respond to the Call for Evidence and to the many organisations and individuals who made the time to have face to face meetings with us in the period December 2011 to March 2012. 90 meetings have taken place in that period with Ros and myself. We will be visiting many of you again as we move towards solutions.

In the interests of full transparency, it would be appropriate to declare my personal interests in relation to certain organisations that appear in this report – ALCS, BBC, NUJ, Directors UK, BFI, Informa plc.

My wife the author Meredith Hooper is a member of the Authors Collecting Society (ALCS). My daughter, Rachel Byrne, is a journalist in the BBC reporting on Parliament and a member of the NUJ. A son, Tom, is a film director, a member of Directors UK and a director of the British Film Institute. I was Chairman of Informa plc and still hold shares in the company.

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## 1. Key quotes

- “It is simple: we do not know who the rights owners are - therefore we cannot reimburse them.” Dame Lynne Brindley, Chief Executive of the British Library
  - The issue to which this Study constantly returns is the need for better navigation in a complex world.
  - The BBC would like “a copyright licensing regime in place which reflects the needs of a digital converged world – a world increasingly dominated by high volume, low value transactions as opposed to the low volume, high value transactions which were a feature of the analogue era.”
  - Publishers are leading attempts, as is beginning to happen in other sectors, to develop a common language and common standards for sharing information across sectors and across countries.
  - “... the current digital ecosystem does not deliver on the potential of the internet insofar as the licensing framework for commercial light use and the ‘long tail’ is limited. Ordinary people in the digital sphere who do not just consume content but publish their own, pass it on, comment, re-post and transform – ‘end users’ – are being failed by the current framework in their ability to obtain licences for their activities.” News Corporation
  - This Study believes that much of the criticism of the music industry is a left-over, a residual echo, from the past. But there are still real issues with copyright licensing in the music industry that need firm attention by all parties.
  - “... there are two classes of user for whom the system should work better: a user at home wanting to mash up materials found on the internet for the amusement of friends; and a start-up or other company wanting to aggregate content from many different places. In the former case it is often literally impossible for the user to do the right thing. In the latter it can be hard even to know who owns the rights to a given piece of content.” Pearson
  - Photographers want to see much greater protection and transparency for their rights data. Knowing authoritatively who owns what rights to what picture is the second key step in the copyright licensing process. Without it, copyright licensing cannot work.
  - “...there are some difficulties with the pan-European licensing of mechanical and performing rights in musical works. Problems lie in knowing which collecting society represents which rights and repertoire, and in issuing accurate and timely invoices....” PRS
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## 2. Executive Summary

This Study has concluded on the basis of the evidence collected that copyright licensing processes in the UK compare well with other countries in the world but there is much that still could be improved.

The UK has, for example, more digital music services operating (70+) than any other country.

Copyright licensing can be made more streamlined, easier and cheaper to use, especially for the small and medium-sized enterprises (SMEs) which make up 90% of the creative industries, without eroding the rights of rights owners.

As a result, innovation will be further encouraged and an ever more diverse array of fixed and mobile digital services across all media types (moving pictures, still pictures, text, music, mixed media) can be expected, driving economic growth across the UK's creative and technology industries.

There is no evidence of significant problems in the computer games industry, the public performances/theatre sector, nor in the corporate use of copyright licensing.

But we did identify significant problems in a range of other market segments and industry sectors:

- Libraries, archives and museums
- Educational institutions
- The audiovisual industry (feature films and television)
- The publishing industry (newspapers, magazines, books and journals)
- The music industry
- The images industry (still pictures, photo libraries, artworks)

We also identified an overarching cross-sector and cross-territory problem which, if resolved, will further improve copyright licensing for the mixed media and borderless world of the internet.

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Those problems can be summarised as follows:

- Complexity of licensing processes
- Complexity of licensing organisations
- Repertoire imbalance between the digital and physical worlds
- The difficulty in finding out who owns what rights to what content in what country
- The difficulty in accurately paying to creators the fair share of revenues from uses and reuses of their copyright content
- The labour-intensiveness, expense and difficulty of licensing copyright for the high volume low value transactions that characterise the digital world
- The lack of common standards and of a common language for expressing, identifying and communicating rights information across the different creative sectors and across national borders

There is a political dimension to the issues surrounding copyright licensing, but it is not party political.

Media companies wish to see tougher enforcement against copyright infringement.

To achieve this, the media companies must be – and, as important, must be seen to be – doing everything possible to enable and encourage new digital services.

Making copyright licensing easier to use, less expensive, more accessible for licensees both large and small, for companies and for individuals, will encourage new digital services.

A wide and diverse range of new digital services for the fixed and mobile internet that are easy to use, that offer a repertoire not too different from the physical world, that are customer-oriented and sensibly priced, reduce, for example in the eyes of the politicians, the justification for any copyright infringement by consumers.

As a result, there will be stronger political will to enforce copyright ever more vigorously across peer to peer file-sharing, websites, search engines, payment systems and advertisers.

A combination of three streams of activity: our own Phase 2 work – Seeking Solutions; the various initiatives already underway in the creative industries such as the publishing industry's Linked Content Coalition; and the solutions coming out of the IPO's parallel consultation into copyright matters, will together enable UK copyright licensing to be even more fit for purpose in the years to come.

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### 3. Introduction

1. In November 2010, the Prime Minister commissioned Professor Ian Hargreaves to look at how the IP system could do more to help the UK economy grow. The Hargreaves Review published in May 2011<sup>1</sup> and the UK Government's subsequent response (published in August 2011)<sup>2</sup> are about reforming the IP system to stimulate both technology and content creation. In his report Professor Ian Hargreaves argued that digital technology is challenging existing business models while enabling new ones but the IP system – and particularly the copyright system – have not kept pace. To create a better functioning market for the licensing and use of copyright, Professor Hargreaves made a number of recommendations including that the Government should facilitate an industry-led Digital Copyright Exchange (DCE).
2. The Government broadly accepted all of the Hargreaves Review's recommendations and as part of its ongoing implementation of these recommendations appointed Richard Hooper in December 2011 to lead an independent feasibility study (the Study) to develop a DCE.
3. The Terms of Reference for the Study are set out in Annex 1 but in summary its aim is to consider options for developing a functional digital market in rights clearance and a source of information about rights ownership, as recommended by the Hargreaves Review of Intellectual Property and Growth.
4. The Study is being conducted in two phases. Phase 1 – the diagnostic phase – focused on examining available evidence to identify the issues preventing copyright licensing from being fully effective for the digital age. The findings are based on two sources of evidence:
  - Face to face meetings with individuals, businesses, lobby groups and trade associations in the creative industries; and
  - Responses to the Call for Evidence issued on 4<sup>th</sup> January 2012 (see Annex 2). The responses are summarised in Annex 3, which also includes a list of those respondents who were willing to be named.
5. We conducted 90 face to face meetings with individuals and organisations in the creative industries over a three month period from December to March. Discussions were held with individuals, companies, collecting societies, record labels, trade associations and lobby groups representing the music, publishing, audiovisual and image/picture library/artworks industries, among others. These meetings largely took place where the stakeholders operate, though a small number of meetings were held at the Intellectual Property Office, where the Study has its base.
6. The Study received 117 responses to the Call for Evidence (Annex 3). As the list shows, responses were received from a wide variety of stakeholders including collecting societies, trade associations, individual businesses, educational institutions, libraries and museums, among others.

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1 <http://www.ipo.gov.uk/ipreview-finalreport.pdf>

2 <http://www.ipo.gov.uk/ipresponse-full.pdf>

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7. A crucial aspect of this Study has been the need to ensure that it is a collaborative effort. As part of this we invited 12 men and women from across the creative industries to form an Advisory Panel to peer review the draft report and ensure accuracy in our statements. Panel members were chosen to achieve a balance between those who, initially at least, were against the Hargreaves Hypothesis and those who were for it, and those in the middle (i.e some of it is true and some of it is not true). The following kindly agreed to become members of the panel:
    - Paul Brown, Mary Evans Picture Library
    - Sarah Faulder, Publishers Licensing Society
    - Spencer Hyman, Artfinder
    - Simon Juden, Pearson
    - Anthony Lilley, Magic Lantern
    - Jeff Lynn, COADEC
    - Richard Mollet, Publishers Association
    - Najma Rajah, BBC
    - Sophia Robb, Amazon EU SarL
    - Geoff Taylor, British Phonographic Industry
    - Jon Webster, Music Managers Forum
    - Ben White, British Library
  8. It is important to note that while we have named the organisations these individuals work for, their participation on the panel was as individuals, rather than as representatives of their organisations. All panel members agreed to act in a personal capacity to help modernise copyright licensing for the digital age where required, acting therefore not in the narrow interest of their specific organisation but in the best interests of the music industry, the audiovisual industry, the images industry, the publishing industry and the technology industry - with a view to creating strong and successful economic growth across the creative industries and technology sectors as a whole.
  9. Each panel member was required to sign a Non-Disclosure Agreement (NDA) and was asked to read the final draft of this report to check for factual errors and omissions, and to say where they disagreed with the findings. The panel met with the team on Tuesday, 20 March to agree the final version of the report.
  10. In addition to their help in shaping this report, panel members were also given the opportunity to submit 200 words expressing their views on the report or the process. Annex 4 contains submissions received.
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## Next Steps

11. Phase 2 of the Study begins in April 2012 and focuses on seeking solutions to the issues with copyright licensing as identified in this report. The digital copyright exchange will be one of the potential solutions examined.
  12. As the report sets out there is already a great deal of work underway to automate the licensing process, with some DCEs already in operation and others in development. This is where we will begin. We will continue to collaborate with industry and will be meeting with key stakeholders as appropriate, some of whom we met in Phase 1.
  13. We will report to Government before the 2012 summer Parliamentary Recess.
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## 4. Definitions

14. The area of copyright is complex and granular, sitting as it does within a mesh of laws and precedents. Definitions will always be tinged with uncertainty and overlap, and can end up in court for final judgements. The Intellectual Property Office's useful beginners' guide to copyright<sup>3</sup> can be found at <http://www.ipo.gov.uk/c-essential.pdf>
15. In a report such as this, the question of definitions would usually be found in the back of the report in an annex. However, definitions are so critical to understanding the scope and intent of our work that we set out here certain key definitions, ahead of the main narrative. Some of the heated debate in the creative industries and beyond about copyright licensing turns out to be different people defining the same terms differently and therefore disagreeing with each other more about terminology than about substance. Our definition of "copyright licensing" needs to be fully understood (see 4.3) – it concerns the process of licensing and not, for example, the price of rights.
16. Some of the responses to the Call for Evidence and some stakeholders in the face to face meetings took issue with a number of the draft definitions set out in the Call for Evidence (Annex 2). For example, at the meeting with the Creative Copyright Coalition, one person pointed out that the "end user" was also a "rights user" because he or she in buying a DVD was acquiring and agreeing to certain rights and certain obligations. So the term "end user" has now been replaced by "consumer" which helps but does not altogether solve the problem. Similarly, a number of creators, for example writers and composers, felt that the term "creator" should be added to the value chain of key players involved in copyright licensing ahead of "rights owner". Creators can own and can retain their rights but also can assign those rights to a publisher or producer. Most creators retain their moral rights which are crucial in copyright licensing since creators may have strong views as to how their work may be reused while others are asked to waive their moral rights under standard terms and conditions. Visual artists/photographers do not necessarily, for example, wish their images to be used in tobacco advertising and have the right to stop this happening.

### 4.1 Defining the players

17. There are five players in the chain of rights licensing. They are not mutually exclusive. A book publisher can be both a rights owner and a rights user, for example.
  - **Creators** are the writers, composers, photographers, artists, performers, directors who create the copyrighted work and are at the start of the value chain. Creators are always the first rights owner of a work (unless in the course of employment) and remain so unless and until they assign their rights to, for example, a publisher.
  - **Rights owners** (sometimes referred to as rights holders) are those individuals or organisations which own the copyright, for example in the book publishing industry the author and the illustrator (creators). Publishers and record labels will also often be rights owners too, by dint of the copyright that they create. They can manage these rights themselves, or mandate licensing and collecting societies to do it for them.

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<sup>3</sup> IPO Copyright: Essential Reading, January 2011, Crown Copyright.

- **Rights managers** are those individuals and organisations who manage rights on behalf of rights owners, for example the collecting societies like PPL, PRS, ERA and DACS<sup>4</sup> (sometimes referred to as CMOs, collective management organisations) or agents acting on behalf of the copyright owner. Aggregators such as The Orchard act as rights managers. They aggregate repertoire from independent labels and supply it to digital services like iTunes.
- **Rights users** are licensees - those individuals or organisations who wish to acquire a licence to use other people's copyright to create a new work or operate a new service, for example a BBC documentary using still pictures from Mary Evans Picture Library or a digital internet service such as Spotify (music) or Lovefilm (film and television).
- **Consumers** access and enjoy (also as licensees) the copyrighted content developed by rights users and rights owners. When those consumers create content themselves (e.g. uploading a video to YouTube – UGC, user generated content) they become, without always being aware of it, rights users or rights owners.

## 4.2 What is a digital copyright exchange (DCE)?

18. A digital copyright exchange, as envisaged in the Hargreaves Report, is an automated e-commerce website or network of websites which allows licensors to set out the rights they wish to license and allows licensees to acquire those rights from the licensors. Licensees can:
- look for different types of content across the range of media types
  - define and agree what uses they wish to make of the chosen content with the licensors
  - be quoted a price by the licensor for those uses of the specified content that the system is programmed to offer
  - pay for the rights online within the normal e-commerce framework
  - have the content delivered to them in the appropriate format
  - account back to the licensor as to what content was actually used so that the right creators can be paid their shares
19. Digital copyright exchanges already exist or are in the process of being developed in some sectors. We were, for example, shown working systems at Getty Images ([www.gettyimages.co.uk](http://www.gettyimages.co.uk)), the Newspaper Licensing Agency ([www.nla.co.uk](http://www.nla.co.uk)) and have been made aware of other systems such as [www.universalclips.com](http://www.universalclips.com) and [www.rightslink.com](http://www.rightslink.com) among others. We will be looking in detail at these kinds of systems in Phase 2 of the Study. Final recommendations may include a DCE that has a different remit from the Hargreaves vision, dependent on the needs of the industry and the problems that this Study highlights.

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4 A guide to acronyms is found in Annex 5.

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### 4.3 Copyright licensing defined

20. Licensing involves those who license (licensors) and those who are licensed (licensees). Licensors are often of course themselves also licensees. Copyright licensing can be initiated by the rights owner offering content to potential licensees or, conversely, by potential licensees making a request to use the content of licensors. Copyright licensing is defined in this report as comprising seven distinct processes all of which do not necessarily occur in every licensing transaction:
1. The licensee, assisted by the licensor as appropriate, decides which rights are appropriate for the specific purpose or purposes of the licensee
  2. The licensee discovers who owns the particular rights that are needed and requests the appropriate licence
  3. The licensor may grant a licence for those rights that match the specific purpose(s)
  4. The licensee pays for the rights (where required)<sup>5</sup>
  5. The licensor delivers to the licensee the licensed content in the appropriate format (although the content is often readily available)
  6. The licensee ensures that any terms and conditions attached to the granting of the licence are effectively applied
  7. The licensee accounts to the rights owner/manager for the content actually used (if required) so that the correct monies can be paid to the individual rights owners/creators.
21. This process is not linear. The 7 processes do not necessarily always follow in this order.
22. As is emphasised in the next section (5), this report makes a clear distinction between commercial negotiations (ie which set the cost of the actual rights) and the process of copyright licensing (ie the transaction costs of licensing).

### 4.4 Defining the media types involved in copyright licensing

23. For the purpose of this Study copyright licensing involves eight major media types:
1. Music and audio
  2. Theatrical performances
  3. Literary works and other text

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<sup>5</sup> Payment is not always upfront, but agreement to pay is usually required before content is delivered. For example, for a music download service, the licensee agrees to pay for the use of music publishing rights at a particular rate, based on usage of those rights. The licence includes a framework for reporting sales (ie use) after which the licensor will calculate the fees due and invoice the licensee accordingly.

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4. Artworks
5. Still images
6. Moving pictures
7. Computer games
8. Mixed media (content that contains more than one media type)

## 4.5 Defining the industries and sectors involved

24. The key sectors and industries involved in copyright licensing for digital services are:

- Archives, libraries, museums
- Educational institutions
- The corporate sector (eg newspaper cuttings and their digital equivalents)
- The audiovisual industry (film and television: predominantly moving pictures)
- The publishing industry (books, newspapers, magazines: predominantly text)
- The music industry (all types of music)
- The fine art/images industry (predominantly the picture library business, still pictures and artworks – there was no great consensus as to what this industry segment should be called)
- The computer games industry
- The theatre (public performances of theatrical works)

25. The media types do not match perfectly to the different industries. There is much overlap. The audiovisual industry, for example, is much more than just moving pictures - it builds on copyrighted works from publishing, music and the theatre. Modern picture libraries deal with both still pictures and moving pictures and some are expanding into music (eg Getty Images) and text. Newspaper websites routinely contain text, still pictures and moving pictures.

## 4.6 Types of licensing

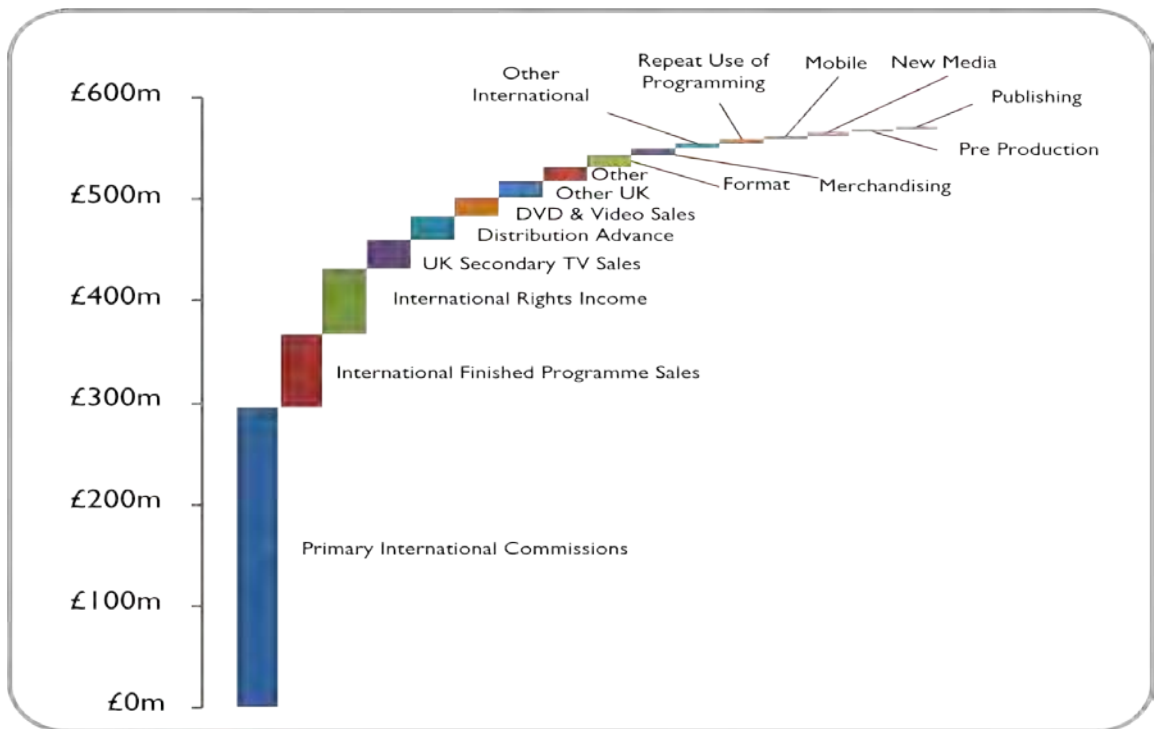
26. The Study encountered a profusion of terms used across the various industries to describe the many different types of licensing – primary, secondary, first class, second class, grand rights, small rights, underlying rights, blanket licensing, direct licensing etc. We were not able to arrive at a common definition of these terms between the various industries involved. Thus we have tried to avoid them whenever possible.

27. Instead we make the one distinction between the original creation and first appearance of the copyrighted work, and then all and any subsequent reuses of the work that require

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licensing. This report is largely about the second of these - reuse. Figure 1 shows this graphically for the Channel 4 programme Supernanny.

**Figure 1: Sources of revenue for the UK independent production sector, 2009<sup>6</sup>**



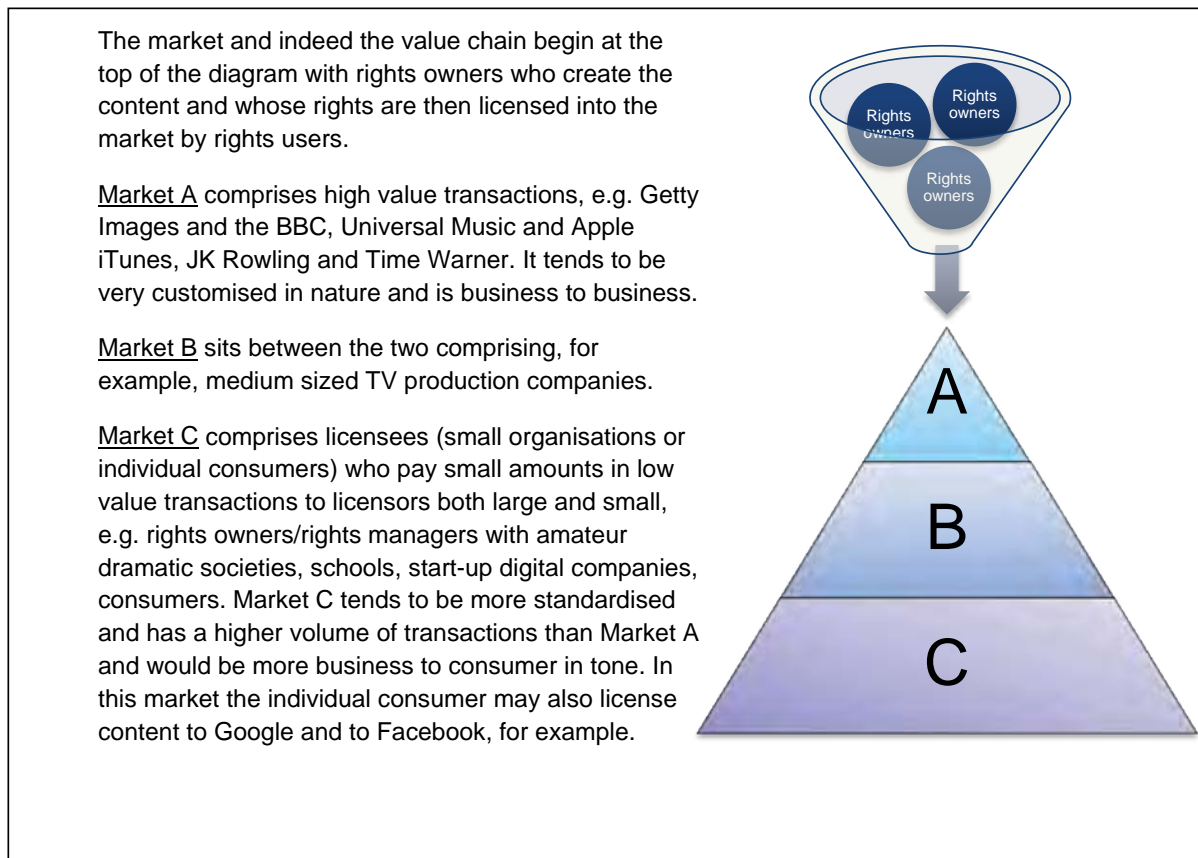
6 Creative UK, based on Pact Financial Census and Survey, 2010

28. The original commissions are as shown on the left, and to the right are the many uses and reuses that make up a long tail, all of which require licensing and all of which are increasingly important to help fund the original creation. One broadcaster pointed out in its response that even a well-performing drama may only recover 60% of the production investment from the primary broadcast window.

## 4.7 Defining the copyright licensing markets

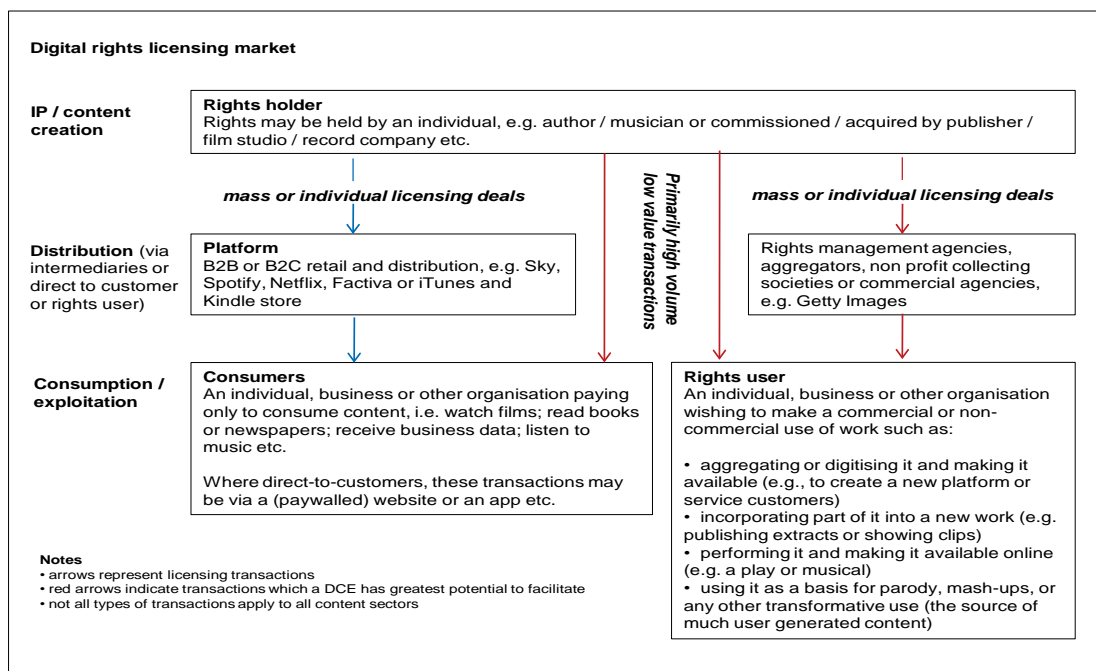
29. Each piece of copyright content has its own set of rights associated with it, with some of those rights managed by collecting societies and some managed directly by rights owners. There are of course multiple owners of rights in some content.
30. We attempted to graphically represent this in the Call for Evidence as three defined markets (see Figure 2 below). Some respondents felt that this market definition was too simple and did not adequately capture the complexity or the sectoral differentiation in the marketplace. Others thought it was a useful starting point.

**Figure 2: The three defined copyright markets**



31. One suggestion made was to focus on the supply of licences to the market, with demand and supply being separated into three differently defined copyright segments. News Corporation sketched out a diagrammatic representation of how the digital rights licensing market currently operates, and where a DCE might fit in. The Advisory Panel suggested some amendments to the News Corporation diagram and this is represented in Figure 3 below.

**Figure 3: Digital rights market definition**





## 5. What this report is not about

32. The universe of copyright is both complex and contentious, as has already been emphasised. Copyright licensing is just one part of that universe. Yet because of the inherent interrelatedness of the whole subject, copyright licensing bumps up against a host of other issues, adjacent parts of the same universe. In our meetings with the industry many of these issues were raised and their significance and relatedness were emphasised.
33. This report is about the process of copyright licensing as defined and whether it is fit for purpose for the digital age. At risk of holding up the main narrative again, it is important to be clear what this report is not primarily about.

### 5.1 Not about commercial rights and moral rights

34. This report is not about rights owners' and rights managers' commercial right to negotiate. There can, for example, be confusion between the process of copyright licensing and the price of licences being offered by rights owners or rights managers. A digital start-up company may claim that it is being thwarted and innovation is being held back by the copyright licensing process, when in fact, on closer examination, the real disagreement is about the prices being charged. What a creator/rights owner wishes to charge for their copyright is a commercial decision which remains outside the scope of this report. However, it has been claimed that the existence of a digital copyright exchange with greater transparency and higher volumes of licensing, will exert a downward pressure on prices being charged. This claim will be examined in Phase 2 of the work – Seeking Solutions. There is in a sense an indirect link between the price of rights and the transactions cost involved in the licensing process.
35. There can also be confusion between the process of copyright licensing and the desire of rights owners to withhold the granting of certain rights. JK Rowling and the rights holders for Ian Fleming, creator of James Bond, are high-profile examples of copyright owners who have exercised their right to control e-book publications themselves, or through parties they appoint, and would not accept such decisions being made by any third parties on their behalves. Considerations would include both commercial ones and the complexity of other copyright licensing arrangements around their properties (such as film and other non-book commitments). Again these are commercial decisions by creators and rights owners which remain outside the scope of this report.
36. Further confusion may be caused by a photographer, for example, asserting his or her moral rights in the work created (already alluded to in section 4 above). This may very well hold up or stop altogether copyright licensing. Services which allow their consumers to do mash-ups on the internet<sup>7</sup> involving different media types may indeed be stopped because of creators' moral rights – that is not a copyright licensing problem.

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<sup>7</sup> A mash-up is a song or composition created by blending two or more pre-recorded songs, usually by overlaying the vocal track of one song seamlessly over the instrumental track of another. A common example is a vocal from one track over drum and bass from another. Another might be moving images from one video over sound taken from another.

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## 5.2 Not about the IPO's parallel consultation

37. This report is not about the IPO's own parallel consultation<sup>8</sup> which covers a range of issues that from time to time do touch up against copyright licensing, for example orphan works, extended collective licensing and exceptions to copyright. Orphan works (works that remain in copyright but where the owner of the rights either cannot be identified or cannot be found after a diligent search) cause problems for organisations such as the BBC and the British Library who wish to digitise and make available to the public their entire archive, but are less of a problem in the music industry. The IPO's parallel consultation stems, like this digital copyright exchange feasibility study, from the Hargreaves Review. We will examine in Phase 2 what role a digital copyright exchange might play alongside other policy options in helping to address issues around orphan works and extended collective licensing.

## 5.3 Focus on creative industries, especially music, moving pictures, still pictures, literary works and text

38. This report focuses on the creative industries and within them mainly on the music industry, the audiovisual industry, the images industry and the publishing industry. Text and data mining in scientific and academic publishing (for example scientists in the pharmaceutical industry searching with specialist software a very large number of academic articles for interesting and commercially important correlations) is not covered here but is covered in the parallel IPO consultation. This report also does not focus on the computer games industry, the theatre/public performances or the corporate sector's use of copyright material since little or no evidence was submitted to this Study of any problems with copyright licensing in these sectors. Computer games and the theatre of course make vital contributions to the UK's creative economy and to the success of the industry sectors this Study does focus on. The stage show Mamma Mia!, for example, went on to become one of the most successful British films as measured by box office takings. Further, this report does not discuss individuals licensing their content to social media sites or internet companies such as Facebook.

## 5.4 Not about competition issues

39. This report is not about competition issues in the industries covered. Some organisations argued strongly that copyright licensing was not the major problem within the music industry. But competition issues were - for example, the market power of certain record labels and of online retailers like iTunes. If the Government really wanted to help the creative industries grow and expand, they claimed, the Government should focus more single-mindedly on the issues of competition, market access and industry structure. It is possible that a digital copyright exchange, were that to be the appropriate solution, could increase competition of a beneficial kind by reducing information asymmetries and lowering barriers to entry. Copyright confers exclusive rights. Thus if an organisation aggregates

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8 <http://www.ipo.gov.uk/pro-policy/consult/consult-live/consult-2011-copyright.htm>

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large amounts of copyright content so that it has significant market power and is seen to be behaving anti-competitively, then that is a matter for competition authorities not the reform of copyright licensing. Many people commented on the imbalance of bargaining power between licensors and licensees (there are powerful licensors and also powerful licensees) which is not the fault of copyright licensing but could perhaps be alleviated by greater transparency in copyright licensing.

## 5.5 Not about copyright infringement/piracy

40. This report is not principally about copyright infringement, a more neutral term than the often-used piracy. More than one organisation commented on the fact that the Digital Economy Act (DEA) still has not been implemented by the Government two years after it came into law and that high levels of digital copyright infringement are seriously impacting on the viability of licensed digital content services in the UK. These organisations felt that stopping or reducing copyright infringement, rather like sorting out structural competition issues, was much more important than any changes to copyright licensing. However, a working digital copyright exchange could reduce copyright infringement by making it much easier for prospective rights users to find out, from an authoritative source, who owns what rights and pay the owners accordingly. In the case of recorded music there is no significant difficulty in identifying rights owners. Spencer Hyman (CEO Artfinder) pointed out that where there is piracy, there is usually a misalignment of incentives – an issue which this Study does grapple with.

## 5.6 Not about venture capital or bank lending strategies

41. This report does not comment on the issue of financing of innovation, for example venture capital for digital start-ups wishing to create digital music services. A number of people have said that what is holding up innovation and holding back digital start-ups is not copyright licensing processes but the absence of the types of light-footed financing that is seen to be widely available in the USA, especially in California's Silicon Valley.

## 5.7 Not about search engines

42. Finally, this report is not about how the rise of search engines (like Google) creates new challenges and anomalies for copyright licensing frameworks and how they cause a major shift in the balance of power inside the creative industries. While they are not licensees, search engines and the like are part of the copyright process in the digital world. Their emergence is one of the reasons why copyright in the digital era is so problematic as they highlight the shift in power between the analogue world, where content creator and broadcaster are pivotal, and the online space where the navigator ie the search engine and the network hold the keys to generate value. This report does however return again and again to the difficulties of navigating and signposting through the maze of copyright complexity.
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## 6. Copyright licensing in the digital age

43. This first phase of the Digital Copyright Exchange Feasibility Study seeks to interrogate the hypothesis which emanates from the Hargreaves Report. The Hargreaves Hypothesis (hereinafter called the hypothesis) was refined further as a result of meetings in December 2011 with a range of stakeholders who agreed and disagreed with parts or all of the hypothesis. The hypothesis can be described thus:

***Copyright licensing, involving creators, rights owners, rights managers, rights users and consumers across the different media types and the different industry segments is not fit for purpose for the digital age.***

44. Seven **reasons** are given for this. Copyright licensing is:

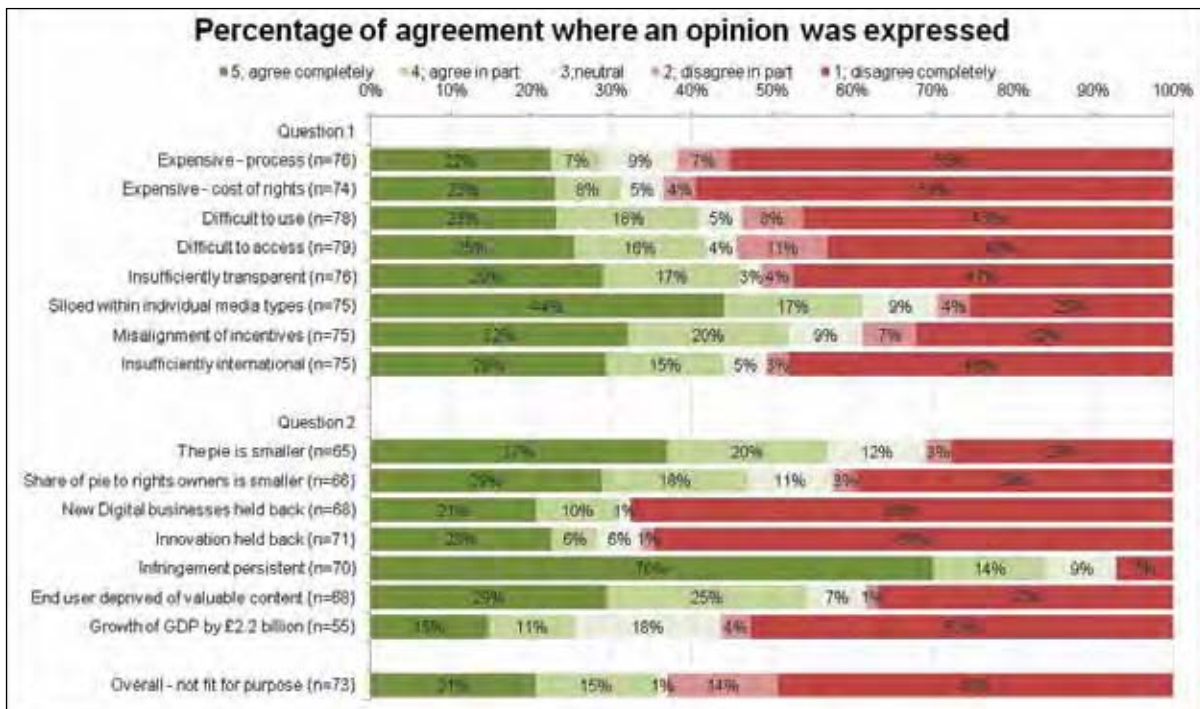
1. expensive (this refers to the process itself not the prices being charged for the rights)
2. difficult to use
3. difficult to access
4. insufficiently transparent
5. siloed within individual media types (at a time when more and more digital content is mixed media and cross-media)
6. victim to a misalignment of incentives between creators, rights owners, rights managers, rights users and end users
7. insufficiently international in focus and scope

45. As a result of copyright licensing not being fit for purpose according to the hypothesis, the following seven claims are made:

1. the size of the pie for rights owners/managers is smaller than it could be
  2. the share of the pie going to rights owners is smaller than it could be
  3. new digital businesses within the creative industries are being held back
  4. innovation is being held back
  5. infringement of copyrighted content remains persistent
  6. victim to a misalignment between creators, rights owners, rights managers, rights users and consumers
  7. If barriers in the digital copyright market were reduced, UK GDP could grow by an extra £2 billion per year by 2020.
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- 46. At the first two face to face meetings in early December 2011 it was clear that there was no consensus about the hypothesis. UK Music, representing the commercial music industry, fundamentally disagreed with it – copyright licensing is fit for purpose for the digital age. Coadec, which represents digital start-up and digital internet companies, believed it to be absolutely true – copyright licensing is not fit for purpose for the digital age. Organisations that license copyright (licensors) tend to disagree with the hypothesis, whilst organisations that are licensed (licensees) tend to agree.
- 47. This review has to make judgements between the two conflicting positions. There are of course many organisations, the BBC for example or Cambridge University Press, which are both licensor and licensee. Figure 4 shows the spectrum between agreement with the hypothesis at one end and disagreement with the hypothesis at the other, with responses to the Call for Evidence plotted (anonymously) along the spectrum.

**Figure 4: Percentage of agreement where an opinion was expressed**



- 48. It was a notable feature of many of the face to face meetings held from December 2011 to March 2012 that most organisations/sectors felt that their own approach to copyright licensing for the digital age in their world was fit for purpose. However, they were of the view that it was other sectors and other organisations who were not fit for purpose in their approach to copyright licensing.
- 49. It is important to note that this Study of copyright licensing does not always sit easily within a larger and very fraught debate in the UK and worldwide between those who believe that the internet should be free and copyright should be rolled back in the interests of citizens' rights, culture, education, economic growth and digital innovation, and the copyright

owners across the creative industries who argue that copyright support and the reduction of copyright infringement are essential to the future health of those industries, to culture, to innovation in digital content services and to economic growth. There is intense conflict between technology<sup>9</sup> companies like Google and media companies like the Hollywood studios. “Media companies argue that piracy is costing them billions of dollars every year and killing jobs. But technology companies including Facebook and Google, say ... laws [which stop online piracy] censor the internet and choke innovation.” (Financial Times, ‘Murdoch attacks Obama over opposition to online piracy laws’, 16/1/12, page 17).

## 6.1 Is copyright licensing fit for purpose?

50. The responses to the Call for Evidence and the many face to face meetings demonstrated time and again that there was no simple Yes/No answer to this question.
51. Once the initial caution of some organisations concerning government interference in commercial operations was overcome (as in “we do not want the Government telling us how to license copyright and regulating our prices”), a range of very nuanced and thoughtful answers and written responses were received.
52. NBC Universal, in their response, warned of the danger of drawing general conclusions that are then applied to all industries and all types of digital content, based simply on the experience of operators in certain sub-sectors. At a meeting chaired by Consumer Focus and the Creators’ Rights Alliance, more than one person emphasised the different shades of grey in answering the questions set out in the Call for Evidence. For example, in answer to the question - were collecting societies properly transparent to the members that owned them – one person went through a list of collecting societies stating that, in her view, some were very transparent to members (DACs and ALCS) but others were not (NLA). Acronyms, of which there is a profusion in the world of copyright licensing, are explained in Annex 5.
53. The question(s) about the fitness for purpose of copyright licensing will now be answered in relation to the relevant industry/market segments which exhibit, in the opinion of this Study, problems with copyright licensing and we conclude with our view of copyright licensing across the creative industries as a whole:
  - Archives, libraries, and museums
  - Educational institutions
  - The audiovisual industry (film and television: predominantly moving pictures)
  - The publishing industry (books, newspapers, magazines and journals: predominantly text)
  - The music industry (all types of music)
  - The fine art/images industry (predominantly the picture library business, still pictures and artworks)
  - The creative industries taken together

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<sup>9</sup> There is an argument for calling companies like Google ‘internet intermediaries’ rather than technology companies. In the digital age most content companies have to also be technology companies.

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## 6.2 Archives, libraries, museums

54. For archives, libraries and museums this Study has come to the view that copyright licensing is not fit for purpose in one key respect – the difficulty in securing the necessary permissions from rights owners. This is not an issue with the National Archives where crown copyright material is freely available.
55. Archives wish to digitise their collections thus making them available to a much wider public than the small number of researchers who can come physically to study the collection. But in order to digitise the collection, it is essential to discover whether the work (a letter, an article, a photo, a sound recording, a film clip) is still in copyright and, if it is, who owns the rights. This is the vital second step in the copyright licensing process as set out in 4.3 above.
56. Digitising a letter for example without the permission of the letter writer (normally the rights owner) constitutes copyright infringement. The older the work,<sup>10</sup> the more difficult it can be to establish the owner. It is extremely costly for the library or archive to carry out the due diligence to discover who owns what. The owner of the copyright may have died, for example, so the copyright has passed to his or her estate. Ownership of copyright can change thus complicating any search. At the end of the search there remains a large number of what are termed orphan works – works where the copyright owner cannot be traced. This may not just be because of the death of the owner or the age of the work. There are, for example, living authors who are not full-time professional writers. They have chosen not to register with author collecting societies (eg ALCS), or they find it too complicated and time-consuming to register and keep their entries up to date, or they do not actually know that author collecting societies exist. These living people are therefore also very difficult to trace and their works become orphan.
57. The first four reasons for the hypothesis (expensive; difficult to use; difficult to find; insufficiently transparent) are clearly in evidence here.
58. The Chief Executive of the British Library, Dame Lynne Brindley, at a meeting at the British Library summarised the problem succinctly: “It is simple: we do not know who the rights owners are - therefore we cannot reimburse them.”
59. The British Library pointed out further that, because the collections could not be easily digitised since that would mean infringing the copyright of the undiscovered authors, innovation and digital businesses are being held back. Thus in the case of archives, libraries and museums, there is clear evidence that claims 3 and 4 in the hypothesis (new digital business are being held back; innovation is being held back) are correct. Furthermore, that means that claims 1 and 2 in the hypothesis (the size of the pie for rights owners/managers is smaller than it could be; the share of the pie going to rights owners is smaller than it could be) are also substantiated.

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<sup>10</sup> The copyright term is long: the death of the author plus seventy years

60. The publishing industry is in the process of developing a number of search tools (eg ARROW)<sup>11</sup> that will save time and costs in relation to the orphan works problem (see 6.5). We will examine in Phase 2 what role a digital copyright exchange could play alongside these initiatives and other policy options to help address issues around orphan works and extended collective licensing.
61. The net result of copyright licensing not being fit for purpose in this sector because of the orphan works problem and a lack of legal mechanisms to enable mass digitisation is that claim no 6 in the hypothesis (the consumer is deprived of access to a significant amount of commercially and culturally valuable content) is clearly true, at least for some media types.
62. Difficulties in discovering the rights owners of older works are also encountered in the audiovisual industry (see 6.4 below).
63. Finally, there are some important copyright issues concerning the public ownership of artworks in museums. With reference to claim 6 of the hypothesis (the consumer is deprived of access to a significant amount of commercially and culturally valuable content) many of the works that are in public collections and often in the public domain are hard to view either in person or online. For example, it is extremely difficult to access the Government Art Collection or the works owned by the Arts Councils. Copyright licensing is cited as one of the reasons why they are not yet available in digital format via the fixed or mobile internet.

### 6.3 Educational institutions

64. This Study has come to the view that copyright licensing is not fit for purpose in the education sector - but for reasons that are totally different from the reasons in the archives, libraries and museums sector.
65. The main reason in education is complexity. Complexity is again and again found to be a major reason for copyright licensing not being fit for purpose in this report. The Study is not willing at this stage in its life to agree with many people who assert that complexity is a fact of life in the copyright industry about which nothing can be done. The issue to which this Study constantly returns is the need for better navigation in a complex world. The complexity in education is well illustrated in Figure 5.

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11 ARROW was established as a European Commission support project, which ran between 1st September 2008 and 28th February 2011, the purpose of which was to investigate the extent to which existing data sources could support a 'diligent search' process for libraries involved in projects for mass digitisation of books and similar textual works in their collections.

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Figure 5: guide to licensing in schools<sup>12</sup>

**at-a-glance guide to licensing in schools**

SOME ACTIVITIES REQUIRING A LICENCE

	CCLI	CLA	ERA	PPL	PRS	MCPS	OTHER
Photocopying, manual or electronic reproduction of a wide range of hymns and worship songs used during assemblies for acts of collective worship	✓						
Photocopying music (other than hymns and worship songs) and performing musical plays							✓
Organising a school play, an end of term concert or recital involving live or recorded music that is attended by family or friends (this does not cover musicals*)				✓	✓		
Recording a radio or television broadcast for educational purposes			✓				
Photocopying articles from magazines or journals, or photocopying extracts from books (this does not cover sheet music*)		✓					
Playing a radio or tape/CD player in administration offices or staff rooms				✓	✓		
Holding a school disco, fete or fair outside normal school hours where music is played				✓	✓		
Creating overhead transparencies from magazines, journals or books (excluding music)		✓					
Hiring out premises for keep fit/aerobic classes				✓	✓		
Showing videos to an after class film club					✓		✓
Using music on hold on your telephone system				✓	✓	✓	
Creating and storing, on computer, the school's own hymn book or carol sheets	✓						
Producing video or audio recordings of a school carol service or other religious/seasonal festival to circulate to parents	✓					✓	
Recording a school concert, play or other event containing music (this does not cover musicals*)						✓	

\*Contact the music publisher directly or, for further information, the MPA (details inside).

Note: Specific details about the rights represented by these organisations may be obtained on our website: [www.licensing-copyright.org](http://www.licensing-copyright.org). This guide covers the majority of routine activities for which schools need a licence, but it is not exhaustive. Other organisations may need to be contacted. Licences for certain school activities are obtainable directly from the relevant copyright owners.

66. This shows on the vertical axis the fourteen different activities that schools need licences for. In fact the small print points out that it is more than fourteen because the list “is not exhaustive”. Along the horizontal axis, there are six different collecting societies plus an “other” column which schools have to get licences from. It was estimated for the Study that it is probably as many as 12 different organisations that schools have to deal with. For musicals, the music publisher has to be contacted, for example, probably via the Music Publishers Association (MPA). The small print also notes that “licences for certain school activities are obtainable directly from the relevant copyright owners.”
67. The complexity of copyright licensing in education is well documented in the response to the Call for Evidence by Scotland’s Colleges (representing Scotland’s Further Education sector). Unlike some organisations (see below in 6.6), Scotland’s Colleges is happy for their response to be in the public domain. Scotland’s Colleges deal with some or all of nine different collecting societies (CLA, ERA, NLA, Open University, British Standards Institute, Ordnance Survey, PRS/MCPS, PPL, DACS – see Annex 5 for a guide to acronyms). The response then goes on to state:

12 Source: A guide to Copyright Licensing in Schools: Where to Start. [www.licensing-copyright.org](http://www.licensing-copyright.org). Provided by ERA

68. “Some of the licences are difficult to use. The CLA claim that their licence is a “blanket” licence, but there are significant numbers of authors and publishers who do not mandate CLA and as result, there is a lengthy exclusions list of both works and publishers. The CLA licence also only covers text in books and some periodicals – many other forms of text, such as newspapers, are not included – they are licensed by the NLA ....<sup>13</sup> All collective licences are complex and are confusing and difficult to understand by the majority of those working in FE – but they are also the people who need to access materials for teaching and learning purposes. This results in either lack of use of legitimately available resources or the possibility of infringement.”
69. This claim is supported by other feedback stating that CLA licences are complicated and that their administrative costs appear to be on the high side. However, to be fair to the CLA, it has to get mandates from publishers and authors on an individual basis which increases the complexity and costs. In other countries their equivalents do not need a mandate because it exists in law. Furthermore, PricewaterhouseCoopers (PwC) points out in its research for the CLA that less than 0.25% of works are unavailable under their licence to educational establishments.<sup>14</sup>
70. This Study understands that there are services to which copyright owners/licensors contribute content where it is possible to obtain a single cross platform licence for a nominal fee or by an affordable subscription, and which directly remunerates the copyright owner/licensor. This allows the educational institution to side step the complicated and expensive licences noted above. However, not everything that an educational institution would require is currently available through these services.
71. What the education sector demonstrates is that complexity of process is caused by and also contributes to complexity of organisational structure – 12 different organisations requiring licences in the education sector. What Phase 2 will need to examine is how and whether greater simplification of both processes and of organisations is possible, to make copyright licensing easier for educational institutions.

## 6.4 The audiovisual industry

72. The audiovisual industry segments into two main sub-sectors – feature films and television.

### Feature films

73. The fact that rights are centralised in the film producer or the studio significantly reduces complexity and increases streamlining of copyright licensing in the feature film sub-sector.

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13 In February 2012 the NLA and CLA began a trial in which each agency is able to offer clients a licence for the repertoire of the other. The objective is to explore the appetite for a simpler approach to licensing newspapers, magazines, journals and books.

14 PricewaterhouseCoopers, ‘An Economic Analysis of Education Exceptions in Copyright’, 21 March 2012. This report is only concerned with licences to UK educational establishments, i.e. schools, universities and FE colleges. The 0.25% includes UK works specifically excluded by authors and publishers and foreign works from countries where there is no bilateral agreement in place with CLA.

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74. No evidence has been put forward to the Study that new digital film services have been hampered by the licensing process. While there is no way to prove definitively that licensing issues are holding back innovation, there is a strong possibility that would-be entrepreneurs in the audiovisual sector are seeing the challenges faced by music start-ups (actual or perceived), which only need to deal with one type of rights, and are deciding that negotiating multiple sets of rights would be so complicated that it is not worth trying. The fact that it has been left to Netflix – a large American company – to introduce widespread video streaming in the UK, when a home grown start-up could have done the same thing, further points in this direction.
75. The Study considers that there are four licensing-related areas that need attention in the feature film sub-sector:
- Accounting back properly and on a timely basis to creators for their revenue shares
  - The lack of availability of repertoire in the digital space (download and streaming services) compared with the physical space (DVDs, Blu-Rays)
  - The archive issues of the British Film Institute
  - Cross-sectoral obstacles

#### **Accounting back to the creators**

76. Accounting back to the creators for their revenue shares remains complex and data quality needs constant attention. The IT systems that account for relatively small payments to the very large numbers of people involved in creating feature films (actors, production designers, directors etc) do not always appear to be fit for purpose.

#### **Repertoire**

77. The indicative research carried out by the Open Rights Group in October 2011 concludes that “DVDs are available for just shy of 100% of...films. But a wealth of British cultural history is simply not available through legal providers [online]. Only 43% of the top 50 British films can be bought or rented online. Similarly, only 58% of the BAFTA Best Film award winners since 1960 have been made available [online].”
78. The fact that digital services are less comprehensive in terms of repertoire than the traditional physical product market of DVDs and Blu-Rays suggests some problems with copyright licensing.
79. The film industry would argue that it is still (relatively) early in the market for AV digital content online (as compared to say music and DVDs) and therefore it is unsurprising that not everything is as yet available. Netflix, for example, has only just launched in the UK. Given that the industry is still at this early stage in the development of the market it is unsurprising that older titles (i.e. those less likely to be initially in popular demand) are not yet widely available. Digital services need to be commercially viable and of good quality; the cost and complexity of digitizing older titles can be significant and should not be underestimated.
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80. The lack of availability of certain titles may also be a result of commercial decisions around release patterns for titles and should not be confused with the copyright licensing process. There is criticism of the traditional use of windows<sup>15</sup> for releasing feature films by film producers and studios. A digital consumer has the expectation that a feature film once released should be available in the digital space. But that consumer expectation is at odds with the right of copyright owners to release their products in ways that maximise audience and commercial return.
81. There is one other important point about this imbalance of repertoire between the digital and the physical space in relation to the audiovisual industry and the music industry. A strong perception exists in political circles that copyright infringement is more explicable (though no more excusable) if consumers of internet-based digital services (Lovefilm, Netflix, Spotify, iTunes etc) have access to a less comprehensive repertoire of music, film and television programmes than consumers of services in the physical space (DVDs, CDs, high street retail and rental, Lovefilm, Sky, Virgin Media, digital broadcasting etc). The music and audiovisual industries point out that the evidence in fact shows that the most pirated products by consumers are the most popular ones and that these are in almost all cases in the digital services repertoire. But the political perception remains.
82. The British Film Institute (BFI) noted another reason why the digital repertoire is less comprehensive than the physical repertoire: “independent film distribution companies have found it difficult to license material to digital services such as iTunes. It is understood that disproportionately high transaction costs for companies which do not have large inventories of films often mean that it is not economically viable for emerging platforms to conclude deals to make material available on their services.”

### Film archives

83. There is clearly a licensing problem for the film archive of the British Film Institute. “Film material in the BFI National Archives has been sourced from different rights holders over more than 75 years. Much of it has been ‘donated’ but not necessarily by the rights holder and often ownership is unclear.” Just like the British Library, the BFI finds it costly and difficult to establish who owns what rights to the older items in the archive. The British Library, the BFI and the BBC are working together on several projects to solve the issues surrounding archive release which might themselves facilitate more efficient online licensing solutions. The IPO’s parallel consultation on orphan works and extended collective licensing, alongside our own Phase 2 work and these existing industry initiatives, may find solutions.

### Cross-sectoral obstacles

84. Given the importance of the creative relationship between the audiovisual industry and the publishing industry, more than one person, for example a top Hollywood agent, pointed out forcibly how difficult it is to find out who owns what rights to literary works. In copyright licensing there are still many barriers to prospective licensees moving cost-effectively from their own creative sector (audiovisual) to the one next door (publishing or music or images). This has always been a problem in the analogue era but is exacerbated in the digital era.

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<sup>15</sup> Feature films are normally released first into cinemas, then into DVD, then into pay television and then into free to air terrestrial television.

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## Television

85. In the television sub-sector of the audiovisual industry, the Study was faced with hugely conflicting, diametrically opposed evidence. All the big commercial television companies (eg ITV, Channel 4, NBC Universal, Time Warner) and relevant trade associations (eg Pact and the British Video Association) asserted and demonstrated with evidence that:
- copyright licensing was fit for purpose
  - innovation and new digital businesses were not being held back
  - there was much competition and consumer choice in digital audiovisual services across a wide range of platforms
  - there was no need for any real changes or solutions (with one possible exception)
86. But there was one big broadcasting voice - the BBC - which asserted and demonstrated that copyright licensing was not fit for purpose.
87. The BBC, in its dual role as licensor and licensee spanning radio, television and online, agrees with the hypothesis that copyright licensing is expensive, difficult to access, difficult to use, siloed, insufficiently international in focus and scope. The BBC owns a large archive, unlike the other major companies in this sector, and reducing the licensing costs surrounding the digitisation of that archive is a key driver of their views.
88. In their response to the Call for Evidence the BBC wrote: "Broadcasters face high deadweight costs of rights clearance because of the complex nature of TV and radio programmes which comprise contributions from many different rights holders all of whom need to be traced, contacted and then paid. On average the BBC spends £10 million per year on the administrative costs of rights clearance....In the future, however, we anticipate that this figure will rise substantially as the BBC makes greater use of archive content unless the copyright regime is modernised to reflect the demands of audiences in the digital world. This is because audiences' appetite for on-demand content (current and archive) is increasing and some of our older rights contracts only specify the right to use a work in a linear TV context and do not permit new digital uses. Based on earlier experience of clearing just 1,000 hours of archive programming, it is estimated that under the present copyright licensing framework 800 staff would take three years to clear the entire Archive at a total cost of over £70m."
89. "...the current copyright licensing framework is not particularly suited to dealing with large numbers of rights owners spread across many different sectors or in different countries. In order to minimise transactions costs, the BBC prefers, where possible, to agree collective licences with collecting societies and trade organisations representing a particular sector.... However, for many types of work we have to rely on thousands of individual transactions with a myriad of different rights holders."
90. Organisations like the BBC say they prefer to deal with collecting societies because it simplifies licensing for them, lowers transactions costs of the licensing process and increases certainty. Some rights owners observe that major rights users may favour collective licensing because the price at which they can acquire rights is lower, due to the price regulation exercised by the Copyright Tribunal.
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91. The BBC summarises its position by saying it would like “a copyright licensing regime in place which reflects the needs of a digital converged world – a world increasingly dominated by high volume, low value transactions as opposed to the low volume, high value transactions which were a feature of the analogue era.”
92. If this is true of the BBC, a large corporation with resources to devote to licensing and to lawyers, then, in the view of the Study, how much more true must it be for the smaller companies in the sector – the micro and small businesses that make up 90% of the creative industries<sup>16</sup>. But the Study received little or no formal evidence from SMEs that this was indeed the case. The BVA which represents both the larger and smaller companies admits however, rather cautiously, that there may be an issue here. “It is true that at times it can be difficult to know who to speak to or where to go to find out about licensing in the audiovisual sector to create appealing consumer propositions, particularly for individuals with a new business idea. We do accept that a service that helps direct people to the right place for licensing by groups of rights owners would be a positive step which should be encouraged.”
93. This Study takes the view that in the audiovisual sector, whilst the big companies can mostly fend for themselves in the complex world of copyright licensing, the small user, the SME, the individual creative, the prosumer<sup>17</sup> are not so well served. At the same time we believe that the big companies could save money if they operated a less labour-intensive licensing system for the low value high volume transactions involving many individual creators. Time Warner pointed out in their response that “if the DCE were to act, in effect, as a portal that enabled rights holders to voluntarily market their available rights and rights users of all shapes and sizes to find out information about where and how they might purchase rights, this could reduce transaction costs and increase opportunities for rights exploitation.”
94. The smaller companies, as the BVA pointed out, are not so clear where to go for rights information (the vital second stage of the licensing process as set out in 4.3) and for education in copyright matters. Any solutions found in Phase 2 must be smart enough to incorporate, not necessarily explicitly, education about copyright matters – something that many people stressed to us, for example Lord (David) Puttnam.
95. It may also be the case that licensing departments not just in the audiovisual industry, consciously or unconsciously, protect their jobs by keeping copyright licensing more complex and less automated than it need be – especially for the higher volume smaller transactions which would be most obviously amenable to automation.
96. The larger companies such as the BBC and BSkyB are already trying to drive down costs through automating the rights clearance process. If ways could be found to improve copyright licensing for the smaller business, it very well may turn out, in the view of this Study, that the large companies, such as ITV, could use the same systems to reduce their labour-intensive costs of licensing particularly in relation to the many high volume small transactions they handle (eg a 20” clip or a particular image for use in a documentary). At a time of squeezed funding at the BBC as a result of the licence fee settlement, these back office cost savings would be very welcome.

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16 Demos presentation to the Creative Industries Council, 24 January 2012

17 The prosumer is well defined in News Corporation’s response: “Ordinary people in the digital sphere who do not just consume content but publish their own, pass it on, comment, re-post and transform...”



97. A senior BBC radio manager told the Study that he asked for a particular programme to be put on the website as a downloadable podcast. The immediate response was that it was “too much hassle” to license and then pay all the many contributors relatively small sums of money (£27 in one case). If he had not insisted, this would have been another small example of the hypothesis being substantiated - the pie being smaller than it could be and the share of the pie going to creators being smaller than it need be. The podcast also turned out to be popular with listeners – so if he had not insisted, the listeners would also have missed out.
98. Whether there is a workable business model for this high volume, low value transactions opportunity, which could be industry-led and industry-funded, and which could be useful to both the big companies and the smaller companies in the sector, is a key question for Phase 2 and any answer is clearly relevant to more than one sector.

## 6.5 The publishing industry

99. The publishing industry can be segmented into newspaper and magazine publishing on the one hand and books and journals on the other.

### Newspapers

100. In the case of newspapers the Study finds that for the most part copyright licensing is considered fit for purpose. For large-scale business-to-business transactions there is a well-established market that works. We were, for example, shown an automated process for purchasing rights and were told that the Newspaper Licensing Agency (NLA) is working to develop the ‘next generation’ of copyright licensing that will integrate rights with content (in effect a fully-fledged DCE).
101. Nevertheless it was accepted that copyright licensing was siloed (“specialised”) and that this adds a certain degree of complexity to the process, which could be streamlined by “an infrastructure which signposts rights information more clearly.”
102. It is also acknowledged by the industry that not all parts of the market are functioning efficiently. As News Corporation states in their response to the Study:
- “... the current digital ecosystem does not deliver on the potential of the internet insofar as the licensing framework for commercial light use and the ‘long tail’ is limited. Ordinary people in the digital sphere who do not just consume content but publish their own, pass it on, comment, re-post and transform – ‘end users’ – are being failed by the current framework in their ability to obtain licences for their activities.”
103. This is very close to the BBC argument in the audiovisual sector for a high volume/ low value/low cost licensing service fit for purpose for the digital world.
104. Furthermore, as the NLA notes, “it is self-evident that the blanket approach offered by the NLA and other collecting societies has inbuilt limitations. *Technical standards and a widely adopted rights language for licensing* would allow the development of new and better organised licensing models which would increase the value offered to all the stakeholders mentioned” (our italics).
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105. The NUJ disagreed with the overall assertion implied by the hypothesis but agreed with some of the consequences as set out in the Call for Evidence. NUJ agreed that both the size of the pie and the share of the pie going to rights owners were smaller than it could be, infringement was persistent and that it is sometimes the case that the end user was deprived of access to a significant amount of commercially and culturally valuable content. NUJ also argued that the market is characterised by a few dominant buyers which leads to imperfect competition. These dominant buyers are believed to impose unfair contracts on NUJ members, depriving them of certain fees, moral rights and copyright.
106. This NUJ concern links to a significant dissatisfaction with the way that the NLA operates, according to some freelance journalists and freelance photographers who talked to us. They claim that when monies are collected by the NLA and returned to the newspaper companies which own the NLA, there appears to be no adequate motivation for the newspaper companies to return any of that money to the freelance journalists and photographers involved. In the music industry PPL and PRS are required to return revenue shares to performers and composers as a legal requirement of performance rights. The seventh and final part of the copyright licensing process as set out in 4.3 above (accounting back to the original creators for their share of monies collected) does not always show itself to be fit for purpose, the Study has found, across more than one sector.

### **Magazines**

107. In the magazine industry the Study has received no evidence that copyright licensing is not fit for purpose. It is only when magazine publishers step into other creative industries, as will be demonstrated in 6.6 below, that barriers are encountered. This is another example of the cross-sectoral obstacles to cost-effective copyright licensing first noted above in relationship to the feature film industry.

### **Book publishing**

108. Book publishers, authors and their representative bodies largely disagree with the hypothesis, arguing instead that due to its flexibility, the publishing industry has been able to adapt relatively quickly to the challenges brought about by the digital age. The industry cites the rapid growth in sales of e-books and e-readers and the development of new systems such as ARROW as proof not only that the industry is responding to new demands but that copyright licensing does not inhibit innovation within this industry. The industry did agree with the claim that copyright licensing is siloed within individual media types and that there are real cross-sectoral obstacles. The siloed nature of the industry is believed to be a result of historical factors and, as the Publishers Licensing Society (PLS) argues, has led to each sector being preoccupied with adapting itself to the digital age without a unifying driving force or common cross-sector standards.
109. Publishers are leading attempts, which is also beginning to happen in other sectors, to develop a common language and common standards for sharing information across sectors and across countries. The Linked Content Coalition ([www.linkedcontentcoalition.org](http://www.linkedcontentcoalition.org)) is developing global, cross-media and cross-sector rights and licensing communication standards to facilitate more efficient online licensing solutions. This project stems from a conviction that the development of a standard rights information infrastructure is the
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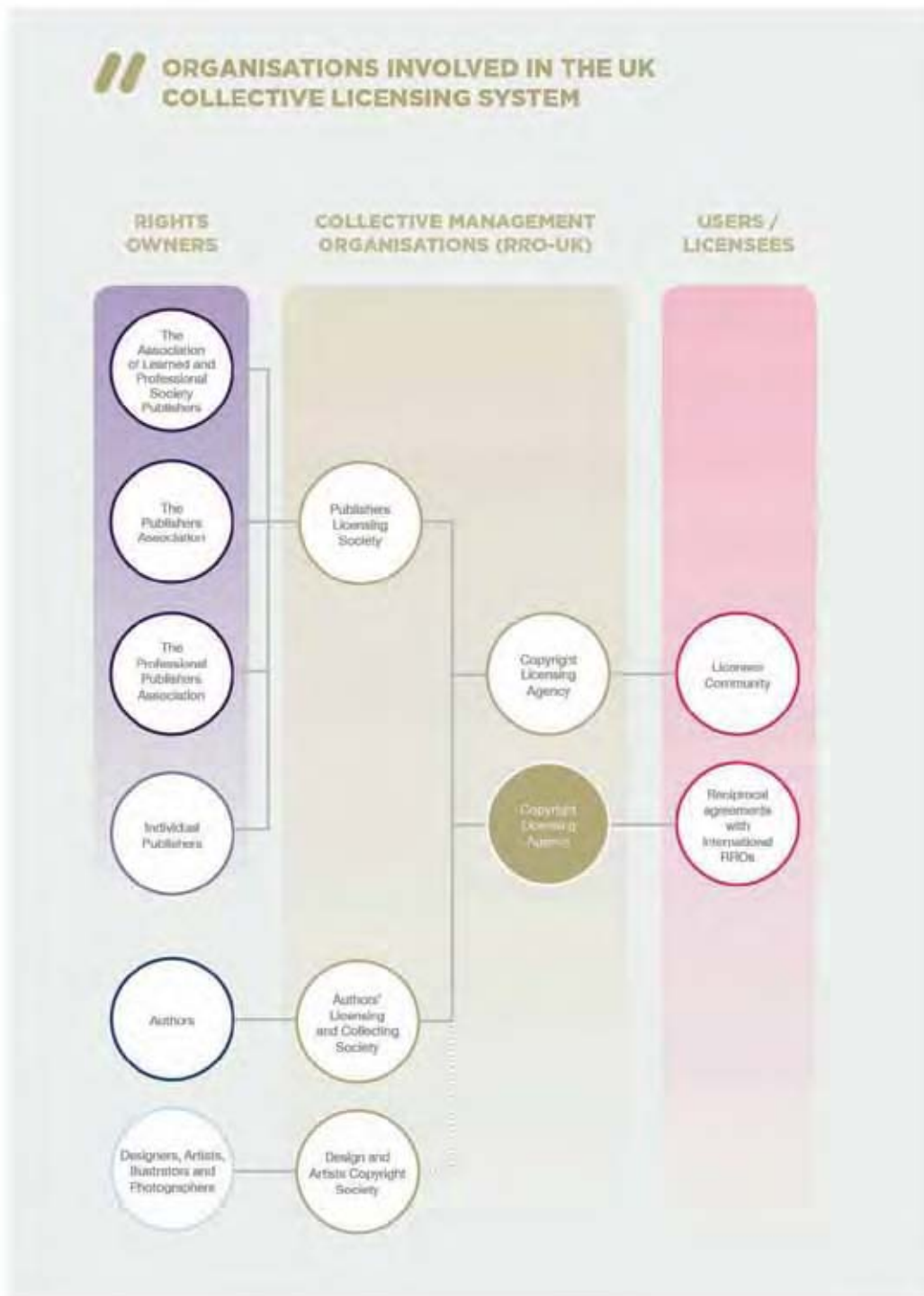
necessary first step in allowing copyright to be licensed and administered more effectively online, thus providing mechanisms through which users can acquire rights more simply and creators and rightsholders of all kinds can be properly rewarded. As well as a number of workstreams designed to resolve technical issues, the project includes work on the business case and on long term governance. It has attracted participants from over 30 different organisations from around the world representing all major media types and different roles in the supply chain. The legacy is intended to be a framework through which existing media industry standards organisations can work together to ensure sharing of technical best practice. Work is scheduled to begin in March 2012 and will conclude by the end of the year. This work clearly addresses the issue of cross-sectoral obstacles and Phase 2 will scrutinise it closely, starting in April.

110. There is recognition within the industry that further reform and streamlining of the process could be beneficial. Without such streamlining it is likely that UK plc is missing out on real opportunities. As Pearson argues “it is very difficult to put a value to this opportunity, currently lost to the UK economy, because by definition much of the value is in innovation which hasn’t happened yet.”
  111. Pearson goes on to say that “there are two classes of user for whom the system should work better: a user at home wanting to mash up materials found on the internet for the amusement of friends; and a start-up or other company wanting to aggregate content from many different places. In the former case it is often literally impossible for the user to do the right thing. In the latter it can be hard even to know who owns the rights to a given piece of content.”
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## Journal publishing

112. Journal publishers are not unified in terms of their views on the copyright licensing process and its ability to respond to the digital age. The International Association of Scientific, Technical and Medical Publishers (STM) disagreed with the hypothesis and the 14 bullet points that were attributed to it – for them copyright licensing is fit for purpose.
  113. However, the Association of Learned and Professional Society Publishers (ALPSP) believes that “there are good arguments for further streamlining the process of obtaining rights to reuse intellectual property and a DCE is likely to be a strong step forward in assisting in the granting of straightforward, basic reuse rights and in identifying rights owners where reuse requirements are more complex.”
  114. Informa Business Information argues that “the current legal regime governing copyright is flawed” though it did not agree with all the reasons or the outcomes given. Informa argues that the process is complex - “book authors often need to reproduce a photograph or table from an academic journal in their book. Managing requests from rival publishers for this content or knowing who at another publisher to approach to secure rights when compiling our own books is difficult, time-consuming and more costly than it should be given the proportion that the requested content makes up of the whole project.”
  115. The responses to this Study lead us to believe that while copyright licensing in the publishing industry does not hold back innovation and new developments are being introduced to respond to the challenges of the digital age, it is clear that more could be done to make the process less complex and more straightforward for the ‘long tail’ of users and uses. A number of publishing initiatives such as ARROW and the Linked Content Coalition are underway to address these concerns – useful building blocks for our work in Phase 2 Seeking Solutions, as already noted.
  116. The publishing industry has also shown a positive way forward to reduce the complexity of organisations and collecting societies. This Study has highlighted organisational complexity as a potential negative in more than one sector. Figure 6 below shows how the one organisation, CLA, collects monies on behalf of three organisations – the publishers (PLS), the authors (ALCS) and photographers (DACS), thus reducing expense and increasing ease of use. This diagram is included to illustrate how in one sector an attempt has been made to reduce complexity.
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**Figure 6: Organisations involved in the UK collective licensing system in the publishing industry**



Source: Publishers Licensing Society Annual Review 2011

## 6.6 The music industry

117. A decade ago the music industry was the first sector to be thrust into the digital colosseum, wrestling with the internet. Individual music tracks, compared to feature films, required and require little bandwidth and thus at the birth of broadband, songs were easy to copy illegally and distribute over the internet. The music industry arguably made tactical mistakes in focussing too much on preventing copyright infringement and being too slow to deliver legitimate, sensibly priced, easy to use music services over the internet. The first really compelling consumer proposition from a major brand was iTunes, which launched in the UK in 2003.
118. Today this situation is transformed. The UK has over 70 licensed commercial music digital services, more than anywhere else in the world and offering a wide range of business models, and the modern music industry has embraced the digital age with some vigour.
119. Yet the music industry is still perceived by its critics, more than any other creative industry, to have a copyright licensing regime that is not fit for purpose for the digital age. Time and again this Study was told that the problems with copyright licensing were mostly in the music industry. Conversations that began at the level of the creative industries sector so often then focussed down on the music industry in particular.
120. Digital start-ups from London's Silicon Roundabout (Old Street) are stopped, it is claimed over and over again, from creating exciting new businesses by the music industry's old-fashioned ways. Economic growth is thus arrested. Record labels, used to controlling the physical distribution of CDs, find it hard to come to terms with the digital world where they no longer can exert such or any control on distribution.
121. The Study received a lot of assertion but less hard evidence that digital start-ups were being stopped by copyright licensing processes in the music industry. Where there was evidence, the complaint often seemed to be more about the prices being charged and the advances demanded than the mechanics of copyright licensing. Coadec has argued to the Study that sensible pricing which reflects the licensee's actual use of the rights is an integral part of the licensing process. They endorse the principle that a rights owner can negotiate commercial deals. But greater transparency in the licensing process would be beneficial and a DCE is one potential solution for this.
122. Three companies (two small and one large) were not willing to have their evidence against the music industry made public because that might jeopardise future commercial relationships. More than one senior person in the music industry asked the Study to relay to any dissatisfied companies an open invitation to come and discuss what obstacles had been put in their way with a view to sorting them out. We would be happy to facilitate such meetings in our Phase 2 work<sup>18</sup>. Clearly these senior people in the music industry felt that they had nothing to hide.
123. But like so many traditional media businesses, for example the letters business of the Royal Mail or the newspaper business, the loss of revenues and profits from products dating from the physical-only era is not yet made up by the growth of revenues and profits

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18 Email us at [hoopersecretariat@ipo.gov.uk](mailto:hoopersecretariat@ipo.gov.uk)

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from the new digital opportunities. In the period 2001 to 2010 the real market decline in music sales (counting physical and digital sales) was 45.3% in the UK against a global decline of 50.3% and a European decline of 54.0%.<sup>19</sup> This suggests that the UK music industry has done relatively better than most other countries in managing the analogue to digital transition. But for business leaders in any sector, let alone shareholders or creators, these are massive structural changes to contend with, understand and respond to.

124. This Study believes that much of the criticism of the music industry is a left-over, a residual echo, from the past. But there are still real issues with copyright licensing in the music industry that need firm attention by all parties – and there are many parties in the music industry.

125. Those issues are interrelated:

- Complexity
- Expense
- Transparency
- Quality of data

### Complexity

126. The music industry has immensely complex processes and also complex organisations – a plethora of collecting societies and trade associations. Many in the music industry have said to the Study that this complexity is inherent, unavoidable, a fact of life because of the underlying nature of the rights and the wide range of rights owners. The Study is not willing, as already noted above, to accept this inevitability. One of the main reasons for complexity is the need to ensure that the individual musician, composer, lyricist, and record label get their fair share of revenues when their work is enjoyed by the public.

127. But complexity can so easily become a barrier to market entry by the smaller companies and inhibit innovation. Complexity can also become, as already noted, a source of somewhat unfair competitive advantage in the short term, whilst turning out often to be an unreliable source of competitive advantage in the longer term. More than one senior member of the music industry has said privately that the complexity is not inevitable and that it can and should be simplified.

128. One example of organisational complexity that makes copyright licensing cumbersome has nothing to do, ironically, with the digital age.

129. Thousands of small businesses across the UK are required to have two music licences from two different organisations and two invoices - to play the same pieces of music for their employees and customers. The two collecting societies PPL and PRS patiently explain that there are indeed two different types of licences involved but that does not obviate the fact that, seen from the small business/consumer point of view, it is unnecessarily

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19 Figures provided by a respected source within the music industry who prefers to remain anonymous

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complex and annoying. What is stopping the two collecting societies doing joint licensing for the thousands of small businesses that play music, thus cutting down on expense and unnecessary consumer and political aggravation?

130. The Study has raised this with PPL and PRS who have responded constructively: "PPL and PRS recognise the value in presenting a common face to licensees and already offer joint licences for schools, churches, DJ's and, since January this year Community Buildings. This was launched on time, as planned, following consultation with the sector. We are actively engaged in exploring further joint initiatives and fully committed to improving the licensing experience of our users."

131. An example of complexity in the digital age concerns the different types of rights, some of which are mandated exclusively to the collecting society, some non-exclusively, some are retained by the record labels and some are hybrids. Thus an aspiring digital music service may need to deal with multiple collecting societies, many more than one record label and a bewildering array of different types of licences. A record label describes the current situation in an email to the Study:

132. "Firstly we grant to PPL exclusive rights covering public performance, traditional radio and television broadcast (and the online simulcast of such broadcast) in respect of our recorded music repertoire.

In addition we from time to time choose to mandate PPL with additional rights on a non-exclusive basis. These rights are as follows:

- Interactive radio
- Non-interactive internet radio and TV
- On demand streaming of 30 second clips
- On demand streaming of radio and TV programmes
- Temporary downloads of radio and TV programmes
- Downloads to own of TV programmes
- DVDs of television programmes

All other rights are licensed by us directly including

- Physical exploitation (eg licences to third parties to release compilations, back catalogue, cover mounts, premium records),
- Synchronisation licences in respect of feature films and commercials [synchronising the use of music to moving pictures],
- Digital exploitation including: downloads on demand, streaming, subscription services.

"...where the services are a hybrid, combining elements of say radio and on demand track streaming, we would often license those direct notwithstanding PPL's mandate."

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133. Copyright-owning record labels, performers, music publishers and composers clearly must have the right to decide how to license their rights and should not be forced to cede the ability to compete on price and strike their own commercial deals. But the absence of any common platform for the individual licensing of rights (such as a DCE) means that it is a very complex and time-consuming business for a start-up or other small or large businesses who wish to find their way through the maze and license music in order to create new services.
134. The London-based internet start-up music service Mixcloud told the Study that it took them nine months to get the licences they needed from PPL, during which time they were burning cash. One reason it took so long was that some of the rights they wanted were not mandated to PPL by the record labels. Mixcloud sorted out the UK rights eventually but then turned their eyes towards the continent of Europe and found themselves facing the prospect of dealing with 26 more collecting societies. There is clearly no single European market in the music industry (nor in other sectors).
135. Another example of complexity slowing up digital take-up was given to us by a leading magazine publisher in the business to consumer market. The publisher wishes to remove all cover-mounted CDs from their magazines to reduce waste and costs and move towards being a global digital content company. A secure online system has been created which allows magazine readers to access specific editorial content instead of receiving the physical CD. This requires the publisher to obtain music licences from the collecting society MCPS (part of PRS). But MCPS do not have a relevant licence for this kind of activity. They have many digital licences including an Online Covermount Licence, an Online Music Licence, a Limited Online Music Licence but no licence for what this publisher wants to do. MCPS are currently unable to create a new licence for this type of work and as a result the magazine publisher has to either accept an unsuitable licence option or pull the project. In addition the publisher would have to obtain separate music licences for every territory worldwide from the relevant local collecting society in case a reader wishes to access the content from other countries, even though the site hosting/distributing the content is UK-based. Where the publisher has to approach a foreign collecting society for a local licence, MCPS are not able to provide any assistance.
136. There is surely a case for streamlining digital rights. As one long-established and successful aggregator<sup>20</sup> told the Study, digital rights licensing has been around 10-15 years so the risks and the rewards should be well known by now. Just as simple copyright licensing for broadcasters (eg blanket licences from PPL) has allowed large numbers of broadcasters to prosper, increasing music revenues and promoting talented musicians, so it should be possible for digital services licensing to be simplified and streamlined, leading to an ever greater increase in digital music services and thus digital revenues. There will always be new digital services which should remain customised and un-streamlined under the direct licensing control of the record labels, whilst their risks and rewards are being fully understood. They in their turn could be streamlined in the years ahead as and when they are properly understood.

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20 Aggregators are one-stop shops that will place an artist's recordings on up to 200 digital stores worldwide. Aggregators operate like wholesalers, usually taking a percentage of anything they sell.

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137. A DCE would not necessarily eliminate all complexity from licensing, since rights owners should remain free to choose if they license their rights individually or via an aggregator or collecting society. However, a common platform for the licensing of rights (whether individually or collectively administered) could increase transparency and make it substantially easier for potential licensees to navigate complexity.
138. The music industry (like the audiovisual industry) wishes to catch the politician's ear in the matter of ever tougher enforcement against copyright infringement. To achieve this, they must be - and must be seen to be - doing everything possible to enable new digital services (both free advertising-supported ones, and subscription services). New services that are easy to use, offering a wide and up to date repertoire, customer-oriented and sensibly-priced, reduce in the eyes of the politician the justification for copyright infringement/piracy and thus increase the will of the politician to enforce copyright across peer to peer file-sharing, websites, search engines, payment systems and advertisers. The music industry has achieved a lot in this regard already, with more licensed music services than any other country. But there is no doubt that further simplification of licensing will make further Government action against copyright infringement all the easier to justify.
139. An extension of this argument touches upon a consistent finding of this Study. If there was an authoritative and accessible web portal which contained up to date and detailed information on who owns what rights to what in what territories as a result of our Phase 2 work, politicians would then be able to encourage ISPs, search engines, advertisers and payment providers to use that portal regularly to establish legal uses of copyright material of all kinds. This might further the cause of reducing copyright infringement.
140. There is statutory backing for some of these ideas concerning the reduction of copyright infringement. Under the Digital Economy Act (DEA) the Secretary of State (SoS) has a power to introduce a framework which would require ISPs to apply technical measures to individual subscriber accounts. Such measures include the slowing of traffic and the temporary suspension of access. The decision to introduce such a scheme cannot be taken until the notifications scheme (ISPs write to subscribers informing them that an allegation of copyright infringement has been made against their account) has been in operation for at least 12 months. A report by Ofcom plays a key part in that decision. If the report says, for instance, that the copyright owners have not done sufficient themselves to reduce piracy levels, then it would be difficult for the SoS to justify triggering the technical measures powers. As such, Ofcom has leverage over the actions of copyright holders.

## Expense

141. Complexity also breeds expense. PPL and PRS each in their individual way are efficient and both societies in their responses to the Study argue the case forcefully. "PRS for Music is the most efficient major collecting society in the world, as measured by its administration costs divided by total domestic revenues." International league tables measuring collecting societies' efficiency suggest that this is broadly the case. In the UK, operating costs of PPL as a % of total revenues distributed is 13.2% compared with the European average of 16.3%. Only the USA stands out ahead of all other countries by this measure of efficiency – at 8.5%.<sup>21</sup>

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21 Figures provided by a respected source within the music industry who prefers to remain anonymous

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142. But if a different question is asked – is it actually necessary to have two music collecting societies – then significant savings from a joint venture or merger are clearly possible. There have been moves over the years to examine these options. This rationalisation would reduce the overall level of overheads and back office costs, increase IT capability (where so much of the resource is now needed), reduce the overall transaction costs and complexity of copyright licensing and increase the monies payable to members – performers, composers, record labels, music publishers. An organisation seen just in close up may be sensibly efficient and well managed. But it is possible to conclude that that same organisation seen in wide shot alongside other similar organisations is party, unconsciously, to a collective complexity, a collective inefficiency and a collective unnecessary expense. Of course any organisational solutions must reconcile the potential conflicts of interest that need to be addressed in bringing together licensing by different constituents of the same value chain, whose interests can run in competition to each other.

### **Transparency**

143. Complexity also breeds a lack of transparency. At the Study's first face to face meeting in December 2011, UK Music argued strongly that they disagreed with the hypothesis – for them copyright licensing was fit for purpose. But on closer discussion they did agree in part with one of the seven reasons given for the hypothesis in the Call for Evidence – that copyright licensing was insufficiently transparent. Some UK Music members pointed to the proliferation of Non-Disclosure Agreements that permeated copyright licensing, especially on big deals between, say, a record label and a digital music service. The existence of NDA's meant that it was more difficult for a real market to blossom. This is a particular problem for the many small record labels represented by AIM.

### **Quality of data**

144. The Study found that much more needed to be done to improve the quality of data used by the music industry since data is at the heart of copyright licensing. The quality of data impacts on the front end of the copyright licensing process – knowing accurately who owns what rights to what in what territories – and impacts even more strongly on the seventh and final aspect of licensing – accounting/audit. This involves knowing exactly what content has been used (for example in a broadcast or a digital stream or download) so that the relevant creators and rights owners can be correctly paid for their contribution. The expense and complexity of this accounting function were constantly emphasised by respondents. Digital music services generate huge volumes of data compared with services in the analogue space. IT systems struggle to be fit for purpose to handle such volumes with accuracy and speed. The duplication of back end IT systems across both organisations and territories would appear to create unnecessary expense.

145. A leading revenue assurance auditor for the music industry estimated for the Study that there was evidence of a 5-10% error rate in revenues paid by a music service to a record label under specific contracts, caused by the inadequate quality of reporting data. That could mean that in a £50million contract, the record label could be losing out on revenues worth between £2.5m and £5m. There was for example evidence that the wrong record label was being paid in some cases for works used that that record label did not own the rights to. It is possible of course that if payment is made to an incorrect music label that the

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artists may themselves not get paid. On mobile delivery platforms, because of the increased technical complexity of delivery over mobile networks, there was evidence of content being downloaded and not paid for and content being paid for but never received by the customer.

146. For copyright licensing to work better in the digital age, the quality of the data is all important to ensure that the right people get paid the right amounts. This requires the participants to know exactly who owns what rights to what thus making the digital streams accurately countable in a world of very high volumes of data.
147. Many people in the music industry and in other sectors told the Study that the key issue facing copyright licensing was all about the data and the metadata (the data about the data – who owns that image, for example). The metadata demands are much greater in music than in most other sectors due to the high number of individual tracks in the repertoire (20m+) and the multiple contributors to every track. Improving the quality of data will significantly improve the effectiveness of copyright licensing in the digital age. Data streams in the digital age are fully countable so the older methods of statistical sampling and surveys are less justified in discovering which creator should get paid what amounts. Statistical sampling, we were told, tends to favour unfairly in terms of revenue sharing the bigger and more well-known creators over the smaller.
148. PRS and PPL have acknowledged that much more work on data quality and standards is necessary and, as in the publishing industry, there are important initiatives underway which Phase 2 of this Feasibility Study would hope to be able to build on.
149. PRS, for example, responded as follows in relation to the current problems of licensing internationally:

“...there are some difficulties with the pan-European licensing of mechanical and performing rights in musical works. Problems lie in knowing which collecting society represents which rights and repertoire, and in issuing accurate and timely invoices....The key challenges for multi-territorial digital licensing deals lies in the urgent, already recognised business need for:

- The unique identification of all entities involved in any individual transaction
- A centralised, authenticated global database for each type of creative work that recognises all works in a category, with metadata linking unique identifiers, including creator information, all rights associated with the works and the identity of the owner of the rights in them by rights type, by usage type, by territory and by exploitation date
- The development and adoption of technical standards for the exchange of information, and standard protocols to support the high volume transactions.

The Global Repertoire Database (GRD)<sup>22</sup>, combined with the administrative and licensing hubs advocated by PRS for Music, is expected to solve these problems within 18 months to two years.”

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22 The GRD has as its objective the creation of a single, comprehensive and authoritative database of the global ownership and control of musical works.

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150. PPL has also been running a major IT project to clean and update all the sound recording metadata that it holds and has implemented a suite of new IT systems to make use of that data to support its operations. PPL is also working to develop international partnerships to make further use of the new IT systems it has developed.
151. It was not clear to the Study that the GRD work of PRS was sufficiently joined up to the database work being carried out by PPL.

## 6.7 The fine art/picture libraries/images industry

152. This industry is radically different from the other sectors covered in this Study. The still pictures industry is very decentralised, fragmented, competitive and proud of its artistic roots. In many ways it is a cottage industry built on the work of a large number of individuals - photographers, artists, library founders and the often forgotten researchers who play such an important part in tracking down the right images for prospective licensees as part of the licensing process.
153. The images industry unlike publishing and music does not have big centralised collecting societies. Some respondents see that as a strength, others see it as a weakness. Revenues returned to photographers through collective licensing are small. Revenues from collective management to those photographers represented by picture libraries account for only about 1.5% of industry turnover. Some picture libraries in the UK<sup>23</sup> said to us that they act in effect as kinds of collecting societies for their creative talent, alongside the “official” collecting societies DACS and ACS, but through direct not collective licensing. Compared to the collective licensing model illustrated in Figure 6 (see 6.5 above), direct licensing cuts out the middlemen, directly remunerates a creator in exact proportion to use and returns a greater proportion of the original licence fee to the creator.
154. There are big and commercially successful picture libraries like Getty Images and Corbis which do not fit the description of cottage industry. Getty Images already runs a digital copyright exchange which allows automated licensing. Critics of the DCE concept argue that you cannot automate, ie pre-designate, the types of uses for which licensees want permission. That is clearly true at the top end of the market where large value transactions are carried out between large players based on very customised and expensive processes including many pages of lawyered contracts. Getty Images’ DCE demonstrates that it is not true at the higher volume but lower value end of the market involving both large and small players.
155. Getty Images like a number of other picture libraries has also moved out of reliance solely on still pictures. 15% of Getty’s business now involves licensing music and moving pictures, as demands for mixed-media content grow and grow.
156. The Study finds the copyright licensing regime for the fine art/images/still pictures industry is fit for purpose – with two exceptions.

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23 It is estimated that there are 400 picture libraries in the UK.

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157. The first is familiar – the difficulty of navigating and finding rights information across sectors and across countries, the issue that is common to all four sectors studied.
158. The second exception relates to the contentious issue of establishing who owns the rights to a still picture in a technological environment where the metadata (the data about the data – ie who owns the rights to this or that picture) can be and is easily stripped out, leaving the still picture potentially orphan.
159. Photographers want to see much greater protection and transparency for their rights data. Knowing authoritatively who owns what rights to what picture is the second key step in the copyright licensing process. Without it, copyright licensing cannot work. Many have said that it is much easier in this case to state the problem in the images industry than find an answer. Others feel strongly that the answer to the machine is in the machine – there are a number of technological solutions which track image ownership across the internet and can thus reveal copyright infringement. That debate will continue and hopefully be resolved in Phase 2.
160. The fine arts/photography industry comprises business to business, business to consumer and consumer to consumer sectors. Players such as Getty Images is largely in the business to business space. For the business to consumer sector and the consumer to consumer sector, as the emergence of Pinterest<sup>24</sup> shows, the framework and mechanics for licensing of images still need a lot of work.

## 6.8 The creative industries taken together

- 161. It is a consistent finding of this diagnostic report that specific organisations or sectors scrutinised on their own, seen in close-up, are often sensibly efficient and modern in outlook. But when one pulls back to the wide shot and looks at the totality of sectors within the creative industries or the agglomeration of organisations often within a sector doing similar things (for example collecting societies), the picture is not so efficient and not so modern, due to the differences in standards and licensing practice that have evolved in the different media sectors.**
- 162. The barriers to integrated cross-border and mixed-media rights management are only partly technological. A combination of differences in law, in custom and practice, and in commercial interests is equally influential.**
- 163. Copyright licensing is siloed and is insufficiently international in focus and scope and is therefore difficult to use and difficult to access - in one very particular sense. There are no agreed and operational standards across the creative industries in the UK and internationally for expressing, identifying and communicating rights information. These standards can and do exist within a specific sector but often end there. Thus the publishing industry can establish via a book's ISBN number some key publishing rights information but this does not connect easily or at all to rights**

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24 Pinterest enables its users to pin images of interest on their own virtual board. This creates the opportunity for businesses to showcase products and brands and for consumers to build an image board and share with friends.

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**information in the audiovisual sector next door regarding who owns the film rights to that book. Nor does it connect easily to the music rights (eg synchronisation rights) linked to that film. In addition, rights information about that book or film in the UK does not connect easily or at all to rights information about the book or film across national borders - yet the internet, the home of so many new digital services, is effectively a borderless medium.**

164. We are all now living in an age where most activity in the creative industries is affected in whole or in part by digital technology. The nature of digitisation is to reduce everything to digital bits; as a result boundaries between media are blurring. As users increasingly control their own media experience they increasingly expect choice, portability and control which is unprecedented in history. When all media can be delivered across converged networks - even though in some circumstances the technology or economics might continue to mitigate against this - undue reliance on traditional ways of going about things is unlikely to be sufficient.

165. **Thus, any given sector of the creative industries seen on its own may show that copyright licensing is by and large fit for purpose. But seen in the context of other sectors, which together create the modern mixed-media world of digital, that sector may not be so fit for purpose. The important work being led by PRS on the GRD (Global Repertoire Database) does look to be potentially resolving data issues within the music publishing industry in the UK and across national borders but it is clear that this needs to relate to work in the publishing industry by the Linked Content Coalition, to other sectors and to wider international initiatives. Industries are actively searching for solutions to many of the issues raised in this report and we will explore these attempts at resolving the problem in more detail in Phase 2.**

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## 7. Summary

166. When I did my previous independent review of the UK postal services sector for the Government (Labour and Coalition), my team and I concluded that, whilst the UK postal market was one of the most competitive in the world, the performance of Royal Mail ranked well behind the leading postal operators from the Netherlands to New Zealand.
167. In this independent Study's first report for Secretary of State Vince Cable analysing how fit UK copyright licensing is for the digital world, my team and I have concluded from all the available evidence that copyright licensing processes in the UK compare well with other countries in the world.
168. There was no evidence of significant problems in the computer games industry, the public performances/theatre sector, nor in the corporate use of copyright licensing, for example newspaper cuttings and their digital equivalents. But we did identify problems in a range of other market segments and industry sectors.
169. A combination of three streams of activity: our own Phase 2 work – Seeking Solutions; the various initiatives already underway in the creative industries such as the music publishing industry's Global Repertoire Database; and the solutions coming out of the IPO's parallel consultation into copyright matters, will together enable UK copyright licensing to be even more fit for purpose as we continue to make the sometimes painful transition from the analogue to the digital world.
170. The UK has, for example, more digital music services operating (70+) than any other country. If copyright licensing can be made yet more streamlined, even easier and cheaper to use, without eroding the rights of rights owners, then an ever more diverse array of digital services across all media types (moving pictures, still pictures, text, music) can be stimulated, leading to more innovation and faster economic growth in the creative and technology industries.
171. We have identified specific problems that need attention in
- Libraries, archives and museums
  - Educational institutions
  - The audiovisual industry (feature films and television)
  - The publishing industry (newspapers, magazines, books and journals)
  - The music industry
  - The images industry (still pictures, photo libraries, artworks)
172. We also focus on an overarching cross-sector and cross-territory problem which, if resolved, will further improve copyright licensing for the mixed media and borderless world of the internet.
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173. Those problems can be summarised as follows:

- Complexity of processes
- Complexity of organisations
- Repertoire imbalance between the digital and physical worlds
- The difficulty in finding out who owns what rights to what content in what country
- The difficulty in accurately paying to creators the fair share of revenues created by their copyright content
- The labour-intensiveness, expense and difficulty of licensing copyright for the high volume low value transactions that characterise the digital world
- The lack of common standards and of a common language for sharing rights information across creative sectors and across national borders

174. Finally, there is a political dimension to the issues surrounding copyright licensing, but it is not party political. Creative industries companies wish to catch the politician's ear in the matter of ever tougher enforcement against copyright infringement, as so many people told us during this first phase of our work. To achieve this, the media companies must be – and, as important, must be seen to be – doing everything possible to enable and encourage new digital services. A wide and diverse range of new digital services for the fixed and mobile internet that are easy to use, that offer a repertoire not too different from the physical world, that are customer-oriented and sensibly priced, reduces in the eyes of the politician the justification for copyright infringement by consumers. As a result, the will of the politician is strengthened to enforce copyright ever more vigorously across peer to peer file-sharing, websites containing copyright-infringing content, search engines navigating to copyright-infringing content, payment systems handling subscriptions from copyright-infringing services, and advertisers advertising on copyright-infringing websites.

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## 8. Seeking solutions

175. Having established what is wrong and right with current copyright licensing and where it is and is not fit for purpose for the digital age, both at the market segment/industry sector level and at the level of the creative industries taken together, the work now moves to Phase 2 – Seeking Solutions.

176. One of the solutions to be examined will be the digital copyright exchange. This in no way implies that there is a single solution, but as the Open Digital Policy Organisation states it could be “a plurality of exchanges with a common set of features and a standardised interface (application programming interface, API) such that searches and user operations can be carried out seamlessly across exchanges with simplicity and ease.” The Hargreaves Review itself talks of “interoperable databases”.

177. The DCE Feasibility Study team will of course be working closely with the IPO team where the solutions are likely to be found in a combination of the outcomes of the IPO parallel consultation and Phase 2 of our own work. This is most obviously true of the orphan works and collective licensing issues which have been set out above in libraries, archives and museums (6.2) and in the audiovisual industry (6.4), and it is true of the codes of conduct for collecting societies with reference to discussions about transparency.

178. It would be useful to set out the criteria by which any solutions in Phase 2 should be judged.

179. Solutions should ideally:

- Be industry-led and industry-funded
- Be cross-sector and international in focus
- Be voluntary but with clever use of available incentives to take part
- Be clear, open and freely accessible
- Not necessarily require primary legislation (the IPO’s parallel consultation may require legislation)
- Reduce copyright infringement and the incentives to infringe copyright
- Increase competition where appropriate by getting the right balance between the benefits of one-stop shops and the disadvantages of monopolies
- Increase overall size of market, drive economic growth and innovation
- Meet the needs of consumers and citizens<sup>25</sup>; ie maximise wider social benefits
- Be trusted, authoritative, confidence-giving and flexible

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25 Citizens alongside consumers were introduced into the Communications Act 2003 following interventions in the House of Lords by Lord Puttnam. An example from the food retailing industry defines the difference. Out of town shopping centres are very much liked by consumers because of low prices and easy car parking. Citizens however might object to such out of town shopping centres because they increase car usage and hollow out town centres.

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- Create new value, not just concern themselves with fixing what is wrong.
  - Build on existing IT standards that the industry has and is developing
  - Build on the large IT investments that the industry has already made
  - Build on existing DCEs and DCE-like systems and not indulge in NIH (Not Invented Here)
  - Fill gaps and solve real problems rather than duplicate and reinvent the wheel
  - Focus solutions on those parts of the creative industries where it is agreed that there are real cases for improvement and modernisation in copyright licensing for the digital age
  - Be aware of and protect the rights of creators, and recognise and protect the investment in content
-

## ANNEX 1

### Digital Copyright Exchange feasibility study Terms of Reference

#### Aim

The Digital Copyright Exchange (DCE) feasibility study will consider options for developing a functional digital market in rights clearance and a source of information about rights ownership, as recommended by the Hargreaves Review of Intellectual Property and Growth and accepted by the Government.

The feasibility study will examine available evidence and bring together industry partners and sectors of the creative world to create a framework for a distributed rights exchange and the necessary supporting systems to allow a functioning licensing system.

#### Context

The Hargreaves Review of Intellectual Property and Growth recommended that:

*“In order to boost UK firms’ access to transparent, contestable and global digital markets, the UK should establish a cross sectoral Digital Copyright Exchange... A range of incentives and disincentives will be needed to encourage rights holders and others to take part. Governance should reflect the interests of participants, working to an agreed code of practice.”*

In its Response the Government has stated that it wants to see a DCE, or something like it, to speed up copyright licensing and thus enable new business opportunities.

#### Scope

The study will address the issues that Hargreaves identified and consider the feasibility of setting up a DCE or something like it. The work will be conducted in two phases:

- **Diagnosis:** convening/ discussing with industry partners to explore the issues affecting rights licensing and to create a clear understanding of the problems
- **Options:** bringing forward appropriate industry-led solutions with a view to how these could be put into practice

The study will not focus on other copyright recommendations set out in the Government Response, except where these directly impact on DCE.

#### Reporting

The feasibility study will provide recommendations for the operation of a functioning copyright licensing system to the Secretary of State for Business, Innovation and Skills by summer 2012 Parliamentary Recess.

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## ANNEX 2

### Digital Copyright Exchange (DCE) Feasibility Study: Call for Evidence

4 January 2012

Dear Sir/Madam,

I, with Ros Lynch as head of the DCE secretariat, have commenced Phase 1 of work on the feasibility study. The Study is independent but based in the offices of the IPO.

Phase 1 is diagnostic, looking at what are the issues surrounding copyright licensing in and for the digital age. Phase 2 will examine and recommend the range of potential solutions to any issues found. One solution put forward by the Hargreaves report is the idea of the Digital Copyright Exchange.

Section 1 contains the main hypothesis the interrogation of which is at the centre of Phase 1. Copyright licensing is complex and a consensus around definitions will aid clarity of debate. Section 2 below contains our suggested definitions of key terms and our market definition. We would like your views as to whether you think these definitions are sensible. Key terms when used first are indicated in bold.

There appears to be a lot of assertion in this controversial area – we are seeking hard data and evidence for or against the main hypothesis, or parts of the hypothesis. Your responses to the two questions set out below in Sections 1 and 2 would be welcome, please submit these, with a completed cover sheet to [HooperSecretariat@ipo.gov.uk](mailto:HooperSecretariat@ipo.gov.uk) by no later than **Friday 10 February 2012**.

Many thanks,

**Richard Hooper**  
**DCE Feasibility Study**

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## Section 1 - The Hargreaves Hypothesis

The hypothesis emanates from the Hargreaves Report and has been refined as a result of meetings in December 2011 with a range of stakeholders who agree and disagree with parts or all of the hypothesis. The hypothesis can be described like this:

***“Copyright licensing, involving rights owners, rights managers, rights users and end users across the different media types, in the three defined copyright markets, is not fit for purpose for the digital age.”***

There are seven reasons given for this. Copyright licensing is:

1. expensive (both the licensing process and the cost of rights)
2. difficult to use
3. difficult to access
4. insufficiently transparent
5. siloed within individual media types (at a time when more and more digital content is mixed media and cross-media)
6. victim to a misalignment of incentives between rights owners, rights managers, rights users and end users
7. insufficiently international in focus and scope

As a result of copyright licensing not being fit for purpose, the following seven claims are made:

8. the size of the pie for rights owners/managers is smaller than it could be
  9. the share of the pie going to rights owners is smaller than it could be
  10. new digital businesses within the creative industries are being held back
  11. innovation is being held back
  12. infringement of copyrighted content remains persistent
  13. the end user is deprived of access to a significant amount of commercially and culturally valuable content, e.g. archive material
  14. UK GDP should grow by an extra £2 billion per year by 2020, if barriers in the digital copyright market were reduced.
-

**Question 1: Do you agree with this hypothesis in whole or in part?**

**If so, please provide evidence from those markets and media types you have experience of.**

**If you do not agree with the hypothesis in whole or in part, please provide the evidence for those markets and media types you have experience of.**

**Evidence for and against each of the fourteen bullet points would be especially valuable.**

## **Section 2 - Definitions**

**Copyright licensing** comprises six distinct processes:

1. Deciding which rights are appropriate for the specific purpose or purposes of the potential rights user
2. Discovering who owns the particular rights that are needed including where there have been changes in ownership
3. Giving a licence for those rights that match the specific purpose(s)
4. The rights user paying for the rights
5. The rights owner/manager delivering to the rights user the licensed content in the appropriate format (although the content is often readily available)
6. The rights user accounting to the rights owner/manager for the content actually used so that, for example in the case of collecting societies, the correct monies can be paid to the individual rights owners

There are two important distinctions which need to borne in mind with copyright licensing:

- the use/licensing of an existing work (e.g. a piece of music or photograph already in existence) is different in nature and complexity from the copyright licensing issues involved in commissioning a new work, e.g. a script for a television drama
- being licensed to incorporate an original copyright work into another work which has its own copyright (e.g. a piece of music into a television programme) is different in nature and complexity from being licensed to exploit the original work itself (e.g. the piece of music being licensed to iTunes)

**Rights owners** (sometimes referred to as rights holders) are those individuals or organisations which own the copyright, for example in the book publishing industry the author, the illustrator or in the case of non-fiction often the publisher.

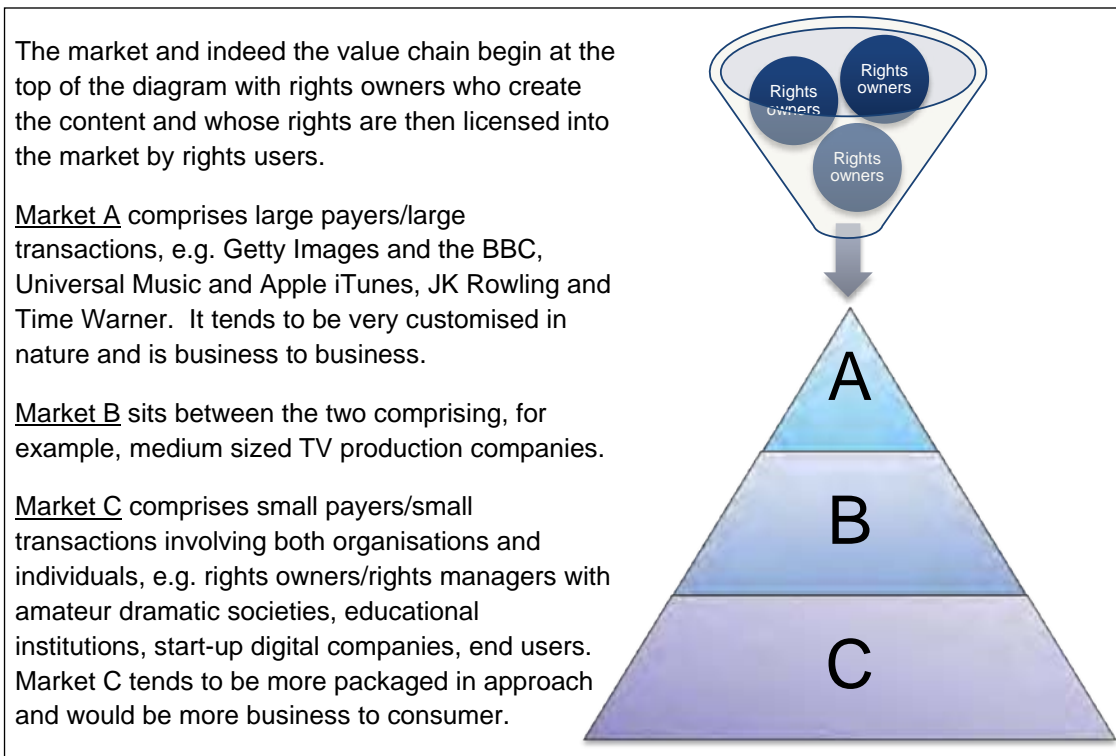
**Rights managers** are those organisations who manage rights on behalf of rights owners, for example the music collecting societies like PPL and PRS (sometimes referred to as CMOs, collective management organisations)

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**Rights users** are those individuals or organisations who wish to acquire a licence to use other people’s copyright, for example film producers in the feature film industry

**End users** are the final consumers who access and enjoy the copyrighted content developed by rights users and rights owners. When those end users create content (e.g. uploading a video to YouTube) they become, without always being aware of it, rights users.

The **three defined copyright markets**, for the purposes of this study are described in Figure 1:



Copyright licensing involves nine major **media types**:

- 9. Music and audio
- 10. Performances
- 11. Text
- 12. Artworks
- 13. Still pictures
- 14. Moving pictures
- 15. Computer games

16. Mixed media (content that contains moving pictures, text and still pictures, e.g. a newspaper website)
17. Cross-media (the same digital content being licensed on different platforms, for example cable television and Smartphones)

**The digital age** is defined variously as the age of the internet with a single convergent computer language which can deliver, both one-way and two-way, music and audio, text, still or moving pictures over fixed, broadcast and mobile networks. The UK creative industries, the focus of this study, are past the inflexion point where digital technology has taken over from analogue and print. Digital switchover of terrestrial television, for example, completes this year, 2012. The digital age is characterised by many features that are different from the analogue/print age:

- the creative destruction of incumbent analogue businesses
- rapid change and uncertainty
- low barriers to entry and intensifying competition
- disintermediation (squeezing or bypassing the middle man/intermediary)
- the cost of copying and distributing digital content is much less than the cost of copying and distributing analogue content
- a digital copy shows little or no degradation from the original, an analogue copy does
- lower prices and lower profits (it is said that pounds in the analogue space become pennies in the digital space)
- the erosion of monopoly status
- spectrum and advertising inventory go from scarcity in the analogue age to abundance in the digital age
- the ownership of content model (a physical CD at home) transforms into an access model (accessing the song from a cloud-based music service)
- the traditional “push” model of broadcasting (one-way with a distant editor deciding what you will receive, e.g. BBC Radio) is joined by the “pull” model of on demand (you deciding what you want and retrieving it, e.g. a radio programme on the BBC i-player)
- passive consumers become active creators, UGC (user generated content)
- if the content is digitisable, then sooner or later in the digital age it will be digitised
- the fixed internet is effectively borderless, a global service on a single platform. Traditional copyright licensing in the analogue age was/is managed by territory (e.g. Canada) and by platform (e.g. terrestrial free to air television).

**Question 2: Do you agree with these definitions including the market definition?**

**If not, why not? Please suggest better ones.**

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## ANNEX 3

### Summary of responses to the Call for Evidence

Stakeholders were invited to respond to the hypothesis that:

“Copyright licensing involving rights owners, rights managers, rights users and end users across the different media types, in the three defined copyright markets, is not fit for purpose for the digital age”.

Do you agree with this hypothesis in whole or in part?

A total number of 117 responses were received. Responses varied from those that stated they either agreed or disagreed with the hypothesis, to others that provided more evidence-based responses.

Of the 117 responses, 26 (22%) broadly **agreed** with the hypothesis that copyright licensing was not fit for purpose, whilst 61 respondents (52%) broadly **disagreed** with the hypothesis, 18 respondents (16%) both agreed and disagreed and 12 (10%) didn't provide a definite answer.

Importantly, a significant number of responses that disagreed with the statement also concluded that whilst copyright licensing was fit for purpose, in some areas there was opportunity for 'improvement'.

Respondents reflected the wide and varied nature of those participating in the copyright licensing 'space': libraries, museums, music publishers, print publishing, image publishing, and education amongst others.

With specific reference to the seven reasons to support the hypothesis here is a summary of some responses to each of those reasons:

1. It is **expensive** (both the licensing process and the cost of rights).

29 respondents (25%) agreed that it is expensive, 53 (45%) disagreed and 8 (7%) both agreed and disagreed. 27 respondents (23%) did not provide an answer.

The majority of respondents emphasised the need to distinguish between the cost of the licensing process and the cost of rights. They were strongly of the view that the 'cost of rights' is a commercial and market driven valuation and negotiation and therefore should not be considered as part of any review or outcome of a DCE.

A large number of respondents who either agreed or disagreed with the statement, proposed that only those costs associated with bringing licences to market (administration, legal, resource) should be considered as part of any DCE solution: the BBC spends around £10m per year on the admin costs of rights clearances; BASCA supports a more efficient licensing process; British Library estimates the true cost of digitising 100,000 books at £9m; the Music Managers Forum point to the withdrawal of rights from collective management organisations by rights owners which would make the process of identification and negotiation more difficult and therefore more costly.

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A small number of respondents (mostly rights users) agreed that both the cost of licensing and the cost of rights are expensive and that both should be included in a DCE solution.

In some instances, respondents operate as both a rights owner and rights user. The V&A for example, is confident that their own licensing model as a rights owner is robust and effective but feel as a rights user it is expensive and time consuming: A recent project to clear rights for 270 images included in an exhibition took 125 working days and a staff cost of £14k (the challenge is the time it takes to trace rights owners either directly or through 3<sup>rd</sup> parties).

The National Archives concern lies in the disparity across Government departments in securing a licence from the CLA: licence fees vary from one department to another (although they state this approach is under review).

## 2. It is **difficult to use**.

27 respondents (23%) agreed that it is difficult to use, 54 (46%) disagreed and 6 (5%) both agreed and disagreed. 30 respondents (26%) did not provide an answer.

Again, a large proportion of those that agreed with this statement are mostly rights users. There was also the view that those operating in Market C find it more difficult. The BFI points to more challenges for SMEs operating in Market C than those operating in Markets A and B.

The Publishers Association agreed that the copyright licensing system is broadly working although could be made easier to use and that whilst control of rights should remain with the creator/rights owner, more might be done to 'enhance the discoverability' of rights to content.

The PPL illustrated the ease of use for its business: providing over 1,000 licences (to TV channels, webcasters and radio stations) through the filling out of a single form.

The National Library of Wales is also both a rights owner and rights user and in much the same way as the V&A highlights in its evidence the challenges and complexity of using and accessing rights. Their Welsh Journals Online project has delivered half of what had been targeted: 50 out of 90 journals and 400,000 pages of text from 600,000. The time, resource and ease of accessibility has contributed to the under delivery of expectations.

## 3. It is **difficult to access**.

30 respondents (26%) agreed that it is difficult to access, 52 (44%) disagreed and 5 (4%) both agreed and disagreed. 30 respondents (26%) did not provide an answer.

The common theme amongst those that agree with the statement is the ability to identify copyright ownership. For SMEs it is the cost, resource and complexity of tracking down ownership which often prohibits progressing or completing 'transactions'.

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Even amongst those that disagreed with the statement, a large number were open and supportive of a digital rights exchange that operated as a data/information portal only (rather than a trading platform).

Larger companies in the film and music space also point out examples of projects and initiatives that have already been developed (or are in development) that operate as an online portal (or form of): imdb.com, findanyfilm.com, silvermouse.com, soundmouse.com, mediapeers.com, rightstrade.com, Global Repertoire Database (GRD), Educational Recording Agency (ERA) and ARROW amongst others.

#### 4. It is **insufficiently transparent**.

16 respondents (14%) agreed that there was insufficient transparency, 45 (38%) disagreed with the statement and 14 (12%) both agreed and disagreed. 42 respondents (36%) did not provide an answer.

PPL pointed to its own 'Repertoire Database' as an illustration of transparency: the provision of access to search 5m tracks through its website.

Equity highlighted its own participation in making rights more transparent: BECS website [www.equitycollecting.org.uk](http://www.equitycollecting.org.uk) and the Equity website [www.equity.org.uk](http://www.equity.org.uk) in providing basic information.

All of the broadcasters (except the BBC) disagree that the market is insufficiently transparent, although do broadly accept that the process may appear complicated to both SMEs and new entrants. Again the understanding of where rights lie was highlighted as a key challenge for a number of organisations.

The issue of transparency of deals was also highlighted in some of the evidence. BskyB stated that any deals or negotiations that are commercial in nature will always require confidentiality although some respondents suggested more could be done in some areas to make it more transparent: the current regulation and operation of Collecting Societies; the complicated legal language associated with copyright; and the use and access of rights across multi-platforms.

The Beggars Group broadly agreed with the statement although conceded there was some transparency for standard a la carte digital services. The issue they cite is lack of information from services about the terms agreed with other labels.

Artfinder also agreed that transparency was a key issue, citing negotiation discussions with rights owners and managers that included "We can get more money by suing you later than agreeing now".

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5. It is **siloed within individual media types** (at a time when more and more digital content is mixed media and cross media).

50 (43%) agreed that it is siloed within individual media types, 30 (26%) disagreed with the statement and 7 (6%) respondents both agreed and disagreed. 30 respondents (25%) did not provide an answer.

A large proportion of respondents who agreed with the statement did so with the view that it was a nature of the market as opposed to any deliberate barrier to growth in the digital space, including Reuters which operates as both a rights owner and rights user and News Corp who described the 'infrastructure' as an 'inevitable corollary of mixed media content'.

The National Gallery provided evidence that an increasing number of its clients were asking for new types of licences with new iterations for projects across multi-platforms. Whilst they recognised it's a nature of the market 'a more co-ordinated approach across silos would be beneficial'.

6. It is **victim to a misalignment of incentives between** rights owners, rights managers, rights users and end users.

33 respondents (28%) agreed that It is victim to a misalignment of incentives, 49 (42%) disagreed with the statement and 4 (3%) both agreed and disagreed. 31 respondents (27%) did not provide an answer.

AIM's view is that it is a fair assessment and through their own research show that 94.5% of revenues for its independent record label members comes through just three companies (Amazon, iTunes and Spotify). The key issue for them is the amount of free content available in the market and via piracy. Misalignment will remain in play unless market imbalance is addressed.

Getty Images broadly disagrees with the statement, suggesting that misalignment is down to normal conditions of trading: the tension between rights owners and rights users to get the best deal.

7. It is **insufficiently international**

28 respondents (24%) agreed that it is insufficiently international, 47 (40%) disagreed with the statement and 7 (6%) both agreed and disagreed. 35 respondents (30%) did not provide an answer.

Fremantle Media Group broadly disagrees with the statement, proposing that producers of audiovisual content (and their licensees) are global in their nature, however where complexities do arise it is usually down to national, cultural or linguistic differences which

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cannot be pinned on an insufficient process but as a result of the nature of the global market and those 'differences' market by market.

PPL provided evidence to highlight the positive internationalisation of licences: MTV/VPL Pan European licence, aggregating rights from independent record companies in 23 countries.

The University of Wales Press on the other hand agreed with the statement that it is insufficiently international despite there being a pan territorial scope of digital rights in place. They point to the complexity and difficulty in having to apply to both UK and US publishers for licences to produce the same extract.

**As a result of copyright licensing not being fit for purpose, the following seven claims are made:**

1. The **size of the pie** for rights owners/managers is smaller than it could be.

31 respondents (26%) agreed that the size is smaller than it could be, 37 (32%) disagreed with the statement and 7 (6%) both agreed and disagreed. 42 respondents (36%) did not provide an answer.

BVA stated its view that it was doubtful that the size of the pie could be bigger. It believes that indications are that it could be the reverse. For example, the appeal of low cost 'all you can eat', free or ad funded film services (Netflix £5.99 per month subscription).

The NUJ on the other hand agreed it is smaller than it could be – one reason it promotes are the weak penalties for infringement.

Getty Images estimates that 80% of online usage of images is unauthorised and so agrees that the size of the pie could be bigger if infringement was addressed.

2. The **share of the pie** going to rights owners is smaller than it could be.

25 respondents (21%) agreed that the share is smaller than it could be, 41 (35%) disagreed with the statement and 6 (5%) both agreed and disagreed. 45 respondents (39%) did not provide an answer.

The CLA agree it could be but there needs to be enforcement of infringement prevention in place and a corresponding development of legitimate download channels. A significant number of respondents pointed to copyright infringement as the primary driver or barrier to growth.

The Publisher's Association in its response suggested the UK's publishing collecting societies remain cost efficient and that whilst there may be marginal efficiencies, to them there is no evidence of systemic underpayment.

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### 3. New digital businesses within the creative industries are being held back.

18 respondents (15%) agreed that creative industries are being held back, 55 (47%) disagreed with the statement and 6 (5%) both agreed and disagreed. 38 respondents (33%) did not provide an answer.

There was broad disagreement amongst respondents. Getty Images proposed that the characteristics of the image licensing sector remained positive: readily available content; at varied price points; across multiple digital platforms and on a mixed media basis.

The BPI in its response and evidence pointed to a number of developments: Topspin; Zune; The Orchard and Pure amongst others.

Pearson points to the growth of its own digital revenues from £721m in 2006 to £2bn in 2011 and its significant investment in digital platforms for use and re-use of content.

### 4. Innovation is being held back.

17 respondents (15%) agreed that innovation is being held back, 57 (48%) disagreed with the statement and 6 (5%) both agreed and disagreed. 37 respondents (32%) did not provide an answer.

5. A large proportion of those that responded disagree that innovation has been held back and cite the fact that over 70 digital services (in music alone) are operating in the UK: Lovefilm, Blinkbox, iTunes, Amazon and Spotify as B2C facing platforms. In addition, examples of B2B innovation were also provided: imbd.com, [www.universalclips.com](http://www.universalclips.com), Copyright Clearance Centre and [www.ipddb.org](http://www.ipddb.org).

In addition, pact highlighted their partnership with Microsoft to facilitate entering into the UK VOD market. The Motion Picture Association highlighted the double digit growth in download-to-own sales to 12.2m transactions in 2010. They also referred to BASC's statistics showing consumer spending on online movies increased by 82% to £43.8m.

BPI points to Google and Coadec's submission of research findings to the Hargreaves Review: that 72% of digital SMEs disagreed with the statement that UK copyright stops them innovating.

Intellect, the UK trade association for the technology industry provided evidence that innovation is being held back. One of its members (an SME) is delivering a 3D virtual digital pilot for the NHS which requires multi-platform clearances. The process is complex and time consuming with additional concern over risk of "what if" infringement. As an SME the risks potentially outweigh the opportunity for innovation.

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## 6. Infringement of copyrighted content remains persistent.

66 respondents (57%) agreed that infringement of copyrighted content remains persistent, 7 (6%) disagreed with the statement and 4 (3%) both agreed and disagreed. 40 respondents (34%) did not provide an answer.

A significant number of respondents pointed to copyright infringement as a real driver of barriers for growth (but not the licensing process) and that the issue has been compounded with the growth of digital technology.

Time Warner's response pointed to the problem that whilst there are numerous opportunities for consumers to access legitimate content they are in parallel offered access to pirated material through online search.

Reuters agrees but likens any solution to remove creators' rights so that infringements cease, to dealing with issue of speeding offences by removing all speed limits. Reuters also propose that the simple way to offset infringement is to see more robust legislation around requirements for sourcing (and more stringent penalties for removing metadata).

The underlying view from a large number of respondents including The Publishers Association is that a DCE won't prevent infringement – legal enforcement is the only way to combat infringement.

## 7. The **end user is deprived of access** to a significant amount of commercially and culturally valuable content, e.g. archive material.

34 respondents (29%) agreed that the end user is being deprived of access, 35 (30%) disagreed with the statement and 6 (5%) both agreed and disagreed. 42 respondents (36%) did not provide an answer.

The common theme that came out from a number of respondents was the issue over 'Orphan Works' – the inability (and complexity) of identifying historical rights and ownership. The Royal Society of Chemistry broadly agreed that with reference to Orphan Works the statement is true, although the wider access to content framework remains appropriate.

The ALCS point to collective licensing as a broadly efficient facilitator of content. It provided the example of its partnership with the PLS and the Wellcome Library to pilot the European ARROW system.

Channel 4 also disagreed that end users are deprived of access: it provided examples of multiple opportunities to access content through its own business: 4OD (and through iPad, iPhone, PS3, Android and Xbox).

The PMA's view is that there should be a clear distinction between commercially valuable content and culturally valuable content. Rights owners and creators of the former have the right to determine access to their own content. Culturally valuable content they argue should be freely available to access.

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8. **UK GDP should grow by an extra £2 billion per year by 2020**, if barriers in the digital copyright market were reduced.

7 respondents (6%) agreed that UK GDP should grow by extra £2bn per year by 2020, 41 (35%) disagreed with the statement and 5 (4%) both agreed and disagreed. 64 respondents (55%) did not provide an answer.

A significant number of respondents dismissed the notion of £2bn growth in GDP by 2020, referencing the Copenhagen Economic Impact of a Digital Single Market as the source of that figure. There were a number of concerns around the validity of that figure: a study funded by technology companies including Intel, Microsoft and Nokia; a report that is focussed on the impact of a European Digital Single Market (and not one that looks at growth and productivity); and the lack of empirical data to support that figure.

The Premier League as far as sports rights were concerned could not see where additional income would be generated. The ALPSP believe the figure to be flawed (in the context of a DCE) and the AOP, whilst supporting the creation of a DCE to drive revenue growth, couldn't support that figure without further empirical evidence.

Five respondents agreed that that UK did have the growth potential including Getty Images, Music Managers Forum and the University of Wales.

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## DCE Call for Evidence respondents<sup>26</sup>

Artfinder  
 Artist Collecting Society  
 Association of Illustrators  
 Association of Independent Music  
 Association of Learned and Professional Society Publishers  
 Association of Photographers  
 Authors' Licensing & Collecting Society  
 BBC Worldwide  
 Beggars Group  
 Ben Rattigan  
 Big Innovation Centre  
 Birmingham City University  
 British Academy of Songwriters, Composers and Authors  
 British Association of Picture Libraries & Agencies  
 British Copyright Council  
 British Equity Collecting Society  
 British Film Institute  
 British Library  
 British Phonographic Industry  
 British Video Association  
 BECTU  
 BskyB  
 BT  
 Central European News  
 Channel 4  
 CJ Office Technology  
 Coadec  
 Collections Picture Library  
 Commercial Broadcasters Association  
 Confederation of British Industry  
 Consumer Focus  
 Copyright Licensing Agency  
 Creative Barcode  
 Creative Industries Knowledge Transfer Network  
 Creators Rights Alliance

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<sup>26</sup> This list excludes organisations that requested their response remain confidential

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Culture Sparks (Ambition Scotland project)  
Design and Artists Copyright Society  
Directors UK  
Educational Recording Agency  
EMI Music Publishing  
Equity  
Federation Against Software Theft  
Film Distributors Association  
FOCAL International  
Freemantle Media  
Getty Images  
Hazel Speed  
Ian Grant  
ICE Publishing, Thomas Telford Ltd  
IFTA  
Informa  
Initiative for a Competitive Online Marketplace  
In Print Imaging  
Integrating Technology, IP & business models  
Intellect  
IPR Connections  
International Association of Scientific, Technical & Medical Publishers  
Jonathan Webb  
KU Leuven Belgium  
Laurence Kay Solicitors  
Libraries and Archives Copyright Alliance  
Microsoft  
Ministry of Defence  
Mixcloud  
Motion Picture Association)  
Music Managers Forum / Featured Artists Coalition  
Music Publishers Association  
Music Reports Inc  
NA3T Transport photos  
National Archives  
National Library of Wales  
National Museum Director's Conference  
National Portrait Gallery  
National Union of Journalists

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Netribution  
News Corporation  
Newspaper Licensing Agency  
Newspaper Society / Newspaper Publishers Association  
Open Digital® Policy Organisation Ltd  
Pact  
Pearson  
Personal Managers Association  
Premier League  
Professional Publishers Association  
PRS for Music  
PPL  
Publishers Association  
Publishers Licensing Society  
Rex Features  
Royal Holloway University of London  
Royal National Institute of the Blind  
Royal Society of Chemistry  
Scotland Colleges  
Sinman  
Society of Authors  
Sports Rights Owners Coalition  
Stop 43  
Thomson Reuters  
Time Warner  
TopFoto  
UK Music  
University of Wales Press  
Victoria & Albert  
Writers Guild  
Zoid Pictures Limited

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## ANNEX 4

### Advisory Panel comments (Each member is allowed max 200 words to comment on the report if they feel that is necessary)

#### Richard Mollet, Publishers Association

Licensing books, journals and other types of work for digital usage has never been easier. But as this study shows, it could be made easier still.

The digital rights marketplace is rich in biodiversity. Different content has evolved at different paces, variations in approach have arisen, and the inherent qualities of each medium have interacted with the consumer environment in differing ways, giving rise to various licensing regimes. Each has the same core aim: to ensure creators are rewarded and investors incentivised and the widest possible dissemination of works.

This Phase One feasibility study into a Digital Copyright Exchange makes clear that there is a need for and a benefit to bringing order to this world. A voluntary system, which provides potential users with information about licensing digital works has much to commend it. The DCE will not impose prices or terms on the market, but will facilitate the striking of deals.

The DCE could solve many of the problems with digital licensing. It is a more nuanced instrument than the radical erosion of copyright which is currently subject to consultation. And by working with the grain of the commercial reality of the market it will contribute to economic growth.

#### Sarah Faulder, PLS

I have been impressed by the scale and depth of Richard Hooper's assessment of the state of copyright licensing in such a short period. He seems to relish the challenge of streamlining its undoubted complexities and nuances which vary from sector to sector. Whilst the Report explains the reasons for its complexity the reality is that many other aspects of life are just as complex, a point not made in the Report. Having listened carefully to industry he has succeeded in presenting the issues in a remarkably balanced way and has come to his own very clear conclusions.

His decision to consult an Advisory Panel drawn from across industry before releasing this Report was inspired given that the development and success of any Digital Copyright Exchange that he may propose in Phase 2 of his work will depend on industry buy-in. It has been a privilege to work with so many key players and with Dr Ros Lynch. I now look forward with interest to the results of Phase 2 of this exercise.

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## **Simon Juden, Pearson**

It has been a pleasure to work with Richard Hooper and Ros Lynch on this Phase of the project, which has taken a refreshingly open and engaging approach.

Copyright is the bedrock on which so much of value rests; yet it needs to work better online. A properly defined and functioning DCE could deliver enormous benefit to creators, consumers and the UK's digital businesses - large ones like Pearson or small ones like those within Tech City. It could allow transformative, creative re-use of content while respecting the rights of those who created and invested in that content.

A lot of great work already exists in this space and, going forward, it is essential that this project does not try to define One True Solution. What is needed is, rather, a lightweight but rigorously defined framework encompassing and building on what already exists; underpinned by open, non-proprietary technological standards delivering against clearly-defined use cases.

Difficult questions including a sustainable commercial model and governance remain – difficult but not insurmountable, and with the right support from all stakeholders the DCE could genuinely deliver economic growth to the UK. I look forward with great interest to What Happens Next.

## **Geoff Taylor, BPI**

In the digital age, licensing is the lifeblood of the music business.

So UK record companies, music publishers and collecting societies have been in the vanguard of digital media licensing, supporting a huge range of new services offering consumers music with a myriad of different experiences and price points.

As a result, the UK has more licensed digital music services than any other country and the number - nearly 80 now - is growing quickly.

Given the many innovative ways digital music is used, the multiple contributors to recorded music (composers, artists, producers, session musicians) and the size of our catalogue (over 20m tracks now available), there is complexity to navigate in licensing.

As the first in line in the digital revolution and the focus of much technology innovation, the music sector attracted criticism for not making licensing simple enough. But as the Study finds, often that criticism is outdated, or motivated by a desire not to pay fairly for music.

Creating a voluntary platform that identifies who owns rights in a range of media, where the owners can set out the terms on which they can be used, and enabling users to get a license with a click is the right way forward for digital copyright licensing.

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**John Webster, MMF**

It is legally correct to say that monopolies can be referred to competition authorities but the commercial exercise of exclusive rights, whilst not being monopolistic, can lead to the throttling of new services. The withholding of one set of exclusive content, especially music publishing, can have that effect. The move away from collective rights management by the music industry in the digital age has exacerbated this problem and drastically increased the cost of acquiring IP.

Collectivity and extended collective licensing potentially remove the issue that rights users have about who to pay for rights use. They should pay the relevant collecting society and let them sort out monetary distribution.

In general we need systems that allow switches to be set at “on” but which rights owners can turn “off” if they object to specific uses.

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## ANNEX 5

### ACRONYMS

ACS	Artists' Collecting Society
AIM	Association of Independent Music
ALCS	Authors Licensing and Collecting Society Limited
ALPSP	Association of Learned and Professional Society Publishers
BASCA	British Academy of Songwriters, Composers and Authors
B to B	Business to business
B to C	Business to consumer
BBC	British Broadcasting Corporation
BFI	British Film Institute
BSI	British Standards Institute
BVA	British Video Association
CLA	The Copyright Licensing Agency Limited
CMO	Collective Management Organisation
Coadec	The Coalition for a digital economy
C to C	Consumer to consumer
DACS	Design and Artists Copyright Society
DCE	Digital Copyright Exchange
DEA	Digital Economy Act
DVD	Digital video disk
ERA	The Educational Recording Agency Limited
FE	Further Education
GDP	Gross Domestic Product
GRD	Global Repertoire Database
IPO	Intellectual Property Office
ISP	Internet Service Provider
ISBN	International Standard Book Number
MCPS	The Mechanical Copyright Protection Society
MPA	Music Publishers Association
NDA	Non-disclosure agreement
NLA	Newspaper Licensing Agency

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NUJ	National Union of Journalists
pact	Producers Alliance for Cinema and Television
PLS	Publishers Licensing Society
PPL	Phonographic Performance Limited
PRS for Music	Music Performing Rights Society
RRO	Reprographic Rights Organisation
SME	Small and medium sized enterprise
STM	International Association of Scientific, Technical and Medical Publishers
UGC	User generated content

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