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## Ministerial Foreword



The Government has long recognised the importance of creativity and knowledge to the UK. It lies behind our investment in research, education and skills and our support for the creative industries. Much of this value relies on our ability to access and share information as never before through the internet.

We are, however, at a crossroads in our relationship with our new digital world. Digital technology means access to information on a vast scale. It has changed the way people publish and consume works. It allows anyone and everyone to make and distribute quick, cheap and totally accurate copies. Consumers have reached out to grab the potential of this new technology. The copyright debate, once in the hands of the professionals of the creative industries, is now a debate for everyone. Businesses and governments have seen the challenges but have been slow to respond.

Although creative industries and governments are trying to catch up with the digital world, there is more to be done. We must push harder. Policy makers need to get ahead of the game. They need to recognise the need to work with an awareness of what consumers are doing and want to do. And they need to recognise that no single national government has control of the agenda.

We must now work within the international and European framework to ensure copyright keeps up with technology and consumer behaviour. We have to make it simpler, and make it address the concerns of all those who have an interest in the copyright system: business, consumers, creators and copyright owners.

(c) the way ahead: A Copyright Strategy for the Digital Age is a recognition that the world we live in has changed. This report is the latest part of our ongoing response.

A handwritten signature in blue ink that reads "David Lammy". The signature is fluid and cursive, with a long horizontal stroke at the end.

David Lammy MP

## Executive summary

The aim of copyright is to encourage authors' creativity and make their works available widely. It is a global system that provides incentives for authors and investors, while allowing access to works for educators, researchers, cultural institutions and users of all sorts, both in business and in the home.

Copyright engenders strong emotions. It is about authors' livelihoods and recognition and about financial rewards for rights holders. But it is also about access to the copyright works which are essential to our values, our cultures and to the way we spend our work and our leisure time.

This work looks ahead to how copyright can tackle the challenges of the digital age, drawing on previous work including Digital Britain and the Gowers Review of Intellectual Property, on international perspectives including the European Commission's and on discussions and submissions from stakeholders.

### *The value of copyright*

The last 300 years have seen an unprecedented explosion in the cultural, scientific and historical material available to scholars, business people and private citizen. Financial and societal rewards to creators and investors have helped continue to fuel the engine of creativity. Copyright has been in the background of much of this activity.

Now, creative industries are a vital part of the UK's economy: around 6.4% of GDP. The internet has brought wider access to a broader range of works than ever before. But this has brought to the fore existing tensions between incentives for authors, publishers and investors and the desire for access to works by a wide range of users. Copyright faces fresh challenges in the digital age. These challenges are global and many of them require international agreement to be addressed fully.

### *Findings from the Copyright Strategy*

Investigation led by the Intellectual Property Office (IPO) over the course of the last year found that:

- For the first time, individual citizens have the means to create, use and distribute copyright works through digital technology. People want to make use of these opportunities but in doing so it is almost inevitable that they will violate copyright. This mismatch of expectations is significant because neither the law nor people's attitudes is easy to change.
- Copyright is also complex for users. Much of this complexity can be addressed by rights holders and how they administer their rights. This would have many advantages over changes to the law, which can be slow and risks adding to rather than reducing complexity.
- Making non-commercial use less onerous for consumers, for example by removing the need to seek permission and make payment for personal use of individual copyright works, would help tackle the "mismatch of expectations" problem. But fair compensation for rights holders would be required. Action at a European level would be necessary.
- Processes for licensing copyright works need to be improved. The Government has already brought forward proposals in the Digital Britain Report, which noted problems with access to "orphan works" and the potential benefits of extended collective licensing in tackling some of these problems. Non-compulsory registration systems may also help rights holders manage their rights more effectively.
- Creative industries face real challenges in monetising content. Firms must continue to evolve products and services to offer consumers something they value at prices they are prepared to pay. Education and enforcement can support these efforts but cannot tackle infringement of copyright on their own.

### *Actions and recommendations*

Based on these findings, the Government's intentions are:

- for **authors** of copyright works; to support fair treatment through new model contracts and clauses and fair returns for use of their work by improving education about and enforcement of rights;
- for **rights holders**; to help secure a viable future by encouraging the development of new business models, modernising the licensing process and maintaining support for education about and enforcement of rights;

- for **consumers**; to allow them to benefit from the digital age by seeking to legitimise non-commercial use of legitimately-purchased copyright works and improving access to 'orphan works' such as out-of-print books;
- for **educators** and researchers; to support them by improving access to works, resolving issues around copyright and contract and ensuring exceptions to copyright are right for the digital age; and
- for **businesses** and other users; to work towards a simpler copyright system by, improving the copyright licensing process and encouraging the development of new business models.

This means:

- UK action to improve access to orphan works, enable extended collective licensing, encourage the development of model contracts and clauses, and tackle P2P file-sharing; and
- A willingness on the Government's part to consider European action that provides commonsense rules for private, non-commercial use of copyright material that will give consumers much more freedom to do what they want (such as creating mash-ups) and make clear what they cannot do.

The actions and recommendations of the report are given in full in Chapter 5.

## General introduction

The UK's copyright system is 300 years old this year. It is an appropriate moment to reflect on what it has achieved, how well it is working and where it needs to go in the future.

The original stated purpose of copyright<sup>1</sup> was “for the Encouragement of Learned Men to Compose and Write useful Books” and to protect the livelihoods of “authors or proprietors” of books and writings (and their families). Its effect was to stop printers and booksellers from publishing works without authors' consents for 14 years after first publication.<sup>2</sup> This basic principle of encouraging creativity by rewards to authors for a limited period remains at the heart of copyright today. The aim remains to balance access to valued works of many kinds (not just “useful Books”) with incentives to create and distribute them.

### *The development of copyright*

Copyright began in the UK with the Statute of Anne.<sup>3</sup> The French Revolution saw the first laws which recognised the rights of authors emerge in Europe.<sup>4</sup> Following the implementation of the Statute of Anne in twelve of the thirteen American states, copyright found its way into the constitution of the newly-emerged United States as a means of promoting “the Progress of Science and useful Arts”<sup>5</sup>. Copyright now reaches globally most nations are signatories to international conventions on copyright.

Copyright has spread from books to other art forms, to music, to film, and has adapted to new technologies such as the gramophone, the photocopier and the World Wide Web. Not only has its sphere of influence expanded geographically, technically and culturally, but it has extended into the lives of every one of us.

Copyright has spread to impact on more and more people. Once, obtaining authorisation to use copyright works was the province of professionals such as lawyers, authors' agents and broadcasters. Now no one can afford to be ignorant of copyright. In principle, at least, it dictates what we can reach through the Web; it governs how we can use copyright material in our business lives and in our leisure time.

### *The impact of copyright*

On the face of it copyright is a success. The last 300 years have seen an unprecedented explosion in the level of cultural, scientific and historical material available to scholars, business people and to the private citizen. Financial and societal rewards to creators and investors have helped continue to fuel the engine of creativity.

Creative industries are a growing component in the economic performance of developed and developing<sup>6</sup> economies. The UK's creative industries represent 6.4% of its GDP. Other governments are increasingly getting interested in the value of their creative sectors as well.

But at the same time, copyright is not without its critics. Some see it not as a facilitator but as a constraint on the free dissemination of knowledge. They believe it puts a price on things that should be freely available, and puts our cultural heritage out of reach of those who most need it.

This debate on the value of copyright has been going on almost since its inception. But on top of this, there are new concerns about the application of copyright in the digital age. Creative and cultural works are now easier to produce and reproduce than they have ever been. Consumers, noting the falling cost of digital copying, are less willing to pay the prices that are charged for these works. As the Gowers Review noted, there is a problem with the public legitimacy of copyright.<sup>7</sup> Copyright is, arguably, under unprecedented challenge, for example, to ensure remuneration to authors, as it struggles to cope with the evolution of our society from an analogue to a digital world.

1 Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned, 8 Anne c. 19, 1710 ('The Statute of Anne')

2 There was the possibility of a further 14 years' protection if the author remained alive at the end of the first 14 year period. All books then published received protection for 21 years.

3 See reference 1

4 French Revolutionary Laws of 13-19 January 1791 and 19 July 1793

5 Article 1, section 8, clause 8 of the Constitution of the United States of America.

6 S. Alikhan (2000) *Socio-economic Benefits of Intellectual Property in Developing Countries*, WIPO: Geneva

7 HMT (2006), *Gowers Review of Intellectual Property*, HMT: London, paragraph 3.26 <[www.hm-treasury.gov.uk/gowers](http://www.hm-treasury.gov.uk/gowers)>

### *Meeting the challenge of copyright*

Copyright engenders strong emotions. It is about authors' livelihoods and recognition and about financial rewards for rights holders. But it is also about access to the copyright works which are essential to our values, our cultures and to the way we spend our work and our leisure time.

This document was written against the background of this current era of change. Many people argue that copyright has survived such technological changes before, and can do so again. Others think it is at a crossroads. This work is about establishing a viable strategy for copyright in the digital age.

## © the way ahead: A Copyright Strategy for the Digital Age

### *The importance of copyright*

1. Copyright is important because it impacts on the UK's economy, culture, education and research, and on everyone who enjoys or creates copyright material such as computer games, TV shows or modern art. This encompasses almost the entire population.
2. Copyright is the legal vehicle through which creativity, and interaction with it by authors, rights holders, business and users, is managed by society. Creativity is what entertains, educates and informs us. It brings many benefits, economic, cultural and social.
3. The scope and value of copyright means it is vital that the UK's copyright framework is fit for the 21st century. As copyright assumes greater prominence in the public mind, it also merits greater attention in public policy.
4. This work therefore sets out the UK Government's strategy for copyright in the digital age, bringing together copyright perspectives, following Gowers, with a focus on digital technology's impact on copyright. Its objective<sup>8</sup> is "to ensure the copyright system supports creativity and promotes investment and jobs" as our economy recovers. This means the system needs the confidence of businesses; at the same time users, creators and other stakeholders such

as educators and researchers must see it as appropriate, effective, fair and reasonable.

5. The changing technological and social environment in which copyright operates means that this work does not and cannot present a final, immutable position on the UK copyright system. Rather it attempts to chart a way ahead for copyright and provide a firmer basis for future work, both domestically and internationally.

### *The relationship between the Gowers Review and this work*

6. Copyright has been the subject of periodic re-examination throughout its history. Prior to this work, the most comprehensive and recent examination of UK government policy on copyright was the Gowers Review of Intellectual Property in 2006. Gowers consulted widely and talked to a broad range of stakeholders in an attempt to answer the question of whether the UK's IP system, including copyright, was fit for purpose. Gowers found the IP system, including copyright, to be "broadly performing satisfactorily", but sought change in a number of areas: stronger enforcement of rights, lower costs for business and balanced and flexible rights. The Government is acting in all these areas.

#### **The Gowers Review, 2006**

On 2 December 2005, the Chancellor of the Exchequer announced that he was asking Andrew Gowers, former Editor of the Financial Times, to lead an independent review into intellectual property rights in the UK. The review reported on 6 December 2006, making 54 recommendations.

Details of the review and its findings are at [www.hm-treasury.gov.uk/gowers](http://www.hm-treasury.gov.uk/gowers)

7. Because of its remit to look at IP rights in the UK, the Gowers Review took the European and larger international framework largely as a given. Although some of its recommendations would require changes to EU law and international conventions, the review's focus was largely on what might need to be done to improve the UK system within the context of the existing European landscape.

<sup>8</sup> Intellectual Property Office & Department for Innovation University and Skills (DIUS) (2008), © the future: Developing a Copyright Agenda for the 21st Century, Intellectual Property Office/DIUS, 2008 <[www.ipo.gov.uk/c-policy-consultation.pdf](http://www.ipo.gov.uk/c-policy-consultation.pdf)>

8. However, the international nature of the Web, and the tendency for firms in the digital arena to operate on a pan-national basis, make copyright an increasingly global issue. Global problems require global solutions.

#### *The changing environment in which copyright functions*

9. Gowers reported in 2006 but even in the short time which has followed, much has changed. Sixty-three% of all UK households now have a broadband connection, up from 56% in 2008. Of those households with internet access, 90% had a broadband connection in 2009, an increase from 69% in 2006.<sup>9</sup>
10. New business offerings since 2006 have also radically changed the way we access copyright content. The BBC's programme-streaming service, iPlayer, was launched in July 2007. Services for streaming music over the internet and remote device have also been launched in the UK. These include Nokia Music UK in October 2007 and Spotify in October 2008, while subscription music service Sky Songs went live in October 2009.
11. While existing businesses have emphasised the need to make the current copyright framework effective, new services are challenging the conventions and assumptions upon which traditional business models operate. The Google Books Settlement challenges both current practice and interpretation of copyright law. Film and TV on demand services are becoming available, for example from BT Vision. Virgin Media and Universal Music recently announced "the world's first unlimited music download subscription service"<sup>10</sup>, while Spotify is popularising music streaming through its service.

12. Digital technology has changed how people create, distribute and consume copyright works – and how they expect to do so in future. People can create videos at home where once a studio would have been needed, share copyright works across the world in seconds with friends and family and have near-constant access to creative works through phones, computers and MP4 players.
13. The issue for copyright is that now this capability exists, people want to use it, however many uses of technology (from putting one's own photos to a soundtrack from CDs one owns or transferring old LPs to MP3 for ease of listening) are civil or criminal offences. Legal ways to do these things are largely unavailable to consumers and copyright infringement is common.
14. Against this background of change, it is right to examine how best to ensure the copyright system meets its objectives.

#### *How this strategy relates to other action by the UK Government*

15. The *Digital Britain* Report<sup>11</sup>, the Government's strategic vision for ensuring the UK is at the leading edge of the global digital economy, was published in 2009. The report lays out a strategy for broadband and digital content, outlining central policy commitments as part of the Government's wider plan for Building Britain's Future. A key strand of this work addresses the role of the creative industries in the digital world, intending to make Britain one of the world's creative capitals.
16. In 2008 the Government presented its commitments to action in support of the creative industries in *Creative Britain*<sup>12</sup>, emphasising the need to foster and protect intellectual property. The Government has provided over £70 million to support the strategy, with departments across Government and agencies working together to successfully deliver the commitments.

9 Intellectual Property Office & Department for Innovation University and Skills (DIUS) (2008), © the future: Developing a Copyright Agenda for the 21st Century, Intellectual Property Office/DIUS, 2008 <[www.ipo.gov.uk/c-policy-consultation.pdf](http://www.ipo.gov.uk/c-policy-consultation.pdf)>

10 Reuters, 'Virgin Media and Universal Music to Launch World's First Unlimited Music Download...' Reuters, 15 June 2009 <<http://www.reuters.com/article/pressRelease/idUS84823+15-Jun-2009+GNW20090615>>

11 Department of Business Innovation and Skills (BIS) (2009) Digital Britain, BIS: London <<http://digitalbritainforum.org.uk/report/>>

12 Department of Culture, Media and Sport (DCMS) (2008), *Creative Britain: New Talents for the New Economy*, DCMS: London <<http://www.culture.gov.uk/images/publications/CEPFeb2008.pdf>>



17. This strategy builds on Gowers, Creative Britain and the Digital Britain Report but also takes account of wider economic interests in copyright and the strong international dimension to the copyright system. It looks at the economic purpose of copyright in its broader context of the social and moral issues around the use and ownership of works.

*What this document does not do*

18. This document does not set out to be a comprehensive guide to the copyright system, copyright law or to studies on copyright, though it draws on all three.
19. There is extensive debate going on in a range of countries and international fora about issues relating to copyright. This report notes some of the major directions of these debates such as the role of copyright exceptions and moral rights, but does not attempt to adjudicate these debates or present them in detail.

*Structure of the document*

20. This work is set out as follows:
  - This introduction
  - Background information and glossary of terms
  - The value of copyright
  - How the strategy was developed
  - Findings from the strategy process
  - Actions and recommendations

## What is copyright?

Copyright gives the owners of certain types of works the right to use and authorise defined uses of their works. For example, only the owner of a work can allow or prohibit the copying of their work, the performance of their work in public or the communication of their work to the public. The author of the work, as defined by the Copyright, Designs and Patents Act 1988 (CDPA), is the first owner except in certain specific circumstances. The author can assign or license their rights. The rights holder to which these rights are assigned or licensed can also be identified as the owner.

The works in question are original and recorded literary (e.g. song lyrics and computer programs); original and recorded dramatic (e.g. dance and mime); musical (e.g. music composition); and original artistic (e.g. painting and sculpture) works. Broadcasts, sound recordings, films and typographical arrangements of published editions (e.g. the layout of a book) are also granted copyright protection.

Copyright applies for a limited duration or “term”, the length of which varies depending on the type of work. Literary, dramatic, musical and artistic works are generally protected throughout the lifetime of the author and for 70 years after their death. Films are protected for 70 years from the end of the year of death of the last to die out of the principal director, the author of the screenplay, the author of the dialogue or the composer of the music for the film. Rights in sound recordings, broadcasts and typographical arrangements have a shorter duration.

As well as economic rights over their works, authors of literary, musical, dramatic and artistic works and directors of films are given moral rights to be identified as the author of the work, object to derogatory treatment of the work and not to be falsely identified as the author of a work. Moral rights last as long as economic rights. These moral rights can be waived in writing, however they cannot be assigned or transferred.

In the UK, a work is automatically protected by copyright once it is created if the required qualifying conditions are met (e.g. fixation in the cases of literary, dramatic and musical works). Fixation means the work is fixed in material form, such as in writing or otherwise. The UK does not require a work to be registered or go through any formal process before protection is granted.

Copyright is infringed if a person does, or authorises another to do, in relation to the whole or a substantial part of the copyright work any of the acts restricted by the copyright without the permission of the owner. Importantly, however, there are circumstances (“copyright exceptions”) where a user may use copyright works without infringing. The role of these exceptions is varied and includes the need for certain sections of the public to access a work, the correction of market failure and the preservation of works with historical and cultural significance. These exceptions reflect those permitted for EU law and international conventions.

The recognition of rights, related to copyright, but outside the scope of copyright: (‘related rights’) are also a feature of copyright. The term ‘related rights’ includes database rights, public lending rights and artist resale rights but is sometimes, confusingly, used to refer to copyright in broadcasts and sound recordings.

Performers’ rights are related rights. A performance can take place at a live concert or it can also be recorded and broadcast. The rights of performers split into property (e.g. right to copy the recording of a performance), non-property rights (e.g. consent being required to record a live performance) and right of remuneration (e.g. a right to equitable remuneration when a commercially published performance is publically performed or broadcast). These rights last for 50 years from the end of the calendar year in which the performance takes place or in which the recording of the performance is first released. Performers are also granted moral rights.

## Who's who in copyright?

In the course of the document the following terms are used:

### The author:

The author is the person who is the source of a work, expending resources such as time, effort, judgment and creativity to generate it (e.g. a writer, producer of a sound recording or a software designer). The author can work alone or with other authors. The author is granted exclusive economic rights and moral rights under copyright, except in certain circumstances such as the creation of the work under a contract of employment. These rights can be assigned or licensed or waived depending on the circumstances and the right, be it economic or moral. The moral right to be identified as the author of the work needs to be asserted before it can be exercised.

### The rights holder:

The rights holder is the person or organisation that has been assigned or is licensed to use the rights to a work or works. The term is used particularly to describe firms such as publishers, film studios and record companies that invest in authors' works with a view to exploiting them – generally, this is for profit, though there may be other motives as well (e.g. the BBC's mandate to educate, entertain and inform). The creator may enter into an arrangement where the rights holder is granted the rights in order to secure funding or a route to market. The transmission of these rights is sometimes presumed by statute, as an implied contractual term.

### The owner:

The term "owner" is used as a general term to refer to the rights holders who own the rights to a work at a given time. It is also used in reference to authors who have not assigned or waived their rights, as well as rights holders, as defined above.

### Business:

This term refers to several sectors of business, including the creative industries (businesses that operate as creators and/or rights holders) and internet service providers (ISPs). Businesses also act as consumers of many goods and services protected by copyright, such as office software, music played in shops or retailers offering music and books for sale.

### The user:

The user interacts with the copyright work often exploiting the work for a particular purpose, such as making new works. For example, a teacher might wish to incorporate works of visual art, literature, music and film into a presentation on the Suez crisis, or a commercial film maker might wish to use period music as soundtrack to a film set in the 1970s.

In most cases, in order to legitimately interact with the work, the users must obtain a licence or permission from the creator or the rights holder. In some cases, a licence or permission will not be required as the use may fall within a list of acts which are permitted under copyright law. These permitted acts are also referred to as exceptions to copyright and include research and private study and criticism or review. The permitted acts are defined by statute.

### The consumer:

The consumer obtains copyright works but – unlike a user – does not exploit the work as described above. Examples of the consumer include: the person who buys a music single online through a legal site, watches television over the internet through a legitimate site or reads the newspaper online. The expectations of consumption are changing rapidly in the digital age.

## The value of copyright

It has been suggested that copyright is responsible for the success of the creative industries or the creation of particularly important artistic works. Others take the view that copyright would impede rather than incentivise a modern-day Shakespeare and can exert a chilling effect on innovation, particularly innovation in services. They argue that it can have damaging effects on research, education, heritage and cultural diversity. This section outlines briefly some economic and non-economic perspectives on the value of copyright.

### Copyright and creative industries

“The creative industries must move from the margins to the mainstream of economic and policy thinking, as we look to create the jobs of the future”

– Creative Britain Report, page 4

1. Although copyright is potentially important to many parts of the economy, the creative industries are a key creator of value from copyright works. They contribute 6.4% of the UK's GDP<sup>13</sup>, employ 1.9 million people<sup>14</sup> and have grown considerably since 1997<sup>15</sup>.
2. The UK is the third most successful exporter of creative services<sup>16</sup>; or on a wider definition including architecture, advertising and R&D is second only to the US<sup>17</sup>. The significant role of the creative industries in the UK's economy is underlined by recent Organisation for Economic Cooperation and Development (OECD) research, which states that the UK's creative industries form a greater proportion of its GDP than any other nation<sup>18</sup>. The Government's ambition is for the UK to remain a creative hub of the world economy.

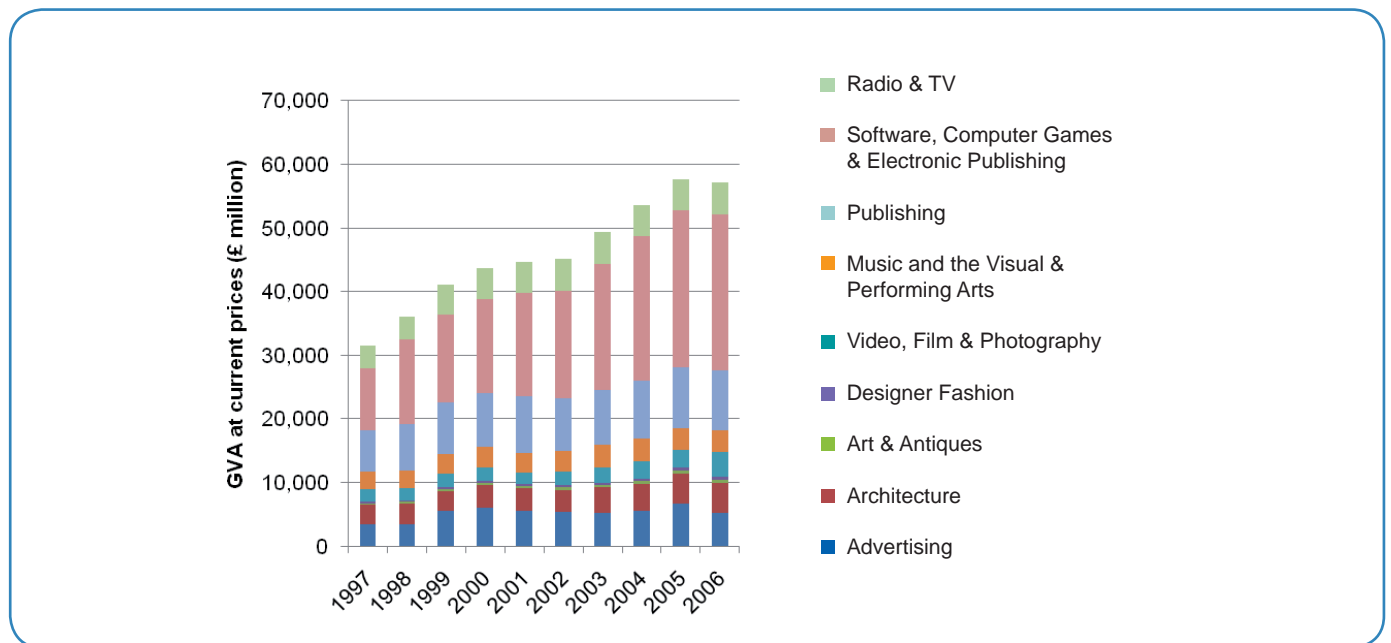


Figure 1: The economic contribution of creative industries, 1997-2006 (source: DCMS)

13 DCMS, Creative Industries Economic Estimates Statistical Bulletin <[www.culture.gov.uk/images/research/CreativeIndustriesEconomicEstimates2007.pdf](http://www.culture.gov.uk/images/research/CreativeIndustriesEconomicEstimates2007.pdf)>

14 Figure from summer 2006, see reference 13

15 Average real terms growth rate of 2% per annum in 1997-2005, 4% growth from 2005-2006, see on reference 13

16 UK grosses \$19,385m after the US (\$71,530m) and Germany (\$28,156m),

17 Figures compiled from: TSB (2009), Creative Industries Technology Strategy 2009-2012; DCMS (2009), Creative Industries Economic Estimates Statistical Bulletin <[http://www.culture.gov.uk/images/research/Creative\\_Industries\\_Economic\\_Estimates\\_Jan\\_09.pdf](http://www.culture.gov.uk/images/research/Creative_Industries_Economic_Estimates_Jan_09.pdf)> and CIA World Fact book (2009) <<https://www.cia.gov/library/publications/the-world-factbook/geos/uk.html>>

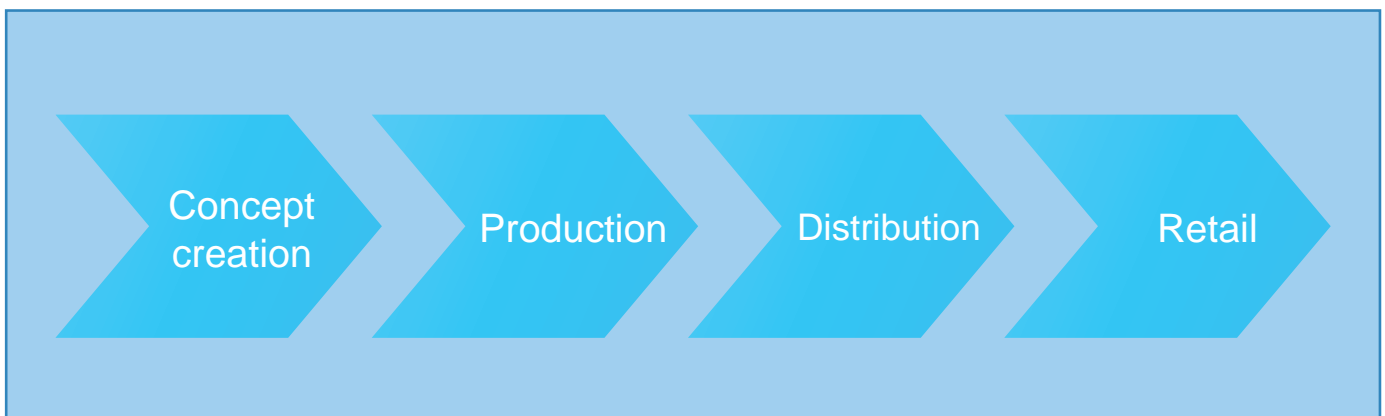
18 TSB (2009), Creative Industries Technology Strategy 2009-2012, TSB: London

3. To help meet the challenges posed by global economic uncertainty, the copyright system must deliver continuing incentives for creation of and investment in creative works. The creative industries have the potential to play a strong part in driving the UK's recovery and spearheading its success in the coming years. The Government is looking to help the UK return to economic growth by removing the barriers holding British businesses back and building on our strengths.<sup>19</sup> But the UK's creative industries are global players; it makes little sense to think about them on a merely national basis.
4. Copyright is important not just to the UK's creative industries, many of whose revenue streams are directly dependent on copyright, but also to a range of other businesses.

For example, the hospitality industry, composed of clubs and pubs, benefit from copyright protected works and being able to use them in the course of business. Protecting an author's right to benefit from sharing the interest in their work (for example, a music track that will be played in a club or a football match that will be broadcast in a pub) encourages that work to be shared therefore contributing to the productivity and growth of other industries and in turn, resulting in a stronger economy.

#### *The changing value chain and business models*

5. The changing value chain and pressures on business models have made copyright difficult to manage, in particular, to extract the value from copyright material.
6. Traditionally, copyright industries had a fairly simple value chain. Distributors and publishers of works acquired rights from authors. Record companies, collecting societies, publishers etc benefited from the security given by copyright to develop their businesses. Physical copies – books and records – were hard to reproduce and distributor had a high level of control. Copyright goods were more excludable.
7. Digital technologies have altered the value chain.<sup>20</sup> Authors can publish directly in the online world: Commercial rights holders can sell product in new ways, and consumers have an enormous quantity of legitimate content at their fingertips, both free and paid for. For many creative businesses, the changing value chain is making the situation more complex as it is more difficult to realise economic benefits with digital technology, but there may be new opportunities to do so.



**Figure 2: The value chain in the analogue world [source: TSB]**

<sup>19</sup> HM Government (2009), *Building Britain's Future: New Industry New Jobs*, <[www.berr.gov.uk/files/file51023.pdf](http://www.berr.gov.uk/files/file51023.pdf)>

<sup>20</sup> A modern digital value chain model is set out in DCMS (2009) Final report for the Department for Culture, Media and Sport Fostering creative ambition in the UK Digital Economy Analysis and development of policy recommendations, DCMS: London <[http://www.culture.gov.uk/images/publications/analysismason\\_fosteringcreativeambition.pdf](http://www.culture.gov.uk/images/publications/analysismason_fosteringcreativeambition.pdf)>

8. A current challenge to developing business models, many of which rely on advertising revenues, is the state of online advertising. The UK's advertising industry is the third most prominent in the world, after the USA and Japan, but its £5.3 billion contribution to UK GDP in 2008 represented a 23% fall compared to the previous year. Investment in advertising tends to fall during economic downturns<sup>21</sup>; the consequences are likely to be difficult for new advertising-funded business models
9. We need to better understand the impact of digital technologies on our copyright industries. Independent research is needed to establish where in the copyright value chain value is being added (or taken away) by these technologies. We urge the copyright industries to collaborate with independent researchers so that we may better understand the challenges and opportunities they are facing in the digital world.



Figure 3: The value chain in the digital world [Source: TSB]

<sup>21</sup> The ONS (2009) Monthly Inquiry into Distributive and Service Sectors indicates that UK advertising's turnover in Q2 2009 was £4bn, a 24% fall in turnover from Q2 2008

### Economic Perspectives

10. This section draws heavily on a literature review on the economics of copyright and digital copying commissioned by the Strategic Advisory Board for Intellectual Property Policy (SABIP) and to be published in December 2009. It summarises existing economic understanding of copyright.

### Theory

11. According to economic theory, one of the aims of copyright is to act as an economic incentive to create or maintain works<sup>22</sup>, by giving owners an exclusive right to exploit their work for their own gain and deterring others from free-riding on their investment of time, skill and other resources. Copyright law also incentivises financial investment in authors by rights holders. Other motivations of authors, such as a desire for recognition, are also satisfied by copyright, which entitles an author to be identified as the author of a work, following the assertion of this right, when this work is used.
12. Copyright's effects can be both positive and negative. Too little control over works may undermine incentives to create or supply works. Too much can stifle innovation, act as a drag on the economy through rent-seeking and impair competition and choice for consumers.
13. Without a copyright system, creative works could be undersupplied<sup>23</sup> because they often have some characteristics of public goods such as non-excludability (i.e. it is hard to stop people getting value from them) and non-rivalry (i.e. use by one person often does not preclude others from using the work). Public goods typically have positive externalities: they benefit not just their producer but others too.
14. Copyright, where it is enforced and for as long as it lasts, increases the excludability of works. That increases the financial incentive to produce and exploit such works by weakening their public good characteristics.
15. As a result, there are negative outcomes associated with the increase in excludability that copyright brings:
- The administrative and enforcement costs of copyright create a deadweight loss, i.e. costs that do not contribute to the creation of valuable works.
  - Copyright acts like a monopoly, albeit in markets where there may be close substitutes for the goods in question (e.g. there are several authors of popular novels about the Royal Navy in the Napoleonic era). This allows copyright holders to charge higher prices than would otherwise be possible and consequently loses or excludes some customers who do not value the work at the higher price.
  - Some "excluded" people will be authors who are deterred from using and building upon existing works by the administrative and monopolistic costs of copyright. This would tend to reduce the number of new works created, counteracting to a degree the incentive to create provided by copyright. However, these excluded people could create entirely new works instead, rather than use existing works.
16. The cost-structure of the creative industries amplifies these effects: it is often very expensive to produce creative works (e.g. major films or computer games)<sup>24</sup> but relatively very cheap to reproduce them (less than £1 for a DVD, cheaper still over a fast broadband connection). This makes it very attractive to pirate such works.

22 There are suggestions that these incentives are weaker than might be expected in some creative industries, such as music, where the production of albums has increased despite the impact of file-sharing. See: F. Oberholzer-Gee and K. Strumpf (2009) File-Sharing and Copyright, Harvard Business School Working Paper 09-132, <[www.hbs.edu/research/pdf/09-132.pdf](http://www.hbs.edu/research/pdf/09-132.pdf)>. It is also open to question whether this incentive is necessary in all cases (e.g. to an artist painting for pleasure or a researcher working for recognition from their peers) or whether there are alternative ways to induce the production of works (see: S. Breyer (1970) 'The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies and Computer Programs' 84 Harvard Law Review 281). There may be no greater incentive in some cases (e.g. enhancing the value of a back catalogue may result in the preference to exploit that back catalogue as opposed to new works) see: S. Frith & L. Marshall (ed.) (2004) Music and Copyright, Edinburgh University Press: Edinburgh p. 134

23 Although see reference 22

24 Improved technology for production means it is getting cheaper to produce other types of works (although not major films or computer games, with budgets for both reaching \$100m in some cases).

17. Given the range of factors described above, copyright may or may not be the best system for incentivising the creation of works in a particular set of circumstances. Economic theory itself fails to provide an overwhelmingly compelling justification for the copyright system.

#### Evidence

18. In the absence of a compelling theoretical economic justification for copyright, or aspects of the copyright system, empirical evidence is needed. However, such evidence is hard to generate and hard to come by.
19. In principle, achieving the government's economic objectives for copyright means seeking the combination of incentives to create and access what is created. In practice, it is not currently possible to determine what this optimal combination might be.
20. In the responses to our copyright issues paper there was no stakeholder consensus on the extent to which healthy competition based on strong rights, is the best way of providing high quality content for the public.
21. The government is prepared to change UK law if needed, or to build consensus for change in international copyright frameworks, if it can be convinced of the merits of such change. However, a lack of strong evidence across the world makes it difficult to establish the case for changes to aspects of copyright law and practice.

#### Social and cultural perspectives

“The act of Queen Anne is contrived with great judgement, not only for the benefit of authors, but for the benefit of learning in general. It excites men of genius to exert their talents for composition; and it multiplies books both of instruction and amusement. And when, upon expiration of the monopoly, the commerce of these books is laid open to all, their cheapness, from a concurrence of many editors, is singularly beneficial to the public.” –Lord Kames, *Hinton v. Donaldson*, Scots Court of Session 1773

22. Although direct value to the economy is very important and must play a role in our recovery from the recession, copyright works are valuable to society in other ways.
23. The value of copyright material to society is in its use, not in its mere possession. Producers of copyright works may benefit from and be incentivised by higher prices, but users benefit from having them available easily and affordably. Copyright policy has always aimed to take account of the needs of both authors, those who invest in them and the many people and organisations that use copyright works.
24. Some copyright works are believed to be goods which serve the interests of society at large, in the sense that they contribute to education and research. Works are often seen as cultural outputs, for which similar public benefits are claimed<sup>25</sup>, though “these claims are not easy to prove or even to make explicit”<sup>26</sup>.
25. By protecting value that is not simply economic by granting moral rights<sup>27</sup>, such as the right to be identified as the author of a work or object to derogatory treatment of it, copyright is also valuable to the author. Copyright protects the author, indicating that they and their act of creation are valuable and meaningful to society.
26. Our working assumption for this strategy has been that many of the hard-to-quantify benefits associated with an effective copyright system, including cultural and social outcomes, are likely to be promoted by the same factors that lead to economic benefit. For example, improvements to education through use of copyright material can impact on communities, on individual health and happiness both directly and through the economic benefits of better education such as access to more skilled work and higher pay.

25 “...cultural goods have some public-good properties; in aggregate they yield positive externalities or diffused benefits that may be demanded in their own right.” See: V.A. Ginsburgh & D. Throsby (eds) (2006), *Handbook of the Economics of Art and Culture* Vol. 1, Elsevier: Amsterdam p. 7

26 Towse (ed.) (2003), *A Handbook of Cultural Economics*, Edward Elgar Publishing: London p. 22

27 Moral rights can have economic significance, for instance, by protecting reputation; the moral rights of paternity and integrity can impact the ability for an author to influence the terms on which they sell or license their work.



## How was this Copyright Strategy developed?

1. The work which has culminated in this report was launched by David Lammy MP at the Institute for Contemporary Arts on 16 December 2008. In his speech the Minister stressed the importance of the creative industries, the role of copyright in these industries and the pressures that copyright is under.
2. David Lammy outlined that although these pressures were reason enough to look at the copyright system, an examination of copyright was necessary in order to develop UK thinking and inform the UK voice in the European copyright debate. The economic importance of copyright and the changing nature of the consumption of copyright material were also highlighted as issues necessitating reconsideration of the copyright framework in the UK. The copyright strategy was placed in the context of domestic, European and international examinations of copyright.
3. It was emphasised that this work would not take the form of a traditional consultation, but rather it would seek to reach out to those user communities who were not usually reached by a conventional written consultation. Accordingly, the issues on which the government wanted views were presented in an open-ended way, to provide respondents with the best opportunity to identify the particular questions they felt the work should focus on.
4. These broad areas for inquiry were set out in an issues paper<sup>28</sup> and are reproduced below.
  - *Delivering access to a wider range of works more easily.* People want access to many copyright works, some of which are currently hard to access. Access provides material for educators, knowledge for researchers and inspiration for creators and innovators, stimulating more creativity and in turn benefiting wider society. Having works or licences available legitimately reduces the incentive to infringe. However, systems for licensing are complex, time-consuming to access and incomplete (they do not exist for all rights or types of works). There is a need for easier access and ways to pay for some of it.
  - *Making copyright licensing simpler for everyone.* Copyright is automatic and many works (such as photographs) do not incorporate details of their creator or rights holder. As a result, it is hard to get permission to use works. A user may find it impossible to identify the owner of a work. A business may be unable to get a licence in time to develop a new business model. Making licensing easier benefits all who are currently involved and has potential to bring in new users of works as well.
  - *Ensuring fairness for everyone involved with copyright, including ensuring that creators and rights holders receive remuneration.* Many people see the current copyright system as unfair or burdensome, for often contradictory reasons. (For example, paying licence fees to play a CD or the radio in a shop or salon is seen as fair by rights holders and creators but unfair by many businesses.) To expect adherence to a system that is saddled with perceptions of unfairness is difficult. Existing practices have developed the protection of works and rights holders to the extent that some creators and users feel neglected by the copyright system. In particular, we have heard that some creators are facing challenges in monetising their works and developing their relationships with rights holders in the digital age. Users feel that they are hindered by the exception regime which is meant to deliver them access. We address this issue of fairness by considering the creator/rights holder relationship and by looking at the system of exceptions.
  - *Reducing copyright infringement.* To achieve a system in which rights are widely respected, the behaviour of users and consumers must change. Enforcement is part of the answer, but so is the offer of attractive legitimate services by business.”
5. People were invited to submit written observations. Over 140 responses were received by the IPO by the closing date of 28 February 2009. All of the responses can be found on the Copyright Strategy website, in the policy area of the Intellectual Property Office website.<sup>29</sup>

<sup>28</sup> see reference 8 p. 5-7

<sup>29</sup> Copyright Strategy Issues Paper Responses <<http://www.ipso.gov.uk/pro-types/pro-copy/c-policy/c-strategy/c-strategy-responses.htm>>

6. Copyright is an area where many difficult issues exist and discussions can be divisive and confrontational. A programme of stakeholder engagement was undertaken to capture the voices of those who have active interests in the copyright system, including those who are often underrepresented in the debate. The aim of these workshops was to create an environment where people could come together to discuss these controversial and emotive issues frankly and openly.
7. Four stakeholder workshops were held during the period 12 February to 4 March 2009. The workshops were attended by stakeholders representing a range of interests from commercial rights holders and creators to intermediaries and user representative bodies. The events were an opportunity for people to voice their own perspectives and to hear the perspectives of others. During the events, small group discussions were facilitated on key issues such as access and remuneration followed by broader plenary debates.
8. Research workshops were held in Cardiff, Glasgow, Manchester and London, at the beginning of March. Separate workshops were held with authors, the public and small businesses to seek their views on how the copyright system is currently working, with much discussion on content in the online world. These groups were brought together at a later date for a roundtable discussion on the key issues.
9. Reports of both these workshops can be found at Copyright Strategy website, in the policy area of the Intellectual Property Office website.<sup>30</sup>
10. The written submissions and the output from the stakeholder workshops showed that it was not a simple matter to separate out each of the four issues. Instead, each of the issues we had identified in the issues paper was, in a sense, the manifestation of a more general malaise within the system, and the issues were entwined. For example, delivering wider access might reduce infringement, or improve perceptions of fairness; while simplification might encourage users to interact more positively with the system. As a result it became clear that a more practical way of approaching the work was to look at the copyright “value chain” to identify the problems that the various parts of the user and stakeholder community had, and to see to what extent they could be resolved with an eye to the general issue areas set out at the start of the exercise.
11. It was made clear by many who responded to this work that these were pressing problems needing swift solutions. However, there are a number of paradoxes here.
12. At a business to business level the industry both here and internationally is highly reliant on being able to exploit to the fullest possible extent the rights and permissions within private law legislative frameworks. But copyright is both a national and an international framework: best regarded as a patchwork of national and pan-national jurisdictions adding up to an international product which provides coverage, if not complete consistency, across the globe.
13. As the UK copyright framework is part of a harmonised European system the scope for significant independent national level legislative changes is even more limited. But even were there to be early legislative change in Europe, a harmonised European system would only be part of a larger system. In the EU, this fact has been recognised by Commissioner Reding, who recently suggested in relation to digital libraries and orphan works that “Member States must stop envying progress made in other continents and finally do their own homework... We need to work better together to make Europe’s copyright framework fit for the digital age.”<sup>31</sup> A conclusion that may be drawn from this is that swift action means seeking solutions which do not rely at the outset on concerted international legislation.

#### *Sources of Information for the Copyright Strategy*

14. In addition to direct stakeholder engagement, the Copyright Strategy has drawn on the work programmes of organisations such as (‘SABIP’) and the Technology Strategy Board (‘the TSB’).

<sup>30</sup> Copyright Strategy Phase 1 Reports <<http://www.ipo.gov.uk/pro-types/pro-copy/c-policy/c-strategy/c-strategy-phase1.htm>>

<sup>31</sup> Europa, ‘Europe’s Digital Library doubles in size but also shows EU’s lack of common web copyright solution’, Press Release, 28 August 2009 IP/09/1257 <<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1257&format=HTML&aged=0&language=EN&guiLanguage=en>>

*SABIP's Strategic Priorities for Copyright*

15. SABIP was established in June 2008 following a recommendation in the Gowers Review.<sup>32</sup> Its terms of reference require it to provide a strategic overview of intellectual property policy as an independent input into government policy-making. To this end the Government invited SABIP to provide advice to complement work on the copyright debate described above.

16. In the paper 'Strategic Priorities for Copyright'<sup>33</sup> SABIP identified six areas with strategic importance to the UK:

1. The role of the copyright system in fostering creativity and innovation;
2. Issues concerning the ownership and coverage of copyright;
3. Rights management techniques and technologies;
4. The relationship between copyright and contract law;
5. Possible simplification of the copyright framework; and
6. The implications of changing attitudes and practices among consumers.

17. SABIP has taken forward work in some of these areas and has provided valuable input into the copyright strategy work.

18. One important strand of SABIP's work is investigating the economic value of intellectual property. A joint Intellectual Property Office SABIP Forum on the Economic Value of IP<sup>34</sup> formulated a research agenda revolving around four general themes, as follows:

- I. The IP System – Endogenous Effects and Operational Issues
- II. Individual Behaviour and Firm Strategy
- III. Industry and Sector Effects
- IV. Macro-Economic Effects and Systems of Innovation

19. SABIP's aim is for research on these four themes to make a considerable contribution to evidence-based IP policy, and, more generally, to our understanding of 'knowledge economies'. SABIP will invite the involvement of a wide variety of experts and use a wide variety of methodologies including quantitative surveys, qualitative interviews, scenario modelling and policy simulations.

20. These themes are by no means rigid or exhaustive but, taken together, they offer a framework for future research by SABIP, the IPO and other bodies interested in funding and conducting IP-related research. Of particular interest for copyright are the third and fourth categories, where research projects that elucidate copyright value chains and investigate different ways to finance creative and artistic works in the digital age and broader social and economic effects of IP are suggested.

*Technology Strategy Board ('TSB')*

1. The TSB is an executive non-departmental public body, established by the Government in 2007 and sponsored by the Department for Business, Innovation and Skills (BIS). The TSB is focused on driving technology enabled innovation.

2. In 2009 the TSB published its three-year Creative Industries Technology Strategy to drive innovation in the UK.<sup>35</sup> Focusing on challenge led innovation, the strategy identified a number of strategic priorities for investment, these include enabling of meta-data infrastructure development and improving cross-platform interoperability and convergence.

<sup>32</sup> See reference 7, recommendation 46: "Establish a new Strategic Advisory Board for IP Policy, covering the range of IP rights, reporting to the Minister responsible, by 2007. The Board should be drawn from a wide range of external experts as well as key senior policy officials from relevant government departments, and should be based in London. £150,000 should be allocated to fund the secretariat by the Patent Office."

<sup>33</sup> SABIP (2009) Strategic Priorities for Copyright, SABIP: London <<http://www.sabip.org.uk/copyright-100309.pdf>>

<sup>34</sup> IPO SABIP (2009) Economic Value of Intellectual Property Forum Agenda, 10 June 2009 <<http://www.sabip.org.uk/forum-agenda.pdf>>

<sup>35</sup> See reference 18

3. Under the Digital Britain report the Technology Strategy Board has been tasked with leading and co-ordinating the development and management of a Digital Test Bed. The Digital Test Bed will be an experimental environment that brings the internet value chain together to explore new technologies, products and business models in a 'safe-harbour' for pre-competitive innovation or to address wider social barriers to take-up. The Technology Strategy Board has allocated an initial budget of £30 million to pursue this.<sup>36</sup>
4. With a broad vision to build a sustainable ecosystem for all, the Digital Test Bed will focus on the economics of the network; economics of content and services; and the protection and enablement of the consumer. The Test bed will engage with industry partners to take action towards developing (for example) new monetisation methods for online content; alternative business models to encourage the sharing and exploitation of intellectual property; new models of identity management and innovation to enable context and content aware networks to enable more intelligent management of data and content flows.
5. The work of the Technology Strategy Board will offer an essential insight into the interaction of copyright and consumption in the digital age and assist the investigation of new technologies to enable access in a way that is suitable for users, consumers, authors and rights holders.

<b>Rights Holders</b>	<ul style="list-style-type: none"> <li>• Focus on enforcement should be retained as the solution to piracy</li> <li>• Education is necessary to improve respect for copyright</li> <li>• No new exceptions to copyright</li> </ul>
<b>Business and SMEs</b>	<ul style="list-style-type: none"> <li>• Support should be given to businesses to develop new business models</li> <li>• Reject idea of levies (e.g. on recording media) to compensate rights holders for lost value from infringement if not harmonised at the EU level</li> <li>• Against "double charging" by collecting societies, i.e. collecting royalty payments for both 'communication to the public' and 'public performance', e.g. for playing the radio in the workplace</li> </ul>
<b>Authors</b>	<ul style="list-style-type: none"> <li>• Authors need to be given more control over their work through the terms of assignment or license in contracts with rights holders.</li> <li>• Greater financial and legal support is needed to address copyright infringement</li> <li>• Strengthen the moral rights of authors</li> </ul>
<b>Users and consumers</b>	<ul style="list-style-type: none"> <li>• Treat different types of users differently with private use such as format shifting being allowed</li> <li>• No extension to the duration of copyright</li> <li>• Rights holders can afford infringement as they are often exploiting those who create works</li> </ul>

**Table 1: Summary of stakeholder perspectives**

<sup>36</sup> See reference 11, p. 125

## Findings

1. The discussions with stakeholders revealed widely divergent views from authors, business, consumers and others on the role of copyright in the digital age and the problems it is facing. Not only do those representing individual consumers have different perspectives from rights holders, but the creative industries themselves are a diverse field, with, for example, the music, photography and publishing sectors having distinct and different perspectives on the issues.
2. The views expressed are summarised in the table below and some can be seen in more detail on the IPO website<sup>37</sup>:
3. Despite these diverging views, a number of key themes emerged from discussions with stakeholders. These themes are mirrored broadly in responses to a consultation undertaken in Canada in 2009<sup>38</sup>. This illustrates how many of the copyright issues facing the UK are global rather than national in scope.
4. The themes and issues around copyright have been examined as part of the development of this strategy; the findings of this work are presented below.
  - A. **Technology means the capability to create, use and distribute copyright works is now in the hands of the individual.**
5. The widespread adoption and use of digital technologies by individual consumers represents a fundamental challenge to the copyright system.
6. Discussions with stakeholders indicated that all saw responding to technological advances as extremely important for the copyright system, albeit for different reasons. There were differing views on what that response should be. What many owners and rights holders saw as threats were for many businesses, users and consumers exciting opportunities, and vice versa.
7. Although offline access to information remains significant, access via the internet is ever more important and in general, easier. Search engines like Google or Yahoo assist in finding information on the Web. Aggregators like Google News and Wikipedia collect and organise information. These services all make information and content readily and widely available to users.
8. Technology has also made easier the creation of many kinds of copyright-protected works. Music that two generations ago could only have been produced in a professional-size recording studio can now be made to comparable quality using equipment capable of being packed in a single suitcase. Today, a user with a laptop, a microphone and a commercial software package can achieve what it took a full scale business operation to deliver in the past.
9. Technology has not only delivered creative power into the hands of a wider range of people, but also made it possible to create those works more cheaply.
 

Major movies may cost over £100m to make, but a British film made for just £45 recently secured a cinema distribution deal<sup>39</sup>. It is true that where authors continue to push the boundaries of what is technically possible, for example in visual effects for film and computer games, considerable investment is still needed.

However, there are increasing areas of the creative sector where new technologies and reducing cost mean that the distinction between author and consumer is blurring. Users and consumers do not only use and consume, but many also create and distribute, and can do so on a significant scale.
10. In addition to fresh creation by a new generation of non-professional users, it has also become easier to create “derivative” works, which draw on the creations of other artists (for example, a holiday video that combines photographs and video clips, overlaid in places with music, or an online ‘mash-up’ of music, lyrics and images).<sup>40</sup>

<sup>37</sup> See: Copyright Strategy Phase 1 <<http://www.ipa.gov.uk/pro-types/pro-copy/c-policy/c-strategy/c-strategy-phase1.htm>>

<sup>38</sup> The Canadian Copyright Consultation opened on 20 July 2009. It involved round tables, town hall meetings, online submissions and online discussions on copyright in the digital age. Over 5000 responses were received. The consultation closed on 13 September 2009. Responses to the issues are now being posted online. Following analysis of the submissions, the Canadian government intends to draft and table new legislation. See: <http://copyright.econsultation.ca/>

<sup>39</sup> BBC, ‘Distribution Deal for £45 film’ BBC News Wales, 27 July 2009 <<http://news.bbc.co.uk/1/hi/wales/8171489.stm>>. The differences in these two examples are noted however, it still demonstrates that the circumstances of creation and distribution are changing.

<sup>40</sup> We hesitate to give examples, as we do not condone copyright infringement, but <[www.vikingkittens.com](http://www.vikingkittens.com)> is typical of the genre.

The greater availability of copyright works, and tools to manipulate them into new forms such as mash-ups, has created new situations where copyright can be infringed.

11. Finally, a new generation of authors have access to the substantial distributive power of the web. There is no longer a need for would-be distributors to have access to warehouses, vehicles and shops to get their product to the public. Authors such as webcomic artists have the ability to publish their work directly to the public, at virtually no financial cost to themselves. However, authors who exploit their work in these ways can find it difficult to monetise it or to take effective action against infringement.
12. The net impact of these powerful new technologies is to shift power – but generally not legal or political authority – over the distribution and use of works from rights holders to users and consumers and from rights holders to authors. The same internet that allows an author to share his or her own work also allows the sharing of others' work, with or without permission.
13. Technological developments have also influenced copyright itself, pushing the debate forward as states are forced to deal with new questions and new problems. An example is the conclusion of the 'internet treaties'<sup>41</sup>, which demonstrate the responsiveness of the global copyright framework to the changing world.
14. The controversy over the proposed Google Books Settlement<sup>42</sup> is just one example of the difficulty that current copyright law and practice has in dealing with a mix of issues: the potential benefits of technology to users, ownership and exercise of rights (particularly where no owner can be found), digitisation and making available

online, and the principles of reward for use of works and control over works. It also sets the wider benefits of access to works against concerns about competition, respect for law and cultural diversity<sup>43</sup>.

15. However, the capabilities of digital technology are not dictated by the copyright framework, and neither are the problems caused by digital technology in any sense solved by the copyright system. These capabilities and associated problems are a fact of life in the digital age.
  16. Technology can in some cases prevent or limit unlawful usage of copyright materials, through Digital Rights Management (DRM) and Technical Protection Measures (TPM)<sup>44</sup>.
  17. These measures aim to prevent users gaining illegal access or using protected works for unauthorised purposes, and can be a powerful tool against copyright infringement. However, they can also prevent users gaining access in cases where the use is permitted, for example by exceptions. These measures can also be applied in ways which constrain the use of equipment, for example, restricting the use of particular digital products to particular hardware.
- B. The global copyright system serves a number of inter-related and often conflicting objectives.**
18. Given the scale of technological developments, and changes in users' attitudes to copyright, some stakeholders questioned whether copyright is indeed 'fit for purpose' in the 21st century. Responses to © the future reflected this: some respondents suggested that the starting point for a government strategy should be whether the copyright system should be dispensed with or replaced, while others argued for perpetual copyright protection for works.

41 The World Intellectual Property Organisation (WIPO) Copyright Treaty and the WIPO Phonograms and Producers Treaty

42 <http://www.googlebooksettlement.com/>

43 Some of these concerns are articulated by the French government. See: French Ministry of Culture, La France veut garantir le respect du droit d'auteur dans le cadre du contentieux opposant Google Books aux auteurs et éditeurs américains, Press Release, 8 September 2009 <<http://www.culture.gouv.fr/mcc/Espace-Presses/Communiqués/La-France-veut-garantir-le-respect-du-droit-d-auteur-dans-le-cadre-du-contentieux-opposant-Google-Books-aux-auteurs-et-editeurs-americains>>

44 TPM refers to technological tools which restrict the use and/or access to a work such as content scrambling systems protecting DVDs. DRMs are electronic rights management information systems, for example electronic tags or 'fingerprints' included on copies of digital products enabling them to be traced and identified whenever they may be in use, lawfully or otherwise. Most DRM systems also employ some TPM, and the two terms are often used interchangeably to mean "access controls".

**Box 1: SABIP's summary of objectives for copyright policy by interest group****Creators**

- Recognise and protect the work of creators.
- Provide, through financial and other benefits, incentives and rewards for creative and innovative work.

**Intermediaries**

- Encourage investment in the diffusion of new works and development of new business models.
- Prevent unauthorised copying and distribution.

**Users**

- Facilitate wide dissemination of creative works in order to enhance access to, and enjoyment of, culture, knowledge and entertainment.
- Deliver benefits to consumers through wider choice, higher quality, greater innovation and stronger supplier competition.

**Public Interest**

- Support investment and employment in the creative industries.
- Generate economic growth through innovation.
- Contribute to the social, economic and cultural development of nations and understanding of their diversity.

19. The objectives copyright is designed to serve, and the extent to which the existing system is capable of serving them, is a subject of considerable academic and research interest. The work of SABIP (Box 1) sets out a number of different objectives for copyright. SABIP notes that “such multiple objectives are unlikely to be fully satisfied by any single policy or policy instrument.”<sup>45</sup> Both the objectives and the observation accord with the Government’s view.
20. Stakeholders expressed widely differing views on which objectives should be prioritised; there is limited evidence to inform this choice. In this context, provided the copyright framework continues to be capable of serving the full range of policy objectives, it may be judged reasonably fit for purpose.
21. On a practical level, the UK government is constrained in its ability to make radical changes to the copyright system. It is not possible to act alone. Even at EU level, copyright law must remain in line with international frameworks. Changes at this international level would be extremely slow to deliver<sup>46</sup>.
22. Finally, although there are many who call for a radical rethink of copyright, this work has not identified proposals for fundamental change that would appear to satisfy the objectives of copyright much better than the existing system.
- C. The complexity of copyright derives from the historical accretion of rights, more complicated business models and the interactions of rights holders.**
23. Not all stakeholders sought root and branch reform of copyright. Many wished to improve aspects of the current system. In particular, a host of issues related to the complexity of copyright were raised in response to the Government’s issues paper.
24. The arguments made for the simplification of copyright were in many cases less focused on legal complexity and more on the complexity caused by the wider copyright system, in practice, particularly around being able to use works with a minimum of difficulty and expense.

<sup>45</sup> See reference 33

<sup>46</sup> Copyright law is, to an extent, harmonised at the European level, reflecting the benefits of shared principles and practices between member states. UK copyright law often differs from that of continental Europe, reflecting both the UK’s status as a pioneer of copyright and also the different legal traditions involved. The legal framework for copyright is set internationally, through treaties such as the Berne Convention (‘Berne’) and bodies such as WIPO who administer these conventions.

25. Some stakeholders wanted the copyright system to be simpler in order to promote understanding and compliance. They saw the complexity of copyright as the main challenge to lawful use of works. In their view, the current situation online was too confusing to understand and as a result many people gave up trying. Even some long-time professionals in the creative industries indicated a lack of knowledge of all relevant copyright developments in their area.
26. To some extent this is a reflection of the long period over which copyright has evolved. New subject matter has received protection. New rights have been added. Existing rights have been strengthened and extended.
27. An additional complication lies in the need for policy makers to allow particular uses of works by those who do not hold copyright. Because copyright empowers owners to decide whether to allow a work to be exploited, special arrangements (“copyright exceptions”) are needed if creative works are to be drawn upon for educational, cultural and research purposes without the consent of the owner. Yet exceptions themselves have in many cases become complex. Not only are these exceptions different from country to country, but in some cases they are subject to special licensing arrangements which result in material that could be used under an exception being subject to the payment of a fee.<sup>47</sup>

### Box 2: The Development of Rights

Copyright has developed over a long period of time. Statutory protection of copyright began life in the UK with the Statute of Anne. The principle of creating legal rights for authors to control copying of their works was later taken up by France, the US, and progressively across the world. Individual nations tended to approach the copyright issue from their own national and cultural perspectives, and there are significant variances still to be seen between different copyright systems.

At its outset, in the UK copyright related only to printed works; its reach has grown and developed ever since. It has branched out, to cover an ever-widening range of expressions of creative endeavour, from books to plays, to music and to still and moving images. It has evolved to reflect the changing technologies of photographs, phonograms, film, television, and the internet. And it has evolved globally, with the development of international conventions intended to harmonise approaches to copyright.

Broadcasting illustrates the challenges of adapting copyright to global technological change.

Television and sound broadcasts did not attract copyright in the UK until 1956. An international agreement on copyright in broadcasts was established in the Rome Convention of 1961. In line with the broadcasting technology of its day, the Rome Convention covers wireless transmission but not distribution of broadcasts by wire. It has been overtaken by the new technologies pioneered over the last 50 years: for example, cable, satellite, internet, mobile, both singly and in combination.

Over recent years UK law has been updated in response to these fast-moving technological developments. At EU level a number of harmonising Directives have been introduced. However, the internet has made unauthorised re-use of broadcasts a world-wide phenomenon that requires international action. The UK has therefore been strongly supportive of proposals to update the protection of broadcasters at a global level to include an exclusive right to authorise re-transmission over the internet.

<sup>47</sup> s. 35(2) CDPA, for example, states that if a licensing scheme is in place, the recording of a broadcast by an educational establishment is not subject to the exception in s. 35(1) CDPA



### Box 3: Copyright exceptions – the European perspective

The European Commission's 2008 Green Paper a Copyright in the Knowledge Economy considers the exceptions outlined in the Information Society Directive and their impact on the dissemination of research, science and educational materials. In particular, it considers whether there should be any changes to the existing exceptions for the benefit of libraries and archives and for teaching and research purposes to facilitate wider dissemination. It considers how well the current exception for the benefit of people with a disability is working and it looks at the possibility of an exception for user created content.

The Green Paper indicates the strategic direction of the EU in relation to exceptions, and although the Commission intends to monitor some areas for later consideration, it plans further work in relation to libraries and archives and in relation to those with disabilities.

#### Complexity and the exploitation of copyright works

28. Alongside the legislative development of copyright, there has been an increasing sophistication in the way the rights which copyright provides are exploited. The basic model of an individual author using copyright protection to make his works available on a suitably protected basis to the general public, and reaping an appropriate reward, is frequently not what happens in practice. The original author's rights may be assigned or licensed, bought and sold, and (increasingly) carved up into sub-rights for individual countries or periods of time. In many cases the right may be in the hands of intermediary distributors, such as publishers, collecting societies and so forth, and the original author may have been paid a lump sum for the rights or may be in receipt of a royalty.
29. Determining the exact nature of the legal rights which may exist in a work can often be an involved legal process<sup>48</sup> which is further obscured by the complexities of the licences and permissions, such as the forms in which they may have been granted and who now owns them.

30. Since these complexities are largely a result of business practice rather than the law itself, legal change may be less successful in reducing them than changes of practice would be. Rights holders have the potential to tackle some complexity directly by administering their rights differently, for example by launching new services<sup>49</sup> or simpler ways to access works<sup>50</sup>. Over the long term, legal change may be necessary and desirable<sup>51</sup>, but given the international nature of the issues, changes to business practices may be a faster and more practical way to achieve desired improvements.

#### Copyright and contract

31. One complex topic raised by stakeholders is the relationship between statutory protection of copyright and contracts dealing with copyright, particularly the degree to which exceptions that allow use of copyright material without the consent of the rights holder may be over-ridden by contracts.
32. It has been argued<sup>52</sup> that contracts override copyright exceptions in the CDPA, although this is not the case in all circumstances.<sup>53</sup>

48 For example determining the length of copyright term for old books.

49 The Newspaper Licensing Agency (NLA) is developing eClipsweb, an online clippings database of newspaper website content <[http://www.nla.co.uk/index.php?option=com\\_content&task=view&id=52&Itemid=79](http://www.nla.co.uk/index.php?option=com_content&task=view&id=52&Itemid=79)>

50 Margot Frohlinger raised the possibility of the imposition of a flat-rate fee on certain types of internet use. See: Intellectual Property Office and SABIP (Forthcoming) The Economic Value of Intellectual Property: An agenda for Policy-Relevant Research Draft Interim Report of Proceedings, Intellectual Property Office and SABIP, p. 40

51 SABIP is currently investigating the case for simplification of copyright, and held a workshop on 16 July 2009 to examine the issues. Their report will be published in October 2009.

52 British Library, (2008) Analysis of 100 Contracts Offered to the British Library <<http://www.bl.uk/ip/pdf/ipmatrix.pdf>>

53 For example s. 50B-50BA CDPA: Certain acts in relation to a computer programme cannot be overridden by contract, e.g. making a backup copy and decompilation.

33. The issue is of particular concern to libraries and archives because limitations on acquiring, archiving and preserving copyright works to give access to the public directly impede their purpose as organisations. There are concerns from these stakeholders that access is becoming more limited in the digital age.

**Box 4: Copyright and contract – examples from the British Library**

The British Library took a sample of 30 licences it had negotiated in 2006. In its view, only two of these were compliant with fair dealing exceptions in the CDPA, another two allowed archiving, and none allowed copying for use by the visually-impaired. In its response to our issues paper, the British Library presented an analysis of 100 contracts offered to them stating that over 90% of these contracts are inconsistent with copyright exceptions. The degree of proactive contractual negotiation that had taken place seems to have been limited.

34. SABIP is conducting a literature review on the relationship between copyright and contract law, to be published by the end of 2009.

*The relationship between the rights holder and the author*

35. One of the fundamental aims of the copyright system is to incentivise the creation of new works, including investment in the creation of new works as well as rewards for authors. In our discussions with stakeholders, authors spoke of new challenges in monetising their works and developing their relationships with rights holders in the digital age. This has contributed to the complexity of copyright as the relationship between the rights holder and the author can be problematic.

36. The relative difference in power between authors of works and those who make them available to consumers has been a feature of copyright from the very beginning. 300 years ago the Statute of Anne safeguarded the future of printers by giving copyright to authors, who depended on the printer for publication of their works. The printers' monopoly on distribution gave them significant bargaining power in negotiation with authors. The difference in power between authors and those who make them available to consumers can also exist in the digital age and the difficulties in this relationship have also been noted by commentators.<sup>54</sup>

*Economic Rights and Contract*

37. Authors generally assign or license their economic rights to a business, such as a freelance journalist to a newspaper. The economic aspect of the business relationship between the author and the rights holder is usually covered by contract.
38. Assignment of rights means the author has no ability to authorise non-commercial or charitable uses or to take back control if a work becomes unavailable (e.g. out of print or not available to download). Licensing works can give the author more freedom to do these things, but authors in many sectors say it is much less common practice than assignment<sup>55</sup>.
39. Our consultation indicated that many authors felt the balance of power with publishers was not in their favour and that they gave too much control of their work to others<sup>56</sup>. This was a particular issue for photographers, freelance journalists and writers, musicians and also for SMEs from many sectors that actively sought to be author-friendly.

54 M. Connolly & A.B. Krueger, (2005) 'Rockonomics: the economics of popular music' Princeton University Working Paper <<http://www.irs.princeton.edu/pubs/pdfs/499.pdf>> p. 6

55 For example: "It is common practice especially when dealing with larger commercial entities that artists are forced to assign their rights in their works." – DACS response to © the future <<http://www.ipso.gov.uk/responses-copyissues-dacs.pdf>>

56 British Market Research Bureau (BMRB) (2009) Future Copyright Development prepared for IPO and COI, BMRB: London <<http://www.ipso.gov.uk/strategy-bmrb.pdf>> p. 20 and p. 27

*Moral rights and contracts*

40. Moral rights<sup>57</sup> were also seen as an issue causing difficulty and complexity in the relationship between the rights holder and the author, as well as between the author and the consumer and business.
41. Moral rights can be covered by contract and they can be waived by written agreement.<sup>58</sup> This can be problematic for authors. For example, The Featured Artists Coalition (FAC) have objected to the use of music by FAC artists in a compilation CD by a political party. Following the release of this compilation the artists complained of ‘... the inability to object to the use of music in situations that are contrary to their beliefs and morals’<sup>59</sup>.
42. In discussions with stakeholders, many less high-profile authors were concerned about the issue of moral rights. In particular, that these moral rights can be waived and that the right of attribution requires assertion. This was deemed to indicate that the moral rights system in the UK needed strengthening and was fundamentally misaligned with moral rights in continental Europe.
- D. There is a mismatch between the expectations of consumers and users and what copyright currently allows.**

*Public perceptions of the existing system*

43. The copyright system suffers from a marked lack of public legitimacy. The Gowers Review noted that this lack of public legitimacy was linked to its inflexibility. The system is often unable to accommodate certain uses of copyright works that a large proportion of the population regards as legitimate fair and reasonable<sup>60</sup>. However, the situation is more complex.
44. Our consultation has revealed that the public legitimacy of copyright has also been impacted by difficulties identified in the relationship between authors and rights holders,<sup>61</sup> for instance those who do not receive a fair reward from those who exploit their works. The gulf between expectations of behaviour and what technology allows has also marred perceptions of the copyright system, for example, people do not understand why they should have to pay for using works in the “cut and paste” world in which we live.<sup>62</sup>
45. The problems become more pronounced as people feel a sense of ownership or attachment to material in which the copyright is owned by others. Consumers may have strong ties to material, they for example, because of the time and effort they have devoted to it (such as in developing and equipping a character in an online multiplayer game such as World of Warcraft<sup>63</sup>) or through emotional significance (photos of family members or videos of a wedding etc.<sup>64</sup>), but may not have any form of rights over it.

<sup>57</sup> While copyright grants the owner the right to authorise economic acts in relation to their works, such as reproduction, it also grants the author ‘moral rights’ which protect the non-economic interest in the work. Moral rights are derived from the French concept of ‘droit moral’ and represent rights to control. Moral rights in the UK consist of the rights of integrity and attribution (identification as author of the work) as well as the right to object to false attribution. The use of a photographic image to promote a product to which the author has ethical objections is an example of infringement of the moral right of integrity.

<sup>58</sup> s.87(2) CDPA

<sup>59</sup> J. Smith, M. Kelly, D. Rowntree et al., ‘Music and the BNP’ (Letter to the Editor), The Times, May 29 2009, <<http://www.timesonline.co.uk/tol/comment/letters/article6374280.ece>>

<sup>60</sup> See reference 7, p. 39

<sup>61</sup> See reference 7

<sup>62</sup> COI (2009), Developing a Copyright Agenda for the 21st Century A report on the IPO stakeholder event 12th February 2009, COI: London, <<http://www.ipa.gov.uk/strategy-coi120209.pdf>>

<sup>63</sup> Characters developed in online games may be capable of attracting copyright protection: See: Salinger v. Colting 09 Civ. 5095

<sup>64</sup> Although under s. 85 CDPA a person who for private and domestic purposes commissions the taking of a photograph or the making of a film has, where the copyright subsists in the resulting work, the right to privacy of those photographs and films, this right is often waived in contracts.

46. These difficulties have a very real impact on perceptions of the copyright system. The copyright system must be seen as fair to authors and users if it is to command greater public respect.
47. This perception of unfairness to authors has wider currency. There is a persistent belief among consumers (as well as among some authors) that authors get relatively little from deals with major rights holders.<sup>65</sup> This seems to reinforce attitudes that copyright infringement is a victimless crime 'because the author won't see a difference'.

#### *Copyright exceptions and public opinion*

48. One key element of fairness in the system is the existence of exceptions, by which certain uses of copyright material can be defended without a licence, for example fair dealing for research and private study. It is important that these exceptions do not conflict with the normal exploitation of the work but that they continue to provide access to knowledge for society as a whole. A publisher cannot, for example, use the research and private study exception to produce a study guide it claims is for the private study of those who purchase the study guide.<sup>66</sup>
49. However users' expectations of fairness go beyond the current exceptions regime. In the pre-digital era expectations of legitimate use were limited and matched legal rights. For example, one could readily read a book or could sell, give or lend it within the limits of copyright law. Infringement of copyright (for example, copying a poem by hand) was possible but laborious and its consequences for rights holders were therefore limited. In other words, many people expected to treat things like books and records just like any other item of physical property – that is, to do more or less whatever they wanted with them.
50. Responses to the issues paper suggest that people still associate "what one can readily do with legitimately-obtained material" with "what it is fair and reasonable to be allowed to do" to a degree. But many acts that new technology has made possible or easier, such as copying text and images or format-shifting video recordings, are infringements of copyright.
51. This mismatch of expectations is significant because neither the law nor people's attitudes are easy to change, but the two need to be reconciled if copyright is to be respected in the digital age.
- E. The digital environment is confusing. A broader distinction between commercial and non-commercial use would help. Such a distinction would need to be drawn up and applied at the EU level.**

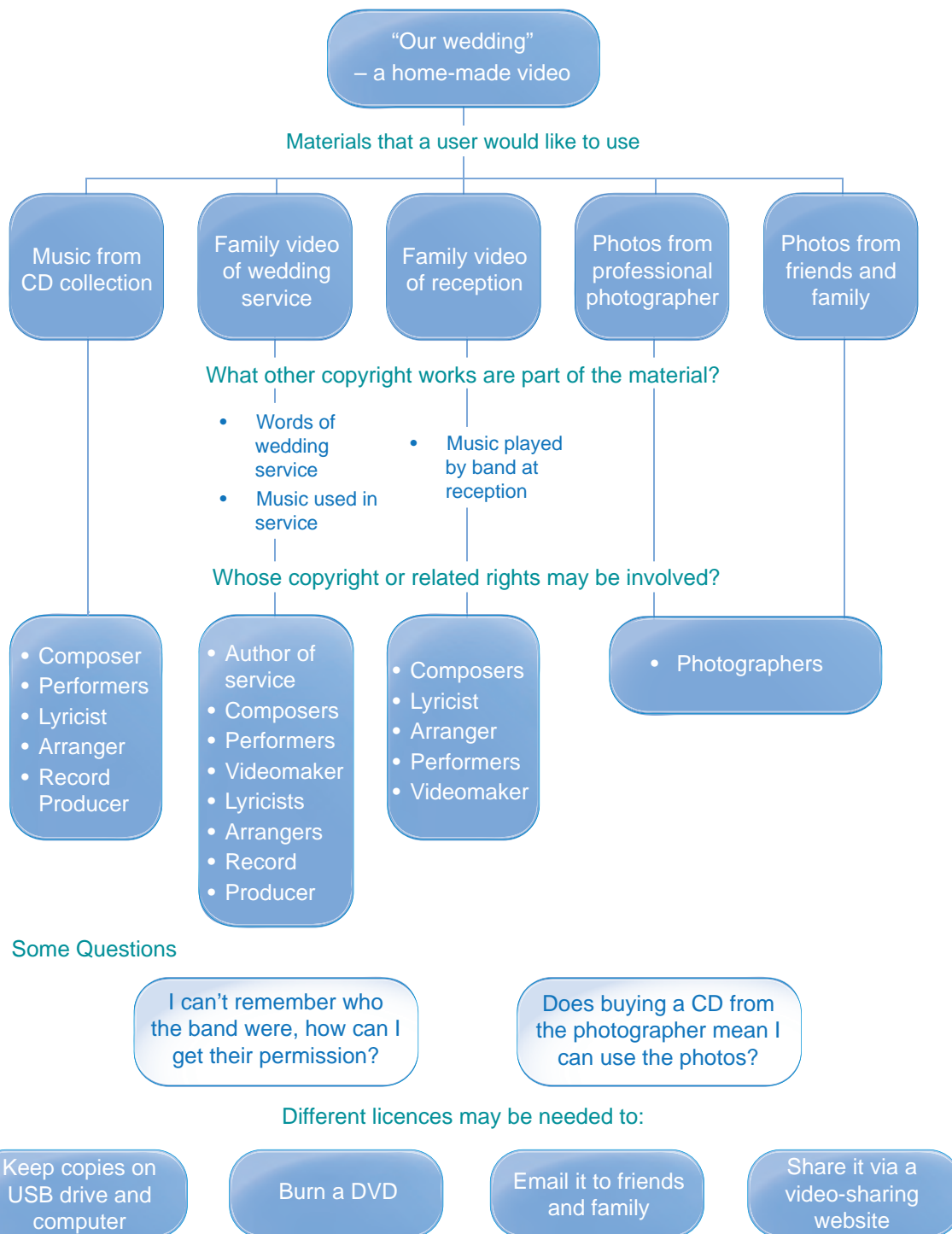
#### *Confusions surrounding non-commercial use*

52. The capability and the desire to use and access works to suit various interests and purposes is much greater than even a decade ago. A person might copy a CD onto an MP3 player and listen to their music collection while travelling. A free community book club might make an advertisement by photocopying the artwork from the front of a book. But while the people doing these acts might see them as reasonable, useful and harmless all would be infringements of copyright if done without permission.
53. This illustrates that copyright law is an equally strong control on limited, non-commercial and mass-market commercial use. Many responses to the issues paper indicated that this strength of control was not proportionate to limited, non-commercial use.
54. The strength of copyright control over non-commercial use is easy to illustrate. Figure 4 outlines some of the complexity of obtaining rights to make a video of a family member's wedding that fully respects copyright and performers' rights.

<sup>65</sup> See reference 56, p. 20 and p. 27

<sup>66</sup> *Sillitoe v. McGraw Hill Book Co.* [1983] FSR 548, although as this case is pre-1988 it is unclear whether it was obviously abuse or an attempt at mutating the exceptions: The 1911 Act codified existing common law which permitted fair abridgments. The 1956 Act repeated the provision.

55. The diagram also highlights the hidden complexity of copyright and performers' rights. For example, music recorded in the background at a wedding reception may fall within the exception which applies to the incidental inclusion of copyright material<sup>67</sup>. This will depend on the particular circumstances of the use. The right to use digital photograph files purchased from the photographer depends on the terms of any contracts signed, and where there is no express contractual provision, whether a licence is implied by the purchase of a CD of digital images.



**Figure 4: Copyright nightmare – the wedding video**

<sup>67</sup> s.31 CDPA. This is further complicated by some collecting societies having voluntary exceptions for civil and religious services and for domestic/family occasions which includes wedding receptions.

### Consumer rights

56. There is also confusion over consumer rights. As the Consumer White Paper notes, “Consumers are embracing the digital economy; downloading music, films and software. Yet it is not clear what rights consumers have in these circumstances, and how their rights differ from buying a CD or DVD.”<sup>68</sup> The CD of wedding photos raises similar issues.

#### Box 5: Consumer confusion: 1984 and Amazon.com

The recent case of e-books deleted from the Kindle reader device by amazon.com illustrates confusion about user rights; Many Kindle users thought they were buying a book, whereas they were actually buying a licence to use the book – in effect, renting it. When amazon discovered a copyright infringement in some works that it had sold, including George Orwell’s 1984, the licence was revoked – and the file deleted from the reader – without consultation or discussion.

Subsequently, amazon CEO Jeff Bezos issued an apology calling the deletion “stupid, thoughtless, and painfully out of line with our principles.” Amazon then offered the return of the book free of charge to those who had purchased it, including any annotations which may have been made, or a \$30 refund.

A lawsuit seeking class-action status was filed on 30 July 2009 in a U.S. District Court on behalf of a 17 year old student as well as an adult reader. The lawsuit sought unspecified damages for all buyers of e-books that Amazon deleted from the Kindle as well as a ban on future deletions. The lawsuit said Amazon never disclosed to customers that it “possessed the technological ability or right to remotely delete digital content purchased through the Kindle Store.”

57. The Government has stated its intention to ensure that its new consumer law regime is adapted to the internet age. As set out in the Consumer White Paper, the Government intends to review existing consumer law in terms of applicability to “digital” products and make provision to ensure appropriate consumer protection.

### Non-commercial use and exceptions

58. The most fundamental issue of concern for the Government is that the simple, certain basis of UK copyright (the fulfilment of qualifying criteria leading automatically to rights over the work) is not mirrored in an equally simple and certain principle for users, through exceptions or otherwise. Neither the UK’s concept of fair dealing nor other countries’ approaches such as the US’s fair use doctrine<sup>69</sup> seem to deliver such certainty or simplicity in practice.

68 HM Government (2009) A better deal for consumers: delivering real help now and change for the future, HM Government, BIS: London pg.79 <<http://www.berr.gov.uk/files/file52072.pdf>>

69 The debate about whether fair use or fair dealing provides the right degree of flexibility is ongoing. While it is argued that fair use is a highly flexible instrument, defenders of the UK approach state it offers certainty, whereas the fair use doctrine is dogged by pervasive unpredictability that is only resolved through litigation. For a discussion of the relationship between fair use and fair dealing see for example: ‘The Fair Use Panacea’ Chapter 9 in R. Burrell & A. Coleman, (2005), Copyright Exceptions: The Digital Impact, Cambridge University Press: Cambridge

### Box 6: Fair Use

As an alternative to enumerated exceptions the US has a doctrine of fair use. This doctrine is also applied in Israel and it has had an influence over South Korean copyright law. Fair use allows the use of copyright material without requiring permission if it can be considered to be fair use.

Fair use is a judicially interpreted principle and when determining its application, four factors must be considered (as codified under s. 107 of the US Copyright Act 1976)

1. The purpose and character of the use, including whether the use is for commercial or non-profit educational purposes;
2. The nature of the copyright work;
3. The amount and substantiality of the portion used in relation to the copyright work as a whole; and
4. The effect of the use upon the potential market for or value of the copyrighted work.

Substantial benefits, particularly on the economic development of the US, have been claimed for fair use. A 2007 report by the Computer and Communications Industry Association (CCIA) states that fair use industries (such as manufacturers of consumer devices that allow individual copying of copyright material) educational institutions, software developers, and internet search and web hosting providers) generate \$4.5 trillion for the US economy.

However, the fair use approach is arguably in contravention of Art. 9(2) of the Berne Convention, Article 13 of TRIPS and Article 10 of the WIPO Copyright Treaty, commonly known as the three-step test, which states:

1. It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases,
2. Provided that such reproduction does not conflict with a normal exploitation of the work and
3. Does not unreasonably prejudice the legitimate interests of the author.

59. Copyright exceptions in UK law set out specific circumstances where a defence to the charge of copyright infringement is available. The rationale behind these defences varies but these exceptions highlight that there are instances where the importance of unfettered use of works prevails over the benefit to the author or the rights holder. These circumstances where the exceptions explicitly differentiate between commercial and non-commercial use are limited.<sup>70</sup>

60. European law <sup>71</sup> governs what exceptions are possible in the UK. Currently it allows an exception for reproduction “for private use and for ends that are neither directly nor indirectly commercial, on condition that the rights holders receive fair compensation...”<sup>72</sup>

<sup>70</sup> For example, s. 29 CDPA provides an exception for research and private study for a non-commercial purpose; s. 31A(3) provides for the making of an accessible copy for a visually impaired person if copies of the work are commercially available, by or with the authority of the copyright owner, in a form that is accessible to that person; private performance is not within the exclusive rights of the owner either.

<sup>71</sup> Article 5 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society (‘the Information Society Directive’)

<sup>72</sup> Article 5(2)(b) of the Information Society Directive

### Box 7: Copyright exceptions

Copyright exceptions determine what acts are permitted in relation to copyright works by giving a defence to a charge of infringement.

As copyright is a monopoly, limitations to it are necessary to ensure that works are still available for certain limited uses despite the exclusive rights granted to owners of works. In the UK the scope of these limitations is outlined by specific provisions that constitute defences to the unauthorised use of a copyright work in relation to the right of reproduction, distribution making available to the public, in line with the three-step test and the Information Society Directive.

At present, permitted use constitutes over 40 categories of specified exceptions. These range from research and private study to transfers of copies of works in electronic form. A full list of exceptions can be found at Chapter III Part I of the CDPA which can be found online at [www.statutelaw.gov](http://www.statutelaw.gov)

This system of setting out all possible circumstances of permitted action in relation to a copyright work contrasts with the US system of fair use which is more flexible but arguably less certain.

The Gowers Review made recommendations to amend the UK's copyright exceptions regime by:

- Creating a new exception for transferring ('format shifting') e.g. music from a CD to the hard drive of a computer. This practice is widespread but is currently not legal.
- Allowing educational establishments to copy broadcasts and extracts for distance learners.
- Extending the current 'fair dealing' exception for research and private study to apply to sound recordings, broadcasts and film.
- Permitting libraries and archives to make more than one copy and to format shift as long as this is only for preservation purposes. The Government is also considering the viability of extending this to include museums and galleries.
- Creating a new exception for parody, caricature and pastiche.

An initial consultation at the beginning of 2008 on how to take forward the recommendations made in relation to the copyright exceptions regime yielded a variety of responses from stakeholders, many of which offered conflicting views on how, and indeed whether, to act on the recommendations. The Government has taken these views into consideration and is intending to launch the second stage of the consultation, accompanied by draft legal language, before the end of 2009. The consultation will focus mainly on encouraging broader access to works for educational and related purposes and for the preservation of cultural material.

61. User confusion is compounded by the difference between copyright regimes, in particular exceptions, in different countries. Due to the key formative role of American culture in the development of the internet and its associated culture, a US-specific view of content has tended to drive global attitudes to use online. In Europe, it has been recognised that differences in statutory rules between EU Member States contribute to consumer confusion and frustration<sup>73</sup>.

#### *Non-commercial use in practice*

62. Copyright practice is in many cases more forgiving than the letter of the law. It is hard to imagine a publisher or cover artist objecting to the book club example at paragraph 53 above. In the case of format shifting by the individual for personal use, the British Phonographic Industry (BPI) indicated to the Commons Select Committee for Culture, Media and Sport "that the UK record industry had never taken action against an individual copying their CDs to their computer for the purpose of transferring those tracks to another device for their private and personal use only, and it added that the industry had no intention of doing so in the future."<sup>74</sup>

73 Creative Content in a European Digital Single Market: Challenges for the future – A Reflection Document of DG INFSO and DG MARKT, p. 9, <[http://ec.europa.eu/avpolicy/docs/other\\_actions/col\\_2009/reflection\\_paper.pdf](http://ec.europa.eu/avpolicy/docs/other_actions/col_2009/reflection_paper.pdf)>



But in both cases there is no right to use, and no alternative proportionately simple way of obtaining it.<sup>75</sup>

63. One solution adopted by some owners is the use of a licence such as Creative Commons<sup>76</sup>, which allows a variety of uses (chosen by the owner) while reserving rights to others. The most popular<sup>77</sup> Creative Commons licences allow non-commercial uses while reserving economic rights.
64. Both restraint in enforcement of rights (as demonstrated by the BPI statement at paragraph 63 above) and licensing on non-commercial terms would appear to have benefits to non-commercial users significantly in excess of any loss to rights holders, this is because the cost of collecting revenues seems unlikely to exceed the potential value to individuals, however the value to users is evident.
65. Despite these solutions the problem remains: legally, users are limited in what they may do with copyright works. This problem underlies many of the issues that concern users of the copyright system, be they domestic consumers, businesses, education or third sector organisations, such as charities and not for profit organisations. It seems likely that these frustrations reduce respect for copyright, by creating a perception of an unreasonable, unfair, constraining framework that circumscribes what the user does and wants to do in their daily life.
66. Many European states have wider permissions for use coupled with fees such as levies on blank recording media and/or equipment (see box 8), which mirror the exception in Article 5(2)(b) of the Information Society Directive.

67. Calls have been made for solutions which lessen or remove a non-commercial consumer's need to understand copyright law<sup>78</sup>. The analysis above would suggest that "hiding the wiring" by simplifying the situation for users could help tackle some of the problems of the copyright system. However, making a clear distinction between commercial and non-commercial use would seem to require a broader EU definition of non-commercial use than that currently under Article 5(2)(b), and would have to ensure some form of compensation returns to rights holders for any lost revenue.

#### *A definition of non-commercial use*

68. Differentiation between types of use and access can make the determination of the non-commercial difficult. Is the photograph of an artwork on the webpage of a public library commercial use? Does the situation change when advertising is sold on that webpage? Does the situation change again if it is advertising a not-for-profit exhibition to be held at another public library? This issue is currently the subject of debate within the Creative Commons community and is the subject of a recent report and study<sup>79</sup>. But the fundamental issue was understood and discussed as early as the 18th century.

"... new doubts and difficulties arise whenever we attempt to proceed. Is this property descendable, transferable, or assignable? When published, can the purchaser lend his book to his friend? Can he let it out for hire as the circulating libraries do? Can he enter it as common stock in a literary club, as is done in the country? May he transcribe it for charity?"

– Lord Camden in *Donaldson v. Beckett*, House of Lords, 1774

74 House of Commons Culture Media and Sport Committee (2006-07), *New Media and the Creative Industries*, Fifth Report of Session 2006-07 p. 138 <<http://www.parliament.the-stationery-office.co.uk/pa/cm200607/cmselect/cmcmds/509/509i.pdf>>

75 Re-purchasing an entire music collection in MP3 format would be time-consuming even if all the works were available.

76 <http://creativecommons.org/>

77 Around two-thirds of CC licences; see [http://wiki.creativecommons.org/License\\_statistics](http://wiki.creativecommons.org/License_statistics)

78 See for example reference 73, p. 15, which also states "Serious consideration should be given to measures facilitating non-commercial re-use of copyrighted content for artistic purposes".

79 Defining non-commercial, <http://creativecommons.org/weblog/entry/17127>

69. In the digital age there are principles which could guide any legal recognition of non-commercial use, through exceptions or otherwise. First, it would have to recognise the changing, more interactive, relationship of consumers and users to content. Second, it would have to recognise the moral rights of the original author. Third, it would have to be accompanied by a compensatory system which provides appropriate remuneration to rights holders.
70. Currently, UK law sees non-commercial use as 'an act otherwise than in the course of a business'.<sup>80</sup> Criminal liability results when an act is performed to the extent that it effects prejudicially the owner of the copyright.<sup>81</sup> This idea of prejudicial use could be a useful starting point for a non-commercial use definition that reflects the realities of the digital age.
72. A number of EU states use a levy to raise compensation for rights holders for private copying. Under these systems, certain unlicensed acts of copying of audio, audio-visual and textual material such as music, films or books by consumers are allowed but paid for by charges on recording media such as blank CDs or equipment such as personal video recorders or MP3 players.<sup>82</sup> Levies are only one potential way to deliver fair compensation; industry-led licensing schemes could perhaps deliver similar outcomes, for example.

#### *Compensation for rights holders*

71. International agreements on copyright means that any non-commercial use must pass a three-step test (see box 6 above) under the Berne Convention. Step three of this test states that if legislation permits the use of works, the use will not unreasonably prejudice the legitimate interest of the author. Leaving aside questions of whether permitting non-commercial use would be reasonable, or whether non-commercial use would satisfy the certain special circumstances step of the three-step test, any unreasonable prejudice could be compensated for.

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<sup>80</sup> s. 107 CDPA: Commercial action is the basis for the criminal offence

<sup>81</sup> s. 107(1)(e); s. 107(2A)(b) CDPA. In the case of non-commercial use, a prejudicial effect on the owner could be lost sales, which might to a degree be counteracted by any benefits the promotion of the artist to friends and family.

<sup>82</sup> Directorate General for the Internal Market and Services (2006), Stakeholder Consultation on Levies in a Converging World, p. 2 <[http://ec.europa.eu/internal\\_market/copyright/docs/levy\\_reform/stakeholder\\_consultation\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/levy_reform/stakeholder_consultation_en.pdf)>

**Box 8: The history of copyright levies**

Although copyright gives rights holders the exclusive right to control the reproduction of their works, the widespread use of tape recorders in the 1960s meant that there were no effective means to control or seek remuneration for acts of private copying by consumers. Levies were therefore introduced in Germany on the purchase of equipment capable of carrying out the act of copying, to allow such use while providing appropriate compensation for rights holders. Over the next couple of decades, other continental European jurisdictions adopted the same approach.

In the early 1990s, the European Commission proposed the harmonisation of private copying levies by requiring levies to be introduced in all Member States as a “right to remuneration” for private copying, which met with strong criticism by consumer groups. Later work in the 1990s to harmonise copyright more broadly following the conclusion of the WPPT and WCT, culminated in the Information Society Directive. This introduced the concept of ‘fair compensation’ alongside an optional exception to permit ‘private copying’.

The Directive left up to individual member states the details of how exactly ‘fair compensation’ was to be determined. Some member states apply levies according to storage capacity (of e.g. digital music players) whereas others choose a flat tariff per item or a percentage of the sale price. The concept of fair compensation is currently under review in the ECJ case *SGAE v Padawan*.

73. Copyright levies potentially offer benefits to rights holders and authors, both in terms of increased revenue and (as a consequence) greater attractiveness to investors. In the EU, copyright levies raised €568m in 2004.<sup>83</sup> However, there are concerns about the negative impact on business, particularly equipment manufacturers<sup>84</sup>, while consumer groups have also expressed resistance towards levies. For example, a levy may lead to paying twice for the ability to copy: once on the equipment and again within the purchase price of downloads from legal sites.
74. Levies can also affect both business and domestic users who do not use equipment or blank media for private copying purposes, including people with disabilities who require the aid of technological tools purely for communication purposes.

*Non-commercial use, fair compensation and the UK*

75. At the time of implementing the 2001 Information Society Directive, the UK chose not to introduce any private copying exception, in part because of the problems with the levy system set out above. The Gowers Review had the same concerns and therefore proposed a limited format shifting exception for which the fair compensation would be – it argued – nothing.<sup>85</sup>
76. It has been suggested that a format shifting exception is insufficient to meet either consumer or business needs in the digital age, and that a more comprehensive approach to the problems associated with the legal use of copyright material is needed.

83 R. Andrews, ‘Private Copying Levy: Hardware Makers Ready For Europe-Wide ‘iPod Tax’?’ Paid Content: UK, 27 May 2008 <<http://paidcontent.co.uk/article/419-private-copying-levy-europe-wide-ipod-tax-on-the-agenda/>>

84 HP response to © the future <<http://www.ipo.gov.uk/responses-copyissues-hewlett.pdf>>

85 See reference 7, paragraph 4.68-4.76

77. Digital Britain examined one form of private copying: the recording of broadcast audio-visual transmissions. Time-shifting of a broadcast (i.e. recording it at home for viewing or listening at a more convenient time) does not infringe copyright<sup>86</sup>, but retaining and re-using it may do so. The Digital Britain Report noted arguments that “consumers should pay for a ‘right to copy’, reimbursing the copyright holder for the privilege of (a) retaining a recording of the material, and (b) being able to watch the material outside of the linear broadcast window”<sup>87</sup>.
78. Any UK levy system would clearly suffer the same problems identified by prior work. A transparent, harmonised system across the EU that did not place additional unwarranted burdens on business and was fair to authors, rights holders and consumers could merit further examination as a means of fair compensation.
79. There is some evidence that a more predictable, harmonised levy system in Europe could attract support<sup>88</sup>. The Copyright Levies Reform Alliance, representing a range of industry interests<sup>89</sup>, has called for reform of the levies system rather than its removal.
- F. The licensing process needs to be modernised for the digital age. Licensing can frequently be burdensome and is not currently possible for a wide range of works.**

#### *Licensing and access*

80. Copyright was introduced to end a monopoly on access to works, but is seen by some as hindering access to works in the digital era. One reason for this is that the processes for enabling access through licensing can be costly, protracted and – for some categories of works – useless.

The licensing of works is not only required for legitimate distribution but, more generally, to enable copyright works to be used, read, heard and seen. This can also facilitate and enrich the production of other works, opening up the creative outputs of the UK to be used in dynamic new ways.

81. Even those who wish to stay scrupulously within the law often find that there is no clear, easy, legal route to obtain the rights they would need. Expensive and lengthy rights clearance procedures do not make licensing of works impossible, but they inhibit it and may in some cases prevent the development of otherwise viable projects or interfere with research – including research on copyright itself<sup>90</sup>. Those who wish to use works may incur unnecessary costs seeking permissions or may infringe simply because the alternative is too onerous.
82. Burdensome licensing harms rights holders as well as potential licensees. Complex licensing procedures deter some commercial users, and thus rights holders’ potential revenue from licensing to those users is lost. Rights holders may also decline certain deals because the administrative burden on them is too great. Furthermore, the escalating frustration of consumers with a complex system may increase the likelihood of infringement and possible loss to rights holders. In fact, a lack of legitimate services enabling content to be accessed legally at the right price in a way that consumers want arguably encourages copyright infringement. For instance, 80% of current P2P users would be interested in a legal file-sharing service – and say they would pay for it. There is also a willingness to pay a monthly tariff at a level sufficient to compensate owners through their broadband or mobile network provider.<sup>91</sup>

86 s.70 CDPA

87 See reference 11 paragraph 63 p. 119

88 M. Palmer & N. Tait, ‘Tech companies seek truce on copyright’, Financial Times, 27 May 2008 <[http://www.ft.com/cms/s/0/fafecdc2-2b84-11dd-a7fc-000077b07658.html?nclink\\_check=1](http://www.ft.com/cms/s/0/fafecdc2-2b84-11dd-a7fc-000077b07658.html?nclink_check=1)>

89 Comprised of Business Software Alliance (BSA), European American Business Council (EABC), European Digital Media Association (EDiMA), European Information and Communications Technology and Consumer Electronics Association (EICTA), European Semiconductor Industry Association (ESIA), and Recording-media Industry Association of Europe (RIAE).

90 For example, creation of a database of the material involved in copyright infringement cases in the UK, c.f. the Columbia University music copyright infringement website <<http://cip.law.ucla.edu/>>

91 University of Hertfordshire and British Music Rights, (2008) Music Experience and Behaviour in Young People: Main Findings and Conclusions, University of Hertfordshire

*Cheaper and Quicker*

83. Existing structures for authorising the use of copyright material are often ineffective, particularly for those who wish to exploit works. Licensing, in particular, is proving difficult in areas of mass exploitation where it can be financially burdensome and time-consuming, especially for a commercial user who has to locate all rights owners and conclude contracts with each of them.

84. The financial burden of concluding these contracts is documented. The European Commission, quoting EDIMA, the organisation representing online music providers, found, "(t)he direct cost of negotiating one single licence amounts to €9,500 (which comprises 20 internal man hours, external legal advice and travel expenses). As mechanical rights and public performance rights in most Member States require separate clearance, the overall cost of the two requisite licences per Member State would amount to almost €19,000."<sup>92</sup>

**Box 9: BBC Archive Trial**

In the second half of 2007, the BBC undertook an Archive Trial, which entailed making 1,000 hours of archive programmes available online for streaming for a 6-month period, in order to assess the appetite and interest among audiences for a service of this type.

Programme material was deliberately selected from programme genres such as documentary, other factual and natural history, which in broad terms are less complex in rights clearance administration than, for example, drama and comedy.

In order to make this limited amount of archive material available for a short time period, the BBC had to spend an estimated 6,500 person hours checking material for rights implications and subsequently obtaining permission for this use from about 300 individual or collective rights holders.

The BBC television archive contains about 400,000 hours of programmes. The BBC estimates that clearing 10,000 hours of BBC television archive to be made available online would require 60 rights staff working for a year. Clearing the entire archive would require 800 staff working for three years; if each member of staff cost £30k p.a. to employ this would amount to £72m just to go through the process of rights clearance, on top of any fees incurred.

Other websites seeking to act as archives or repositories of knowledge, for example in universities, could incur administrative costs on a scale proportionate to this example.

<sup>92</sup> European Digital Rights, 'Music: Commission wants one internet clearing house', EDRI-gram Number 3.14, 14 July 2005 <<http://www.edri.org/edriagram/number3.14/music>>

### *Extended collective licensing: tackling complexity*

85. Extended collective licensing has been used by the Nordic countries since the 1960s as a means for addressing the complexity brought on by mass use and exploitation of numerous rights<sup>93</sup>. Under the Nordic system, once a collecting society is deemed to represent a critical mass of rights holders, it is assumed to act for all rights holders in that class or category of right. The works of all rights holders in the particular area that the collecting society represents are assumed to be in the collecting society's repertoire, unless the rights holder specifically opts out of it.
86. Extended collective licensing can reduce the average cost of obtaining a licence. Instead of investing time and other expenses on each individual licence, a potential licensee can instead, under extended collective licensing, obtain a licence for a broad repertoire of works. Similarly, legal simplification and certainty, as a consequence of extended collective licensing<sup>94</sup>, would reduce expenditure on obtaining independent legal advice.
87. Extended collective licensing has the potential to be a mechanism for the quick and efficient processing of agreements. KOPINOR, an umbrella organisation for Norwegian reprographic collecting societies, recently concluded a complex agreement for making works available on the internet with Norway's National Library. The process took two months. This compares favourably to the five years taken to clear the rights for the BBC's iPlayer service<sup>95</sup>.

88. Extended collective licensing should also generate benefits for rights holders. For example, in 2004 the revenue raised by collecting societies in the Nordic market (countries with a total population of around 25 million people) amounted to an estimated €450 million, or 5% of estimated global revenue.<sup>96</sup> Extended collective licensing guarantees remuneration for rights owners who may not previously have managed their works actively or effectively. As their works are assumed to be in the repertoire of the relevant collecting society, royalties are collected for the use of those works.
89. The Government believes that a scheme of extended collective licensing allows rights holders to exercise their rights to 'authorise or prohibit' use of their work, as they would always retain the ability to opt out of any extended licensing scheme.<sup>97</sup>

### *Orphan Works: a legal basis for access*

90. Despite the licensing procedures in place, there are a number of circumstances in which works cannot be licensed and, as a result, may not be used legally unless the use is covered by an exception to copyright<sup>98</sup>. Where licensing negotiations fail or the rights holder is simply unwilling to give permission under any circumstances, then this is the right outcome. But it is currently not possible to use a work that is in copyright legitimately if the owner of a right in the work cannot be identified or found, even after a diligent search and even if all other identified owners of rights agree to its use. Works for which this is the case are known as 'orphan works'; the rights for which no owner has been located can be termed 'orphan rights'.<sup>99</sup> An orphan work may have been anonymously created or records of a right holder may have been lost (making it impossible to determine who inherits a right after its author's death, for example).

93 A short study of the Nordic arrangements can be found: D. Gervais (2003) "Application of an Extended Collective Licensing regime in Canada: Principles and Issues related to implementation", Study Prepared for the Department of Canadian Heritage, Ottawa <[http://aix1.uottawa.ca/~dgervais/publications/extended\\_licensing.pdf](http://aix1.uottawa.ca/~dgervais/publications/extended_licensing.pdf)>

94 The potential for increased legal certainty is noted in reference 73, for example.

95 It should be noted that broadcasting rights can be particularly complex, so this is not a straightforward comparison.

96 T. Kosinen-Olsson, 'Collective Management in the Nordic Countries' in D. Gervais (ed.), (2006) *Collective Management of Copyright and Related Rights*, Kluwer Law International: The Netherlands p. 281

97 Other EU member states that have this system already consider it to be consistent with the exclusive rights granted by Article 2, 3 and 4 of the Information Society Directive as recital 18 of the Directive provides: "This Directive is without prejudice to the arrangement in the Member States concerning the management of rights such as extended collective licences." This interpretation has not been challenged to date.

98 In other words, unless their use falls within the "permitted acts" under CDPA 1988. For example, some "abandonware" (software, typically old computer games, which is no longer sold or supported) would be orphan works; other abandonware still has identifiable rights owners. Without orphan works provisions, all sharing of abandonware infringes copyright.

99 An orphan work is therefore by definition a work in which one or more rights are orphan rights.

91. Because there is no way to obtain permission to use orphan works, they are therefore either unused or used illicitly<sup>100</sup>, whatever their value, and there are many of them. There could be 25 million orphan works across UK museums and galleries.<sup>101</sup> Roughly 40% of the British Library's collection and around 1 million hours of BBC programming are considered orphan works.<sup>102</sup> Further, it is estimated that 5-10% of all collections held by public bodies and up to 70% of cultural works are orphan works.<sup>103</sup> Indeed, orphan works are arising out of these circumstances in growing numbers. Photographers, for instance, are concerned that photographs on websites frequently lack identifying metadata and as a result evidence of ownership is lost. The increase of user-generated content, produced and shared online, may lead to a further increase in orphan works in future years, when authors are difficult to trace or contact.
92. The inability to use these orphan works has broad implications. It impedes access to the historical archives, thereby inhibiting the flow of works from past to future and diminishing the stock of knowledge which could be used to inspire or teach about the past. Furthermore, many orphan works belong to public bodies and represent our cultural heritage; the inability to use these works means the treasures of the nation are locked away. Mass digitisation projects, which could put forgotten works back onto the cultural map, are severely hampered by the orphan works problem. The BBC has similar problems with its archive of sound recordings, and again this prevents or greatly complicates the use of that material for the cultural benefit of the nation.
93. Economically, preventing the licensing of orphan works impacts on the cost and value of the production of other creative works. Some commercial creative works employ elements of others. Preventing the licensing of orphan works decreases the range of works that can be used and potentially increases their price. It also decreases the value of publicly-funded content.
94. A scheme which encouraged the identification of orphan works' authors, for example as a precondition for their licensed use by another party, could benefit groups such as photographers that are concerned about current infringing use. Reducing incentives to infringe is a desirable feature of an orphan works scheme.
95. The UK has a particular need to develop an orphan works solution, because of the number of English language works available. However, we must exercise caution when looking to the orphan works solutions of other English language speaking jurisdictions, such as the US and Canada. The orphan works problem faced by these jurisdictions is not identical to the UK. For example, in the UK the problem is compounded as the registry documentation has not existed since 1912,<sup>104</sup> and the scope of copyright exceptions is limited.
96. Similarly, as the right of attribution was only introduced in the UK in 1989, and then in a heavily circumscribed form, the UK orphan works problem does not mirror the orphan works problem faced in Europe, where attribution has been available for longer.
97. Yet the government recognises the benefits of a Europe-wide orphan works solution and is encouraged by action being taken at the European level to address the orphan works problem.

<sup>100</sup> However, the failure to use an orphan work is not as much of a problem and does not present such an obstacle to creativity. A user may be able to utilise another option, e.g. a work in the public domain or a work where the rights holder can be found and contacted.

<sup>101</sup> In from the cold: An assessment of the scope of orphan works and its impact on the delivery of services to the public, commissioned by Strategic Content Alliance and The Collections Trust <[www.jisc.ac.uk/news/stories/2009/06/podcast81infromthecold.aspx](http://www.jisc.ac.uk/news/stories/2009/06/podcast81infromthecold.aspx)>

<sup>102</sup> See reference 5 p. 69 paragraph 4.91

<sup>103</sup> Joint Information Systems Committee (JISC) response to © the future <<http://www.ipso.gov.uk/responses-copyissues-jisc.pdf>>

<sup>104</sup> The 1911 Copyright Act abandoned all formality requirements, such as the need to register the work with the Stationers' Company. A catalogue of registered works is not available after 1912.

98. At a European level, an EU High Level Expert Group on Digital Libraries, which was set up in 2006, has investigated problems with providing large volumes of content in online libraries, including the problem of orphan works. The group was set up to give practical assistance to EU member states to implement a European Commission recommendation<sup>105</sup> on the digitisation and online accessibility of cultural content, and its future preservation. A copyright subgroup of the EU High Level Expert Group on Digital Libraries has deemed a solution to the problem of orphan works desirable (at least for literary and audiovisual works) it made general non legislative recommendations to enhance transparency and to prevent works becoming orphan. The recommendations include: dedicated databases concerning information on orphan works<sup>106</sup>; improved inclusion of metadata (information on rights holders) in the digital material and enhanced contractual practices, in particular for audiovisual works.<sup>107</sup>
99. Other EU approaches to access and orphan works are more proactive. For instance, the EU approach to licensing information is also encouraging. Systems such as ARROW (Accessible Registries of Rights Information and Orphan Works) enable the identification of rights holders and the status of the work, for example, whether it is orphan or not.
100. Europeana, the European digital library, which aims to make Europe's cultural and scientific resources accessible for all, also has a role to play in enabling access to works.

#### Box 10: EU – Licensing, Orphan Works and ARROW

ARROW began in November 2008 as a project funded as part of the EC eContent Plus agenda to make content within Europe more accessible, usable and exploitable. ARROW is a consortium project involving national libraries across Europe as well as publishers and writers' collecting societies supporting the EC's i2010 Digital Library Project.

ARROW will enable the identification of rights holders, rights and the right status of works; this will assist users of works, in particular, libraries, who must seek permission to digitise their collections and make them available to user groups. As well, the ARROW project will facilitate the exchange of information about rights, which is often held by rights holders, collecting societies and others. These solutions are proposed through the establishment of systems for the exchange of rights data, the creation of registries of orphan works, information on or registries of works out of print and a network of rights clearance mechanisms.

The project will run until May 2011.

<sup>105</sup> European Commission, Recommendation 2006/585/EC of 24 August 2006 on the Digitisation and Online Accessibility of Cultural Material and Digital Preservation <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32006H0585:EN:NOT>>

<sup>106</sup> This would bring together information gathered on orphan works into lists of known orphan works. See: S. Van Gompel, (2007) 'Unlocking the potential of pre-existing content: How to address the issue of orphan works in Europe', IIC, 38(6), 669-702 fn. 67

<sup>107</sup> Copyright Subgroup of the High Level Expert Group on Digital Libraries, Report on Digital Preservation, Orphan Works and Out of Print Works: Selected Implementations issues, Adopted by the High Level Expert Group at its third meeting on 18 April 2007 <[http://www.cenl.org/docs/Report\\_Digital\\_Preservation\\_Orphan\\_Works\\_Out-of-Print\\_Works\\_Selected\\_Implementation\\_Issues\\_June07.pdf](http://www.cenl.org/docs/Report_Digital_Preservation_Orphan_Works_Out-of-Print_Works_Selected_Implementation_Issues_June07.pdf)> p. 5



101. As a more general approach to the licensing of works the government is encouraged by EU support for solutions to the problems of multi-territorial licensing, in particular discussions and business solutions emerging as part of the Online Commerce Roundtable and the EU Digital Agenda.
- G. Even if the Berne convention prohibits formal registration for copyright, non-legislative registration systems exist and are used extensively in the commercial world and have proved useful. Their value is likely to grow in the digital age.**
102. Formalities are official requirements that rights holders must fulfil in order to enjoy the full extent of copyright. Formalities were prevalent in many countries from a very early stage of copyright laws and continued to form part of copyright laws for up to two centuries. Typical formalities involved the requirement of registration, deposit of copies, copyright notice, record of transfer and payment of fees. The consequences of non-compliance varied from losing advantages in litigation, to a complete and irreversible forfeiture of exclusive rights.
103. Currently, however, copyright is subject to no formalities in order to secure the protection of rights. This principle can be found in Article 5(2) of Berne.<sup>108</sup> In the original 1886 text of Berne, domestic formalities were allowed.<sup>109</sup>
104. The provisions prohibiting registration were introduced in the 1908 Berlin Revision conference after concerns that formalities would result in the loss of copyright for authors due to mistakes, unawareness or unfeasibility. There was broad consensus that domestic formalities were considered too burdensome for an international regime.
105. Aside from the burdensome nature of formalities, the decision to reject formalities could be tied to the supposedly ephemeral nature of works protected and the process of creation not being subject to the requirements of non-disclosure, as per patents.
106. The Government is conscious that non-legislative registration systems exist as a result of private sector initiatives to manage works. Collecting societies increasingly make use of information on the rights holders, whose rights they administer.
107. Furthermore, the U.S continues to implement a system of registration claiming that registration is only a legal formality intended to make a public record of the basic facts of a particular copyright, and is not a requirement for protection.<sup>110</sup> The 1976 Copyright Act abandoned the observance of formalities, reflecting the concern that rigid formalities put an undue burden on authors, who could lose copyright protection in its entirety for failure to comply with a formality requirement.<sup>111</sup> A primary goal, however, was to harmonize U.S. copyright law with international treaties and practice.

<sup>108</sup> "The enjoyment and the exercise of these rights shall not be subject to any formality..."

<sup>109</sup> This was regulated by Art. II(2) where if formalities existed in the country of origin and the country of adjudication, the country of adjudication was obligated to recognize compliance in the country of origin.

<sup>110</sup> Compared to the situation prior to 1976, when the United States, not yet a member of Berne, required registration in order for a grant of copyright and the 1909 Copyright Act outlined copyright could only attach to published works that had a notice of copyright affixed. A copyright notice would be granted upon compliance with s. 11 of the 1909 Act, mandating a deposit of copies of the work with the U.S. Copyright Office.

<sup>111</sup> This change has not been without controversy. See: *Kahle v. Gonzales* 487 F.3d 697 (9th Cir. 2007) where it was alleged this change altered a traditional contour of copyright and therefore required First Amendment review under *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003), that is, its impact on free speech.

108. Although Berne and policy makers stand against the implementation of a system of registration because of the difficulty regarding international disputes and the potential that authors could lose out in the confusion, registration could be a solution to aid authentication and management of works.<sup>112</sup> For instance, it has been asserted that one of the main reasons for the lack of identifying information on the rights owner of a work lies in the prohibition on formalities.<sup>113</sup> Registration could produce a database which a user could access to find out information about the rights holders and ways to contact them. Thus, registration could prevent future orphan works or at least, help manage them.
109. In response to concerns regarding the burden of registration for authors, it should be noted the improvements in communication would certainly facilitate registration and diminish the burden of registration for authors. For example, the US Copyright Office has an eCo online system enabling registration. The ability to register online lowers costs; makes processing faster and enables online tracking of the registration.<sup>114</sup> This is in direct contrast to 1908, the time when formalities were prohibited, and methods of communication were more primitive.
110. It has been represented that a way to solve the problems caused by the lack of registration, such as orphan works<sup>115</sup> would be to implement shorter copyright terms, or to make registration a condition of extension. Whilst this may well be true, a reduction in existing or even new terms is likely to be difficult to achieve. No copyright term brought to our attention has ever been shortened<sup>116</sup> and registration can assist in the management of rights that last for a significant period of time.
111. The Government recognises the cogency of the economic arguments enunciated by Andrew Gowers in relation to term, but has recognised that in certain circumstances there may be other factors to take into account, as referenced by the current debate about extending the term of protection for sound recordings and performances.
112. In general however, in the likely scenario that there may be pushes for further extensions of copyright term or accretion of rights, policy makers need to consider what response will be taken. In this case, in so far as further term extension or accretion of rights is to be entertained by policy makers, there needs to be a consideration of what impact such an extension would have on other stakeholders. As a matter of policy, where it is difficult to resist such proposals, it becomes important to look for ways of dealing with the countervailing impact on consumers and those possibly denied access to cultural works as a result.
- H. Monetising content is problematic. Rights holders and business are responding to change. This needs to be taken further.**
113. Some people use digital technology illegally to create, distribute and receive music, video, text and images, for example via peer-to-peer (P2P) file sharing. Many commentators agree that this has a negative impact on legitimate businesses involved in selling such goods and services<sup>117</sup>, and thus on owners (who suffer reduced royalties) and investors in those firms. A possible consequence would be reduced investment in creative content, relative to the pre-digital world.

112 C. Sprigman, (2004) 'Reform(aliz)ing Copyright', Stan. Law Rev. Vol. 57 488-568

113 See reference 106

114 <<http://www.copyright.gov/eCo/>>

115 see reference 106

116 The 1908 introduction of 50 year *post mortem auctoris* term requirements in the Berne Convention required Brazil to reduce term from 60 years *post mortem auctoris* and Spain to reduce term from 80 years *post mortem auctoris* see: S. Ricketson, (1987) The Berne Convention for the protection of literary and artistic works: 1886-1986, Centre for Commercial Law Studies, Queen Mary College, University of London, London, p. 329.

117 An overview of evidence from the music industry is given in R. Towse, C. Handke and P. Stepan, 'The economics of copyright law: A Stocktake of the Literature', (2008) Review of Economic Research on Copyright Issues, Volume 5(1)

114. Estimates of the impact on revenue to the creative industries vary. Oberholzer-Gee and Strumpf indicate that “many studies conclude that music piracy can perhaps explain as much as one fifth of the recent decline in industry sales”. However they go on to explain studies using actual file-sharing data suggest that piracy and music sales are largely unrelated.<sup>118</sup> An earlier paper by the same authors asserts downloads have an effect on sales which is statistically indistinguishable from zero, this estimate being inconsistent with claims that file sharing is the primary reason for the recent decline in music sales.<sup>119</sup>
115. Creative industries’ own studies indicate serious losses from copyright infringement: £180m p.a. to the UK music industry through illegal P2P filesharing, £152m to UK film<sup>120</sup> and US \$1.83 billion for the estimated 35% of all software installed in 2007 that was unlicensed (BSA/IDC study). But there may be positive impacts of file sharing on income from live music performances, for example.<sup>121</sup>
116. Business has a strong opportunity to draw consumers to legal consumption online to a greater degree than presently exists, through greater innovation rather than increasing restrictions on users and harsher penalties. There are indications that the public will pay for legitimate services that give convenience at a competitive price<sup>122</sup>. Users seem particularly interested in models that give unlimited downloads for a flat fee: streaming models (like that used by Last FM, for example) are seen by some to lack convenience and flexibility<sup>123</sup>.

#### Box 11: New Monetisation Methods: Technology Strategy Board (TSB), Test Beds and micropayments

The TSB will establish a broadly based Test Bed platform upon which a range of trials will be run to explore the commercial potential of new business models. It is hoped that the content industry will license to the Test Bed itself, a range of content sufficiently compelling to allow third party operators the opportunity to innovate with new services and products. Included in these might be, for example, the use of micropayments to reduce friction in paid for content transactions.

The TSB expects to use the Test Bed to trial new revenue collection models which will be worked out together by content publishers, broadcasters, ISPs and banking providers. Importantly, the TSB is hoping these Test Beds will encourage interested parties to put aside competing interests and understand the benefits of co-operation.

- I. **Copyright continues to support creativity in both the creative industries and business**
117. There are real and legitimate fears over the future of creative businesses, but it is important not to overstate them or their consequences. Previous challenges to the established order from new technology threatened the status quo but led to the birth of whole new industries and cultures. The printing press contributed to widespread literacy, creating as it did so a greatly expanded market for its output and – perhaps coincidentally, perhaps not – coinciding with a revolution in freedom of thought and expression. Television and film have arisen from nothing to be global industries.

118 F. Oberholzer-Gee and K. Strumpf, (2009) ‘File-Sharing and Copyright’, Harvard Business School Working Paper 09-132 <<http://www.hbs.edu/faculty/overholzer/workingpapers/09-132.pdf>>

119 See reference 83

120 See reference 11 p. 109

121 See reference 118

122 For example, 92% of P2P file sharers that responded to a recent survey by STIM (the Swedish Performing Rights Society) said they would pay for legal P2P content. Fewer than half (48%) would consider paying more than £8 per month. See: STIM, Pirates, file-sharers and music users, STIM Press Release, 20 April 2009

123 A 2008 survey sponsored by British Music Rights found that 80% of 14 to 24 year olds – the age group most often believed to be leading the trend towards illegal downloading – were interested in paying for a “legal file-sharing service”. See reference 91.

118. The software sector is substantial and, in January 2009, it was reported<sup>124</sup> that the sector had the highest average growth despite the problems of piracy. Even the music industry, where illegal copying is known to be widespread, managed its greatest-ever number of new releases in 2008<sup>125</sup>, whilst widespread pre-release copies of the film *X-Men Origins: Wolverine* did not prevent it from taking \$85m in its opening week at the US box office<sup>126</sup> and £6.66m in its opening weekend in the UK<sup>127</sup>.
119. Copyright is also encouraging the vibrancy of business by allowing and encouraging the creation of new business models. One of the strong views that emerged across many stakeholder groups was that the solutions to the challenges brought about by digital technology lie with business and not with Government. Many stakeholders saw changes to business practices – which, given the global reach of the internet, had to be international in scope – rather than copyright law, as the best way to respond to change. This was not a unanimous view: some felt that industry had been given sufficient time to evolve to meet user needs within a digital market, and now called for legislative solutions.
120. Business-led solutions have the advantage over legislation that they could be developed faster and can be more responsive to future change.
121. One possible solution enabled by new technology is a self-publishing model, where an author or small group of authors release their own material. An interesting example of this is Brighton-based Loca Records<sup>128</sup>, which releases material under a creative commons licence that allows other people to re-use and redistribute it. CD sales (some of which include not only the music but also the files used in its creation) and donations are Loca's sources of income.
122. At the same time new kinds of business have grown up in the digital age and are adapting accordingly. For example, ISPs want to make content easy to locate and aggregators want to make it accessible in useful and appealing ways. Wired and wireless telecommunication companies have a major stake in the quantity and quality<sup>129</sup> of creative content flowing through their 'pipes'. Whole new categories of online music and games have emerged. In addition, the expectations of media are dissolving as convergence enables us to watch TV on mobile phones and to have telephone conversations on our computers. The ever-increasing desire for rapid information and communication is driving interest in news feeds, blogs and social media sites like Twitter. This has created new business opportunities, often underpinned by online advertising.
123. Many creative industry firms and sectors are already investing heavily in developing new business models that aim to meet or shape customer demand as it develops. In late 2008, major music companies and Apple (iTunes) removed DRM features from their music downloads, in response to users' strong preference for DRM-free music. Other examples include Amazon's cutting of the download price of some of its tracks to 29p<sup>130</sup>, and Borders' launch of an online e-book service in the UK offering over 45,000 items.

124 DCMS (2009), Creative Industries Economic Estimates Statistical Bulletin, <[http://www.culture.gov.uk/images/research/Creative\\_Industries\\_Economic\\_Estimates\\_Jan\\_09.pdf](http://www.culture.gov.uk/images/research/Creative_Industries_Economic_Estimates_Jan_09.pdf)>

125 C. Green (ed.) (2009), BPI Statistical Handbook 2009, Official Charts Company: London

126 Box Office Mojo, *X-Men Origins: Wolverine* <[www.boxofficemojo.com/movies/?id=wolverine.htm](http://www.boxofficemojo.com/movies/?id=wolverine.htm)>

127 C. Grant, 'Wolverine Rips Up 2009 Box-Office Opening Records', *The Guardian*, 6 May 2009, <[www.guardian.co.uk/film/filmblog/2009/may/06/x-men-origins-wolverine-hugh-jackman](http://www.guardian.co.uk/film/filmblog/2009/may/06/x-men-origins-wolverine-hugh-jackman)>

128 <<http://www.locarecords.com/index2.html>>

129 Not only does network use depend on demand from users (which in turn is affected by their perception of quality), but also some forms of higher quality service such as HD video require greater bandwidth than a more basic service.

130 A. Topping, 'Amazon to challenge iTunes with 29p MP3 music downloads', *The Guardian*, 8 April 2009 <<http://www.guardian.co.uk/music/2009/apr/08/amazon-itunes-music-downloads-mp3>>

124. Rights holders in the creative industries are responding to the change. Performing Right Society (PRS) (a UK music collecting society that obtains royalties on behalf of music composers, songwriters and publishers) recently reduced its royalty rate from 0.22p to 0.085p per track played online, while increasing its share of licensees' advertising and other revenues from 8% to 10.5%<sup>131</sup>. Joint Information Systems Committee (JISC) funded an 'E-books for Further Education' project to make 3000 e-books available to every college and sixth form in the UK. This project will allow all students in further education to access online course texts to support their studies.<sup>132</sup>
125. The traditional participants in creative and content-based industries are being joined by new players in the online world. For example, Spotify provides free, legal access to a sizeable music library, and allows sharing by email and instant messenger. Its business model incorporates a combination of advertising revenues, day passes and subscription models<sup>133</sup>. By April 2009, Spotify had reached 1 million UK users<sup>134</sup>.

**J. Education and enforcement remain important but aren't the whole story.**

126. In the absence of appropriate education, enforcement and redress mechanisms, social norms around how users relate to content are driven by what is technologically possible rather than what is legally correct. But education and enforcement cannot solve all the problems faced by creative industries.

*Copyright violation should not be condoned, but it will continue en masse until more is done to provide digital content in the way that consumers want. – Jill Johnstone, Consumer Focus*

127. Efforts to ensure legitimate access through licensing, to simplify the copyright system and to communicate a sense of fairness to users can be complemented by continuing copyright education and enforcement efforts.

*Education about rights*

128. Education for users and consumers is important to developing a copyright system where people are responsible users, aware and respectful of rights. Education measures could be deployed at the point of purchase of hardware that could enable copyright infringement education for schools and other educational institutions, for example. Education is a way to tap into the latent willingness of people to pay and to strengthen the deterrent of piracy.
129. 'Wallace and Gromit Present A World of Cracking Ideas' is a Government-sponsored education initiative at the Science Museum, London, running from March 2009 to November 2009. It is a family oriented experience intending to inspire innovation and educate about intellectual property issues, including copyright. The independent evaluation commissioned by the IPO suggests that it has been an effective means of increasing understanding of IP, and in raising interest in pursuing careers in innovation, among all categories of visitors.
130. The CREATE Group works to educate young people between the ages of 7 and 18 about intellectual property, including copyright. It brings together the IPO, DCMS and DCSF (Department for Children, Schools and Families) with partners in industry. This group recognises that awareness of the value of ideas, and respect for IP, are important educational objectives if our young people are to be properly equipped for the digital age. Both the IPO and DCMS have been involved for some time in the development of educational material on IP for schools.

<sup>131</sup> Press release no longer accessible online. It had however been available at: [www.prsformusic.com/about\\_us/press/latestpressreleases/Pages/PRsforMusicStreamingRates.asp](http://www.prsformusic.com/about_us/press/latestpressreleases/Pages/PRsforMusicStreamingRates.asp). It is reported at <<http://news.bbc.co.uk/1/hi/technology/8068154.stm>>.

<sup>132</sup> JISC, National e-books project brings free learning to further education, JISC Press Release, 10 June 2009 <[www.jisc.ac.uk/news/stories/2009/06/febooks.aspx](http://www.jisc.ac.uk/news/stories/2009/06/febooks.aspx)>

<sup>133</sup> As with many such services, there is debate about the viability of the business model; see for example: A. Orłowski, 'Fifty Quid Bloke meet Spotify's 14p man', The Register, 25 June 2009 <[http://www.theregister.co.uk/2009/06/25/spotify\\_exclusive/](http://www.theregister.co.uk/2009/06/25/spotify_exclusive/)> and M. Ahmed & D. Sabbagh, 'Spotify could be dead within a year', Times Online, 9 October 2009 <[http://technology.timesonline.co.uk/tol/news/tech\\_and\\_web/article6866734.ece](http://technology.timesonline.co.uk/tol/news/tech_and_web/article6866734.ece)>

<sup>134</sup> see reference 11

### Enforcement of rights

131. Enforcement is often viewed by rights holders as the solution to infringement which should be utilised more effectively. Views from those outside of the creative industry tend to be mixed. There is a concern that an over-reliance on enforcement will stifle innovation within the creative industries. Some consumers suggested that rights holders were seeking unrealistic returns, i.e. that prices were too high relative to other goods or services.<sup>135</sup> Representatives of all stakeholder groups believed that both education of the public on the financial and other harm<sup>136</sup> caused by piracy and the development of attractive new business models helped win customer buy-in to consuming creative content online.
132. Despite these opposing views of stakeholders about enforcement it is however acknowledged by most that piracy is commonplace: it is easy to access high quality content, the risk of detection is regarded as low and it is claimed this is seen as a victimless crime. The small sample of members of the public who engaged in full debate were clear that changing the perception that piracy is a victimless crime, by showing that authors suffer, is an important factor in changing public attitudes towards piracy.<sup>137</sup>
133. The Government observes that the muscular language of enforcement emphasising theft is unhelpful and problematic. It would be useful for everyone to recognise that a loyal customer base is alienated when the distinction between criminal liability and civil infringement is not made clear. The 'cooperation not criminalisation' approach of the Featured Artists Coalition is encouraging.<sup>138</sup>
134. Copyright enforcement, particularly action against people who commit criminal offences, remains a central priority for Government. But we need to consider the extent to which rising pressure on enforcement is a symptom of outdated business models as well as problems with the copyright system.
135. The Government wants to see the copyright system respected, but to achieve this, the system has to be respectable. It must be seen to benefit all parties, rather than some at the expense of others. Some aspects of this relate to the behaviours of the various parties – for example, rights holders being seen to act in line with the values of authors, or collecting societies acting reasonably towards potential licensees. Others are around the establishment of new social norms that underpin or drive those behaviours – for example, through take up of legitimate services becoming the norm and illegal file-sharing the exception.

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135 The Guardian, 'Most Britons Think Music is too pricey', The Guardian, 29 September 2009 <<http://www.guardian.co.uk/media/pda/2009/sep/29/survey-brits-music-filesharing-buy-if-cheaper>>

136 Such as risks of viruses and other malware, or of purchasing pirate DVDs that are defective

137 COI (2009), Developing a Copyright Agenda for the 21st Century IPO stakeholder event final report, COI: London, <<http://www.ipo.gov.uk/strategy-coifinal.pdf>>

138 FAC, 'Digital Britain: Co-operation, Not Criminalisation', FAC MySpace Page, 22 July 2009; <http://blogs.myspace.com/index.cfm?fuseaction=blog.view&friendId=439669959&blogId=495322594#>

## Conclusions and actions

### Summary

1. The Government wants a copyright system that works as well as it can for everyone in the UK, supporting investment and sustaining jobs, as well as underpinning our cultural life, and supporting consumers to get the best from the digital age. This part of the report sets out what the Government plans to do based on the findings above.
2. Much of what we plan to do will need to be reflected in EU – level action or legislation. This is because the UK shares legislative authority in this area with the rest of the EU, through the Commission, Council and Parliament.
3. The Government's intentions through these measures are:
  - for **creators** of copyright works: to support fair treatment through new model contracts and clauses and fair returns for use of their work by improving education about and enforcement of rights;
  - for **rights holders**: to help secure a viable future by encouraging the development of new business models, modernising the licensing process and maintaining support for education about and enforcement of rights (including tackling peer-to-peer filesharing);
  - for **consumers**: to allow them to benefit from the digital age by seeking to legitimise non-commercial use of legitimately-purchased copyright works and improving access to 'orphan works' such as out-of-print books;
  - for **educators and researchers**: to support them by improving access to works, resolving issues around copyright and contract and ensuring exceptions to copyright are right for the digital age; and
  - for **businesses and other users**: to work towards a simpler system by looking at the scope to simplify copyright, improving the copyright licensing process and encouraging the development of new business models.
4. The detailed conclusions and actions relating to particular findings are set out below:
 

#### *Conclusions and actions from the findings*

  - A. **Technology means the capability to create, use and distribute copyright works is now in the hands of individuals.**
    5. This is a fundamental shift in the balance of technological capability. Its consequences are inescapable, including the desire of consumers to make use of this technology for their own purposes. This strategy is part of the Government's response to it.
    6. When governments make rules they often deal badly with technological changes. The Government is alive to this danger: it does not want to see the potential benefits of new technology circumscribed by copyright; nor does it wish to see the copyright system undermined by technology. Instead, it wishes copyright to develop in a technologically-neutral way, and urges other governments to take a similar view. If we do not, copyright will forever be playing catch-up with technology, never meeting the needs of current users or providing any certainty for investors or creators.
  - B. **The global copyright system serves a number of important, inter-related but often conflicting objectives.**
    7. Opinions are very varied: people the Government has consulted have very divergent objectives for the development of the copyright system, including the wish for radical reform such as the curtailment or infinite extension of copyright term.
    8. Consultation has not revealed an alternative to the current system that is clearly preferable across the range of objectives. Therefore, **while the Government is open to new evidence and thinking, its starting premise will be to work to improve the existing copyright system rather than to devise a radically new one.**
    9. This approach fits not only the evidence but also the practicalities of a global copyright system, within which the UK cannot act independently but will continue to work with other states to tackle the biggest issues together. It will be easier to work effectively in Europe on this basis, too.

- C. The complexity of copyright derives from the historical accretion of rights, more complicated business models and value chains and the interactions of rights holders.**
10. There is no doubt that overall simplification of the copyright system would be beneficial. The detailed arguments for specific simplifications such as particular forms of improved rights clearance are themselves complex and need further investigation. **The Government will examine the evidence for copyright simplification that SABIP puts forward.** SABIP will be reporting in November 2009. Its report will look at whether there is a case for simplification of UK copyright law and practice, and at any areas where intervention might be required. This could draw on studies on simplification initiatives carried out in other countries, for example Australia.
  11. Copyright exceptions have the potential to simplify use of copyright works for consumers, educators and researchers. There are limits to what the UK can or should do within the current European regime for copyright exceptions. **The Government would look favourably on moves towards a pan-European approach to copyright exceptions for the digital age.**
  12. Contracts are an important way of dealing with some of the complexities of copyright, as they can provide a degree of definiteness. However, some institutions such as libraries and archives are concerned that contracts undermine the exceptions that simplify and guarantee access to works. **The Government will help bring together public institutions and publishers to establish guidelines on how contracts should reflect copyright exceptions. If agreements cannot be reached, the Government will consider the case for legislation to resolve the issues, within the scope of exceptions permitted in Europe.**
  13. **The Government will examine the evidence that SABIP is assembling concerning the wider relationship between contract and copyright.** SABIP will be reporting in November 2009. Its report will look at issues such as achieving “fairness” in a copyright contract, the needs of libraries and educational institutions in terms of copyright permissions and the case for returning rights to authors after a fixed period.
  14. **The Government will draw together a group to develop model contracts or contract clauses that strike a fair balance between the rights of creators and publishers,** which will form a benchmark for good practice. These should include alternatives based on licensing of rights to publishers as well as assignment of rights, including reversion of rights where works are no longer being made available. We expect this group to operate in a similar way to the one that created the Lambert Agreements on university-business research collaborations.
- D. There is a mismatch between the expectations of users and what copyright currently allows.**
15. This is not simply an issue of poor information or education. Many users who know (and may even accept) the arguments for protecting authors and rights holders from unauthorised use of works are nonetheless impatient of the restrictions placed on them by copyright.
 

*One stakeholder workshop gave the example of a wedding photographer who retains copyright over his photos, while the couple who paid for his services believe they are entitled to put them on Facebook. Education could establish the fact of the photographer’s copyright and its consequences, but the couple’s wish to share the photographs with friends (and not to be prevented from doing so by the law) is likely to run deeper.*

    - Based on an example in COI (2009) Developing a Copyright Agenda for the 21st Century IPO Stakeholder Events Final Report
  16. This is significant because neither the law nor people’s attitudes are easy to change, but the two need to be reconciled if copyright is to be effective in the digital age. The copyright system cannot be expected to command public support unless consumers can use works in the ways they want, such as sharing photos with friends on the Web. This means rights holders offering works with broader terms of use.
- E. The digital environment is confusing. A distinction between commercial and non-commercial use would help. Such a distinction would need to be drawn up and applied at the EU level.**



17. Enforcing rights over personal, non-commercial uses of works appears disproportionately difficult in the digital age and consumers have shown not only strong unwillingness to pay directly for these uses but also a high degree of resentment that they should be asked to do so.
18. A case can therefore be made for a broader, better-defined exception to copyright that allows personal, non-commercial use of legitimately-obtained copyright works without explicit permission. This might apply not only to the reproduction of works, for example to transfer old LPs or CDs onto a computer, but also for example to creating derivative works and/or to sharing with family and friends. An expanded exception for non-commercial use could impact on revenues for rights holders; an element of fair compensation for any loss would be required.
19. **The Government would look favourably on movement by the EU towards options that benefit consumers.** A broad exception to copyright for non-commercial use would be one possibility. As set out in the Consumer White Paper<sup>139</sup>, the Government intends to review existing consumer law in terms of applicability to “digital” products and make provision to ensure appropriate consumer protection.
- What might a personal, non-commercial use exception cover? The scope would be decided in Europe; possibilities include:*
- *creating mash-ups of sound and/or images for personal use, such as sampled music or putting a sound-track to family photos;*
  - *format-shifting from CDs to MP3 on computer, phone or player*
  - *sharing mash-ups and photos with friends and family*
- Commercial use not covered by the exception might include a DJ playing his or her mashed-up tunes in the course of paid employment or someone obtaining advertising revenue through putting works on the web. “Personal use” implies that public performance or extensive sharing of works would fall outside the exception, as would use by third sector organisations or businesses.*
20. A similar argument could be made for pre-commercial use by businesses (particularly SMEs) of copyright material<sup>140</sup>. Easier, cheaper access to works would help to stimulate innovation based around those works, while rights holders would benefit from additional licence fees based on the new products and services that were ready to reach the market. No use of copyright material outside the firm, or for purposes other than product and service development, would be allowed. **The Government would like to see the case for a pre-commercial use exception examined in Europe alongside any consideration of broader non-commercial use.**
- F. The licensing process needs to be modernised for the digital age. Licensing can frequently be burdensome and is not currently possible for a wide range of works.**
21. To simplify and improve the efficiency of licensing of works for users and rights holders, the **Government intends to implement a system of extended collective licensing along the lines described in the Digital Britain Final Report.** This will enable a collecting society or other organisation with significant representation in a particular category of right to apply for permission from the Government to licence all works in that category including on behalf of rights holders who have not specifically signed up to that society or organisation, subject to appropriate safeguards including an opt-out for rights holders.
22. As set out in the Digital Britain Final Report, the **Government intends to legislate in order to enable schemes for dealing with orphan works to be set up on a regulated basis.** This will allow cultural institutions and others including commercial businesses to unlock large numbers of works that currently cannot be used. Safeguards will include requirements to make a diligent search for the true owners and making provision for the reimbursement of rights holders who are subsequently found and claim for the use of their work.

<sup>139</sup> HM Government (2009), A Better Deal for Consumers: Delivering Real Help Now and Change for the Future, London: BIS <<http://www.berr.gov.uk/whatwedo/consumers/consumer-white-paper/>>

<sup>140</sup> This is comparable to the situation in Norway, whose Copyright Act allows individuals to make copies of protected material within their business for work-related purposes only. See: J. Espantaleón (2008) ‘Does Private Copying need an update in the UK’ Journal of IP Law & Practice, Vol.3 No.2 at fn. 30.

23. Subject to the Government obtaining the enabling powers to license the use of orphan works and extended collective schemes, the detail of these provisions will be developed through extensive consultation and enacted in secondary legislation. Thus, decisions on details such as the term of licences and what will happen to licence fees arising from use of orphan works will be taken as the details of specific schemes are developed.
24. For both orphan works and extended collective licensing, it is particularly important that rights holders, especially absent rights holders, can have confidence in the integrity and fairness of those acting on their behalf. Licensees must also be sure that their licences are valid. Therefore, as outlined in the Digital Britain report, **the Government will act to manage organisations licensed to set up extended collective licensing and orphan works schemes.** It will look at, for example, adherence to Codes of Conduct and minimum standards for transparency and accountability<sup>141</sup>. These powers will be reserve powers, to be used only when a collecting society or other licensed body fails to self-regulate effectively.
- G. Non-legislative registration systems exist and have proved useful.**
25. Treaties make clear that copyright is an unregistered right. Yet most collecting societies, and others (like Google through its Book Search project, for example) maintain what can be seen as voluntary registers of rights. These are used for licensing and for the distribution of licensing income. The potential value of systems of voluntary copyright registration in enabling rights holders to assert their rights and obtain remuneration merits further examination, particularly given that the term of many rights has increased over time. **The Government will look for an opportunity to raise the issue of copyright registration in international organisations.**
26. The objective will not be to promote a move to mandatory registration. Rather, it will be to promote a consistent international response to the development of voluntary registers, to ensure that all rights holders continue to receive the right level of protection, and to ensure that the rules of the global copyright system are set by accountable governments, rather than through the ad hoc development of new, registration-based business models.
27. That said, the Government will not stand in the way of private sector initiatives that require registration, provided they comply with normal competition rules.
- H. Monetising content is problematic. Commercial rights holders are responding to change. This needs to be taken further.**
28. It is for the industry to come up with business models that work for the digital age. The role of government is to assist this process by removing barriers where they exist and helping to get dialogue started where progress is slow.
29. **The Government is supporting the Technology Strategy Board's £30m Digital Test Beds project,** which will create opportunities to test a variety of new systems like micropayments, the use of metadata and automatic licensing systems, and other elements crucial to the development of new business models.
- I. Education and enforcement remain important but aren't the whole story.**
30. Deterring infringement of copyright is part of many business models. The Government remains firmly opposed to the unlawful use of copyright material. **The Government remains committed to tackling P2P file-sharing through the measures announced in Digital Britain.**
31. **The possibility for persistent file sharers to be suspended from internet services is also being considered.** Suspension would only be used as a last resort in the most serious cases of copyright infringement.
32. Copyright infringement in the digital world is a global issue. **The Government is collaborating with international authorities to reduce copyright-related crime.** This includes finding ways to clamp down on criminal infringement and to provide an effective legal framework and enforcement regime.

<sup>141</sup> A recent European Commission reflection paper recognises the potential value of measures focusing on the governance and transparency of collecting societies: see reference 73, p. 20



