Creators' Rights Alliance response to consultation on copyright

Cover sheet

Your name

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Job Title

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Creators' Rights Alliance

Organisation's main products/services

Representing the interests of creators belonging to CRA member organisations

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Creators' Rights Alliance response to consultation on copyright

The CRA's interest

The Creators' Rights Alliance is an affiliation of organisations representing the interests of over 100,000 original creators in a wide range of fields – including music, illustration, journalism, photography and writing[1]. Most of the 100,000 creators we represent make their living by licensing copyright and performers' rights in their work.

The majority of that 100,000 are freelance – meaning that they by default own copyright in their work and in general depend for a significant proportion of their income on equitable remuneration for re-uses of that work. Almost all of these are rights-holders, offering media that publish or broadcast their work the licence necessary for that purpose and retaining the right to issue licences for second and subsequent uses, translations, and so on.

The CRA has been in discussion with consumer interests, notably Consumer Focus. We are agreed that:

- action must be taken to make the so-called "moral rights" automatic, universal and enforceable;
- and to level the playing field for negotiation of contracts concerning copyright, whether between a creator and an intermediary such as a publisher or broadcaster or a consumer and an intermediary such as a publisher, or broadcaster or online service provider.

1. Introduction

Most simplified reporting of copyright and authors' rights presents the issues as a series of conflict between "users" and "rightsholders" – presuming that creators and the publishers and broadcasters who distribute creators' work are a single interest. But creators are of course among the heaviest consumers of other creators' works. They rely more than most on the current "exceptions" that allow certain kinds of use of their works and others' without permission – such as that allowing extracts for "review and criticism". And – crucially – rapidly increasing numbers of "consumers" are creating works. Almost every child now in school will be a "published" or "broadcast" creator before they can vote – thanks to FaceBook and YouTube and NextBigThing™.

No-one can know which of these creators will go on to be the professionals who drive the future of the "information economy". Most do not themselves know. They may place no cash value on

1 See list of member organisations at www.creatorsrights.org.uk

their work now: that may change. It is our experience that they most certainly do mind when their work is taken from an online source and used in a way that they disapprove of.[2]

In this new environment, changes to copyright law affect *every citizen*. The primary changes may be motivated according to the terms of reference set for the Hargreaves Review – to promote economic growth (though we dispute that the effect of the changes will be to do so sustainably, or for more than a very narrow sector). But they imply "consequential amendments" that are necessary to protect citizens' interests. The present consultation fails to ask questions about the "consequential amendments" that are absolutely necessary if certain of the proposals are to be implemented.

These consequential amendments include:

- Provision to ensure that individual creators are rewarded for the use of their work; and
- All creators having the right to be identified and to maintain the integrity of their work.

1.1. *Sustainable* growth in the creative industries depends on creators

Too much of the focus of the Hargreaves report – and hence of this consultation – is on ways of re-using already-created works for profit. The economic purpose of copyright, however, is to reward those who produce new work, so that they may dedicate themselves to producing new works as professionals building their expertise. Without new works, the creative industries die.

As we observed to Hargreaves, some commentators make much of the potential of creation by volunteers doing it for the joy of it – and Wikipedia is held up as a prime example. However:

> Someone may spend countless unpaid hours crafting a Wikipedia entry: but unless they provide references to the work of professionals who have been able to build careers understanding the topic, it will rightly be flagged as worthless.[3]

If growth in re-use of works is not matched by growth in new high-quality, professionally-produced works, then, even a famous web search engine will find that its business model falters.

For those new works to be possible, creators must receive a fair share of the income they generate from consumers, so that they can sustain themselves. Consumers are willing to pay for works online if and only if they are sure that a fair share is going to the human creators who produced the works.[4]

There is no point in legislating for proper remuneration through extended collective licensing, or for exceptions to copyright bearing a right of remuneration, if publishers and broadcasters can then inform creators that they must sign over all such income, or never work in the industry again. Such offered contracts are commonplace and are documented for example in the regular British Photographic Council surveys[5].

2 See the CRA submission to Hargreaves, available at http://www.creatorsrights.org.uk/media/hargreaves-cra.pdf

3 http://www.creatorsrights.org.uk/?section=News&subsect=Hargreaves+review+2011 p 5, accessed 20/03/2012

4 Surveys by the Authors' Licensing and Collecting Society in 2005 and by Consumer Focus in 2009

The CRA insists that steps to level the playing field in negotiations between individual freelance journalists and large media corporations are urgently required.

At a minimum, an equitable share of income from new streams such as extended collective licensing must be an unwaivable right of the individual creator. Such an unwaivable right already exists in UK copyright law in the implementation[6] of the EU Rental and Lending Directive[7].

The uses envisaged for ECL – putting online scanned printed material held in libraries and archives, and making available of film and television archives – amount to lending, unless fees are charged or advertising included in which case they are unequivocably rental.

1.2. Creators' need for identification and integrity

In order for there to be *sustainable* growth in the creative industries, creators must have the right to be identified as author or performer of their works, and to defend the integrity of those works.

These rights are inextricably linked: in the sentence "Judith Wilcox wrote this" the "*this*" has equal weight with the "Judith Wilcox". That is, authorship is identified for each particular, *genuine* work, and attributing authorship to a distorted copy is contrary to the author's "honour or reputation"[8].

These rights together are labelled the "moral rights", a poor translation of the French "*droit moral*" with which we are stuck.

Among the reasons for the necessity of the rights of identification and integrity, both to creators and to the polity, are:

- In the process of advancing a professional career a creator needs to establish a "brand". This is as important to building their contribution to economic growth as trade marks are to widget manufacturers. Without the rights of identification and integrity enabling potential customers to see exactly what the creator has produced, brand-building is impossible.
- Especially in the case of journalism, to be identified correctly as author of a work is to take responsibility for it.[9]

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5 The 2010 survey report is at http://www.british-photographic-council.org/news/british-photographic-council-industry-survey-shows-true-value-of-creators-copyright and was reported for example in the *BJP* at http://www.bjp-online.com/british-journal-of-photography/news/1720931/survey-pro-photographers-worries-changing-market accessed 20/03/2012

6 *The Copyright and Related Rights Regulations 1996:* Statutory Instrument 1996 No. 2967 available at http://www.legislation.gov.uk/uksi/1996/2967/regulation/14/made accessed 20/03/2012

7 92/100/EEC has been repealed and replaced by Directive 2006/115/EC, available at http://ec.europa.eu/internal_market/copyright/rental-right/rental-right_en.htm accessed 20/03/2012

8 In the words of the Berne Convention Article 6*bis*, available at www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html accessed 20/03/2012

9 This argument is developed in the European Federation of Journalists publication *Authors' Rights – copyright in a Democratic Society* available at http://www.londonfreelance.org/ar/efj-pamphlet.pdf accessed 20/03/2012

- Maintaining the integrity of the historical and bibliographic record: in a nutshell, what is the point of having a work on a library shelf (or disk farm) if you don't know what it *is*?
- Practically and empirically, preventing future works becoming "orphans" by ensuring that identifying (and, in metadata, contact) information for all rights-holders is included in and stays with the work. This is not solely a concern related to proposed orphan works legislation: it is equally required if proposed extended collective licensing measures are implemented, to ensure that works distributed by this means are, and remain, identified.

The immediate changes required to UK law to protect creators' and all citizens' interests include:

- The moral rights must be applicable to all works, automatically, by virtue of their creation, without formality – that is, the bizarre requirement to "assert" them needs to be repealed;
- The exclusion of moral rights from journalists' works – in fact from all works "for newspapers or magazines" or "for the purpose of reporting current affairs"[10] – is bizarre and must be repealed – in what other field of creative work is it *more* important that the citizen has a guarantee of the provenance and integrity of the work?
- The moral rights should be inalienable. The provision in the Copyright Designs and Patents Act 1988 allowing for them to be "waived" has led to creators and even citizens who participate in "internet communities" being "offered" boilerplate contracts demanding that they be waived, even where the law already excludes them. They are therefore, for practical purposes for all but the best-represented creators, void. We will supply example contracts on request.
- The moral rights must be enforceable. The present arrangement in which they are bolted uncomfortably onto the side of the copyright system means that it is difficult to take action when they are breached and it remains to be seen how the proposed Small Claims track at Patents County Court will handle claims.
- In particular, there needs to be effective deterrence of the widespread practice of removing identification information (or other "metadata") from works.

10 Copyright, Designs and Patents Act 1988 sections 79, 81, 205E & 205G available via http://www.legislation.gov.uk/ukpga/1988/48/contents accessed 20/03/2012

2. Cross-cutting observations on the proposals

2.1. Educational copying

One feature of the consultation that has caused a lot of anxiety stems from officials' question: what would happen if the government extended the "exception" to copyright allowing copying in educational institutions to be as wide as conceivably allowable under UK law? The answer would be that those who write books used in schools and colleges would lose out on significant annual payments from the licence fees that educational institutions currently pay.

The answer to Question 89 is: "no". Proposals to allow schools to copy materials onto "whiteboards" and inside password-protected "online learning environments" are acceptable, and will actually enlarge the creative economy, *only* if all this is covered by a licensing scheme to compensate authors.

2.2. Private copying

It is indeed daft that it is currently illegal in the UK for people to copy music or indeed e-magazines onto different devices. The part of the proposal that is wrong in principle and in European Union law is that the "fair compensation" to authors demanded by European Union law could set to zero. (Photographers are "authors" for this purpose.)

In a judgment on 21 October 2010 the Court of Justice of the EU expressly stated that "Copying by natural persons acting in a private capacity must be regarded as an act likely to cause harm to the author of the work concerned." The judgement, which is binding on member states, finds that fair compensation must be regarded as recompense for the possible harm caused and the mere fact that equipment or devices enable the making of copies is sufficient per se to justify the application of levies.[11]

A recent European Court of Justice decision, *Stichting de Thuiskopie v Opus Supplies Deutschland GmbH*, has confirmed that member states can provide for a levy to be raised on the equipment used for private copying. Therefore if a private copying exception was introduced, in order to be compliant with existing European case law and legislation, a levy on the relevant technological devices would be appropriate.[12]

Unsurprisingly, the consultation document doesn't explicitly ask about this: Questions 69 and 70 are closest. Any "private copying exception" should apply only to legitimately-obtained works (Question 67).

2.3. Extended collective licensing

We discuss ECL in the context of a scheme that would allow organisations such as the BBC and

11 *Padawan v SGAE* Case C-467/08

12 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009CJ0462:EN:HTML accessed 21/03/2012

the British Library to write one cheque to each collecting society for permission to use, for example, works in its archive – without inquiring who held rights in them.

We note that some creators are opposed to ECL under any circumstances. We submit that effective procedures for authorisation of a collecting society to propose a *particular* ECL scheme are required, as argued below; and we expect that authorisation would not be forthcoming for any particular licensing scheme would be forthcoming.

If such a scheme is introduced, further very strong safeguards are required.

Our colleagues in the Nordic countries are happy with their ECL schemes – *but* these work against the background of strong "Authors' Rights" protection. Authors' Rights are rights of the individual, whereas copyright is a purely property right[13] – as you discover when a publisher or broadcaster demands that you "assign" authorship to them, which is impossible in the Nordic countries, France, Germany and almost all non-English-speaking countries.

The proposal is definitely unacceptable unless:

- Automatic, enforceable and unwaivable rights to be identified and to defend the integrity of works (the so-called "moral rights") are brought in for all creators in the UK at the same time, including an enforceable prohibition on removing the "metadata" that encodes identification in digital documents (answer applies to Questions 1 and 29);
- Only collecting societies democratically controlled by creators in the field may issue such licences (Question 11), and the process for deciding which are representative should be common-sense, and adapted to each kind of creative work (Question 30);
- Said collecting societies' handling of applications for such licences shall be subject to government regulation (Question 32);
- As a matter of principle, unclaimed monies should be applied to the benefit of authors as a whole. The money is, after all, held in trust for unknown authors. For example for training and education. We wouldn't be suprised if authors in the future decided that a part of it go (back) to libraries; archiving is after all a benefit to authors as a whole (Question 43);
- We welcome officials' clarification that if ECL is to happen, a collecting society should need a vote of its members to approve any particular scheme – we expect that there is no possibility of authors approving anything except libraries (Question 31);
- There must be a clear, simple opportunity to "opt out" of such a scheme, and this implied a public register of which author or what works are opted out (Questions 38 & 39).

Some of the understandable nervousness among creators about extended collective licensing could be allayed it it were specified, on the face of statute, that extended collective licences shall not be granted for the first making-available, broadcast or publication of any work; nor for second

13 The distinction is discussed in the recent European Federation of Journalists *The Right Thing: An Authors' Rights handbook for journalists* – available via http://europe.ifj.org/en/articles/efj-launches-handbook-to-help-journalists-protect-authors-rights accessed 20/02/2012

and subsequent uses of such works through syndication to any broadcaster or publisher; nor, where applicable, for translation rights.

We would phrase this in terms of the traditional division between "primary" and "secondary" uses, were it not that the entire point of the licences sought by the British Library and the BBC is for a use after the first use which makes archived works directly available to the public on demand and is therefore more "primary" than "secondary".

As explained above, individual creators must have an unwaivable right to receive equitable remuneration from ECL income streams, as already provided in the rental and lending provisions of the Copyright Designs and Patents Act (as amended)[14].

2.4. Orphan works:

The proposal that collecting societies should be able to apply to the government for authorisation to issue licences to use works whose creators cannot be identified, or cannot be located, has aroused passions. If the ECL idea (above) were implemented, there probably wouldn't be much demand for this – perhaps for local museums to sell tea-towels with historic illustrations, or for documentary film-makers to include archive clips. Nevertheless:

All the same principles as for ECL apply, as above. Also, IF there is to be such a scheme:

- Licences must be paid for in advance (Question 18);
- The fee for such a licence must reflect the market rate (Question 16) – that is, in our case, the Fees Guide) (Question 17);
- When it comes to defining a "diligent search" to locate an author, the Memorandum of Understanding drawn up under the tutelage of the European Commission is a good start (Question 12) and there are no circumstances in which a search can be dispensed with (Question 14);
- Where an author (or performer) is known but not found, all uses, without exception, must have a proper credit or attribution and uses of those whose author is not known must say so, to encourage authors to come forward (Question 19);

2.5. Exceptions:

The exceptions allowing us, as journalists, to quote written works, with a credit, for the purposes of reporting news and current affairs, or for criticism and review, work well. If they are to be clarified, the new law must be absolutely clear what is allowed and not use vague phrases such as "*such as* criticism and review" – which would make lawyers very happy as people were forced to spend thousands in court finding out what the vagueness meant, and everyone else miserable (Questions 94 and 95).

14 Copyright, Designs and Patents Act 1988 section 93B, available via http://www.legislation.gov.uk/ukpga/1988/48/contents accessed 20/03/2012

The proposal to make it legal to use a work for "parody" without asking or payment risks producing a parody of legislation. Anyway, most of the cases brought up by those who argue for this concern trademarks, such as those of McDonalds™, not copyright (Questions 78 to 84).

2.6. "Evidence"

The few referenced "studies" provided in "evidence" in the consultation appear to have serious flaws, or are simply mystifying. We shall raise a sample of these issues in responding to the 114 Questions.

Even the size of the "creative industries" that are supposed to be growing vary wildly, with estimates ranging up to 8.2 per cent of UK Gross Domestic Product in 2007 [15] [16]. Whatever their size is, it is certainly on a par with the 8.3 per cent claimed for the UK "online economy"[17] in a report commissioned from the Boston Consulting Group by Google[18] – which very likely includes some copyright-licensing turnover[19].

At the heart of the present consultation, however, is an economic illiteracy: throughout, income from licensing copyright works is counted as a cost to the economy – whereas fashion design, for example, is counted as income. The CRA shares the British Copyright Council's judgement that this represents an "unjustified ideological shift".[20]

If any of these proposals is proceeded with, then a longer period than three months must be allowed to conduct the empirical research requested. The policy of "evidence-based policymaking" – a phrase with which few could quibble as it stands – turns out to be a privatisation of impact assessment. Unless funds are made available to enable vitally interested but financially constrained parties such as the organisations representing individual creators to commission research from organisations such as the Boston Consulting Group, then we must request four years, that being the time to propose, fund and complete a doctorate thesis, given a following wind and the gods of the Economic and Social Research Council smiling upon one.

We do not believe that the economic case for exceptions has been convincingly made by government in this consultation. In particular government should not assume transfers of value

15 © *the future* UK IPO, London, 2010 http://www.ipo.gov.uk/c-policy-consultation.pdf accessed 27/02/2011

16 The fact that the output figures quoted are so various again suggests the need for better data-gathering. At http://www.culture.gov.uk/what_we_do/creative_industries/default.aspx#Creative the Gross Value added was given at 5.6 per cent when accessed on 04/03/2011 but as 2.8% when accessed on 21/02/2012, after DCMS had removed parts of the computer software industry – despite it being dependent on copyright for its business – from the estimate.

17 http://www.bbc.co.uk/news/business-17405016 accessed 13/03/2012

18 This point was not widely reported in the UK: see "The international study, conducted for Google by Boston Consulting Group" at http://www.winnipegfreepress.com/business/canadian-internet-economy-lags-g20-peers-online-shopping-a-drag-study-143278736.html accessed 13/03/2012.

19 We have not yet been able to study the methodology of the Boston Consulting report, which, perhaps by coincidence, appeared just as the deadline for this consultation loomed.

20 British Copyright Council submission to this consultation (from final draft, p 2)

from creators create economic growth, particularly where those transfers go offshore – as to US technology firms – or are merely captured in consumer surplus or lower costs for public or private sector institutions. As an industrial policy the Government, rather than picking winners, is choosing losers in the UK content sectors in the hope of a new, successful economy that exists only in theory. It should do so with great caution.

We concerned, among other things, about the quality of the Economic Impact assessment used in regard to private copying. The Assessment is inconsistent in its argument and uses assertion rather than evidence in its main conclusions around harm to content owners. It has not, for instance, considered the potential effects on licence income from the levy in Europe that is currently repatriated to UK Music Licensing Companies and would come under question if there were no reciprocal arrangements.

Its initial assessment, i.e. that if there is private copying exception there will be minimal or zero impact on copyright owners, is based not on data or evidence, but on a theoretical discussion paper by Hal Varian, the Chief Economist of Google[21].

Because of the assumptions underlying the consultation, i.e. an assertion that copyright is a problem, we believe the document has failed adequately to reflect the benefits of the current copyright regime. The consultation lacks an assessment of the benefits to the economy of copyright. As a consequence it often assumes change that weakens right is positive without assessing the costs of such change to copyright owners.[22]

Numerical methods

The most egregious fault is in the impact assessments themselves. Where no estimate of cost or benefit is available, it is not appropriate to take the value as zero: this is a fundamental feature of numerical methods (that is, applied number theory). The appropriate value is Not a Number, "NaN" for short. The practical effect of the distinction between NaN and zero is severe and stems from the rules for operations on this special value: whereas £666M – £0 = £666M, £666M – £NaN = £NaN and the same applies to all arithmetic operations.[23] The great majority of the impact assessment totals should therefore, have been rendered as NaN.

That is to say, in plainer English, that if any calculation contains one or more "don't know" values, the result of that calculation can only be "don't know". If a writer's projected fee for conducting and licensing an interview with a Minister is £400 including expenses, and they don't know the fare to get to see her, they don't know your net income from the piece of work, even if you do know everything else. And thus and so even unto macroeconomics...

21 "Copying and Copyright" *Journal of Economic Perspectives* Volume 19, Number 2, Spring 2005. Hal Varian has worked as a consultant to Google since 2002

22 The preceding four paragraphs are taken, with permission, from an argument developed by the BPI.

23 *Standard for floating-point arithmetic* (2008), New York: Institute of Electrical and Electronics Engineers, p 34

3. The questions

Orphan works

1a. Does the initial impact assessment capture the costs and benefits of creating a system enabling the use of individual orphan works alone, as distinct from the costs and benefits of introducing extended collective licensing? Please provide reasons and evidence about any under or over-estimates or any missing costs and benefits?

No, the impact assessment does not capture the costs; and we do not recognise the basis for the proffered £666M – £1,322M benefit.

We cannot think of any methodology which would allow an "evidence-based" prior estimate of costs to creators that may arise, for example, from "orphan works" licences substituting for licensing of works by known creators. One might conduct an experiment that includes introducing orphan works licensing for a subset of creators alongside a comprehensive survey of all creators, detailed enough to exclude confounding factors such as other changes in the markets for licensing of their work. The experiment – which is what is proposed – would have to be designed to pass an Ethics Committee which would require that steps be taken to minimise potential harm.

Nor is it clear how all the costs could sensibly be monetised, short of litigation after the fact. Significant costs to creators include, for example, potential damage to their "honour and reputation" arising from the mistaken issue of an orphan work licence and subsequent identification.

See our discussion of the so-called "moral rights" at **1.2** above.

1b. The Government is particularly interested in the scale of holdings you suspect to be orphaned in any collections you are responsible for. Would you expect your organisation to make use of this proposed system for the use of individual orphan works? How much of the archive is your organisation likely to undertake diligent searches for under this proposed system?

We do not hold any orphan works and are not aware of members doing so, beyond family documents.

1c. What would you like to do with orphan works under a scheme to authorise use of individual orphan works?

Were there to be a scheme to authorise use, it is possible that individual members who are editors or direct films would wish to licence some historical still and moving images.

2. Please provide any estimates for the cost of storing and preserving works that you may not be able to use because they are/could be orphan works. Please explain how you arrived at these estimates.

N/A

3. Please describe any experiences you have of using orphan works (perhaps abroad). What worked well and what could be improved? What was the end result? What lessons are there for the UK?

N/A

4. What do you consider are the constraints on the UK authorising the use of UK orphan works outside the UK? How advantageous would it be for the UK to authorise the use of such works outside the UK?

Legal certainty seems impossible, since it is by definition not known where national treatment should be applied when the author or performer is unknown.

In general, given the ease of global digital distribution, clarification of international licensing procedures is required. This should be a priority in international policy work: the special case of orphan works licensing is not the place to set a precedent. Any licences granted should follow practice for licences granted by known creators: normally on a territorial basis, or at a premium for wider scope.

5. What do you consider are the constraints on the UK authorising the use of orphan works in the possession of an organisation/individual in the UK but appearing to originate from outside the UK:

5a. for use in the UK only

5b. for use outside the UK?

It currently appears probable that an eventual EU Directive will mandate that orphan work licences must be issued by the member state in which the work appears to originate. This is the correct approach; evaluation of a diligent search carried out in the "wrong" country would be difficult.

5c, How advantageous would it be for the UK to authorise the use of such works in the UK and elsewhere?

See above.

6. If the UK scheme to authorise the use of orphan works does not include provision for circumstances when copyright status is unclear, what proportion of works in your sector (please specify) do you estimate would remain unusable? Would you prefer the UK scheme to cover these works? Please give reasons for your answer.

For better or worse, the copyright status of any orphan work made less than around 140 years ago is unclear, since it cannot be ascertained when unknown authors and performers died. If there is to

be such a scheme, the risks attached to granting a licence for the use of a work which is in fact out of copyright would be small – *if* that any scheme is constructed in a way that fulfils our overarching principles, set out in section **2.4** above.

Any scheme should therefore be applicable to all cases in which the creator (or other rightsholder) cannot be located; collecting societies issuing licences should inform the person seeking one in the event that the work is certainly out of copyright.

In the (probably exceedingly rare) event that a creator is discovered, and discovered to have died more than 70 years before the licence was issued, the licence fee should be passed to the estate, if it is locatable, and dealt with as are other unallocated fees if it is not. This may symbolically compensate the estate for other uses made while the work was in copyright.

7. If the UK's orphan works' scheme only included published/broadcast work what proportion of orphan works do you estimate would remain unusable? If the scheme was limited to published/broadcast works how would you define these terms?

Several of our member organisations, in particular the National Union of Journalists, have serious concerns about the issuing of licences for unpublished works. These are likely to include sensitive material, for example journalists' notebooks identifying confidential sources. The presence of these in a physical archive available to researchers may raise issues; their presence on the internet in searchable form or in commercial distribution are much more severe.

These concerns also affect extended collective licensing, though no relevant question is posed in this consultation in that context: please take this as a response to the unasked portion of Question 21.

8. What would be the pros and cons of limiting the term of copyright in unpublished and in anonymous and in pseudonymous literary, dramatic and musical works to the life of the author plus 70 years or to 70 years from the date of creation, rather than to 2039 at the earliest?

Term is governed by EU and international law.

We believe that many of the issues around orphan works could be mitigated by provisions for works that are not being actively exploited by a licensee to revert to the creator. It is almost always easier to locate a human creator (or their estate) than it is to find the successors in title to a disappeared publisher or production company, especially when the reason that the company has disappeared is that at least one receiver in bankruptcy has been involved and in many cases still holds licences.

A form of reversion is provided in the EU Directive on performers' rights[24]. We believe that earlier reversion than provided for in that Directive is appropriate; and understand that this may better be

24 Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights – http://ec.europa.eu/internal_market/copyright/term-protection/term-protection_en.htm accessed 12/03/2012

pursued at a European level.

9. In your view, what would be the effects of limiting an orphan works' provision to non-commercial uses? How would this affect the Government's agenda for economic growth?

Though the idea of "non-commercial use" has appeal to many members, a definition that is both precise and useful is elusive. We have spent far longer than is good for our health discussing the case in which a library shop sells tea-towels bearing an orphaned illustration; and believe that an approach in which all uses are potentially licensable is preferable – *so long as* those licences are issued for a fee, paid in advance, reflecting the market rate for the use licensed: see **2.4** above.

In the unhappy event that any other licensing arrangement were proceeded with, then we would have to insist it were be for non-commercial use, tightly defined, only.

We note that journalists frequently undertake "non-commercial" work – for example for charity brochures – which may attract lower rates than "commercial". Some charities, though by law non-commercial, have highly-paid employees and significant publication budgets – though freelances find that they still attempt to blag work for free.

10. Please provide any evidence you have about the potential effects of introducing an orphan works provision on competition in particular markets. Which works are substitutable and which are not (depending on circumstances of use)?

Examples of works which are not substitutable would include:

- In the field of journalism, particular pieces of textual reporting or editorial comment that for some reason need to be reproduced beyond the extent allowed by existing exceptions to copyright;
- Original musical scores;
- Works of art or of literature; and
- Photographs of deceased persons, demolished streetscapes, *etc*.

Other works are substitutable and any orphan work licensing scheme must the avoid market distortion that would result were it to become cheaper to licence an orphaned work than to commission a new work. As noted above, the only way to produce quantitative evidence on this point is to conduct an experiment, and any experiment must be conducted with due caution for (at least) predictable effects such as this.

11. Who should authorise use of orphan works and why? What costs would be involved and how should they be funded?

Any orphan works licences must be issued by collecting societies that are democratically

controlled by creators in the field of work involved.

See our observations at **2.4** above and Question 51 below.

12. In your view what should constitute a diligent search? Should there be mandatory elements and if so what and why?

The EU-brokered Memorandum of Understanding on Diligent Search[25] is a good start.

Requirements for diligent search should **not** be reduced simply to a lookup in a "Digital Copyright Exchange" database. See our response to Question 15 below.

The nature of diligent search is is likely to change as technology develops, probably reducing the effort involved in locating authors. This is particularly likely for images – if for example services such as TinEye[26], given a sample image without metadata, are able to find the same image with.

13. Do you see merit in the authorising body offering a service to conduct diligent searches? Why/why not?

If the authorising body performed the diligent search, an audit mechanism would be required, since there is the potential for a conflict of interest involving the collecting society's contradictory desires to obtain revenue for an orphan work licence and to maximise revenue to members who are located.

If on the other hand it were the responsibility of the person seeking the licence to perform the diligent search, then only general supervision of the the authorising body's processes for auditing that search are required. We believe this option is preferable.

14. Are there circumstances in which you think that a diligent search could be dispensed with for the licensing of individual orphan works, such as by publishing an awaiting claim list on a central, public database?

No.

There are not. Not least, it is in the interests of all that any scheme be clear and transparent: to discriminate between categories of creator (or other rightholder) would be to introduce unnecessary complexity.

A public claim list should be the last stage before a licence is granted. We observe the experience of the Hathi collaboration: on publishing a claim list, the US Authors Guild was on the telephone to the wife of the agent of one of the allegedly untraceable authors within minutes[27].

25 http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/orphan/mou.pdf accessed 12/03/2012

26 http://www.tineye.com accessed 1303/2012

27 http:www.londonfreelance.org/fl/1110copy.html accessed 13/03/2012

15. Once a work is on an orphan works registry, following a diligent search, to what extent can that search be relied upon for further uses? Would this vary according to the type of work, the type of use etc? If so, why?

Members' experience with maintaining databases suggests that it is essential that there should be a requirement for a re-search in order to check that the registry entry is accurate. Further, new information about an unlocatable author or performer may be available; new technology (for example searching for image and sound files by image or sonic content) will probably have improved since the prior search.

We are not aware of any reason why this requirement should be different for different classes of work.

16. Are there circumstances in which market rate remuneration would not be appropriate? If so, why?

No.

There are not. Of course, the definition of market rate remuneration is that it will vary according to the use licensed.

17. How should the authorising body determine what a market rate is for any particular work and use (if the upfront payment system is introduced)?

Some member organisations conduct and publish surveys of rates paid to members. Others have encountered difficulties with such databases: it would help if the competition authorities clarified the situation and made it clear that such open sharing of market information was positively welcomed.

Initially, rates for uses that are not the subject of such a survey may need to be estimated by interpolation; we expect that the filling of gaps in survey data could be rapid, given this clarification, at least in the main fields in which our members work.

18. Do you favour an upfront payment system with an escrow account or a delayed payment system if and when a revenant copyright holder appears? Why?

We insist on up-front payment.

Any other arrangement is likely to become indistinguishable from the practice of "taking a punt" on the authors and performers not coming forward, which while illegal is, it appears, common; it would, we predict, at least psychologically undermine the requirement for a diligent search.

Any other arrangement introduces an obvious threat of distortion of the market for works by known authors and performers.

19. What are your views about attribution in relation to use of orphan works?

Attribution to the author or performer, where their name is known, must be mandatory.

There are issues with specifying that a work is licensed as an orphan: this could encourage unauthorised use beyond the licence. But the benefits of clarity – and of encouraging authors and performers to come forward – outweigh these.

20. What are your views about protecting the owners of moral rights in orphan works from derogatory treatment?

First, of course, all creators need to have automatic, unwaivable, enforceable moral rights: see **1.2** above.

Collecting societies issuing licences should have clear policies against granting orphan works licences that would allow uses that would likely be contrary to the honour or reputation of the author, were that person locatable: for example, party-political or advertising use.

We note that as the law currently stands, in the case where:

- the right to identified has been asserted; and
- the work is not for a newspaper, magazine, encyclopaedia, reporting current events or under any of the other exclusions from the rights of identification

– then use of that work without identification is actionable.

21. What are your views about what a user of orphan works can do with that work in terms of duration of the authorisation?

Licences should be for fixed periods. The reasonable duration of a licence will (of course) depend on the use envisaged and practice in the field of creative work involved.

Revenant authors must have the opportunity to challenge a licence that still has time to run on their reappearance. Revenant authors must also have the opportunity to re-negotiate the licence fee. If the challenge or re-negotiation needs to go to the Copyright Tribunal then the costs of the revenant author should be advanced by the collecting society that issued the licence.

Extended collective licensing

For clarity we reiterate here our preconditions for the acceptabilty of extended collective licensing:

1. Enforceable unwaivable moral rights for all creators, including an *enforceable* prohibition on removing metadata, are brought in at the same time;
2. Only collecting societies democratically controlled by creators in the field may issue either kind of licence;
3. Said collecting societies' handling of applications for such licences shall be subject to government regulation;
4. Licences are for a fee reflecting the market rate; and
5. Unclaimed monies should be applied to the benefit of authors as a whole, e.g. for training and education.

Another question not asked is whether extended collective licensing should extend to unpublished works. We have serious concerns about this: see Question 7 above.

22. What aspects of the current collective licensing system work well for users and rights holders and what are the areas for improvement? Please give reasons for your answers.

The UK collective licensing practices that most affect journalists are those for photocopying and educational use.

Though the system has room for improvement, in broad principle it operates well and we note that MPs received only two complaints from creators about collecting societies between October 2010 and December 2011[28].

Members raise questions about the transparency of operation of some collecting societies, and about the level of detail of reporting of sources of income[29].

Of course, members would prefer that the administrative charges of the collecting societies were lower than they are at present.

23. In the Impact Assessment which accompanies this consultation, it has been estimated that the efficiencies generated by ECL could reduce administrative costs within collecting societies by 2-5%. What level of cost savings do you think might be generated by the efficiency gains from ECL? What do you think the cost savings might be for businesses seeking to negotiate licences for content in

28 http://www.ipo.gov.uk/types/hargreaves/hargreaves-copyright/hargreaves-copyright-events/hargreaves-cce-complaints.htm accessed 12/03/2012

29 Personal communications with Mike Holderness

comparison to the current system?

We have no evidence on the potential for ECL itself to reduce costs. Improvement of accounting systems must offer benefits.

24. Should the savings be applied elsewhere e.g. to reduce the cost of a licence? Please provide reasons and evidence for your answers.

Savings should be distributed to authors and performers. Freelance journalists' fees are already declining in real terms[30]; and they face negotiating fees for primary use on a steeply slanted playing field (see **1.1** above).

25. The Government assumes in the impact assessment for these proposals that the cost of a licence will remain the same if a collecting society operates in extended mode. Do you think that increased repertoire could or should lead to an increase in the price of the licence? Please provide reasons for your answers.

More than the extension of the repertoire, the greater legal certainty and reduction in the costs to the licensee in applying for and administering licences is a reason for a modest increase in charges.

In effect, ECL transfers the legal uncertainty faced at present by the licensee to the body of creators as a whole. It requires creators to undertake additional work – that is, to forgo directly-paid work by investing time – in supervising their collecting society's administration of licences, its distribution of funds and its negotiation of fees on their behalf – *assuming*, that is, that the principle is enacted that ECL may be offered only by collecting societies democratically controlled by creators in the field. If by some mischance this assumption were not met, creators in general would have to factor legal fees into their costs of doing business instead.

26. If you are a collecting society, can you say what proportion of rights holders you currently represent in your sector?

We are not.

27. Would your collecting society consider operating in extended licensing mode, and in which circumstances? If so, what benefits do you think it would offer to your members and to your licensees?

N/A

28. If you do not intend to operate in extended licensing mode, can you say why?

N/A

30 Evidence submitted in confidence by the National Union of Journalists to Hargreaves review.

29. Who else do you think might be affected by the introduction of extended collective licensing? What would the impact be on those parties? Please provide reasons and evidence to support your arguments.

Don't know.

30. What criteria do you think should be used to demonstrate that a collecting society is "representative"? Please provide reasons for your answer.

Several CRA member organisations would be prepared to assist with estimates of the total number of active creators.

31. Do you think that it is necessary for a collecting society to obtain the consent of its members to apply for an ECL authorisation? What should qualify as consent – for example, would the collecting society need to show that a simple majority of its members have agreed to the application being made?

Yes.

We wish to record our intention to make further representations on the procedures for notification of a ballot and the majorities requires – a majority of *all* members?

32. Apart from securing the consent of its members and showing that it is representative, are there other criteria that you think a collecting society should meet before it can approach the Government for an ECL authorisation? Please give reasons for your answer.

The collecting society must:

- specify clearly the class of licences for which it seeks authorisation;
- publicise the vote (see above *re:* our intention to make further representations); and
- demonstrate that it has good governance (see Questions 45 to 57).

33. When, if ever, would a collecting society have reasonable grounds to treat members and nonmember rights holders differently? Please give reasons and provide evidence to support your response.

If there is a real difference in the costs of administering payments to members and to non-members, this may be reflected in charges subtracted from said payments – or in the frequency at which payments are issued.

34. Do you have any specific concerns about any additional powers that could accrue to a collecting society under an ECL scheme? If so, please say what these are and what checks and balances you think are necessary to counter them? Please also give reasons and evidence for your concerns.

The biggest single economic issue with extended collective licensing is that it transfers the negotiation of fees from the individual creator to a collective body.

In order for copyright to fulfil its function of supporting and incentivising a sustainable supply of creative works to the economy (see **1.1** above), there must be means of ensuring that collecting societies granted ECL authorisations negotiate in good faith in the best interests of creators.

35. Are there any other conditions you think a collecting society should commit to adhering to or other factors which the Government should be required to consider, before an ECL authorisation could be granted? Please say what these additional conditions would help achieve?

Before granting a licence, the regulator should also consider:

- the potential for market distortion;
- whether the proposed licence meets the "three-step test", that is: it is legitimate if it covers:
    - *certain special cases* which
    - *do not conflict with a normal exploitation of the work* and
    - *do not unreasonably prejudice the legitimate interests of the rights holder*.
- whether significant numbers of authors or performers have been forced to waive or to assign their rights to income from the licence; extended collective licences should not be granted if this is the case. See **1.1** above.

36. What are the best ways of ensuring that non-member rights holders are made aware of the introduction of an ECL scheme and that as many as possible have the opportunity to opt out, should they wish to?

Advertising in appropriate media: see Question 37 below.

37. What type of collecting society should be required to advertise in national media? For example, should it need to be a certain size, have a certain number of members, or collect a certain amount of money?

Collecting societies should advertise in a*ppropriate* media, at the discretion of the regulator.

38. What would you suggest are the least onerous ways for a rights holder to opt out of a proposed extended licensing scheme?

A one-stop shop website, with the alternative of opting out by post.

Unfortunately, it appears that it would be necessary to offer creators the option of opting out either all their works, or specific works only.

An example of the requirement for a per-work opt-out would be a photographer who wishes the majority of their work to be available through libraries but who has certain series of pictures taken under the agreement that they will not be made available online – whether as a condition of a model release agreement, or due to the intrinsically sensitive nature of the work (for example documentation of atrocities).

39. Should a collecting society be required to show that it has taken account of all opt out notifications? If so, how should it do so? Please provide reasons for your answers.

There should be a simple and persistent audit trail from request to inclusion in the database. This is simply good administrative practice.

40. Are there any groups of rights-holders who are at a higher risk of not receiving information about the introduction of an ECL scheme, or for whom the opt-out process may be more difficult? What steps could be taken to alleviate these risks?

Heirs of deceased rightholders are at greater risk – if only those who are not aware of what they have inherited. We haven't yet thought of a way of alerting them, beyond the notices that must be required for the attention of creators in general. On the other hand, neither have we yet thought of a valid reason why their need to opt out should be pressing.

We presume, in passing, that a creator's opt-out made while living would remain in effect for the term of copyright.

41. What measures should a collecting society take to find a non-member or missing rights owner after the distribution notice fails to bring them forward?

Collecting societies should conduct the equivalent of diligent search to locate missing creators – as is currently best practice. It would seem sensible first to search for the creators to whom the largest sums appear to be due (who will be those whose names are known, but not yet their locations).

42. How long should a collecting society allow for a non-member rights holder to come forward?

Seven years.

It's the appropariate traditional[31] number.

31 See for example *Inheritance Tax Act 1984*; or *Trade Marks Act 1938*; or www.pitt.edu/~dash/grimm101.html accessed 19/03/2012

43. Aside from retention by the collecting society or redistribution to other rights holders in the sector, in what other ways might unclaimed funds be used? Please state why you think so?

Unclaimed funds should be used to the benefit of individual authors and performers in general – for example for training and awareness-raising – as is the case in the Nordic countries' schemes.

This is a matter of principle and one element of the *quid pro quo* established in the Nordic countries in return for weakening the creator's exclusive right to authorise copying.

The funds are, after all, held in trust on behalf of the creators.

44. What do collecting societies do well under the current system? Who benefits from the way they operate? Please explain your response and provide evidence for it.

By collecting money due to creators under various licences and distributing it to individuals, collecting societies save licensees the cost in time and grief of negotiating individual licences and otherwise dealing with the very large numbers of contracts. Though we can see room for improvement (Question 45) we are in general happy with performance.

45. What are the areas for improvement in the way that collecting societies operate at present? Who would benefit from these improvements, and what current costs (if any) could be avoided? Please give reasons and provide evidence for your response.

Some collecting societies need to democratise – especially as a condition of issuing orphan-work or extended collective licences. See Questions 49 and 51.

Naturally, we would like to see collecting societies reduce their administrative charges. At present creators can be charged 16 per cent or more of the money collected on their behalf, since there are administrative charges for collection (*e.g.* by CLA for photocopying or ERA) beneath those for distribution (*e.g.* by ALCS for writers or DACS for visual creators).

Some members, particularly book authors, have called for more detail in the statements outlining the sources of the monies distributed to them (and some for less). We understand that improvements allowing members to access full details online are in hand.

46. Do you agree with the analysis contained in the impact assessment of the costs and benefits for collecting societies and their users? Are there additional costs and benefits which have not been included, or which you are able to quantify? Please provide reasons and evidence for your response.

No data.

47. Who else do you think would be affected by a requirement for collecting societies to adhere to codes of conduct? What would the impact be on them? Please provide reasons and evidence for your response.

The consultation mentions collecting societies' members and licensees: if Extended Collective Licensing were implemented then all non-member creators and their heirs and assigns would be affected. See Question 49.

Untraced non-members would be a particular disadvantage in taking advantage of the code (among other things), since it is less likely that they would be aware of the collecting society, let alone its code. The reasons for this are obvious.

48. Is one year a sufficient period of time for collecting societies to put in place a code of conduct? Please provide reasons for why you agree or disagree? Please also provide evidence to show what a workable timeline would be?

We recommend a year and a day, it having more poetry.

The evidence is available in the submission and model Codes from the collecting societies meeting under the auspices of the British Copyright Council.

49. What other benefits or rewards could accrue to a collecting society for putting in place a voluntary code? Please provide evidence for your answer.

The tide of public opinion is, we observe, running against pure self-regulation. We observe the collecting societies' clear preference for this.

We also observe that there is some disjunction between the section of this consultation on the regulation of collecting societies' present operations and the proposals for additional regulation related to Extended Collective Licensing or Orphan Works licensing, if these are implemented. These activities should be regulated by a statutory code (or codes) in order to have the best chance of building or maintaining creator confidence. See also Question 51.

50. In your view, does it make a difference whether there is a single code, one joint code, or several joint codes? Please give reasons for your answer.

In principle, we prefer a single code, but understand that the collecting societies have found this to be impracticable.

There should be a single code for matters specifically related to Extended Collective Licensing or Orphan Works licensing, if these are implemented: see **2.3** and **2.4** above.

51. Are there any other areas that you think should be covered in the minimum standards, or area which you think should be excluded? Please give reasons for your response, including evidence of alternative means of securing protection in relation to any areas you propose should be excluded from the minimum standard.

It would seem sensible to incorporate into the code(s) provisions for demonstrating that collecting

societies are democratically controlled by their members, as required by the proposals for extended collective licensing and for licensing orphan works: for example that the membership of the body corporate should be the rightsholders represented and that the Board should be elected by that membership.

The reason for this is simply a preference for the clarity achieved by each collecting society having a single code covering all its relations with rightsholders (and another covering its relations with licensees).

We recommend that in these elections each collecting society member have one vote.

Membership must be open to all economically active creators (and other rights-holders where appropriate) in the collecting society's field.

52. Are there any additional undertakings that a collecting society should give with regard to its members and the manner in which it represents them? Should any of the proposed minimum standards about members be excluded? Please provide reasons and evidence to support your response

Not that we can think of; but observe that *all* those listed in the consultation document are necessary.

53. Are there any additional undertakings that a collecting society should give with regard to its licensees, or should any of the proposed minimum standards be excluded? Please give reasons and evidence for your response, included why you consider any standards which you propose should be excluded to be unnecessary.

Not that we can think of.

54. Are there any additional expectations for licensees that should be set out by a collecting society in its code, or should any of those listed be excluded? Please give reasons why.

Not that we can think of.

55. Are there any additional measures that a collecting society should put in place to ensure proper control of the conduct of its employees, agents, and representatives? Should any of the proposed standards be excluded? Please say what these are and provide evidence to support your response.

Not that we can think of.

56. Are there any additional provisions that you believe would enhance the transparency of collecting societies? Should any of the proposed provisions be excluded? Please give reasons and evidence to support your response.

Not that we can think of.

57. Are there any other criteria that a collecting society should report against? Should any of the proposed criteria be excluded? Please give full reasons and evidence for your answer, describing what impact it would have and on whom

See our answer to Question 51.

58a. Are these criteria sufficient for the creation of a complaints procedure that is regarded as fair and reasonable by the members and users of collecting societies? Should any proposed criteria be excluded? Please provide reasons and evidence to support your response.

No answer.

58b. Please indicate whether you think a joint ombudsman or individual ombudsmen would work better.

Our preference would be for a single ombudscreature, or at least for a single point of contact for all the ombudscreatures.

59. Please say why you would prefer one over the other?

In order to maximise their accessibility

60. Is the ombudsman the right person to review the codes of conduct? Please give reasons for your answer, and propose alternatives if think the ombudsman is not best placed to be the code reviewer.

Probably.

61. What do you think about the intervals for review? Are they too frequent or too far apart? Please provide reasons for your answers.

The interval between reviews should be no longer than five years.

62. What initiatives should the Government bring forward to provide recognition of high performance against voluntary codes of conduct? Please give reasons and evidence for your response.

Don't know.

63. What do you consider the process and threshold for non-compliance should be? For example,

should Government test compliance on a regular basis (say by following Ombudsman's reports) or on an ad-hoc basis? What evidence would be appropriate to demonstrate non-compliance? Please give reasons for your response.

Compliance should be tested on a regular basis, probably in parallel with reviews, *and* in response to the ombudscreature's reports when these indicate material breaches of the code.

64. What, in your view, are suitable penalties for non-compliance with a statutory code of practice? For example, are financial penalties appropriate, and, if so, what order of magnitude would be suitable? Please give reasons and provide evidence for your answer.

One essential and deterrent penalty would the withdrawal of approval to issue orphan-works and extended-collective licenses in the event of breach of rules.

Our discussion of this raises an interesting question not covered in the consulation: what body would take over administration of existing Extended Collective Licensing contracts in the event that a collecting society was thus disqualified? We are tempted to suggest Network Rail, but will refrain.

The complexities of this may deter the regulator from imposing this sanction: we conclude that it must also have the option of levying a fine, which should be of the same order of magnitude as the salary of the Chief Executive.

65. Do you agree that the imposition of a statutory code should be subject to review? How long should such a code be in place before it is reviewed? Please give reasons for your response.

No answer.

66. If you are a collecting society which may qualify as a micro-business, would you be likely to introduce a voluntary code? If you are a user of collecting societies, what do you believe the Government should do to encourage good practice in any collecting societies which are exemp from the power to introduce a statutory code? Please give reasons for your response.

N/A

Exceptions

Private copying

67. Do you agree that a private copying exception should not permit copying of content that the copier does not own?

Yes.

(The form of the question indicates a misapprehension of the market in copyright works: it

suggests that the person doing the copying may hold a deed of assignment from, for example, the Beatles. The limitation should be to works which the user has legitimately licensed, or owns.)

68. Should the private copying exception allow copying of legally-owned content for use within a domestic circle, such as a family or household? What would be the costs and benefits of such an exception?

We believe it is impracticable to implement an exception which permits copying for personal use but forbids copying to household members.

Therefore, we insist that there be fair compensation, as mandated by EU law.

We believe that the European Commission is preparing to move to harmonise fair compensation for private copying: this should remove the inconsistencies between member states' systems that formed the main plank of criticism in the research paper cited. We note, additionally, that many of these inconsistencies arise from legal action taken by equipment manufacturers in attempts to frustrate the purpose of member states' legislation[32] and it is therefore perverse to call them in aid against the legislation or indeed the concept of fair remuneration.

There is merit in postponing UK legislation until there is an EU Directive, to avoid re-revision.

Extreme care must be taken with promulgating such an exception. In the context of privacy, it is widely accepted that most users (wrongly) perceive Facebook™ and blogs as "private". In the context of copyright, many will not be aware, or will choose not to be aware, that such use is publication.

Economic harm to creators from online dissemination is demonstrable. For example, National Union of Journalists member the Nick McGowan-Lowe reports:

> I was discussing illustrating a feature with a picture editor: and proposed that she could use a photograph I had taken of a fox eying up a chicken. "But I can't," she responded: "it's all over the blogs". I used the TinEye image search program[33] and found 15 infringing copies of the photo; I later found 255 using Google Image Search. So I lost a sale because of that use: the licence fee would have been in the mid-to-low hundreds. Further, many of the copies I found had been manipulated to bring the beasts closer together.

69. Should a private copying exception be limited so that it only allows copying of legally-owned content for personal use? Would an exception limited in this way cause minimal harm to copyright owners, or would further restrictions be required? What would be the costs and benefits of such an exception?

See above.

32 Details of German cases available on request

33 http://www.tineye.com accessed 19/03/2012

70. Should a private copying exception be explicitly limited so that it only applies when harm caused by copying is minimal? Is this sufficient limitation by itself, or should it be applied in combination with other measures? What are the costs and benefits of this option?

It should be so limited; but the odds against a randomly-selected individual understanding this limitation are steep.

71. Should the current mechanism allowing beneficiaries of exceptions to access works protected by technological measures be extended to cover a private copying exception? What would be the costs and benefits of doing this?

It should not be so extended. The only outcome of doing so that we can foresee would be a series of nuisance applications to the Secretary of State.

Libraries and archives

72. Should the preservation exception be extended:

- to include more types of work?

- to allow multiple copies to be made?

- to apply to more types of cultural organisations, such as museums?

How might this be done, and what would be the costs and benefits of doing it?

So long as it is clear that this refers to archiving only, not to making available to the public off the premises, then the making of backup copies of all creative works should be encouraged – with the provisos set out by the British Copyright Council.

73. Is there a case for simplifying the designation process which is part of Section 75? How might this be done and what would be the costs and benefits of doing it?

Don't know.

74. Should any other changes be made to the current exceptions relating to libraries and archives, and what would be their costs and benefits?

We know of none.

Research and private study

75. Would extending the copyright exception for research and private study to include sound recordings, film and broadcasts achieve the aims described above? Can you provide evidence of its costs and benefits?

No action should be taken until a proper impact assessment is done. See **2.6** above on "evidence".

76. Should the copyright exception for research and private study permit educational establishments, libraries, archives or museums to make works available for research or private study on their premises by electronic means? What would be the costs and benefits of doing this?

As does the British Copyright Council, the CRA insists that any such exception be a fair dealing exception.

Text and data mining

77. Would an exception for text and data mining that is limited to non-commercial research be capable of delivering the intended benefits? Can you provide evidence of the costs and benefits of this measure? Are there any alternative solutions that could support the growth of text and data mining technologies and access to them?

We support the position of the British Copyright Council.

Parody

78. Do you agree that a parody exception could create new opportunities for economic growth?

Most of the arguments advanced arguing that such an exception supports freedom of expression are in fact concerned with parodies of trade marks, not with copyright – and there are no plans to open that can of worms.

We have no idea what the opportunities for economic growth might be and very much doubt that anyone else has either.[34]

As we observed to Hargreaves, there is no parody shortage in the UK.

79. What is the value of the market for parody works in the UK and globally?

Don't know.

80. How might a parody exception impact on creators of original works and creators of parodies? What would be the costs and benefits of such an exception?

Any creative work, including a parody, will produce income if it is any good. Whenever someone makes a profit from a parody, the creator(s) of the work parodied should be entitled to a share the in income, as with pastiche: see Question 81.

34 The works of De Selby may provide clues: references can be found in Flann O'Brien, *The Dalkey Archive* (1964) Dublin: MacGibbon & Kee

We find it is impossible to conceive how quantitative research on the economic impact could be produced. What *extra* parodic work might be produced, given such an exception? What proportion of that work would be a genuine use of the exception as argued, and what an attempt to circumvent the purpose of copyright in rewarding the creator? What parodic work might *no longer* be produced, in the event that an exception removed the publicity value of an act of civil disobedience[35]?

We note that the consultation document claims that the moral rights of the creators of the work parodied protect against abuse. They should do so – were they to be universal, unwaivable and enforceable: see **1.2** above.

81. When introducing an exception for parody, caricature and pastiche, will it be necessary to define these terms? If so, how should this be done?

'Fraid so!

Is there any need to do anything about pastiche? In practical terms this is largely an issue for musical works, and any given "pastiche" is either an original work or an adaptation or arrangement of a work for which the original composer has a right to remuneration.

82. How should an exception for parody, caricature and pastiche be framed in order to mitigate some of the potential costs described above?

Very, very carefully, if at all.

83. Would making this a "fair dealing" exception sufficiently minimise negative impacts to copyright owners, or would more specific measures need to be taken?

The legitimate interests of creators – and consumers – are not met unless the moral rights are automatic, unwaivable and enforceable (see **1.2** above).

Consumers need the protection of knowing *what* it is that they are consuming (of which *by whom* is an essential component in the case of creative works).

One example of the need for this is raised by collections of photographs made available in limited circumstances on the clear understanding that they be released only in carefully-controlled circumstances. A vivid example was provided during the consultation meetings: consider a collection of photographs documenting the use of rape as a weapon of war in a place such as the Congo. The Imperial War Museum holds such collections on the understanding outlined above. The use of such images in parodies is unacceptable, and likely a breach of contract. We believe that only the photographer has legal standing to prevent such use – but she must *have* the ability to make use of that legal standing.

35 Henry David Thoreau, *Civil Disobedience* (1849) and Mohandas K. Gandhi, "Duty of Disobeying Laws" *Indian Opinion* 7 September and 14 September 1907

84. Are you able to provide evidence of the costs and benefits of such an exception?

See Question 80 on the improbability of quantitative date, or even estimates, on this.

Education

85. How should the Government extend the education exceptions to cover more types of work? Can you provide evidence of the costs and benefits of doing this?

The "British system" of an exception which applies until a licensing scheme is created is held up internationally – for example at WIPO in Geneva – as a sensible, flexible approach. Why break it?

Samuel Johnson said that no-one "but a blockhead, writes but for money". The effect of changes that went so far as to eliminate licence fees for educational use – about which the Impact Assessment asks – would be to ensure that only blockheads wrote material specifically for schools – and, perhaps worse than these fools, the knaves of Public Relations seeking to insert material promoting their clients' interest into the classroom.

It appears that there is a misunderstanding in some quarters, confusing academic authorship with the profession of authoring. Academic authorship is generally a side-effect of a salaried post, and its major financial reward is through continuing or increased salary. Authoring textbooks involves a quite different set of skills, as anyone who has copy-edited academic prose for a general audience can attest.

We do hope that, as indicated by some officials, the question about elimination of collectively managed income from educational use falls into the category "we were only asking..."

86. Would provision of "fair dealing" exceptions for reprographic copying by educational establishments provide the greater flexibility that is intended? Can you provide evidence of the costs and benefits of such an exception?

We understand that the Authors' Licensing and Collecting Society has made a detailed submission on this question: we have no data on costs.

87. What is the best way to allow the transmission of copyright works used in teaching to distance learners? What types of work should be covered under such an exception? Should on-demand as well as traditional broadcasts be covered? What would be the costs and benefits of such an exception?

The potential costs for such an exception include loss of sales of works made available in this way: see Question 85 above. Online educational "environments" must:

- be secured against unauthorised access;
- detect password-sharing (including logging IP addresses and networks from which access is gained and querying *excessive* relocation of the user); and

- take reasonable steps to prevent copying beyond the fair dealing extracts permitted for study, criticism & review – though it is not feasible absolutely to prevent wholesale copying and licence fees must reflect the lost sales.

88. Should these exceptions be amended so that more types of educational body can benefit from them? How should an "educational establishment" be defined? Can you provide evidence of the costs and benefits of doing this?

No case has been made for widening the exceptions, or that bodies to which they might be extended cannot already make whatever fair-dealing or library-user uses they legitimately require.

89. Is there a case for removing or restricting the licensing schemes that currently apply to the educational exceptions for recording broadcasts and reprographic copying? Can you provide evidence of the costs and benefits of doing this, in particular financial implications and impacts on educational provision and incentives to creators?

No!

See answer to Question 85 above.

Disability

90. How should the current disability exceptions be amended so that more people are able to benefit from them? Can you provide evidence of the costs and benefits of doing this

As submitted by the British Copyright Council, the exception should apply to those disabilities which are directly related to the disabled individual's ability to access the work, that is, to those who are "Reading Impaired".

91. How should the disability exceptions be expanded so that they apply to more types of work? Is there a case for treating certain works differently to others? What would be the costs and benefits of amending the exceptions in this way?

Far preferable would be steps to encourage all open-market works to offer accessibility: for example for copies of films carry subtitles and audio description, and similar provision for other types of work.

92. What are the costs and benefits of the current licensing arrangements for the disability exceptions, and is there a case for amending or removing them?

The costs are minimal and the benefits include legal certainty. There is no case for amending or removing them.

Criticism & review

93. How should this exception be modified in order to simplify its operation?

There may be scope for clarifying the exceptions, though this has to be balanced against the confusion generated by over-clever interpretations of any new wording and of the very fact that there has been a change, and the legal costs incurred by those needing to establish precedent to determine what the new wording actually means.

As noted at **2.5** above any new wording must be precise – conforming with the first, "certain special cases" clause of the "three-step test" – and the use of vague terms such as "such as" can make only lawyers happy.

Even more so than with private copying, any extension of this exception risks misunderstanding or abuse. Again, in the context of privacy, it is widely accepted that most users perceive Facebook™ and blogs as "private". In the context of copyright, many will not be aware, or will choose not to be aware, that such use is publication.

See Question 68 for evidence of harm.

94. Should the current exception for criticism and review be amended so that it covers more uses of quotations? If so, should it be extended to cover any quotation, or only cover specific categories of use? Can you provide evidence of the costs or benefits of amending this exception?

See Question 93 above.

Reporting current events

95. Is there a need to amend or clarify the exception for reporting current events? Could this be done as part of a quotation exception, or would a separate measure be needed? What would be the costs and benefits of doing this?

No. It works. Leave it alone.

96. Is there a need to amend the existing provisions relating to speeches and lectures, and what would be the costs and benefits of doing so? Should these provisions be combined within a quotations exception?

We see no need to amend this.

97. Would there be additional benefits if all three types of exception examined by this section were combined?

No. The current exceptions are well-understood by many and such a rewrite risks confusion – and

thus heavy costs of litigation to establish the application of a new statute.

98. How should the current exceptions for use by public bodies be amended to support greater transparency? How could such exceptions be limited to ensure that incentives to copyright owners are not undermined? Can you provide evidence of costs or benefits of doing this?

No answer.

99. Should a new exception for time-shifting of broadcasts by social institutions be introduced? What would be the costs and benefits of doing this?

No answer.

100. Should a new exception for use during religious celebrations or official celebrations organised by public authorities be introduced? What would be the costs and benefits of doing this?

No.

It should not. The costs would include pre-empting almost any possibility of income from the creation of sacred music.

101. Should our current exceptions be expanded to cover use for public exhibition or sale of artistic works on the internet? What would be the costs and benefits of doing this?

This is a case in which the risks of an expanded exception lie in its possible misunderstanding or deliberate abuse more than in the intended effect. *If* there is to be such an expansion, it must be narrowly defined as suggested in consultation.

102. Should our current exceptions for the demonstration and repair of equipment be expanded? What would be the costs and benefits of doing this?

No answer.

103. What are the advantages and disadvantages of allowing copyright exceptions to be overridden by contracts? Can you provide evidence of the costs or benefits of introducing a contract-override clause of the type described above?

If the law were to override contracts to guarantee *exceptions* to copyright, we ask, why should it not do so to guarantee *rights to remuneration* as well?

It is impossible to assess the costs or benefits of introducing such a contract-override clause without specifying *what* the exceptions are. We suspect that officials do not wish to receive a 60-

dimensional matrix of permutations on the possible impacts.

As pointed out during the consultation meetings[36], the likelihood of interactions among the proposed changes is severe and crystallises around this one. Further, we are dubious of the "evidence" presented.

Consultation on this question should be repeated when policy on the exceptions is clear.

We note that the demand for such a clause comes from the libraries, specifically the British Library. It would seem that a large proportion of the contracts about which they have concerns are governed by law other than that of England and Wales or of Scotland; and it appears that many contracts in the paper presented to Hargreaves are in fact software contracts; so it is very doubtful that such a provision would offer the legal certainty requested. Alternative means of offering the requested legal certainty should be explored: if statutory Notices are not proceeded with, some form of judicial ruling should be sought.

In any case, the existing exceptions that permit or promote licensing should remain in their present form.

To answer questions raised in consultation meetings rather than the document: if government were minded nevertheless to proceed with such a rule, it should have application only to use by or in libraries and archives as currently defined in the Act.

104. Are there specific and or general areas of practical uncertainty in relation to copyright which you think would benefit from clarification from the IPO? What has been the consequence to you or your organisation of this lack of clarity?

The outstanding problem that creators suffer is not lack of clarity, but lack of access to justice. We await with interest the Small Claims Track in the Patents County Court.

105. Who do you think would benefit from this sort of clarification? Should it be reserved for SMEs as the group likely to produce the greatest benefit in economic growth terms?

It seems sensible to focus resources on SMEs (and, as noted in the consultation, micro-businesses).

106. Have you experienced a copyright dispute over the last 5 years? If so, did you consult lawyers and how much did this cost?

Creators are constantly beset with copyright disputes: approximately 200 per year have approached one CRA member, the National Union of Journalists for assistance[37] – and, as noted in its submission on the consultation on the Small Claims Track in the Patents County Court[38], an

36 Not least by the extremely experienced Judith Sullivan, late of the Intellectual Property Office

37 Estimate by the staff of the NUJ Freelance Office

38 See the NUJ's submission on the proposal for a Small Claims Track, available at http://www.londonfreelance.org/ar/SCT-PCC.pdf accessed 21/03/2012

unknowable number will have been deterred by the knowledge that there is no accessible legal remedy.

107. Do you think that it would be helpful for the IPO to publish its own interpretation of problem areas which may have general interest and relevance? What sources should it rely on in doing so?

It is likely that this would be helpful. Presumably answers would be compiled by officials and checked by counsel.

108. Do you agree that it would be helpful to formalise the arrangements for these Notices through legislation? Please explain your reasons.

Not initially. See Question 110.

109. How do you think that the IPO should prioritise which areas to cover in these Notices?

Solicit questions from stakeholders and on www.ipo.gov.uk and start with the most frequently asked.

110. Does there need to be a legal obligation on the Courts to have regard to these Notices? Please explain your answer.

Not at this time. Among other things, were such a requirement to be introduced at the same time as other far-reaching changes the risk of increasing public confusion is severe.

111. Are there other ways in which you think that the IPO can help clarify areas where the law is misunderstood? How would these work?

We are interested in the idea of an Official Copyright Guide – the contents of which could accumulate through the issuing of Notices (see Question 114). The question of whether this might grow up into a "Highway Code" to which the Courts would be obliged to have regard should be postponed (see Question 110).

112. Do you think it would be helpful for the IPO to provide (for a fee) a non-binding dispute resolution service for specific disputes relating to copyright? Who would benefit and how? Are there any disadvantages of IPO operating such a service?

It could *possibly* be helpful: but we are not clear for which of the cases that individual creators are likely to bring. Presumably the fee would be considerably higher than that for bringing a claim in the new Small Claims Track of the Patents County Court; would *non-binding* dispute resolution be massively useful in cases in which more than £5000 (or £3000 in Scotland) was at stake? As far as

the cases of we have in mind go, and assuming that a Small Claims Track is in fact implemented, it would seem sensible to wait to evaluate the usage of this.

113. What would you be prepared to pay for a dispute resolution service provided by the IPO? Please explain your answer, for example by comparison with the time and financial cost of other means of redress.

Don't know.

114. Which would you find more useful: general Notices on the interpretation of the law (free) or advice on your specific dispute (for which there would be a charge)? Please explain your answer.

We prefer general Notices. These should contribute to the education of new creators – and of citisens in general – will cumulatively construct a body of guidance. It is not clear why paid-for advice in specific disputes would be preferable to that available from membership organisations.

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