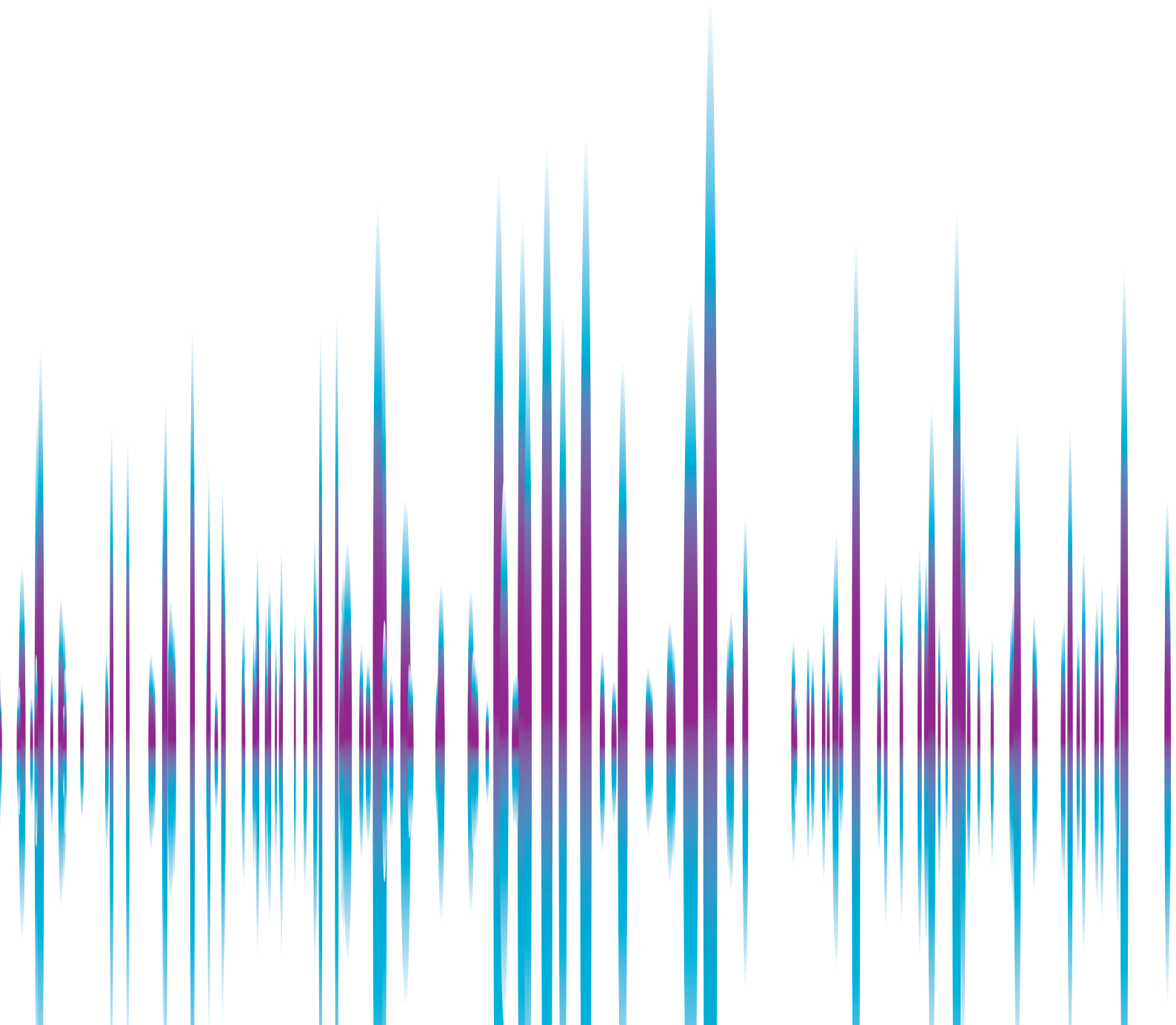
HM Government

MODERNISING COPYRIGHT:
A modern, robust and flexible framework

Government response to consultation on copyright exceptions and clarifying copyright law



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Executive Summary

The Government is committed to achieving strong, sustainable and balanced growth that is shared across the country and between industries. Following the Hargreaves Review of Intellectual Property and Growth, and an extensive consultation process, the Government believes that the copyright framework can be improved to make the UK a better place for consumers and for firms to innovate, in markets which are vital for future growth.

The UK already has a strong framework for exploiting copyright works (e.g. computer games, paintings, photographs, films, books, and music), ranked second only to the United States. This framework supports world-class creative industries, which together make up around three per cent of the UK's economy.

The Government recognises the importance of these sectors as contributors to the UK's wealth, export performance and cultural significance on the world stage. It recognises that copyright protection is vital for their success and will continue to ensure that the copyright framework supports their growth. The digital era and digital technologies provide new opportunities across the creative sectors and beyond, but pose new questions of a copyright regime that is based on an analogue world.

The UK therefore needs to adapt its strong but rigid framework for copyright into one that is modern, robust and flexible:

- **flexible** in removing certain barriers to using copyright works, and thus supporting innovation and growth;
- **modern** in dealing better with the challenges of current and future technologies; and
- **robust** in ensuring there continue to be appropriate incentives for creators and rights holders to carry on investing in the UK, as they do so successfully at the moment.

This document details the Government's response to consultation on a number of areas where copyright legislation appeared to get in the way of reasonable use of copyright works. The response (set out below) has been developed with three principles in mind, these are:

1. The copyright framework must continue to incentivise creators of content and support them in protecting their rights from unlawful use;
2. Where possible barriers to competition and growth should be reduced;
3. There are areas of life where copyright should not interfere.

After considering the responses to the consultation from a wide range of stakeholders and individuals[1] the Government considers that permitting people to make wider use of copyright works, but with suitable safeguards for rights holders, can make those works more valuable for everyone.

1 http://www.ipo.gov.uk/pro-policy/consult/consult-closed/consult-closed-2011/consult-2011-copyright/consult-copyright-response.htm

The Government aims to find a balance between the interests of rights holders, creators, consumers and users by introducing through Parliament a revised framework of boundaries for copyright and related rights in the digital age.

Legitimate users of copyright works, the vast silent majority who pay for works and value greatly the contribution that creators make to their lives, will gain important new rights to use those works. It should make those works more valuable, and creators and rights owners stand to gain some of that value, particularly where they themselves are innovating.

The interests of creators and owners will continue to enjoy strong protection, including requirements for people to deal fairly with copyright works[2] and robust action against those who acquire or make use of works unlawfully.

The Government believes these measures will also benefit innovation, competition, research, education and respect for the law, and expects them to lead to further, as yet un-quantified benefits to rights holders and to the UK. The case for action is set out in this document, with consideration of points made in consultation, while detailed impacts are explored in the economic impact assessments (IAs) published alongside it. Those impact assessments (reviewed and validated by the Government's independent Regulatory Policy Committee) suggest that these measures could contribute over £500m[3] to the UK economy over 10 years on a conservative view, with likely additional benefits of around £290m each year.

To ensure that permitted acts have the maximum positive impact, the Government wishes them to be clearly established and readily usable, and to deal effectively with current and emerging technologies. It wants to shift some of the current uncertainty about whether something can be done lawfully into a question of whether a licence is needed or not.

Consumers and users who purchase access to content should not have to pay again to store or make use of that content, if it is for their private, non-commercial use.

The changes are in line with the Hargreaves Review recommendations, and are set in a UK context in which there is existing case law and compliance with EU law on copyright.

Together, the measures set out in this document help ensure copyright is a force for growth across the economy, not a barrier to innovation in parts of it.

2 This defence of "fair dealing", already a feature of UK copyright law, means that these certain exceptions for users are limited to what a fair-minded person would think was fair and reasonable. This protects the interests of rights owners and creators while still allowing freedom to the many responsible users of copyright works.

3 Net Present Value, i.e. in today's money, allowing for future inflation etc.

The Government intends amend the number and scope of permitted acts in the following ways:

1. Private copying

- People will be permitted to copy content they have bought onto any medium or device that they own, strictly for their own personal use (such as transferring their music collection from CD to iPod).
- This will not allow sharing copies with others but it will allow consumers to copy material to and from private online cloud storage[4].
- Rights owners will still have the ability and incentive to license innovative, value-added cloud services.

2. Education

- The Government welcomes Richard Hooper's recommendation that rights holders should simplify copyright licensing for the education sector. Government will provide a fair basis for future licensing by modernising the current educational exceptions.
- Changes will make it easier to use interactive whiteboards and similar technology in classrooms, provide access to copyright works over secure networks to support the growing demand for distance learning, and allow use of all media in teaching and education.
- Only limited use of works will be allowed without a licence, so educational institutions will continue to require licences for general reprographic copying – for example copying significant extracts from text books to hand out to students.
- However, minor acts of copying for the purpose of teaching which cause little harm to rights holders, such as copying an extract of text to display on an interactive whiteboard, will be permitted without a licence as long as they are fair.

3. Quotation and news reporting

- The Government will create a more general permission for quotation of copyright works for any purpose, as long as the use of a particular quotation is "fair dealing" and its source is acknowledged.
- Minor uses of copyright materials, such as references and citations in academic papers, quotation as part of educational activities and short quotations on internet blogs or in tweets, will therefore be permitted as long as they are fair.
- Photographs will continue to be excluded from news reporting provisions, as they are at present.

4. Parody, caricature and pastiche

- The Government will legislate to allow limited copying on a fair dealing basis for parody, caricature and pastiche.
- Existing protection for moral rights, including the right to object to derogatory treatment, will be maintained.

4 Providers of "value-added" cloud services will still require appropriate licences from copyright owners.

5. Research and private study

- The Government will allow sound recordings, films and broadcasts to be copied for non-commercial research and private study purposes, without permission from the copyright holder. This includes both user copying and library copying.
- This change, which expands an existing exception which covers, literary, dramatic, musical and artistic works is limited to fair dealing and in the case of research the usage must be accompanied by a sufficient acknowledgement.
- Educational institutions, libraries, archives and museums will also be permitted to offer access to the same types of copyright works on their premises by electronic means at dedicated terminals.

6. Data analytics for non-commercial research

- Non-commercial researchers will be allowed to use computers to study published research results and other data without copyright law interfering.
- Where researchers have lawful access to copyright works, for example through a subscription to a scientific journal or having copies of papers published under a Creative Commons licence, they will be allowed to make copies of those works to the extent necessary for their computer analysis.
- Researchers will in many cases have to negotiate access to those works with copyright holders, for example through licensing. This approach is compatible with the approach to Open Access publishing set out by the Finch Review, allowing publishers to control access to their computer systems and get paid for the services they provide.
- This is an emerging field and the Government is prepared to facilitate discussions between publishers and researchers, both commercial and non-commercial.

7. Access for people with disabilities

- Government will allow people with disabilities the right to obtain copyright works in an accessible form, if there is not a suitable one on the market already.
- This will apply to all types of disability that prevent someone from accessing a copyright work, and to all types of copyright work.

8. Archiving and preservation

- Museums, galleries, libraries and archives will be allowed to preserve any type of copyright work that is in their permanent collection and cannot readily be replaced.

9. Public administration

- The existing exceptions will be widened to enable more public bodies to proactively share some third party information online, as they already can through issuing paper copies.
- The changes will only apply to works that are unpublished, or works that are already available to public inspection, and so will not compete with commercial use of works.

- The existing mechanism of complaint where a permitted act is restricted by technological protection measures will be maintained.

10. Copyright Notices

- The Government also intends to introduce a new, non-statutory system for clarifying areas where there is manifest confusion or misunderstanding on the scope and application of copyright law via Copyright Notices issued by the Intellectual Property Office (IPO). These notices are intended to clarify, but not make new law.

Next steps

The Government will publish draft legislation for technical review in 2013. It intends to introduce the measures in the smallest possible number of statutory instruments to minimise disruption to stakeholders, make best use of Parliamentary time and ensure that the revised system is implemented in a clear and consistent manner. The intention is that measures will come into force in October 2013.

In line with the impact assessments for these measures, the Government will also publish an evaluation strategy that will set out how the Government intends to measure the impact of the policy. There will be a formal post-implementation review to review the benefits and costs of the reforms and see whether further change is needed.

Introduction: copyright and growth

The Government is committed to achieving strong, sustainable and balanced growth that is shared across the country and between industries. It wants to make the UK one of the best places in Europe to start, finance and grow a business, with a competitive tax system, a skilled workforce, and a world-class research and technology base. The ambition to create the best conditions to encourage innovation and growth underpins the Government's work in all sectors, not least in regard to the UK's intellectual property framework.

The UK already has a strong framework for exploiting copyright works, ranked by users as second only to the United States[5]. This framework supports some world-class creative industries, which together make up around three per cent of the UK's economy. The Government recognises the importance of these sectors as contributors to the UK's wealth, export performance and cultural significance on the world stage, and will continue to support their growth. But the UK's system is much less well regarded for being fit for digital technologies than many major competitors.[6] Tackling this issue is vital not only for the health of UK technology firms of all sizes and the UK's globally renowned research base[7] but also for creating an environment in which UK creative businesses can shape and be shaped by emerging technologies. The UK therefore needs to adapt its strong but rigid framework for copyright into one that is both robust and flexible in the current digital age.

5 *Global Intellectual Property Index: The Third Report*, Taylor Wessing, 2011

6 In the Taylor Wessing Global IP Index (previous reference), the 'fitness of purpose' of UK IP law for new media was assessed as 13th among 18 ranked countries, below Japan, China, Brazil, the USA, France, Russia and Turkey among others.

7 The UK accounts for 14% of the world's most highly-cited academic articles, and the government invests £4.6 billion a year to support science and research projects.

Having identified this opportunity, the UK Government has consulted on proposals to make the UK's framework of copyright and related rights more robust, modern and flexible. This document sets out the Government's policy on allowing use of copyright works in certain special cases ("permitted acts", often referred to as copyright exceptions) and – again following the Hargreaves Review – on introducing a system of Copyright Notices aimed at clarifying poorly-understood areas of copyright law, which will aim to improve both consumer and business users knowledge and understanding. This will benefit both users and owners of copyright works.

Background to the Government's proposals

A number of opportunities for the UK to enhance its prospects for future growth through changes to its copyright system were highlighted by the Hargreaves Review of Intellectual Property and Growth[8] (May 2011), to which the Government responded in August 2011 with proposals based on the Review's recommendations[9]. The Government response indicated a desire to facilitate the legitimate use of copyright works without undue adverse impact on creators and rights owners, and to improve the flexibility of the system to deal fairly with digital technology and the potential for copying and new uses of works that it brings.

A consultation on the Government's copyright proposals was published in December 2011 and closed on 21 March 2012. The Government is grateful for the effort put into responses and the preparation of evidence. A summary of those responses was published on 14 June 2012 and is available from the Intellectual Property Office's website[10]. The responses – redacted to remove potentially defamatory material in some cases – were published on 26 July 2012, along with several that were received after the deadline. The Government also welcomes the interest of the BIS Select Committee in this area of work, and its recent report[11], to which the Government has responded[12].

Several of the copyright measures on which Government consulted are already being implemented. In the first part of its response to consultation, the Government announced it would introduce schemes to allow lawful use of orphan works and extended collective licensing by collecting societies under appropriate conditions, and to regulate collecting societies through codes of conduct. Measures to enable this form part of the Enterprise and Regulatory Reform Bill.

Alongside this process, work on the proposed Digital Copyright Exchange continues under Richard Hooper, including publication of his Phase 2 report in July 2012[13]. This work is looking at improvements in licensing, aiming to reduce transaction costs and make licensing easier. The Government said when it commissioned the feasibility study that it wanted the establishment of any Exchange to be industry-led, and Richard Hooper's recommendations are in the most part for industry to take forward. The Government is pleased that the industry has responded positively to the report's recommendations and will continue to support and facilitate the development of this industry-led work where necessary.

8 www.ipo.gov.uk/ipreview
9 www.ipo.gov.uk/ipresponse-full.pdf
10 www.ipo.gov.uk/types/hargreaves
11 www.publications.parliament.uk/pa/cm201213/cmselect/cmbis/367/36702.htm
12 www.publications.parliament.uk/pa/cm201213/cmselect/cmbis/579/57904.htm
13 Available from the DCE webpage at http://www.ipo.gov.uk/hargreaves-copyright-dce

The economic issues: copyright and growth

The copyright system is an important part of the UK's social and economic infrastructure. Not only is it key to the business model of many creative businesses, it also impacts on the sharing of information and culture by researchers, educators and citizens, and on the potential for digital technologies to create new value in the storage, display and transmission of content. The Government wants to ensure copyright makes the greatest possible contribution to UK economic growth and to our society.

Copyright gives authors, artists, and other creators the right to control the use of their works, and so to help earn a living from their creativity. It gives publishers, broadcasters and record companies an incentive over and above immediate returns to invest in new talent, culture and content and then enjoy returns on that investment over a long period. Related rights give musical performers, for example, an interest in the recordings they helped to create.

Copyright and related rights bring undoubted benefits to their owners, but can have less desirable consequences for others. Restrictions on copying and transmission of works that are intended to protect creators and encourage investment can end up merely preventing or limiting valuable uses of works. Archives stand to save money from being able to copy works and share them by computer terminals on their premises rather than shifting fragile documents back and forth from storage, and both users and society will benefit from improved access to those works. Furthermore, there are some instances where allowing creators control over certain uses of works would amount to giving them a veto power over public comment, news reporting or the direction of teaching or academic research.

It is therefore built into the fabric of copyright that the strong rights established by law for creators may be balanced by automatic permissions to use works for these and other purposes, as long as these "exceptions" do not unreasonably harm the owners of the copyright in those works.

The Government believes the UK will gain from allowing creators greater ability to quote fairly from works, from letting users do more with content, from reduced transaction costs and from more opportunities to share and develop knowledge. These gains must come within the strong European legal framework that protects the interests of creators and rights holders.

The Government's intention is both to ensure copyright provides appropriate incentives for the creation of valuable works and to make changes to tackle problems in the current system[14]. Economic growth is a principal motivator but fairness, the reputation of the copyright system, the consequences of increasingly widespread digital technologies and a range of wider social goods such as education and culture are also important considerations.

Much of the economic rationale for copyright reform comes from the radical change the digital revolution has brought to the creation and distribution of creative, scientific and academic material. For many forms of content, digital distribution is now the most common way to deliver services to consumers, reducing marginal costs of supply to a very small fraction of what they were. Production processes have altered at least as much, enabling significant economies in processing of images, text and audio-visual material, as well as much greater variety – through the use of innovative techniques – in what can be produced. Because many of these processes can be done over the internet, globalisation of content creation and distribution has accelerated. Consumers have gained from greater choice and availability of content services, and new industries have been created to supply them.

14 The Hargreaves Review referred to these as "activities that copyright currently over-regulates to the detriment of the UK". Both of these aims are set out in the Government's initial response to the Review, at http://www.ipo.gov.uk/ipresponse-full.pdf

The evidence is mounting that the IP system in Europe has hampered its development of digital industries, content and technology alike. A review of where global growth is being created in ICT and content industries[15] shows that Europe has failed to create any significant 'young leading innovators' in the internet based activities where growth is concentrated. Fragmented markets along with more restrictive and less coherent IP regimes are identified as part of the reason for the disadvantage compared to the rest of the world, including the US. The UK and Europe need to do better.

One illustration of how legal uncertainty over copyright can create barriers to growth and deter investment in new businesses comes from studies of venture capital investment both in Europe and in the United States. Studies by Josh Lerner at Harvard Business School have shown that adverse law reduces venture capital investment:

"Research in Europe following court cases in France and Germany related to online video platforms and cloud technologies found that rulings tightening the scope of copyright exceptions had significant negative impacts on venture capital investment."[16]

"In the United States… despite the widespread availability and maturity of technologies to time-shift video recordings and to store the underlying data in the cloud, investment in cloud video services did not really take off until a court ruling made it clear that the hosting providers were not at risk of infringing content owners' rights"[17]

Because of the potential for large damages, even small risks and uncertainties around copyright law may become impossible for investors to bear when added to those associated with new technologies and markets.[18] Feedback to the consultation suggests that this is a very real problem for the UK's emerging digital businesses. Many felt that all the risk of innovation lay with them, whereas rights holders would seek to appropriate a large share of any profit.The reforms proposed by Government are designed to improve clarity in the UK over what copyright-using firms and other users can do, so that risks are reduced and innovation is encouraged. They are also intended to meet consumers' reasonable expectations about how the system works, to allow the use of material which is currently blocked and effectively valueless, and to promote more efficient and lower cost licensing of content by owners to users. The measures are aimed at clear economic benefits through increased innovation and improved efficiency.

The Government is of course concerned that efforts to support growth in the rest of the economy should not be at the expense of the UK's valuable creative industries, and vice versa. Concerns include not just rights holders' and creators' fears of negative financial impacts from the Government's proposed reforms but also the adverse consequences for all parties (not just owners and users, but throughout the value chain) of working within a legal structure that does not align with the realities of modern creative businesses and of consumers, particularly digital technology and its implications for copying and distributing creative works through an ever-growing range of technologies.

Creative industries are very important to the UK; the importance of their investment in copyright to the UK may be even greater than previously thought: around £3.2bn (0.3% of UK Gross Value Added) higher than suggested by official data[19].

15 *New ICT Sectors: Platforms for European Growth?,* Reinhilde Veugelers, Bruegel Institute, 2012

16 *The impact of copyright policy changes in France and Germany on venture capital investment in cloud computing companies*, Lerner, 2012

17 *The impact of copyright policy changes on venture capital investment in cloud computing companies*, Lerner, 2011

18 *Copyright and Innovation; the Untold Story*, Michael Carrier, Rutgers University 2012,

19 The study, a collaboration between Imperial College, the Office for National Statistics (ONS), the Intellectual Property Office (IPO) and industry sources, is available from www.ipo.gov.uk/ipresearch-ukinvestment-201206.pdf

Equally, the internet is vital to any modern economy. It is hard to quantify exactly its impact but for illustrative purposes an AT Kearney report for Vodafone[20] suggested that the internet was worth £82bn to the UK and a 2012 Boston Consulting Group paper[21] suggested a value of $2.3 trillion for the G20 using a different methodology. Content rights accounted for £1bn of the AT Kearney figure, and a proportion of the £11bn online services market could be attributed to creative industries. This reinforces the fact that creative industries are an important part of the internet economy and that the internet is vital to creative industries. The Government wishes to encourage growth in both.

Furthermore, UK firms are an important part of global value chains for digital technology. For example, Apple purchases extensively from UK firms such as ARM Ltd, Imagination Technologies, Volex, Laird Technologies, and IQE; broker Charles Stanley estimated that around 30% of Volex's £320m annual revenues come from Apple. This shows not just that the UK already has a stake in high-tech electronics but also that there may be further opportunities for the UK to compete in a field currently dominated by large multinationals from outside Europe. Copyright may be only one factor in this, but it is an important one. Fair use of copyright works has been linked to enhanced growth by "private copying" industries in a recent – though as yet not formally published – study funded by Google[22]. This study found these positive impacts for growth from the introduction of US-style fair use in Singapore had little or no adverse impact on creative industries.

Taken together, these arguments reinforce the importance of providing a system that encourages both creative industries and technology industries. They illustrate the symbiotic relationship between the two and suggest that there are options for change that will benefit technology firms without harming creative industries and vice versa.

The case for change: issues raised in consultation

Consultation highlighted the strongly opposing views of rights holders and others on the likely benefits of the Government's proposals. A summary of these views is set out in the Summary of Responses[23].

A wide range of respondents were positive about the estimated impacts of the measures. In addition to agreeing with the Government's rationale for change, many provided helpful examples and illustrations of administrative savings and other benefits from the proposed changes, citing reductions in travel time and costs, savings in administrative time and improvements in efficiency through use of ICT to transmit information. Small firms identified benefits and potential for growth but struggled to provide meaningful quantification of them.

Many responses from rights holder and creator interests have at all stages questioned the case for change on economic grounds. This has been further articulated in responses to the consultation. A small number of respondents commissioned economic evidence, some of which was provided on a confidential basis.

20 *The Internet Economy in the United Kingdom*, AT Kearney/Vodafone, February 2012

21 *The internet economy in the G20*, Boston Consulting Group, https://www.bcgperspectives.com/content/articles/media_entertainment_strategic_planning_4_2_trillion_opportunity_internet_economy_g20/

22 *The Economic Value of Fair Use in Copyright Law. Counterfactual Impact Analysis of Fair Use Policy On Private Copying Technology and Copyright Markets in Singapore*, Roya Ghafele and Benjamin Gibert, 2012, available at: http://works.bepress.com/roya_ghafele/12

23 http://www.ipo.gov.uk/copyright-summaryofresponses-pdf

Some rights holder respondents felt that the estimates for growth set out in the initial impact assessments were either too high or incomplete (for example lacking figures for possible losses), and several questioned whether copyright reforms would result in any significant economic growth. In particular, it was argued that many of the Government's proposed measures would simply transfer value between businesses (e.g. from creative industries to multinational technology companies), or from business to consumers, without generating new value, or could even lead to a reduction in UK economic activity.

However, as others argued, new uses can benefit both new businesses and consumers, without causing harm to rights holders. This is not simply transferring surpluses from producers to consumers, or between industries, but creating new value from copyright works, allowing the UK stock of knowledge to benefit the economy as a whole.

Many of the arguments made in consultation responses concerning value transfer relied – implicitly or explicitly – on assumptions of perfect competition in static copyright markets. This is not a strong assumption, given the existence of monopoly rights. Similarly, assumptions about markets being static are less likely to be appropriate given that the case for change is in part driven by the evolving consequences of disruptive digital technologies. While the Government has listened carefully to arguments based on such premises[24], it is unable to give them significant weight.

Some rights holders who offered general comments argued that the existing copyright framework did not impede growth and innovation; and that it was only through strengthening the framework that further growth and innovation could be delivered. The same respondents often argued that stronger property rights would give creators and rights holders greater legal certainty, which in turn would incentivise innovation, whereas weaker protection would put the UK at a competitive disadvantage. While there is evidence for a general correlation between the perceived strength of IP rights and economic competitiveness, the relationship is much less clear for copyright in more developed economies.

Others noted that growth and innovation were influenced by several other factors such as access to finance and skills, and felt that the copyright framework should not have been considered in isolation. There are of course many more factors that bear on the attractiveness of investment in creative works in the UK, including access to finance, the global market for the work, and other opportunities available to creators. But neither these nor any of the important factors set out above mean that improving the UK's system of permitted acts will not be beneficial to the UK.

Impact assessment

One area where Government was urged to revisit its approach by some respondents to the consultation is the calculation of costs and benefits in impact assessments (IAs). It was suggested that IAs for the copyright consultation were over-optimistic in calculating benefits while not taking sufficient account of potential costs. This concern has been taken into account in preparing impact assessments for the measures announced in this document.

One of the purposes of the consultation was to elicit further information about costs and benefits, and where suitable data have been provided they have been used to refine impact assessments on the Government's proposals. In doing this, the Government has erred on the side of caution by including monetised costs even where benefits cannot credibly be monetised and by making more conservative estimates of likely gains. In consequence, some proposals have lower quantified benefits than assessed at previous stages and/or higher costs, but a correspondingly greater potential upside.

24 e.g. in Consultation on Copyright: Comments on Economic Impacts, Oxford Economics, 2012, http://www.allianceagainstiptheft.co.uk/downloads/consultations/current/Oxford%20Economics%20Consultation%20on%20Copyright.pdf

In a number of cases the Government has used experience in comparable markets, where similar changes in legislation have led to the creation and development of new products, as the best proxy for future outcomes of policy change in the UK. Although this relies on inference, the alternative – to neglect the possibility of future benefits – is worse: ignoring the known benefits of innovation in aggregate would privilege the status quo against the future best economic outcomes. Of course, over-estimating the benefits of innovation or under-estimating those of the current situation would be equally unhelpful in privileging change over continuity. For this reason the Government has looked carefully and critically at possible sources of future benefit from innovation.

The Government notes the argument made by some stakeholders that such measures should not be introduced unless there is a quantified net benefit[25]. However, Treasury guidance is that costs and benefits "should not be ignored simply because they cannot easily be valued"[26]. The unquantified benefits of many of these proposals are judged to be significant; both by Government and by a number of consultation respondents, and in some cases indicative figures for these benefits are substantial.

Legal and political issues

The Government has heard from copyright owners and their representatives that copyright is a property right, not regulation. The truth is that is a property right established and bounded by regulation such as the Copyright, Designs and Patents Act 1988, as amended ("the Copyright Act" in this document). This regulation gives force and form to copyright and related rights; creative industries (broadcasting excepted) are not regulated industries in the sense that, for example, utilities companies are.

It remains the Government's view that the legal system that governs how copyright interacts with other rights and laws – the regulatory framework for copyright – is not optional. Just as for other property rights,[27] the legal system for copyright must set reasonable boundaries. The Government is therefore looking to ensure that the UK has a modern, fair legal framework for copyright.

Some respondents raised legal concerns about the implementation of copyright exceptions, especially in the context of any potential departure from the Berne three-step test for permitted acts. The Government is confident that its proposals are within the law on any reasonable interpretation and compatible with the UK's international treaty obligations.

Other respondents argued that introducing or broadening certain permitted acts would put the UK out of step with the rest of Europe and therefore leave the UK isolated. In fact, the UK lacks provision for a number of permitted acts that are common in other European Member States, such as private copying and parody, which the Government now intends to introduce. Many common law countries, including the United States, Canada and Australia, also allow more flexible use of copyright materials than is currently permitted in the UK. Some respondents also suggested that UK work should be put on hold until various international-level discussions on exceptions had been concluded and/or begun. While it is important for the UK to remain compliant with international treaties and European law, it is also important for the UK to adapt rapidly and effectively to the changing conditions of digital technology. Waiting for international debate to cease is not a recipe for achieving this.

25 These calls typically refer to reference **24.**, a study commissioned by the Alliance against IP Theft (now Alliance for IP).

26 *The Green Book*: *Appraisal and Evaluation in Central Government*, HM Treasury, 2011, para 5.76, page 34, http://www.hm-treasury.gov.uk/d/green_book_complete.pdf

27 For example in the law of England and Wales the extent of rights over land is limited. For example, freehold interests in land can be lost by failures to protect them, and they may be affected by the rights of third parties, e.g. rights accrued by adverse possession, restrictive covenants and the like.

Licensing and permitted acts

Much of the disagreement between stakeholders in consultation on the Government's proposals was on the issue of licensing. Here there was a clear divergence of views at all points between rights holders, who argued that any and all permitted acts would detract from their ability to offer licences and/or the value of those licences, and users who wanted their rights to use copyright material to be unfettered by conditions, bureaucracy and – in many cases – payment of fees.

One of the arguments made by creators and rights holders in consultation was that licensing should always preclude or override any exception to copyright: if there is a licence then people should purchase it. On this basis, it is argued that the Copyright Hub that may be established by the creative industries (following the Hargreaves Review and Richard Hooper's subsequent feasibility study[28] into the creation of a Digital Copyright Exchange) renders any alteration to the UK's system of permitted acts unnecessary or premature.

The existence of a licence or otherwise can be an important factor in whether to permit certain acts of copying and if so on what terms. In particular, as discussed in the section "Fair dealing in UK copyright law" below, the existence or otherwise of a licence may be an important factor in deciding whether a particular act of copying would constitute 'fair dealing' and hence be permitted. However, the Government believes that other factors are important: the terms on which the licence is available, including the ease with which it may be obtained, the value of the permitted acts to society as a whole, and the likelihood and extent of any harm to right holders. For this reason, the Government rejects the argument that the mere availability of a licence should automatically require licensing a permitted act.

Some responses to consultation suggested that allowing unlicensed use of works when a licence was available was necessarily a violation of the three-step test. The Government believes this view to be incorrect, as the requirement of the three-step test is that the law "does not unreasonably prejudice the legitimate interests of the author", or conflict with the "normal exploitation" of the work. To argue that all exploitation of a work is "normal exploitation" is to reduce the three-step test to two steps, which is manifestly not its intent. Furthermore, a licensing override is potentially inequitable to users: some could be forced to buy licences for uses much broader than the permitted act in question, while others – where there was no licensing scheme in place – would pay nothing.

In the case of the Copyright Hub arising from the Hargreaves Review and Richard Hooper's subsequent programme of study, the mere existence of such an entity is therefore an insufficient reason to retain the status quo. It is also the case that no such body yet exists. The Copyright Hub is not even in its infancy: it has been conceived but not yet born. Furthermore, an industry-led service should not be given control over permitted acts; that is the responsibility of government. The Government's intention is therefore to review the impact of the system of permitted acts in the light of developments such as the Copyright Hub, rather than postponing long-overdue action to improve the UK's copyright framework. This will be done through post-implementation review, as described below under *What happens now?*

28 http://www.ipo.gov.uk/dce-report-phase2.pdf

Fair dealing in UK copyright law

Fair dealing[29] is a concept relevant to the scope and impact of many of the UK's permitted acts, including those on which the Government consulted. The Court of Appeal[30] has described the test for fair dealing as the objective standard of whether a fair minded and honest person would have dealt with the copyright work in the manner in which the defendant did, for the relevant purpose. First introduced into UK copyright legislation in 1911, fair dealing is a concept which is underpinned by substantial case law and exists in many common law countries, from Canada and Australia to India and Singapore. In the UK, fair dealing currently applies to acts permitted for non-commercial research, private study, criticism and review, reporting of current events, and education.

Three important factors relevant to whether a particular dealing with a work is fair are the effect that the dealing has on the market for the original work; the amount taken; and whether the work is readily available. In other words:

- The degree to which a use competes with exploitation of the copyright work by its owner. If a use of a work acts as a substitute for it, and thus affects its value, then it is less likely to be fair. However, this consideration does not rule out fair dealing for a commercial purpose.
- The extent of the use, and the importance of what has been taken. A useful test may be whether it was necessary to use the amount taken for the relevant purpose. This does not rule out copying of a whole work, but will usually mean only part of a work may be copied.
- Whether a work has been published or not. If it is has not been published, then dealing with it is unlikely to be fair.

As noted above, the existence or otherwise of a licence is an important factor in deciding whether a particular act of copying would constitute 'fair dealing'. If a use competes with a licensed use and so potentially harms rights holders, it is less likely to be fair dealing, particularly if the licence is easily available on reasonable and proportionate terms.

The Government asked in its consultation whether fair dealing should, in certain cases, be replaced by other standards of fairness, such as those set out in the EU Copyright Directive. Some respondents were concerned that doing so would mean departing from an already established body of case law, and would cause unnecessary confusion. The Government accepts these arguments and will therefore retain and use "fair dealing" as the standard when the fairness and degree of use of a work is relevant to a permitted act.

Technology neutrality

The Government's intention, in line with the Hargreaves Review's findings, is to ensure copyright is fit for the digital age, in which innovation and change is constant and rapid. That means the UK needs laws that apply not just to current technologies but potentially to future ones of similar utility. For example, as always-connected devices such as smart phones become ever more popular, the line between local and remote storage is becoming increasingly blurred, and is often indistinguishable to consumers. Many consumers expect to be able to transfer or back-up copies they have bought to remote private storage. Artificial distinctions between 'local' and 'remote' storage are therefore unlikely to satisfy this test of future-readiness, as well as being perceived as arbitrary or unfair by some.

29 The concept of "fair dealing" entered UK law in the 1911 Copyright Act and has been developed in statute and case law over the last century.

30 in Hyde Park *Residence Ltd v Yelland* (2001)

That is not to say that the law cannot and should not change in the face of further technological advances. No doubt it will need to. But the aim remains to have law that is meaningful to future technologies, not just today's or yesterday's.

Other factors in a healthy copyright system

Copyright does not exist in a vacuum, and the updating of UK copyright discussed here takes place in a broader context of support for UK creative industries. In particular, as well as a modern, fair legal framework for copyright, a healthy UK copyright system also needs there to be attractive legal ways to buy or access copyright works, education about IP and enforcement of IP rights.

Consumer awareness and education about fair behaviour with copyright works is very important. Although there is a limit to what Government can do, IPO has, in partnership with Aardman Animations, run the Cracking Ideas competition to introduce school children to intellectual property; is working with universities to reach students who need a good understanding of intellectual property to benefit their future careers; and is working with the music industry to raise awareness and respect of copyright, particularly in the online environment. To do this the IPO, together with UK Music, has launched a competition ("Musi© Biz") aimed at 14-18 year olds. This will be followed by a mobile platform game, developed in partnership with Aardman, which will engage this age group to develop their understanding of the value of copyright and the impact that illegal downloads can have on the industry, and the artists within it. Building on this, IPO will coordinate a wider campaign of action to help consumers and young people understand the importance of respect for and the harm counterfeiting of illegal downloads can do.

The industry-led Copyright Hub proposed by Richard Hooper in his report on the Digital Copyright Exchange also envisages a role in this space, and the Copyright Notices system would also contribute to better knowledge of what can and cannot lawfully be done with copyright works in the absence of rights holder permission. This will sit alongside other work by the IPO to help smaller firms get better value from their intellectual property[31].

Being able to enforce copyright is also a necessity for a healthy copyright system. The Government continues to press ahead with measures to assist enforcement, including improvements to the Patents County Court (introducing a small claims track from 1 October 2012 and in 2013 renaming the court to stress its broader role in Intellectual Property disputes, including copyright cases), taking action against online copyright infringement including through implementation of the Digital Economy Act, and following up the IP Crime Strategy published alongside the Government's response to the Hargreaves Review in August 2011. To understand issues around on line enforcement of copyright, IPO sponsored a large-scale consumer tracking survey by Kontar Media for Ofcom. The study - available from stakeholders.ofcom.org.uk/market-data-research/other/telecoms-research/copyright-infringement-tracker - is the first of a series that will create a benchmark for online infringement. The IP Crime Report 2012 highlights other ongoing work on enforcement.

31 *From ideas to growth: Helping SMEs get value from their intellectual property*, IPO, April 2012

What the Government will do

Summary: changes to permitted acts in the UK

This table summarises what the Government will do in response to consultation on its proposals to enhance the UK's regime of permitted acts.

Permitted act	What will the Government do?
Private copying	Introduce a narrow private copying exception, allowing copying of content lawfully owned by an individual (such as a CD) to another medium or device owned by that individual (such as a mobile phone, MP3 player or private online storage), strictly for their own personal use.
Education	Introduce a fair dealing exception for non-commercial use of copyright materials in teaching. Expand the type and extent of copyright works that can be copied by educational establishments. Expand the exceptions to enable distance learners to access educational materials over secure networks. Retain existing licensing arrangements for recording broadcasts and photocopying.
Quotation	Introduce an exception permitting fair dealing with quotations, as long as sources are identified.
Text and Data mining	Create a copyright exception to cover text and data analytics for non-commercial research within certain restricted limits, which will protect publishers from large-scale copyright infringement.
Parody	Introduce a fair dealing exception to allow limited copying for parody, caricature and pastiche, while maintaining current system of moral rights.
Research and private study	Change the scope of copyright law to allow copying of all types of copyright works for non-commercial research purposes and private study. Introduce an exception to allow educational institutions, libraries, archives and museums to offer access to all types of copyright works on the premises by electronic means at dedicated terminals for research and private study.
Disabilities	Broaden the scope of the current disability copyright exceptions to include all relevant types of disability and copyright work, and simplifying the processes and procedures related to these exceptions.
Preservation	Enable libraries, archives, museums and galleries to make preservation copies of all classes of work.
Public Admin. and reporting	Amend the current copyright exception for public administration and reporting to permit the publication of relevant third-party documents online.
Other permitted acts	Current position to be maintained.

Licensing: should contract terms exclude permitted acts?

There are longstanding concerns that contracts may in some circumstances undesirably restrict the uses permitted by copyright law. In order to achieve the full benefits of permitted acts, the Hargreaves Review proposed a general protection of such permissions from override by contract, which in a small number of cases the UK already provides[32].

The Government responded that where UK law permitted an act, the benefits of that permission should not be undermined by restrictions re-imposed by other means, such as contractual terms. The Government therefore sought views on whether to introduce a general provision that would make unenforceable any contract term purporting to prohibit or restrict a permitted act.

Consultation highlighted a distinct divergence of views[33], broadly between those that felt that permitted acts delivered public benefits that should not be restricted by contract provision; and those who considered that freedom to contract was important in principle and/or in practice, and should not be restricted.

Restrictions on permitted acts would tend to allow rights holders to use contracts to mitigate potential harms at the possible expense of reducing or eliminating benefits. In principle a restriction could benefit all parties; in practice it might benefit no-one, if the action taken does little or nothing to reduce harm to rights holders (for example if there was no harm to begin with) but impairs the value of permitted acts.

Rights holders were generally strongly opposed to any broad prohibition on contractual override of the exceptions, arguing that it would challenge established principles of freedom to contract and that there were serious dangers of unintended consequences. Rights holders suggested that contracts provide clarity and certainty for users about what the licensee may or may not do, and the price reflects the terms of use. It was argued that the absence of this clarity could lead to an increase in disputes and litigation, as permitted acts needed interpretation on a case-by-case basis. Some put forward a view that contract terms that prohibited or restricted the use of exceptions were relatively rare. Others felt that contractual freedom provided sufficient scope for users to negotiate or to choose not to accept terms, for example accepting a restriction in return for a specific benefit or a reduced fee.

By contrast, users and institutions serving users felt that a failure to address the possibility of contract override could and did render permitted acts meaningless, and their benefits wholly or partly unrealised. They argued this was a problem now. Consumers were not in any position to negotiate the terms on which copyright goods were sold or licensed, and even larger users such as institutions argued that negotiation was so resource-intensive as to be effectively impossible as a general rule; prices were not transparent and there was little or no choice of supplier.

32 For example, section 50A(3) of the Copyright Act – in the context of permitting software backups – states: “Where an act is permitted under this section, it is irrelevant whether or not there exists any term or condition in an agreement which purports to prohibit or restrict the act (such terms being, by virtue of section 296A, void).”

33 *Consultation on copyright: Summary of Responses*, June 2012, p. 27

The impact of multiple contracts

A particular issue concerning working with many different contracts was identified by libraries, museums and educational institutions. Contracts, particularly those governing the use of electronic journals, often override the copyright exceptions established in UK law. The transition from physical to digital media has meant that, in many cases, libraries have moved from owning physical resources to licensing digital ones. Contract terms and conditions govern the relationship between the licensor (usually the publisher) and the user (the library and its users).

Libraries reported that contracts with publishers for digital delivery of works restrict permitted acts. In practice, given the time and effort involved in checking the terms of individual contracts, they are forced to follow the most restrictive terms of which they are aware; this represents a significant curtailing of the permitted uses set out in the Copyright Act. The sum of much of this, according to the National History Museum, is that the "vital balance between the monopoly rights of the copyright owner and the need to protect public policy considerations... is being eroded."

Some rights holders warned that content providers could be reluctant to serve UK markets or move overseas if they considered that they were prevented from exercising necessary controls on users' actions in relation to works. A number of rights holders, even if sceptical of the benefits of preventing contracts from restricting permitted acts, acknowledged that libraries and similar institutions were encountering problems with the complexity and costs of the system. These respondents proposed alternative solutions including the greater use of model and consortium licenses, better contract management systems and better management of institutional resources.

While publishers made strong claims for the importance of freedom to contract in principle, there was little evidence of the benefits to any group of very wide variation in terms relating to permitted uses, where the uses sought (e.g. by library users) will often tend to be of a similar kind.

Waiver of moral rights by contract

Some creator respondents argued that if copyright exceptions were to be protected from override by contracts, then certain creators' rights should be protected in the same way from override by any contracts licensing their rights. The situation is not a direct parallel with permitted acts, in which the protection is for the non-owner of rights against the possible actions of a rights holder; the argument here is that a creator rights owner should be protected against the bargaining power of a potential purchaser or exclusive licensee of those rights. This issue was not part of the consultation, so views of other respondents are not recorded, but the issues raised about freedom to contract in other contexts are relevant here.

Clarity, uniformity and fairness of contract terms

The issue of whether or not contracts should be permitted to restrict permitted acts is complicated by a range of issues around the perceived clarity, uniformity and fairness – or otherwise – of contract terms.

At their best, contracts can provide clarity, certainty and proportionality in dealings: you give me X and I will do Y. But these benefits can be eroded if the bargaining power of the two parties is very different or if the contract terms are unclear, for example. Consultation responses here took very different views of the current situation.

Regardless of the relationship between permitted acts and contracts, it is important for copyright licensing to be on clear terms, whether between creator and purchaser or between owner and user. In particular, for digital content – where consumers' rights are less well developed than physical goods and services – this was identified as a need by some respondents. Additional clarity and transparency should benefit all parties.

The Government therefore encourages licensors' current and future efforts to make licence terms clearer for users.

What the Government will do

What is clear from consultation responses is that licence terms are important. At their best they may create clarity and enable far more than the limited permitted acts allowed under European law. At their worst they can erode socially and economically important uses of copyright works. The Government wishes to mitigate these negative effects while allowing the former. It considers that the benefits of clarity from licensing can be achieved by offering licences of broader scope than the permitted acts in UK law.

There are some permitted acts which under European law may not override contract terms[34]. A blanket ban on contract overriding copyright is therefore not possible. But the general principle that contracts should not be allowed to erode the benefits of permitted acts is accepted. Therefore, **to the extent that is legally allowed, the Government will provide for each permitted act considered in this document that it cannot be undermined or waived by contract.** This may include a prohibition on licensing override of permitted acts, or restricting the terms on which licensing may impact on permitted acts. The aim is not to establish contract as superior to permitted act or vice versa, but to ensure licensing does not restrict acts that are beneficial to society as a whole.

Other terms of contracts that are not directly related to copyright will not be affected. So for example being able to copy extracts from a document as an act of quotation will not be a defence against breach of a confidentiality clause in a contract. It will remain possible for access to copyright works to be controlled by contracts that govern how many works may be viewed, as a number or as a quantity of data (e.g. a maximum of 500 works or 10 GB/week). This will protect legitimate interests of rights holders.

This may not fully resolve issues around the terms of multiple contracts. The Government in the first instance encourages publishers and institutional users to work together to resolve those problems. Issues around creators' contracts could also be addressed in the same way by creators and those who purchase or license their rights.

The post-implementation review of the new system of permitted acts will consider the extent to which the new arrangements achieve the overall objective of achieving wider benefits while not disrupting the provision of appropriate incentives for investment in creative works. Further changes – whether to protect the integrity of permitted acts or the interests of rights holders and creators – may be necessary at this point.

34 For example, art. 5(3)(n) of the Copyright Directive

Technological Protection Measures and permitted acts

Some digital copies of works are protected from copying using technological measures. For example, DVDs are usually protected against copying, and some eBooks and digital videos use digital rights management (DRM) technologies to control the number of devices they can be used with. Such measures are referred to as Technical Protection Measures (TPMs) in UK and EU law. TPMs are also frequently used as a way to permit and control private copying of digital files. For example, films and eBooks purchased from the iTunes store are protected by DRM that permits personal copying by the buyer of the content but limit their copying to a limited number of approved devices, and the BBC's HD Freeview channels can use DRM.

Rights holders use these measures to prevent or deter copyright infringement. The supply and use of equipment to circumvent technological measures is therefore illegal in UK and European law in recognition of the damage it can cause. However, the use of TPM sometimes prevents activities that are permitted acts such as making an accessible copy for the visually impaired. For the majority of permitted acts, either the UK *must* provide for a means of access to TPM-protected content for the purpose of such acts, or the UK *may not* do so[35]. Of the permitted acts considered in this document, private copying is the exception: the UK has a choice as to whether to provide a means of access.

Access through appeal to the Secretary of State

In the UK, if a person cannot carry out a permitted act due to a TPM, and the rights holder has refused to provide a 'workaround', the mechanism used is that a user may issue a notice of complaint to the Secretary of State[36] (SoS). The SoS can issue 'directions' to ensure that the permitted act can be carried out.

It is important to note that the SoS cannot simply authorise a user to circumvent TPMs; it would not be lawful under the Copyright Directive. Possible outcomes of a SoS intervention would include a direction to the user to purchase an existing digital copy that was usable for the purpose required, or that a rights holder provide the user with a particular excerpt from a work.

It has previously been suggested that the notice of complaint procedure is not clear or easily accessible. In 2006 the Gowers Review of Intellectual Property recommended that work be done to remedy this, e.g. a model email form available on the IPO website. This change is long overdue.

The Government will therefore allow people to make requests electronically for override of DRM/TPM, as part of its broader aim of making government services accessible online.

Many respondents to the consultation expressed concern at the possibility of their work being easier to copy unlawfully if TPM could be overridden or removed. As stated above, users will not be allowed to override or remove TPM. To further insure against adverse impact from the appeals process, **the Government will set out clear criteria that the Secretary of State will take into account in considering an application to override TPM, such as the availability of suitable commercial offerings and the impact on business of the decision, in order to support a robust, modern and flexible system of permitted acts.**

Whether the way TPM workarounds are handled in the UK is effective in achieving the Government's objectives[37] will be considered as part of the post-implementation review of the new system of permitted acts.

35 Article 6 of the Copyright Directive

36 s296ZE, Copyright, Designs and Patents Act 1988, introduced into UK law by The Copyright and Related Rights Regulations 2003

37 i.e. to ensure copyright provides appropriate incentives for the creation of valuable works and to permit activities that copyright currently over-regulates to the detriment of the UK.

What happens now?

Legislation

The Government intends to legislate for a new system of permitted acts for copyright works, incorporating the changes discussed in this document. These changes need to be carried through consistently. In the light of stakeholder comments about the degree to which the existing Copyright Act has been amended since 1988, the Government will therefore introduce the system for Parliamentary approval *en bloc* rather than piecemeal, through the smallest possible number of Statutory Instruments. This will help the system be clear and consistent. For this reason, the Government proposes that all the measures take effect at the same time, the intention being that they come into force in October 2013.

Given that these measures result from a public call for evidence of the Hargreaves Review and have subsequently been consulted on by the Government, no further formal consultation is contemplated.

The Government will make available draft regulations for public scrutiny, and will seek comments on how well the text gives effect to the policies set out in this document. This is envisaged as comprising technical comments on the drafting of the regulations in question, not discussion of the merits of the policy. It will also publish criteria for appeal against refusals to provide copies of works protected by Technological Protection Measures.

The Government will not legislate to create a statutory system of Copyright Notices but the Intellectual Property Office will introduce a non-statutory scheme.

Evaluation

As noted in the impact assessments for these measures, a full evaluation strategy and Post Implementation Review is being developed. The Post Implementation Review will detail the benefits associated with the introduction of the copyright reforms and will include input from external stakeholders. The plan will also set out how and when the benefits will be measured. This will depend on the type of benefit, as some benefits will be measured by applications and take-up that can be measured from the first year of operation, whereas others will depend on information that will take several years. The evaluation strategy will set out the activities that will be undertaken in order to evaluate the policy, drawing on management information collected through the copyright system, as well as research commissioned in order to measure the benefits.

The main source of data available for evaluation will be collated using industry figures. These statistics, alongside other management information on the operation of the system, will be used by Government to assess the impact of the copyright reforms, including assessing whether benefits have been achieved and how policy or operations can be developed to realise benefits more effectively.

ANNEX A: Private Copying

Digital technology makes it easy to copy creative content like music and video from one device or medium to another. Copying is integral to many technologies such as computers and MP3 players and many consumers make private copies of content they have bought with little thought that they might be infringing copyright. For example, people commonly "format-shift" CDs they have bought to their own MP3 player or other personal media device, believing it to be reasonable, fair and lawful. However, such copying is currently unlawful in the UK without permission from copyright holders.

In this consultation the Government proposed to introduce a new exception to copyright for minimal acts of private copying which most people consider to be reasonable and which cause little or no harm to copyright owners.

Details of the current situation and the proposals on which the Government consulted were given in the consultation document.[38]

Points made in consultation

Submissions to the consultation from parties other than those representing copyright owners were, almost unanimously, in favour of this exception. Many felt that introducing this exception would deliver greater fairness to consumers and help to reduce uncertainty over what is legal and what is not, thus increasing public respect for copyright. Respondents felt strongly that it was unfair to prevent someone reproducing a legitimate copy that they have paid for, for their own personal use – for example moving a copy between personal devices or making a private backup of a copy. The Business, Innovation and Skills Select Committee agreed with this majority view, concluding "that a copyright exception based on personal use or use within the private sphere might prove most practicable and justifiable"[39]

Submissions on behalf of copyright holders also recognised the current ubiquity of private copying and the need for this to be recognised in law. However, the great majority of them felt that a private copying exception of any type or scope would cause them unreasonable harm. They argued that the Government should therefore apply a levy, licence or tax to copying devices in order to compensate for this harm, as is the case in some other European countries.

Some respondents argued that an exception truly reflecting what most consumers consider to be reasonable would permit copying in family and domestic circles as well as copying by and for the owner of a copy. A submission from Brunel University argued that this would be "a more realistic option that better corresponds to consumers' habits and practices". Others disagreed. UK Music, for example, noted survey data which shows that "whilst a clear majority believe that format-shifting one's own CD onto an MP3 player is totally acceptable, only one in 5 respondents believe copying a CD for a friend or 'ripping' music from a CD borrowed from a friend is totally acceptable behaviour."

38 http://www.ipo.gov.uk/consult-2011-copyright.pdf, p. 61

39 http://www.publications.parliament.uk/pa/cm201213/cmselect/cmbis/367/36702#a9.htm, para 36

The majority of respondents agreed with the Government's initial view that a wide exception which permits unrestricted private copying, including copying of rented, borrowed, or other content not owned by the copier, is not justified. Most felt that ownership of a lawful copy should be a prerequisite for being allowed to make private copies. The City of London Law Society said that an exception which is limited in this way "would render lawful acts which are undertaken by a large section (perhaps the majority) of UK society, and which society does not generally consider morally objectionable or harmful" while ensuring that creators still receive adequate compensation.

Many of those in favour of this exception wanted the Secretary of State to have the power to ensure that people are able to benefit from the exception even when rights holders apply technological protection measures (TPM) which physically prevent copying. There was concern from rights holders, however, that any measure that might require them to provide copies without TPM would lead to easier copying and therefore – as a further consequence – to financial loss.

Some respondents to the consultation considered the right to make private copies to be a basic consumer right which should not be limited by contract terms. Others, including but not limited to groups representing rights holders, supported a continued ability to license acts of private copying.

It was also apparent from a number of consultation responses that end-user licences relating to digital content are often obscure and difficult to understand, and cause a great deal of confusion over the extent of copying that consumers are permitted to do.

Minimising harm to rights holders

In its consultation paper, the Government proposed an exception that causes minimal or no harm to copyright owners. The Government considers that its preferred option (an exception which permits copying only by a lawful owner of an original copy) will achieve this aim. The exception will be limited to use by people who already own a lawful copy of a work it means that the ability to make personal copies can be factored in at the point of sale.

Market evidence suggests that the value to consumers of additional functionality associated with content, including the ability to make private copies, can be, and often is, factored in at the point of sale. When music downloads that could be copied freely for personal non-commercial use were first introduced they were sold at higher prices than the DRM-protected equivalents they were sold alongside, reflecting consumer willingness to pay more for copies that they could use more easily on different types of device.[40] Similar price differences can be observed in relation to other types of content where DRM is still used. Some consumers say they would not buy CDs at all if they were physically unable to format-shift them to their personal media devices.

The Government's own analysis agrees that, to some extent, the value that consumers gain from being able to make personal copies will be factored into the market via positive effects on prices and demand.

The Copyright Directive says that rights holders must be compensated for unreasonable harm caused to them by users of a private copying exception. In view of the minimal impact on sales expected to arise from introduction of this permitted act, and the opportunity that it provides for the value of private copying to be priced in at the point of sale, the Government believes it will cause minimal, if any, harm to rights holders.

40 http://news.bbc.co.uk/1/hi/technology/6516189.stm

The Government considers that levies or other compensation are neither required nor desirable in the context of a narrow provision that causes minimal harm. Levies are an unnecessary and inefficient tax on consumers. They are unfair to consumers in that they are payable regardless of the use to which a levied device (for example a hard disk) is put and regardless of whether a user has already paid for the copies they store on a device. Furthermore, particularly in the current economic climate, it is not right to extract more money from the pockets of hard pressed consumers.

Application to remote storage of copies

The Government proposed a technology-neutral private copying exception which would include remote private storage of copies (including private "cloud" storage). Technology neutrality is likely to be increasingly important to consumers and technology providers as the use of cloud services and remote storage becomes more common.

Some respondents questioned whether cloud storage could ever be "private"; that may depend on the exact nature of the storage and how it is achieved and accessed. In principle, the Government sees no reason in principle why private copying should be restricted to devices in the physical possession of users, particularly given the value placed on technology neutrality.

A number of rights holders, particularly in the music sector, argued that private copying to remote cloud-based storage as well as local device-based storage would cause them significant loss of licensing revenue. Various existing licensing arrangements with cloud services already operating in the UK were cited in support of this argument, most if not all of which provide value-added services beyond the mere storage of copies that consumers already own, such as Spotify (which operates a streaming, not ownership model) and iTunes Match (which distributes new copies of music to consumers). To the extent that cloud services add value above merely enabling consumers to store copies they have already paid for, they will be unaffected by the exception and providers of these services will continue to require appropriate licences from copyright owners. The position would be similar to that in the United States, where licenses from rights holders are required for value-added services, but are not required for basic storage of content.

Some rights holders argued that the removal of their ability to license certain types of cloud storage would cause them a significant loss of income, for which they should receive compensation. All or most cloud services that currently exist in the market and are licensed by rights holders will still require licences following introduction of the exception. Any loss of licensing income is therefore unlikely to be significant. Moreover, the Copyright Directive only requires compensation to be paid in relation to harm caused to rights holders by people who make private copies (for example, harm caused by sharing copies with friends and family). A narrow exception which does not permit sharing of copies is not expected to cause significant, if any, harm to rights holders, regardless of whether those copies are stored on a local or remote device.

The removal of the need for a licence to provide online storage services for private use is likely to reduce barriers to entry and enhance competition in this market, supporting technological innovation and economic growth. It would mean that providers of such storage are put on an equal footing with providers of digital device storage (such as hard disks and mobile phones) and physical storage (such as bookcases and CD racks), who are not currently required to pay for the right to store copies owned by consumers. Likewise, consumers would avoid paying additional fees when storing remotely content they have already paid for.

What the Government will do

There is a clear mismatch between what is permitted by law and the type of private copying that most people think is reasonable. The current law imposes unreasonable restrictions on consumers and may restrict the range of products and services available to them by limiting opportunities for technological innovation. In response to this, **the Government will introduce a narrow technology-neutral private copying exception which applies equally to all types of private storage and all types of copyright works. It will allow a lawful owner or buyer of a copy of a work to reproduce that copy for their personal use, but would not permit them to share copies with other people.**

This exception would therefore permit someone to copy music from a CD they have bought onto their mobile phone, or to back up an eBook onto their computer hard disk or other private storage, whether held locally or remotely. It would be allowed regardless of contract terms to the contrary. However, it would not allow someone to give copies they have made to friends, family or the wider public, nor would it permit copying of rented, borrowed or streamed content.

The aim of this measure is to align copyright law with reasonable and widespread consumer behaviour that causes little or no harm to copyright owners. Although the Government received no evidence of actual harm resulting from private copying within family or domestic circles, and recognises that many respondents consider this behaviour to be acceptable, it does not plan to allow it. Nor will it allow wider private copying, even on a "minimal harm only" basis. The aim of this measure is not to allow people to get content for free, without payment to rights holders, simply by copying it from someone else.

A permitted act that only allows copies to be made by and for a person who lawfully owns[41] an original copy will remove restrictions on the use of copyright materials that most people consider to be unreasonable and unnecessary, while drawing a clear line between acceptable personal copying and unacceptable sharing of copies. Consumers appear to recognise that sharing copies can harm creators and the Government does not want to dilute this message. Rights holders will therefore still be able to offer family copying and other licences that add value over pure private copying by individuals. They will also remain able to use technological protection measures (TPM) to restrict copying of works as and when they wish to do so.

The Government recognises the importance of TPM to copyright owners as a means of hindering unlawful copying of their content. In the interests of transparency, any restrictions on use enforced by TPM should be made clear to consumers up front, at the point of sale.

If TPM prevent consumers benefiting from this permitted act, consumers will be able to appeal to the Secretary of State to obtain an accessible copy. The Government considers this is necessary to gain the full benefit of private copying, but does not want this provision to undermine the reasonable application of TPM by rights holders, particularly in new business models. **The Government will therefore introduce a modified appeal provision, which will enable the Secretary of State to consider the availability of suitable commercial offerings and impacts on business before taking action on TPM.**

41 This would include downloaded digital content that has been purchased to keep (or licensed in an analogous way) such as eBooks or film downloads, but not rented or streamed materials.

ANNEX B: Quotation, reporting current events, and speeches

The Copyright Act provides certain exceptions which support freedom of expression and comment, including exceptions for the purpose of criticism and review, for reporting current events, and for the use of speeches. The consultation asked if these should be updated in order to remove restrictions to freedom of speech, minimise unnecessary barriers to business, and to better align with international standards.

Section 30 of the Copyright Act permits fair dealing with a work

(1) for the purposes of criticism or review and

(2) for the purpose of reporting current events.

Any extract must have lawfully been made available to the public[42] and must be accompanied by a sufficient acknowledgement. The exception for criticism and review applies to all types of work, while the exception for reporting current events does not apply to photographs[43]. The Act also provides exceptions for the use of speeches and lectures[44].

Article 5(3)(d) of the Copyright Directive[45] allows EU states to have exceptions covering "quotations for purposes *such as* criticism and review ...", whereas the equivalent exception in the Act is limited to use only for criticism and review. Other EU countries provide wider quotation exceptions than the UK's. Some define extra categories of quotation, whereas others permit any fair quotation.

Article 5(3)(c) of the Directive allows EU states to provide an exception for reproduction by the press. This is slightly broader than the current UK provision on use for reporting current events. For example, it can apply to photographs as well as other types of work.

Points made in consultation

Quotation, criticism and review

There were mixed views on whether the existing fair dealing exception for the purpose of criticism and review should be amended to permit other types of fair quotation of a work.

Those in favour of this amendment included groups representing academic institutions, those advocating free speech and debate, and other groups representing both rights holders and users. They gave examples of particular uses for quotation including academic citation, dramatic quotation, and internet linking. In addition to free speech considerations, it was argued that permitting *de minimis* quotation without having to seek permission from rights holders would reduce the administrative burden of clearing rights.

42 e.g. published, posted on the internet

43 This exclusion was introduced to guarantee that photographers were not deprived of the exclusive rights to a "scoop" news picture with a limited life.

44 Sections 58 and 59 CDPA, which rely on Article 5(3)(f) of the Copyright Directive

45 2001/29/EC, which is based on Article 10(1) of the Berne Convention

Those against this change – some strongly – included commercial film archives, news agencies, and publishers. They reported concerns that significant damage to their businesses would arise from scenarios such as:

- organisations ceasing to buy clips from news agencies and film archives; and
- news aggregators and cutting agencies extracting and distributing content without a need for a licence

It is, however, highly unlikely that any of these uses would be permitted by the proposed fair dealing exception. The fair dealing requirement will mean that the exception will not apply if the use of such a clip would conflict with its normal exploitation or cause unreasonable harm to rights holders, so would take into account whether a clip is available commercially from a news agency or film archive. The courts have already ruled that news aggregation of the type cited by these respondents is not fair dealing for criticism, review or reporting current events and it is therefore unlikely that it would be considered fair dealing under a quotation exception. Moreover, quotation exceptions appear to operate effectively in other countries without these projected problems.

Some respondents, for example the Open University, were of the view that copying of titles and extracts for the purpose of academic citation is already permitted as it is not a copyright infringement to copy an insubstantial part of a work. However, others noted that a newspaper headline or a title may enjoy copyright, to the extent that it reflects the creativity of its author, so could be considered a substantial part of a work when copied. Therefore, although many would not consider the citation of a title or short extract, to be a substantial or harmful use of copyright material, it may infringe copyright unless an appropriate defence can be relied upon. A quotation exception would provide a defence for this type of minimal use, provided such use is fair.

Reporting current events

Several respondents to the consultation, particularly those from the broadcast sector, were in favour of amending the existing exception for reporting current events. The BBC and others said that the exclusion of photographs from this exception was a real hindrance to news reporting in a visual medium. They noted that bringing photographs within its scope would not fundamentally alter protection for photographs, as the use of photographs without permission for the purpose of reporting current events will rarely be regarded as “fair dealing”. However, such an amendment would permit the use of photographs in certain limited cases that are in the public interest, such as where a photograph of a company director is taken from their website to report wrongdoing by them.

Responses to the consultation from photographers and their representatives suggested that the current exclusion is one which gives reassurance to photographers. They argued that its removal would not necessarily serve to provide greater clarity or support greater freedom of expression, and could weaken photographers’ rights.

Another argument from television production companies was that the exception should be amended to allow third party works originally used for the reporting of current events to be available for repeat use or viewing at a later date. We note, however, that the restriction of this exception to reporting of “current” events is a requirement of the EU Copyright Directive.

What the Government will do

The Government will amend the Copyright Act to permit the use of quotations for other fair purposes. This minor amendment will remove unnecessary restrictions to freedom of expression and comment and will better align UK law with international copyright standards. The exception will continue to require that a quotation is accompanied by a sufficient acknowledgement of its source, and it will only apply if the use of the quotation is fair.

The Court of Appeal of England and Wales, has described "criticism and review" as being of "wide and indefinite scope"[46].

The majority of uses that will be permitted by a quotation exception are therefore likely to be already permitted under the existing exception for criticism and review. Uses of quotations which might be considered to be fair but may not currently be considered to fall within the criticism and review defence could include references and citations in research papers, the use of titles to identify sources in a bibliography, and the use of titles and short extracts to identify hyperlinks in internet blogs and tweets. This amendment will serve to clearly provide that the use of quotations for such purposes is permitted long as the particular use is fair.

The Government will not amend the existing fair dealing exception for reporting current events, which does not apply to photographs. Although the use of a photograph without permission in order to report current events will rarely be considered "fair dealing", the Government notes the concerns of photographers and considers that there is insufficient justification for bringing photographs within the scope of this provision.

The Government does not intend to amend the existing exceptions relating to speeches.

In line with its general comments about contracts above, and with particular reference to ensuring freedom of speech and freedom of expression, the Government will provide that contract terms should not be able to prevent the use of these exceptions.

46 In Pro Seiben Media AG v Carlton UK Television Ltd [1998] EWCA 610

ANNEX C: Parody, caricature and pastiche

Currently, the UK Copyright Act does not provide an exception for parody, caricature and pastiche. However, the Copyright Directive allows such an exception, and many countries in Europe and around the world have provisions which allow for this use[47]. Parody is a popular form of comedy, and is often either aimed at works protected by copyright or makes use of them. People in the UK therefore currently need to get permission in most cases from relevant rights holders before using copyright works to create a parody work and run the risk of legal action and potential damages if they do not.

In its consultation, the Government proposed the introduction of a new exception to copyright for the purpose of parody, caricature, and pastiche.

Points made in consultation

The consultation sought views on whether an exception such as this could create new opportunities for economic growth, it also asked about the impact on creators of original works and the impact on creators of parodies. The consultation also asked questions about the details of such an exception – how should it be defined? How might it be limited so as not to harm creators?

There were many responses about this proposal, the vast majority of which were supportive of the general principle of this exception. Most notable was the quantity of responses from people who are 'consumers' of parody works, and saw this particular form of comedy as something important and something to be enjoyed. Others felt that the freedom to make critical parody works was a matter of freedom of speech and expression. Many were not aware that the UK Copyright Act currently restricts the use of copyright works for this purpose.

The consultation document suggested that the UK may be at a disadvantage on the world stage and that British broadcasters, production companies, and creators who produce commercially valuable parody works may be inhibited from making the most of their potential. It was also recognised that there is a growing trend for user-generated, often non-commercial, parody content on YouTube and similar websites.

Some responses received from parodists back this up. We received responses from parodists that said the current situation made it difficult to monetise some of their work because, for example, they said that broadcasters are reluctant to use their work because of the risk of legal action from rights holders. They also highlighted difficulties in obtaining permissions from rights holders.

Individual creators and comedians, as well as producers and broadcasters, said that they would expect to benefit from a reduction in the administrative burden of seeking permission from rights holders in order to make a parody. Parody-makers who rely on topical or current content also said they would benefit from spending less time to obtain permissions.

47 For example, in the EU France, Germany and the Netherlands have all opted to implement an exception for parody. Outside the EU, Australia and Canada also have equivalent provisions.

Although the consultation recognised that parody works may be created for humour and amusement and that they may also have an underlying satirical or critical purpose the consultation did not place much emphasis on the importance of the latter uses. However, many respondents pointed out that this was an important application of parody, saying that it served as a means to 'hold the powerful to account'.

The role of parody works in education, and in the nurturing of new creative talent (especially through non-commercial user generated content sites) was also highlighted by several respondents. It was suggested that making it easier to create parody works would have a profound effect on the development of new creators, providing a net benefit to the cultural industries.

However, there were also responses from those who perceived this exception as potentially damaging. Responses were received from groups that issue licences allowing people to use copyright works for parody, which raised concerns about loss of licensing revenue. Respondents, including the Music Publishers Association, argue that licensing, and particularly licensing of synchronisation rights, is a substantial revenue stream for their businesses and that an exception for parody could result in a loss of income which would disincentivise their investment in new content. This issue was also important to film and picture archives. The response from ITN, which licences film clips for parody and other uses, said the proposals *"would have a dramatic cumulative effect on revenue streams."*

We have considered these responses carefully and our view is that a fair dealing exception should strike the right balance. A parody exception framed in this way would be unlikely to result in a significant loss of licensing revenue. At present, when a whole work (such as a musical track) is used in a parody the copyright owner will often allow this in exchange for appropriate remuneration. The introduction of a parody exception with a fair dealing limitation would mean that such licensing would still be possible, as it is unlikely that the taking of an entire work, where such works are usually available for licence, would be considered fair dealing in most cases. (A full explanation of 'fair dealing' is provided at the beginning of this document).

Concerns about possible infringement of moral rights were also raised by some respondents who felt that a parody exception would conflict with a creator's right to object to derogatory treatment of their work. Problems of such damage are however not evident in other jurisdictions, including many EU Member States that permit use of copyright works for the purpose of parody etc. The existence of a parody exception does not alter an author's moral rights or vice versa, and respect for moral rights could be a factor in whether an act is considered fair dealing.

What will Government do?

The Government will legislate to allow limited copying on a fair dealing basis for parody, caricature and pastiche, while leaving the existing moral rights regime unchanged. It considers that this permitted act will provide economic and cultural benefits by removing unnecessary restrictions on the activity of some creators, reducing administrative costs, and encouraging creators, without causing any significant economic harm to holders of rights in the parodied content. The requirement that any parody use of a work be 'fair dealing' is an additional restriction which ensures that the exception is not misused, and will preclude the copying of entire works where such taking would not be considered fair (for example if such works are already licensable for a fee). The existing moral rights regime will be maintained unchanged, so that creators will be protected from damage to their reputation or image through the use of works for parody.

In addition to the benefits to parodists outlined above, of allowing easier production of parody works, there are compelling social and cultural benefits such as the development of free speech and the fostering of creative talent. The wider public would also benefit from increased legal clarity and opportunities for freedom of expression when creating parody for non-commercial reasons. The Government agrees with the Business, Innovation and Skills Select Committee that genuine political and satirical comment should be protected[48].

If those using the exception for parody, caricature and pastiche find their access is restricted by technological protection measures, they will not benefit from the complaints mechanism that exists for some other permitted acts, as this is not allowed by European law.

48 www.publications.parliament.uk/pa/cm201213/cmselect/cmbis/367/36702.htm, para 47

ANNEX D: Research and Private Study

The Hargreaves Review identified a need to widen the existing research and private study exception to increase opportunities for innovation and widen access to skills and knowledge in certain fields through the use of sound recordings, films and broadcasts.

Copyright law currently allows researchers and students to copy some types of copyright works for non-commercial research or private study[49] provided the copying constitutes fair dealing, as described above. However, there is no equivalent exception forsound recordings, films and broadcasts. This means that people who wish to make use of these copyright works for the purposes of non-commercial research or private study, for example in the fields of musicology (several tracks may be needed for computer analysis), media studies, film, oral history, architecture, medicine (audiovisual stimuli), genealogy and science, need to obtain permission from the copyright owner. Obtaining permission can be an expensive and time-consuming process, especially if the copyright owner is difficult to trace or does not respond to a request, with no guarantee of ultimate success.

The Copyright Act also permits libraries to make and supply copies of works for the purpose of non-commercial research or private study. The person to whom copies are supplied must satisfy the librarian that they will use such copies only for the purpose of non-commercial research or private study. This exception is restricted to the same classes of works.

These exceptions in relation to copies made by libraries for non-commercial research and private study reflect the provisions in the Copyright Directive. However, the Copyright Directive also allows educational institutions, libraries, archives and museums (collectively referred to as “Institutions” in the text below) to communicate works from their collections to people on their premises by electronic means for the purpose of research and private study[50]. The UK currently has no such legal provision.

Issues arising from consultation

Extending the research and private study exception to all types of work

Stakeholder responses showed a similar pattern to responses to the consultation that followed the 2006 Gowers Review[51]. The majority of respondents supported the introduction of a research and private study exception covering more types of copyright work. This reflects a belief that all fields of research should benefit from a similar access to source material. Supporters – mostly researchers, libraries, archives, educational establishments and museums – cited the benefits to learning, education, and research, including administrative cost savings[52]. It was argued that expanding this exception would support a consistent and logical copyright regime, and promote transparency and legal compliance. Views on how to frame an expanded exception were mixed.

49 The Copyright, Designs and Patents Act 1988 (as amended) s 29 provides that fair dealing with a literary, dramatic, musical, artistic work or typographical arrangement for the purposes of private study does not infringe any copyright in the work, and so does not require the user to obtain prior permission from the copyright holder.

50 Copyright in the Information Society, Directive 2001/29/EC. Article 5(3)(n) : “use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2(c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections;”

51 *Taking forward the Gowers Review of Intellectual Property: second stage consultation on Copyright Exceptions*, http://www.ipo.gov.uk/consult-gowers2.pdf

52 See for example http://www.ipo.gov.uk/response-2011-copyright-christie.pdf

Of those who did not support any expansion of the exception, several were concerned about the risk of misuse; other respondents argued that there was already adequate provision through licensing schemes[53]. Some felt that expanding this exception would lead to copies being separated from their metadata and uploaded onto online platforms without rights holders' consent. Others were content with introducing the measure, provided it preserves existing licensing arrangements. It was argued that to dispense with these would have a significant impact on sales and the incentive to create.

Copying by libraries etc. for research and private study

Some individual respondents expressed concerns about the complexity involved in making copies and how time-consuming and often costly it could be. Some users suggested that the regime of current restrictions made illegal copying commonplace. The main argument from supporters of expansion of this exception was that it was inequitable and inconsistent for some categories of material to be outside the exception. Several respondents here pointed out that works often contained a variety of different media, so differing copyright regimes represented an inconsistency that was difficult to manage. There were also arguments around cost savings to researchers and Institutions[54], and the legitimisation of common archiving and preservation practice while preserving a high degree of control over copying[55].

Libraries and archives suggest that seeking signed declarations about lawful use from students or researchers asking for copies under this exception may be unnecessarily burdensome[56]. They argue that there is no obvious financial incentive to abuse the exception as the cost of copying by libraries and archives is greatly in excess of the purchase price of those works that are commercially available.

Making works available via dedicated terminals at Institutions

Those in support of permitting access to works electronically via dedicated terminals on the premises of Institutions cited the merits of opening up collections to researchers and educational groups. Responses indicated a problem with providing access to the range of copyright works held by educational establishments, libraries, archives and museums[57]. This was particularly the case for materials that could not readily be provided in physical form because they were too fragile to risk (e.g. old manuscripts) or incompatible with modern software (e.g. old computer programs) but had already been digitised for preservation purposes. Some anecdotal examples of potential cost savings were given[58].

Some rights holders felt that to allow any exception permitting educational establishments, libraries, archives or museums to make works available for non-commercial research or private study by electronic means would damage the revenue of those providing services to these bodies. These respondents noted in respect of access via terminals that the Copyright Directive only allowed works to be transmitted electronically if they were not subject to purchase or licensing terms.

53 See for example http://www.ipo.gov.uk/response-2011-copyright-bapla.pdf

54 http://www.ipo.gov.uk/response-2011-copyright-natrecscot.pdf

55 http://www.ipo.gov.uk/response-2011-copyright-na.pdf

56 See for example http://www.ipo.gov.uk/response-2011-copyright-nls.pdf response to question 74

57 e.g. http://www.ipo.gov.uk/response-2011-copyright-nmdc.pdf

58 For example, the Natural History Museum identified but did not quantify cost savings through dispensing with the need for a physical document delivery service between its on-site and off-site collections: it would "save the staffing, lease and running of the shuttle vehicle". By way of illustration, "man and van" hire in London – where the museum is based – is available for £15 per hour. Taking this as a proxy for the full cost of a shuttle service (including administration) during an 8 hour day, 250 working days per year gives an indicative figure of £30,000 for the potential saving in this one example.

Some institutions outlined existing contractual safeguards for "walk in access" to libraries etc. including vetting individuals wishing to use resources, and the existence of rules and regulations establishing conditions of access. In a submission received after the consultation closed, Universities UK made a similar argument[59]. The Publishers' Association[60] provided an example of the terms on which Lithuanian law permits access on the premises of an Institution.

Concerns about abuse

For some respondents, changing the exception would be acceptable as long as concerns around infringement could be addressed. Most of these concerns were around the circumvention or removal of Digital Rights Management (DRM) protection on any source materials and subsequent illegal copying and distribution. There were further concerns around how Institutions would oversee access, and whether the individual engaged in the copying was genuinely acting in an individual capacity or was part of a body, such as an education establishment, which had a licence covering the copying in question.

Potential competition between libraries and other such Institutions and rights holders' own commercial archives was a further issue, but the consultation did not elicit detailed evidence on this. The scope for abuse of copying provisions by Institutions providing cheap copies to users appears very limited: figures provided to the consultation suggest that such copies are much more expensive than commercial ones in any case.

Rights holders cited difficulties in identifying non-commercial research when performed by private individuals. Some rights holders who either accepted the merits of the exception or dealt with ways in which the exception should be mitigated, took the view that access should be controlled tightly (for example, on the premises of an educational institution), and should also be kept secure. Publisher John Wiley and Sons injected a cautionary note into these calls:

> *"There is no guarantee that restricting application of the exception to educational institutions will preclude potential abuse. The retention of a non-commercial fair dealing exception will be an important measure."*

What will Government do?

The Government believes it is important that all copyright works, including sound recordings, films and broadcasts, should be available for reasonable use in genuine research and study, while not unduly infringing the rights of copyright holders of such material. This directly benefits those conducting research and private study; however, it is generally understood that there are spill-over benefits from fundamental research, so improvements to research should have broader positive consequences for the UK economy and society. The status quo is likely to make UK research less effective, less efficient, and more constrained in its scope.

In the absence of strong quantitative data, the Government has identified and provided illustrative figures for administrative savings for all parties from the expanded research and private study exception (best estimate of benefits: around £10m p.a. to rights holders and £5m p.a. to users). Provided that the exception is drawn in such a way as to reflect concerns of rights holders over possible abuse (including over impacts on technological protection methods), direct costs are likely to be low. A fair dealing exception will tend to minimise negative impacts on licensing and is also most likely to save the administrative costs of a small number of requests to use works: for larger numbers of requests, licensing will also be a good way to reduce such costs. Such an exception may also stimulate the development of research-orientated copyright licences for Institutions and/or individuals, which would be new markets or sub-markets for rights holders.

59 http://www.ipo.gov.uk/response-2011-copyright-uniuk.pdf
60 http://www.ipo.gov.uk/response-2011-copyright-pubassoc.pdf

The Government will therefore introduce provisions to allow sound recordings, films and broadcasts to be copied solely to the extent necessary for non-commercial research and private study purposes, without permission from the copyright holder. In the case of non-commercial research, usage must be accompanies by sufficient acknowledgement. This includes both user copying and library copying. This change will remove the current inconsistency caused by the uneven treatment of different media, and will enable increased quantity of higher quality research in relevant fields. Other benefits will include reducing transaction costs and removing unnecessary rights clearance barriers for existing research.

Provision will be made to prevent this permitted use from being undermined by contracts, provided of course that such use is fair. The UK's mechanism for access to TPM-protected material will apply, as required by EU law.

To cut unnecessary administrative costs on libraries and archives, and on their users, the Government will look to remove or reduce requirements to seek signed declarations from students and researchers as to the intended use of works.

In addition, to facilitate research and private study on digitally-preserved material in educational institutions, libraries, archives and museums, these Institutions will be permitted to offer access to the same types of copyright works on the premises by electronic means at dedicated terminals for research and private study, subject to purchase or licensing terms for those works. There is potential for cost savings through the substitution of digital delivery for physical delivery. The main benefit of this exception is likely to lie in enhanced access to cultural works that have been lawfully digitised.

ANNEX E: Data analytics for non-commercial research

Automated analytical techniques such as text and data mining work by copying electronic information, for instance articles in scientific journals and other works, and analysing the data they contain for patterns, trends and other useful information. These technologies typically work by bulk copying entire works (e.g. journal articles), which will infringe the copyright in those works unless relevant copyright owners and publishers have given their specific permission in relation to each work used, or unless the copies are transient copies. Researchers argue that copyright can thus obstruct the use of technology that is capable of adding considerable value to scientific research.

Researchers argue that some of the things that text and data mining can do merely automate actions that could be done lawfully "by hand" if enough researchers were involved. From this perspective, the added value is in the automation of the activity undertaken with the copyright work, value provided by analytic technology, and not by an additional service provided by a copyright owner.

On this basis, the Hargreaves Review recommended introducing an exception to copyright that would permit the use of analytics for non-commercial research. The Review also noted that text and data mining were often expressly excluded by contracts for access to research material, and recommended that this restriction should be removed. The Government agreed and consulted on a proposal to this effect.

Issues arising from consultation

This proposal received a large number of comments, with strong and divergent views. There was general agreement that analytic technologies are valuable, and that encouraging their wider deployment will be beneficial for the UK[61]. A number of publishers stated their aim to support wider deployment of these technologies. But views were strongly divided on how to achieve this aim, the current levels of demand for using these technologies for research, and the effectiveness of publishers' processes for servicing demand. There was also uncertainty about what uses of these technologies were currently permissible without specific authorisation from a copyright holder, and some demand for action by the Government and/or the EU to clarify this. There was also uncertainty about the meaning in practice of "non-commercial"[62].

Broadly, responses were divided between supporters of an exception in this area on the basis that it would lead to improved research; those who supported an exception but believed that only a solution which also covers commercial research would be effective; a number of individual responses stressing in particular the need to support the use of analytics technologies for accessibility; and opponents (typically publishers). Opponents were concerned to maintain security of access to works and stressed the importance of licensing solutions to effective research publishing. Publishers set out a range of issues from technical challenges to potential interference with the services they had developed or were developing. Some questioned whether there was genuine demand for text and data mining services.

61 Benefits cited included: enabling knowledge discovery to operate with very large quantities of research; better research across specialisms; novel discoveries and discoveries of new areas to explore further; increased outputs such as research findings, academic papers, improvements to the robustness of conclusions, and costs saved from trials where problems could be predicted early.

62 Recital 42 of the Copyright Directive offers some insight here: "When applying the exception or limitation for non-commercial educational and scientific research purposes, including distance learning, the non-commercial nature of the activity in question should be determined by that activity as such. The organisational structure and the means of funding of the establishment concerned are not the decisive factors in this respect."

What will Government do?

The Government recognises that some publishers take an active role in developing text and data analytic technologies, and that some offer contracts that support the use of these technologies. However, under current conditions, research projects may in some cases require specific permissions from a large number of publishers in order to proceed. The Government has heard that the current requirement for specific permissions from each publisher is in some cases an insurmountable obstacle, preventing a potentially significant quantity of research from taking place at all. A more open market for the development of analytical technologies also has potential to offer opportunities to new and existing businesses, with potential knock-on impacts for growth. Evidence provided to the consultation suggests a permitted act would benefit researchers by £124m each year, and given the strength of the UK research base and the growing importance of data sharing/re-use this has a potential to be much higher if exploited effectively.

The copying involved in text and data analytics is a necessary part of a technological process, and is unlikely to substitute for the work in question (such as a journal article). It is therefore unlikely that permitting mining for research will of itself negatively affect the market for or value of copyright works. Indeed, it may be that removing restrictions from analytic technologies would increase the value of articles to researchers.

Bearing this in mind, **the Government proposes to amend the Copyright, Designs and Patents Act 1988 so that it is not an infringement of copyright for a person who already has a right to access a work (whether under a licence or otherwise) to copy the work as part of a technological process of analysis and synthesis of the content of the work for the sole purpose of non-commercial research.** This will enable key research without undermining publishers' control over IT systems or commercial exploitation.

A licence governing access to a work will not be able to prevent or restrict use of the work in accordance with this exception, but it may impose conditions of access to the licensor's computer system or to third party systems on which the work is accessed. Therefore the exception will not prevent a publisher from applying technological measures on networks required in order to maintain security or stability, or from licensing higher volumes of access to research outputs at an additional cost. To the extent that technological measures prevent a researcher benefiting from this exception, they will be able to appeal to the Secretary of State.

This measure will not provide a "right to data mine" works to which the researcher does not already have a right of access, and will not cover data mining for commercial purposes. This is consistent with the principles of the Finch Review of Open Access to publicly funded research, which concluded earlier this year[63].

Licensing for access will continue to be very important for much research, and may become more so for services offering added value. The Government recognises and commends work to make processes for licensing more effective, benefitting users and rights holders alike. The Government is prepared to facilitate discussions between publishers and researchers, both commercial and non-commercial, that will help establish the UK as a world leader in text and data mining techniques and services.

As noted in the Hargreaves Review, to gain the maximum overall public benefits from deployment of these technologies over the long term, their deployment for commercial uses will need to be encouraged. The Government will continue to consider what assistance, perhaps including clarification of existing law, could both support the commercial use of these vital new technologies in the UK and ensure fair remuneration and appropriate incentives for rights holders.

63 *Report of the Working Group on Expanding Access to Published Research Findings*, http://www.researchinfonet.org/wp-content/uploads/2012/06/Finch-Group-report-FINAL-VERSION.pdf

ANNEX F: Education

The Copyright Act includes exceptions which aim to support the provision of education by removing unnecessary burdens from teachers and educational establishments. Among these, Section 32 of the Act permits copying for the purpose of examination, and non-reprographic copying for the purpose of instruction. Section 35 permits educational establishments to record and use broadcasts, to the extent that licences for such use do not exist. Section 36 permits educational establishments to reproduce short passages from published literary, dramatic and musical works using reprographic means, to the extent that licences for such use do not exist. The Government consulted on proposals to modernise these permitted acts so that they reflect modern teaching practice and meet the needs of educational establishments.

The proposals on which the Government consulted included widening the permitted acts for education so that they apply to all types of copyright work and all types of modern technology, making the rules for using these works more flexible, and allowing more types of educational establishment to benefit from them. The Government's proposals sought to ensure that educational establishments are able to use technology such as interactive whiteboards and distance learning platforms without risk of copyright infringement. The consultation also asked whether, and to what extent, rights holders should be able to continue to override permitted acts for education through licensing.

Details of the current legal position and the Government's proposals are set out in the consultation document.[64]

Issues arising from consultation

Responses to consultation were divergent and strongly expressed. Educational users tended to find these permitted acts complex and resource-intensive to navigate, and felt that expanding the existing permitted acts could provide greater flexibility. In particular, they felt that the existing provisions had not kept up with technological developments and modern teaching methods, and should be amended to apply to presentation technology such as interactive whiteboards as well as distance learning networks. Many felt that licences for educational use were unnecessarily burdensome, and that it should not be possible for rights holders to license the uses permitted by education exceptions.

Reactions from rights holders were mixed. Representatives of certain sectors whose works are not currently covered by these exceptions, such as those representing photographers, argued that their works should continue to be excluded, in part because it was difficult to copy extracts of them without undermining their commercial exploitation. A number of rights holders were supportive of modernising education exceptions as long as they do not disrupt existing licensing arrangements or undermine technological measures that protect content. Rights holders were unanimously opposed to any removal or restriction of their ability to license uses permitted by the education exceptions.

Recording broadcasts, reprographic copying, and licensing

Particular concerns were raised about the removal of rights holders' ability to license the uses permitted under Sections 35 and 36 of the Copyright Act which respectively permit educational establishments to record and use broadcasts, and to make copies of up to 1% of a literary, dramatic or musical work using a reprographic process such as photocopying.

64 www.ipo.gov.uk/consult-2011-copyright.pdf, page 89.

Many authors and groups representing them were concerned that removing the ability to license the reprographic copying exception would significantly damage the income authors currently receive from educational photocopying and their incentives to research and write new works. An economic analysis commissioned by the Copyright Licensing Agency[65] was submitted which examined potential impacts of removing or restricting licensing of this exception – particularly if the percentage copying permitted by it were also increased. This analysis suggested that the proposed change would reduce the availability, quality and supply of those materials by reducing incentives to create them.

Supporters of licensed exceptions for reprography and recording broadcasts noted that, when they were introduced, the policy intent of these exceptions was to encourage the provision of licences for these activities and remove the risk of infringement by educational establishments in relation to works that have not been licensed. They are not like other permitted acts, which permit free uses of works, but act as backstop provisions to cover those works not covered by a collective licence.

In addition, supporters of Sections 35 and 36 noted that allows the acts covered by them to be licensed enables them to be broader than could otherwise be achieved without unreasonably harming incentives to creators. If broad exceptions were provided without allowing rights holders to license over them, they would potentially conflict with the international Berne three-step test. They also noted that, for similar reasons, a fair dealing exception would be unlikely to permit reprography beyond a very minimal level.

Very different views were expressed by those in the education sector. Although most agreed that licensing has an important role in compensating creators, existing licences were often felt not to reflect the true nature and extent of copying that they do. The Association of Colleges (AoC) said that many colleges pay thousands of pounds a year for a licence which effectively is “an insurance policy against possible use of copyright material” without taking into account the true nature and extent of any use.

Although some in the education sector supported replacing the current licensed exception that permits educational establishments to record and use broadcasts with a narrower unlicensed exception allowing only “time-shifting” of broadcasts, others were against this as doing so would mean narrowing this exception and making it less useful than it is at present. Many felt that the licences for recording broadcasts are fairly operated and aimed not to impose unnecessary burdens on them.

Flexibility of permitted acts for education

A number of respondents to the consultation noted that the current provisions relating to education were inflexible, so had not kept up with developments in technology and were often incapable of delivering their intended aims. For example, they noted that the bar on copying artistic works under the current reprography exception means that it is difficult to copy literary works which contain illustrations, and that limitation of this exception to copying 1% of a work per quarter often does not allow a useful proportion of a work to be copied. Many of these respondents favoured a more flexible approach to education exceptions.

Distance learning

Respondents to the consultation from the education sector generally supported proposals to extend exceptions for education to cover distance learning networks. A number of groups representing rights holders also supported this, as long as appropriate safeguards were provided in the form of adequate security and registration of users and the ability to license such networks was not removed.

65 *An economic analysis of education exceptions in copyright*, PWC, March 2012, viewable at p74 awards of www.ipo.gov.uk/response-2011-copyright-cla.pdf

The definition of an educational establishment

Most of the existing education exceptions can only be used by traditional educational establishments as defined in the Copyright Act. The Government proposed to widen this definition to include other institutions carrying out an educational purpose, for example public museums and galleries, in order to expand the type and number of bodies that are able to benefit from them. The organisations likely to benefit from this exception welcomed its application to them. Some rights holders welcomed an opportunity to clarify the definition of educational establishments, but few agreed that the definition should be expanded. Many were concerned that doing so would lead to greater uncertainty as to which institutions were able to benefit from these exceptions, and that a broad definition could potentially be open to abuse.

What will Government do?

There is little doubt that educational institutions face particular challenges when using copyright materials, and find copyright law and licences to be over-complicated and bureaucratic. The Government welcomes Richard Hooper's recommendation that rights holders should simplify copyright licensing for the education sector and provide greater transparency for licencees, and notes the encouraging that steps that are already being taken by a number of licensing bodies.

The education exceptions are intended both to complement and underpin educational licensing schemes. When they are modernised, it will become easier to use copyright materials in *de minimis* cases – with an interactive whiteboard, for example. The risk of accidental infringement will also be reduced when using materials under licence. However, schools, colleges and universities will continue to need to hold licences for significant uses of copyright materials, such as photocopying books or recording television programmes. It therefore remains essential that additional steps are taken to simplify licensing in this area.

The Government intends to implement the following amendments to ensure that teachers are able to copy and use creative works for the purpose of education, without unnecessary risk of copyright infringement:

- The permitted acts provided by Section 32 (currently permitting non-reprographic copying for the purpose of instruction and copying for the purpose of examination) will be replaced by a single non-commercial fair dealing exception for teaching, which will permit the use of copyright works to the extent necessary by way of illustration in order to teach about a subject. This, together with the fair dealing exception for quotation, will continue to permit the uses currently permitted by Section 32 but will also permit other similarly minor uses of materials protected by copyright which do not conflict with their normal exploitation. It will allow, for example, a teacher to copy and display a work by Picasso in an interactive whiteboard presentation to a class of students studying 20th century art; or to allow a university to make its past examination papers (which contain quotes and extracts from third party works) available to students on its university intranet.

  The exception will permit such use regardless of contract and licence terms to the contrary, but only if the use is a fair dealing with the work, is not for a commercial purpose, and the source of the work is indicated. It will not permit copying to an extent that would conflict with the normal exploitation of a work and potentially undermine sales of those works. So it would not permit, for example, a significant amount of a textbook to be photocopied for multiple students, as doing so could displace sales of that textbook. To a similar extent, it would not permit copying and sharing of commercial interactive whiteboard course packs.

- Fair dealing for teaching will apply to all organisations and individuals, and not only those that are defined as "educational establishments" in the Copyright Act.

- The licensed permitted acts provided by Section 35 (recording broadcasts) and Section 36 (reprographic copying) will be retained, and rights holders will continue to be able to license the acts which they permit. The Government agrees that wide exceptions permitting mass copying and sharing of books and other materials in a classroom could – if not licensable – cause unreasonable losses to rights holders, damage incentives to creators, and could potentially conflict with the Berne three-step test. Therefore, although fair dealing for teaching will permit limited reproduction of works, schools, colleges and universities will still require licences for general classroom reprography and for recording broadcasts.

  The Section 35 educational broadcast exception appears to be broadly fit for purpose. The Government therefore does not intend to amend the scope of this exception, but will simplify it by removing the requirement for licenses in this area to be subject to certification by the Secretary of State.

  The Section 36 reprography exception, on the other hand, does not currently appear to be fit for purpose. When a work is not licensed for reprography, the exception is so limited in scope that it does little to remove the risk of infringement by schools and other educational establishments which, as respondents noted, is the primary purpose of this licensed provision. The Government will therefore amend this exception so that it applies to all types of copyright work, and allows educational establishments to copy materials that are not licensed for reprographic copying to a similar degree as those that are.

- The Government agrees that it does not make sense in the digital age for these exceptions to be confined only to use made on the premises of educational establishments, to the detriment of distance learners. The Government will therefore ensure that the acts permitted under the education exceptions are permitted to the same extent over secure distance learning networks controlled by educational establishments as they are permitted within those educational establishments.

- The mechanism that permits beneficiaries of these permitted uses to complain to the Secretary of State if their access is restricted by technological protection measures already applies to education and teaching. This is required by EU law and will therefore continue to be the position after the above changes are introduced. As film stakeholders noted in consultation responses, this mechanism does not apply to on-demand services.

Taken together, these changes will mean that educational establishments are assured of their ability to use relevant works for educational purposes, in ways that modern technology allows, while rights holders – especially authors of educational textbooks – will continue to benefit from licences for uses of their materials such as photocopying, which could otherwise undermine sales of educational works.

ANNEX G: Copyright exceptions for people with disabilities

The Copyright Act provides exceptions[66] that allow accessible versions of literary, dramatic, musical and artistic works to be made for visually impaired people, and subtitled broadcasts to be made for people who are deaf, hard of hearing, or physically or mentally disabled, without infringing copyright in the underlying works.[67]

The Government consulted on proposals to broaden these exceptions, which would allow more people who have disabilities that prevent them from accessing copyright works to benefit from accessible copies of all types of copyright work. The Government also consulted on whether licences should continue to take precedence over exceptions for disabled people. Details of the current legal position and the Government's proposals are set out in the consultation document.[68]

Issues arising from consultation

Consultation responses were generally in support of a broad exception which covers all relevant types of disability and copyright work, the strongest support coming from disability groups such as RNIB and Share the Vision, and educational organisations.

Some rights holders felt that existing licensing schemes and initiatives were already available and sufficient to permit access to copyright materials, and that any extension should be limited to those with a reading impairment. Several collecting societies argued that they were already meeting consumer demand for accessible copies. For example, the Copyright Licensing Agency (CLA) said it already provided zero-rate licences that permit the creation of accessible works while providing beneficial information to rights holders.

The exception currently permitting accessible copies to be made for visually impaired people only applies when commercial copies of a work in the relevant accessible format are unavailable. Respondents generally agreed that this requirement should remain, as the purpose of the exception is to address a market failure and it should not discourage the provision of accessible copies by rights holders.

Views were divided on whether the ability to license over the exception should be removed. The licences that are currently available for this purpose do not make money for rights holders, as the only fees charged for them are used to cover administration costs.

Many groups representing rights holders, such as The Publishers Association, were concerned that their ability to license over the disability exceptions could be removed. They emphasised the benefits of these licences, including legal certainty, security and control over the use of digital files, and collection of data that helps licensing agencies to improve their services to disabled people.

66 Sections 31A-F, Copyright, Designs and Patents Act 1988 (as amended)

67 Section 74 of the Copyright Act, under which designated not-for-profit bodies may subtitle and issue copies of broadcasts without infringing copyright. This use (as with those for visually impaired people) is permitted only when there is no licensing scheme. The Secretary of State must actively approve the not-for-profit bodies by adding them to an Order, which is a more burdensome process than for the equivalent bodies supporting visually impaired people.

68 http://www.ipo.gov.uk/consult-2011-copyright.pdf, p. 96

What will the Government do?

In light of the consultation responses and further impact assessment, the Government will proceed with its proposals to broaden and simplify the disability exceptions to include all types of disability that prevent someone from accessing a copyright work, and to all types of copyright work. A disability exception that applies to people with any type of disability, if and to the extent that their disability prevents them accessing a copyright work, would give more people equal access to cultural materials. Applying the exception to all types of copyright work would enable organisations to make accessible copies of films, broadcasts and sound recordings in addition to literary, dramatic, musical and artistic works. For example, they would be able to add subtitles or audio-description to films to make them accessible.

The Government will restrict the exception that permits organisations to make copies on behalf of disabled people to cases where commercial copies of an accessible format are unavailable. This important restriction applies to the existing exception for visually impaired people and ensures that rights holders continue to have incentives to provide their own accessible versions of works.

The Government recognises the importance that groups representing rights holders place on having a relationship with organisations that make accessible copies of their works, and concerns from disability groups that licences may be burdensome. The Government will ensure that the benefits of this exception cannot be undermined by contracts, and notes that the existing exception for visually impaired people already prohibits unreasonably restrictive licence terms. The Government also recognises that the record keeping and notification requirements currently found in this exception are important to rights holders, and intends to retain these requirements.

The mechanism that permits a complaint to the Secretary of State if access is restricted by technological protection measures already applies to the existing disability exceptions, and will continue to apply, to the amended exception.

The Government will also continue to support work towards an international treaty on improving access to copyright works for visually impaired people.

ANNEX H: Archiving and Preservation

Summary

The Hargreaves Review identified a need to widen existing exceptions for archiving and preservation to make it easier to preserve creative content held in cultural institutions. Copyright law currently allows librarians and archivists to copy certain works for the purpose of preservation without infringing copyright[69], but not artistic works, sound recordings or films. The Government consulted on proposals to apply this exception to include all classes of copyright work and to extend it to cultural organisations such as museums and galleries.

Organisations are also permitted to record folk songs and broadcasts in order to archive and preserve them, when designated to do so by the Secretary of State. The Government proposed to make this designation process less bureaucratic.

Details of the current legal position and the Government's proposals are set out in the consultation document.[70]

Issues arising from consultation

Stakeholder responses to these proposals were weighted heavily in favour of change. Most respondents supported amending the exception as proposed and agreed that doing so would not undermine rights holders' interests.

Libraries, archives, museums and galleries were strongly in favour of the proposals. Many considered the present rights clearance procedure to be onerous and costly. Most respondents felt that rights holders were unlikely to be harmed if the exception were extended to cover more types of work because this was unlikely to interfere with commercial exploitation of those works. Museums argued that they had "a duty of care" to all works in their collection, including artistic works, sound recordings and films, and welcomed amendments to copyright law that would make preservation of those works easier. Archivists noted that some formats are at risk of becoming obsolete in as little as five years, and digital formats can deteriorate or corrupt at any time.

Many rights holders were also in favour of these proposals, though some sought the inclusion of further safeguards within the exception. Some also expressed concern about the security of preservation copies and were worried that copies might be stolen and used for other purposes not permitted by the exception.

Responses to the consultation suggest that many copyright owners are happy for their works to be copied by libraries and archives for preservation purposes. Libraries and archives also noted that, when asked, copyright owners rarely refuse permission or seek remuneration for preservation copying. However, the administrative costs of clearance can still be high even if permission to copy is granted without a fee being charged.

69 The Copyright, Designs and Patents Act. 1988 (as amended) s.42. provides that librarians and archivists can make a copy of any literary, dramatic or musical work in their permanent collection for the purpose of preservation, where it is not reasonably practicable to purchase a copy of the item in question to fulfil that purpose, without infringing copyright.

70 http://www.ipo.gov.uk/consult-2011-copyright.pdf, p. 70

What will the Government do?

Given the wide support for this measure and the benefits that it will deliver, the Government will permit acts of copying for preservation and archiving in line with its original proposals.

It will therefore:

- Allow preservation of any type of copyright work. This would make it easier to preserve films, broadcasts, sound recordings and artistic works (including photographs), as well as literary, dramatic and musical works. The work could be copied as many times as necessary for the work to be preserved;
- Include preservation by museums and galleries as well as libraries and archives;
- Ensure that this permitted act cannot be undermined by restrictive contract terms;
- Retain the current restriction to works in a permanent collection for which it is not reasonably practicable to purchase a replacement, to minimise potential harm to rights holders; and
- Simplify the procedures relating to the archiving of folk songs and broadcasts, so that organisations that use these provisions no longer have to go through a bureaucratic authorisation process.

The mechanism that allows people to complain to the Secretary of State if a permitted act is restricted by technological protection measures already applies to exceptions for preservation and archiving, and will continue to apply following their amendment.

ANNEX I: Public Administration

Public bodies hold vast amounts of information, the majority of which is available for public inspection under the Freedom of Information (FOI) Act or under specific statutory provisions. Some of this material will have been submitted by third parties, and may be essential to fully understand certain processes and decisions. Third party information may currently be shared in paper format or viewed on the premises of public bodies, and existing copyright exceptions permit some third party materials to be copied and issued to the public, for example sent by letter or email. However, current exceptions that permit public bodies to copy third party materials and issue them to the public generally allow them to only issue copies to individuals, and not to make them available for wider viewing on the internet.

The Government therefore consulted on widening the existing permitted acts for public administration and reporting to enable documents to be communicated to the public by other means, for example by making available on the internet. The aim of this measure was to enable more public bodies to share information proactively, and thus enable the public to access information easily and conveniently, saving both public bodies and individuals' time and expense.

Issues arising from consultation

At consultation[71] the Government asked stakeholders how the current exceptions for use by public bodies should be amended to support greater transparency, and limited to ensure that incentives to copyright owners are not undermined. A detailed assessment of the options, including costs and benefits, was set out in the impact assessment. No other options were considered as the EU Copyright Directive does not provide the necessary flexibility.

A summary of consultation responses has been published[72]. Responses were mixed, with universities, galleries, museums and other government departments being generally supportive. Rights holders, their representatives and publishers were generally opposed.

Many respondents supported the Government's proposal and rationale for action, identifying administrative savings and certainty over what could be released as potential benefits. The proposal supports the Government's wider agenda of greater transparency and would bring legislation in line with contemporary practices and public expectations.

Further benefits from a possible reduction in FOI cases were identified in studies from Frontier[73] and MOD[74]. The proposals also support FOI guidance which recommends that public bodies should make information available online proactively.

Opponents argued that widening the exceptions was unnecessary. Some rights holders were concerned at the possibility of lost revenue and loss of control over copies of works. Others argued that allowing the public to access information for free for which they would otherwise have needed permission or a licence to use could harm commercial revenue streams. Some thought that rights holders should receive fair compensation.

71 http://www.ipo.gov.uk/consult-2011-copyright.pdf, p. 107

72 http://www.ipo.gov.uk/copyright-summaryofresponses-pdf, p. 25

73 *Independent Review of the impact of the Freedom of Information Act*, Frontier Economics (2006).

74 *Freedom of Information Act 2000 – Statistics on implementation in central government – 2011*, Ministry of Justice (April 2012)

A number of respondents were concerned that the proposals may not comply with the three-step test. Others highlighted an absence of controls such as Digital Rights Management (DRM) or encryption to prevent further use of material.

Although these concerns are understandable, they arise from a misconception, that the extension of the exception would apply more broadly than is actually the case. As the proposed extension of the permitted act in section 47 applies only to works already available to public inspection, the ability to make these same works accessible online would not change the situation significantly. Copyright would also continue to protect any further dealing with relevant works as it does now. The permitted act under section 48 conversely is already limited to unpublished works, so there would be no conflict with works that are commercially available for purchase or licence.

What will Government do?

Based on the evidence provided, the Government expects that the proposed amendment would make it easier for public bodies to publish useful information third party material online and to launch new services, leading to savings for both public bodies and individuals in terms of time and expenses. By being able to make material of public interest proactively available online, public bodies will be able to avoid repeat FOI requests for the same documents. By giving the public access to more complete information of interest to them, they will have a better understanding of why certain decisions have been taken by both Government and public bodies, which will improve transparency and public confidence.

The Government will therefore extend the permitted acts in sections 47 and 48 of the Copyright Act to allow public bodies to make relevant material available online. In the case of sections 47(2) and 47(3), this power will be limited so that material that is available commercially to buy or licence (such as academic articles) would not fall within the scope of the permitted act. The safeguard in section 48, restricting the permitted act to unpublished works (and allowing for the overriding of the exception by contract) will be maintained. Any material published online under either section would continue to be protected by copyright against further exploitation.

The mechanism of complaint to the Secretary of State which is available under Section 296ZE if a permitted act is restricted by technological protection measures will be retained, and will continue to apply to these exceptions.

ANNEX J: Other permitted acts in the Copyright Directive

In addition to the exceptions discussed above, the Government sought views on other permitted acts in the Copyright Directive and asked whether these were also suitable for introduction or modernisation.

In particular, the Government sought views on whether or not to permit recording and reproducing broadcasts in social institutions such as hospitals; use of copyright materials during religious or official celebrations; use relating to the sale or exhibition of artistic works; and use relating to the demonstration or repair of equipment. Stakeholders also offered views on other exceptions permitted by the Copyright Directive, such as the incidental inclusion of one work in another.

Further details are set out in the consultation document[75], and a summary of consultation responses on this issue has been published[76]. The general sense was either that amending these permitted acts would provide little benefit, or that doing so would be unduly harmful to rights holder interests.

What will Government do?

As no strong case was presented for amending or introducing these permitted acts, the Government does not intend to do so. However, the Government does not rule out action in these areas in the future, should a stronger case be made.

75 http://www.ipo.gov.uk/consult-2011-copyright.pdf, p. 110
76 http://www.ipo.gov.uk/copyright-summaryofresponses-pdf, p. 26

ANNEX K: Clarifying copyright law: copyright notices

Summary

The Government wishes to make it easier for smaller firms and other users to understand the implications of copyright law. The Intellectual Property Office (IPO) will therefore provide further guidance tailored for non-experts. These "Copyright Notices" will be impartial and focus on areas where there is particular confusion or misunderstanding.

The Notices will not have a statutory basis. However, they will aim to provide an authoritative and reliable reference, particularly for those who do not have access to expensive legal advice.

Current situation

The copyright system is complex and there is confusion about the boundaries of copyright infringement, particularly in the new circumstances which digital technology creates. Uncertainty can lead either to unintentional infringement or to opportunities being lost because of fear of infringing. It hinders innovation and growth.

Copyright law can be difficult to apply without expensive legal assistance. Lawyers and others can offer views on the meaning of the law in particular cases and the Courts can set precedent in their judgments. However, the Hargreaves Review noted that the IPO has no means

"to clarify the law where it is causing misunderstanding or confusion – as it manifestly is for many people – in a way which carries formal authority, although it has equivalent functions in patents and trade marks."[77]

and therefore recommended that the Intellectual Property Office "should be empowered to issue statutory opinions where these will help clarify copyright law".

Proposals for Change

In response to the Hargreaves Review, the Government set out proposals in the Copyright Consultation for a Copyright Notice service. These Notices were intended to clarify areas where there is manifest confusion or misunderstanding on the scope and application of copyright law, but would not make new law.

The Government sought views on: the sort of queries and issues which these Notices should cover; whether there should be a statutory obligation upon the IPO to issue them; and the merits of a statutory obligation upon the Courts to have regard to the proposed Notices.

77 Hargreaves Review of Intellectual Property and Growth, para 10.21, p.95

Issues arising from consultation

As noted in the summary of responses[78], views on this issue were generally consistent across a range of respondents, noting the difficulties in interpreting copyright law but expressing concern about any form of statutory clarification by the Government.

Respondents to the consultation expressed the view that, as it stands, the copyright system can be inconsistent and confusing, particularly in its application to new technologies, leading to imbalances of power between parties. Rights, limitations and exceptions were said to be confusing (or even unknown) to individuals and groups such as SMEs, researchers, consumers, teachers and librarians. For this reason, respondents suggested the system needed to be made simpler and more consistent, or at the very least there needed to be clear and reliable information on what was permissible.

Most respondents felt that understanding of copyright law was generally poor, even in areas where the law itself was clear. Although some acknowledged the material already published by the IPO[79], there were many calls for the IPO to produce more guidance about the basics of copyright law, and how these operate across different sectors. The CBI noted that the IPO could "play an important role in improving knowledge of basic copyright law and practice." English Heritage argued that they would benefit from clarification on specific issues relevant to its organisation and would welcome IPO interpretation of problem areas, especially on any changes to copyright law following the Government's consultation on copyright.

Several respondents suggested that the IPO should focus more on raising general awareness about copyright law, and that this education process would help reduce confusion due to the lack of basic knowledge. It was also suggested that any communications could specifically focus on the issues and obstacles that SMEs face.

Others suggested that there was a need for basic guidance aimed at schools and higher educational institutions. Getty Images suggested that the IPO target Notices for SMEs and educational institutions to ensure that students had a better understanding of intellectual property. The City of London Law Society[80] supported the prospect of the IPO providing more communication about the basics of copyright law as it works across different sectors, in terms and in a manner tailored to non-experts.

The proposal for a statutory duty on the Courts to have regard to the proposed Copyright Notices was criticised in three main ways:

- A number of rights holders argued that the proposal would place the IPO in a quasi-judicial role which raised questions for them in relation to powers being appropriately separated between the executive and judiciary[81].

- It was suggested that since there is no obligation on the High Court to have any regard to the judgments from the Patents County Court, it follows that there should not be any obligation upon the Courts to have regard to Notices from the IPO .

78 Consultation on copyright: Summary of Responses, June 2012, p. 29

79 see for example the Copyright basic facts leaflet (http://www.ipo.gov.uk/c-basicfacts.pdf) and other IPO publications (http://www.ipo.gov.uk/ourpublications-literature), plus other material on copyright at http://www.ipo.gov.uk/types/copy.htm

80 Joint response from City of London Law Society, Intellectual Property Lawyers' Association (IPLA) and Law Society's IP Working Party.

81 These included PRS for Music, the Alliance Against IP Theft, the British Copyright Council and Newspaper Licensing Agency.

- There is no duty upon the Courts to have regard to the IPO's Patent Opinions or trade mark directions, which are the closest analogy to the proposed Copyright Notices.

The BPI (British Phonographic Industry) submission also argued that there would be a danger that an obligation upon the Courts to have regard to Notices from the IPO would carry disproportionate weight with the Courts, and if not, there would be no point to providing such guidance.

The City of London Law Society expressed concerns about how problem areas would be identified and the evidentiary basis on which the Notices would be provided. It argued that the IPO should not cover issues that were identified by some as problem areas without full prior consultation with all categories of affected rights holders and users.

Government response

Stakeholders agree with the Government's view that there is a need for clear, authoritative and impartial general guidance in copyright law. The Government agrees this should cover the basics and areas where common misunderstandings occur, or are likely to occur.

Given the concerns expressed, the Government does not propose that IPO should make these Notices on a statutory basis. It is right that the guidance should be judged on its own merits, and the feedback on the Government's proposal suggests that the objective of clarification can as readily be met by a non-statutory scheme. Any additional authority that Copyright Notices might glean from a statutory basis would seem be more than offset by concerns about the legitimacy of such a scheme.

The Government will therefore issue non-statutory Copyright Notices via the Intellectual Property Office. These will provide basic guidance about copyright law and practice and will generally be tailored to non-experts. An outline of how the scheme would operate, based on the consultation proposal, is below. The IPO will set out in more detail how the scheme will work and hold discussions with stakeholders to establish initial areas in which further guidance would be most useful.

As the copyright consultation noted, the Government is aware of calls for a broader review of the relevant copyright legislation, particularly the Copyright, Designs and Patents Act 1988 (as amended), to simplify it and make it easier to apply. The Hargreaves Review made this suggestion, as have a number of others. Having committed to no further major reviews of the IP system in this Parliament, the Government does not intend to embark on such a major programme of revision. As the Government Response to the Review indicates, introducing the system of Copyright Notices would help to build a picture both of problems with the existing law and of interpretations that work in practice. Knowledge of problem areas could inform any future reviews of UK copyright law.

Looking to the future, as noted above, the proposed private-sector Copyright Hub (Digital Copyright Exchange) is envisaged as taking an active role in education and information about copyright. As the Copyright Hub takes shape and begins to operate, part of its dialogue with Government may therefore be about its relationship with IPO's Copyright Notices. Would the Hub provide a channel for Copyright Notices to reach users? Could it take over the provision of impartial and authoritative advice? These are questions that cannot readily be addressed until the Copyright Hub is a practical reality.

How the Notice Service would work: an indicative outline

- The Notices would cover matters of general interest rather than the particulars of a specific dispute. There would be no charge for a Notice.
- The IPO would issue Notices upon request or where there was evidence of confusion. It would set out some guidance on how to apply for a Notice and the timescales within which it might respond to a request.
- The IPO would, however, be able to exercise discretion over when to respond to a request for a Notice. For example, it would be mindful to employ its resources efficiently. Therefore, it would prioritise those requests which seem to cover topics where there was evidence of a widespread need for clarification; or which overlapped with the substance of the routine queries which it frequently receives.
- Similarly, the IPO may decide to prioritise requests for Notices which seem most able to benefit a wider audience or facilitate innovation and growth – for example, because they assist small businesses in dealing effectively with copyright issues. The IPO would be able to issue a Notice on its own initiative, but the same prioritisation criteria would apply.
- Domestic, EU and international legal initiatives and case law change rapidly. Notices may therefore be superseded.
- The IPO would not bear any legal liability in relation to these Notices and how they were applied by others. However, the Government's intention is for these Notices to become an authoritative source of copyright clarification which the Courts would take into account.

The Government also sought in consultation to gauge interest in a copyright dispute resolution service. Responses to the consultation did not provide much information on potential users and benefits. The Government is therefore considering separately how to make it easier and cheaper to settle intellectual property disputes, including those relating to copyright.

The discussion paper *From ideas to growth: Helping SMEs get value from their intellectual property*[82], stated that the IPO Mediation Service would be reviewed. A Call For Evidence on The Intellectual Property Office Mediation Service[83] sought comments and evidence from stakeholders and IP rights holders on the reasons why the IPO's Mediation Service (which potentially covers all forms of intellectual property) is used so infrequently, and what service (if any) the IPO should be offering to support speedier and lower cost dispute resolution.

The deadline for comments passed in July and the IPO published its findings on 7 November 2012[84]. As of 1 October 2012, copyright holders enforcing their IP through the Patents County Court (PCC) can choose to pursue uncomplicated and low value IP disputes through a new small claims track.[85]

82 *From ideas to growth: Helping SMEs get value from their intellectual property*, IPO, April 2012

83 http://www.ipo.gov.uk/c4e-mediation.pdf

84 http://www.ipo.gov.uk/business-sme-conclusions.pdf

85 A guide to the small claims track is available from HM Courts and Tribunals Service: http://www.justice.gov.uk/downloads/courts/patents-court/patents-court-small-claims.pdf

December 2012

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DPS/C450-12-12