CONSULTATION ON COPYRIGHT
Foreword – by Baroness Wilcox

The Government’s economic policy objective is to achieve strong, sustainable and balanced growth that is more evenly shared across the country and between industries. It is looking to cut back on things that are curbing growth of investment and hiring by business across the economy. Intellectual property (IP) as a whole helps underpin the case for investment in and by businesses across the economy, from striking designs to hard-won reputation and brand. It is important to creative work in industries from media and ICT to pharmaceuticals and aerospace.

Copyright is the central IP right relied on by the UK’s strong creative industries. By defining who can and cannot use creative works in particular ways, copyright both helps encourage investment in these works – films, visual arts, music and books, for example – and restricts their use.

The Hargreaves Review was launched by the Prime Minister to look at enhancing the impact the IP system has on growth and reported in May 2011. In August 2011 the Government set out the range of actions that it will take in response to the Review. Its aim is to remove unnecessary barriers to growth from the IP system while maintaining appropriate incentives for investment in the creation of IP.

Many of Professor Hargreaves’s recommendations were aimed at tackling problems with the copyright system. A range of difficulties, with licensing copyright works in particular, appear to be holding back valuable uses of those works in ways that, in many cases, do not benefit copyright holders and may even harm their interests. These problems also impact negatively on potential users of those works, whether other businesses or customers: they make it harder to start and grow businesses.

This consultation sets out how the Government proposes to tackle some of these issues with copyright, in line with its response to the Hargreaves Review. It seeks relevant evidence on the potential for the proposed measures to improve the contribution of the copyright system to UK economic growth, to inform decisions on legislative and other action in these areas.

The Government’s intention is to respond to this consultation and make formal proposals for legislation or other action in an IP and Growth White Paper in Spring 2012. The White Paper would also serve as a progress report on other work arising from the Hargreaves Review, whether ultimately leading to legislation or not.
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1. Executive summary

This consultation seeks views on the Government’s proposals for implementing a number of the recommendations, relating to copyright, that it accepted in its response to the Hargreaves Review. It seeks relevant evidence on the potential for the proposed measures to improve the contribution of the copyright system to UK economic growth, to inform decisions on legislative and other action in these areas.

The proposals in this document are consistent with the Government’s Growth strategy. The proposals in this document will bring benefits for business, creators and consumers by making it easier to use IP to create value across the economy and across society.

Orphan Works

This Government seeks views on its proposals for an orphan works scheme, which would allow works (where the owner was unknown) to be used and has in place necessary safeguards for both the owners of orphan works and rights holders. The Government is committed to minimising market distortion between orphan and non-orphan works, by ensuring the owners of rights in orphan works are treated as similarly as possible to comparable ‘non-orphan’ rights holders; maximising the benefits to economic growth of the scheme; minimising or eliminating perverse incentives or opportunities to ‘orphan’ works; and through these and other appropriate measures, ensuring adequate protection for the interests of absent rights holders. It is especially interested in hearing from those who hold collections of orphan works and those who have used them.

Extended Collective Licensing

The Government seeks views on its proposals to simplify the rights clearance system through the introduction (via legislation) of a voluntary extended collective licensing (ECL) scheme in the UK, which would allow authorised collecting societies to license on behalf of all rights holders in a particular sector, except for those who choose to opt out. In the context of mass usage of rights, transaction costs can be high for users who need to seek multiple permissions. This authorisation would be subject to certain criteria being met by the collecting society. The intention is that ECL could also be used for the mass clearance of collections of works which may include orphan works and out of commerce works. To the extent that this happens, under the proposals in the consultation, the collecting society will be expected to search for the missing rights holder and to distribute appropriate remuneration. The Government welcomes views from collecting societies, rights holders and other organisations that regularly need to use large bundles of copyright works (mass usage of rights).
Codes of Conduct for Collecting Societies

The Government seeks views on its proposal to publish minimum standards - for fairness, transparency and good governance - which it would like to see included in voluntary codes of conduct for collecting societies, and its plans to introduce a backstop power that would allow for a statutory code to be implemented if the voluntary system does not prove effective. It is the Government’s view that clarity and transparency of the copyright licensing system is an end in itself. It would be good for members, licensees, and collecting societies themselves. All three would enjoy the benefits of being able to operate in and access a transparent marketplace for licensing content in the UK. The Government welcomes views from collecting societies and their members on the minimum standards and scope of a code, and on whether there should be penalties for non-compliance.

Exceptions to Copyright

The Government seeks views on its proposals to widen copyright exceptions with a view to modernising and opening them up to the maximum degree (within European Union (EU) law). This includes allowing limited private copying, widening the exception for non-commercial research, widening the exception for library archiving and introducing an exception for parody and pastiche. The Government will be guided by the following principles: exceptions should be introduced or expanded to the maximum degree that is possible without undermining incentives to creators; exceptions must be compatible with European and international law, including the EU Copyright Directive and the international “three-step” test; and uses permitted by copyright exceptions should not be restricted by other means. It should not be possible to use contracts to over-ride exceptions; new or revised copyright laws should be clear, straightforward, and avoid unnecessary regulation and bureaucracy. The Government welcomes views from copyright owners, those who may be affected by changes to specific exceptions, such as: educational establishments; research institutions; libraries and archives; and people with disabilities. It would also welcome views from consumer groups and individual consumers.
Copyright Notices

Finally, the Government seeks views on its proposal to introduce a Copyright Notice Service which would give the Intellectual Property Office (IPO) a statutory function to publish formal opinions on UK copyright law and its application. Copyright law 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. The IPO currently has no means to clarify the law relating to copyright where it is causing misunderstanding or confusion, in a way which carries formal authority. In contrast, the IPO issues Practice Notices and Directions setting out procedural aspects on patents, trade marks and designs. The Government seeks views about the potential benefits of a Notice service, how the service should operate and the specific sort of queries and issues which it should cover. In particular, it welcomes views from the legal profession and small and medium sized businesses.

Economic Impact Assessments

In line with the Government’s better regulation principles Economic Impact Assessments have been completed for each of the Government’s proposals (at consultation stage) and provide information on existing evidence and assumptions on which it has taken a view at this stage. In addition, each Impact Assessment identifies where the Government would like to collect further evidence during the consultation.

Next Steps

It is the Government’s intention to respond to this consultation and make formal proposals for legislation or other action in an IP and Growth White Paper in Spring 2012.
2. About this consultation

This consultation is about proposals to change the UK’s copyright system arising from the Hargreaves Review of IP and Growth, as set out in the Government’s response to the review.

Professor Hargreaves’s principal recommendation in this space was for a Digital Copyright Exchange (DCE), a marketplace where ownership of copyrights could be advertised and rights licensed. He suggested, and Government agrees, that to be effective in this space a DCE needs to be developed by and owned by the industry. The Government announced, on 22 November 2011, that Richard Hooper CBE (former Deputy Chairman of Ofcom) will lead this work and will report back before Summer parliamentary recess 2012. The Government does not see the creation of the DCE as primarily a legislative task. The DCE is therefore not the subject of this consultation, though it would enhance the impact of several of its proposals.

This consultation deals with the other Hargreaves recommendations for UK copyright on which the Government proposes to legislate or is considering legislation. It sets out how the Government proposes to act on:

- Orphan works
- Extended collective licensing
- Codes of conduct for collecting societies
- Exceptions to copyright within the scope of the Information Society Directive, including private copying, non-commercial research, archiving and parody
- A copyright notices service from the IPO

The Government also seeks relevant evidence to inform its decisions. It does not cover Hargreaves recommendations for other IP rights or on broader topics such as enforcement of IP rights or the role of the IPO.

Where the issues in this consultation have a direct bearing on European proposals, for example on orphan works or the regulation of collecting societies, the UK Government’s engagement with those proposals will be informed by responses to the document as well as the policy proposals set out in the Government response.

4 Copyright in the Information Society 2001/29/EC.
This consultation does not cover other copyright issues arising from the Hargreaves Review on which EU-level action would be required. For example, cross-border licensing of copyright works and new or amended exceptions to copyright outside the current scope of the Information Society Directive are outside its scope. On these issues, the Government will continue to work with other Member States and the European Commission to develop EU proposals including by: engaging effectively in Commission working groups; responding to EU calls for evidence; actively supporting and promoting ad-hoc and informal discussions with the Commission, the Parliament and other Member States; and communicating the UK Government’s thinking to influential members of European institutions. The Commission is expected to issue calls for evidence on any proposals for major legislative change and the UK Government would at that stage invite interested parties to provide evidence, opinions and objections to inform the UK’s response to those proposals.

The consultation does not cover other copyright issues, whether raised by the Hargreaves Review or not, or issues relating to other IP rights such as design or trade marks. For the avoidance of doubt, issues directly relating to the enforcement of copyright are not the subject of this consultation, although several of the measures proposed are expected to reduce copyright infringement.
3. How to respond

The Government invites views on all the policy issues discussed in this consultation document. Responses to the specific questions which are raised in each section are particularly welcomed. It is not necessary to respond to all the questions; you are welcome to provide answers only to those issues of most interest or relevance to you.

Please make your responses as brief as possible. At this stage of consultation the Government is listening to views as to how it should deliver on its commitments, so detailed suggestions about how to draft legislation, for example, are likely to be premature.

While the Government will do its best to note responses that are outside the scope of this consultation, it may not be in a position to respond to those points alongside the issues we are asking about.

This consultation will run for 14 weeks and the closing date for responses is 21 March 2012. A response can be submitted by letter or email or by using the response form included as Annex D to this document.

Responses should be sent to:
David Burgess
Intellectual Property Office
21 Bloomsbury Street
London WC1B 3HF
United Kingdom

E-mail: copyrightconsultation@ipo.gov.uk
Fax: +44 (0) 020 7034 2826

When responding, please state whether you are responding as an individual, or representing the views of an organisation. If responding on behalf of an organisation, please make it clear who the organisation represents (providing a link to a webpage that has the information would be ideal) and, where applicable, how the views of members were assembled. Similarly, if you as an individual have been encouraged to respond by an organisation, it would be useful to know which one.
Evidence

A key theme of the Hargreaves Review was a need for transparent reliance on evidence as a basis for policy on intellectual property. In responding to the Review, the Government made it clear that it would give limited weight in IP policy-making to evidence that is not sufficiently open and transparent in its approach and methodology\(^5\). That is the approach that is being taken by this consultation and will be used in assessing contributions to it.

As the response to the Hargreaves Review makes clear, the Government is conscious that smaller businesses and organisations, and individuals, face particular challenges in assembling evidence and will assess their contributions sympathetically, with the same emphasis on transparency and openness.

The Government’s focus in this work is firmly on economic growth, but issues of fairness and social impact also form part of the Government’s consideration in bringing forward these proposals and assessing comments on them.

While working hard to improve the quality of evidence available, the Government nonetheless recognises that perfect evidence is an ideal. The Government is determined to have an IP system that is the best possible incentive for UK growth and wants to make rapid progress towards it, informed by emerging evidence.

To help contributors gauge their responses, the IPO is publishing alongside this consultation document a short guide to what constitutes open and transparent evidence, with particular reference to intellectual property. These can be summed up as:

- basing work on data that are transparent and readily available to others for review;
- using methodology, models and statistical treatments which are clearly set out and well-founded; and
- making the work available for peer review.

Queries

Queries on the issues raised in the consultation should be addressed to the appropriate team at the contact addresses above.

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Confidentiality & Data Protection

We will publish all formal responses to this consultation on the IPO website.

Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004. If you want other information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence.

In view of this, if you consider information you have provided to be confidential, it would be helpful if you could explain to us why this is the case. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the IPO.

The IPO will process you personal data in accordance with the DPA and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.

Complaints

If you have comments or complaints about the way this consultation has been conducted, these should be sent to:

Sameera De Silva
Consultation Coordinator
Better Regulation Team
Department for Business, Innovation and Skills
1 Victoria Street
London SW1H 0ET

Tel: 020 7215 0412
Email: sameera.de.silva@bis.gsi.gov.uk

A copy of the Code of Practice on consultations is attached at Annex B.
4. Copyright licensing: orphan works

This chapter sets out proposals to enable the copying and publication of copyright works and performances for a fee, in the event that the owner/s is/are not known or cannot be located. These works, which could include, for example: books, films, music and photographs, are referred to as orphan works. This chapter discusses ways in which orphan works could be authorised for use. Orphan works are also discussed in the context of ‘Extended Collective Licensing’ (see chapter 5).

Current Situation

4.1 Literary, dramatic, musical and artistic works; layouts or typographical arrangements; and recordings and broadcasts of a work are all protected by copyright and related rights for certain periods of time – in many cases up to 70 years after the death of the author – as are performances of works. While they are in copyright anyone who wishes to:

• make a copy of the work
• distribute copies to the public
• rent or lend copies to the public
• perform/show/play the work in public
• communicate the work to the public
• or make an adaption of the work

requires the permission of the copyright owner/s to do so. The copyright holder may require a one-off or ongoing payments for these uses.7

4.2 In many cases, particularly older works, paperwork identifying the copyright holder/s may have been lost and/or copyright holder/s may not have updated their contact details. Unless there is an exception provided in law (such as for limited educational uses) the work cannot be used lawfully.

6 In this consultation document and the accompanying Impact Assessment the term ‘orphan works’ is used to refer to both orphan works and orphan performances.

4.3 One very limited exception of this sort in UK copyright law allows for the Copyright Tribunal to give consent on behalf of a performer to the making of a copy of a recording of a performance where the identity or whereabouts of the person entitled to the reproduction right cannot be ascertained by reasonable inquiry. However, this exception only relates to one type of work and only to the right to make a copy. It does not allow other activities such as distribution of copies or making copies available to the public.

4.4 Another set of limited exceptions permits libraries and archives to supply copies of older works for the purposes of publication and allows them to be published (once) if the publisher does not know the identity of the present copyright owner.

The Case for Change

4.5 The inability to use orphan works is a significant problem for organisations such as archives, which may be required to preserve collections of works, without being able to display or otherwise communicate the works to the public or to recoup their costs in any way. Orphan works which are stored on older formats such as celluloid film or audio tape are in danger of being lost due to the storage medium decaying to a point where it is no longer useable. A vast wealth of material cannot be used and may be deteriorating in this way. For example, the BBC archives hold a large number of orphan works while 31% of books in the British Library are estimated to be orphan, 90 per cent of still photographs in UK museums and up to 95% of newspaper content held in the British Library are orphaned. 20-30% of material in archives is said to be orphan.

8 s190, Copyright Designs and Patents Act. 1988 (as amended)
9 The Copyright Tribunal is an independent tribunal established by the Copyright, Designs and Patents Act 1988. Its main role is to adjudicate in commercial licensing disputes between collecting societies and users of copyright material in their business.
10 CDPA sch 1 para 16, which preserves (with minor amendment) an exception in s7 of the Copyright Act 1956 [http://www.legislation.gov.uk/ukpga/1956/74/contents/enacted] [Accessed: 24 November 2011.]
4.6 It is likely that orphan works are already being used for both commercial and non-commercial purposes in ways that may well infringe the law (that is without permission of the rights holder/s and outside any applicable exceptions to copyright). In these cases the rights holder may be unaware of the use to which the work is being put and will not receive any payment, while any such user of orphan works risks legal action. Additionally, there are many potential users who are unable or unwilling to risk using the orphan works and therefore the rights holder again misses out on potential fees. The inability or reluctance to use orphan works may hold back the launch of new products and services that would contribute to economic growth. Consumers, researchers, teachers, students and businesses all miss out on the benefits of access to potentially important cultural and scientific works.

4.7 Both the Hargreaves Review and the Gowers Review of Intellectual Property\textsuperscript{15}, have identified orphan works as an area that needs attention, as cultural content is being lost and commercial opportunities appear to be being missed.

\begin{quote}
Hargreaves Review of Intellectual Property and Growth

“The problem of orphan works – works to which access is effectively barred because the copyright holder cannot be traced – represents the starkest failure of the copyright framework to adapt.”\textsuperscript{1}
\end{quote}

4.8 Consistent with Government's commitment to better regulation, it has explored whether a non-regulatory approach could deliver its policy objectives. It has been suggested that insurance could be taken out to indemnify users of orphan works against subsequent legal challenges (i.e. if the owner of the right later comes forward). However, such an arrangement requires the user of the orphan works to breach the law and exposes him/her to civil legal action, should the owner reappear. It also exposes the user to potential criminal liability if the usage is on a commercial scale. So, the current state of the law does not make such private sector initiatives legally possible. Any amendment of the law would risk being contrary to the UK’s international obligations under the Trade Related Aspects of International Property Rights (TRIPS) Agreement\textsuperscript{16}. Furthermore, the Government does not regard a business system relying on an overt infringement of copyright to be a satisfactory option in terms of bolstering respect for IP rights. The orphan works problem therefore results in a missing market which the private sector cannot solve. The demand for authorised orphan works can be satisfied only by legislative changes.


\textsuperscript{16} Further information on TRIPS is available at: \url{http://www.wto.org/english/tratop_e/trats_e/trips_e.htm} [Accessed: 14 November 2011]
## Key potential costs and benefits

### Potential costs:

Creating and maintaining a registry of orphan works – this (or elements of it) could be run by the Copyright Tribunal, the proposed industry-led Digital Copyright Exchange and/or by collecting societies for the areas they represent. If the registry were run by the Copyright Tribunal an administration charge could be made on those wishing to use the orphan works to recoup these costs. However, if industry organisations that stood to benefit from use of the work ran the registry an administration fee might not be necessary.

Conducting a diligent search – it is likely that potential users would conduct the diligent search as they have the incentive to do so.

Time in checking the registry for use of orphan works by rights holders in case some of their work has become orphaned. This time cost could be offset by the fees they would be paid for the uses which they would not otherwise have received. Also, at present, rights holders would have to monitor multiple outlets (e.g. internet, TV, newspapers) to detect use of their works so there could be a reduction in their monitoring costs.

### Potential benefits:

By creating a central registry for rights holders to be able to check in case any of their work has become orphaned, rights holders are enabled to obtain fees for use of their work and to end the orphan status of that work.

Cultural archives and museums would be able to digitise and make available orphan works for public view.

If cultural archives/museums are able to charge for these services they can also recoup the costs of preservation and digitisation.

Where archives and museums are funded by the taxpayer, the taxpayer would no longer have to pay to preserve something which they were not able to see/experience.

New products and services could be developed using orphan works such as documentary television programmes, incorporating historical material (but which is still in copyright).

Increased confidence in the copyright system.
Impact on micro-businesses and Small and Medium-sized Enterprises (SMEs)

4.9 This is a de-regulatory measure in that it removes a legal restriction on the use of orphan works while making appropriate provision for remuneration for rights holders. Micro-businesses and SMEs are among both those who would like to use orphan works but cannot at present and among those who would benefit as rights holders. There are some small commercial or semi-commercial archives such as film libraries who would also welcome the ability to make available orphan works in their collections. The costs listed in the box above would also apply to micro-businesses and SMEs but so would the offset factors.

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<tr>
<td>1. Does the initial impact assessment capture the costs and benefits of creating a system enabling the use of individual orphan works alone, as distinct from the costs and benefits of introducing extended collective licensing? Please provide reasons and evidence about any under or over-estimates or any missing costs and benefits. The Government is particularly interested in the scale of holdings you suspect to be orphaned in any collections for which you are responsible. Would you expect your organisation to make use of this proposed system for the use of individual orphan works? How much of the archive is your organisation likely to undertake diligent searches for under this proposed system? What would you like to do with orphan works under a scheme to authorise use of individual orphan works?</td>
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<tr>
<td>2. Please provide any estimates for the cost of storing and preserving works that you may not be able to use because they are/could be orphan works. Please explain how you arrived at these estimates.</td>
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<tr>
<td>3. Please describe any experiences you have of using orphan works (perhaps abroad). What worked well and what could be improved? What was the end result? What lessons are there for the UK?</td>
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Proposals

4.10 The Government is proposing new legislation that will enable the use of individual orphan works after a diligent search and confirmed by an authorising body such as a collecting society or a public body like the Copyright Tribunal. It has defined orphan works as works that are in copyright and where the copyright holders remain un-located after a diligent search. (If copyright holders refuse to reply or if there is dispute about ownership, these works will not be considered as orphan works.)
4.11 Orphan works in this proposal can include works where there are a number of different rights holders, for example in an audiovisual work where some rights holders are locatable and some are not. Those rights holders who can be located would need to consent and to agree terms for any use, while the rights that were orphaned would be covered by the proposed scheme. In other words, if Person A cannot be located to clear rights in a work, Person B’s rights in that work would not be affected.

4.12 The Government is considering and consulting on whether the body that authorises use of individual orphan works can and should also authorise use where there is doubt about whether something is in copyright or not. The Government is minded to include both published and unpublished works, and to include works whether they are in commerce or not (though in commerce works are less likely to be found to be orphaned after a diligent search). The proposals are intended to cover all types or copyrighted works and to allow both non-commercial and commercial use.

4.13 The key principles underlying these proposals are:

- Minimising market distortion between orphan and non-orphan works, by ensuring the owners of rights in orphan works are treated as similarly as possible to comparable ‘non-orphan’ rights holders.
- Maximising the benefits to economic growth of the scheme.
- Minimising or eliminating perverse incentives or opportunities to ‘orphan’ works.
- Through these and other appropriate measures, to ensure adequate protection for the interests of absent rights holders.

4.14 The Government will only introduce an orphan works scheme if absent rights holders are adequately protected. This includes making due provision for remuneration for rights holders and the introduction of codes of conduct for collecting societies (see chapter 6 on codes of conduct).

4.15 The Government also understands that use of orphan works may operate in different ways in different sectors, for example, where rights holders are not represented by collecting societies. Diligent searches for complex works such as audio-visual works, that may contain moving and still images, speech and music, will necessarily take more time than works with only one type of copyright. The Government also recognises that photographs often lack any information about rights holders or about the photograph’s age, original purpose, subject matter or country of origin.

4.16 Proposals for extended collective licensing of copyright works, and the impact they may have on an orphan works regime, are set out in chapter 5 below.
The legal basis for an orphan works scheme

4.17 The UK is a signatory to a number of international treaties concerning copyright including the Berne Convention for the Protection of Literary and Artistic Works and it needs to ensure that UK legislation is compatible with these obligations and with EU legislation. The European Commission has introduced a draft Directive on orphan works\(^{17}\). As originally drafted it is narrower in scope than the scheme the UK is proposing but, at the time of writing, it does not appear to limit the scope of what member states may choose to do on a domestic basis.

4.18 One way to introduce an orphan works scheme could be to introduce an exception from the provisions of copyright law for the use of orphan works\(^{18}\). Any such exception would need to be compatible with the provisions of the Berne Convention, including the Three Step Test\(^{19}\). This test states that:

- exceptions shall be applied ‘in certain, special cases’;
- which ‘do not conflict with the normal exploitation of the work or the subject matter’; and
- ‘do not unreasonably prejudice the legitimate interests of the right holder’.

4.19 Permitting the reproduction of a work where the owner cannot be found is a special case. It does not conflict with the normal exploitation of the work by the rights holder because having an orphan works scheme allows for rights holders to gain income from a situation where there would otherwise have been no exploitation or illegal use and therefore no income. Once a rights holder makes a legitimate claim to an orphan work they regain control of it and a formal orphan works scheme makes the reclamation more likely.

4.20 The European Commission’s Impact Assessment on cross-border online access to orphan works\(^{20}\) considered a number of policy options for implementation. These included the introduction of a statutory exception for cultural uses of orphan works by all member states. This was not the option that the Commission originally proposed. Instead it chose to allow mutual recognition of national solutions. However, the Presidency, in a compromise text, proposed that member states should implement the Directive by means of an exception. At the time of writing, discussion is ongoing.

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18 Copyright in the Information Society 2001/29/EC. Article 2
4.21 To optimise the benefits from enabling use of orphan works the UK is proposing a scheme that will enable a wide variety of orphan works, held by a wide variety of organisations/individuals, to be used for both non-commercial and commercial uses. Therefore, it is likely that it will not propose an exception to copyright law but make provision for authorisation for use within the protection of UK copyright law.

4.22 The Government considers that, by providing safeguards and remuneration for rights holders, its proposal is compatible with the Berne Convention and other international obligations. The Government thinks that rights holders will be in a better position overall with the introduction of an orphan works scheme because it is more likely that they will be reunited with their work and, therefore, in a position to recover fees. It also notes that the Canadian orphan works scheme allows for commercial use and Canada is a signatory to the Berne Convention.

Scope of proposed UK orphan works scheme

Territoriality

4.23 When a rights holder controls their work they are able to license use in any part of the world if they so wish. In contrast, the Canadian system has not attempted to authorise the use of Canadian orphan works in territories outside Canada (although they do authorise use of orphan works on websites that can be accessed from abroad). The draft EU Directive is intended to facilitate cross-border use of orphan works.

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<td>4. What do you consider are the constraints on the UK authorising the use of UK orphan works outside the UK? How advantageous would it be for the UK to authorise the use of such works outside the UK?</td>
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4.24 The question also arises about whether orphan works that have originated in countries outside the UK, or partly originated outside the UK, but held in UK archives can be authorised for use by the UK. The Supreme Court of Canada has held that their test is whether the persons or activities concerned have a ‘real and substantial connection’ to Canada. So the Canadians hold that they can authorise use of an orphan work in Canada owned by a foreign national.

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Consultation Question

5. What do you consider are the constraints on the UK authorising the use of orphan works in the possession of an organisation/individual in the UK but appearing to originate from outside the UK:
   a) for use in the UK only
   b) for use outside the UK?
   How advantageous would it be for the UK to authorise the use of such works in the UK and elsewhere?

Unknown copyright status

4.25 If an orphan work is out of copyright there is obviously no need to obtain authorisation for use of that work. Sometimes, however, it is not clear whether a work is still within copyright or not. For example, the duration of copyright term is often determined from the death of the creator. If the creator is unlocatable, and therefore the date of death unknown, it will not be possible to calculate when the copyright term ends. The Canadian authorities seem to have taken the view that refusal to authorise use in such circumstances could exacerbate the problem that the orphan works scheme was designed to address. So they are willing to authorise in some circumstances when copyright status is unclear. The UK proposes to do likewise, subject to the outcome of this consultation.

Consultation Question

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

Published and unpublished works

4.26 The Government understands that some orphan works schemes limit authorisation to published or broadcast works, as is the case in Canada. However, this may cause more problems than it solves. It will not always be clear whether something has been published/broadcast and there are many documents in museums and archives that have never been published but that would be very valuable to bring to public attention (e.g. on a website). This may not be a problem in countries like Canada where the effective length of copyright protection is much shorter than in the UK and this could be why only published works have been included. However, it is understood that India has procedures to enable use of unpublished orphan works.
4.27 A recent example was referred to the IPO concerning an American author who had bought a British woman’s diary from an antiques dealer. The author had been unable to find any descendants of the writer of the diary. The diary was historically very valuable and the author wished to reproduce parts of the diary in a book that she was writing. However, at present, without UK legislative provision for the use of orphan works, the author cannot use the work without legal risk.

4.28 Some people have raised concerns about privacy issues if an orphan works scheme included unpublished works. Where works have been donated to museums it could be assumed quite reasonably that they had been placed there with the intention of display to the public. Moreover, authorisation to use an orphan work would not relieve users of the obligations to consider other issues such as privacy, libel and slander.

Consultation Question

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

4.29 It has been suggested that one way to reduce the scale of the orphan works problem would be to limit the term of copyright in unpublished (and possibly anonymous or pseudonymous) literary, dramatic and musical works to the life of the author plus 70 years or to 70 years from the date of creation, rather than to 2039 at the earliest. An example of the benefits of such a change can be seen from an enquiry The National Archives received about a research project to use historic material from the 14th to the 16th centuries. The research council to which an application for funding was submitted raised the question of copyright in the sources. It may seem strange that documents from a date long before the first Copyright Act was passed are still in copyright and will be until 2039. The UK could apply the harmonised term conditions in relation to unpublished works, as the rest of Europe has done.

Consultation Question

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

4.30 The Government considers that to maximise the opportunities for economic advantage for all, including rights holders, a scheme that allows the commercial use of orphan works is needed. In addition, there would otherwise always be debate about what constitutes non-commercial use. For example, if a museum charges for use of orphan works to recoup its costs, does this constitute commercial use? There could be quite considerable cost for some museums. Not only do they have to pay for the preservation of orphan works and the costs of conducting a diligent search but, if providing publication on a website, they also have to cover the costs of digitisation. It would seem sensible that museums are enabled to recoup these costs. There are also valuable historical documentaries in the archives of broadcasters (including public service broadcasters, who may or may not be commercially funded). To rule these works out of scope, even after a diligent search, would be to deprive the public of a vast amount of work and to prevent the production of new programmes.

4.31 An argument has been put that absent rights holders might be willing to allow non-commercial use but that commercial uses may not be compatible with their wishes. However, this issue also arises for non-commercial uses by charities or campaigning organisations. There are certain safeguards that could be put in place in relation to this which are explored in the section on moral rights. Over-strong safeguards or a restriction to non-commercial use would reduce the impact of the proposal on economic growth.

4.32 Concern has also been expressed in relation to photographs that commercial use could undermine the market for non-orphan works. The argument appears to run that orphan photographs would be cheaper to use than non-orphans and would therefore undercut the market. This assumes that the use of orphan works would not be charged at market rate. The Government considers that remuneration would need to be at market rate for the type of work and type of use in consideration. (See also section on remuneration.) There will be certain types of photographs that are not substitutable, such as unique shots of a historical event. The Government is interested in examining further the effects of the availability of stock shots on the internet which can be used with no charge. These have been available for some years but it is understood that this has not led to a major contraction of the paid for market.
Consultation Question

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

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

The authorisation system

4.33 Legal provision would need to be made for an organisation or organisations to authorise the use of orphan works following a diligent search (see next section). This authorising organisation could publish details of works they are considering declaring as orphan works and offer rights holders the opportunity to identify works as their own. They would need to maintain an orphan works registry of all works that had been declared orphan after a diligent search. The power to authorise use could be given to a public sector body, like the Copyright Tribunal and/or to private organisations like collecting societies. Arguably, if collecting societies provided authorisation there would be less need for them to charge an administration fee for so doing than if a public sector body provided authorisation. Collecting societies exist to collect royalties for their members. By allowing them to authorise the use of orphan works they are increasing the potential royalties available by maintaining an orphan works registry, thereby increasing the chances of absent rights holders being reunited with their works.

4.34 The Copyright Tribunal is possibly the best-placed public sector body to authorise the use of orphan works but it would need extra resources to take on this additional work. Administration fees paid by potential users of orphan works could fund these extra resources.

4.35 If payment of remuneration for absent rights holders is made up front (see remuneration section for the alternative), it could be argued that collecting societies are in a good position to set an appropriate market rate but others have argued that, authorisation of orphan works would give them a monopoly to charge as much as they liked for use of orphan works.

Consultation Question

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

4.36 Unlike extended collective licensing, the proposals for the use of individual orphan works require a diligent search to ascertain who the rights holders are and to locate them. Details of this search would need to be provided to the authorising body so that they could decide whether reasonable efforts, in good faith, had been made to discover the rights holders. Another possibility is that the authorising body could conduct the diligent search in return for a fee from the potential user.

4.37 An alternative approach would be for the authorising body to list works that, for example, a museum considers are probably orphans, on a public website, awaiting claim by the rightful copyright owners. If the works were not claimed within a certain period the authorising body could declare them orphan and available for use as such.

**What constitutes a diligent search?**

4.38 Some thought has already been given to what should be done in a diligent search for different sectors, including by the European Digital Libraries Initiative. Existing industry databases/registries and bibliographic publications are just a couple of examples of sources of information that could be searched.

4.39 If the DCE finds favour with industry and becomes a reality, it is likely that a search of the DCE would be an essential part of any diligent search. Searching on the DCE should be cheaper than searching a variety of unconnected databases. If the DCE becomes recognised as a type of de facto default register for orphan works, a search of the DCE may simplify the process of identifying whether there are claimants to a particular work, because claimants are likely to use the DCE to register their works and to check whether any of their work has become orphaned.

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In Canada there is no mandatory list of sources for a diligent search. Instead, the Copyright Board of Canada considers each case separately to determine what would constitute a reasonable search for the particular work and its intended use. If they have reason to believe that information on the rights holder/s might be available outside Canada they may require that the search is extended in other countries.

The question also arises as to whether, once a work is on the register following a diligent search, that search can be relied on for further uses. The Canadian system does not automatically allow this and requires a further diligent search but reference can be made to earlier searches. In contrast, the EU draft Directive proposes that once a diligent search has been conducted in one member state, that search should be recognised by other member states. This would clearly facilitate cross-border use and reduce the costs of using orphan works.

### Consultation Question

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<tr>
<td>12. In your view what should constitute a diligent search? Should there be mandatory elements, and if so what and why?</td>
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<td>13. Do you see merit in the authorising body offering a service to conduct diligent searches? Why/why not?</td>
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<tr>
<td>14. Are there circumstances in which you think that a diligent search could be dispensed with for the licensing of individual orphan works, such as by publishing an awaiting claim list on a central, public database?</td>
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<tr>
<td>15. Once a work is on an orphan works registry, following a diligent search, to what extent can that search be relied upon for further uses? Would this vary according to the type of work, the type of use etc? If so, why?</td>
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### Remuneration

This proposal requires provision for remuneration of copyright holders who appear after use has been made of their work under the orphan works scheme. These are sometimes known as revenant rights holders. The Government considers that payments for use should be at market rate. There are two principal ways in which payment provision could be made. One is for the authorising body to require upfront payment of a royalty fee which is then held in an escrow account in case any revenant rights holders or successors in title appear. The other is to require agreement that payment will be made if the rights holder/s appear.

The upfront system means that the authorising body has to determine what a market rate for the work and the particular use would be. There are ways of doing this using, for example, collecting society tariffs where applicable, but they require more work. It would also mean that decisions need to be made about the management of the escrow account: who holds the account, how long do they...
hold a particular fee while awaiting claim, what happens if fees are held by a collecting society which becomes insolvent, and what happens to any money that is unclaimed after this period of time. There is a body of law in the UK which deals with abandoned/unclaimed/ownerless property. There are provisions which allow the disposal of property of dissolved companies and persons who die without heirs. For example, section 1012 of the Companies Act 2006 provides that the property of dissolved companies is to be regarded as what is termed “bona vacantia”. On this basis, unclaimed monies could be returned to the Crown.

4.44 The delayed payment system means that a revenant rights holder can negotiate the royalty fee directly with the user (with disputes arbitrated by the Copyright Tribunal) and avoids all the issues about managing an escrow account. However, some users of orphan works may go out of business before a revenant rights holder makes a claim. It is thought that this is less likely with some types of organisations, particularly where the works will pass on to a successor organisation. Provision for an insurance to cover this eventuality could be explored. However, delayed payment can create differential treatment between orphan works and non-orphan works, where payment in advance is sought by the holder of the non-orphan rights, potentially meaning market distortion.

4.45 The Canadian Copyright Board uses the delayed system because they found that maintaining an escrow account was too costly. They do sometimes require payments to be made to relevant collecting societies upfront, who then hold escrow accounts.

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<tr>
<td>16. Are there circumstances in which market rate remuneration would not be appropriate? If so, why?</td>
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<tr>
<td>17. How should the authorising body determine what a market rate is for any particular work and use (if an upfront payment system were to be introduced)?</td>
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<tr>
<td>18. Do you favour an upfront payment system with an escrow account or a delayed payment system if and when a revenant copyright holder appears? Why?</td>
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Moral rights

4.46 As well as economic rights to remuneration, rights holders have moral rights such as the right to attribution for their work and the right not to have their work subjected to derogatory treatment. Sometimes the author of a work may retain the moral rights but transfer their economic rights. In the UK, moral rights cannot be transferred but they can be waived. This is a matter of concern to many UK creators who feel that they are put under pressure by those who have commissioned them to waive their moral rights. However, it can be very difficult for organisations that have commissioned the work, such as broadcasters, to clear rights for future uses, especially in fast-moving circumstances such as news broadcasting when there are many rights holders (for whom they may not have current contact details).

4.47 The Government believes that by introducing an official means of using orphan works there is a greater likelihood of marrying up orphans with revenant owners. This should reduce illegal use of orphan works because they will become more traceable. It envisages that users of orphan works will be required to attribute the works to the copyright holders where the names are known (but unlocatable). This is the practice in Canada.

4.48 The orphan works registry would capture metadata on the work. Any attempts, deliberate or otherwise to strip metadata from copies of the work would be easily identified and appropriate sanctions could be enforced. It is already against the law knowingly to remove or alter metadata without authority from the rights holder\(^\text{24}\).\footnote{296ZG, CDPA 1988.}

4.49 Once a revenant rights holder discovers that some of their work has been identified as an orphan and is being used (which would be easier to find out under these proposals), they can regain control of their works and stipulate which uses they are willing to license and which they are not. At present, orphan works may be used without authorisation, perhaps even deliberately made orphan by stripping out metadata, with no regard to concerns about derogatory treatment. Instituting a system of authorisation leads the way for proper means of redress in such situations. This, and a greater chance of wrong-doing being discovered, should act as a deterrent to infringement of both moral and economic rights.
4.50 It is also possible that the body that authorises use of orphan works could be required to consider very carefully any modifications to the work that might be considered derogatory by the rights holder and refuse authorisation. Of course, this is a somewhat subjective judgement, particularly if the rights holder is unknown (as opposed to merely unlocatable). This is something the Copyright Board of Canada can do. It is understood that this has not caused any problems, but further research is being conducted on this issue.

4.51 For these reasons the Government does not see a need to alter the UK’s moral rights regime to accommodate an orphan works scheme.

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<tr>
<td>19. What are your views about attribution in relation to use of orphan works?</td>
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<td>20. What are your views about protecting the owners of moral rights in orphan works from derogatory treatment?</td>
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What can a user of an orphan work do with the work once it has been authorised?

4.52 The use will be circumscribed by the authorising body. It will not interfere with any future uses that the revenant owner may make, even while they do not know of its orphan status.

4.53 In Canada, the Copyright Board determines the duration over which authorisation is given depending on the nature of the orphan work and its potential use. In markets, such as for audio-visual works, where perpetual licences are more common, the Board may issue a perpetual licence. In Hungary a period of five years is the norm.

4.54 If a revenant copyright holder appears the work ceases to be an orphan work and the authorising body can no longer permit new uses. There is potentially a question about a revenant owner who wishes to terminate a use which has already been properly authorised. Such circumstances do not appear to have arisen in Canada and so the issue has not been tested there.

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<tr>
<td>21. What are your views about what a user of orphan works can do with that work in terms of duration of the authorisation?</td>
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5. Copyright licensing: extended collective licensing

This chapter discusses proposals to introduce Extended Collective Licensing (ECL) on a voluntary basis in the UK. ECL is a type of rights clearance that would allow an authorised collecting society – one that represents the majority of rights holders in a sector – to license for specific uses of works within the UK on behalf of all rights holders in that sector, except for those who choose to opt out.

Current Situation

5.1 Copyright owners have a number of exclusive rights over their creations. This means that anyone wanting to use these creations needs the owner’s permission first. This can be obtained directly from the copyright owner or from a collecting society if the owner has given it a mandate to administer their copyrights. Collecting societies are authorised by their members, the copyright owners, to license their rights. They collect licensing fees and distribute these as royalties to their members, after deducting an administrative fee for their services.

5.2 In the context of mass usage of rights, transaction costs can be high for users who need to seek multiple permissions. For instance, the mass digitisation of a collection of works in a national library is entirely practical today, but it may be prohibited by the high cost- in time and money- of securing all the necessary permissions. Likewise, copyright owners can find it expensive and time-consuming to exercise control over the use of their works and administer their rights. While the system of collecting societies can at least partially alleviate this problem, their repertoires are, in practice, incomplete.

Consultation Question

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

5.3 The Hargreaves Review called for the simplification of the existing licensing system. In particular, it advocated the use of extended collective licensing which has been used for many years in some Nordic countries for the more efficient mass clearance of rights.

5.4 The Government has accepted this recommendation. It wants to introduce voluntary extended collective licensing in order to simplify what is often a complex, time-consuming and expensive rights clearance system for both users and copyright owners.

5.5 The intention is that ECL could also be used for the mass clearance of collections of works which may include orphan works and out of commerce works. To the extent that any orphan works are caught in an ECL scheme, the collecting society will be expected to search for the missing rights holder and to distribute appropriate remuneration. The case for change on orphan works is set out in Chapter 4.

5.6 The Government know that costs can be high - sometimes prohibitively so - for users. For instance, in 2005, the European Commission, quoting the European Digital Media Association (EDIMA) which represents online music providers, said that: "The direct cost of negotiating one single licence amounts to €9,500 (which comprises 20 internal man hours, external legal advice and travel expenses). As mechanical rights and public performance rights in most Member States require separate clearance, the overall cost of the two requisite licences per Member State would amount to almost €19,000."26

5.7 Acquiring all the necessary rights can also be a lengthy process for the user. By way of illustration, the initial rights clearance for the BBC’s iPlayer service took five years to complete. The Government believes that such high transaction costs can increase barriers to entry, ultimately hindering the development of new products and services which could stimulate growth and enhance choice for consumers.

5.8 Rights holders can have an equally complex experience in negotiating the rights clearance framework. A large number of rights holders tend to use the many-to-many licensing facilities provided by collecting societies. To maximise the gains from their creations, individual rights holders would need to identify all users and potential users; negotiate the fees and scope for their licences; collect royalties

and monitor the use of the licence. Copyright owners managing their own rights can find it difficult to control and manage every single use, especially when their works are being exploited on digital platforms and/or in high volumes.

5.9 As a result, permissions might be missed, either inadvertently (because the user is unaware that the right needs to be cleared/ the rights holder is unaware of/ unable to control his rights) or deliberately (because the user decides to risk being unlicensed rather than negotiate the rights clearance system). Where this happens, the user runs the risk of infringement, while the rights holder loses money due to them. Additionally, the complexity and cost can inhibit the creation and development of new works and investment, which can in turn diminish the potential cultural and economic output of the UK.

5.10 The ECL mechanism has been widely used in Nordic countries since the 1960’s and has led to the simplification of rights clearance. Its introduction in the UK would result in a “one-stop-shop” for particular types of right (in those sectors where collecting societies choose to act in ECL mode, and were authorised to do so under the scheme). In such cases, the only additional rights that might need to be negotiated would be with rights holders that have opted out of an ECL arrangement.

5.11 The Government believes that simplified rights clearance will result in more content becoming available legally. Under an ECL regime, service providers should find it easier (and cheaper) to obtain permissions for the provision of comprehensive and therefore attractive legal offers. In the absence of such legal offers, complete but unlicensed repertoires will continue to be attractive.

5.12 The simplified regime is good for businesses because reduced transaction costs will lower barriers to entry, and enable the development and rollout of new business models and services. It is good for consumers because it extends their ability to enjoy copyright works.

5.13 ECL is also good for creators because it guarantees them remuneration where their work is used. Many rights holders are unaware of their rights or are simply unable to manage them in a complex rights environment. A well-designed ECL system would safeguard their rights and the income generated from their use.

5.14 The efficiencies and time savings generated by an ECL provision could well have a knock on effect on administration costs within collecting societies which opt to use ECL. The Government has assumed that any cost savings will be redistributed as royalties to the rights holders, and your views are sought about whether this is optimal.
### Consultation Question

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<td>23</td>
<td>In the Impact Assessment which accompanies this consultation, it has been estimated that the efficiencies generated by ECL could reduce administrative costs within collecting societies by 2-5%. What level of cost savings do you think might be generated by the efficiency gains from ECL? What do you think the cost savings might be for businesses seeking to negotiate licences for content in comparison to the current system?</td>
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<td>24</td>
<td>Should the savings be applied elsewhere e.g. to reduce the cost of a licence? Please provide reasons and evidence for your answers.</td>
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<td>25</td>
<td>The Government assumes in the Impact Assessment for these proposals that the cost of a licence will remain the same if a collecting society operates in extended mode. Do you think that increased repertoire could or should lead to an increase in the price of the licence? Please provide reasons for your answers.</td>
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5.15 The Government believes that the current business models and operations of certain collecting societies may give rise to the risk of civil or criminal sanctions. This is because, against the digital backdrop of mass usage in numerous permutations, it can be difficult - if not ultimately impossible - for a collecting society to obtain a mandate to represent all rights holders, whether domestic or foreign (foreign rights are usually dealt with by means of reciprocal agreements with overseas collecting societies, but the same problems of coverage apply as with domestic rights). Given the demand for different types of usage of different rights, it is possible that a collecting society could get to a point where it may be inadvertently licensing outside its repertoire. The granting of an ECL authorisation would significantly reduce the risk of infringement in relation to the uses it covered. Collecting societies would be able to license confidently with a minimal risk of there being a right or a work not being in their repertoire, unless the rights-holder has exercised their right to opt-out of the ECL system. Simultaneously, users would be able to obtain licences for the use of an increased number of works from one body. Thus, once they have bought their licence, users can be more confident that their use will not be interrupted by unexpected claims from one or more rights holders.

5.16 Consistent with the Government’s commitment to better regulation, non-regulatory approaches to improve the collective licensing framework have been explored. The conclusion is that that this is not possible without legislative intervention: the existing legislation requires explicit consent from a rights holder for someone to use their rights. ECL, which would allow a collecting society to act with implicit rather than explicit consent, would not be compatible with the existing regime and new regulation is therefore required.
Consultation Question

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<td>26</td>
<td>If you are a collecting society, can you say what proportion of rights holders you currently represent in your sector?</td>
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<td>27</td>
<td>Would your collecting society consider operating in extended licensing mode, and in which circumstances? If it is something you’d consider, what benefits do you think it would offer to your members and to your licensees?</td>
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<tr>
<td>28</td>
<td>If you do not intend to operate in extended licensing mode, can you say why?</td>
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<td>29</td>
<td>Who else do you think might be affected by the introduction of extended collective licensing? What would the impact be on those parties? Please provide reasons and evidence to support your arguments.</td>
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Proposals

5.17 The Government is proposing new legislation that would introduce voluntary extended collective licensing in the UK. It would allow collecting societies that wish to operate an extended licensing scheme in relation to particular rights and uses of rights within the UK to apply for an authorisation from Government to do so. This authorisation would be subject to certain criteria being met by the collecting society. Once authorised, the collecting society would be able to act not just for its members, but also for rights holders who are not members, with the exception of those who opt out of the ECL scheme.

Qualifying Criteria

5.18 Collecting societies wanting to operate an ECL scheme would need to demonstrate that they are representative of the rights holders in their sector i.e. they would need to act for most rights holders in the sector. It follows that only one collecting society could be authorised to operate ECL in a particular sector at any one time.

5.19 The Government envisages that the collecting society would then need to seek the consent of the majority of their members to apply for an ECL authorisation. This would, in our view, counter concerns that ECL may be imposed on a sector without the consent of rights holders. If their members agreed, the collecting society would apply to the Government for permission to operate an ECL scheme.
5.20 Collecting societies authorised to operate an ECL scheme would be given additional powers to act on behalf of non-member rights holders who have not given them explicit consent to act. Understandably, there are concerns from some quarters about these additional powers. The Government believes these can be counterbalanced with some checks: the ECL authorisation would only be given if the collecting society committed itself to adhere to certain conditions set by Government. These would include compliance with minimum standards of fairness and transparency set by Government and enshrined in codes of conduct. Collecting societies operating ECL schemes would be required to treat members and non-member rights holders equally, unless there are reasonable grounds for differences in treatment.

5.21 The Government welcomes views on other factors which should be considered when deciding whether or not an ECL authorisation should be granted.

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<tr>
<td>30 What criteria do you think should be used to demonstrate that a collecting society is “representative”? Please provide reasons for your answer.</td>
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<tr>
<td>31 Do you think that it is necessary for a collecting society to obtain the consent of its members to apply for an ECL authorisation? What should qualify as consent - for example, would the collecting society need to show that a simple majority of its members have agreed to the application being made?</td>
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<tr>
<td>32 Apart from securing the consent of its members and showing that it is representative, are there other criteria that you think a collecting society should meet before it can approach the Government for an ECL authorisation? Please give reasons for your answer.</td>
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<tr>
<td>33 When, if ever, would a collecting society have reasonable grounds to treat members and non-member rights holders differently? Please give reasons and provide evidence to support your response.</td>
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<tr>
<td>34 Do you have any specific concerns about any additional powers that could accrue to a collecting society under an ECL scheme? If so, please say what these are and what checks and balances you think are necessary to counter them. Please also give reasons and evidence for your concerns.</td>
<td></td>
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<tr>
<td>35 Are there any other conditions you think a collecting society should commit to adhering to or other factors which the Government should be required to consider, before an ECL authorisation could be granted? Please say what these additional conditions would help achieve.</td>
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The Opt Out Mechanism

5.22 The Government is aware of concerns on the part of some rights holders that there may not be sufficient opportunity for them to opt-out of an ECL scheme. The Government agrees that the opt-out is an essential component of such a scheme, and is required to ensure that any ECL system would remain compliant with existing protections for rightsholders. The Government's view, on this basis, is that the widest possible notice should be given of the introduction of ECL in any sector. Depending on the size and coverage of the collecting society, it is proposed that it would be appropriate to place adverts, designed to attract the attention of rights holders, in national media such as radio, television, and newspapers.

5.23 There are also fears that it will be onerous to opt out from an ECL arrangement or that a collecting society might deliberately ignore an opt out. The proposal is that the opt out mechanism should be simple and at zero or negligible cost to the rights holder. An email or a telephone call to a free phone or local number are examples of simple and cheap opt out mechanisms. The Government would welcome your views on how a collecting society should show that it has taken account of opt outs.

Consultation Question

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

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

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

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

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

5.24 The Hargreaves Review recommended that ECL be used for the mass clearance of works which could include orphan works, such as in large-scale digitisation projects for cultural institutions. ECL does not include a diligent search in advance - it would defeat the objective of more efficient rights clearance - so it cannot be proposed as a solution to orphan works specifically.

5.25 However, ECL schemes are likely to sweep up some orphan works. This is because ECL involves the clearance of all rights in a given sector, bar those that have been opted out. This means that some orphan works will be caught up, but that they will only be discovered at the end of the process when the money comes to be allocated and distributed.

5.26 If, at the end of the clearance procedure, there are works left over that the collecting society cannot match to a rights holder, then the proposal is that the collecting society would need to conduct a search to find the rights holders. The Government’s view is that a collecting society be required to give as wide notice as possible of its intention to make a distribution of monies. As with the opt out notice, this should be designed to attract the attention of as many rights holders as possible. However, there may still be some rights holders missing after this. The government is interested in your views about what further measures should be taken to search for missing rights holders. For example, do you think there should be a full diligent search, as discussed in chapter 4? If so, who should bear the cost of conducting such a search?

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<td>41</td>
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<tr>
<td>What measures should a collecting society take to find a non-member or missing rights owner after the distribution notice fails to bring them forward?</td>
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Unclaimed Royalties

5.27 A collecting society that uses ECL will be required to retain any money due to non-members. Notice of distribution should be advertised widely so that as much of the royalties collected as possible are paid out in a timely manner. The collecting society may be required to put in place additional measures to search for missing rights holders, as described above.
5.28 But despite best efforts, it is possible that some rights holders may not make a claim or be found, leaving an undistributed surplus. This gives rise to the question of what should be done with any monies which have not been claimed followed a specified period. Some creators’ representatives are keen that unclaimed money should be distributed to creators in the same field. However, there are in fact a range of possible options, all worthy of consideration, such as the monies being used for social, cultural or charitable purposes or for investment in creative industries.

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<tr>
<td>42 How long should a collecting society allow for a non-member rights holder to come forward?</td>
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<tr>
<td>43 Aside from retention by the collecting society or redistribution to other rights holders in the sector, in what other ways might unclaimed funds be used? Please state why you think so.</td>
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6. Copyright licensing: codes of conduct for collecting societies

This chapter discusses proposals to introduce codes of conduct for collecting societies, initially on a voluntary basis. These codes will contain minimum standards of fairness, transparency and good governance which will be set up by the Government after this consultation. We seek your views on the minimum standards and the scope of the code. We would also welcome initial views on suitable penalties for non-compliance with a statutory code of conduct.

Current Situation

6.1 Collecting societies in the UK are privately-run commercial entities. They are an economically significant sector, collecting close to £1 billion per annum in total on behalf of their members (creators and rights holders)\(^{29}\).

6.2 The Government recognises and values the role that collecting societies play in copyright licensing. By enabling "many to many" licensing, they reduce transaction costs both for their members and their licensees, both of whom would otherwise need to negotiate the use of copyrighted works on a case-by-case basis. Collective licensing consequently increases the ability of the consumer to access a wide variety of copyright works. The Government sees collecting societies as central to the monetisation of copyright content.

6.3 In the UK and elsewhere, collecting societies tend to be monopoly suppliers of the licensing products for their sectors: there is typically one collecting society per category of right or sector. Consequently, collecting societies do not need to compete for members or users. This reflects the nature of the market; there are efficiencies for members and licensees in having to negotiate a single agreement for a particular set of works, or category of rights. Creators can either manage their rights on their own - though the complexity and time involved in doing so would be a deterrent - or become a member of the collecting society for their sector. Users can, in most cases, only purchase their licence from a single collecting society.

6.4 The price and terms and conditions of these licences are regulated on an ad hoc basis by the Copyright Tribunal. Collecting societies are also subject to the same wider legal framework as other companies of the same legal form. However, their collecting society functions are not specifically regulated by the Government.

6.5 The Government has heard a range of concerns about the operation of some collecting societies, reflected in correspondence to Ministers as well as meetings with trade and representative bodies. Some of these are questions about the transparency of collection and distribution mechanisms that have been raised by members of collecting societies. Others are from licensees who have complained about heavy handed, misleading or unfair practices in charging for usage of work. Owing to the monopoly status of most collecting societies, there are limited alternative licensing options available for users who feel they have been poorly treated.

6.6 Furthermore, transactions with collecting societies are categorised as business-to-business. This means that although in some sectors the majority of licensees are small and micro-businesses and sole traders, they do not enjoy the protections that are afforded to individual consumers when dealing with other monopolies, such as recourse to an independent ombudsman.

6.7 In many jurisdictions, the risk of harmful effects (for example, on competition) that are generated by the presence of a monopoly supplier, have been counterbalanced with supervision or regulation of collecting societies. The UK is one of only three EU member states that does not regulate its collecting societies, either by making provision for their formation in legislation or by regulating their collecting society activities in law. This is in contrast to other UK monopoly suppliers such as utility companies.

**UK Collecting Societies**

At present, the legislation simply defines what a collecting society, or licensing body is: "...a society or other organisation which has its object, or one of its main objects, the negotiation or granting, either as owner or prospective owner of copyright or as agent of him, of copyright licences, and whose objects include the granting of licences covering works of more than one author." There are no requirements that must be met or adhered to before or after formation. This means that any organisation meeting the definition can operate as a collecting society.

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**The Case for Change**

6.8 The Government wants collecting societies to adhere to minimum standards of good governance, fairness and transparency and to enshrine these in codes of conduct. Our view is that clarity and transparency of the copyright licensing system is an end in itself. It would be good for members, licensees, and collecting societies themselves. All three would enjoy the benefits of being able to operate in and access a transparent marketplace for licensing content in the UK.

6.9 Members of collecting societies would benefit from greater transparency because they would have clearer and more accessible information about how their rights are administered. They would be confident that their rights are being managed effectively, responsibly and transparently. Licensees would benefit because they would be able to clearly see how the price for their licences is set. They would have the assurance that the licensing process is fair and reasonable. Collecting societies would be able to operate on a level playing field in relation to each other.

6.10 The case for change should be seen in a context where uncertainty in some sectors about the operation of collecting societies is compounded by instances of opaque financial reporting. Accessing detailed financial accounts of some collecting societies does not always prove to be straightforward. Hargreaves noted that information on earnings, distributions, costs, and cost-income ratios are not reported in uniform format, making it difficult to provide an overview and impossible to provide a comprehensive account of an economically significant sector\(^3\)\(^1\). Consistent standards (e.g. a requirement to report in a uniform format) are necessary to provide a comprehensive account of the sector. It will be invaluable in giving users of the system greater certainty and insight.

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31 *Digital Opportunity: Economic Impact of Recommendations*, p.18
6.11 Based on available evidence, Hargreaves concluded that individual collecting societies appeared to cause avoidable deadweight losses and inefficiencies. For example, the wide range of cost margins and remuneration in the industry tends to point to inefficiencies. The Government believes that improved levels of accountability and transparency would result in the differences in administrative charges being narrowed.

6.12 As such, more competition on cost ratios and distribution between collecting societies would be expected to result. This would be beneficial to both members and licensees of collecting societies. In the short term, there will be implementation, monitoring and compliance costs for collecting societies as a result of these changes. However, in the longer term, these should be offset by the efficiencies generated by supervision. As collecting societies are able to provide an improved service level, so too will they be able to attract new members, while their existing members and licensees will benefit from higher service levels and a reduction in the time spent resolving complaints.

6.13 The EU is looking at the creation of harmonised standards of governance and transparency in the context of its work on a Framework Directive for Collective Rights Management. Hargreaves identified opportunities for the UK and its collecting societies and recommended that the UK should take a leadership role in this area. The Government believes that early adoption of codes of conduct would provide UK collecting societies with the credibility to become role models for the rest of Europe. This could position them favourably to take advantage of opportunities as the European Digital Single Market develops. The Government concurs with Hargreaves’s view that the UK has the potential to become a leader in copyright licensing- but only by being a leader in good practice, including by UK collecting societies.

6.14 Finally, codes of conduct are needed to support other measures that have been recommended by Hargreaves and which the Government intends to introduce. Codes that comply with minimum standards, will act as a check on the enhanced powers of collecting societies that are licensed to act on behalf of absent rights holders if they are authorised to operate extended licensing or orphan works schemes. Second, heightened transparency is needed to support measures that are intended to establish better functioning markets: the Digital Copyright Exchange and cross border licensing systems. Failure to introduce codes would put these initiatives, and their associated benefits, at risk.

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32 Digital Opportunity: Economic Impact of Recommendations, p.18
33 Digital Opportunity, p.37
6.15 Consistent with our commitment to better regulation, the Government has explored whether a non-regulatory approach could deliver our policy objectives. The Government’s proposals give collecting societies full opportunity to self-regulate in the first instance i.e. regulation through statutory codes will only be necessary if a collecting society fails to self-regulate effectively. The backstop power to regulate is a necessary enforcement mechanism to ensure compliance with the codes of conduct and consistent standards across the sector.

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<tr>
<td>46 Do you agree with the analysis contained in the impact assessment of the costs and benefits for collecting societies and their users? Are there additional costs and benefits which have not been included, or which you are able to quantify? Please provide reasons and evidence for your response.</td>
</tr>
<tr>
<td>47 Who else do you think would be affected by a requirement for collecting societies to adhere to codes of conduct? What would the impact be on them? Please provide reasons and evidence for your response.</td>
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**Proposals**

6.16 The Government proposes that, in the first instance, collecting societies self-regulate by adopting codes of conduct that incorporate minimum standards set by the government. In tandem, the Government intends to introduce legislation that will give the government a backstop power to put in place statutory codes of conduct for any collecting society that fails to self-regulate effectively. The backstop power will provide for penalties for non-compliance.

**Timescale**

6.17 The Government intends to publish minimum standards that must be included in a collecting society’s code of conduct. It hopes to do so following the conclusion of this consultation process, accompanied by guidance for collecting societies which sets out the measures they will need to take to ensure compliance with these standards.
6.18 Once the minimum standards have been published, collecting societies will be given the opportunity to self-regulate by adopting voluntary codes of conduct which include these standards. Work on voluntary codes of conduct for collecting societies taking place under the auspices of the British Copyright Council is at an advanced stage; the Government understands that these codes will not be far from being able to meet the minimum standards. One collecting society, PRS for Music, already has a voluntary code of conduct in place. This can be built on quickly to incorporate the minimum standards.

6.19 There are also good existing precedents such as the Australian Code of Conduct which can be used as a template by collecting societies when implementing voluntary codes.

6.20 The Government’s expectation is that, given the work that has already been done on the development of codes and the existence of precedents, collecting societies would be able to implement suitable voluntary codes within a year of the minimum standards and guidance being published. The Government also considers that the voluntary model provides several advantages for collecting societies themselves, including:

- The ability to retain control (within the context of the Government’s minimum standards) of the content of a code, ensuring it is best tailored to the needs of that sector.
- Avoiding the risk of penalties for non-compliance with a statutory code (see consultation section “initial views on non-compliance”).
- Eligibility for Government initiatives to recognise good practice (see consultation section “recognition of good practice”).
- Avoiding potential negative comparison against collecting societies who have introduced such codes on a voluntary basis.

**Consultation Question**

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<td>48</td>
<td>Is one year a sufficient period of time for collecting societies to put in place a code of conduct? Please provide reasons for why you agree or disagree? Please also provide evidence to show what a workable timeline would be.</td>
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<tr>
<td>49</td>
<td>What other benefits or rewards could accrue to a collecting society for putting in place a voluntary code? Please provide evidence for your answer.</td>
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Individual or Joint Codes

6.21 The British Copyright Council initially began work on producing a joint code of conduct for all collecting societies. Their experience of differences between sectors led them to produce a set of principles that should be included in the individual codes of the different collecting societies. The Government’s view is that it does not matter whether there is a single code, a series of joint codes or individual codes for collecting societies, as long as they incorporate the minimum standards. Joint codes could generate economies of scale and scope for sharing the cost of compliance – however, this is a matter for the collecting societies to decide.

**Consultation Question**

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

Minimum standards

6.22 The Government is of the view that each code must contain minimum standards. Many collecting societies already have good standards in place for the manner in which they deal with members and licensees; so much of this process should be about codifying existing good practice rather than creating new obligations. Indeed, collecting societies may wish to introduce voluntary codes which go further. The Government considers that the minimum standards should cover the following areas:

- obligations to rights holders.
- obligations to licensees.
- control of the conduct of employees and agents.
- information and transparency; monitoring and reporting requirements.
- complaint handling.
- an ombudsman.
- review of the code.
Consultation Question

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

Obligations to rights holders

(a) Membership

Under this heading, the government’s view is that, at a minimum, a collecting society’s code should:

• offer membership to all rights owners in the sector they manage.
• have rules or a constitution that enables members (and non-members if operating an ECL scheme) to withdraw their rights on reasonable notice.
• offer fair and balanced representation of rights-holder members in the internal decision making process of the collecting society.
• provide a copy of its [rules/constitution] to members and potential members.

(b) Representation

Under this heading, the government’s view is that, at a minimum, a code should give undertakings that a collecting society will:

• act with the utmost diligence in representing the interests of its members.
• treat its members (and non-member rights holders if operating an ECL scheme) fairly, honestly, impartially and courteously and in accordance with its rules and membership agreement.
• treat all categories of members equally.
• deal with all members transparently.

Consultation Question

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

(c) Under this heading, the Government proposes that a collecting society should, at a minimum, undertake to:

- treat its licensees and potential licensees fairly, honestly, impartially, courteously and in accordance with its [rules] and any licence agreement.
- ensure that its dealings with licensees or potential licensees are transparent.
- consult and negotiate with any relevant trade association in relation to the terms and conditions of a new or significantly amended licensing scheme.
- provide information to licensees and potential licensees about its licensing schemes, their terms and conditions and how it collects royalties.
- ensure that all licensees and licensing schemes are drafted in plain English and accompanied by suitable explanatory material.

Consultation Question

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

(d) The Government proposes that codes should include a section that sets out what collecting societies expect of their licensees. We propose that these could include requirements:

- to respect the rights of creators and rights holders, including their right to receive fair payment when their works are used.
- that copyright material will only be used in accordance with the terms and conditions of a licence.

Consultation Question

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

(e) Under this heading, our view is that the collecting society should, at a minimum, give an undertaking that:

• staff training procedures require employees, agents and representatives to refrain from high pressure selling techniques.
• staff provide licensees and potential licensees with clear information including information about any cooling-off periods which may apply to new licences.
• employees and agents are aware of the procedures for handling complaints and resolving disputes and are able to explain those procedures to members, licensees and the general public in plain English.

Consultation Question

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

Information and transparency

(f) In this section of the code, the collecting society should set out its obligations to:

• inform members, licensees, and potential licensees, on request, about the scope of its repertoire, any existing reciprocal representation agreements, and the territorial scope of its mandate.
• maintain, and make available to its members on request, a clear distribution policy that includes the basis for calculating remuneration; the frequency of payments; and clear information about deductions and what they are for.
• provide details of its tariffs in a uniform format on its website.
• provide details of its code of conduct and complaints procedure, accessible via a link on the homepage of its website.
• undertake that all information it provides be kept up to date, readily accessible, and written in clear language that can be easily understood by licensees, potential licensees and members.
Consultation Question

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

Reporting requirements

(g) The collecting society should, in this section of its code, undertake to publish an annual report which includes details about:

- the number of rights holders it represents, whether as members or through representative agreements. Where possible, and if applicable this should include an estimate of numbers or rights holders represented by extended collective licensing.
- its distribution policy.
- total revenue from licences granted for its repertoire during the reporting period.
- the total costs incurred in administering licences and licensing schemes.
- the itemised costs incurred in administering licences and licensing schemes.
- the allocation and distribution of payments of the revenues received and the extent to which this is compliant with its distribution policy.
- the procedures for the appointment of directors to the collecting society and details of any appointments in the course of the reporting period.
- details of the remuneration of each director of the collecting society during the reporting period.
- a report regarding compliance with its code of conduct over the past year, including data on total level of complaints, and resolution methods.

Consultation Question

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

(h) Under this heading, the Government proposes that code of conduct includes provisions for:

- the collecting society to adopt and publicise procedures for dealing with complaints from members, non-member rights-holders (if operating in ECL mode) licensees and potential licensees.
- that the complaints procedure should be based on the minimum standards covered by the code of conduct.
- the Government proposes that the complaints procedure provided for in the code of conduct of the collecting society must:
  - define the categories of complaints and explain how each will be dealt with.
  - ensure information on how to make complaints is readily accessible to members, licensees and potential licensees.
  - provide reasonable assistance to a complainant when forming and lodging a complaint.
  - specify who will handle the complaint on behalf of the collecting society.
  - indicate the time frame for the handling of a complaint or dispute.
  - provide that the collecting society will give a written response to each complaint that is made in writing.
  - provide that the collecting society will give a written decision in any dispute and give reasons for that decision.
  - ensure that the collecting society makes adequate resources available for the purpose of responding to complaints and resolving disputes.
  - provide that the collecting society will regularly review its complaint handling and dispute resolution procedures to ensure that they comply with these minimum standards.

Consultation Question

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

6.23 The Government proposes that the codes should include a requirement for collecting societies to appoint and fund an independent and impartial person to arbitrate on disputes and review their performance against their code(s). For consistency and cost reduction reasons, the Government suggests that a single ombudsman would be sensible, but ultimately this is a matter for individual collecting societies.

6.24 The Government proposes that the ombudsman should be the final arbiter on complaints between the collecting society and its members or licensees in relation to the minimum standards of their code(s) of conduct.

6.25 The scope of the ombudsman service will not include matters that are within the jurisdiction of the Copyright Tribunal.

Consultation Question

59 Please indicate whether you think a joint ombudsman or individual ombudsmen would work better. Please say why you would prefer one over the other.

Ombudsman: Review of the Code

6.26 The Government believes that there is a further role for the ombudsman in monitoring and reviewing performance of the collecting society against the minimum standards of the code. We propose that there should be review provisions in the code which should include the following:

• An initial review which should take place two years after implementation.
• Thereafter, reviews at intervals of at least three years.
• Powers for the ombudsman to publicise and consult on the review and to make public his conclusions.

Consultation Question

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

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

6.27 The Government wants codes of conduct to become the basis for best practice amongst collecting societies, providing assurance to users and helping UK collecting societies to become role-models internationally. In support of this goal, Government should provide public recognition of strong performance against voluntary codes of conduct (as evidenced by ombudsman’s reports), giving collecting societies the opportunity to demonstrate their commitment to high levels of service.

6.28 The Government has not reached a view on what form this recognition might take, and would welcome views from stakeholders on such a scheme (which could, for example, involve allowing collecting societies to display a kite-mark or some indicator of high performance on their website and in other literature).

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<tr>
<td>62 What initiatives should the Government bring forward to provide recognition of high performance against voluntary codes of conduct? Please give reasons and evidence for your response.</td>
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Initial Views on Non-Compliance

6.29 Under these proposals, the “penalty” for not putting in place or adhering to a voluntary code of conduct that complies with the minimum criteria is that a statutory code will be put in place through the use of a backstop legislative power. The Government anticipates that any statutory code will closely reflect the minimum standards which will be published following this consultation process, and which will form the basis for voluntary codes.

6.30 The Government has not yet reached a view on the process to determine whether a society is in breach of either a voluntary or statutory code. The Government believes this decision should be within the purview of Ministers, who will be responsible for implementing any statutory measures as a result of non-compliance. It is anticipated that Government would consider Ombudsman’s reports and representations from collecting societies and their users in reaching such a decision, and we would welcome views on the process and thresholds that would provide the basis for Government intervention.

6.31 The Government would also like to hear views on what suitable penalties would be in the event that a collecting society fails to comply with a statutory code of conduct.
6.32 In the event that the decision is taken to impose a statutory code, the Government’s initial view is that this should be subject to review after an initial set period. This would give the collecting society the opportunity to return to a voluntary code if it can demonstrate (evidenced for example by the Ombudsman’s report) that it has improved its practices and complied with the minimum standards. The Government would like to hear from you on this or any other suitable approaches.

### Consultation Question

63 What do you consider the process and threshold for non-compliance should be? For example, should Government test compliance on a regular basis (say by following Ombudsman’s reports) or on an ad-hoc basis? What evidence would be appropriate to demonstrate non-compliance? Please give reasons for your response.

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

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

### Exemption for Micro-businesses

6.33 The Government want to support small and micro-businesses, and has introduced a moratorium on any new regulation for micro-businesses in particular. We recognise that some collecting societies (both already in operation and potential future societies) could meet the criteria of a micro-business, and that the costs associated with a statutory code of conduct could constitute a significant burden in such instances. Accordingly, we have taken the position that any such societies should be exempt from the scope of the power to impose a statutory code. However the Government would encourage these collecting societies to introduce a code incorporating the minimum standards on a voluntary basis.

### Consultation Question

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

This chapter discusses proposals to introduce new exceptions to copyright and widen existing ones. Currently UK law requires that permission must be sought from the copyright owner if people wish to use a copyright work. However, there are a number of exceptions to this under the law which allow certain uses without permission.

Current Situation

7.1 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 a reason to invest in new talent, culture and content. Without copyright protection British creators and creative industries, from film directors to video game developers, would have less incentive to create new works, to the detriment of the UK’s culture and economy.

7.2 Allowing copyright owners to restrict the use of their works in this way generally benefits creators and the creative industries at the expense of other groups. There is a trade-off between the increased incentives and rewards given to creators, and the economic and cultural benefits that flow from this, and the negative impacts on users of copyright works who face restricted supply, increased transaction costs, and less freedom to use knowledge, data, and cultural works. In general, there is economic justification for this trade-off. But in some circumstances the economic costs of copyright to those using copyright works – whether individuals, businesses or other organisations – can outweigh its benefits.

7.3 One way in which copyright legislation seeks to balance these competing interests is by permitting certain uses of copyright works without permission from their owners through specific exceptions to copyright. The UK’s Copyright, Designs and Patents Act 1988 (referred to above as “the Copyright Act”) contains a range of exceptions, each of which applies to a different use of certain copyright works by a specific group or groups. Examples of existing exceptions include: quoting from copyright works for the purpose of criticism or review; copying for educational purposes including teaching and examination; making accessible copies of books and other works for visually impaired people; and recording television programmes for later viewing.

7.4 All countries that have copyright also provide exceptions and there are a variety of approaches to doing so. In the United States, as well as defined statutory exceptions, the doctrine of “fair use” provides a flexible set of principles that can be applied to different uses of copyright works as they arise. This approach is adaptable to new technologies and provides space for business innovation, but it also creates a high degree of uncertainty. In the European Union, copyright law is partly harmonised and EU states are able to provide specific exceptions for certain narrowly-defined types of use. This approach can provide greater clarity but less flexibility and adaptability.
7.5 The UK and most other countries are also members of international copyright treaties. Most notable is the Berne Convention which sets out a broad framework for copyright protection and a “three-step” test that any exception in national law must meet.

### Sources of copyright exceptions in UK, EU and international law

#### UK copyright law

UK copyright law is set out in the Copyright Act. The Act gives copyright owners the right to prevent their works being copied, issued to the public, rented or lent to the public, performed or shown in public, communicated to the public, or adapted.

Chapter III of the Act, entitled *Acts Permitted in relation to Copyright Works*, has more than fifty Sections providing exceptions to these rights. Schedule 2 to the Act sets out similar exceptions in relation to rights in performances. Numerous statutory Orders and Regulations further define the exceptions that are provided in the Act. Together these different legislative instruments contain well over a hundred provisions on copyright exceptions.

#### European copyright law

The main source of EU copyright law is Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, often called the “Infosoc Directive” or, as referred to in this consultation, the “Copyright Directive” or “the Directive”. Article 5 of the Directive sets out twenty types of exception to copyright that EU states are allowed to have, such as private copying, education and research. Other Directives permit similar exceptions in relation to computer programs, databases and other works. UK law must comply with these Directives.

#### International copyright law

The main international treaty relating to copyright is the Berne Convention. The Convention permits its member states, including the UK, to have exceptions to copyright in certain defined cases, for example to make quotations from a work, or to use works by way of illustration for teaching. It also permits other exceptions as long as they meet a “three-step test”, a test since reflected in other copyright treaties including the Copyright Directive.

#### The three-step test

Since its first appearance in the Berne Convention, versions of the three-step test have been included in a number of other copyright treaties, most notably the TRIPS Agreement. A modified version is provided in the Copyright Directive, where it applies to every permitted type of exception. In essence, the three step test says that countries may only allow a work to be copied:

1. in certain special cases;
2. which do not conflict with a normal exploitation of the work; and
3. do not unreasonably prejudice the legitimate interests of copyright owners.
The Case for Change

7.6 The Government’s top priority is creating the right conditions for economic growth. It aims to make the UK the best place in Europe to start, finance and grow a business. The Government also aims to put more power in the hands of ordinary people and enable them to play a more active part in society. Removing copyright regulation where it unnecessarily restricts productive economic or social activity will help to realise these aims.

7.7 With these aims in mind, the Hargreaves Review made the following recommendations on exceptions to copyright:

“Government should firmly resist over-regulation of activities which do not prejudice the central objective of copyright, namely the provision of incentives to creators. Government should deliver copyright exceptions at national level to realise all the opportunities within the EU framework, including format shifting, parody, non-commercial research, and library archiving. The UK should also promote at EU level an exception to support text and data analytics. The UK should give a lead at EU level to develop a further copyright exception designed to build into the EU framework adaptability to new technologies. This would be designed to allow uses enabled by technology of works in ways which do not directly trade on the underlying creative and expressive purpose of the work. The Government should also legislate to ensure that these and other copyright exceptions are protected from override by contract.”

7.8 The Government agrees with the Hargreaves Review’s premise that it should prevent copyright over-regulating activities that do not prejudice the central objective of copyright - the provision of incentives to creators. According to this view, removal of unnecessary and disproportionate copyright regulation from businesses, individuals and other groups will help to encourage innovation and will provide new opportunities for economic growth. That is not to deny the value of copyright to UK businesses; it is a way of enhancing the value of creativity to the UK as a whole. But it does not follow that more copyright necessarily means more benefit to the UK.

7.9 The Government therefore intends to expand copyright exceptions to permit greater use and reuse of creative works without permission of copyright owners where this has social and/or economic benefit. It believes the Review was right to conclude that there is considerable scope to extend, simplify and improve UK exceptions to copyright, without significant detriment to creators or the creative industries, and potentially to their benefit.
7.10 There are several reasons to support expansion of copyright exceptions. First, and most fundamental, is that it should create new opportunities for economic growth. Some restrictions that copyright places on businesses are of little or no economic benefit to copyright owners but prevent businesses using creative content in innovative ways to generate new works, products and services. These unnecessary rules and regulations can restrict growth opportunities for businesses and deny consumers the benefits of new technologies. Removing them will help to support innovative businesses and create opportunities for economic growth.

7.11 Secondly, certain restrictions on copyright are necessary to ensure an appropriate balance between benefits to the creative economy from protecting works and wider benefits to the public and society from allowing them to be used freely. Many existing exceptions, such as those relating to the use of copyright works for education, by public bodies, and by disabled people, are justified on this basis. The Government wants to ensure that everyone has an opportunity to contribute to society, and that copyright does not over-regulate activity that is of social benefit. This is particularly the case with regard to public goods such as education that deliver spill over economic benefits over time.

7.12 Thirdly, copyright should be understandable by ordinary people and exceptions should reflect reasonable expectations of what they should be able to do with copyright works. Individuals are often both users and creators of copyright works, and the use of digital technology and social media makes it easy to share, discuss and transform creative works. There is often a disparity between what ordinary people expect to be able to do with creative works and what copyright law says they are able to do which damages the reputation of the copyright system. Moreover, as many have noted, copyright law is complex and opaque, and is confusing to those who use it. In an age when millions of ordinary people create and use copyright works every day, greater clarity around the limits of copyright is essential.

7.13 The Government therefore intends to explore the scope for widening copyright exceptions within EU law, with a view to modernising and opening up copyright exceptions to the maximum degree. When doing this, it will be guided by the following principles:

- Exceptions should be introduced or expanded to the maximum degree that is possible without undermining incentives to creators.
- Exceptions must be compatible with European and international law, including the EU Copyright Directive and the international “three-step” test.
- It should not be possible to use contracts to restrict uses that are permitted by exceptions.
- New or revised copyright laws should be clear, straightforward, and avoid unnecessary regulation and bureaucracy.
**What this means in practice**

7.14 The extent to which the UK can reform copyright exceptions is ultimately limited by EU law. The EU Copyright Directive exhaustively lists nineteen types of exception that EU states are permitted to provide in their national copyright laws. Similar exceptions are permitted by other Directives. Each of these is narrowly defined to apply to particular uses, groups of users, and types of copyright work, and any exceptions the UK Government provides in domestic law must be similarly constrained.

7.15 The Government plans to consider the case for each exception permitted under the Copyright Directive during this consultation process. Some of these have already been fully or largely implemented in UK law, and there is only minor scope to amend them. Others do not yet exist or could be significantly widened. The consultation aims to explore the extent to which exceptions could be introduced or widened and to set out potential costs and benefits.

7.16 To help ensure the full benefits of exceptions to copyright are delivered, it is also proposed to make it impossible to restrict the use of any exception by means of a contract.

7.17 Simplification of copyright exceptions is also proposed. The Copyright Act currently provides only 13 Sections setting out the acts restricted by copyright, compared to 66 Sections setting out the acts permitted by exceptions. Many exceptions have been implemented in ways that are complex and difficult to understand and need to be read in conjunction with additional, supporting legislation\(^{37}\), and some may be subject to additional licences.\(^{38}\) Complex exceptions cause confusion and generate administrative costs and legal risks to those who ought to benefit from them. The Government would like to take every opportunity to make exceptions as clear and straightforward as possible.

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38 Sections 35 and 36, relating to copying by educational establishments, for example.
7.18 One way to introduce greater clarity into the copyright exceptions could be to use the terminology of the EU Copyright Directive to a greater extent. This is the Government’s preferred approach to implementing EU legislation, and has long been recommended by the Patent Judges of England and Wales. The volume of legislation on exceptions could also be reduced in order to make them easier to access and understand. There are many other more specific ways in which exceptions could be simplified or clarified, a number of which are mentioned below.

The structure of this chapter

7.19 The rest of this chapter looks at the types of exception under consideration. These are divided into categories based broadly on the optional exceptions permitted by the Copyright Directive.

7.20 This chapter begins with the five exceptions that the Hargreaves Review specifically identified as being important to economic growth. These are exceptions for private copying, archiving, research, text and data mining, and parody. Following this, the chapter looks at the scope within EU law for implementing or widening other exceptions, including those for educational use, use by people with disabilities, public administration, and quotation. Finally, this chapter sets out the case for introducing a general requirement that contracts should not be able to reinstate the restrictions removed by exceptions.

7.21 Other exceptions are outside the scope of this consultation. These include any exception that is mandatory under EU law, such as the exception for temporary copying, or any pre-existing exception that is not expressly defined in EU law.

Responding to the questions raised by this chapter

7.22 Given the wide range of exceptions covered by this chapter, it contains a large number of questions. You are welcome to reply only to those questions that are of particular interest to you, or to reply to every question, or to comment on the case for or against copyright exceptions in general. However, it is requested that evidence is provided wherever possible, in particular data relating to short- and long-term economic costs and benefits, as well as social and cultural impacts.


40 Copyright in the Information Society 2001/29/EC. Articles 5(2) and 5(3). Some categories have been grouped together (e.g. quotations, news reporting and speeches) others have been split (e.g. archives and education).

41 Copyright in the Information Society 2001/29/EC. Article 5(1)(a)

42 Copyright in the Information Society 2001/29/EC. Article 5(3)(o) (minor exceptions) and Article 9 (other provisions)
Private copying

This section discusses a proposal to introduce a private copying exception that would permit an individual to copy creative content that they own to other devices, media and platforms.

Current situation

7.23 Digital technology makes it easy to copy creative content such as music, eBooks and video from one medium to another. The iPod’s success was built on being able to “rip” CDs and store them as digital mp3 files. Many consumers believe that copying content they have purchased from one device to another is a legitimate activity, mirroring their ability to transfer and store analogue media such as books, records and films. However, private use of copyright works without permission is in fact unlawful, as it infringes copyright.

7.24 There is strong evidence that consumers view private copying – in particular copying of content they have paid for – as legitimate activity that should not be restricted by copyright. A recent Consumer Focus survey found only 15% of consumers knew that copying a CD that they had bought onto their MP3 player was illegal, and only 9% thought it should be.43 A University of Hertfordshire survey for UK Music found that being able to copy music between devices is important to 87% of 14 to 24 year-olds.44

7.25 In recognition of consumer behaviour and belief, UK record labels have not sued people who copy music they own for their private use. Purchases from many digital download services are accompanied by licences that expressly permit buyers to make private copies. For example, Apple’s iTunes allows copying and backup of purchased content, and Amazon’s music store allows unlimited copying for personal use. Producers are able to protect digital content from copying by applying technological protection measures such as digital rights management (DRM). However, digital music files are increasingly sold DRM-free, reflecting consumer demand for easy private copying.

7.26 Other trends also indicate that both consumers and producers benefit from an environment where content can be copied for private use. Many vinyl records sold today come with a digital download code that allows people to download digital versions of the music they have bought, enabling them to listen on more than one device without the hassle of copying between vinyl and digital formats. This practice has been credited as one factor behind a recent increase in vinyl sales.\(^\text{45}\)

7.27 These trends suggest that both consumers and producers of music expect it to be copied between devices, that producers derive value from enabling consumers to format shift content, and that the ability to do so is priced into the purchase price of music.

7.28 Is this true of other media? If it is to remain relevant in light of technological innovation and deliver the greatest benefits to consumers, any private copying exception would need to be technology neutral and apply to every type of copyright work. A useful exception would apply to videos, DVDs, photographs, books and eBooks, as well as sound recordings.

7.29 Developments in software and digital storage have made it much easier to create and copy video. It is also easier to copy an electronic book than a physical version. To meet the desire of consumers to be able to view video on multiple devices, many DVD and Blu Ray discs are accompanied with a code, such as the iTunes Digital Copy code,\(^\text{46}\) which allows digital copies to be downloaded. As such, it appears consumer expectations of private copying are being recognised, and to some extent being met, by producers of DVDs.

7.30 Most commercially available DVDs and many eBooks are protected from copying by technological protection measures (TPM) such as digital rights management (DRM). This technology controls the way digital media may be used, for example by limiting access to an eBook to an accredited purchaser, or by preventing the data on a DVD from being copied onto another device. While in practice such measures can often be circumvented, in most cases it is illegal to do so under UK and European law\(^\text{47}\).


\(^{46}\) One exception for the purposes of cryptography research is found in Copyright, Designs and Patents Act. 1988 (as amended), s296ZA(2).
7.31 There may sometimes be disparity between what a copyright exception allows someone to do and what TPM permit them to do. The Copyright Act provides a mechanism that facilitates access in these cases. An individual who wishes to access media (not including computer programs) in order to take advantage of existing copyright exceptions, but cannot do so due to TPMs, can complain to the Secretary of State if the copyright owner does not make an accessible copy of the work available to them voluntarily. The Secretary of State then has certain powers to ensure that an accessible work is provided to the individual. It is possible to extend these powers so that they also apply to a private copying exception.

The case for change

7.32 Many new technologies and services are based on the assumption that people can make copies of content they have bought. The best known is the Apple iPod, which permits consumers to store entire CD collections on a single convenient and portable device. Millions of iPods were sold before legal digital downloads were available, meaning that, initially, all of their content was format-shifted from CDs (whether directly or by unlawful distribution of copies).

7.33 The iPod was launched in the United States where copying for private use is considered to be “fair use”. But Brennan, an innovative British company, faced difficulties marketing its own private copying device – the Brennan JB7 music player – in the UK. This device enables people to store music from CDs that they have bought on its hard disk for easy and convenient playback. Brennan was ordered by the Advertising Standards Authority to include a warning in its advertisements that use of its device involved copyright infringement. Although this device merely makes it easier for consumers to do what they have been doing for years, the lack of recognition for this behaviour in law threatened the growth of this innovative British company.

7.34 A similar scenario arose in the 1980s as video cassette recorders began appearing in shops and homes across the country. At that time, it was illegal to record a television programme for later viewing as this infringed copyright. In response, an exception was created to allow “time-shifting” of broadcasts. This technology-neutral exception (Section 70 of the Copyright Act) has allowed consumers to use new inventions, from video cassette recorders to digital hard disk recorders, which allow people to enjoy television and radio broadcasts at a more convenient time.

48 Copyright, Designs and Patents Act. 1988 (as amended). part 1, s 5A
49 Copyright, Designs and Patents Act. 1988 (as amended). s 296ZE
In a similar way to the introduction of the time-shifting exception in the 1980s, the introduction of a private copying exception should provide benefits both by aligning copyright with the reasonable expectations of consumers, and creating space for new technological innovation. It will remove some of the risks that businesses, particularly SMEs, face when developing and selling new technologies and services, supporting innovation and competition.

One area of potential innovation is in the provision of private cloud services. Private clouds allow people to store digital files remotely and access them over the internet, instead of storing them locally on a PC or other device. In the United States, and in other countries with private copying exceptions, such services can be provided freely. Research suggests that recent clarification of US copyright law has helped to support significant venture capital investment in US-based cloud computing firms. However, without a private copying exception, providers of similar services in the UK face legal risks and copyright owners may seek licence fees from them.

This means that providers of cloud services and consumers who use them face costs in the UK that they do not in other countries. These costs, including the costs of negotiating and paying for licences, are likely to prevent new businesses, particularly innovative start-ups, entering the UK market for cloud-based services. Moreover, if such services are licensed, consumers may have to pay copyright owners twice for the same right to copy content – once at the point of sale, and again via a subscription to private cloud storage. Certain cloud music services are already licensed in the UK, although the extent to which these licences relate to the narrow acts of private copying under consideration, as opposed to value-added services, is currently unclear. It seems reasonable that people should be able to copy content they have bought, to a private cloud to the same extent that they are able to copy it to a personal device. But we would not want to undermine the ability of copyright owners to charge for value added services based on the provision of content. We would welcome evidence on the impact of existing copyright law on the development and provision of cloud services, and the potential impact of a private copying exception on future developments in this area.

In summary, we believe there will be benefits to both consumers and innovative businesses if certain, limited, acts of private copying are permitted and are fully factored in to the price of content at the point of sale.
Proposals

7.39 In view of the above, we propose to create a new exception to copyright that allows people to copy creative content for private, non-commercial use. To be future-proof, we intend this exception to be technology, format and platform neutral, permitting private copying of any type of copyright work to any type of device or medium. We will ensure that such an exception is sufficiently narrow so that any harm caused to copyright owners through private copying is minimised, and therefore do not intend to introduce a levy on electronic devices or blank media, as exists in some other EU states (see box). Possible implementations are considered below.

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<th>Private copying levies</th>
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<td>EU law permits exceptions for private copying, but requires that if such an exception causes economic harm to copyright owners, then compensation should be provided to them. With this in mind, many EU countries that have wide private copying exceptions have introduced levy systems – charges on certain digital media and devices that enable copying, such as blank DVDs, scanners and computers.</td>
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Levies vary considerably between EU states. They are applied to different media and devices at different rates, and appear to bear little relation to the actual harm caused by private copying. In Sweden, a 64GB iPod attracts a €19 euro levy compared with a €1.42 levy in Latvia. There is also inconsistency in the application of levies to different copying devices. For example, only four EU states extend a levy to personal computers and twelve states extend a levy to printers, whereas most apply levies to blank CDs. Most of the cost of levies is borne by consumers through higher prices.

There is evidence that levies are inefficient and inexact methods of compensating copyright owners, and that they distort markets. They also mean that consumers can end up having to pay twice for the right to copy content – once through the price of content when they buy it, and again via a levy when they buy a copying device. Consumers also have to pay levies if they intend to only store content they have generated themselves – for example copying home videos to blank DVDs.

In view of these problems, the Government does not intend to introduce a private copying levy. To avoid having to implement a system of compensation, we will therefore need to ensure that any harm caused to copyright owners as a result of a private copying exception is kept to a bare minimum.
**Unrestricted private copying**

7.40 A wide private copying exception would permit copying of any work from any source, including works lent or shared by others, for private use. It might, for example, permit copying of DVDs lent by friends, or CDs borrowed from a library. Wide exceptions like this are provided by a number of other European states. Most (though not all) of these states currently provide compensation to copyright owners through a levy system.

7.41 This type of exception would allow people to legally copy any work that they have access to, and it would be easy to obtain copies of works without paying for them. It is likely that revenues to creators would fall as a consequence, and the incentive effects of copyright would be damaged. In view of the potential for harm caused by this option, the Government does not plan to introduce an unrestricted private copying exception. Instead, each option under consideration includes specific measures that are intended to minimise potential harm to copyright owners.

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<th>Consultation Question</th>
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<td><strong>67</strong></td>
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**Copying within the private sphere**

7.42 Many countries with private copying exceptions, such as France and Spain, permit copying not only for personal use, but also for use within a private or domestic sphere, such as a family, household or social circle. The Hargreaves Review suggested that a private copying exception permitting copying for family use would deliver greater consumer benefits than one covering only personal use.

7.43 As this option would give more people access to content the direct benefits to consumers are likely to be greater, as may be the benefits to manufacturers of technologies relying on private copying. However, allowing people to copy content they do not own could result in lost sales for copyright owners, which in turn could impact on incentives to creators and the range of content available to consumers.

7.44 Some economists liken copying within a private circle to shared uses of traditional media, such as private sharing of books or family television viewing. Someone buying a television for their family home will be prepared to pay more for it as it will benefit their whole family. In a similar way, it may be possible to factor the value of family copying into the purchase price of content, compensating for potential harm to copyright owners. To the extent that this behaviour already occurs, it may already be factored in to prices to some degree.

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However, comparisons with other shared uses of media are imperfect. Sharing a work by copying it results in multiple independent copies that can be used in parallel, and may replace sales. It is unclear whether harm caused by sharing, however limited, can be fully compensated through the price mechanism. The extent to which consumers consider copying for family to be reasonable behaviour is also unclear. In view of these uncertainties, an exception, that permits copying of content within the private sphere, is not currently the Government’s preferred option. However, the Intellectual Property Office intends to commission research into pricing of creative content to further explore this issue.

**Consultation Question**

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

### Copying for personal use

Evidence suggests that copying of legally-owned content for personal use is considered reasonable by most people. It is tolerated and sometimes facilitated by producers and creators, and is widespread. It is also necessary in order to use many types of digital device and is often licensed when digital content is downloaded. Many people think they should be able to copy a CD they have paid for onto their MP3 player, and many do this regardless of the law. An exception that permits copying of legally owned content for strictly personal use would reflect and legitimise this consumer behaviour. Such an exception would allow copying for uses such as format-shifting, backup, and use on different devices, but would not permit sharing of content.

To the extent that such an exception merely reflects widespread, though currently unlawful, behaviour it is unlikely to deliver either significant direct costs or benefits to users or producers of content. But if it encourages new private uses, such as those that may be enabled by new services, then consumers will benefit and may be prepared to pay more for content or purchase more content as a result. Either way, producers of content should be able to charge for this use at the point of sale by factoring it in to the price of content.

Despite being narrow, a private copying exception of this type could provide significant opportunities for growth in consumer technology and services. British businesses developing private-copying devices and services, particularly SMEs, will benefit from reduced legislative barriers to innovation and growth.
7.49 An exception that permits individuals to copy content that they legitimately own for their personal use while ruling out sharing of such copies will also more clearly differentiate between acceptable and unacceptable uses of copyright works.

7.50 In view of its potential benefits this is currently the Government’s preferred option, either by itself or in combination with other measures as described below. The Government invites evidence on the potential costs and benefits of such an exception, and whether it reflects reasonable consumer expectations.

**Consultation Question**

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

**Other measures to minimise harm from private copying**

7.51 As an alternative to the approaches described above, a private copying exception could be widely drawn but expressly limited so that it only applies when harm caused by copying is minimal. This approach is similar to that taken in the UK’s existing fair dealing exceptions, which enable the Courts to apply the law flexibly to individual cases depending upon the specific facts before them. It also has similarities to the “fair use” approach taken in the United States. Such an approach has the benefit of flexibility and allows adaptation to different situations, but may result in a lack of clarity about the type of copying that is allowed under the exception, as its limits will need to be defined through case law.

7.52 The Government would welcome views on whether this approach is preferable to the more specific approaches described above or whether, to help avoid uncertainty, it could be introduced in combination with them. It would also welcome views on any other measure that would enable such a provision to operate flexibly while minimising any potential economic harm to copyright owners.

**Consultation Question**

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

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53 For example, the UK fair dealing exception for private study.
Technological protection measures

7.53 As noted above, the Government is able to intervene in cases where an individual cannot use an existing exception due to Digital Rights Management (DRM) or other technological protection measures, to ensure that they are able to exercise the exception. These powers could be extended to apply to the private copying exception.

7.54 The EU Copyright Directive permits us to extend these provisions to allow the Government to intervene when an individual is unable to copy a work for private use, but only in certain circumstances. Such provisions cannot apply to on-demand services, and cannot prevent copyright owners restricting the number of copies that can be made by users of a private copying exception.

7.55 Extending these powers to cover a private copying exception is likely to deliver greater benefits to consumers. Reasonable technological measures that allow consumers to access services at a time and place chosen by them will be unaffected, but individuals will be able to challenge measures that are unduly restrictive and prevent them realising the full benefits of a private copying exception. In view of these potential benefits, we propose to extend these provisions to cover a private copying exception when it is introduced.

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<tr>
<td>71 Should the current mechanism allowing beneficiaries of exceptions to access works protected by technological measures be extended to cover a private copying exception? What would be the costs and benefits of doing this?</td>
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</table>
Preservation by Libraries and Archives

This section discusses proposals to extend current copyright exceptions relating to the preservation of cultural material so that they cover more types and uses of copyright works. Exceptions currently ensure that librarians or archivists who copy literary and other works in order to preserve them do not infringe copyright, but restrict the number of copies that can be made and do not apply to audio and visual works.

Current Situation

7.56 The Copyright Act currently provides an exception (Section 42) that permits librarians and archivists to copy certain works for the purposes of preservation without infringing copyright in those works. The exception only applies if it is impractical to buy a replacement copy, meaning that copying is the only way to preserve the work. This restriction ensures that the exception does not impact on the sale of new works.

7.57 The exception is restrictive as it applies only to prescribed libraries and archives, does not extend to artistic works, sound recordings, films or broadcasts, and does not permit multiple back-up copies to be made.

7.58 These restrictions mean transaction costs can be high for prescribed libraries and archives wishing to copy works that are not included in the scope of the exception. These costs are even higher for institutions that are currently not covered by the existing exception at all, such as galleries and museums. It usually takes several hours to get permission to copy a single work for preservation\(^{54}\) – assuming the copyright owner can be found in the first place – and libraries and archives often hold collections of millions of works. Seeking these permissions is so costly that bodies often face a stark choice between infringing copyright to preserve works or allowing them to deteriorate.

7.59 Separate exceptions allow designated bodies to record folk songs (Section 61) and broadcasts (section 75) in order to archive and preserve them. The process for achieving designated status is bureaucratic (see box) and could be simplified to make it easier for these types of works to be preserved.

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Becoming a designated body under Section 75

Section 75 of the Copyright Act allows designated bodies to make copies of broadcasts in order to archive and preserve them. A designated body is one that appears in an Order made by the Secretary of State for Business, Innovation and Skills. This takes the form of a Statutory Instrument, which is subject to annulment in either House of Parliament.

All the Order does in effect is add designated bodies to, or remove them from, an officially-sanctioned list. The Secretary of State will designate any body that is not established or conducted for profit.

The Order was last amended in 2003. Since then, we understand that several organisations named on the Order have disbanded, changed their name or altered their status. In addition, numerous other bodies wish to be added.

The time and bureaucracy involved in making a new Order means that it has only been done infrequently since the exception was introduced in 1988. A simpler approach would mean a much more responsive, effective and beneficial exception.

The Case for Change

7.60 The Hargreaves Review noted:

“... that libraries are inhibited in preserving content through digitisation, that they cannot preserve all categories of works and that as a result, works continue to deteriorate. This makes no sense and it should be uncontroversial to deliver the necessary change by extending the archiving exception, including to cover fully audio visual works and sound recordings.”

7.61 These restrictions hamper legitimate and often innovative activity that benefits society by enabling more of the UK’s cultural heritage to be preserved. The Review noted that a public digital archive preserved using these exceptions “could have considerable economic as well as social and cultural value.” The Government believes these restrictions could be removed without significant detriment to copyright owners.

7.62 The limitation of the UK’s archiving exceptions to literary, dramatic and musical works creates problems when attempting to preserve a range of unstable media that deteriorate with age, such as film or videotape. An archive that wants to preserve a film has to identify and seek permission from a range of copyright owners, and the transaction costs associated with this are high. Expanding these exceptions to include sound recordings, artistic works, films and broadcasts will reduce these costs and help to ensure these media are preserved for future generations.

56 Digital Opportunity, page 50
7.63 In addition, the exceptions only allow a library or archive to make a single copy of an item in order to preserve it. Making multiple copies is useful in itself (to create backups, for example) and certain modern preservation techniques rely on it. In order to do this under the current law, an archive must seek permission from copyright owners, with the associated transaction costs.

7.64 Other institutions such as galleries and museums have similar preservation needs as libraries and archives, but at present cannot benefit from the preservation exception. As a result, the transaction costs associated with preserving works are likely to be higher for museums and galleries. Expanding these exceptions to include more types of organisation is likely to mean more content is ultimately preserved.

7.65 This chapter has highlighted (above) the bureaucratic designation process that underpins the UK exception for archiving broadcasts. Simplifying how this exception operates should reduce costs to heritage institutions and mean this exception is more effective at enabling broadcasts to be easily preserved.

**Proposals**

**Widening our existing preservation exception**

7.66 For the reasons described above, the proposal is to extend Section 42 of the Copyright Act to make it easier to preserve a wide range of media for future generations. In addition it is proposed this exception is amended so that it applies to audiovisual works and sound recordings as well as literary, dramatic or musical works, and so that multiple copies can be made. Finally it is also proposed to allow museums and galleries to benefit from this exception as well as libraries and archives.

**Making it easier to preserve broadcasts and folk songs**

7.67 The Government proposes to simplify Sections 61 and 75 of the Copyright Act to make it easier to archive broadcasts and folk songs. This could be done by making it easier to become a designated body under these provisions, for example, by delegating authority to do this to the Comptroller General of the Intellectual Property Office, or by removing the need for formal designation altogether. Alternatively, it may be possible to further simplify these provisions by merging them with the more general preservation exception of Section 42.
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<tr>
<td><strong>72</strong> Should the preservation exception be extended:</td>
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<td>- to include more types of work?</td>
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<td>- to allow multiple copies to be made?</td>
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<td>- to apply to more types of cultural organisations, such as museums?</td>
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<td>How might this be done, and what would be the costs and benefits of doing it?</td>
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<td><strong>73</strong> Is there a case for simplifying the designation process which is part of</td>
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<td>Section 75? How might this be done and what would be the costs and benefits of doing it</td>
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<td><strong>74</strong> Should any other changes be made to the current exceptions relating to libraries</td>
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<td>and archives, and what would be their costs and benefits?</td>
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</table>
Research and private study

This section discusses proposals to amend current copyright exceptions for research and private study so that they apply to sound recordings, films and broadcasts as well as other works, and permit more types of use within an educational establishment.

Current situation

7.68 The Copyright Act provides an exception (Section 29) permitting certain uses of copyright works for research and private study. It allows literary, dramatic, musical and artistic works, and published editions, to be copied for non-commercial research purposes as long as such copying amounts to “fair dealing”. From a practical point of view, this means that those undertaking non-commercial research may make copies of works and are able to quote extracts in their own works without having to obtain prior permission from copyright holders. It also allows fair dealing for the purpose of private study.

7.69 The Act also provides several exceptions that permit libraries to make and supply copies of works for the purpose of non-commercial research or private study. The person to whom copies supplied to must satisfy the librarian that they will only use such copies for the purpose of non-commercial research and private study.

7.70 However, these exceptions do not apply to sound recordings, films and broadcasts. This means that those who wish to copy such works for the purposes of non-commercial research and private study need to obtain permission from copyright owners (assuming the relevant works are within copyright). Otherwise they will infringe the copyright in those works. Obtaining permission can be an expensive and time-consuming process especially if the copyright holder is hard to trace or does not respond to a request.

7.71 The Copyright Directive allows the UK to implement copyright exceptions for research, as long as such research is non-commercial, and copied extracts are accompanied by sufficient acknowledgement of their sources. These restrictions apply to the part of the current exception that relates to research (Section 29(1)). The other part of the exception relates to private study (Section 29(1C)). This is a special case of private use, and is limited to acts of fair dealing so that it does not harm incentives to copyright owners.

58 Copyright in the Information Society 2001/29/EC. Article 5(3)(a)
7.72 The EU Copyright Directive allows a further type of use of copyright works for the purpose of research or private study. EU states are able to provide exceptions that allow educational institutions, libraries, archives and museums to communicate works from their collections to people on their premises by electronic means for the purpose of research and private study. Such use must be limited to individual members of the public who are able to access these works. The Copyright Act does not currently provide an exception of this type.

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**Fair dealing in UK copyright law**

"Fair dealing" is a concept that has existed in UK copyright legislation since the 1911 Copyright Act. It currently applies to exceptions for non-commercial research, private study, criticism and review, reporting of current events, and education.

The meaning of fair dealing has been developed in case law. The Court of Appeal (in *Hyde Park Residence Ltd v Yelland* (2001)) described the test for fairness 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. The three most important factors relevant to whether a certain dealing with a work was fair have been identified as:

1. The degree to which a use competes with exploitation of the copyright work by its owner. If a review of a work acts as a substitute for it, and thus affects its value, then this will be highly relevant. However, this consideration does not rule out fair dealing for a commercial purpose.

2. Whether a work has been published or not. If it is has not been published, then dealing with it is unlikely to be fair.

3. 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 copying only a part of it.

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**The Case for Change**

7.73 The Hargreaves Review, and before that the Gowers Review, argued that this exception needs to be amended to avoid holding back research and study, narrowing opportunities for innovation, and restricting access to skills and knowledge in certain fields.
7.74 The UK’s current research and private study exception is inconsistent and benefits certain groups of researchers and students more than others. Audio and video content makes up a large proportion of modern research material, particularly when that research relates to the arts and humanities. It seems unreasonable and inconsistent that people are able to make copies of materials such as books and artistic works for research or study, but cannot do the same with audio and video content without permission. This is even more of an anachronism now that low-cost consumer equipment makes copying and study of this type of content possible for a wide range of students.

7.75 Updating the exception in these areas will redress this imbalance, meet the reasonable expectations of students and researchers, and will help to support multimedia education. Overall, it should reduce transaction costs for researchers, students, and the institutions to which they belong, as they will no longer have to identify and contact copyright owners to obtain permission to copy such works. Anything that supports research, learning and skills is also likely to benefit the UK economy and society. Costs to copyright owners should be kept to a minimum, as they are under the existing exception, by limiting it to “fair dealing” with works.

7.76 A risk of expanding this exception is that it may offer an opportunity for abuse by individuals who rely on it to copy works they would like to see or hear for entertainment purposes rather than for advancing their research or study in a particular field. Measures may need to be introduced in order to mitigate these risks. The approach proposed by the previous Government was to restrict an expanded exception to use by people who are members of an educational establishment, for uses relating to their study or research at that establishment.

Proposals

7.77 The Government proposes to amend the UK’s current research exception so that people will be able to copy a wider range of works for non-commercial research and private study.

Widening the current research and private study exception to cover all media

7.78 In view of the benefits identified above, the Government proposes to amend the research and private study exception currently provided in Section 29 of the Copyright Act to enable students and researchers to copy sound recordings, films and broadcasts as well as the other types of work that they are already allowed to copy.
7.79 The aim would be to make the exception “work-neutral”, so that it applies to every type of copyright work. This would remove inconsistencies in the law that currently lead to higher transaction costs for some students and researchers compared to others. In order to ensure that this exception does not damage incentives to creators, it is the Government’s intention to keep it as a “fair dealing” exception. This will mean individuals could not copy entire works where they would ordinarily have to buy them, but they could copy extracts from them.

7.80 Removing this inconsistency in the law will overcome rights clearance problems and enable researchers and students to access and use works that they cannot currently use, thus building knowledge, expertise and skills for use in the marketplace.

7.81 Owners of copyright in sound recordings, films and broadcasts who currently license their works for this use may lose income that they currently get from this licensing. There are also risks of illegitimate use – for example, use of works for recreation and entertainment could be passed off as use for research and private study. The requirement for fair dealing aims to minimise these costs.

7.82 In the same way that we intend to amend the research and private study exception to cover a wider range of works and media, we also intend to amend the related exceptions that permit libraries to make and supply copies for the purposes of non-commercial research or private study.60

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60 Copyright, Designs and Patents Act. 1988 (as amended, s. 38-39, 43)
Permitting electronic communication of works for research and private study within certain establishments

7.83 As noted above, the UK does not currently have a copyright exception that permits educational establishments, libraries, archives or museums to make works available for research or private study on their premises by electronic means. Such an exception is permitted by the Copyright Directive. The Government does not currently know the level of demand for such an exception, or its costs and benefits, but will consider the merits of introducing such an exception based on evidence gathered through this consultation.

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<tr>
<td>Should the copyright exception for research and private study permit educational establishments, libraries, archives or museums to make works available for research or private study on their premises by electronic means? What would be the costs and benefits of doing this?</td>
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Text and data mining for research

This section discusses proposals to create a new exception to copyright that allows whole copyright works to be copied for the purpose of text and data mining for non-commercial research.

Current Situation

7.84 Automated analytical techniques such as text and data mining work by copying existing electronic information, for instance articles in scientific journals and other works and analysing the data they contain for patterns, trends and other useful information.

7.85 Although the Copyright Act currently provides an exception that allows copying for the purpose of research and private study, it does not expressly allow the automated copying of whole works for text and data mining.

7.86 Copying for automated text and data analysis is not listed as a permitted type of copyright exception in EU law. However, the Directive does allow EU states to provide exceptions for non-commercial research, so the introduction of an exception for text and data mining is possible under current EU law as long as it is used only for non-commercial research purposes.

The Case for Change

7.87 The Government is committed to maintaining the incentives that copyright offers to authors and publishers of research material. However, there is a strong case for ensuring that copyright does not obstruct the use of new technologies for scientific research, in particular where the use of those technologies does not unduly prejudice the aims of copyright. The Hargreaves Review commented specifically on the impact that copyright restrictions have on the use of text and data mining technologies, an issue which was raised by several respondents to the Review.

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61 Copyright in the Information Society 2001/29/EC. Article 5(3)(a),
62 Digital Opportunity, paragraphs 5.20 to 5.24, pages 46-47.
7.88 These technologies 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. Researchers argue that copyright can thus obstruct the use of technology that is capable of adding considerable value to scientific research. Researchers also argue that some of the things that text and data mining can do are in effect only automations of actions that could be done “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 data mining technology, not in any extra permission provided by a copyright owner.

7.89 The copying involved in text and data mining goes on within a computer as part of a technological process, and neither this activity nor any result from it is likely to substitutable for the work in question (such as a journal article). It is therefore unlikely that permitting mining for research will on its own negatively affect the market for or value of the copyright works concerned. Indeed, it may be that removing restrictions from text mining would increase the value of access to research databases. However, it would be essential to ensure that adequate protections are in place to ensure that the copying undertaken is not used to develop or distribute substitutable copies.

7.90 The costs to British researchers from the time spent looking for the right material to read form a significant proportion of the overall cost of research. Reducing those costs would free researchers’ resources for other uses.

7.91 The direct beneficiaries of a specific exception for text and data mining are likely to be to scientific researchers, but the public will also gain to the extent that important research is made more efficient, delivering social and economic benefits. Helping to make data analysis less laborious and allowing researchers to analyse a wider range of sources using these techniques should help to improve the quality of research. This would support new scientific breakthroughs and the development of new technology and medicines, with clear social benefits.

7.92 Publishers of information, particularly publishers of scientific material, are likely to be the main group experiencing costs from such an exception. They would lose the right to restrict data analytics on the copyright works, where that was undertaken by users who had legitimately obtained access to the works. The Government recognises that publishers take an active role in developing text and data analytic technologies, and that some actively offer contracts that support the use of these technologies.

7.93 However, under current conditions, in some cases research projects could require specific permissions from a very large number (potentially hundreds) of publishers in order to proceed. The current requirement for specific permissions from each publisher may be an insurmountable obstacle, preventing some research from taking place at all.
7.94 The Government is not aware that publishers currently offer a collective solution that overcomes this difficulty. Therefore the current arrangements for using analytic technologies may well not be the best way of serving the overall public good, and the overall public benefit of a text and data mining exception appears to outweigh the harm to the licensing market. However, the Government will be very interested to hear of any alternative solutions which solve this “hold-up” problem of multiple permissions. A more open market for the development of analytical technologies has potential to offer opportunities to new and existing businesses, with potential knock-on impacts for growth. However, the costs and benefits of this measure are not fully understood, so the submission of further evidence is welcomed in response to this consultation.

7.95 As noted in the Review, the maximum benefits of this type of exception are likely to be delivered by an exception that also covers commercial use. The Government plans to explore with its European partners how to develop the framework in future to support the commercial use of these vital new technologies.

Proposals

7.96 The Government proposes to make it possible for whole works to be copied for the purpose of data mining for non-commercial research.

A new exception for text and data analytics

7.97 This proposal seeks to introduce a new non-commercial research exception that permits copying for text and data analytics, to the extent that this is possible under EU law. The exception would be limited further so that it applies only to uses of technology that do not unduly prejudice the primary market for or value of the copyright works being copied.

7.98 In view of the current EU legal framework, such an exception must be limited to copying for non-commercial research. The extent to which the benefits of such an exception can be realised if it does not include commercial research is at this stage unclear, but the Government believes it could still be of significant value. It would welcome views on whether an exception limited to non-commercial research is practical and whether it would be worthwhile in terms of its benefits.
There could also be risks from introducing an exception that are currently unforeseen. The Government wishes to avoid in particular any unintended consequence of such an exception that damages the primary market for research journals and similar materials, and would welcome all proposals relating to measures to minimise risks.

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<tr>
<td>Would an exception for text and data mining that is limited to non-commercial research be capable of delivering the intended benefits? Can you provide evidence of the costs and benefits of this measure? Are there any alternative solutions that could support the growth of text and data mining technologies and access to them?</td>
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Parody, caricature and pastiche

This section discusses proposals to create a new exception for parody, caricature, and pastiche, allowing people to use creative works for this purpose without infringing copyright.

Current situation

7.100 Britain has a long and vibrant tradition of comedy and satire, and parody, caricature, and pastiche have long been used to comment on the society, culture and politics of the day. From Regency etched caricatures to comedy panel games and sketch shows, British comedy and satire has moved with the times and taken advantage of new forms of expression, but copyright law has not changed to reflect this. In a digital age, this means that parodists can often risk copyright infringement.

7.101 Some countries, such as the United States and France, have long allowed people to copy other people’s works for the purpose of parody. Others, such as the Netherlands and Australia, have introduced exceptions for parody more recently. But no such exception exists in the UK, meaning British parodists, professional and amateur, face obstacles those in other countries do not.

7.102 In the past, UK law provided greater flexibility for works of this nature. In Glyn v Weston Feature Film in 1916, it was held that a burlesque parody – an art form “as old as Aristophanes” – could escape copyright infringement if sufficiently original. But by the 1980s this parody defence had been extinguished. Parodists can attempt to rely on other defences, such as the fair dealing defence of criticism and review, but this defence is very limited and most parodies will not fall within it.

7.103 Parody may be as old as Aristophanes but it has found new popularity in recent years with the development of online social media and digital technology. Modern parodies are as likely to be made at home by ordinary people as by professional writers, broadcasters and comedians. Parodies have become part and parcel of online social interaction, with parody works adorning Facebook walls and trending on Twitter. The modern public’s response to an event is as likely to be expressed through Photoshop competitions and Downfall parodies as through traditional comment, argument, and debate.

7.104 There is also a growing entertainment market worldwide, and comedy can reach wider audiences. Syndicated comedy programmes such as the Daily Show with

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Jon Stewart (made in the US where fair use of copyright material for parody is permitted) often use creative content for the purpose of parody, in particular to comment on news, politics and culture.

7.105 As well as economic rights, the Copyright Act provides certain moral rights to creators, which derive from international law, including the right to be identified as the author of a work and the right to object to derogatory treatment of a work. These rights, deriving from international law, include the right to object to derogatory treatment applies to any use of a work that amounts to distortion or mutilation of the work, or is otherwise prejudicial to the honour or reputation of its creator. Moral rights therefore clearly place limits on the extent of any parody exception. However, many parodies will not constitute derogatory treatment of a work and moral rights and parody exceptions coexist in many other European countries, including those that provide much stronger moral rights than in the UK.

7.106 Issues raised by the absence of a parody exception in the UK therefore include questions of freedom of speech and expression, the economic interests of creators of original works and creators of parodies, and the rights of creators to preserve the integrity of their works.

The case for change

Impacts on creators of parody works

7.107 Individuals, broadcasters and others who wish to create parodies from existing works face legal barriers and administrative cost due to copyright law. To create a parody legally they will need to clear the use of the underlying content with copyright owners – which can be an arduous and expensive process. This has the potential to stifle free expression by individuals and the creation of new material by television and radio programme makers, in particular if they need a quick turnaround or are made on a budget. It also means UK parodists are disadvantaged when compared to those in other countries, which can affect their ability to compete in the global market for comedy.

7.108 The story of Newport State of Mind was cited in the Review as an illustration of the problems faced by parodists. This music video parody, based upon Empire State of Mind, a hit song by the American rapper Jay-Z, achieved great success when posted on YouTube last year, but resulted in action by the copyright owners to have it removed from the internet. In the US, many previous parodies of the same original song have not attracted such action, perhaps because US “Fair Use” can protect parodies. In practice, the offending video has remained both visible and popular. As well as limiting opportunities for creators of parodies, incidents like this can have a negative impact on the public’s trust of the copyright system.
The BBC's contribution to the Hargreaves Review\(^6\) cited a homemade YouTube spoof of the 2010 Masterchef final that made substantial use of their footage. The BBC did not object to this as it used their own material, but other similar parodies risk challenge and removal by copyright owners.

It is likely that the main economic beneficiaries of this exception will be entertainers and comedians, the producers of comedy and entertainment shows, and broadcasters. Satirical shows such as Channel Four's Ten O'clock Live would be able to make savings and respond more quickly to events as they will no longer face the same burden of rights clearance. Members of the public will benefit from having greater opportunities for expression, and it will be in tune with the expectations of people using new media and online social networks.

**Impacts on creators of original works**

Four potential effects of a parody exception on the sales of original works have been identified\(^6\): 1) lost sales due to confusion between a parody and an original work; 2) increased sales due to greater publicity and awareness for the original; 3) lost sales due to negative reputational effects on the original; 4) increased sales due to positive reputational effects on the original.

Effects 1) and 3) may create costs for owners of the copyright in original works, and it will be important to consider how to limit their impact. Lost sales due to confusion, and competition, with an original work (1) are most likely to arise when a work of parody is very similar to the work or works on which it is based. Lost sales due to negative reputational effects (3) will be limited as creators have the right to object to derogatory treatment of their works (which will be unaffected by this exception), but could still be felt.

Effects 2) and 4) may lead to increased sales, and therefore benefits, for copyright owners. A parody may make an original work more visible to the public and heighten interest in that work. Fan tributes such as the abovementioned Masterchef spoof can also act as advertising for the content on which they are based.

In providing this exception, the aim would be to ensure the beneficial effects described above are realised while keeping negative impacts to a minimum.

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Consultation Question

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

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

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

Proposals

7.115 The Government has accepted the Review’s recommendation and intends to introduce an exception for parody. It is consulting on the most appropriate scope and safeguards for this exception.

Defining parody, caricature and pastiche

7.116 The Oxford English Dictionary defines parody as “an imitation of the style of a particular writer, artist or genre with deliberate exaggeration for comic effect”; caricature as “a depiction of a person in which distinguishing characteristics are exaggerated for comic or grotesque effect”; and pastiche as “an artistic work in a style that imitates that of another work, artist or period”. Other dictionaries provide broader or narrower definitions. Countries with parody exceptions have generally left definition of these terms to their Courts. This is also the Government’s preferred approach. However we would welcome views on whether additional definition could be provided for the sake of clarity.

Consultation Question

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

Possible limitations to a parody exception

7.117 One way to limit this exception could be by the intent behind a work of parody, caricature, or pastiche. The terms parody and caricature tend to apply only to works made for comic effect, such as satire and burlesque, but this is not necessarily true of a pastiche. Restricting this exception to use for comedy or satire could help ensure that works made under it do not mimic original works too closely.
7.118 Another way to limit this exception could be by the impact a parody is likely to have on sales of an original work. As described above, the main sources of harm to creators from this type of exception are likely to be from confusion with the original leading to substitution effects or from damage to the reputation of the original. To address the first issue a useful rule could be that a parody can only benefit from the exception if it is distinct enough from the original so as to not be a substitute for it. A similar approach is taken in other countries with parody exceptions, where the distance between an original work and a parody is highly relevant to whether it infringes copyright.

7.119 Negative reputational impacts of a parody will be limited to a degree by the moral rights given to creators, which are described above. The Government does not intend to dilute these rights, which are important to creators. The right to object to derogatory treatment will prevent the making of certain parodies, although many are unlikely to constitute derogatory treatment even if not liked by copyright owners.

7.120 Even if a parody is not considered derogatory treatment of an original work, it may still have a negative impact on its reputation. For example, use of a work for purely commercial reasons, such as advertising, may not be considered derogatory, but could form associations between the original and the product being advertised that affect sales of the original. It may be desirable, therefore, to introduce further measures to limit reputational damage.

Fair dealing

7.121 The Government’s current preferred way to address these issues is to make this a “fair dealing” exception. Fair dealing (which is described in more detail in relation to the research exception, above) is likely to mean that commercially competing uses of copyright material (those capable of substituting for the original) are not allowed. So, for example, use of the parody exception to make a straightforward cover version would be ruled out. A parody that is likely to unfairly damage the reputation of a creator would also be ruled out by a fair dealing exception.

67 Garnett. K et al. 2011. ‘Copinger and Skone James on Copyright’. Sixteenth Edition, Volume One. UK: Sweet and Maxwell/Thomson Reuters, sections 11-41 – 11-48, suggests that alteration of an author’s work so as to make him appear inept, untruthful, bigoted and so on are all possible examples of derogatory treatment. A parody that is not made out to be the work of the creator of the original is less likely to be considered derogatory.
7.122 A fair dealing exception appears to be the simplest and most flexible way to provide a useful exception while limiting potential negative impacts. It was the approach taken by the Australian government when it introduced a parody exception in 2006, which we understand to have been well received. However, the Government recognises that some creators will seek greater clarity as to the limits of a parody exception, so it does not rule out the introduction of other limitations if these can be clearly defined and support the overall objectives of the exception.

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<td>82 How should an exception for parody, caricature and pastiche be framed in order to mitigate some of the potential costs described above?</td>
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<td>83 Would making this a “fair dealing” exception sufficiently minimise negative impacts to copyright owners, or would more specific measures need to be taken?</td>
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<td>84 Are you able to provide evidence of the costs and benefits of such an exception?</td>
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Use of works for education

This section discusses proposals to extend the UK’s current copyright exceptions for educational use. The Government seeks views about the impact of these proposals on educational establishments, rights holders, students and teachers, licence operators and other interested groups.

Current Situation

7.123 The Copyright Act contains various exceptions that allow educational establishments to carry out certain acts that would otherwise infringe copyright. These exceptions exist in recognition of education as a public good that provides both economic and social benefits.

7.124 Section 32 allows anyone giving instruction or holding an examination (whether belonging to an educational establishment or not) to copy works for these purposes without infringing copyright, but does not allow copies to be made by a “reprographic process”, including photocopying, printing, or use with technology such as interactive whiteboards or PowerPoint. This means that, in effect, the exception only permits “chalk and talk” copying, for example writing an extract from a book on a board in the classroom.

7.125 Section 35 allows educational establishments such as schools, colleges and universities, to record broadcasts and show them to students. This means a school can record a radio or television programme and allow students to view or listen to it at a later time.

7.126 Section 36 allows educational establishments to make reprographic copies of short extracts from published literary, dramatic or musical works (less than 1% per quarter). These may be photocopies, for example, given to students as handouts. Copies must be accompanied by a sufficient acknowledgement that identifies the work and its author (unless published anonymously).

7.127 However, Sections 35 and 36 do not apply to the extent that licensing schemes cover the relevant uses of copyright works. Such schemes are operated by a number of bodies including the Copyright Licensing Agency (CLA), the Educational Recording Agency (ERA) and the Open University (OU). This means that, in practice, these exceptions will not apply in most cases and most educational establishments require licences to record broadcasts and copy other works.

68 Copyright, Designs and Patents Act. 1988 (as amended). s 32 to 36A.
In addition, all of these exceptions apply only when students are physically located at an educational establishment and do not cover distance learning environments.

The Copyright Directive permits EU states to have exceptions for the purpose of illustration for teaching as well as other copying by educational establishments as long as it is non-commercial. Such exceptions must also comply with the three-step test, but there is otherwise relatively wide scope to amend the law in this area.

The Case for Change

The Hargreaves Review argued against over-regulation of useful activity by copyright. There is scope to expand the education exceptions to permit wider copying of more types of copyright materials, enable use of these materials with digital technology, help students to access education more easily, remove financial burdens and support skills growth in the UK.

Opportunities to widen the scope of education exceptions

Currently, education exceptions only permit educational establishments to make reprographic copies of extracts from literary, dramatic and musical works. There is a strong case for permitting the copying of more types of work, including films, sound recordings, and artistic works, and for widening these exceptions so that copyright is no impediment to teaching using digital technology such as interactive whiteboards in the classroom. These changes are likely to support the teaching of arts and humanities subjects in particular.

Current education exceptions permit educational establishments to copy no more than 1% of a work per quarter. This limit is very low, and likely to be meaningless when applied to small works. Being able to copy 1% of a poem or a newspaper headline, for example, is of little practical use. Other countries, such as the United States permit the copying of larger extracts of copyright works, and there are opportunities for us to do the same.

Educational establishments are currently unable to communicate copies made under education exceptions to distance learners. Distance learning is increasingly popular and distance learners may include people who are unable to access education in other ways, such as students with disabilities.
7.134 Current education exceptions are framed with reference to specific establishments which have as their main purpose the provision of education, such as schools and universities. The relevant definitions exclude organisations that offer a range of educational activities to students alongside their core activities, such as museums. The benefits of these exceptions could be increased by widening the types of organisations able to use them, and would reflect the diversity of modern education provision.

The role of collective licences

7.135 Despite the 1% limit on the amount of copying that can be done under the exception for reprographic copying, in practice the exception is even narrower. This is because the exception only applies where there is no scheme to license the use of the relevant copyright works. The same is true of the exception for recording broadcasts. Many licensing schemes are available and in practice most works will be collectively licensed. So the great majority of educational establishments have to pay for licences to copy, at considerable cost, despite the apparent availability of copyright exceptions.

7.136 Licensing schemes cost educational establishments as they require the payment of licence fees, but they benefit copyright owners whose works are licensed, in particular those providing educational materials. Their financial impact is significant. In 2008/9, the Educational Recording Agency collected £7.7m from educational establishments for the right to record television programmes. In 2008/9 the Copyright Licensing Agency collected £27m from educational establishments for the right to copy extracts of literary works. The total cost to educational establishments is greater than this due to the administrative costs associated with licensing. For example higher education institutions face, in addition to licence fees, around £1.7m in transaction costs per annum associated with applying for and administering licences.

7.137 Restricting or removing this ability to license could therefore deliver significant financial benefits to educational establishments and free up their use of copyright works. However, there is a danger that going too far will undermine the financial incentives that encourage the creation of new educational works. The Government intends to seek further data on the impact of educational licensing schemes during the course of this consultation.

70 Copyright Licensing Agency Annual Review, 2009.f
Proposals

7.138 To take greater advantage of the opportunities provided within the EU framework the Government is proposing to expand these exceptions. The Hargreaves Review did not make specific recommendations as regards the education exceptions, so the following proposals are those that appear to deliver the greatest benefits. However, the Government has not ruled out other proposals, and it particularly welcomes data that helps to assess the costs and benefits of these proposals.

Expanding the works and technologies covered by education exceptions

7.139 Expanding the types of works covered by the existing education exceptions would allow the copying of extracts from artistic works, sound recordings and audiovisual works for the purpose of education, in addition to literary, dramatic and musical works. Furthermore, current exceptions for instruction and reprographic copying apply only to traditional methods of teaching. They cover writing quotes with chalk or marker pen on a board and producing photocopied handouts, but are not flexible enough to cover use of modern presentation technology such as interactive whiteboards. The Government, therefore, proposes to amend the education exceptions so that a much wider range of technology could be used by teachers without infringing copyright.

7.140 Making these changes would increase the number and type of materials that can be used in teaching, and provide more opportunities to use them with digital technology, enabling teachers to provide a richer and more varied learning environment.

Consultation Question

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

Increasing the proportion of a copyright work that can be copied

7.141 The current limitation on Section 36 that permits 1% of a work to be copied per quarter is so restrictive as to make it almost useless in many cases, particularly in relation to small copyright works. The Government proposes to amend this limit so that the exception permits “fair dealing” with a work for the purpose of education. Fair dealing (discussed in more detail above in relation to the research exception) would in general permit more of a work to be copied, in particular when works are small and a more significant proportion of a work needs to be copied in order for it to be useful in education. However, it would not permit copying that is so extensive as to substitute for the sale of copyright works.
7.142 Students are already able to copy extracts of works for their own use, as long as this is fair dealing, under the exception for private study (described above). Section 32, which permits “chalk and talk” copying, is also a fair dealing exception. Making Section 36 a fair dealing exception would align it with these existing exceptions, granting educational establishments an equivalent ability to copy works as is already given to individual students, and permitting them to copy the same proportion of copyright works using digital technology as they are already permitted to copy using a pen and paper.

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<td>86 Would provision of “fair dealing” exceptions for reprographic copying by educational establishments provide the greater flexibility that is intended? Can you provide evidence of the costs and benefits of such an exception?</td>
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### Enabling distance learners to access educational materials

7.143 Extending the existing education exceptions to cover uses by students studying within a secure distance learning environment, as well as within the premises of an educational establishment, would enable educational establishments not only to copy broadcasts and other works (potentially including on-demand services) and to show them to students on their premises, but also to transmit them to students who are working remotely.

7.144 When the previous Government considered proposals to extend copyright exceptions to cover distance learning, it concluded that remote use should be permitted, but only over secure connections. By making copyright works available electronically, such works may become more vulnerable to unauthorised copying and onward transmission to others for whom they are not intended. Confining remote use to secure networks would thus help limit any potential harm to copyright owners. The Government agrees with this conclusion.

7.145 The previous Government also considered whether it should be possible to transmit on-demand broadcasts as well as traditional broadcasts over secure networks to distance learners. It concluded that it would be difficult to treat on-demand broadcasts in the same way as traditional broadcasts, as the use of much on-demand content was restricted by digital rights management (DRM). The Government recognises these difficulties, but believes there could be benefits to including on-demand services within these exceptions, so this consultation invites views on the merits of doing this.
Consultation Question
87 What is the best way to allow the transmission of copyright works used in teaching to distance learners? What types of work should be covered under such an exception? Should on-demand as well as traditional broadcasts be covered? What would be the costs and benefits of such an exception?

Widening the definition of an educational establishment

7.146 Most of the education exceptions can only be used by educational establishments as defined in the Copyright Act. Expanding the type and number of educational bodies that can benefit from these exceptions could be done by widening the definition of educational establishments to include a wider range of organisations with an educational purpose, such as public museums and galleries. This could also be done by widening Section 32, which applies to anyone delivering instruction regardless of the organisation to which they belong.

7.147 Widening these exceptions in this way will mean that more teachers, students and educational bodies can benefit from them, and will reflect the diversity of modern education provision.

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

Licensing schemes

7.148 Above it was noted that the benefits to educational institutions of the current exceptions are reduced due to the fact that collective licensing schemes can over-ride them. Collective licensing schemes are much more efficient than individual licensing,\(^\text{72}\) and implementing the changes proposed above without removing the ability to license-out of the exceptions will still deliver benefits to educational establishments.

7.149 However, the benefits to educational establishments – particularly financial benefits due to a reduction of the fees and bureaucracy associated with licensing – will be much more significant if these became true exceptions that could not be licensed over. This approach would also align the education exceptions with similar exceptions that aim to promote the sharing of knowledge, such as those for research, private study, and library copying.

7.150 On the other hand, given the scale of revenues currently collected via educational licensing schemes, removal of the ability to license these exceptions would cost copyright owners, who would no longer receive the same level of licensing income from schools and higher education institutions. This could lead to reduced incentives to produce educational works. Evidence as to the costs and benefits of this approach, in particular impacts on incentives to creators, is not currently clear.

7.151 It should be noted that this option would not remove the need for education licences altogether. The CLA licence currently permits a wide range of uses likely to fall outside the definition of “fair dealing”, and educational establishments wishing to make wider use of copyright works would still require a licence. Also, if Government were to restrict the ability to license the exception for recording broadcasts (Section 35), it would expect to do so only to the extent that permitted “time-shifting” of broadcasts, and not long-term storage of them. Establishments wishing to do more than time-shifting of broadcasts would still require a licence.

7.152 In summary, it is expected that permitting fair dealing with copyright works and time-shifting of broadcasts for educational use without need for collective licences, will deliver significant benefits to educational establishments. It would also reduce revenues for copyright owners, but it is not clear whether this will significantly undermine incentives to create new works. Further evidence and economic data to help assessment of the costs and benefits of this option would be welcome.

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Copyright exceptions for people with disabilities

This section discusses proposals to extend the UK’s current exceptions that make it easier for people with disabilities to access copyright works. The UK currently has an exception that permits the making of accessible copies (such as Braille or large print) for visually impaired people and another that allows non-profit organisations to subtitle broadcasts for deaf, hard of hearing, and other disabled people.

Current Situation

Visually impaired people

7.153 The Copyright (Visually Impaired Persons) Act 2002 amended the Copyright Act to allow accessible copies of certain copyright works to be made by and on behalf of visually impaired people.

7.154 The relevant exceptions allow accessible works to be made for visually impaired people in two circumstances. First, if a visually impaired person lawfully possesses a copy of the whole or part of a copyright work but is unable to access this because of his or her impairment, a single accessible copy can be made for their personal use, either by them or by someone acting on their behalf (Section 31A).

7.155 Secondly, approved bodies, such as educational establishments and non-profit organisations, that lawfully possess a copy of a copyright work may make or supply multiple accessible copies for the personal use of visually impaired people, and may make and hold intermediate copies for this purpose (Section 31B-E).

7.156 In both cases, the exceptions apply only to literary, dramatic, musical or artistic works or published editions. In addition, they only apply to the extent that equivalent accessible copies are not commercially available. This is because these exceptions exist only to address a specific market failure – the lack of supply of accessible copies. If the market is able to supply these goods then the exception no longer applies.

7.157 Like the exceptions for education, this is another exception that only applies to the extent that it is not covered by a licensing scheme. A licensing scheme permitting the copying of works for visually impaired people is operated by the Copyright Licensing Agency, which means that, in effect, the full exception does not apply to many works.

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Overall, these exceptions have been successful in enabling visually impaired people to access copyright works more easily, and are valued by those who use them. But their impact could be increased if some of their current limitations are removed. In particular, the definition of a visually impaired person does not extend, for example, to those with cognitive or perceptual disabilities such as dyslexia. Also, the types of works covered are limited to literary, dramatic, musical or artistic works or published editions, and do not include, films, broadcasts or sound recordings. As such, they do not cover audio description for films, or other ways of accessing works.

Discussions are taking place internationally on the need to reform copyright laws to make it easier for visually impaired and print disabled people to access works, and to facilitate the sharing of these works across borders. As part of these discussions, efforts are being made to establish legal norms in the area of exceptions. This work is ongoing, but the current working definition of someone who should benefit from this type of exception is wider than the UK’s current definition - including people with dyslexia - as is the range of works covered.

Other disabilities

People who are deaf or hard of hearing, or physically or mentally handicapped may benefit from another existing exception that allows designated not-for-profit bodies to subtitle and issue copies of broadcasts without infringing the copyright in them (Section 74). As with the exception for visually impaired people, the Section does not apply if or to the extent that a licensing scheme exists. It also requires bodies to be designated via a similar process as that for broadcast archives (described above).

The Copyright Directive permits us to provide exceptions for people with any disability, for non-commercial uses directly connected to that disability.

The Case for Change

Ensuring people with disabilities are treated fairly is important for its own sake. Making it easier for all individuals to enjoy copyright works enhances the value of those works to society. Exceptions to copyright in this area should help copyright owners and service providers ensure that they comply with equalities legislation.

Arguments for change also exist at the international level. The discussions currently taking place at the World Intellectual Property Organization are not the focus of this consultation, but they highlight some potential problems with the UK’s current exceptions. The UK Government supports the two key objectives of this work:

- Encouraging countries around the world to provide copyright exceptions that make it easier for visually impaired people to access works in accessible formats such as Braille, audio or large print.
- To facilitate the transfer of those works across borders so that they can be accessed by more people.

The Royal National Institute for the Blind’s (RNIB) submission to the Hargreaves Review noted the difficulties of sharing accessible works across borders. Existing copyright laws mean that five different English speaking countries had to separately produce from scratch a Braille version of one of the Harry Potter books, which meant a massive duplication of work. Making it easier to share accessible copies and the files from which they are made will help to avoid unnecessary costs to charitable organisations.

Although UK law does not explicitly prevent such accessible works being exported to other countries, licensing schemes that cover this exception do limit use to the EU. In order to help improve access to copyright works by visually impaired people around the world, the Government could make it clear that accessible works made under the UK’s exceptions can be exported. This will not prevent other countries preventing import or use in their territories, but could make it easier for the UK to comply with any future international system for sharing these works.

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**The Copyright Act currently defines a visually impaired person as:**

A person:

(a) who is blind;

(b) who has an impairment of visual function which cannot be improved, by the use of corrective lenses, to a level that would normally be acceptable for reading without a special level or kind of light;

(c) who is unable, through physical disability, to hold or manipulate a book; or

(d) who is unable, through physical disability, to focus or move his eyes to the extent that would normally be acceptable for reading.

The above definition is not as wide as that used by some other countries. For example, the United States provides an exception for all “print disabled” people. This term includes people who are not able to read a book due to cognitive or perceptual disabilities such as dyslexia. Other European countries go further and provide exceptions for people with any disability, to the extent that the disability prevents them accessing a work.
The Government notes that the limited application of this exception to certain works means that it cannot be used for the purpose of audio description. Audio description is commentary that allows blind and visually impaired people to follow a TV programme or film by describing body language, expressions and movements. Extending the application of this exception could help support the provision of this type of service.

Restrictions caused by the ability of copyright owners to license this exception are described above. As with other licensed exceptions, it can be confusing and costly to get a licence. When you have one it may not cover all the works you want to access and it may contain restrictive terms of use. This type of exception appears to cause few or no costs to copyright owners, as it only applies when there is a market failure. Publishers and other producers of copyright works are still able to provide their own accessible copies commercially, which they frequently do. This may explain why the CLA currently charges a zero fee for its licence. It also suggests that removing the ability to license this exception – a deregulatory step that would simplify its use – will benefit its users without harming copyright owners.

Amending these exceptions could also help us to meet national and international commitments toward people with disabilities. The Equality Act 2010 provides important rights against discrimination when accessing everyday goods and services. The UN Convention on the Rights of Persons with Disabilities states that its parties shall take all appropriate steps to ensure that people with disabilities enjoy access to cultural materials, television programmes, films, theatre and other cultural activities, in accessible formats; and to ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by people with disabilities to cultural materials.

The EU Copyright Directive itself notes that “It is …important for the Member States to adopt all necessary measures to facilitate access to works by persons suffering from a disability which constitute an obstacle to the use of the works themselves, and to pay particular attention to accessible formats”.

To fully realise these aims, it is considered necessary to expand, simplify and clarify the exceptions for people with disabilities.

Proposals

7.172 The Government proposes to expand the UK’s exceptions that benefit people with disabilities to take greater advantage of the opportunities offered by the EU framework. It believes that the key principle underpinning these exceptions is that the exceptions should only apply to the extent that commercial accessible copies are not available. The Government does not intend to alter this approach.

Enabling more people to benefit from these exceptions

7.173 The definition of a visually impaired person is restrictive. Although not limited solely to visually impaired people, many print disabled people are unable to benefit from the exceptions. Those with other cognitive or perceptual disabilities such as dyslexia are excluded, so are disadvantaged. The Government would like to address this issue by expanding the scope of the UK’s disability exceptions. This could be done by broadening the definition of a visually impaired person to bring it in line with international definitions as described above. Even more people would be able to benefit from these exceptions if they were broadened to cover anyone with a disability. This would also allow us to consolidate and simplify the two current types of exception (visually impaired and subtitling), and is currently the Government’s preferred course of action.

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<td>90 How should the current disability exceptions be amended so that more people are able to benefit from them? Can you provide evidence of the costs and benefits of doing this?</td>
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Applying these exceptions to more types of work

7.174 The current exceptions cover limited types of works. The exception for visually impaired people applies in respect of literary, dramatic, musical or artistic works but works such as films are not included. Expanding the type of works covered would allow disabled people or those acting on their behalf to make accessible copies of a much broader range of copyright material. For example, an expanded section might support the provision of audio descriptions of films. The Government proposes to extend the disability exceptions so that they cover more works in order to maximise their benefits.
Consultation Question

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

Licensing schemes

7.175 Apart from the provision that allows people to make individual accessible copies of works they own, the disability exceptions do not apply if a licensing scheme is in force. As described above, the licences currently offered appear to be offered for zero charge, but do not cover all works and are restrictive. Users of this exception experience the transaction costs associated with getting a licence, but there appear to be few corresponding benefits to copyright owners. In particular, licences restrict accessible copies being exported outside Europe. Moreover, copyright owners have an opportunity to provide their own accessible copies. Removing their ability to license accessible copies made by others is likely to increase the incentive to produce their own. In view of the above, the Government proposes to remove the ability to license these exceptions. It believes the benefits of doing so will outweigh the costs, but welcomes evidence from interested parties.

Consultation Question

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

Removing unnecessary bureaucracy

7.176 The exception that allows subtitling of broadcasts operates in a similar way to the exception for archiving broadcasts, which is described above. It requires bodies that are permitted to subtitle broadcasts to be designated by statutory order – a highly bureaucratic and time-consuming procedure for an essentially administrative process. Therefore, like the archiving provision, the intention is to simplify how such bodies are designated.

Consultation Question

93  How should this exception be modified in order to simplify its operation?
Use of works for quotation and reporting current events

This section discusses proposals to update exceptions to copyright that currently permit extracts of copyright works to be copied for criticism, review and news reporting.

Current Situation

7.177 This section considers three related exceptions that are permitted by the Copyright Directive. These are the exceptions for: reproduction by the press or other use connected with the reporting of current events; quotations for purposes such as criticism and review; and use of political speeches, public lectures or similar works. The first two are covered by a single exception in the Copyright Act that permits use for criticism, review and news reporting (Section 30). The Act does not provide the third exception in similar terms as the Directive, but it is covered to a degree by the exception for criticism, review and news reporting, as well as the exception for public reading or recitation.

Use of quotes and extracts for criticism, review and reporting current events

7.178 Section 30 of the Copyright Act permits fair dealing with a work for the purposes of criticism or review as long as it is accompanied by a sufficient acknowledgement and has lawfully been made available to the public. Likewise, fair dealing with a work (except a photograph) for reporting current events does not infringe copyright as long as it is accompanied by a sufficient acknowledgement and has been made available to the public. Similar exceptions relate to rights in performances.

7.179 The language of the Directive in relation to criticism and review is broader than the language used in the Act. Article 5(3)(d) of the Directive allows EU states to provide an exception 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. The UK exception is not expressly limited to "quotations" though in practice fair dealing means that only extracts of a work can be copied.

7.180 Many other countries have wider quotation exceptions than the UK’s. Some, such as Denmark and Sweden, have an exception that covers any quotation of a published work, as long as this is in accordance with proper usage and to the extent necessary for the purpose. Others permit quotations for additional categories to criticism and review, such as for polemic, comment or information.78

77 “Quotations” are understood to include extracts of works in general, and not only quotations of literary works.

Likewise, the language of the Copyright Directive in relation to reproduction by the press is slightly broader than the current UK provision on use for news reporting. Article 5(3)(c) of the Directive covers the reporting of current events, but also allows EU states to have exceptions for the communication or making available of published works on current economic, political or religious topics.

These exceptions have equivalents in international law. The Berne Convention states that “It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries”. The human right to free expression also overlaps with these exceptions, and suggests that they should be given a wide construction.

**Political Speeches and Public Lectures**

The Copyright Directive permits political speeches and extracts of public lectures or works of a similar nature to be used, where justified, as long as the source is indicated. Although the UK has exceptions relating to the making or recording of speeches and recitations, these do not appear to be of the same scope as is permitted by the Directive.

**The Case for Change**

The Government believes that the copyright system should promote free speech rather than limit it. It is therefore open to a widening of this exception. A variety of arguments in favour of amending this exception, to limit, clarify, or extend it, were made in submissions to the Hargreaves Review.

An argument was made in favour of limiting these exceptions in order to prevent the use of works by compilation and review programmes, whose producers often rely on this exception in order to avoid having to clear rights. In this regard, it was noted that the Directive specifically refers to the use of “quotations” and that use must be both “in accordance with fair practice” and “to the extent required by the specific purpose”. Although the Government believes that each of these limitations is inherent to the concept of “fair dealing”, so is already included within the current UK exception, it agrees that the disparity between the language in the Act and that of the Directive might lead to confusion.

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Queen Mary Intellectual Property Research Institute.

79 Copyright in the Information Society 2001/29/EC, Article 5(3)(f)
7.186 Other submissions noted that the Directive does not limit an exception for quotations to use for criticism and review, and the UK exception could be broader. Indeed, the intention behind similar provisions in the Berne Convention appears to be to provide a general exception covering the use of quotations for use such as criticism and review, but not limited to it. This type of exception, for minor uses of copyright works that are likely to have minimal impact on the incentives that copyright provides to creators, and encourages the dissemination of knowledge, appears to sit well with the approach to exceptions encouraged by the Hargreaves Review, in so far as they help to avoid the over-regulation of businesses and individuals, and are unlikely to significantly harm incentives to copyright owners.

7.187 Providing a wider fair dealing exception for quotations could potentially free up businesses and individuals to make greater use of extracts of copyright works without having to clear the use of the rights in them. Much of the cost of clearing the use of quotations is administrative – associated with locating, contacting and seeking clearance from the copyright owner. Permitting broader use of quotations will help individuals and businesses to avoid these administrative costs.

7.188 Anyone who wishes to quote the work of another person in their own work would benefit from this exception. Beneficiaries are likely to include academics and journalists, who often need to quote other works in their own for the purpose of analysis, argument or information, uses which may not fall within the definitions of criticism or review. This exception will also be of particular benefit to members of the public who wish to quote works for non-commercial reasons, for example on blogs or social networks.

7.189 Widening this exception could also help to address some concerns raised following recent European court judgments, which have found that even very small extracts of works – for example, 11-word quotes and newspaper headlines – can infringe copyright. This has raised concerns that much non-commercial quotation of works online, which many people consider to be fair and reasonable, is potentially infringing copyright. Widening this exception, while retaining its fair dealing limits, could permit this non-commercial use of quotations and extracts of works.

7.190 Copyright owners may experience costs if they currently restrict or license the use of their works for this purpose. However, the limitation of this exception to fair dealing and the extent required by the specific purpose, and the requirement for attribution of quotes and extracts, should help to minimise negative impacts. Creators are also likely to benefit from publicity gained through attributed quotation of their works.
Proposals

Clarifying and widening the criticism and review exception to permit other quotation

7.191 The Government proposes to widen the existing exception for criticism and review to cover the use of quotations for other purposes. It will also look to clarify this exception, so that its terminology is more consistent with that of the Copyright Directive. As described above, it is expected that this will be of particular benefit to academics, journalists and individuals engaging in online social networks.

7.192 Our current preferred option is to maintain the current limitation of this exception to fair dealing, and maintain the requirement for attribution, but to widen the type of quotation that is permitted. One approach would be to simply permit any quotation, as long as it is fair. This would be similar to the approach currently taken by the Nordic countries. An alternative approach, with a similar effect, would be to copy the language of the Copyright Directive, which refers to “quotations for purposes such as criticism or review”.

7.193 However, further clarification of this exception may be required, for example by adding further categories of use alongside criticism and review. Such categories could include information, analysis, argument or comment, for example. In addition, it may be helpful to clarify that the exception only applies to the extent required for the specific purpose. This restriction is implicit in fair dealing, but making it explicit (in line with the Directive) may help to reassure copyright owners that the exception is not intended to permit extensive and unjustified copying of works under the guise of quotation. We would welcome views on how best to define this exception.

Consultation Question

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

Reporting of current events

7.194 The Government also proposes to consider whether to widen the existing fair dealing exception for reporting current events, so that it also permits copying and communication by the press of published articles on current economic, political or religious topics (as permitted by EU law). As noted above, these uses would not be permitted if they are expressly reserved by a copyright owner.
It is unclear at this stage whether such an extension would be necessary if the quotation exception is extended as described above. The Government’s preference would be to combine these two exceptions, for simplicity. An alternative approach could be a separate provision that is more closely aligned to the language used by the Copyright Directive. We would welcome views on the merits of these, or any other, approaches.

Consultation Question

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

The use of political speeches, extracts of public lectures or similar works

Uses of political and other speeches and lectures appear to be largely covered by existing exceptions. However, there may be uses that are permitted by the Directive that are not covered by the existing law. Also, some may find the differences in language between the Act and the Directive to be confusing. We would welcome views on whether any amendment of current exceptions that apply to the use of speeches would be of benefit.

As with the exception for reporting of current events, possible approaches to amending this exception could be to combine with a wider quotation exception, or to follow more closely the language of the Copyright Directive.

Consultation Question

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

97 | Would there be additional benefits if all three types of exception examined by this section were combined?
Use of works for public administration and reporting

UK law already provides exceptions to copyright that allow public bodies to carry out their duties. These exceptions cover uses by Parliament or the Courts, by Royal Commissions and statutory inquiries, for public records, official registers, and other public business. In general they only relate to the making of copies and distributing physical copies, and do not permit the making available of materials on the internet.

Current situation

7.198 The Copyright Act allows a variety of acts to be performed by public bodies to enable them to discharge their duties effectively. Exceptions permit copying for the purposes of parliamentary or judicial proceedings and reporting these proceedings, and anything done for the purposes of a Royal Commission or statutory inquiry.

7.199 Further exceptions allow public bodies to copy material that is open to public inspection or on an official register. They allow public bodies to copy factual information in these materials, and allow them to copy these materials and issue copies to the public if they contain information about general scientific, technical, commercial or economic interest, or to enable the materials to be accessed at a more convenient time or place. In certain circumstances, public bodies are able to make copies of unpublished works that have been communicated to them (such as letters) and to issue copies of these to the public.

7.200 There are also exceptions that permit the copying and supply of any public record, and permit any act that is specifically authorised by an Act of Parliament.

7.201 However, although some of these exceptions permit the issuing of copies to the public, this relates only to the issuing of individual copies, for example paper copies. It does not permit copies to be shared on the internet. The copyright in most of the information held by a public body will be owned by that body or the Crown, so this will not be a problem. But where a public body wishes to make available letters or other materials sent to them by third parties they may be prevented from doing so by the owners of the copyright in those materials.

7.202 The Copyright Directive allows us to have exceptions permitting the use of copyright works for the purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings. It allows these exceptions to cover the making available of such copies on the internet, as well as the issuing of physical copies.
The case for change

7.203 Most people expect to be able to access public services and information online and it is the preferred choice of many. Greater transparency and open data has already begun to transform the public’s relationship with public services and their ability to hold the Government and service providers to account. The Government has set out plans to make the whole of the public sector more open, transparent, and accountable, and aims to have the most ambitious open data agenda of any government in the world. But most of the copyright exceptions currently provided for public administration and reporting only allow physical copies to be shared with the public and do not allow copies to be shared online. This could seriously restrict the Government’s ability to achieve these ambitions.

7.204 An example of the problems this may cause was experienced by the Intellectual Property Office when implementing its new patents online file inspection service. Patent files are made open to public inspection so that people can see the arguments made for and against a patent’s grant. But if a person wants to inspect a file they have had to go in person to the IPO. From 1 October, legislation will allow the IPO to make a file available for public inspection online. When consulting on these proposals, a number of respondents asked that proposals go further, so that similar acts performed by other public bodies would be covered.

7.205 Another example was highlighted by the Ministry of Defence in its submission to the Hargreaves Review. The Ministry had considered proactively making available online reports of UFOs that it had received, in order to avoid having to respond individually to queries for this frequently-requested information under the Freedom of Information Act. However, current exceptions do not permit government departments to make third party documents like this available online, even though they do make it possible to copy and disclose them on paper. This makes it more difficult for Government departments and other public bodies to proactively publish information that is of interest to the public and can be used to scrutinise public bodies.

Proposals

7.206 To help address these problems and support its wider open data and transparency agenda, the Government proposes to amend the current UK exceptions for public administration and reporting to permit the publication of relevant documents online. This will help to improve government transparency and enable the provision of new services to the public.

In order to prevent abuse of this type of exception, to minimise harm to copyright owners and ensure compliance with the three-step test, certain safeguards will need to be provided. Current provisions include such safeguards. For example, public bodies can only issue copies of material sent to them by third parties in the course of public business if directly connected to the purpose for which they were sent, or for a purpose that could reasonably have been anticipated by the copyright owner. They cannot publish works that have already been published, or if they have agreed with the copyright owner not to publish. Similar provisions would need to be considered in any exception that allows publication of such materials online.

**Consultation Question**

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

The exceptions described in the earlier parts of this chapter are those permitted by the Copyright Directive that the Government expects will have the most economic impact. The Directive also permits Member States to provide other more narrow exceptions, which are detailed below. Many of these have already been fully or partially implemented in UK copyright law. The case for introducing, widening, or simplifying each of them is discussed below.

Recording of broadcasts by social institutions

7.208 The Copyright Directive permits EU Member States to provide an exception for reproductions of broadcasts made by social institutions such as hospitals, care homes, and prisons. Like those for private copying and photocopying, this exception requires “fair compensation” to be provided to copyright owners harmed by acts of copying arising from it. There is currently no exception of this type in the Copyright Act, although it may be possible for such institutions to rely on the existing “time-shifting” exception, which applies to use in domestic premises.

7.209 The Government’s position on levy systems is explained above. If the UK were to introduce an exception to allow social institutions to make unlimited use of copies of broadcasts, the introduction of a levy, licence or similar means of compensation may be needed. This could be avoided by limiting it to “time-shifting”. Extending the time-shifting exception so that it expressly permits hospitals, care homes, prisons, and other social organisations to record broadcasts for later viewing by their residents would ensure that the benefits of this exception were realised without having to provide compensation to copyright owners.

7.210 The costs and benefits of introducing an exception of this type are currently unclear. It is also unclear whether these institutions already make use of the existing time-shifting exception. In view of this, the Government would welcome views and evidence as to whether or not this exception should be introduced.

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Use during religious or official celebrations

7.211 The Copyright Directive permits exceptions for use during religious celebrations or official celebrations organised by public authorities. There are currently no exceptions of this type in the Copyright Act. However, we are aware that certain uses of this type are not charged for by collecting societies. For example, PRS for Music, which licenses the public performance of music, does not charge for the use of music in weddings or civil partnership ceremonies, funeral services, or religious services at consecrated places of worship. PRS also chose not to charge for use at street parties or other events celebrating the 2011 Royal Wedding.

7.212 A wide exception relating to religious or official celebrations would be difficult to define. Religious and official celebrations of different types happen throughout the year and take many shapes and forms, so it will be difficult to decide which events should qualify for this exception. Do events taking place during Advent to celebrate Christmas constitute religious celebrations? Are carnivals authorised by local authorities’ official celebrations? To ensure such an exception is clear and complies with the three-step test, qualifications and restrictions would need to be provided.

7.213 It is also possible that creators of predominantly faith-based material such as religious music or instructional works could suffer financially if licensing revenues contribute significantly to their incomes.

7.214 In view of these difficulties, the Government does not propose to provide a general exception for the use of copyright works during religious or official celebrations. However, there may be a case for expressly permitting uses similar to those already permitted by collecting societies (such as for weddings and funerals) in order to guarantee the public’s freedom to use copyright works for these purposes and to include works not currently licensed. Doing so would acknowledge the importance of these events to society and increase legal clarity, and we expect there would be few associated costs to copyright owners.

 Consultation Question

| 100 | Should a new exception for use during religious celebrations or official celebrations organised by public authorities be introduced? What would be the costs and benefits of doing this? |
Use relating to the public exhibition or sale of artistic works

7.215 It is not an infringement of copyright to make a copy of an artistic work and issue a copy to the public in order advertise that work for sale (Section 63, Copyright Act). But the Copyright Directive allows us to go further than the present exception, to permit copying in order to advertise a public exhibition, and to apply this exception to advertising on the internet. This could legitimise, for example, the use of images of second-hand books being offered for sale on the internet, so buyers could gauge the condition of the goods for themselves.

7.216 Expanding this exception to include advertising for public exhibition and to also cover advertising on the internet would benefit public galleries and museums and would support modern means of advertising over the internet. It would, however, need to be carefully framed so as not to unreasonably prejudice the interests of the owners of copyright in the works being advertised – for example, if images were of such good quality that they substituted for original works. If this exception was to be widened it would need to be limited in a way that prevents this, for example by making it a fair dealing exception. However, it is also expected that sellers or exhibitors would be disinclined to provide high-quality or non-watermarked images, as doing so would detract from the value of the goods on offer.

7.217 In view of the above, the Government expects that there will be benefits from widening this exception to cover the sale or exhibition of works online, as long as the associated risks can be mitigated.

Consultation Question

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

Use relating to the demonstration or repair of equipment

7.218 The Copyright Directive permits an exception for the use of copyright works in connection with the demonstration or repair of equipment. The Act expressly permits this in relation to broadcasts and any films and sound recordings included in them. This means that shops selling or repairing televisions or radios will not infringe copyright if they demonstrate them using live broadcasts.

7.219 However, this exception only covers broadcasts and does not apply to films or sound recordings that are not part of a broadcast – for example DVDs or CDs. It also does not apply to literary, artistic, dramatic, musical or other works. This means it does not cover the demonstration of a DVD or Blu-ray player, a CD player or ebook reader. Thus, there appears to be scope for extending this exception so that it applies to more types of work and can be used with a wider range of technology.
The Government is aware that some collecting societies, including PRS and PPL, license the use of sound recordings and other rights at reduced rates when a shop is solely using them for demonstration purposes (and not as background ambient music). However, the costs of these licences are still significant. Moreover, whereas a shop could choose not to pay for a licence to play background music, as it could choose not to play music at all, or to use out-of-copyright or freely-licensed music, this is not true for shops selling consumer electronics. Potential buyers of Blu-ray players are likely to want to see it demonstrated using a commercially-available film, for example.

In view of the above, it is expected that widening this exception would deliver benefits to consumer electronics stores, but would mean a loss of licensing revenue to copyright owners. Views on the costs and benefits of widening this exception as described above are welcomed.

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**Photocopying**

The Copyright Directive permits an exception for paper photocopies or copies made using similar reprographic techniques, provided that copyright owners receive fair compensation. There is no such general photocopying exception in the Act, but photocopying is permitted under other exceptions, such as education exceptions. The new private copying exception proposed above would also cover photocopying. For example, it would permit an individual to photocopy pages from a book that they own.

The Government sees little need for a new exception to permit general acts of reprographic copying. No one who responded to the Hargreaves Review’s call for evidence called for one to be introduced, and specific acts of reprographic copying are already covered by other exceptions. Therefore, the Government does not intend to introduce a new exception for reprographic copying.

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82 Copyright in the Information Society 2001/29/EC, Article 5(2)(a),
Ephemeral copying by broadcasters

7.224 The Copyright Act (Section 68) provides an exception that allows broadcasting organisations to make temporary copies of works without infringing the copyright in them. This exception, similar to a Copyright Directive exception for “ephemeral” copying by broadcasters,\(^\text{83}\) reflects the fact that a broadcaster will often have to copy a work a number of times before a broadcast including it can be aired. The exception allows a broadcaster to make copies for the purpose of airing a broadcast, and to keep these copies for up to 28 days.

7.225 There is demand for this exception to be extended to better reflect the needs of modern broadcasting. Most music radio stations no longer broadcast directly from record or CD, but copy tracks onto large hard disk devices, allowing them to manage playlists and queue songs more easily. They are licensed to broadcast these songs by the owners of the copyright in them, but copyright owners charge them for storage on hard disks beyond the 28 days permitted by the exception, even though the same copyright owners already benefit from licensing agreements that allow their works to be broadcast.

7.226 This means many modern storage devices like the hard disk music players described above cannot be used freely by broadcasters. However, although there would appear to be benefits from widening this exception, the UK appears to be prevented from doing this to a useful degree by European law.

7.227 The Copyright Directive permits us to have an exception of this type only in respect of ephemeral copies made by broadcasters. This means copies cannot be stored indefinitely, which is why the current exception has a 28 day limit. In view of this, there appears to be little room to amend this exception and the Government therefore does not intend to.

Use of works located permanently in public places

7.228 The Copyright Act (Section 62) provides an exception allowing the copying of buildings or sculptures permanently located in public places. This closely follows the exception permitted by the Copyright Directive for this purpose.\(^\text{84}\) This exception makes it possible for people to draw, paint, take photographs, or make other representations of buildings and sculptures without infringing copyright.

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\(^{83}\) Copyright in the Information Society 2001/29/EC, Article 5(2)(d).

\(^{84}\) Copyright in the Information Society 2001/29/EC, Article 5(3)(h).
7.229 There appears to be no legal scope for extending this exception as the Act already appears to provide this exception to the full extent permitted by the Directive. All visual works – including graphical works, photographs and films – can be copied under this exception, and it would appear to be meaningless to include other types of work. In view of this, the Government does not intend to amend the extent of this exception.

**Incidental inclusion**

7.230 Incidental inclusion of a work in other material is permitted by the Copyright Act (Section 31), and is similar in scope to the equivalent exception permitted by the Directive. The exception covers acts such as incidental inclusion of advertising hoardings in the broadcast of a football match, or incidental inclusion of music from a radio in the background of a news interview.

7.231 There is little scope to amend this exception, which already covers most of the scenarios in which incidental inclusion will be relevant. However, it is noted that aspects of this exception could be clarified or simplified, and the way it applies to different types of works could be reviewed. For example, literary works are not included, so it is unclear whether the exception applies to works incidentally included in compilations. Also, the meaning of “incidental inclusion” is defined only with regard to the inclusion of musical works.

7.232 There may, therefore, be a case for amending this exception to clarify its scope and operation, but it is expected that the impact of any amendment will be minimal.

**Use for the reconstruction of buildings**

7.233 The Copyright Act provides an exception (Section 65) so that anything done for the purposes of reconstructing a building is not an infringement of copyright either in the building itself or in any drawings or plans to which it was made. This is in line with a similar exception provided by the Copyright Directive, and appears to have been implemented to the full extent possible under the Directive. There appears to be little case for amending this exception, though there may be a limited scope for clarification.
Protecting copyright exceptions from override by contract

This section discusses proposals to prevent the benefits of copyright exceptions established by statute being overridden by contractual terms.

Current Situation

7.234 Most of this chapter considers specific exceptions to copyright that the UK is permitted to have under EU law. This final section looks at a cross-cutting measure that is intended to apply to every exception in the Copyright Act whether existing or new.

7.235 The Hargreaves Review recommended:

“Government should firmly resist over-regulation of activities which do not prejudice the central objective of copyright, namely the provision of incentives to creators... The Government should also legislate to ensure that these and other copyright exceptions are protected from override by contract.”

7.236 The Government agrees that, where a copyright exception has been established in UK law in order to serve certain public purposes, restrictions should not be reimposed by other means, such as contractual terms, in such ways as to undermine the benefits of the exception.

7.237 Although contract terms that purport to limit existing exceptions are widespread, it is far from clear whether such terms are enforceable under current contract law. Making it clear that every exception can be used to its fullest extent without being restricted by contract will introduce legal and practical certainty for those who rely on them.

7.238 This would not be an entirely new departure. Several examples of clauses that prevent contracts overriding or restricting exceptions are already present in the Copyright Act and related legislation (see box). Other countries, such as Ireland, already have clauses that prevent contracts overriding any copyright exception. By doing the same, the Government would both simplify and clarify copyright law, and ensure the full benefits of all of the copyright exceptions are made real.
Examples of contract override clauses in UK copyright legislation

The Copyright Act contains several examples of clauses that prevent contracts overriding exceptions.

Sections 50A, B, BA, provide exceptions relating to computer programs and declare void any contract term that prohibits or restricts the acts permitted by them.

Section 50D provides an exception for certain uses of databases and declares void any contract term that prohibits or restricts such use.

Section 68 provides an exception for making ephemeral recordings of broadcasts (described above), and treats broadcasters as licensed to perform certain acts.

The Broadcasting Act, Section 137, declares void any contract term that prohibits or restricts the use of broadcasts for the purpose of reporting current events in line with the relevant copyright exception (see above).

The Copyright Act also contains a number of provisions that prevent unreasonably restrictive licensing terms and conditions in collective licenses.

The Case for Change

7.239 Everyone (individual, business, or other organisation) who benefits from a particular copyright exception is expected to benefit from this measure, as it would serve to protect the public and economic benefits of exceptions as established in statute. In particular, the measure will reduce costs for institutions managing multiple contracts, such as libraries which manage access to large collections of works.

7.240 An increasing proportion of the material managed by libraries (particularly academic and research libraries) is digital. The transition from physical to digital media has meant that, in many cases, libraries have moved from owning physical resources to licensing digital ones. With ownership of “hard” works, access to a hard copy is largely a matter for the library, and additional uses (such as limited photocopying) are governed by statutory exceptions to copyright. With licensed digital materials, use and access is more likely to be governed by contracts with electronic publishers.

7.241 Libraries provide access to online databases of journal articles under various licences from a large number of different journal publishers. Contracts manage the relationship between the copyright owner (usually the publisher) and the user (the library and its users) of the copyright work within certain terms and conditions.
7.242 Libraries and educational institutions have for some years raised concerns that contracts, particularly those governing the use of electronic journals, often override the copyright exceptions established in UK law. Exceptions often restricted include those relating to archiving and access by visually impaired people. A library that provides access in line with existing copyright exceptions may therefore end up breaching contract terms and could be liable for that breach. Although the enforceability of such terms is unclear, libraries are unwilling to take the legal or reputational risks associated with challenging them.

7.243 Furthermore, there is a multiplicity of contract terms. One institution can be required to administer hundreds of contracts governing the use of different materials. If someone wants access to a certain work held in a library’s collection it is often too time-consuming to check the individual terms of each relevant contract, so in practice they will follow the most restrictive terms of which they are aware. Libraries report that overall this can mean a very significant curtailing of users rights as set out in the Copyright Act.

7.244 In many libraries over 50% of material is now digital (and the proportion is increasing), much of it licensed to institutions through contracts which include provisions over-riding statutory exceptions. The average university may administer over 150 different contracts and over 15,000 users. However, it needs to deliver those electronic works over a single network. It is not feasible in practice for libraries to manage this multitude of contract terms.

7.245 The main beneficiaries of the prohibition of contract terms that aim to restrict exceptions will therefore be libraries, universities, and other holders of large collections of digital works. But any individual, business or group that benefits from any other copyright exception will also benefit from the clarity and certainty of knowing that their right to use copyright works in certain ways cannot be restricted.

7.246 Copyright owners who currently restrict exceptions using contracts are likely to lose out from this approach, as they will no longer have such complete control over the use of their works. They may experience costs due to a restriction of options available to them in licensing and knock-on impacts on their freedom to diversify products and markets. Some copyright owners also argue that exceptions are open to interpretation and contracts help to reduce uncertainty in certain areas. The introduction of this clause could also introduce short-term transitional costs, if contracts need to be revised or renegotiated.

7.247 The Government would welcome evidence of the costs and benefits of these proposals to copyright owners and users of copyright works. Any evidence of the impact of contract override clauses in the copyright legislation of other countries, such as Ireland, would also be welcome.
Proposals

7.248 Consistent with its commitment to better regulation, the Government is exploring whether a non-regulatory approach could deliver its policy objectives in this area. However, given the wide range of users and owners of copyright works affected by contracts, it appears unlikely at present that cross-sectoral agreement to preserve the full operation of copyright exceptions will be either achievable or sufficient.

7.249 The Government is, therefore, proposing to introduce a clause, applying to every exception provided by the Copyright Act, which would make clear that any contract term purporting to prohibit or restrict the use of an exception is unenforceable.

7.250 Some exceptions, including those for education and disabled people, explicitly permit licensing of the acts covered by them. The Government will separately consider the merits of these licensed exceptions. To the extent that they are preserved, any licensing scheme explicitly authorised by an exception will not be affected by the contract override clause.

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8. Copyright Notices

Copyright law is complex and there is confusion about the boundaries of copyright infringement, particularly in the new circumstances which digital technology creates. This chapter discusses proposals for a Copyright Notice Service. We seek views about the potential benefits of such Notices, how the service should operate and the specific sort of queries and issues which they should cover.

Current Situation

8.1 Digital technology allows people to access and use creative content in many different ways across many different devices and services. However, with the emergence of new platforms and formats for creative content, it has become increasingly difficult for consumers, right holders and SMEs to understand what comprises legitimate and infringing use.

8.2 The Government recognises the potential benefits of greater clarity in copyright law, particularly in relation to the application to new technologies and opportunities. Uncertainty can lead either to unintentional infringement or to opportunities being lost because of fear of infringing.

8.3 The Hargreaves Review highlighted the importance of SMEs for the UK’s economic prospects. A survey commissioned in 2011 for the Review also revealed that two thirds of surveyed SMEs indicated that they would be interested in having access to an intermediary who can provide basic advice on intellectual property rights.

8.4 The 2011 survey also revealed that 52% of SMEs reported that the costs of IP enforcement limited their use of the IP system. Moreover, in a survey commissioned in 2010 by the Strategic Advisory Board for Intellectual Property Policy (SABIP), over 50% of SMEs who had a copyright or design problem said that their businesses would benefit from reduced costs of rights enforcement.

8.5 The Government is also aware that schools and other educational institutions, for example, are often required to make many difficult judgements in this area.

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Current law

The IPO has no means to clarify the law relating to copyright where it is causing misunderstanding or confusion, in a way which carries formal authority.

In contrast, the IPO issues Practice Notices and Directions setting out procedural aspects on patents, trade marks and designs. For example, these provide guidelines on the registration of a mark and how the definition of a mark in the relevant legislation is interpreted in practice.

In addition, the IPO has a statutory Tribunal function in relation to patents, trade marks and designs. In relation to patents, this Tribunal function covers a wide range of matters such as ownership and revocation. Patent decisions of the IPO when acting as a Tribunal are legally binding and can be appealed to the Courts.

Since 2005, the IPO has also offered a Patent Opinion Service. This allows individuals or companies to request an opinion on the validity or infringement of a patent. An opinion is not legally binding.

It is low cost, at £200, quick (opinions are typically issued within three months), and allows companies to get an authoritative opinion which can help resolve disputes or clarify issues before entering more costly legal proceedings.

The IPO also offers a general mediation service which could cover any sort of intellectual property including copyright and related rights.

The Case for Change

8.6 The Hargreaves Review noted that

“there is no obvious means to clarify the boundaries of copyright infringement in the new circumstances which digital technology creates. Nor has the IPO any means to clarify the law where it is causing misunderstanding and 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.”

88 Digital Opportunity, page 95.
8.7 The Review therefore proposed a new statutory function on the IPO in this area:

‘A power to publish formal copyright opinions in order to clarify the application of copyright law and specifically the application of copyright exceptions, where new circumstances have arisen, or where there is evidence of confusion as to what is allowed under copyright law’.

8.8 In this chapter, we focus upon the Review’s recommendation for general clarification of areas which are causing confusion. We use the term ‘Copyright Notice’ rather than the term ‘Copyright Opinion’ used in the Review. This is because the IPO uses the term ‘Opinion’ in relation to the dispute resolution service which it offers for certain types of patent disputes. Later in this chapter, we refer to the possibility of a dispute resolution service for specific disputes relating to copyright.

8.9 The Review refers to the challenges presented by new circumstances and technology; it is not just the digital exploitation of copyright works which may benefit from clarification. The scope and application of the existing law also causes confusion in some cases. Solving or reducing the scale of these problems should therefore reduce the costs for some firms associated with either resolving or working around these areas of confusion.

8.10 The IPO currently receives over a thousand detailed queries each year on a wide range of copyright and related rights matters such as:

- how to protect a copyright work and the relevant term of protection.
- what constitutes a “public performance” of a work such as to require a licence, for example to play music or video in a shop or office.
- the boundary between use of facts and infringement of any copyright or database right in a presentation of those facts.
- who owns the copyright in a work created by a student and how and whether files can be shared on a school intranet.
- who owns the copyright in a commissioned work or work completed in the course of employment.

8.11 Some of these are factual questions but the answers frequently depend on the facts of an individual case, i.e. a degree of interpretation is needed. Others are purely interpretative of the law.

8.12 The IPO also periodically receives copyright queries specifically related to digital technologies on matters such as: the legality of digitisation of particular works; online infringement; backing up computer programs and the legality of mod chips and other technical protection type issues.
8.13 The IPO currently deals with these copyright queries on an individual basis providing replies to phone calls, emails and letters to help members of the public understand the areas of copyright law that might be relevant to their question. The IPO also refers inquirers to the very general outline of copyright law on its website. This assists with questions of fact in regard to the law but not in general with questions of interpretation. The IPO does not provide legal advice, particularly as to the likely outcome of legal proceedings; it instead refers inquirers to private legal advice.

8.14 The views of SMEs represented in the submissions to the Hargreaves Review can broadly be separated into two categories: i) small and individual creators, such as composers, photographers and inventors who depend upon the protection afforded by a well functioning IP framework; and ii) innovative firms who license the IP of others to create and provide new products and services.

8.15 In relation to digital technologies, the Review emphasised that the ability of young and innovative firms to realise the potential value of IP is impeded by shortcomings in the IP framework, and this matters increasingly because of the growing importance of smaller IP intensive firms to future growth.

8.16 However, the Review also noted that SMEs have fewer resources and smaller budgets relative to large firms so any cost that is independent of firm size represents a larger proportion of an SME’s budget. In many cases, we understand that the cost of legal advice is seen as prohibitive by many SMEs so they either do not use a copyright work for fear of inadvertently infringing it, or their own works may be infringed and revenue lost because they do not enforce their rights. Larger firms are more able to bear their own costs.

8.17 Moreover, the plethora of services available to SMEs presents difficulties both in knowing when to seek advice and who to seek it from, as well as problems assessing the reliability of the advice provided.

8.18 The Government recognises that a range of initiatives are necessary to improve accessibility of the IP system to SMEs. It sees the IPO’s proposed Copyright Notice Service as a way for SMEs in particular to obtain clarification on issues which are potentially holding back innovation and new business models.
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<td>105</td>
<td>Who do you think would benefit from this sort of clarification? Should it be reserved for SMEs as the group likely to produce the greatest benefit in economic growth terms?</td>
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<td>106</td>
<td>Have you experienced a copyright dispute over the last 5 years? If so, did you consult lawyers and how much did this cost?</td>
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## Proposals

8.19 As set out in the Government’s response to the Hargreaves Review, the Government recognises the potential benefits of greater clarity in the application of copyright law, in particular the application to new technologies and opportunities. It commits to the IPO setting out plans for a copyright opinions service at the turn of the year.

8.20 This consultation document outlines IPO’s plans and asks questions about their impact and how best to clarify copyright law through issuing Copyright Notices. We will use responses to help us draw up more detailed plans, and we will report on these in the planned IP and Growth White Paper in Spring 2012.

8.21 In line with the Hargreaves Review recommendation 10, the Government therefore proposes to introduce a statutory obligation on the IPO to issue general Notices on areas where there is manifest confusion or misunderstanding on the scope and application of copyright law. These Notices would be provided in response to issues raised with the IPO or on the IPO’s own initiative. The IPO should have clear, published rules and procedures for when it should respond to a request for a Notice.

8.22 The Government’s intention is for these Notices to become an authoritative source of copyright clarification which the Courts would take into account. They would not replace or amend either statute or case law.
8.23 It has also been suggested to us that the IPO should operate a dispute resolution service whereby parties can seek a non-binding Opinion on a specific disagreement involving copyright. This would be an alternative to taking action through the Courts, but would not preclude this course of action if either of the parties wished to pursue that route. We are not proposing to establish such a service at this stage but we would like to gauge demand for it.

8.24 There are advantages and disadvantages to both general Notices and specific Opinions. The main benefit of a general Copyright Notices Service is that for issues that affect many businesses it would be much more efficient than each individually seeking a ruling on their specific case, and this would allow the service to be offered without charge. Individual Opinions, on the lines of existing patent Opinions from the IPO, would be tailored to a firm’s specific problem but there would be a cost involved.

**How the Notice Service would work**

8.25 The Notices would cover matters of general interest rather than the particulars of a specific dispute. There would be no charge for a Notice.

8.26 The IPO would have a new statutory duty to issue these Notices upon request or where there was evidence of confusion. There would be rules and procedures covering matters such as how to apply for a Notice and the timescales within which the IPO must respond to a request.

8.27 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, we envisage that 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 routine queries which the IPO frequently receives.

8.28 Similarly, the IPO may decide to prioritise those requests for Notices which seem most able to benefit a wider audience or facilitate innovation and growth. The IPO would be able to issue a Notice on its own initiative, but the same prioritisation criteria would apply.

8.29 We recognise that domestic, EU and international legal initiatives and case law change rapidly. Therefore, there would be challenges for the IPO in ensuring that its Notices were up to date. At the very least, it would need to make clear that Notices may be superseded.
8.30 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.

8.31 Professor Hargreaves recommended that

“These should not be binding but the Courts should have a duty to take account of them in considering cases to which they are relevant”

8.32 We have considered whether a specific legal obligation should be introduced to ensure that the Courts have regard to these Notices. We note, for example, that there is a legal obligation for the Courts to have regard to any relevant decision or statement of the European Commission in competition law proceedings. We propose a similar obligation on the Courts to have regard to the IPO’s Copyright Notices.

8.33 On the other hand, we recognise that this may be complicated to introduce and unnecessary. If the Notices are informative, cogent and well drafted, then the Courts are likely to consider them in any event. Academic text books are often referred to in Court proceedings and this may be a relevant analogy.

8.34 Moreover, even if a legal obligation was introduced so that the Courts had to have regard to the Notices, the Courts would always retain their discretion to disregard them if it thought they were not relevant, superseded or incorrect.

8.35 Although the IPO could issue general notices covering similar ground without any formal statutory obligation to do so or legal procedures, we think that it would be sensible to introduce these. We think that this would impose greater rigor and focus upon the IPO, in the wider context of its enhanced focus on the promotion of innovation and growth. We also think that the Courts are more likely to take account of such Notices if they are issued under a statutory power.

8.36 The Government is aware of calls for a broader review of the relevant copyright legislation, particularly the Copyright Act (as amended), to simplify it and make it easier to apply. The Review makes this suggestion. 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, the Notices we are consulting on here would however help to build a picture both of problems with the existing law and of solutions that work in practice. These could inform any future reviews of UK copyright law.

91 Digital Opportunity, page 96.
92 Competition Act 1998, s 60(3).
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<td>Do you agree that it would be helpful to formalise the arrangements for these Notices through legislation? Please explain your reasons.</td>
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<td>How do you think that the IPO should prioritise which areas to cover in these Notices?</td>
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<td>Does there need to be a legal obligation on the Courts to have regard to these Notices? Please explain your answer.</td>
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<td>111</td>
<td>Are there other ways in which you think that the IPO can help clarify areas where the law is misunderstood? How would these work?</td>
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A dispute resolution service

8.37 We think that misunderstood law needs to be distinguished from unclear law. In the case of misunderstood law, the answer is to point people to a good textbook or, as proposed in the Review, to Notices from the IPO. Unclear law is a different problem.

8.38 Unclear law could arise from the legal text itself or – perhaps more common – uncertainty as to how the legislation applies to particular situations, for example if there are conflicting rules from different sources or the decided cases do not give a clear message. It has been put to us that trying to sort these issues out by means of a general Notice would be difficult. In many situations, the answer will depend at least in part on the facts - but the facts are often disputed.

8.39 For example, a common problem in copyright disputes is over the issue of reproduction of a substantial part: is the part reproduced substantial or not? This requires an assessment to be made which involves judgment and is often specific to the facts of the case.

8.40 The time and expense involved in using the court system (even after reforms to the Patents County Court including a cap on damages) can still be significant for SMEs. It has been suggested that the IPO could provide a useful service here by enabling SMEs to get a neutral opinion, much like the IPO’s current Patent Opinion Service. The patents analogy suggests that this might enable a worthwhile percentage of such disputes to be resolved out of Court. The IPO issues about 23 ‘Patent Opinions’ each year, but these cover specific disputes and a fee is payable to the IPO.
8.41 The IPO could establish a dispute resolution service whereby parties can seek a non binding opinion on a concrete disagreement involving copyright. Like the Patent Opinion Service, this would be an alternative to taking action through the Courts, but would not preclude this if either of the parties wished to pursue that route.

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<td>113 What would you be prepared to pay for a dispute resolution service provided by the IPO? Please explain your answer, for example by comparison with the time and financial cost of other means of redress.</td>
</tr>
<tr>
<td>114 Which would you find more useful: general Notices on the interpretation of the law (free) or advice on your specific dispute (for which there would be a charge)? Please explain your answer.</td>
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</table>
Annex A: Glossary

Berne Convention
An international copyright treaty which sets out a broad framework for copyright protection.

CDPA
Copyright, Designs and Patents Act 1988 (as amended) – the UK’s main body of copyright law.

Collecting Society
A collecting society is a body which licenses the use of copyrighted works, and collects royalties for this use on behalf of its members.

Copyright Tribunal
The Copyright Tribunal, an independent statutory body, decides the terms and conditions of licences offered by, or licensing schemes operated by, collecting societies in the copyright and related rights area in cases where the parties cannot agree between themselves. Its decisions may be appealed to the High Court.

Digitisation
The process of converting an object into a digital representation.

DRM
Digital Rights Management: a system that allows providers of digital content to place limitations on how those files may be used.

The main EU legislation on copyright, which harmonises the rights of copyright owners and sets out permitted exceptions to these rights.

European Digital Single Market
An EU single market goal where trade of creative content, such as books, music, films or video games, is facilitated.

Extended Collective Licensing (ECL)
ECL is a type of collective rights clearance that allows an authorised collecting society to license for specific uses of works on behalf of all rights holders in that sector, except for those rights holders who choose to opt out of the arrangement.

Metadata
Data about that provides information about a specific item’s content. For example, this could describe how large an image is or the author of a text document.

Orphan Works
Works where at least one copyright owner(s) is/are not known or cannot be located so their permission to use the works cannot be sought. These works could include, for example, books, films, music and photographs.

SME(s)
Small and Medium-sized Enterprise(s)

World Intellectual Property Organization (WIPO)
The specialised United Nations agency with responsibility for intellectual property.
Annex B: The consultation code of practice criteria

This consultation has been drawn up in line with the Government’s Code of Practice on consultations.

The Code sets out the approach Government will take to running a formal, written public consultation exercise. While most UK Departments and Agencies have adopted the Code, it does not have legal force, and cannot prevail over statutory or other mandatory external requirements (e.g. under European Community Law).

The Code contains seven criteria. They should be reproduced in all consultation documents, and are therefore set out below. Deviation from the code will at times be unavoidable, but the Government aims to explain the reasons for deviations and what measures will be used to make the exercise as effective as possible in the circumstances.

The Seven Consultation Criteria

1. **When to consult:** Formal consultation should take place at a stage when there is scope to influence the policy outcome.

2. **Duration of consultation exercises:** Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.

3. **Clarity of scope and impact:** Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.

4. **Accessibility of consultation exercises:** Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.

5. **The burden of consultation:** Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees’ buy-in to the process is to be obtained.

6. **Responsiveness of consultation exercises:** Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.

7. **Capacity to consult:** Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.
Annex C: List of consultees

This consultation document has been sent to the following organisations:

Ip21
1Media
3GA Limited
7 Digital
Action on Authors’ Rights
Action on Hearing Loss (Previously known as RNID)
Action with Communities in Rural England (ACRE)
AGICOA
All UK Local Authorities
Amazon
Anti Copying in Design (ACID)
Apple
Archives Council
Archives and Record Association
Artists Collecting Society (ACS)
Artists Rights Administration (ARA)
Association Against Intellectual Property Theft (AAIPT)
Association for University Research and Industry Links (AURIL)
Association of Charity Shops
Association of Commercial Television in Europe (ACT)
Association of Independent Musicians (AIM)
Association of Learned and Professional Society Publishers
Association of Licensed Multiple Retailers (ALMR)
Association of Online Publishers
Association of Photographers
Astrazeneca
Authors Licensing & Collecting Society (ALCS)
Autonomy
Bar Entertainment and Dance Association (BEDA)
Barnardo’s
BBC
Beggars Group Limited
Bodleian Library, University of Oxford
Bridgeman Art Library
British Art Market Federation (BAMF)
British Association of Songwriters, Composers & Authors (BASCA)
British Association of Picture Libraries and Archives (BAPLA)
British Beer and Pub Association
British Computing Society
British Copyright Council (BCC)
British Equity Collecting Society
British Film Industry (BFI)
British Horseracing Authority
British Hospitality Association (BHA)
British Institute of Professional Photography
British Press Photographers Association
British Library
British Literary and Artistic Copyright Association (BLACA)
British Medical Association
British Museum
British Phonographic Industry (BPI)
British Screen Advisory Council (BSAC)
British Universities Film and Video Council
British Video Association
Business Librarians Association (BLA)
Cinema Exhibitors Association (CEA)
Central Council for Physical Recreation
Channel 4
Channel 5
Chartered Institute of Journalists
Chartered Institute of Library & Information Professionals (CILIP)
Christian Copyright Licensing International (CCLI)
Coalition for a Digital Economy (COADEC)
Community Matters
Compact Collections
Computer / Programme Developers / Data Base Developers
Confederation of British Industry (CBI)
Consumer Focus
Copyright Action
Copyright Licensing Agency
Copyright4Knowledge
Creative Economy
Creators Rights Alliance
Deaf Broadcasting Council
Design and Artists Copyright Society (DACS)
Directors UK
Dramatico Record Label
Educational Recording Agency (ERA)
EMI (Europe) Publishing
England and Wales Cricket Board
English Federation of Disability Sports
EPUK
Equity
Ericsson
Featured Artists Coalition (FAC)
Football Association (FA)
Formula One
Foundation for Science and Technology
Federation of Small Businesses (FSB)
Getty Images
GlaxoSmithKline
Google
Imperial War Museum
Institute of Physics
Intellect
Intellectual Property Foresight Forum
Intellectual Property Institute
ITV
Joint Information Systems Committee (JISC)
Jonathan Knowles - Photographer
Knowledge Ecology International (KEI)
Libraries & Archives Copyright Alliance
MBA Literary Agents Ltd.
Microsoft
Mixcloud
Music Publishers Association (MPA)
Motion Picture Association of America (MPAA)
Motion Picture Licensing Corporation (MPLC)
Museums and Galleries Scotland
Museum of Liverpool
Museums Libraries and Archives Council (MLA)
Music Managers Forum
Music Users Council
Musicians Union
National Centre for Text Mining
National Education Network
National Galleries of Scotland
National Library of Scotland
National Library of Wales
National Maritime Museum
National Museums Liverpool
National Museum of Scotland
National Museum of Wales
National Museums Northern Ireland
National Union of Journalists (NUJ)
Natural History Museum
Nature
National Council for Volunteers Organisation (NCVO)
Newspaper Licensing Agency
NOKIA
National Union of Students (NUS)
OFCOM
Open Rights Group
Osbourne Clarke
PACT
Patent County Court Copyright Tribunal
Pearson PLC
Performers Rights Alliance
Periodical Publishers Association
PPL
Premier League
Pro-Imaging
Proctor & Gamble (P&G) Technical Centres Limited
Professional Publishers Association
PRS
Publisher Research Consortium
Publishers Association
Publishers Licensing Society
Radiocentre
Reed Elsevier
Research Councils UK
Research in Motion
Research Information Network
Research Libraries UK
Royal National Institute of Blind People (RNIB)
Rugby Football Union
Science and Technologies Facilities Council
Science Museum
Share the Vision
Skillset
Sky
Society of Authors
Sports Rights Owners Coalition (SROC)
Spotify
Stop 43
Tate
Taylor and Francis
The National Archives
Time Warner
UK Film Council
UK Interactive Entertainment Association
UK Music
UK Music Producers Guild (MPG)
UCL Libraries
Universal Music
University of Glamorgan
University of Southampton
University Wales online Library
Universities UK
Victoria and Albert Museum
Virgin Media
Walt Disney Company
We7
Wellcome Trust
Sanger Institute
Wiley
Wolters Kluwer
Writers Guild of Britain
Annex D: Consultation response forms

Responding to the consultation

As part of the Government’s response to the Hargreaves Review of Intellectual Property and Growth the Government is seeking information on the proposals outlined in this document. The responses to the consultation, together with other evidence, will help shape proposals to improve the UK copyright system.

On this form, please provide your responses to the questions outlined in this document. You do not have to complete the whole form – please answer the questions which are most relevant to you.

Please Note: This consultation forms part of a publication exercise. As such, your response may be subject to publication or disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004). We plan to post responses on the Review website when they are received, and they may be the subject of online discussion.

If you do not want part or whole of your response or name to be made public please state this clearly in the response, explaining why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system cannot be regarded as a formal request for confidentiality.

About You and your organisation

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<th>Your name</th>
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<tbody>
<tr>
<td>Job Title</td>
<td>Desirable</td>
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<tr>
<td>Organisation Name</td>
<td>Desirable</td>
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<tr>
<td>Organisation’s main products/services</td>
<td>Desirable</td>
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1. Does the initial impact assessment capture the costs and benefits of creating a system enabling the use of individual orphan works alone, as distinct from the costs and benefits of introducing extended collective licensing? Please provide reasons and evidence about any under or over-estimates or any missing costs and benefits?

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

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

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

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

4. What do you consider are the constraints on the UK authorising the use of UK orphan works outside the UK? How advantageous would it be for the UK to authorise the use of such works outside the UK?
What do you consider are the constraints on the UK authorising the use of orphan works in the possession of an organisation/individual in the UK but appearing to originate from outside the UK:

a) for use in the UK only
b) for use outside the UK?

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

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

If the UK’s orphan works’ scheme only included published/broadcast work what proportion of orphan works do you estimate would remain unusable? If the scheme was limited to published/broadcast works how would you define these terms?
What would be the pros and cons of limiting the term of copyright in unpublished and anonymous literary, dramatic, and musical works to the life of the author plus 70 years or to 70 years from the date of creation, rather than to 2039 at the earliest?

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

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

Who should authorise use of orphan works and why? What costs would be involved and how should they be funded?
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<th>Question</th>
<th>Response</th>
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<tr>
<td>In your view what should constitute a diligent search? Should there be mandatory elements and if so what and why?</td>
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<td>Do you see merit in the authorising body offering a service to conduct diligent searches? Why/why not?</td>
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<td>Are there circumstances in which you think that a diligent search could be dispensed with for the licensing of individual orphan works, such as by publishing an awaiting claim list on a central, public database?</td>
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<td>Once a work is on an orphan works registry, following a diligent search, to what extent can that search be relied upon for further uses? Would this vary according to the type of work, the type of use etc? If so, why?</td>
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Are there circumstances in which market rate remuneration would not be appropriate? If so, why?

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

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

What are your views about attribution in relation to use of orphan works?
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<th>Question</th>
<th>Answer</th>
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<tr>
<td>20 What are your views about protecting the owners of moral rights in orphan works from derogatory treatment?</td>
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<td>21 What are your views about what a user of orphan works can do with that work in terms of duration of the authorisation?</td>
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<td>22 What aspects of the current collective licensing system work well for users and rights holders and what are the areas for improvement? Please give reasons for your answers.</td>
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<td>23 In the Impact Assessment which accompanies this consultation, it has been estimated that the efficiencies generated by ECL could reduce administrative costs within collecting societies by 2-3%. What level of cost savings do you think might be generated by the efficiency gains from ECL? What do you think the cost savings might be for businesses seeking to negotiate licences for content in comparison to the current system?</td>
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24 Should the savings be applied elsewhere e.g. to reduce the cost of a licence? Please provide reasons and evidence for your answers.

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

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

27 Would your collecting society consider operating in extended licensing mode, and in which circumstances? If so, what benefits do you think it would offer to your members and to your licensees?
28 If you do not intend to operate in extended licensing mode, can you say why?

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

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

31 Do you think that it is necessary for a collecting society to obtain the consent of its members to apply for an ECL authorisation? What should qualify as consent— for example, would the collecting society need to show that a simple majority of its members have agreed to the application being made?
Apart from securing the consent of its members and showing that it is representative, are there other criteria that you think a collecting society should meet before it can approach the Government for an ECL authorisation? Please give reasons for your answer.

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

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

Are there any other conditions you think a collecting society should commit to adhering to or other factors which the Government should be required to consider, before an ECL authorisation could be granted? Please say what these additional conditions would help achieve?
What are the best ways of ensuring that non-member rights holders are made aware of the introduction of an ECL scheme and that as many as possible have the opportunity to opt out, should they wish to?

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

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

Should a collecting society be required to show that it has taken account of all opt out notifications? If so, how should it do so? Please provide reasons for your answers.
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<tr>
<td>40</td>
<td>Are there any groups of rights-holders who are at a higher risk of not receiving information about the introduction of an ECL scheme, or for whom the opt-out process may be more difficult? What steps could be taken to alleviate these risks?</td>
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<td>41</td>
<td>What measures should a collecting society take to find a non-member or missing rights owner after the distribution notice fails to bring them forward?</td>
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<td>42</td>
<td>How long should a collecting society allow for a non-member rights holder to come forward?</td>
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<td>43</td>
<td>Aside from retention by the collecting society or redistribution to other rights holders in the sector, in what other ways might unclaimed funds be used? Please state why you think so?</td>
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44 What do collecting societies do well under the current system? Who benefits from the way they operate? Please explain your response and provide evidence for it.

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

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

47 Who else do you think would be affected by a requirement for collecting societies to adhere to codes of conduct? What would the impact be on them? Please provide reasons and evidence for your response.
<p>| 48 | Is one year a sufficient period of time for collecting societies to put in place a code of conduct? Please provide reasons for why you agree or disagree? Please also provide evidence to show what a workable timeline would be. |
| 49 | What other benefits or rewards could accrue to a collecting society for putting in place a voluntary code? Please provide evidence for your answer. |
| 50 | In your view, does it make a difference whether there is a single code, one joint code, or several joint codes? Please give reasons for your answer. |
| 51 | Are there any other areas that you think should be covered in the minimum standards, or areas which you think should be excluded? Please give reasons for your response, including evidence of alternative means of securing protection in relation to any areas you propose should be excluded from the minimum standard. |</p>
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<td>52</td>
<td>Are there any additional undertakings that a collecting society should give with regard to its members and the manner in which it represents them? Should any of the proposed minimum standards about members be excluded? Please provide reasons and evidence to support your response.</td>
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<tr>
<td>53</td>
<td>Are there any additional undertakings that a collecting society should give with regard to its licensees, or should any of the proposed minimum standards be excluded? Please give reasons and evidence for your response, included why you consider any standards which you propose should be excluded to be unnecessary.</td>
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<td>54</td>
<td>Are there any additional expectations for licensees that should be set out by a collecting society in its code, or should any of those listed be excluded? Please give reasons why.</td>
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<td>55</td>
<td>Are there any additional measures that a collecting society should put in place to ensure proper control of the conduct of its employees, agents, and representatives? Should any of the proposed standards be excluded? Please say what these are and provide evidence to support your response.</td>
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<td>Question</td>
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<td>56 Are there any additional provisions that you believe would enhance the transparency of collecting societies? Should any of the proposed provisions be excluded? Please give reasons and evidence to support your response.</td>
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<tr>
<td>57 Are there any other criteria that a collecting society should report against? Should any of the proposed criteria be excluded? Please give full reasons and evidence for your answer, describing what impact it would have and on whom</td>
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<tr>
<td>58 Are these criteria sufficient for the creation of a complaints procedure that is regarded as fair and reasonable by the members and users of collecting societies? Should any proposed criteria be excluded? Please provide reasons and evidence to support your response.</td>
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<td>59 Please indicate whether you think a joint ombudsman or individual ombudsmen would work better. Please say why you would prefer one over the other?</td>
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</table>
60. Is the ombudsman the right person to review the codes of conduct? Please give reasons for your answer, and propose alternatives if you think the ombudsman is not best placed to be the code reviewer.

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

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

63. What do you consider the process and threshold for non-compliance should be? For example, should Government test compliance on a regular basis (say by following Ombudsman’s reports) or on an ad-hoc basis? What evidence would be appropriate to demonstrate non-compliance? Please give reasons for your response.
64 What, in your view, are suitable penalties for non-compliance with a statutory code of practice? For example, are financial penalties appropriate, and, if so, what order of magnitude would be suitable? Please give reasons and provide evidence for your answer.

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

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

67 Do you agree that a private copying exception should not permit copying of content that the copier does not own?
Should the private copying exception allow copying of legally-owned content for use within a domestic circle, such as a family or household? What would be the costs and benefits of such an exception?

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

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

Should the current mechanism allowing beneficiaries of exceptions to access works protected by technological measures be extended to cover a private copying exception? What would be the costs and benefits of doing this?
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| 72 | Should the preservation exception be extended:  
    - to include more types of work?  
    - to allow multiple copies to be made?  
    - to apply to more types of cultural organisations, such as museums?  
    How might this be done, and what would be the costs and benefits of doing it? |
| 73 | Is there a case for simplifying the designation process which is part of Section 75? How might this be done and what would be the costs and benefits of doing it? |
| 74 | Should any other changes be made to the current exceptions relating to libraries and archives, and what would be their costs and benefits? |
| 75 | Would extending the copyright exception for research and private study to include sound recordings, film and broadcasts achieve the aims described above? Can you provide evidence of its costs and benefits? |
Should the copyright exception for research and private study permit educational establishments, libraries, archives or museums to make works available for research or private study on their premises by electronic means? What would be the costs and benefits of doing this?

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

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

What is the value of the market for parody works in the UK and globally?
80 How might a parody exception impact on creators of original works and creators of parodies? What would be the costs and benefits of such an exception?

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

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

83 Would making this a “fair dealing” exception sufficiently minimise negative impacts to copyright owners, or would more specific measures need to be taken?
84 Are you able to provide evidence of the costs and benefits of such an exception?

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

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

87 What is the best way to allow the transmission of copyright works used in teaching to distance learners? What types of work should be covered under such an exception? Should on-demand as well as traditional broadcasts be covered? What would be the costs and benefits of such an exception?
Should these exceptions be amended so that more types of educational body can benefit from them? How should an “educational establishment” be defined? Can you provide evidence of the costs and benefits of doing this?

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

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

How should the disability exceptions be expanded so that they apply to more types of work? Is there a case for treating certain works differently to others? What would be the costs and benefits of amending the exceptions in this way?
What are the costs and benefits of the current licensing arrangements for the disability exceptions, and is there a case for amending or removing them?

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

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

Is there a need to amend or clarify the exception for reporting current events? Could this be done as part of a quotation exception, or would a separate measure be needed? What would be the costs and benefits of doing this?
| 96 | Is there a need to amend the existing provisions relating to speeches and lectures, and what would be the costs and benefits of doing so? Should these provisions be combined within a quotations exception? |
| 97 | Would there be additional benefits if all three types of exception examined by this section were combined? |
| 98 | How should the current exceptions for use by public bodies be amended to support greater transparency? How could such exceptions be limited to ensure that incentives to copyright owners are not undermined? Can you provide evidence of costs or benefits of doing this? |
| 99 | Should a new exception for time-shifting of broadcasts by social institutions be introduced? What would be the costs and benefits of doing this? |
Should a new exception for use during religious celebrations or official celebrations organised by public authorities be introduced? What would be the costs and benefits of doing this?

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

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

What are the advantages and disadvantages of allowing copyright exceptions to be overridden by contracts? Can you provide evidence of the costs or benefits of introducing a contract-override clause of the type described above?
104 Are there specific and/or general areas of practical uncertainty in relation to copyright which you think would benefit from clarification from the IPO? What has been the consequence to you or your organisation of this lack of clarity?

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

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

107 Do you think that it would be helpful for the IPO to publish its own interpretation of problem areas which may have general interest and relevance? What sources should it rely on in doing so?
Do you agree that it would be helpful to formalise the arrangements for these Notices through legislation? Please explain your reasons.

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

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

Are there other ways in which you think that the IPO can help clarify areas where the law is misunderstood? How would these work?
112 Do you think it would be helpful for the IPO to provide (for a fee) a non-binding dispute resolution service for specific disputes relating to copyright? Who would benefit and how? Are there any disadvantages of IPO operating such a service?

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

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

We are keen to gather quality evidence on the proposals that are discussed in this document.

As part of this process the Government will be holding a number of events around the UK where we are inviting people to have their say.

To book a place at one of the events please email copyrightconsultation@ipo.gov.uk. Bookings will be taken on a first come first serve basis although we may give priority to those who have not had an opportunity to contribute.

We are planning the list of events below. Please be aware that these may be subject to change. We may also add further events. For up to date information please check confirmed details on our website at www.ipo.gov.uk. You can also email us or call us on 0300 300 2000.

**London Events**

We will be holding a number of events in central London at either the Intellectual Property Office (21 Bloomsbury St, London, WC1B 3HF) or the Department for Business Innovation and Skills (1 Victoria St, London, SW1H 0ET).

Events will be held on the following themes:

*Copyright Notices*  
18 January 2012 at the Intellectual Property Office.

*Contract Override*  
18 January 2012 at the Intellectual Property Office.

*Extended Collective Licensing and Orphan Works*  
27 January 2012 at the Department for Business Innovation and Skills.

*Collecting Societies – Codes of Conduct*  
10 January 2012 (event for collecting societies), at the Intellectual Property Office.  
23 January 2012 (event for users), at the Intellectual Property Office.  
8 February 2012 (ministerial roundtable), at the House of Lords.
Copyright Exceptions

1 February 2012 (focusing on exceptions that will benefit individuals, consumers and businesses)
15 February 2012 (focusing on exceptions that will benefit institutions and organisations)

These events will be held at the Intellectual Property Office.

Regional Events

We will be visiting centres around the UK where we invite people to hear about the Government’s plans and ask questions or comment. We especially invite individuals and small and medium sized businesses to come and have their say.

We plan to visit the following locations during February and March 2012:

• Belfast – Invest Northern Ireland
• Birmingham – Birmingham Science Park
• Cardiff – Cardiff City Stadium
• Edinburgh – Holiday Inn
• Leeds – Leeds United Conference and Events
• Plymouth – New Continental Hotel

Dates are to be confirmed and further information will be made available on our website shortly.

Surgeries

We recognise that not all stakeholders will be able to attend our formal events. Some stakeholders may wish to meet Government officials to discuss specific issues.

We will be scheduling a number of days where stakeholders can request 30 minute meetings with Intellectual Property Office officials. These will be available on a first come first serve basis, and they will be available regardless of whether stakeholders attend other events.

These surgeries will be held primarily at the IPO offices in London and Newport.

Please check the website for dates. If you would like to book a slot on a specific day please email copyrightconsultation@ipo.gov.uk.