

BRITISH COPYRIGHT COUNCIL

Independent Review of Intellectual Property and Growth Response to the Call for Evidence

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What rights are you primarily interested in or do you use? Copyright

How do you interact with IP Rights?

Create Yes	Manage Yes	License out Yes	License in Yes	Legal Yes	Collections Yes	Interested party Yes
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What type of respondent are you: interest group/organisation

WHO WE ARE

The British Copyright Council represents those who create, hold interests or manage rights in literary, dramatic, musical and artistic works, performances, films, sound recordings, broadcasts and other material in which there are rights of copyright and related rights. Our members include professional associations, industry bodies and trade unions which together represent hundreds of thousands of authors, creators, performers, publishers and producers. These right holders include many individual freelancers, sole traders and SMEs as well as larger corporations operating within the creative and cultural industries. Our members also include collective management organisations which represent right holders and which enable access to works of creativity.

BCC Member organisations:

Association of Authors' Agents . Association of Illustrators . Association of Learned & Professional Society Publishers . Association of Photographers . Authors' Licensing & Collecting Society . BPI . British Academy of Songwriters, Composers and Authors . British Association of Picture Libraries & Agencies . British Computer Society . British Institute of Professional Photography . Broadcast Entertainment Cinematograph & Theatre Union . Chartered Institute of Journalists . Copyright Licensing Agency . Design & Artists Copyright Society . Directors UK . Educational Recording Agency . Equity . Music Managers' Forum . Music Publishers Association . Musicians' Union . National Union of Journalists . Professional Publishers Association . PPL . PRS for Music . Publishers Association . Publishers Licensing Society . Royal Photographic Society . Society of Authors . Writers' Guild of Great Britain .

Right holders represented by the British Copyright Council create content for, or work within digital media. They are leaders in digital communication and distribution, for example, on-line advertising, broadcasting, journalism and publishing. All provide creative content for use on-line or in digital formats as well as in more traditional formats and media. The content they create is a vital component in, and a driver for, the success of the digital marketplace. As creators of content for on-line and other forms of digital distribution, those right holders also contribute to the success of the information and communication technology industries (ICTs), including the network infrastructure.

THIS REVIEW

We welcome the Review of IP and Growth being carried out by Professor Hargreaves and the Review Team as we have welcomed other earlier reviews. Regular reviews are to be expected in such a rapidly developing market. They provide valuable milestones; points at which to assess the development of new markets and technologies; adjust the legislative framework and add incentives for players in the market.

With regard to this review, we have three preliminary points:-

- The Report resulting from this Review must take a balanced approach to copyright's contribution to economic growth and to the digital sector. Copyright plays an essential role in facilitating the digital economy, whether in the licensing of creative content for online services; or for digital and online businesses which are themselves directly reliant on control of copyright and other forms of IP to protect the value of their own products and services. There are other factors which more directly inhibit growth some of which have already been identified by this review such as access to finance, to which could be added skills needs, absence of tax breaks and general national access to broadband. The first three were the decisive factors for the development of Silicon Valley in the last hundred years and the last is as essential for business start-ups as it is desirable for consumers.
- The creative industries are part of the digital economy and should not be viewed in opposition to it. We acknowledge that there have been some tensions between the creative industries and digital service providers in the past. At the outset, the lack of protection for content and the disregard for copyright by some of those operating in a new and developing marketplace meant right holders were cautious. However, the creative industries and their content providers have developed, or are building new business models in line with developments in each sector of the digital and online market. Investors and innovators in the creative industries are adding digital and online services to their more traditional offerings, or are developing entirely new products and services for the digital economy. It is of paramount importance for the economic growth of the digital market, that creative industries and digital service providers work together to provide a compelling offer for consumers. A policy which isolates any part of the digital market will inhibit economic growth and should be avoided.

Consequently, we have assumed in our response that growth in the creative industries is also a priority for and of interest to this Review.

- If the Review of IP and Growth could achieve one thing for the future of the digital economy, for the creative industries and for copyright, it would be to ensure that future policy is based on evidence and that, as a matter of priority, Government co-operates with industry to address the lack of robust independently produced data well before any recommendations for change are approved or implemented. As Professor Hargreaves acknowledges in his introduction to the Review "*policy is not yet grounded securely in evidence*". We agree. It is a source of real concern that Government has repeatedly put forward legislative measures in the copyright field without having solid data on which to base such changes or on which to assess the long term impact of such changes. Furthermore, the focus on the digital economy as key to UK economic recovery, must be reflected more accurately in Government economic data. Our members would be very pleased to assist Government in the development of appropriate methodology for obtaining more accurate data.

The British Copyright Council looks forward to taking an active part in this Review and in the debates arising from it.

IP AND ECONOMIC GROWTH

The UK's creative industries are one of the most influential and successful in the world. UK digital content has a global reach. Effective copyright law is central to the micro-economy of each sector within the industries. Without it, they cannot recoup investment in creative content, or develop or promote new and innovative products and services.

In their individual submissions, our members will, no doubt, provide the Review with data on the economic situation in their own sector or industry to which we would add the following headline notes:

UK Creative Industries add £60bn to the economy every year, constitute 8% of GDP and employ over 1.7 million people¹;

UK Publishing Industries are the second largest in Europe. In the 2002 PIRA International Report co-managed by the DTI the industry was recognised as having a turnover of £18.4 billion with 8,000 plus companies employing 164,000 people². In 2010, members of the Publishers Association annually accounted for around £4.6bn of turnover, with £3.1bn derived from the sales of books and £1.5bn from the sales of learned journals.³ Members of the Professional Publishers Association are also significant contributors. The total value of the UK consumer magazine and business media industry is estimated to be over £4bn.⁴

UK Music Industry reports a turnover of almost £4 billion and employs over 100,000⁵;

UK Film Industry reports a £4.5 billion contribution to GDP in 2009 with £1.9 billion going to the Exchequer and directly employs 30,000⁶.

According to a report published by The Work Foundation on 29th November 2010: *"The contribution of the creative industries to UK plc cannot be understated: as a high-growth sector worth 6.2% of GVA and growing at double the rate of the rest of the economy, it is a crucial engine of growth."*⁷

In summary, music, film and publishing have continued to grow and have weathered the recession well. All are major exporters. All have actively contributed to the emergence and adoption of digital services. All continue to suffer as a result of copyright infringement.

Though a cornerstone of the success of our creative industries, copyright cannot be reviewed in isolation when talking about future growth. There are other factors which impact on its success and on its future growth, such as skills, whether acquired through education and training, or ongoing professional development and access to finance and business support.

COPYRIGHT - RESPONSE TO QUESTIONS

1. **Is there evidence from other national networks to suggest how the UK (and EU) copyright systems could better support innovation? (e.g. comparisons with the USA's system (including 'fair use') along with other jurisdictions in Asia and Europe**

It has been said that adoption of some features of the USA's copyright system could encourage the development of a "Silicon Valley" economy here in the UK; but there is no evidence that copyright law was a relevant factor in the emergence of "Silicon Valley".

¹ "Creative Britain, New Talents for the New Economy", DCMS, 2008

² National Archives, web archive, www.bis.gov.uk. Snapshot at 04.03.2010.

³ Publishers Association, 2009 annual Statistical Monitor

⁴ PwC, 2010-2014 Global Media and Entertainment Outlook. <http://www.pwc.com/gx/en/global-entertainment-media-outlook>

⁵ Will Page and Chris Carey: Adding up the UK music industry for 2009;

<http://www.prsformusic.com/creators/news/research/Documents/Economic%20Insight%202020web.pdf>

⁶ http://www.ukfilmcouncil.org.uk/media/pdf/i/r/The_Economic_Impact_of_the_UK_Film_Industry_-_June_2010.pdf

⁷ http://www.theworkfoundation.com/assets/docs/publications/277_A%20creative%20block.pdf

The key factors were: long term investment in education; science and research (particularly that associated with radio and military technology starting in the first half of the 20th Century, largely through Stanford University and its Industrial Park); leading to crucial technological developments through the cluster of business start-ups and subsequent spin offs which emerged from within this community, or were encouraged by it to develop in the area. Once started on the path of innovative development, investment naturally followed, resulting in further growth and leading to Silicon Valley as it is today. IP did, however, play a role in helping developers and investors to protect and monetise their innovations.

The one feature of the USA's system above all others on which the spotlight has fallen is "fair use". We are asked by the Review to compare the UK's copyright system with alternatives, the USA's fair use system being the named example, so we have concentrated on this. Most countries under the Berne Convention take a fair dealing approach or in civil law countries, provide a complete list of detailed exceptions.

While a number of major Commonwealth countries have considered the possibility of changing their long established fair dealing systems to a fair use approach, each rejected doing so in favour of incremental reforms achieved by way of targeted exceptions. In rejecting fair use, Australia, the UK and New Zealand have amongst others referred to international treaty compliance, and the undesirability of introducing uncertainty into longstanding relationships⁸.

Principles

64 sections of the Copyright Designs and Patents Act 1988 set out the "acts permitted in relation to copyright works". Only two of these (Sections 29 and 30) deal with Fair Dealing as such. Under these sections, Fair Dealing is permitted for the purposes of private study (which must not be directly or indirectly for a commercial purpose) or non-commercial research; and criticism or review or reporting current events.

An additional requirement is "sufficient acknowledgement of the original author" to protect the personality of the original author (ensuring the moral right of attribution).

The remaining exceptions (Sections 31 to 76) cover a wide range of specific activities. In the USA some of these would be covered by the Fair Use Legislation (e.g. Section 70 CDPA concerning recording for the purposes of time-shifting).

The acknowledged purpose of exceptions in UK and international copyright law is to provide a balance between the interests of the author in his creation and the public interest in access, providing for the needs of specific groupings, such as educational establishments, libraries and archives or for the visually impaired.

Fair use has been developed from US cases in 1841 (*Folsom v. Marsh*); and was codified in 1976 as Section 107 of the US Copyright Act. In a similar way Fair Dealing in the UK originally developed in case law, which was then codified in statute, initially in the Copyright Act 1911.

The uncertainties of interpreting fair use are apparent in this extract from a notice which appeared on the BBC's website in January announcing that Shepard Fairey and the Associated Press agreed to settle copyright infringement claims.⁹

*"In a joint statement, neither side surrendered its view of the legal issues surrounding the dispute."
"The AP will continue to vigilantly protect its copyrighted photographs against wholesale copying and commercialisation where there is no legitimate basis for asserting fair use," said Tom Curley, the AP's president.*

⁸ <http://www.scribd.com/doc/22267044/Why-Canada-should-not-adopt-fair-use>

⁹ <http://www.bbc.co.uk/news/entertainment-arts-12170620>

"I respect the work of photographers, as well as recognise the need to preserve opportunities for other artists to make fair use of photographic images," Fairey added.

There is no clear definition of fair use in s.107 of the US Copyright Act. It is left to the judge to evaluate an actual situation according to four criteria and then decide whether, in his view, the behaviour in question is more likely to be considered fair use than not. Hence, fair use has been said to be the most troublesome in the whole law of copyright, by academics and judges alike. Diverging decisions in different jurisdictional instances, often depending on the geographical location of the Court rather than on any material difference in the underlying facts of the case, contribute further to the uncertainty of the interpretation of what constitutes "fair" use.

Complexity & Uncertainty

We believe that the UK's clear and comprehensive legislation is the reason for there being only limited cases on exceptions being brought to Court, as compared with the large amount of litigation in the US on how to interpret and apply the fair use exception. The interpretation of "fairness" appears to be a lottery, depending on the respective judge and his views; leading to different interpretations between various instances which create great uncertainty.

As US academic Pamela Samuelson¹⁰ said: *"Google's recognition that its fair use defence was not a sure winner may have contributed to its receptivity when representatives of the Authors Guild and AAP approached it to suggest a settlement of the litigation that would allow Google not only to continue to scan books, but to commercialise them."* The case behind the Google Settlement shows how very expensive "fair use" litigation can be, the case itself took a long time and the outcome is to date unresolved resulting in blocked content for users and no return to authors and publishers. Only a large corporation such as Google could possibly have contemplated such an expensive litigation.

The UK's system of fair dealing provides greater certainty around which to build new business models by establishing much clearer boundaries for both right holders and uses. In terms of hard evidence for the view that there is greater uncertainty attached to fair use cases in the USA, we asked Taylor Wessing LLP to prepare a comparison of cases for the British Copyright Council. The full text of their note is available as **Appendix I** to this response. Despite the difficulty of making direct comparisons we believe that their comparison of numbers speaks for itself.

"Number of UK Fair Dealing Cases

This was the most straightforward area to research. In our research, we have looked at decisions made on or after 1 January 1978, which is the date on which the US Copyright Act 1976 came into force and introduced for the first time in the US a statutory Fair Use regime.

On 1 January 1978, the Copyright Act 1956 ("the 1956 Act") was still in force in the UK and it remained in force until 31 July 1989. On 1 August 1989, the Copyright, Designs and Patents Act 1988 ("the 1988 Act") came into force in the UK and it is still in force, although it has been amended on several occasions since 1989.

Under both the 1956 Act and the 1988 Act there were/are a number of exceptions to copyright. In researching the cases, we have drawn a distinction between cases decided which involved the Fair Dealing provisions and those which involve other exceptions. Under the 1988 Act, there are 64 sections which set out the "act permitted in relation to copyright works". However, only two of these (Section 29 and 30) deal with Fair Dealing as such.

¹⁰ The Google Book Settlement As Copyright Reform, September 2010, Pamela Samuelson www.ssrn.com/abstract=1683589

Under these sections, Fair Dealing is permitted for the purposes of private study (which must not be directly or indirectly for a commercial purpose) or non-commercial research, criticism or review or the reporting of current events.

The remaining exceptions (Sections 28 and 31 to 76) cover a wide range of activities such as, for example, recording for purposes of time shifting, incidental recording for purposes of broadcast etc. There was a similar regime in the 1956 Act, only with fewer exceptions. The reason that we have included the other exceptions is that some of them would be covered in the US by the US Fair Use legislation.

The number of reported decisions in the UK since 1 January 1978 is as follows:

- Number of Fair Dealing cases decided under the 1956 Act: 4*
- Number of Fair Dealing cases decided under the 1988 Act: 17*
- Number of other exceptions cases decided under the 1956 Act: 13*
- Number of other exceptions cases decided under the 1988 Act: 40*

The total number of cases decided during the period is 67¹¹ or approximately two per year. We can provide lists of these cases (together with short summaries) if this would be of use. "

"Number of Fair Use Cases in the US"

It has proved much more difficult to obtain details of the number of reported decisions in Fair Use cases in the US.

We have been able to establish that there were not less than the following numbers of such decisions during the years ended June as set out below:

<i>June 2010</i>	<i>- 8</i>
<i>June 2009</i>	<i>- 8</i>
<i>June 2008</i>	<i>- 7</i>
<i>June 2007</i>	<i>- 8</i>

Cost

The uncertainties inherent in the fair use cases make it counterproductive, in particular for individuals and SMEs both in the creative and technology sector to rely on fair use; not only is it expensive to carry through a fair use case, there is the risk of suit by established players. As we have said, fair use is extremely complex and leads to uncertainty due to the broad judicial interpretation of the factors. This complexity and uncertainty causes the overruling of lower court decisions which in turn leads to further litigation and expense.

The note prepared by Taylor Wessing for the British Copyright Council also included a comparison of costs. Again see **Appendix I** for the full note. Here we have included the essential text.

"Legal Costs and Expenses of UK Fair Dealing Case"

It is difficult to generalise. The costs of any particular case will depend on a number of different factors, such as the amount of evidence, whether it is disputed, the complexity of the case, prospects of preliminary references to the ECJ and so on. However, the costs of bringing or defending a copyright case which goes to a full trial and a reported decision is likely to be somewhere between £250,000 and £500,000 (excluding any appeals).

¹¹ Footnotes in the Taylor Wessing paper included at **Appendix I** explain this difference

The newly reinvigorated Patents County Court (which has a cap on recoverable costs of £50,000 and is intended to provide a more streamlined judicial process) may mean that this figure may drop for the smaller and less complicated cases.

Legal Costs and Expenses of US Fair Use Case

A report by the American Intellectual Property Law Association estimates that the average cost to defend a copyright case is just under \$1 million. [Cited at page 42 in an article by Giuseppina D’Agostino entitled “Healing Fair Dealing? A Comparative Copyright Analysis of Canadian Fair Dealing to UK Fair Dealing and US Fair Use – published in Comparative Research in Law & Political Economy 2007 (Vol: 03 No. 04)].

This is clearly an average figure and some cases will be more expensive and some less. For example, in the Google Books litigation, the latest draft of the Amended Settlement Agreement provides that Google will pay \$30 million towards the Plaintiffs’ attorneys fees and costs. The Google Books case was a class action, involved a large number of parties and was extremely complex. Nevertheless, it was a Fair Use case and does demonstrate how difficult, complex and expensive US litigation involving Fair Use can be.”

Conclusion

The fair use system does not provide greater benefits than fair dealing. It is more complex, resulting in greater uncertainty and it is more costly for all concerned.

Fair dealing provisions in the UK Act provide the most effective method for addressing abuses, or too restrictive use of copyright licensing, particularly in a commercial context. Targeted exceptions, such as those in the UK Act, are the best means for providing for non-commercial uses and guarding public access (see our response to question 4) below.

We consider that it would be very damaging to introduce a general fair use exception into UK Copyright law. As stated above, the US fair use law was introduced in the US and was based on pre-existing case law. The same applies to the introduction in the UK of the Fair Dealing provisions. The Copyright Act 1911 was preceded by case law, which assisted in the interpretation of the new legislation. If a US-style general fair use provision is introduced into UK copyright law without any existing case law to aid in its interpretation, there is bound to be a plethora of litigation to establish exactly what it means. No doubt, reference will be made to US cases. However, as mentioned above, these cases are often contradictory and have not given rise to great clarity. The existing Fair Dealing law in the UK seems to work well and does not give rise to a large amount of litigation. This would suggest that the UK law is clear and reasonably well understood and is working effectively.

2. Are markets involving copyright more competitive in any other countries, while still providing satisfactory incentives to creators and investors?

While weak copyright protection may not entirely stifle creativity, when it comes to dissemination of work and remuneration for creators and investors, exploitation seems to follow strong copyright regimes. For example, it is possible to have a very competitive environment in, say film-making but there is little opportunity for film-makers to earn a living from it because of scale of piracy.

Before the USA and Russia joined the Berne/Universal Copyright Convention works were frequently exported for publication in Berne Union countries in order to attract copyright in major jurisdictions.

Each year, the British Copyright Council, working with the WIPO Worldwide Academy and supported by IPO, offers an intensive two week training course in copyright and related rights for government officials from developing countries. Demand for places on this course far exceeds availability. Sometimes it seems that the whole world wants to know how UK copyright has provided a competitive edge for its creative industries.

More telling, however, is the anecdotal evidence provided in the reports from many of these individuals, particularly those from African and Caribbean countries, who confirm that home grown talent tends to record, publish and distribute their work, particularly musical and literary works, in countries where there is a strong copyright framework such as the UK or the USA. Even where a local framework exists, home grown publishing and record production industries are unsustainable due to a failure to enforce rights against counterfeiting and piracy. Given the central role which music and the performing arts play in those countries, the loss to their economies must be very great.

As far as UK creative content is concerned, the industries involved already have a competitive edge which we believe Government should support and encourage. For example, our music industry is a strong global exporter with our artists providing the second largest repertoire to the US market after their own home-grown artists and the UK's share of that market increased in 2010.¹² A more confident approach by Government to the promotion of all parts of our digital economy at international level would be welcomed.

3. Is there evidence of how the UK copyright framework supports growth and innovation? (- has it adapted to the economics and opportunities of the digital age – does it meet the needs of the digital industries e.g. software, games and internet services? – does it provide the right incentives for investors and creators?)

The copyright framework supports growth by the fact that copyright, which is primarily seen as an economic right, arises automatically with no requirement for registration; it is relatively technology neutral; it is transferable; it is flexible with one of its great strengths being the divisibility of rights, which enable right holders to maximise exploitation and to meet user needs.

Copyright promotes growth by underpinning licensing solutions and therefore supports technological innovation. Copyright has evolved in response to technological development and the copyright framework has proved itself sufficiently flexible to cope with this constantly changing environment. The fact that so many on-line business models already exist demonstrates that the copyright framework has adapted successfully to accommodate the rise of online and digital uses.

Copyright brings recognition and support to the grass roots of the creative content industries as well as to the sophisticated markets they support, whether digital, online or otherwise. It is our view, therefore, that the copyright framework provides an incentive to investor and creator alike to continue contributing to the marketplace.

¹² <http://www.bpi.co.uk/press-area/news-amp3b-press-release/article/british-artists-increase-share-of-us-music-market-in-2010.aspx>

Publishing and the digital market:¹³

Figures for the expansion of that part of the digital market represented by the Publishers Association and including trade e-books, ELT content, academic and professional content and school resources. The figures do not include additional turnover relevant for newspapers.

Year	Total	% increase in market
2009	£93.7m	20%
2008	£78.2m	27%

Figures for 2010 will be available shortly, the PA are expecting the figure to be very strong with a possible 30% increase over 2009.

The UK's copyright framework supports a range of sophisticated and adaptable copyright licensing systems. At all levels and in all sectors, those systems provide a channel through which creative content flows in one direction and by which revenue is returned to its creators and investors. For creators and performers copyright provides them with choices about how, when and under what conditions they make their work available and is the source of their livelihood. It is the major means by which the industries function. Its agreements and transactions are based around it and on the whole we believe that copyright licensing functions well. In our response to Question 4 we have highlighted areas where we think there is room for improvement.

Our reply to this question is based on the experiences of our members. Below we provide case studies and glossaries of licensing terms in current use, which support our view.

Firstly, we provide case studies on the way in which individual creators and performers earn their living over a long career and from a range of mainly copyright-derived sources.

Secondly, **Appendix II** provides a selection of licensing terms drawn from agreements produced by a cross section of our members and demonstrating wide ranging opportunities for accessing creative content including those for digital and online uses.

Contribution of individual creators and performers

British creators are the lifeblood of the content market and any adjustment to the copyright framework must start by taking their needs into account.

The range of licensing opportunities available is reflected in the variety of ways in which these individual creators and performers earn their living. In most cases they work with "professional" users. The rights and licenses they, or their agents offer, are priced according to certain factors dependent on the sector in which they work but can roughly be categorised into three types of payment based on:-

- initial use based on exclusivity/non exclusivity, territories, type of use, etc;
- royalties/residuals/additional usage fees;
- collecting society payments which result from licensing fees or from the distribution of equitable remuneration or other statutorily recognised payments (including private copying and cable retransmission payments), often referred to as "secondary rights".

¹³ From the Publishers Association Statistics Yearbook.

Within this tiered framework, individual creators and performers develop and create works for traditional media and, when asked, for digital media. For digital and online media they are, in the main, adapting existing licensing arrangements to fit the new business models, some more rapidly than others for faster growing markets. How, when and on what terms they do this is dependent on client demand, market developments, media and distribution platforms available in their sector and on the forms of technological protection available to ensure the security of their particular type of work.

Copyright and copyright licensing offers creators more than a one-off fee. “Downstream” income is hugely important to them. These case studies demonstrate how they earn a living over the course of their career and as a workforce which does not operate under a traditional employment structure offering security of salary, sick pay and pension, providing them with on-going payments for previously created work. The case studies also show that copyright provides income to creators in a range of ways and through a range of channels, again providing them with additional security.

Where these creators are involved in the digital marketplace, they are successfully adapting existing copyright licensing principles for that marketplace.

Case Studies provided by individual creators

Case Study 1 - film and television director/producer and entrepreneur

“I’ve been freelance in the UK Film and Television business since the mid 1970’s, during which time I have worked in a number of technical and creative disciplines. These range from Film Editor, to owner of a DVD authoring business and Film Director/Producer with own company.

Currently, my income stream comes from a number of sources:

- One-off commissions for video production (ie. a corporate). This is an agreed fee subject to an approved budget and there are no residuals.*
- I have an American distributor who markets my DVD titles in the States. They pay me royalties on sales every 6 months.*
- In the UK and Europe, my DVD sales are handled by Amazon. They pay me royalties monthly.*

In the past, as an editor, I would invoice the Production Company weekly, and it was usually a struggle to get paid in less than 60 days.

I also have had a 3 year film distribution contract with 20th Century Fox. They would pay at 6 month intervals based on an agreed percentage profit basis. Here again one was at the mercy of their accountants.

Since 2005, I have run an on-line website that provides video-streaming services for live events, as well as hosting a variety of arthouse films. The latter part of this operation has not as yet made any money but we are hoping to ‘monetise’ the site this year, so that it may provide an on-going income stream.”

Case Study 2 – illustrator and graphic artist

Illustrator Alan Baker created an image of a pine martin in the late 1970’s when it was originally commissioned for a calendar. He licensed the rights to reproduce the image for a 12 month period. Once the rights reverted back to Alan, he was able to re-license the image for new uses over subsequent years, including various other calendars for this country [the UK], also calendars for France, various greetings cards, a children’s book which was then re-worked 10 years later when he re-sold the rights to another publisher, giving an ongoing flow of income over decades from one image.

Case Study 3 – author, consultant and presenter

"I am a writer, a journalist by training who still writes occasional articles as well as book reviews so as a freelance I need to originate ideas for this sort of work. I am principally an author of non fiction biographies and am now called on to act as a consultant to TV companies on that body of published work as well as to give lectures on the subjects of my books and to write introductions to republished books usually with some relevance to subjects I have written about. I also present occasional radio documentaries, chair events/conferences with other writers and give after dinner talks based on my work.

Primarily I sell my work to publishers in the UK and US who market it with some provision for royalties, serial and translation rights to be sold. I also sell to newspapers and the BBC. I have sold several of my books post publication to film companies to make documentaries from and I have been used variously as consultant, interviewer and originator of the idea. These have been mostly one off deals with some provision for the possibility of subsequent sales. The main markets for my talks are fine arts societies, charitable and heritage institutions and clubs as well as literary festivals and libraries - the last two usually do not pay.

[I have been doing this] since 1980 when I left full time work with Reuters news agency to go freelance.

When I sign a contract for a book I am paid usually in quarters (advances on signature, delivery, publication and paperback). This can mean a long and expensive wait between signature and delivery when there are only heavy outgoings for research and no income at all. After publication, there may be further payments for foreign sales and translations as well as hoped for serial rights. Any interviews, performances or talks during the first few months are generally expected to be given without payment as the book is being promoted. I also receive payments via collecting societies as well as some royalties and payments for republished books.

I have had very little payment through royalties although some of my books have been bought by new publishers and I get royalties from these as well as royalties from books turned into audio products or large print but these are small amounts. PLR and ALCS also provide some income annually - ALCS is much larger for me because of my journalism.

I have not yet licensed any digital work but hope to in the future.

I don't have a business and have never sought loans, grants or finance to help."

Case study 4 – fashion illustrator

Fashion illustrator Jacqueline Bisset had an on-going advertisement commissioned by Givenchy which has been used in Canada, Russia and Chile over the past 4 years.

She received an initial fee for the original illustration, then over the following two years she received 50% of the original fee per year for re-use of the advert worldwide. Last year she received a 10% fee to re-use on point of sale items for shops, eg. leaflets, cards. She says this additional licensing has been quite lucrative.

She also receives regular re-usage fees through her illustration agency when magazines would like to re-use a previously commissioned piece of illustration whose license has expired, or would now like to use the same image on their website. These are usually 50% of the original fee. She has also had small new businesses request to use an image they've seen on her website (as a lower priced reuse) when they cannot afford to commission something new.

Case Study 5 – advertising and fine art photographer

I am a photographer operating as a sole trader. I work mainly in the field of advertising, but also create art works and have some work in a stock /art library www.lensmodern.com.

All my work is licensed. If I am working for an advertising agency I will licence as an initial use e.g. 1 year-UK only - press and internet and then if they wish to extend the time period, geographic use or media to be used in, I will issue extra licences to cover their needs.

They can use my work for display, used in various media, as packaging, as art works, as part of an audio visual work, whatever, subject to negotiation of those extra licences.

I have been in this business for 30 years.

I receive fees for initial licensing, then for extra uses. I also receive licence fees from work held by photo libraries. I sell prints for a one off fee (only for personal display) and I receive royalties from DACS the collecting society.

Creation of new works is vital, income streams from work do tend to tail off but almost all my income comes from some form of continuing licencing.

All our work tends to be available to licence for various digital uses and our price patterns allow for it. A major problem is unauthorised use without remuneration. No amount of watermarking stops people from unauthorised use which is normally without accreditation too.

Generally the ephemeral nature of the creative professions stops the lending of money from traditional sources, despite the huge part we play in the GDP of the country.

Case Study 6 – journalist, author and academic

I am partly a self-employed journalist contributing articles on literature and culture to British newspapers. I also have a PAYE job at a British University. I also write books.

My primary markets are British newspapers and British and US trade publishers. Also, to a lesser extent, British and US academic publishers. Also the BBC which both employs me regularly as a critic and has, on two occasions, bought the rights to my books in order to dramatise them on television (BBC2).

I receive income from newspapers to whom I sell my articles. If the piece is subsequently syndicated to a newspaper in the States or Australia I will received an additional fee. For my books I receive a sum of money from both British and US publishers against future royalties. If I sell more than a certain number of copies then I will receive royalties on top of my 'advance'. I do not get any fees for my academic articles.

Proportions of total income:

- 30% university teaching post PAYE*
- 50% newspaper articles*
- 20% broadcast fees (mainly BBC radio and television)*

I am contracted to two British newspapers each of which pays me monthly regardless of how many pieces I've contributed that month. My books are paid in the usual way - an advance divided into four tranches plus, if things go well, extra royalties. I receive PAYE income for my university post.

My newspaper articles appear on the newspaper's website but I'm not involved in this process. I merely submit copy which then appears both in print and online. The book I'm currently writing will doubtless appear in digital form - my literary agent will handle all the negotiations with my publisher,

I didn't need any capital to set up my business. All I needed was a laptop and a phonline. The people I work for – newspapers, publishers and universities - tend to be very clued up on copyright. I am not always sure, though, that my accountant understands how and why my income varies from one year to the next, depending on whether i've been paid an advance from a publisher.

Case Study 7 - composer / music producer

"I've been freelancing in the UK's Music business for the last 8 years, during which time I have worked on productions for a number of Artists in a variety of genres as well as writing Music for Film & Television.

My income stream comes from a number of sources:

- (a) One-off commissions for Adverts, TV Shows and Films*
- (b) Studio Recording & Productions for Artists and Bands*
- (c) Sync Fees as well as Performing and Mechanical Royalties*
- (d) Upfront Fees/Advances from Publishers*

The income stream can vary from single Artists financing their own Projects up to Major Companies investing in their Artist and Products. Studio Work is normally paid straight away with an upfront deposit. Sync Fees for TV, Adverts and Film Work differ broadly in how long they are paying out from 4 weeks to up to 6 month. Performing and Mechanical Royalties are paying out 4 times a month, however fees vary over the year depending on the usages of your Tracks. Most Publishers I work with pay an upfront Fee/Advance per Track for Production Costs before splitting the Royalties 50/50. This can vary from exclusive to non exclusive agreements. Most contracts I sign in the UK are exclusive. The trend in America leans towards non exclusive contracts.

Case Study 8 - Editorial photographer and specialist picture library manager (by Sal Shuel – Collections)

Photographer Brian Shuel has worked since 1960 as an editorial and industrial photographer. Most work was commissioned prior to the 1988 Copyright Act and having supplied his clients, there was no further income from the photographs. However, he had clients who were happy that he should retain his copyright. Two of these were record companies. For his own pleasure and to supply these companies, he photographed the traditional folk singers of Great Britain at a time when there was a tremendous revival in such music but very few photographers prepared to expend much effort on them. Because he could, he designed countless album covers. Photographing singers led to a very comprehensive coverage of the traditional customs of Great Britain which he did for pleasure, not as a commission and which eventually became a highly individual book.

Eventually the folk revival faded a little but images would be supplied occasionally. His commissioned work as an editorial and industrial photographer continued, the 1988 Copyright Act handed him copyright in all his commissioned work and gradually a picture library was born. It was never intended to grow large although other photographers joined him. It was always devoted to editorial material and it still exists. Analogue gave way seamlessly to digital, transparencies and negatives were scanned, the analogue library became smaller as a consequence but apart from methods of delivery, nothing much has changed.

Images are licensed as they always were with adapted wording, nothing gets lost any more and everything is available to a far wider audience than it once was.

The Folk Revival ebbed and flowed but it never went away. The photographs he took in the 1960s became iconic and in demand. Now, fifty years on, they are still being supplied on a regular basis as the original albums are re-released with the original covers. Obituaries appear as singers die, books about them are published, television documentaries explore the Folk Revival. The income from these images is far greater in 2011 than it was in 1960, even accounting for the change in the value of sterling, requests are now worldwide and he receives a substantial and welcome yearly Payback from DACS.

The additional income from these sales is a welcome addition to his pension. When he began, he was fortunate that some of his clients were content to let him retain his copyright. Had they objected, all this material would now have been lost since neither business was particularly efficient.

As it is, it is all well filed and documented and very carefully scanned; digital versions are available from Getty, prints of many of the singers are in the National Portrait Gallery and his additional income enables him to continue to work as and when he wants to do so, despite being well away in his 70s. A website is under construction which will include both singers and customs. It is his intention that this unique and well researched material should be available to as wide an audience as possible. It is also his intention that his family should be able to enjoy the benefits from his labours in the 60s and 70s when he is no longer around.

Licensing Opportunities

A cross-section of BCC members responded to a request for a glossary of licensing terms. They included Collective Management Organisations (CMOs) as well as Trade Associations and Professional Bodies. While CMOs are directly involved in licensing, Trade Associations and Professional Bodies are more likely to advise their members, who are directly involved, on copyright and licensing issues, while monitoring and reporting back to them on market developments. The full glossary of licensing terms appears at **Appendix II**.

These lists give an indication of the breadth of licensing arrangements including those for on-line business models offered by the creative industries through rights granted under copyright. Here we have picked up on some comments taken from the lists which are, we believe, relevant to the argument that the copyright framework is adapting to the digital age.

The **Association of Illustrators** - www.theaoi.com - are not yet seeing new terms arising for the licensing of new technologies and platforms. Where clients and other commissioners of illustration require a licence for something unusual or different they provide the description to the illustrator who then assesses the type of work required and its use and negotiates a deal including fees and rights are granted accordingly.

Similarly the **Association of Photographers** – www.the-aop.org - which has model licensing agreements and standards for advertising photographers, lists only a few digital uses. As the photographer in Case Study 5 (a member of the AOP) states: “All our work tends to be available to licence for various digital uses and our price patterns allow for it.” Such creators treat licensing of new digital products and services in exactly the same way that they treat other forms of use and negotiate a fair price accordingly.

British Equity Collecting Society – www.equitycollecting.org.uk - is a CMO working for actors and other performers. Much of their licensing activities are in the broadcasting sector and they are negotiating at a different level with digital service providers. They have a direct interest in the way in which the right to broadcast a work and the right to make a work available on demand by means of the communication to the public right are being applied to services within television distribution agreements. The approach which they take is a sophisticated one with granularity of rights providing for consumer choice while still permitting affordable development for technology start ups operating in the sector and payment for the actors and performers they represent.

Another CMO, the **Copyright Licensing Agency** - www.cla.co.uk - issues collective licences to educational establishments, government departments, businesses, law firms, press cutting agencies, document delivery suppliers and many other types of organisations. CLA provides a range of licences to suit the needs of its user constituency, from traditional blanket licences for photocopying and scanning to opt-in licences for Digital Use. Developments in their sector are evolving according to the needs of their users and the mandates received from the right owners which they represent.

Educational Recording Agency – www.era.org.uk - is a CMO which collectively licences agreed educational uses within mandates that have evolved to reflect technological developments and the demands of distance learning. The list of terms which it provided for the glossary were developed for the ERA Plus scheme which is a direct response to the changing needs of the educational sector.

Professional Publishers Association – www.ppa.co.uk a professional body, states that its list of terms demonstrates its members' ability to subdivide markets through the international recognition of the restricted acts of reproduction and communication to the public.

The music sector was the first to respond to the demand for on-line and digital access. The marketplace for music has developed ahead more quickly than those for other forms of work with the result means that their licensing structures are also more developed. The flexibility and scope of the licensing options which they offer, can be seen in the examples of licensing terms provided to the BCC by PPL and which are available from PRS for Music. We believe they indicate the real willingness to respond to the needs of the digital market place.

PPL – www.ppluk.com - is the CMO which licenses recorded music for broadcast, online and public performance use. In doing so, it is representing the rights of sound recording copyright owners (i.e. record companies and other rights holders) and performers.”

Our members are working with or within all parts of the digital economy and at all levels to ensure that the practical application of copyright keeps pace with changing technologies and new business models.

4. Is there evidence of areas where the UK copyright framework does not deliver the optimal outcomes? (do established rules or practices obstruct research or innovation)

We do not believe that established rules or practices in the copyright field obstruct research or innovation.

Any hesitation over involvement with digital and online products and services, at grass roots level (see illustrator case study under our Q1 response), results largely from concerns about protection of works, not just from infringement but against abuse or misuse. It is natural caution, not a lack of interest in, or desire to inhibit the digital economy.

Of course, we recognise that a structure built on exclusive rights may itself be open to abuse, but we do not accept that the copyright framework is inflexible or that it creates barriers to the establishment of new digital and online services in the UK. In any event, all the creative industries are subject to UK and EU competition law in the normal way.

Below we comment on particular points and have highlighted issues where we feel there is more that could be done. We also have a proposal for delivering an optimal outcome for the licensing of orphan works.

Complexity of an established and successful market

It is important to distinguish between criticisms of the copyright system which result from failures within the system to deliver optimal outcomes and the complexities inherent in a sophisticated and successful commercial marketplace and commercial negotiations aimed at driving down prices in the market.

Some commercial users of creative content level criticisms at copyright when what they really mean is that they are unwilling to pay the market rate for individual negotiations or the royalty rate asked for by licensing bodies, or that the scope of the copyright licence available to them is limited by the price they are prepared to pay. In other words they are unwilling to acknowledge that creative content, like any other commodity, has a value and that they are working in a competitive marketplace. We feel that care should be taken to differentiate between market issues and areas where there really are structural issues.

Service providers are themselves very quick to protect their own creativity and investment.¹⁴

¹⁴ <http://www.guardian.co.uk/technology/blog/2011/feb/01/google-bing-search-results?INTCMP=SRCH>
<http://www.metro.co.uk/tech/856856-ps3-imports-banned-in-patent-row>

No one-size-fits-all solution

Where there are challenges which must be addressed, right holders have repeatedly stated that there is no “one size fits all” solution. This was perhaps, most apparent to the BCC during the recent stages of work on developing a proposal for orphan works licensing. Each sector making up the UK’s creative industries is very different and all-encompassing changes or adjustments to the copyright framework must be approached with care. Each sector of the industry responds in different ways to developments in the exploitation of their works, the protection of their work and developing systems for ensuring a just remuneration for creativity to accommodate the rise of digital and online uses.

Conditional and Targeted Exceptions

Wherever possible, licensing solutions are our preferred route for legitimising new forms of digital and online use and in many cases licensing provides the best solution for dealing with anomalies in the system. In particular, the British Copyright Council strongly supports the UK’s established approach of conditional exceptions, i.e. exception subject to licence.

Providing for such a “conditional” exception, which applies only in circumstances when rights holders do not offer a licensed alternative, encourages them to come together to provide effective licensing. This more specific approach offers greater certainty to users, reducing litigation and legal costs, whilst ensuring fair compensation to rights holders.

By way of example, the licensing scheme that has been certified under s 35 and paragraph 6 Schedule 2 of the UK Copyright Act by The Educational Recording Agency (ERA) to cover recording of radio and television broadcasts and subsequent non-commercial educational use within educational establishments, has proved successful in bringing together a uniquely broad range of rights owners to license rights in a specific field¹⁵. ERA has also supported changes to the scope of these provisions in the Copyright Act to permit educational users to take advantage of technological developments. (See our comments under Gowers Copyright Exceptions below).

Where conditional exceptions are not possible then other targeted exceptions, such as those provided by the UK Act, are the best means for providing for non-commercial uses and guarding public access. We do not think the introduction of a “fair use” provides for consumer needs for all the reasons outlined under 1 above. Consumer needs are a quite separate issue and should be approached in a quite different way.

In 2008, the Music Business Group put forward a solution in response to a Government consultation which provided for a conditional licensing arrangement under which music right holders would have come together to permit formatshifting of musical works. This proposal¹⁶ would be flexible and easily implemented. Other right holders within the BCC were interested in supporting this proposal and wanted Government and the Music Business Group to take it forward with a view to its possible future extension to cover other categories of works.

The proposal permitted the following:

- for consumers to copy their legitimately owned music onto a device for their private use;
- provided fair compensation for right holders;
- took account of the technology industries’ needs for clarity over rights when developing new business models.

The British Copyright Council was disappointed that Government did not take this industry led and supported proposal forward.

¹⁵ www.era.co.uk

¹⁶ http://mpaonline.org.uk/files/pdf/MBG_Formatshifting_Response_-_FINAL.pdf

Changes to the scope of copyright exceptions to reflect technological developments

Following the Second Stage Consultation on Copyright Exceptions linked to the Gowers Review, a reasonable consensus was achieved between stakeholders on how certain educational exceptions and the exception for the purpose of preservation of works by libraries and archives, could be amended to take account of identified digital developments. It is to be hoped that the new Review will support the detailed work already carried out, being taken forward. The changes under consideration rely upon the flexibility already enabled by existing rules.

In the case of the Educational Recording Agency (ERA), it has supported changes to the scope of s 35 and paragraph 6 Schedule 2 of the UK Copyright Act to permit educational use of extracts from licensed recordings, and facilitate use of licensed recordings for distance learning by students when working from home. Practical steps were (and continue to be) debated with the IPO. On the back of these discussions, ERA launched a licensing scheme known as ERA Plus (particularly targeted at assisting distance learning) in response to the changing needs of the educational sector due to technological developments.

5. **Is there evidence to suggest that the current framework impacts the production and delivery of goods and services which consumers want?** (*e.g. derivative and transformative works, development of new goods and services*)

Most of the goods and services which consumers want are being licensed. Licensing arrangements are negotiated as new goods and services are developed. In our response to question 4 we have already indicated the breadth of licensing opportunities available, for commercial users, for educational and other similar uses and for consumers. In this context we again note the submission to this review by our member Equity, which lists licensing arrangements for new products, services and business models, with which it and British Equity Collecting Society (BECS) are involved. These enable the BBC iPlayer, 4oD, ITVPlayer and SKY Anytime to provide catch up and archive services, exploitation of BBC product via You Tube, cover the BBC for the broadcast of archive radio programmes made under Equity contracts on the BBC's digital radio station BBC7. There are also collective agreements whereby broadcasters/producers can make their product available via download. **Appendix II** also provides lists of licensing arrangements responding to consumer needs as well as those of commercial and professional users.

We consider that this question is largely for users to comment. However, under this heading we would like to address the question of private copying and user-created content.

Private copying and fair compensation

Many of our members have no objection to a limited private copying exception for protected works in the UK, but believe that any such exception should provide for fair compensation to rights owners and the scope of such an exception requires careful framing to ensure it does not harm new markets. Such fair compensation would also be required if such exception is introduced under mandatory European rules (Article 5 (2b) Copyright Directive 2001/29). Such systems of compensation function successfully in other parts of Europe, for example, in Germany and in France. There is no reason why they should not do so in the UK.

In its response to this Review, our member Equity, which has considerable experience of other European private copying levies, states the following:-

“A majority of EU member states already have a levy on equipment and devices including ipods and computers, a factor which does not inhibit demand for these products. Revenue arising from this system is collected by British Equity Collecting Society (BECS) on behalf of British performers from private copying levies in these countries. The UK is one of only three EU member states without such a system.”

We recognise the value of national interpretation of application of the optional exceptions recognised within the EU Information Society Directive in cases where this supports valuable cultural diversity within the EU. Nevertheless, differences which result in the loss of fair remuneration for rights owners linked to the application of exceptions and limitations should be addressed.

User-created content

The most simple and straightforward way of affording protection to pure user-created works is copyright. It is vital for the “amateur innovators” of today, working non-commercially and privately, not to be excluded from an entitlement to benefit from the copyright elements of their work, should they wish to be, along with opportunities to benefit from potential commercial use of their work which may arise at a later date.

As far as user-generated works such as parodies are concerned, licensing mechanisms are in place to provide the legal certainty required. Moreover, asking the original creator whether he wishes his work to be used in a particular way ensures that that use respects the creator’s personality through moral rights, for example, the right to prevent derogatory treatment of a work.

Returning to the question of parody, we agree with the conclusion reached by IPO following Recommendation 12 of the Gowers Review of Intellectual Property, that there is no evidence of any problems which necessitate Government intervention in the area of parody, pastiche and caricature. The strength of parody in the UK is evidence that the existing model works, whether it is called parody, pastiche, irony, caricature or mockery.

6. What evidence is there that the necessity/complexity/cost of obtaining permissions from existing rights holders constrains economic growth? (in terms of licensing arrangements, in terms of transparency, in terms of collecting societies)

Orphan works are partly the by-product of one of best feature of copyright framework, which is absence of requirements for registration and lack of formalities, combined with requirement to obtain owner consents before exploiting – the fact that in a given case a right holder cannot be identified is not necessarily structural flaw in the system. Our response to this question leads on the British Copyright Council’s proposal for a system for licensing orphan works.

Orphan Works Licensing

Right holders recognise that there is a need to provide greater access to works in certain contexts. The first of these is the licensing of orphan works. In the course of the past two years, the British Copyright Council has developed a proposal and has held discussions with the Intellectual Property Office about orphan works licensing on a number of occasions.

Orphan works is a much greater problem for some sectors than it is for others. For example, for musical works, long established CMOs hold vast databases of works and right holders and users of works are used to providing usage data which acknowledges the right holders, or at least utilise authoritative numbering systems which link to databases of right holders and works because there have been strong economic incentives to register and report usage of music. However, the situation is very different for artistic works, particularly for photographs and graphic works, where collective management is a relatively recent development, where some works are regularly stripped of their metadata for digital use, or where no acknowledgement has been given in the original reproduction or broadcast. Nevertheless, all our members have worked tirelessly to achieve a consensus on some of the very difficult issues which such a proposal raises. The BCC now has a set of principles which we will be discussing and developing with IPO and other Government representatives, as well as with relevant groups such as the British Library and the BBC, in the coming weeks.

Our proposal can be found at **Appendix III** of this submission. It provides a national solution supported by an overwhelming majority of our members, which accommodates recent developments and takes account of sectoral concerns. We hope that our proposal is acknowledged and adopted. Once that is in place we look forward to discussing the practical aspects of such schemes.

Our comment above, that there is no one-size-fits-all solution, rings particularly true when discussing the practical issues of such schemes. Photographers and graphic artists are a case in point. We have worked closely with this group, some BCC members, others which are not, over recent weeks to take account of issues which they see as crucial to any new scheme for orphan works licensing.

Some of these apply to the practical operation of schemes. Others are more general points of dissatisfaction such as the difficulties encountered by small scale right holders in enforcing their rights (see our response on enforcement below), or issues to do with credits on photographs and loss of metadata. The list of caveats as agreed by these organisations is attached as an Annex to the BCC's proposal. Should our proposal be adopted, then schemes must be worked out in detail starting with due diligence procedures tailored to each sector. It is likely that other right holders, licensing bodies seeking certification and groups representing users will also have caveats or concerns. However, we are offering a starting point for a national solution and with the goodwill and involvement of all stakeholders and regulators we feel this is a workable solution. While in agreement with some, but not all, of the principles of the BCC's proposal, our member, BAPLA, has some concerns in agreeing to support this document following consultation with various BAPLA members. For the moment their position is reserved but we hope to agree with them amendments to address those concerns which will enable them to add their support to this proposal in the coming weeks.

The Annex to the BCC's proposal is at **Appendix IV** of this submission. It is a prerequisite for the introduction of any new orphan works licences relating to photographs and graphic works. It has been prepared by the representatives of photographers and graphic artists as listed in the header for the Annex and not by the British Copyright Council. Some of the organisations which worked on this list are members of the British Copyright Council, others are not.

Collective Management of Rights

While we support the pre-eminence of exclusive rights and believe that where individual licensing arrangements are already in place in the market and work well, they should not be interfered with, the BCC recognises that the UK's system of voluntary collective licensing operated by our Collective Management Organisations (CMOs) provides a straightforward and effective method for accessing vast repertoires of works by large numbers of individuals and organisations.

Such schemes are of increasing importance in the context of digital use. While ensuring a suitable and fair return for right owners, they provide ease of access and greater convenience for users.

CMOs have established networks of agreements. Member mandates and representation agreements with other societies at international level allow rights and revenues to flow across borders worldwide, while acknowledging the cultural and legal differences in different territories. UK CMOs bring huge amounts of revenue into the UK. Licensing agreements, which include global repertoires allow works to be used in a way that respects the rights of authors and performers to control the use of their works while providing a fair return.

Copyright Licensing Agency Ltd – key facts from its 2010 Annual Report¹⁷

- Distributed £57m to right holders;
- £11m received from overseas CMOs and £6m paid out to overseas CMOs in 2009/10;
- Digital permissions to copy from digital publications available in licences for HE, Schools, Business and Public Administration licences;
- Schools licence includes permission to copy from websites for first time;
- First digital copying fees paid to right holders

Collective management of rights is particularly important in educational and non-commercial contexts. Rather than developing yet more limitations and exceptions to copyright, the UK should rather concentrate on licensing mechanisms and effective systems of remuneration through CMOs.

British Equity Collecting Society (BECS), one of the newer CMOs, was specifically set up to enable UK performers to collect statutory revenues from private copying etc. under the laws of other EU Member States. Since 1998 it has paid out £30 million pounds to performers. Other new CMOs will no doubt emerge in response to licensing needs and technological developments.

Information such as that given for the CLA and BECS is available for all CMO members of the BCC along with other information about mandates, members, recent developments in licensing activities, collection and distribution of royalties, on their websites.

Collective Management Organisation	Link
Authors Licensing & Collecting Society (ALCS)	http://www.alcs.co.uk/
British Equity Collecting Society (BECS)	http://www.equitycollecting.org.uk/
Copyright Licensing Agency (CLA)	http://www.cla.co.uk/
Design & Artists Copyright Society (DACS)	http://www.dacs.org.uk/
Directors UK	http://www.directors.uk.com/
Educational Recording Agency (ERA)	http://www.era.org.uk/
Phonographic Performance Limited (PPL)	http://www.ppluk.com/
Publishers Licensing Society (PLS)	http://www.pls.org.uk/default.aspx
PRS for Music (MCPS and PRS)	http://www.prsformusic.com/Pages/default.aspx

The British Copyright Council's CMO members are committed to transparency and accountability to members and all our CMOs operate under rules established by each society in association with its members, or in certain circumstances in association with Government. All offer licences in accordance with mandates granted by their members. All distribute regularly. All are committed to providing ease of access and fair treatment for users.

While all our societies make information on their activities readily available, PRS for Music is one of the first of our societies to publish a code of practice for its members¹⁸ and a code of practice for users¹⁹ supported by the Independent Ombudsman Service.

Since May 2010 the BCC's CMO members have been working in co-operation to develop a policy framework for principles of good practice.

¹⁷ http://www.cla.co.uk/data/corporate_material/annual_review.pdf

¹⁸ <http://www.prsformusic.com/creators/membership/codeofpractice/Pages/default.aspx>

¹⁹ http://www.prsformusic.com/search_results/Pages/default.aspx/Results.aspx?k=code of practice for users

The draft policy framework along with papers demonstrating how such a framework could be applied in practice, is now the subject of internal consultation with our other members. Once this consultation phase is complete, we will be seeking ways in which to take this work forward.

6. **What non-legislative changes could improve practices around copyright to improve overall outcomes? (- standard terms and guidance on what actions are permitted – agreed default permissions in some areas – non-legislative dispute resolution)**

Terms and guidance

We welcome initiatives on standard terms and guidance. Many sectors within the creative industries already produce such terms and guidance tailored for their own needs and those of their users.

At grass roots level, most of our licensing body and trade union members produce information and educational materials on rights and licensing which provide a freely available and valuable resource to right holders and users alike. Taking two examples:-

- The Association of Photographers, for example, provides an information portal for professional users of photography²⁰ and a guide to rights, ethics and business practice for professional photographers, including model licences and guidelines²¹ with individual chapters available online as .pdf's.
- The Society of Authors makes available downloads of its “Quick Guide to Copyright and Moral Rights” and “Quick Guide to Permissions” alongside other helpful information.²²
- We were also interested to note the existence of Useplus²³ which provides a universal glossary of over 1,000 licensing terms, definitions and uses, which is intended to provide clarity and certainty to those working with the image licensing industry e.g. picture libraries and agencies.

In relation to terms and guidance, we also note the previous Government’s “Copyright Strategy” project addressing issues such as contract and moral right. This work initiated some interesting and potentially valuable work in this field in which a range of stakeholders had participated. It would be a pity if this were to be lost.

7. **Is there evidence of difficulties in obtaining financing relating to copyright? (compared to other digitally innovative markets (e.g. USA, Israel))**

The Review rightly picks up on the very real difficulties encountered by creative and entrepreneurs alike in attracting finance to aid growth in the creative content sector. Part of that is due to the difficulty of valuing future rights but there are other factors. We leave it to those individual members of the BCC which are more directly involved in such issues, to make detailed comments on this matter but we note that the difficulties experienced by small businesses in general will also apply to individuals creators as SMEs.

²⁰ <http://www.copyright4clients.com/>

²¹ <http://beyond-the-lens.the-aop.org/>

²² <http://www.societyofauthors.org/faqs-about-writing>

²³ <http://www.useplus.com/useplus/glossary.asp>

Case Study 9 – Respect Music Limited

Sharon Dean has been in the music business for sixteen years and is also Executive Director (International) for LA based music industry body NARIP.²⁴ Sharon is the owner of Respect Music Limited, a music publisher, established in July 2006 and representing the songs/compositions of 80 songwriters based predominantly in the UK but with some writers based in Spain and USA. Respect also represent master rights for synchronisation including Dame Shirley Bassey's album 'Get The Party Started'. Respect also manage the careers our songwriters Goran Kay, Rietta Austin and Pure Dead Brilliant. Respect have worldwide sub –publishing in place via Kassner Music Limited.²⁵

“Our income comes mainly from Radio 2, live, record sales and sync licensing. The percentages vary from quarter to quarter. Our music is available on our website, soundcloud, reverb nation, myspace, you tube, artist websites, itunes, amazon, via record labels, at gigs, a number of music supervision sites in the USA and via our sub publishers in most countries.

We started to make money in year 3. The investment is substantial and we are ploughing back the little that we are earning back in to the business: Setting up website, joining relevant bodies, staff costs, annual subscriptions to vital industry publications, international travel to trade and business development events – at least twice a year, paying legal fees for songwriter contracts, producing stationery business cards letterheads, cds, cd covers, international postage, corporate entertainment for music supervisors, artist managers and songwriters. For example, we are going to Brazil with our UK songwriter Goran Kay. He is being developed by us as an artist and we are accompanying him on his tour to ensure that we maximise opportunities. We pay for musicians for recording/production/studio costs. We are also moving into the live scene for our songwriters. We have a Respect Music day on the South Bank at the Scoop and we have recently started the St John's Sessions with known artists and our songwriters supporting. This is a way of showcasing them. We pay artist photography costs. We attend festivals and events such as South by South West in Texas, Great Escape Brighton, Mipcom Cannes, Sunset sessions USA.

We are active in the digital marketplace releasing tracks on itunes, amazon and you tube One of our writing teams wrote a brief for a Red Cross Appeals week viral on youtube.

We have great difficulty in obtaining funding ourselves and indeed, funding for our up and coming songwriters/composers. The lack of knowledge among politicians and government bodies about how we work is staggering.”

8. **To what extent are the international rules around copyright more or less important than those in the UK? How should the UK approach this matter? (do international frameworks adapt effectively to support innovation?)**

As part of the international network of copyright rules governing a global economy the participation of the UK in their framing and implementation is crucial and this is particularly important given the key role which creative content plays in the UK's digital economy. UK Government must give stronger support to its creative industries at international level, i.e. at World Intellectual Property Organisation (WIPO). Representation at a senior level is essential if we are to make our views heard forcefully at international level.

It would also be useful in international discussions to have an UK Office of the Intellectual Property Coordinator, in line with the American model, to promote copyright in international discussions and negotiations and we urge Government to look at the value of this American model.

²⁴ <http://narip.com>

²⁵ <http://www.kassnermusic.com>

ENFORCEMENT OF RIGHTS

Relationship and objective

Enforcement of rights cannot be considered in isolation from the rest of the IP framework, or apart from growth and investment in new markets. Rights only have value if they can be enforced.

The purpose of copyright enforcement is to encourage and support legitimate markets, products and services by providing right holders with access to justice. Failure to provide appropriate support, for example, by delaying implementation of Section 17 of the Digital Economy Act, to the enforcement of rights is a major inhibitor to growth in relation to the ability of creative content providers to develop and exploit new markets and discourages investment in the digital economy. At grass roots level the cost and complexity of enforcing rights, affects the willingness of individual creators and performers and other smaller right holders to participate in new markets.

Case Study 10

"A friend writes to the 1709 Blog with the following little tale of woe, hoping for some advice in return:

"A friend of mine who has a sideline licensing use of her photographs recently came to me with a plea for help. An organisation has used one of her pictures and has refused to agree to, or even acknowledge, her request for her usual fee of around £50. Having sought advice from [Own-It](#) she was told that her course of action was to bring a claim for copyright infringement. However, she can only do this in the Patents County Court, and absent a Small Claims procedure for IP disputes (as proposed in the Jackson Report) this will be an expensive option.

On her behalf I contacted a specialist IP litigator; they expressed interest and sympathy but noted that their normal costs regime meant that even writing a Cease-and-Desist letter would probably be disproportionately expensive given the low value of the dispute. Is there any credible route to redress for my friend? It seems manifestly unjust that flagrant copyright infringement should go without remedy, but the current system for IP litigation does (and this is, I know, not news) seem to ignore the small-scale creators who are supposed to be the bedrock of innovation and our creative economy. Are we likely to see reform to address this, and in the mean time is there anything my friend can do that won't involve outlay an order of magnitude larger than the sum she wants to claim?"

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Effectiveness and Cost

Currently, the copyright enforcement system does not provide a viable means for individual creators and performers, that is, freelancers, sole traders and small companies, to enforce their rights in either traditional or digital markets, particularly in relation to low value infringement of rights.

"The current UK framework is costly, unwieldy to use and time-consuming. The move of copyright cases from Small Claims and County Courts to the Patents County Court has made this even more so for individual and micro-business creators, for whom the expense and disruption of pursuing the typical photographic rights infringement value of £50 - £350 represents a significant burden on their businesses, loss of revenue, loss of business confidence and consequent reduction in overall economic activity, growth and HMG tax receipts."

Paul Ellis, Stop 43

The cost of litigation is prohibitive for individual or small scale right holders, even in the most blatant cases, the most which such right holders can afford is a cease and desist letter. In many cases, enforcement is also far too complicated for such right holders. We welcomed recent changes to Patents County Court rules but we were very disappointed that Lord Justice Jackson's recommendation for a fast track and small claims track has not been carried forward and remains no more than a good idea. While the cost of cases before the Patents County Court are now capped at £50,000 and damages/profits at £500,000, this is still way out of line with the value of the infringement in very many cases, which may be little more than a few hundred pounds.

"The vast majority of infringements are low value and there is no procedure that is economical to pursue. This will also have to apply to MR breaches. It is vital that an infringer should find an unlawful route to publication significantly more expensive than an unlawful route. By way of example I have already this month found around a dozen infringing repros by large organisations. All but one are below £100 and that one is under £300. I will pursue them but will probably make a loss on doing so."

David Hoffman, David Hoffman Photo Library

The Government must investigate ways of ensuring that enforcement of rights is available to right owners of all types and sizes.

The introduction of exemplary damages into the Copyright Act would greatly assist right holders, particularly for infringements of a low monetary value. The absence of such damages means there is no disincentive for potential infringers, who when caught pay only what they would have done if they had obtained a licence.

While we support the provisions of the Digital Economy Act and look forward to its implementation as a first step to providing right holders with some means of protecting their rights in the digital and online environment, the remedies available under the Digital Economy Act will not be accessible to individual or smaller and medium size right holders. Apart from the complexity of the process e.g. burden of proof, the costs for those wishing to enforce "low value" infringement of rights in the online market by using the Digital Economy Act, are prohibitive, at a stroke removing a key provision which could otherwise encourage their involvement in digital and online markets.

Copyright Tribunal

As our member PPL comments in its response to this review: - *"An effective Tribunal that has the confidence of rights owners and copyright users can only promote further collective licensing."*

The main dispute resolution mechanism for copyright disputes involving licensing bodies, in the form of CMOs, is the Copyright Tribunal. The existence of an independent and neutral body of this type is important for licensor and licensee alike.

We welcomed recent changes to the Tribunal following earlier reviews, including tighter case management by the Tribunal and the possibility for early settlement of cases through mediation and we look forward to building a closer relationship with the Tribunal's new Chairman and his team of lay members.

With these new procedures in place, we hope that the Tribunal will take account of the need to balance a cheaper and more accessible service with fair process based on a full review of evidence. Again we note PPL's detailed comments regarding the provision of expert evidence.

Users frequently refer licensing bodies to the Tribunal as a way of negotiating down the cost of licences. While the Tribunal has a valuable role to play in such disputes, we feel it is vital that members of the Tribunal give greater consideration to economic data to improve their understanding and value of rights in the marketplace.

Whatever our hopes for the Tribunal in the future, there remains an intrinsic injustice within the process, which makes the Tribunal incomplete and leads to perceptions that the Tribunal is less than neutral. It is that only one side in a dispute is able to make a reference to the Tribunal. Licensing bodies, in the form of CMOs acting for right holders are generally unable to do so²⁶. IPO's own Review of the Tribunal recommended that right holders be given the right to refer users to the Tribunal. We continue to give our support to this recommendation.

While we would like to see changes made to the Tribunal, we do believe it has greater potential, as an independent and neutral body. An indication of that is the role we feel the Tribunal could play in the licensing of orphan works.

7. INTELLECTUAL PROPERTY AND COMPETITION

We leave it to individual members of the British Copyright Council to respond to this question.

SME ACCESS TO INTELLECTUAL PROPERTY SERVICES

Are there cases where SMEs face barriers in accessing IP services to help them to protect and exploit their IP?

Government has an important role to play in copyright awareness whether targeted at users of copyright or at those working in the digital economy. Our reply focuses mainly on education and skills and ongoing professional development and specialist support services for those working in the creative content industries.

There are few information services in the copyright field other than those provided by industry bodies, trade associations and unions and collective management organisations. The main outside providers of information services have been Businesslinks. The IP information which they provide is often too general in its approach to benefit creative individuals and SMEs, or professional users working in individual sectors of the creative content industries. A relatively recent initiative has been Own It.²⁷ However, until now this has been targeted at London based creative industry professionals and is reliant on funding and volunteers from industry bodies to provide the specialist advice needed.

Case Study 11

"A member of the Association of Illustrators (AOI) created a programme treatment for an animated series. A television company offered him an option contract in 2010, which the member brought to the AOI for advice. We advised as far as we are able to within this field, but he required a specialised solicitor to either re-draft or write a new contract. He also wished to have specialist advice further along the process if the animation went ahead, regarding merchandising or other rights. The cost of hiring a lawyer knowledgeable in this area would use up most of the advance he would receive, and as this might be the only income he would receive from the project if it did not advance, he is left with the option of spending all the money on advice or dropping the project, which could be potentially lucrative."

Without the funds to access specialised professional copyright advice, particularly that tailored to their sector, individual creators, performers and other young or inexperienced innovators can find themselves in a vulnerable position when working, or negotiating with other companies and organisations. This can prevent them from successfully exploiting their IP.

²⁶ Unless the reference relates to an existing Tribunal scheme (s.120 CDPA)

²⁷ <http://www.own-it.org/>

Returning to an earlier point about professional and commercial users of copyright, our members find that the difficulties which some of those new to the creative industries, i.e. developers of new digital products and services, have with rights clearance and the negotiation of licences are more often founded in their lack of knowledge and understanding of the role which copyright plays in their business model. What would really be of help here, are improvements to the skill sets of such users.

Only a slight adjustment of priorities, in the education and training provided across the relevant industries, would make rights clearance a much smoother and easier process for all concerned. No business can function well without its own specialist skill set. In the creative, digital, communications and media industries, knowledge of copyright and copyright licensing is an essential skill.

When asked about copyright education for graphic artists, the Association of Illustrators said that many degree level courses in communication arts/illustration did not incorporate any business knowledge or IP training as part of their curriculum. AOI offers a career talk to college members of the association which includes information on copyright/moral rights/licensing. When this is taken up by colleges for students in their final year, it is clear that most of them are being presented with this information for the first time. As many colleges do not offer any training at all in this area, it would be beneficial to the communication arts industry to make teaching in this area mandatory.

Appendix I

to British Copyright Council response to the Review of IP & Growth Note on Fair Dealing and Fair Use provided by Taylor Wessing LLP and prepared by

TaylorWessing

FAIR DEALING/FAIR USE

The purpose of this note is to summarise the information which we have been able to gather relating to: the number of UK Fair Dealing cases and the number of US Fair Use cases since 1 January 1978; and the cost of copyright litigation in the UK and in the US.

As will be seen, the information is far from complete. However, it does shed some light on these issues.

Number of UK Fair Dealing Cases

This was the most straightforward area to research. In our research, we have looked at decisions made on or after 1 January 1978, which is the date on which the US Copyright Act 1976 came into force and introduced for the first time in the US a statutory Fair Use regime.

On 1 January 1978, the Copyright Act 1956 (“the 1956 Act”) was still in force in the UK and it remained in force until 31 July 1989. On 1 August 1989, the Copyright, Designs and Patents Act 1988 (“the 1988 Act”) came into force in the UK and it is still in force, although it has been amended on several occasions since 1989.

Under both the 1956 Act and the 1988 Act there were/are a number of exceptions to copyright. In researching the cases, we have drawn a distinction between cases decided which involved the Fair Dealing provisions and those which involve other exceptions. Under the 1988 Act, there are 64 sections which set out the “act permitted in relation to copyright works”. However, only two of these (Section 29 and 30) deal with Fair Dealing as such. Under these sections, Fair Dealing is permitted for the purposes of private study (which must not be directly or indirectly for a commercial purpose) or non-commercial research, criticism or review or the reporting of current events.

The remaining exceptions (Sections 28 and 31 to 76) cover a wide range of activities such as, for example, recording for purposes of time shifting, incidental recording for purposes of broadcast etc. There was a similar regime in the 1956 Act, only with fewer exceptions. The reason that we have included the other exceptions is that some of them would be covered in the US by the US Fair Use legislation.

The number of reported decisions in the UK since 1 January 1978 is as follows:

- (i) Number of Fair Dealing cases decided under the 1956 Act: 4
- (ii) Number of Fair Dealing cases decided under the 1988 Act: 17
- (iii) Number of other exceptions cases decided under the 1956 Act: 13
- (iv) Number of other exceptions cases decided under the 1988 Act: 40²⁸²⁹

The total number of cases decided³⁰ during the period is 67 or approximately two per year. We can provide lists of these cases (together with short summaries) if this would be of use.

Number of Fair Use Cases in the US

It has proved much more difficult to obtain details of the number of reported decisions in Fair Use cases in the US.

We have been able to establish that there were not less than the following numbers of such decisions during the years ended June as set out below:

June 2010	- 8
June 2009	- 8
June 2008	- 7
June 2007	- 8

In an article entitled “An Empirical Study of U.S. Copyright Fair Use Opinions, 1978 – 2005”, published in the University of Pennsylvania Law Review – January 2008 Vol. 156 No. 3 Barton Beebe identified 306 reported opinions from 215 cases. This means that during the 28 years from 1 January 1978 to 31 December 2005 there was an average of just fewer than 11 reported opinions per year.

²⁸ Five of these cases also dealt with fair dealing so are included in that total as well. To that extent, there is duplication between the two totals. Those five cases are: *Newspaper Licensing Agency Ltd v Meltwater Holding BV* [2010] EWHC 3099 (Ch); *SAS Institute Inc v World Programming Ltd* [2010] EWHC 1829 (Ch); *HM Stationery Office v Green Amps Ltd* [2007] EWHC 2755 (Ch); *Universities U.K. Ltd v Copyright Licensing Agency Ltd* [2002] E.M.L.R. 35; *Newspaper Licensing Agency Ltd v Marks & Spencer Plc* [2001] Ch. 257

²⁹ Two of these cases also considered the 1956 Act so are included in that total as well. To that extent, there is duplication between the two totals. Those two cases are: *Jules Rimet Cup Ltd v Football Association Ltd* [2007] EWHC 2376; and *Lucasfilm Ltd v Ainsworth* [2009] EWCA Civ 1328.

³⁰ Excluding the duplication referred to above.

Legal Costs and Expenses of UK Fair Dealing Case

It is difficult to generalise. The costs of any particular case will depend on a number of different factors, such as the amount of evidence, whether it is disputed, the complexity of the case, prospects of preliminary references to the ECJ and so on. However, the costs of bringing or defending a copyright case which goes to a full trial and a reported decision is likely to be somewhere between £250,000 and £500,000 (excluding any appeals). The newly reinvigorated Patents County Court (which has a cap on recoverable costs of £50,000 and is intended to provide a more streamlined judicial process) may mean that this figure may drop for the smaller and less complicated cases.

Legal Costs and Expenses of US Fair Use Case

A report by the American Intellectual Property Law Association estimates that the average cost to defend a copyright case is just under \$1 million. [Cited at page 42 in an article by Giuseppina D'Agostino entitled "Healing Fair Dealing? A Comparative Copyright Analysis of Canadian Fair Dealing to UK Fair Dealing and US Fair Use – published in *Comparative Research in Law & Political Economy* 2007 (Vol: 03 No. 04)].

This is clearly an average figure and some cases will be more expensive and some less. For example, in the Google Books litigation, the latest draft of the Amended Settlement Agreement provides that Google will pay \$30 million towards the Plaintiffs' attorneys fees and costs. The Google Books case was a class action, involved a large number of parties and was extremely complex. Nevertheless, it was a Fair Use case and does demonstrate how difficult, complex and expensive US litigation involving Fair Use can be.

Dated: 22 February 2011

Appendix II
Licensing Terms

I. Association of Illustrators

Appendix/glossary of licensing terms based on information provided by the Association of Illustrators (AOI). The AOI are not seeing new terms for new technologies and platforms. Terminology used to describe the licence is frequently provided by the commissioner of the illustration.

SECTOR: visual arts – commissioned illustration

Publication	
Translation rights	Foreign editions
Sub-licensed paperback	Sub-licensed to, for example, Penguin rather than the publisher's own paperback.
Hardcover reprint	For example a library edition.
Electronic book	Straightforward version of the book in electronic form.
Electronic version	An interactive version
First serial rights	Newspaper serialisation before publication in book form
Second/subsequent serial rights	Newspaper serialisation after publication in book form
Dramatisation and documentary	On stage, television, film, etc
Quotation and extract	
Anthology	
Digest rights	For example, Readers Digest
Digest book	For example, a condensed book
One shot periodical	Complete book in one issue of periodical
Educational reprint	
Large print version	
Book club on royalty basis	For example, where Book Club manufactures
Single voice readings	
Merchandising rights – 50-80%	This is potentially important with illustration for children's books
Film strip rights	Applicable to children's picture books
Reprographic rights	Photocopying

Print handicapped/braille	
Electronic rights	<p>Illustration is being licensed for an increasing number of on-line and off-line mobile devices (phones, iPads, portable readers, etc). We have not yet seen any standard licensing terms that are different from current terms, i.e. usage, duration, territory.</p> <p>The licence will depend on usage of the image, distribution of the work, and access (e.g. for all mobile devices through Internet, for Facebook users only, for Intranet use only) though commissioners are not offering 'terms' as such for these so the AOI cannot provide a breakdown. For those illustrators working in this area it is increasingly common for commissioning clients to ask for a copyright buyout.</p>

Illustration is licensed based on the widely accepted fee structure of a mutually agreed licence consisting of terms and fees priced on:

Usage – what the image is utilised for;

Territory – where the product will be available;

Duration – how long the licence will last.

The pricing structure for the visual arts industry depends upon quoting different rates for the licence granted, on a commission by commission basis.

Book royalty contracts tend to be the most sophisticated in terms of licensing. Subsidiary rights are important in this context. Broadly there are two types of subsidiary rights, volume rights (i.e. in book form) and non-volume rights (e.g. merchandising).

Examples of illustration licensing:

Example 1: Book jacket

Terms of copyright licence to be granted:

Use: Cover design for (title of book) client's own UK hardback edition only
Customer: As above
Area covered by licence: See "use"
Exclusive/non-exclusive: Exclusive
Duration: As required (or 10 years or period of copyright)
Special Terms (if any): None

Example 2: Press advertisement

Terms of copyright licence to be granted:

Use: Black & white full-page national newspaper advertisement
Customer: Costa Mucho Holidays Ltd
Area covered by licence: UK
Exclusive/Non-exclusive: Exclusive
Duration: 1 year
Special Terms (if any): None

II. Association of Photographers

Information provided by the AOP (Association of Photographers)

SECTOR: visual arts - advertising photography

Ambient	Public areas where advertising is screened (not cinemas) eg Garage Forecourts, rail station screens
Press	Adverts places in trade, consumer, local, national magazines and newspapers
Posters	Advertising on building wraps, escalator panels (non moving), billboards, bus sides and panels, taxi wraps & seats, tube, underground
Internet	All aspects of website advertising including banners
Intranet	Internal company communication
Direct Mail	Door drop leaflets and postcards
Brochures	
Packaging	Images on product packaging
Point of Sale	Advertising placed near/or on the product being sold
PR	Images used to promote within a press editorial, advertorial or trade handout
Television	Stills for advertising commercials
Marketing Aids	Eg umbrellas, ashtrays, beer mats, exhibition panels, trolley panels but not merchandising products
Interactive TV	
Video	
Mobiles	
CD /DVD Ads	Cover or inserts
Annual Reports	
First British Rights	Right to publish once on a British publication (magazine or newspaper)
First British Rights with syndication	As above with the right to syndicate the image to other publications
1st Edition English language worldwide	Publication in 1 st book edition
Credit/debit cards	

Advertorial	Promotional piece in a magazine
Catalogues	Product catalogues, retail or trade
Inserts	Magazine inserts
Merchandising	Images on promotional, saleable items eg T'shirts

III. British Equity Collecting Society

Information provided by British Equity Collecting Society.

SECTOR: Performance/audiovisual

Demonstrates subdivisions of markets enabled by international recognition of the restricted acts of reproduction and communication to the public. Also the way in which the right to broadcast a work and the right to make available a work on demand by means of communication to the public have been applied to services within television distribution agreements. The approach is a sophisticated one. Granularity provides a) consumer choice and b) permits affordable product development for technology start-ups operating in the sector.

Analogue Terrestrial Television	Terrestrial Television broadcast services where the Authorised Signal Format is analogue.(being a continuous signal of radio waves varied by amplification).
Digital Terrestrial Television	Terrestrial Television broadcast services where the Authorised Signal Format is digital (being transmission by means of a data communication technique that passes information encoded in binary code).
Satellite Distribution	The transmission of programmes in scheduled linear uninterrupted form via any frequency for delivery directly from a satellite to end users without the use of intermediary transmission devices.(such rights being sometimes referred to as DTH (Direct to Home) or DBS (Direct Broadcast by Satellite).
Cable Distribution	The electronic transmission of Programmes in scheduled linear uninterrupted form as part of a television service transmitted by cable (i.e. by wire or fibres).
A la Carte	The transmission of Programmes in a specified broadcast service receivable for a periodic subscription fee payable no less frequently than monthly when the fee payable relates directly to the reception of the specified broadcast service ("A la Carte" specifically excludes Free, Basic, Premium, Pay per Day and Streamed Pay Per View broadcast services and all on demand services).
Basic	The end user receives the service delivering Programmes as part of the most widely available tier or package of broadcast services available from the relevant system operator (and whether or not making use of Multiplex Services (if any)) for a subscription fee payable on a periodic basis usually no less frequent than monthly ("Basic" specifically excludes Free, Premium, A la Carte, Pay per Day and Streamed Pay Per View broadcast services and all on demand services).
Free	The end user receives Programmes free of charge save for the governmental licence fee or levy, if any, payable by the owners

	of receivers to permit reception of services (as opposed to their content).
Pay	The end user is charged a sum for the right to use a decoding device to receive and decode an encoded signal of Programmes together with other programming. ("Pay" specifically excludes (as defined in this Agreement) Free, Basic, Premium, A la Carte, Pay per Day, and Streamed Pay Per View broadcasting services and all on demand services).
Pay per Day	The end user pays a separate fee solely for the privilege of viewing multiple times during a twenty four (24 hour) period or part thereof an individual programme at times scheduled by the programming service operator ("Pay per Day" specifically excludes (as defined in this Agreement) Free, Basic, Pay, Premium, A la Carte and Streamed Pay Per View broadcast services and all on demand services).
Premium	Broadcasting services for which the end user receives the service delivering Programmes as part of a tier or package of services (as opposed to selection of individual services on an A la Carte basis) in addition to the services available as part of a Basic tier or package for a subscription fee payable on a periodic basis usually no less frequent than monthly in addition to the subscription fee payable for the Basic tier or package alone. ("Premium" specifically excludes Free, Basic, Pay, A la Carte Pay per Day and Streamed Pay Per View broadcasting services and all on demand services).
Catch up TV Rights	Means the right for a period of up to a maximum number of days specified in the Schedule of days from the first Authorised Transmission of a Programme ("the Catch up Period") on a Free television service under this Licence to make that Programme available to the public by means of enabling subscribers to record that Programme by means of downloading a copy which can only be accessed and viewed by subscribers during the catch up period provided always that no permanent copy or reproduction of that Programme (or any part of it) shall be made.
Commercial Download Rights	Any Download Rights other than Catch up TV Rights, Restricted VOD Rights and Podcasting Rights.
Download Rights	The right excluding only by means of Catch up TV Rights to make available Programmes to the public by means of electronic transmission in such a way that members of the public may download by transfer and storage of a discrete data file of Programmes required copies of Programmes for subsequent viewing for non-commercial private purposes only, and whether for direct payment or indirect payment or otherwise.
Interactive Additions	Relevant to Videogram Rights means:- (i) recordings of other sound or pictures, embodied with the Programme(s) in a Videogram or other disc, carrier or other device manufactured and available as devices for sale to the general public for "interactive" use in conjunction with a computer or other device whereby several elements of all of such recordings or the Programme(s) can together and

	<p>discontinuously and interactively be accessed, selected, extracted and simultaneously held, viewed and listened to by the user; or</p> <p>(ii) the addition to the complete Programme(s) in linear playback of separate features such as optional related material including still-frame material, biographies and other textual reference items and trailers.</p>
Videogram	Shall mean any audio-visual media device or recording (whether tape, cassette or Blu-Ray disc (BD), DVD, CDI or CD ROM or other optical-read or other disc, carrier or other device of any kind) which is capable of storing visual images and sounds and/or reproducing and/or enabling the reproduction or display of such visual images whether with or without sound associated with such images by any means whether now known or hereafter devised.
Videogram Rights	The right to license and authorise the manufacture, sale, rental, distribution, issue to the public and delivery of Videograms of Programmes or any part thereof (and with or without Interactive Additions) for the purpose of using a Videogram for viewing of material in private home circumstances.
Interactive Use	The electronic transmission of Programmes or any part of them linked to any service that allows the end user to manipulate a Programme or any part of it or to add or delete content or other material of any kind to Programmes.
IPTV or Internet Protocol Television	A digital broadcast transmission delivered using Internet Protocol over a closed network structure where the broadcast signal is sent through a switched telephone or cable network by way of a broadband connection along with a set top box programmed with software that can handle viewer requests to access media sources.
Mobile Rights	Shall mean the electronic transmission of Programmes by wireless technology for playback simultaneously or non-simultaneously on mobile receivers. All Mobile Rights shall be Reserved Rights with the exception on Mobile Relay Rights to the extent that they are specified as forming part of Rights granted in the Schedule.

Mobile Relay Rights	The right to authorise the simulcast of licensed broadcasts of the Programmes over Authorised Distribution Systems by means wireless transmission over a telecommunications service licensed for reception within the Territory but only to the extent that the telecommunications service can be received in the territory in which the original broadcast can be received.
Multiplex Service	A service consisting of two or more channels (i) all having the same name, (ii) all sold and marketed together for a single subscription charge, and (iii) all of whose content is identical, save only that their daily programming schedules start at different times.
Podcasting	The inclusion of Programmes or any part or parts thereof in audio and/or media files containing the domain name and address of the media file and thereafter making the file available for electronic transmission so that the file can be downloaded by third parties for subsequent access.
Restricted VOD	The right within the maximum number of days specified in the Special Conditions in the Schedule (“the VOD access period”) to make Programmes available by electronic transmission in such a way that members of the public may access an individual Programme within the VOD access period but otherwise from a place within the Territory and at a time chosen by them provided always that no permanent copy or reproduction of the Programme (or any part of it) shall be made. (Restricted VOD applies to any VOD access period not relevant to Catch Up TV Rights).
Streaming	Transmitting programmes in electronic form upon receipt of a request from a subscriber by means of the transfer of an apparently steady stream of data but without a permanent copy of the data being made and only when the transmission is intended for viewing simultaneously with reception.
Streamed Pay Per View	Linear broadcasting services for which the end user pays a separate fee solely for the privilege of viewing a single exhibition of an individual programme at a time scheduled by the programme service provider. (Streamed Pay Per View specifically excludes Free, Basic, Pay, Premium, A la Carte and Pay Per Day broadcast services and all on demand services).

IV. Copyright Licensing Agency (CLA)

1. Introduction to CLA

The Copyright Licensing Agency Ltd (“CLA”) is a **Licensing Body** which issues **Collective Licences** to educational establishments (such as schools, colleges and universities), government departments, businesses, law firms, press cutting agencies, document delivery suppliers (such as the British Library) and many other types of organisations. It issues both **Blanket Licences** and **Transactional Licences** on behalf of its **Rightsholders**. It is owned by The Author’s Licensing and Collecting Society (ALCS) and the Publishers Licensing Society (PLS) and has an agency agreement with the Design and Artists Copyright Society (DACS) and many **Repertoire Exchange Agreements** with other **RROs** and derives its authority from these various organisations on behalf of authors, publishers and visual creators in the UK and overseas.

2. Rights Granted by CLA

CLA licences allow the copying of **Extracts** from print and digital publications (including those available as websites on the Internet where **opted-in**) included in **CLA Repertoire**. The rights granted include:-

- Photocopying and other forms of duplication known as **Reprographic Copying**;
- **Scanning** otherwise known as digitisation; and
- **Digital Use or Re-use**

CLA licences authorises copying and use within organisations with some premium licences allowing some limited external delivery by those organisations, as well as for-profit commercial supply of copies within licence limits by document delivery suppliers and press cuttings agents. They legitimise what would otherwise infringe the Restricted Acts laid down by the Copyright, Designs and Patents Act 1988 (“CDPA”) of copying, issuance of copies to the public and communication to the public.

CLA **Blanket Licences** for photocopying and **scanning operate** on an **opt-out** basis; its licences for **Digital Use** operate on an **opt-in** basis.

3. Glossary

Terms	Definitions – in a CLA context
Authorised Persons	Those employees, workers, consultants, staff or students (as appropriate) of a licensed organisation amongst whom copies made under a CLA licence may be circulated or electronically distributed on a Secure Network .
Blanket Licences	Licences covering a wide range of works not specifically identified at title level, where no pre-clearance to copy is required and granted in consideration of payment of a fixed fee. cf Transactional Licence.
Collective Licences	Licences issued by a Licensing Body on behalf of multiple Rightsholders and subject to the jurisdiction of the Copyright Tribunal.
Digital Copies	Either electronic copies of Extracts from publications made by Scanning from printed hard copy originals or electronic copies made in the course of, or as a result of, the access or use of publications distributed in an electronic form.
Digital Use or Re-use	The making available of Digital Copies by way of transmission or communication to staff, students, employees, customers, etc.
Extracts	Portions of the whole work, typically one chapter in a book or one article or, if greater, 5% of the work.
Indemnity	An indemnity to the user against any legal action for copyright infringement by a Rightsholder or copyright owner who has not actually authorised the grant of a licence. This underpins the wide blanket licences issued by CLA on an opt-out basis and reflected in s.136 CDPA.

Licensing Body	A society, subject to the jurisdiction of the Copyright Tribunal, granting licences covering works of, and on behalf of, more than one author – see CDPA s. 116(2).
Mandating Territories	Countries where CLA has concluded a Repertoire Exchange Agreement with an appropriate organisation whether for photocopying, scanning or digital re-use of publications from that country.
Opt-in / Opt-out	The process whereby particular Rightsholders will be assumed to participate in a CLA licence unless they have opted-out, whereas an opt-in licence requires the specific written permission of a Rightsholder given to CLA (via ALCS, PLS, DACS or overseas RROs).
CLA Repertoire	Books, journals, magazines or other periodicals published in the UK or Mandating Territories . CLA licences for UK publications cover all works <u>unless</u> the Rightsholder opts-out and, for digital use only, those publications that had been opted-in . Different rules apply for overseas publications; the full description is available on CLA’s website at www.cla.co.uk .
Repertoire Exchange Agreement	An agreement providing for the reciprocal exchange of licensing rights and, or as appropriate, licensing fees. Note: different legislative regimes in other countries mean that in many cases an authority from CLA is not required for Photocopying, Scanning or Digital Use to be lawful and the agreement simply provides for the remission of licensing fees to the UK.

Reprographic Copying	A process for making identical copies or involving the use of a device for making multiple copies such as a computer, photocopier or scanner (see s.178 CDPA).
Rightsholders	The person, organisation or estate owning or controlling the copyright, database right or copyright in the typographical arrangement of a published edition.
Scanning	Otherwise known as digitisation. The process of creating an electronic copy of, and from, a hard copy, printed, original.
Secure Network	A computer network and/or controlled by a licensee (whether a standalone network or virtual network within the Internet) which is accessible only by Authorised Persons amongst whom copies made under a CLA licence can be circulated or electronically distributed.
Transactional Licences	A licence where a fee is calculated by reference to a value attached to individual acts of copying (either with pre-clearance or more commonly with post-hoc reporting of copying events authorised by the licence).

V. Educational Recording Agency (ERA)

ERA (The Educational Recording Agency) includes within its membership a number of other BCC members and collectively licences agreed educational uses within mandates that have evolved to reflect technological developments and demands of distance learning. These new definitions were developed for the ERA Plus scheme.

SECTOR: audiovisual

RIGHTS:

(a) to make or **to authorise Relevant Educational Establishments to make ERA Digital Recordings** only to the extent that is technically necessary for the purposes of sub clause (b);and

(b) **to make available only by means of Educational Communication to Authorised Users ERA Repertoire included in ERA Digital Recordings** and

(c) **to permit Authorised Users situated outside the Relevant Educational Establishment to access using a Relevant Network ERA Repertoire so made available for personal non-commercial educational use.**

Educational Communication	Means the electronic transmission of the whole or part of an ERA Digital Recording from within a Relevant Educational Establishment to Authorised Users situated outside the premises of the Relevant Educational Establishment for the purpose of education (including teaching and private study) provided always that the transmission does not either involve Commercial Use or authorise or permit any Dealing.
ERA Digital Recording	Means an encoded copy of ERA Repertoire as included in an ERA Recording made under the Principal Licence.
Educational Establishment	Shall mean any school as defined in section 174 of the Act or any other description of educational establishment as may be specified by order of the Secretary of State under that section.
Relevant Educational Establishment	Means either an Educational Establishment being the Licensee under this Agreement or an Educational Establishment to which this Agreement shall have been specifically applied.
Relevant Network	Means a network or part of a network (whether a stand -alone network or a virtual network within the Internet) which is only accessible to Authorised Users.
Secure Authentication	Means the password or other technological protection measures whereby the identity of any individual seeking access to a Relevant Network and through this ERA Digital Recordings are authenticated by or with the authority of a Relevant Educational Establishment at the time of login (and periodically thereafter) in a manner consistent with current best practice, and whose conduct is subject to regulation by or

	on behalf of a Relevant Educational Establishment.
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VI. Professional Publishers Association (PPA)

Demonstrating subdivisions of markets enabled by international recognition of the restricted acts of reproduction and communication to the public

SECTOR: periodical publishing

Serial right	A licence to publish in a “serial” publication – a newspaper, journal or magazine.
First British serial right	A licence to publish for the first time (i.e. before publication of the book, etc) in any British “serial” publication.
First EU serial right	A licence to publish for the first time in any European Union “serial” publication
First US serial right	A licence to publish for the first time in any United States “serial” publication
First World serial right	A licence to publish for the first time in any serial publication in the world.
Second serial right	A licence to publish in a “serial” for the second time (i.e. after publication of the book, etc) in a defined area.
Syndication right	A licence to re-sell copyright material in a defined area on behalf of the copyright owner. Income from syndication is conventionally split between the parties, with the author receiving a percentage of the gross income.
Electronic archive right	(as part of original publication) A licence to store material electronically for publisher’s reference and archival purposes only, not including copyright or further publication without the author’s permission.
Electronic publication right	A licence to publish in electronic form; this can include or comprise publication (e.g. as part of a commercial database) on CD-ROM (either as a “series” or one-off), or on the Internet or an Intranet. Except for Internet and Intranet use, any licence may be restricted to a defined geographical area.
Internet publication right	A licence to publish electronically on the Internet or World-Wide Web (WWW). This is always a worldwide right.
Intranet publication right	A licence to publish on an electronic computer-linked system analogous to the Internet but confined to a single company or other defined group.
Book (or “volume”) rights	A licence to publish in a (non-serial) book; this may be limited to a defined geographical area, duration and language.

Anthology rights	A licence to publish in an anthology.
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VII. PPL

SECTOR musical works, musicians and performers, record companies ABOUT PPL

PPL is the UK-based music licensing company which licenses recorded music for broadcast, online and public performance use. Established in 1934, PPL carries out this role on behalf of thousands of record company and performer members.

ABOUT THIS INFORMATION FROM PPL

PPL is able to offer a broad and flexible range of licensing solutions to music users, including in respect of various types of digital/new media services. This document briefly sets out the basis on which PPL is able to do so, by summarising:

- the rights that PPL obtains from its members
- the flexible and dynamic way in which further types of licensing can be “activated” through PPL’s “New Service Category” system
- the rights PPL obtains under IFPI reciprocal agreements, and
- the main categories of new media and other licensing that PPL currently offers.

PPL RIGHTS APPOINTMENTS

The following Rights Appointments are currently available for PPL members to give to PPL in respect of their sound recording rights:

UK PPB ASSIGNMENT	Covers UK public performance and broadcasting rights (including internet simulcast rights) and related copying rights.
UK NEW MEDIA RIGHTS APPOINTMENT	Optional and non-exclusive. Covers all UK communication to the public rights (including making available rights), thereby enabling PPL to license a wide range of new media services. Uses PPL’s New Service Category system (see below).
UK PROGRAMME DISTRIBUTION RIGHTS APPOINTMENT	Optional and non-exclusive. Covers the physical distribution (sale, rental and lending) on CD and DVD of sound recordings within spoken-word radio programmes and TV programmes. Uses PPL’s New Service Category system (see below).
INTERNATIONAL NEW MEDIA RIGHTS APPOINTMENT	Optional and non-exclusive. Equivalent of the UK New Media Rights Appointment (see above) but for those territories outside of the UK where the member has such rights. Uses PPL’s New Service Category system (see below).
INTERNATIONAL PROGRAMME DISTRIBUTION RIGHTS APPOINTMENT	Optional and non-exclusive. Equivalent of the UK Programme Distribution Rights Appointment (see above) but for those territories outside of the UK where the member has such rights. Uses PPL’s New Service Category system (see below).

NEW SERVICE CATEGORY SYSTEM

As indicated above, several of PPL's Rights Appointment use PPL's so-called New Service Category system (the "NSC System"). The NSC System is designed to provide flexibility and speed with a view to facilitating PPL's ability to license new services, for the benefit of rights holders and music users alike. It avoids the need to obtain separate new rights appointments from PPL's members each time that the scope of PPL's licensing is to be extended. This is achieved through having a series of broad Rights Appointments (as summarised above) which have the potential to cover a very broad range of licensing activities, but in respect of which PPL agrees with its members that it must follow certain steps before such licensing activities can be commenced. In summary:

- First, the PPL Board must resolve that PPL should commence a new category of licensing which falls under one or more of the Rights Appointments.
- Second, details of this "New Service Category" are notified to all PPL members who have chosen to give the relevant Rights Appointment(s) to PPL.
- Third, those members have a 30 day window in which they can opt out of the New Service Category if they do not wish to participate. If a member is happy to participate, they do not need to act and once the 30 days has elapsed PPL will automatically be entitled under the relevant Rights Appointment(s) to include their sound recordings in licenses issued under the New Service Category. If however a member does not wish to participate, they can opt out and their sound recordings will not be included in licences issued under the relevant New Service Category.

THE IFPI RECIPROCAL AGREEMENTS

In addition to the PPL Rights Appointments it receives directly from its membership, the scope of some of PPL's licensing has also been extended to certain overseas territories via a reciprocal arrangement operated by the IFPI (the international trade association for the recorded music industry). Currently music licensing companies in 42 countries around the world, carrying out similar functions to PPL on the basis of similar grants of rights in their own countries, are signatories to the IFPI reciprocal agreements. This enables the territorial coverage of licences offered by PPL to extend to these countries, as indicated below.

NEW MEDIA AND OTHER LICENSING CURRENTLY OFFERED BY PPL

In addition to the UK public performance and broadcasting rights that PPL licenses on behalf of all its members, the New Service Category system means that PPL is also currently able to offer licensing solutions on behalf of many of its members in the following areas:

- **UK non-interactive streaming of radio stations & TV channels***
- **UK interactive streaming of radio stations***
- **UK on-demand streaming of clips**
- **UK on-demand streaming of radio & television programmes***
- **UK DRM-controlled temporary downloads of radio & television programmes**
- **UK downloads to own (TV/spoken-word radio programmes)**
- **UK distribution of DVDs/CD of TV/spoken word radio programmes**
- **International downloads to own (TV/spoken-word radio programmes) – BBC Worldwide only**
- **International distribution of DVDs/CD of TV/spoken word radio programmes – BBC Worldwide only**

(territorial coverage can be extended via the IFPI reciprocal agreements)*

APPENDIX III

BRITISH COPYRIGHT COUNCIL Proposed requirements to make provision for the licensing of orphan works

Introduction

The British Copyright Council (BCC) makes this proposal for a licensing system to cover agreed use of orphan works.

The proposal will meet the challenges in licensing the use of works and performances which are protected under the Copyright, Designs and Patents Act 1988 (“CDPA”) but in respect of which the relevant right owner or licensor is unknown, or cannot be located, after diligent search (“orphan material”).

BCC believes that the system, will in a practical manner and in the interests of rightowners, disseminators and the public, allow the obtaining of the necessary licences.

An essential element of the proposed system must involve agreed procedures for the conducting of diligent search to ascertain if a work is properly to be treated as an “orphan work” for the purposes of required licensing.

The membership of the BCC includes a number of bodies representing the interests of owners of photographs, graphic works and other artistic works.

The BCC proposal is intended to enable collecting societies who already hold mandates for the collective licensing of photographs and graphic works (including when such works have been embedded within other works under primary licences) to seek certification of their licence schemes in the way envisaged for collecting societies representing the interests of other works and performances.

However, to the extent that new licensing schemes may be required to permit the licensing of photographs or graphic works, where the works are deemed orphan material after diligent search, BCC members who represent the interests of such works have joined with other representative bodies for artistic works to agree a set of Principles of Licensing.

A copy of these Principles for Licensing are attached as an Annex to the BCC proposal and amount to conditions which the sector would expect to be satisfied before approval for any new collective licensing schemes might be certified or otherwise permitted in the context of the framework proposed by the BCC.

Licensing of orphan works and performances via collecting societies or the Copyright Tribunal

The BCC believes that a procedure to enable the legitimate use by licensing orphan works could helpfully be established on the basis of the existing sections of the CDPA, in particular sections 143 and 144A and 190.

Appropriate licensing schemes might be certified by the Secretary of State under section 143 CDPA, as follows:

- (a) where collective management is available regarding the relevant rights in works or performances of the same type as the orphan material concerned, a licence would be issued by the relevant collecting society, and

- (b) if no licensing body administers rights of the category involved in the desired use, following application made to the Copyright Tribunal as under the provisions of s.190 CDPA .

It is submitted that such an approach would not conflict with European legislation and only requires the adjustment of already established sections of the CDPA. The approach envisaged is designed to lead to legal clarity and protect the user from civil liability and criminal responsibility for copyright infringement, under CDPA section 107.

Should the owners of the relevant rights not claim the allocated fees or royalties within six years of a licence being granted, it is proposed that the reserved sums could be used to support creative and/or charitable causes in accordance with distribution rules approved by the membership of the relevant collecting society.

Suggested requirements

BCC would propose that collective exercise of certain rights in relation to orphan works and performances should be enabled under the provisions of s 143 CDPA.

(1) The provisions should apply only for the purposes of relevant use a work or performance which comprises an orphan work as defined by the legislation and subject to this :-

(a) to the copyright in a literary, dramatic, musical or (subject to (c) below) artistic work, sound recording or film, to the extent that the relevant copyright owner cannot be located or identified after reasonable inquiry has taken place;

(b) to performances where the relevant rightowner is unknown or cannot be located, or identified after reasonable enquiry has taken place;

(c) to the copyright in photographs or graphic works only to enable collecting societies who already hold mandates for the collective licensing of such works (including when such works have been embedded within other works under primary licences) to seek certification of their licence schemes in the way envisaged for collecting societies representing the interests of other works and performances.

However, to the extent that new licensing schemes may be required to permit the licensing of photographs or graphic works, where the works are deemed orphan material after diligent search, BCC members who represent the interests of such works have joined with other representative bodies for artistic works to agree a set of Principles of Licensing.

A copy of these Principles for Licensing are attached as an Annex and amount to conditions which the sector would expect to be satisfied before approval for any new collective licensing schemes might be certified or otherwise permitted in the context of the framework proposed by the BCC.

(2) The use of an orphan work can be licensed through a licensing body operating a licensing scheme certified for the purposes of section 143 providing for the grant of licences to do acts in relation to an orphan work within the scope of such scheme which would otherwise require the consent of the missing copyright owner. It will be important that such licences include rules concerning the treatment of reventant right owners.

(3) Where the missing copyright owner is not the sole owner of copyright in the work, as regards the relevant use, a licence issued under a certified licensing scheme should not affect the need for consent from any other owner of copyright.

(4) A licence issued under a certified scheme in favour of any person should not preclude any authorisation or licence which may be required from another person.

(5) A licensing body operating a certified licensing scheme which manages rights in respect of the same type of rights in works of the same category as the orphan work concerned should be deemed to be eligible to manage the right for the orphan work concerned on securing the necessary certification.

(6) Any licensing scheme to be certified for the purposes of licensing orphan works must provide for the treatment of royalties and other sums received in respect of licensing for use of an orphan work in accordance with the good practice of the licensing body including:

- (a) the deduction of administrative costs;
- (b) the period for which sums must be held for the copyright owner;
- (c) the treatment of sums held after expiry of any period specified under (b); and
- (d) provision for the treatment of reversionary right owners.

(7) A licensing body should be able to notify the Secretary of State of the details of any proposed licensing scheme or the licensing scheme to be applied for the exercise of certain rights in relation to orphan works and seek certification for the licensing scheme or the application of an identified licensing scheme under section 143.

(8) The Secretary of State should be able at any time to refer a proposed licensing scheme or licence to be issued thereunder to the Copyright Tribunal for a determination of whether the scheme or licence is reasonable in the circumstances.

(9) No licensing scheme certified for the purposes of licensing orphan works should be able to authorise the grant of a licence in respect of an unpublished work, unless regulation by the Secretary of State is developed after consultation, to establish rules enabling such work to be brought within the provisions of a licensing scheme otherwise certified for the purposes of licensing orphan works.

(10) In the absence of a certified licence scheme being in place in relation to a specified use of any orphan work the Copyright Tribunal should be able, on the application of a person wishing to use the orphan work, give consent for use as prescribed provided that

- (a) the Copyright Tribunal is satisfied that the applicant has previously carried out a diligent search to find or, if necessary, to identify and find, the owner of the relevant interest in the copyright in the work for the use for which consent is sought; and
- (b) after the service or publication of such notices as may be required by rules made under general procedural Rules of the Copyright Tribunal, or as the Copyright Tribunal may in a particular case direct.

(11) Where the Copyright Tribunal gives consent to the use of orphan works it should be required to make an order as to the payment to be made by the applicant for the benefit of the owner(s) of the orphan works relevant to the consent in consideration of the consent being given and make provision for the treatment of reversionary rights owners to vary the extent of consents for the use of relevant orphan works otherwise previously approved by the Copyright Tribunal.

Identification of works and performances which are subject to any licensing scheme certified as envisaged by the above proposals should be included in a publicly accessible online database operating on conditions established by the Secretary of State by regulation.

How and when a work or performance is to be treated as “orphan”

(1) A work should only be treated as an orphan work if a person—

(a) has carried out a diligent search to find or, if necessary, to identify and find, the owner of, or of an interest in, copyright in the work, and

(b) has published a Notice of search entered in a publicly accessible online database designed to bring to the attention of the owner of the right in the work concerned the proposed use of such work, such database operating on conditions established in accordance with regulations made by the Secretary of State, but has not found the owner.

(2) References to a missing copyright owner in relation to an orphan work should be treated as references to that owner.

(3) Legislation should provide that the person carrying out the search must in particular:-

(a) make such use as is reasonable of all sources of information, relating to the work’s apparent country of origin, and

(b) have regard to any presumptions under section 104 or 105 that would apply in relation to the work in any proceedings.

(4) Sources of information relevant to this should specifically include:-

(a) licensing bodies;

(b) associations of copyright holders for the relevant type of work;

(c) systems for identifying works of the type concerned;

(d) published library catalogues and indexes; and

(e) public databases, including public records that may indicate successors in title.

(5) A work’s apparent country of origin should be the country which the person carrying out the search reasonably believes is most likely to be:-

(a) the country of the work’s first publication, or

(b) if the work has not been published, the country with which its making is most closely connected.

(6) The same diligent search requirements should apply in respect of an orphan performance, namely a performance where the relevant right owner is unknown or cannot be located, as they apply in respect of an orphan work.

(7) Rules regarding the licensing of copies or transmissions of orphan works or orphan performances in cases where such copies or transmissions originate outside the United Kingdom should be subject to rules made in this regard by regulation by the Secretary of State.

APPENDIX IV

ANNEX to BCC Orphaned Work Proposal

21 February 2011

This Appendix has been prepared by the following organisations:-

Association of Illustrators, Association of Photographers, Bridgeman Art Library, British Institute of Professional Photography, British Photographic Council, British Press Photographers' Association, Design and Artists Copyright Society, Editorial Photographers UK, National Union of Journalists, Pro Imaging, The Royal Photographic Society, Stop 43.

The bodies listed have made representation to the BCC that its proposal for a licensing system to cover agreed use of orphan works should apply in respect of artistic works which are photographs and graphic works only: (to enable collecting societies who already hold mandates for the collective licensing of such works to seek certification of their licence schemes within the scope of mandates granted to such collecting societies representing the owners of interests in identified artistic works (or specified genre(s) of artistic works).

However, to the extent that any new licensing schemes may be required to permit the licensing of photographs or graphic works (where the works are deemed orphan material after diligent search) the following Principles for Licensing must be observed and enforced for the purposes of the provision for and grant of licences.

The following Principles for Licensing are the conditions under which the sector would expect an orphan works licensing scheme to operate.

a) Moral rights legislation and sanctions against any rights infringement must be strengthened for all artistic works as a prerequisite for the licensing of artistic works which are photographs or graphic works within the licensing frameworks envisaged for other types of copyright work found to be orphan works. Moral Rights must automatically, completely and exclusively reside with the creator and be automatically asserted, inalienable and unwaivable in all circumstances unless the creator expressly, voluntarily and without contractual coercion requires anonymity (in order to protect his identity, his privacy, or to voluntarily place his work in the public domain).

(b) The licensing framework proposed is intended to address only the licensing for non-commercial use of photographs or graphic works which are found to be orphan works. If a license to use a photograph or graphic work outside non-commercial uses is required, then the user will not have recourse to apply the certified licence framework or the Copyright Tribunal licence provisions of works deemed to be orphan. Ownership of rights in such orphan works will be reserved by a copyright owner whilst copyright in the work subsists.

(c) The diligent search* to identify a rights owner in a photograph or other specified artistic work which is a photograph or graphic work must be a robust procedure that is both stringent and not a cheap option for the prospective licensee, and implemented such that no conflict of interest can arise between licensee and prospective licensor, e.g. because they are one and the same. Picture Libraries should be treated as bodies to be consulted when seeking details of the owner of relevant rights in a photograph thought to be orphan. Administration fees for a collecting society operating a certified licence for orphan works which are

photographs or graphic works must remain competitive and be kept at an acceptable level.

(d) Where the non-commercial licensing framework can be applied, the regulations need to provide for users who could have secured a non-commercial licence under a certified licence scheme or via the Copyright Tribunal to be subject to punitive damages payment when licence terms are properly established.

(e) Any licensing within the framework must include provisions for licensees to include any and all metadata linked to any digital images licensed or metadata detailing the provenance of the image and also include effective sanctions against the alteration, stripping or removal of metadata (specifically for ownership and rights information).

(f) No licensing scheme for artistic works which are photographs or graphic works that are orphan works should authorise the creation of an adaptation of a work that would adversely affect the interests of the owner in the original orphan work. The terms of any certified licence scheme or licence granted via the Copyright Tribunal should include terms to recognise and reserve the rights of the original orphan work. No authorisation to use any permitted adaptation within the scope of the framework for licensing use of orphan works, should exceed the scope of the non-commercial use authorised.

OUR UNDERSTANDING OF TERMS

Non-commercial Use is any use (including use for preservation, private study and private research) that DOES NOT directly or indirectly generate revenue for the user, including the rights holders; promotes their educational, political, religious or charitable objectives, allow copying; allow inclusion of derivative works.

Commercial Use is any use (including use for preservation, private study and private research) that directly or indirectly generates revenue for the user, including the rights holders, promotes their educational, political, religious or charitable objectives, allow copying; allow inclusion of derivative works.