

Response of the Intellectual Property Law Committee to HM Government consultation on copyright

The City of London Law Society (“**CLLS**”) represents approximately 14,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 18 specialist committees. This response in respect of the HM Government consultation on copyright has been prepared by the CLLS Intellectual Property Law Committee.

The CLLS is pleased to have the opportunity to comment on this consultation about copyright.

This Response has been prepared together with, and is endorsed by, the Intellectual Property Lawyers' Association (IPLA) and The Law Society's IP Working Party. The Law Society is the representative body for more than 145,000 solicitors in England and Wales that negotiates on behalf of the profession, and lobbies regulators, government and others.

We have responded to those questions where we believe that the CLLS, IPLA and The Law Society may contribute or express an informed opinion. We adopt the question numbering set out in Annex D to the Consultation document.

Orphan Works

- 1. Does the initial impact assessment capture the costs and benefits of creating a system enabling the use of individual orphan works alone, as distinct from the costs and benefits of introducing extended collective licensing? Please provide reasons and evidence about any under or over-estimates or any missing costs and benefits? The Government is particularly interested in the scale of holdings you suspect to be orphaned in any collections you are responsible for. Would you expect your organisation to make use of this proposed system for the use of individual orphan works? How much of the archive is your organisation likely to undertake diligent searches for under this proposed system? What would you like to do with orphan works under a scheme to authorise use of individual orphan works?**

Others are better placed to comment than we are.

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

N/A

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

N/A

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

Foreign copyrights are foreign property rights. The whole basis of international copyright protection is one of national treatment i.e. other countries must afford UK originating works the same protection they give to works of national origin. They are not required to give the **same** protection as in the home country (except to the extent an aspect of protection is required under EU law or international agreement).

Notwithstanding the attraction of a "one stop shop", the extension of authorisation to exploitation of foreign copyrights is better left to European Directives or other international agreements.

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

(a) is acceptable so long as the legislation is tightly drafted to apply only to the specific case of an orphan work, and in terms that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author (i.e. the Berne Convention "3 step test"). (b) raises the concerns set out in our previous response.

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

For an orphan works system to satisfy the Berne Convention 3 step test, there need to be clear rules as to what is and is not deemed to be an orphan work.

Where, following diligent search, it is unclear if a work is still in copyright because it is unclear whether and when the author has died, users may prefer to take a licence "in case". It might be possible to bring this within the licensing scheme, provided always that this does not involve any relaxation of the standards of diligent search. This system might be made even more attractive for users if it were provided that any fees paid could be recovered (less an

administration charge) to the extent the work is later shown to have been out of copyright.

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

Extending an orphan works scheme to unpublished materials raises wider concerns than for published works. Unpublished works may contain information that is confidential, highly personal, or even defamatory of third parties, or which an author or his/her heirs do not wish to put into the public arena for reasons of personal style and reputation.

This concern was reflected in Article 5(3)(d) Information Society Directive, leading to the amendment of s.30 Copyright, Designs and Patents Act 1988 to disapply the exception for fair dealing for criticism and review for works that have not been made available to the public. It might therefore be appropriate to adopt the definition of "making available to the public" in s.30(2) for the purposes of identifying which orphan works may be subject to licensing.

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

2039 "at the earliest" comes from the policy implemented in the Copyright, Designs and Patents Act 1988 (see e.g. schedule 1, para. 12 (3)-(5)) to abolish the possibility of perpetual copyrights previously enjoyed by certain categories of works. Otherwise the general rules as to term are those set out in that Act (i.e. term varies depending on type of work and other factors).

For most works, the UK cannot unilaterally change the term of protection because the term of copyright is subject to EU maximum harmonisation as now described in Directive 2006/116 (superseding Directive 92/100/EEC, as amended). For example, Article 1.1 requires a term of copyright for literary and artistic works of life plus 70 years, regardless of when the work is published. Article 1.3 sets a term of 70 years from lawful making available to the public unless the author's identity is or becomes clear in that term, in which case life plus 70 applies. Article 4 provides that if a previously unpublished work that is out of protection is lawfully published or communicated to the public, a new 25 year term runs.

We wonder if this question is aimed only at those works whose term was left unaffected as a result of the transitional provisions of the Directive (see Directive 2006/116, Article 10.1) and in particular works whose term of protection was cut back (to end 2039) as a result of Schedule 1 para. 12 (3)-(5) of the Copyright, Designs and Patents Act 1988 (or similar provisions elsewhere in the transitional provisions to that Act). If this is the case, we are unable to comment on the number of works that would in fact become available for use as a result of passing into the public domain. We also wonder what is the justification for revisiting a policy decision taken in the 1988 Act roughly half way through the 50 year term the legislators then decided to apply.

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

We agree that in practice distinguishing commercial from non-commercial is likely to be problematic. Provided the grant of licences is limited to published works, we believe there is widespread support for commercial use to be allowed, and that this can be justified under the Berne 3 step test in the context of true orphan works provided market rates are charged.

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

What is substitutable depends on the work and the proposed use. In circumstances where a user wants to exploit a particular work, nothing is substitutable.

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

The authorising body should be seen by all concerned as impartial and representing a fair balance between the interests of owners of copyright in orphan works and would-be users. It should be focused on checking whether a work is indeed an orphan work, and (only then) on settling appropriate terms for exploitation.

The UK has a range of existing incumbents who have experience in the administration of rights, and who are subject to scrutiny by the Copyright Tribunal. The proposed Copyright Exchange may also provide a suitable resource. There is no reason why only one body should be permitted to carry out this function. Indeed, there is a case for saying that existing bodies already involved in licensing similar types of work for similar types of use are best placed to know what appropriate terms are likely to be. This will assist in reducing transaction costs.

Since there is no guarantee that owners of orphan works will ever emerge, it is likely that authorising bodies will wish to recover their costs primarily from would-be users through the fees paid. It is also likely the first would-be user will bear a higher diligent search cost than subsequent users. Accordingly a charging structure that does not load all the administration cost on the first user would be more equitable.

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

Orphan work status should not be given lightly to stay within the Berne three step test. We favour minimum standards for what amounts to a diligent search, supplemented with a general requirement to take all other reasonably proportionate measures likely to identify or trace the author.

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

Yes as it may have better resources to do this properly, but the fact the search is done by the authorising body should not automatically satisfy the obligation of the would-be user in all circumstances. For example, the would-be user may have relevant knowledge not known to the authorising body.

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

No. Orphan work status should not be given lightly in order to fit within the Berne Convention 3 step test.

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

We do not think the fact a previous search has been conducted should be conclusive, but if the authorising body maintains records of the searches done we see no reason why these should not be made available to other would-be users. Unless the search was very recent, it is likely that some degree of refreshing would be required, at least.

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

It will be difficult to justify licensing of orphan works unless rightholders receive fair and equitable remuneration. It is hard to see how below-market remuneration could be appropriate.

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

If an authorising body is e.g. an existing collecting society or the Digital Copyright Exchange, it is likely already to have relevant knowledge which it can apply. Would-be users should be permitted to adduce evidence to support their contentions as to market rate. Oversight could be provided by the Copyright Tribunal.

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

An upfront system with funds held in a separate beneficiaries account seems more likely to guarantee that authors will receive fair and equitable remuneration, satisfying the Berne Convention 3 step test. Otherwise they face the risk that users may not exist, or not be in funds, if royalties are only payable when claimed. Where the author is known but he or his heirs do not claim the royalties within a fixed period after the work goes out of copyright, the unclaimed royalties might be applied to defray the costs of the authorising body, or refunded or part-refunded to the user or to fund some other public good.

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

The right to be identified as author is guaranteed by the Berne Convention Article 6bis but normally has to be asserted. If there is no evidence it has been asserted it might still facilitate identification or tracing of the rightholder if it were a condition of the right to exploit orphan works that the author – where known - be identified. However, this may be practically difficult or inappropriate in some contexts. We therefore favour giving the administrative body explicit powers to require this as a term of the licence where appropriate (or, if preferred, to have the power to waive this requirement).

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

We have very little case law on derogatory treatment, but this protection is required under the Berne Convention (Article 6bis). We suggest that any licence to exploit orphan works is subject to the right of the author (if he or she emerges) to object to derogatory treatment.

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

Some users may only require a short term licence for one off use. Other users may wish to include a work in a larger work that is intended to be available to the public without limit of time in circumstances that the licensed work cannot be substituted at reasonable cost and its removal would materially impact the ability of the licensee to exploit the work in which it is included.

It would seem draconian to give owners of rights in orphan works the power to hold users to ransom who have paid a market rate remuneration and built that into their pricing. The key, in our view, is to reflect the market rate value of the actual licensed use.

Extended Collective Licensing

This section of the submissions has been prepared with the assistance of a specialist lawyer from Sweden and our thanks go to Erik Ficks from Roschier in Stockholm. As referred to in the Consultation, Sweden, along with other Nordic countries have adopted an ECL system. Our response therefore makes comparisons with and includes references to first-hand experience from Sweden.

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

The key issues with the current system are: complexity, involving multiple collecting societies, rights holders and users granting and seeking permission to use multiple works, which often require rights to be granted from more than one collecting society; and the lack of control and regulation around the collective licensing schemes.

The benefits of a collective copyright licensing system for both rights holders and licensees raised in the Consultation are acknowledged, primarily that in the absence of these societies, licensees would need to seek permission from each and every rights holder of copyright materials they use. Rights holders would have to negotiate licences with individual licensees and monitor and

enforce unauthorised copying of their materials. Collecting societies significantly simplify copyright licensing and save costs in this respect.

We consider the following areas of the current copyright licensing system could be improved:

1. The current system is complex, often requiring businesses to procure a number of licences from a number of different collecting societies. This can create confusion, uncertainty and an administrative and financial burden on businesses and others including educational establishments.
2. Different licences are required for different types of copyright material, with some overlap, for example, two different licences are required to play a recorded song in a public place, again leading to confusion, uncertainty and an administrative and financial burden on businesses and others.
3. There are no "standard licence terms" for use of copyright materials and so businesses need to be familiar with the different terms of and restrictions under a number of different licences which can be difficult to understand and again leads to confusion, uncertainty and an administrative and financial burden on businesses and others.
4. Existing licences do not necessarily cover all of the activities undertaken or copyright works used (only those belonging to the members of the collecting societies). These "gaps" leave users open to claims of copyright infringement and/or make them wary of using copyright materials. Fear of infringement can lead to missed opportunities to use copyright material, in particular in the educational world. This is an area where the ECL Scheme will help to alleviate the concern.
5. Existing licences fail adequately to deal with developing technologies, in particular the use of digital materials.
6. There is no "one source" to establish whether a copyright work is covered by a collecting society licence. It is therefore difficult to identify whether and within which licensing schemes certain copyright works fall. For example, if a prospective user wants to find out if a film is covered by an MPLC licence, there is no central database to determine this. Instead, organisations have to search for the producer/distributor of the film and then match this up with the participating rights holders, provided this information is available. There is no central database of copyright works available for schools to access and use which hinders their use of available materials. It is acknowledged that the Government's proposal for a Digital Exchange will help to alleviate this concern.
7. There is little information or advice available for organisations in relation to copyright licensing, without going to the collecting societies themselves and there may be concern that they may not be impartial or consistent in their advice.
8. Rights holders, through the collecting societies, are effectively free to dictate their own licensing terms and fees, with little control or consistency.

9. The existing collecting societies are controlled/regulated in the UK by their own constitutions and members. This allows the collecting societies to impose their own licence terms and licence fees on licensees. Licensees do have the right to complain to the Copyright Tribunal if they consider the terms or fees to be unreasonable. However, for SMEs, the costs and time in bringing such a complaint are likely to outweigh the potential benefits.
23. **In the Impact Assessment which accompanies this consultation, it has been estimated that the efficiencies generated by ECL could reduce administrative costs within collecting societies by 2-5%. What level of cost savings do you think might be generated by the efficiency gains from ECL? What do you think the cost savings might be for businesses seeking to negotiate licences for content in comparison to the current system?**

The cost savings for businesses will depend largely on the popularity of the ECL scheme with rights holders and the level of opt out. If the rights holders decide that the ECL scheme is less profitable and decide to opt out, then this will not create any real improvement to the current system.

The cost saving for businesses and others seeking to negotiate licences for content in comparison to the current system will probably be greater than the cost saving for the collecting societies or at least for those businesses that routinely negotiate licences with independent rights holders, depending on the take up of the scheme and the number of rights holders who "opt out". The main cost saving for businesses and other prospective users is likely to be in the administration and burden of identifying from whom they can secure the rights. We envisage that the collecting societies will incur not insignificant additional costs as a result of adopting an ECL scheme, in particular upfront costs, for example, the costs of applying for ELS approval; obtaining consent from its members; monitoring and applying rights holder opt outs and carrying out "searches" for the authors of works.

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

On balance, we consider the savings should be shared amongst the rights holders. However, this should also be a factor when considering any increase in licence fees (see Question 25 below)

The cost savings for the collecting societies should be distributed to the rights holders. The success and trust in collecting societies in the UK and the Nordic countries may be explained by the organisations being member-owned and run on a not for profit basis. Even if the proposal does not go as far as requiring that all UK collecting societies shall be member-owned and run on a no-profit basis, the costs for the administration and the percentage of the licence fees to be paid to rights holders as remuneration (royalty) should be one of the most important factors taken into account when considering authorisation of a collecting society to operate an ECL scheme.

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

We consider that an increase in price of the licence could be justified by the adoption of an ECL scheme, on the basis that the scope of the licence could be significantly extended. However, this should be balanced against the perceived value of the extended licences to most businesses; the anticipated cost savings for collecting societies; and the volume of rights holders that "opt out" of the scheme.

The key considerations are as follows:

1. CLS Members – if the price of the licence remains the same but the number of potential recipients of royalty payments increases (i.e. by extending the scheme to non-members), then the CLS members may feel that they are out of pocket, particularly if the "cost savings" of the ECL Scheme are not sufficient to neutralise the difference. It is therefore difficult to see the incentive for CLS members to consent to the ECL scheme for their sector if their royalty shares would not be maintained.
2. Licensees – where a CLS repertoire is increased through an ECL scheme, the licensee technically is getting "more for their money". This may be an advantage for certain licensees for whom the current collective licensing scheme is insufficient and who then also have to negotiate individual licences with rights holders. However, many individual licensees for whom the current licensing scheme is sufficient will not receive this benefit.

Our experience suggests that there is a general misunderstanding about the scope of collective copyright licensing in the UK. For example, a publican purchases a PRS for Music licence to allow them to play music in their pub. The publican may well be unaware whether the rights in particular music fall within the PRS for Music licence or not. It is uncertain what impact an extended licence would have on this general perception.

3. The extent of the "extended repertoire" – the adoption of an ECL scheme will extend the repertoire of the collecting society. However, the proposal is that rights holders will have the opportunity to "opt out" of the scheme. It is likely that where "high value" rights holders currently choose not to be members of existing collective licensing schemes on the basis that individual licensing is more profitable, they will also choose to opt out of the ECL scheme. If the volume of opt outs is significant in a sector it will be difficult to justify an increase in licence fees.
 4. Cost Savings – see question 24 above in relation to cost savings.
26. **If you are a collecting society, can you say what proportion of rights holders you currently represent in your sector?**
- N/A.
27. **Would your collecting society consider operating in extended licensing mode, and in which circumstances? If so, what benefits do you think it would offer to your members and to your licensees?**
- N/A.
28. **If you do not intend to operate in extended licensing mode, can you say why?**

N/A.

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

In addition to the collecting societies and licensees, we consider rights holders (member, non-member and orphan work authors) and consumers/end users will be impacted by the scheme.

Rights holders

- Collective society member rights holders will be impacted as the royalties collected by the collecting societies will be shared amongst a larger pool of rights holders (i.e. members and non-members), although it is anticipated that unclaimed funds will be distributed amongst members. The balance may be redressed if the ECL scheme results in equivalent cost savings and/or the royalty fees for licences are increased. The distribution of unclaimed funds we understand will be delayed by a certain period, to allow rights holders to come forward.
- Non-member rights holders will be able to take advantage of the ECL scheme and the distributions made under that scheme. Should they wish to continue to license their own works independently, they can choose to opt out.
- Non-identifiable rights holders who are not aware of the scheme may be impacted on the basis that their work may be used under licence without their knowledge or authorisation. Although this may be the case at present, failure to identify the author of a work may be a deterrent to copying under the present regime.
- It is important to note that the geographic scope of collective licensing schemes extends further than the UK as a result of reciprocal agreements between collective licensing societies. Overseas rights holders are also likely to be affected in a similar manner.
- Evidence from the Nordic countries suggests the ECL system(s) is favoured by rights holders.

Consumers/end users

- The ECL scheme is likely to extend the repertoire of copyright works available to licensees/users. This is likely to grant access to works where it would otherwise be difficult or impossible to negotiate a licence and to make available works that may otherwise be unseen.
- By way of example, we consider the ECL scheme will help to address a number of issues identified in relation to the use of copyright materials in schools (Pinsent Masons LLP report for BECTA May 2010 referred to in the Hargreaves Report). An ECL scheme that extends the repertoire of copyright works available under licence is likely to give teachers more confidence to copy and use copyright materials without the fear of exceeding the scope of their licence, benefiting both teaching staff and pupils.

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

We consider the main criteria should be that the collecting society has the "most" members compared with any other collecting society in the same "sector". This will largely depend on how the relevant "sectors" are defined. Competition considerations should be taken into account in setting these criteria.

The Nordic model requires the collecting society to represent a substantial number of rights holders of the category of work in question. However, this could result in more than one collecting society being eligible in each sector (if more than one represents a "substantial number" of rights holders). If it is permitted that more than one collecting society can represent a particular "sector" category of rights in an ECL scheme, and new collecting societies are established in the various sectors, this could "devalue" the licences both for licensees and rights holders (in particular member rights holders). It does not seem appropriate that two collecting societies should represent both their own members and the rest of the rights holders in that sector.

If the requirement is that a collecting society represents the "majority" of rights holders, this may not be attainable in certain sectors where membership is low.

We consider that only one collecting society should be authorised to operate an ECL scheme within a specific field of use (or a clearly defined part of a field) at any one time.

The relevant "sectors" will require careful definition. We anticipate that to avoid a complete restructuring of the current collective licensing system, "sectors" will be based on the existing categories of rights currently represented by the existing licensing societies. However there should be scope to add to or amend these sectors to reflect the changing nature of technology. Currently, in the majority of categories, only one collecting licensing society operates within that category. It is likely that the representative nature of the existing collecting societies would be established. There should be a minimum threshold of members represented for new collecting societies and/or a minimum period of operation before it can apply for an ECL approval.

The proposal that only one collecting society could be authorised to operate an ECL scheme in a particular sector at any one time is reasonable. The legislation should not prevent a new collecting society replacing any previous one if the latter is better suited.

Care should be taken so as not to limit the "sector" in a manner which does not reflect the fields of use (including defined parts of a field which could benefit from having a separate collecting society authorised).

Provision for extensions to existing fields and the addition of new fields following implementation of the extended collective licensing scheme should be included.

The requirement to be representative and to have a substantial number of the relevant sector should, however, only apply to the collecting society's home country. It should not be required that the collecting society should represent –

through reciprocal agreements – the repertoire of a number of foreign countries. In most areas such international representation does not exist. Consequently it should be enough that the collecting society is representative at the national level.

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

The input of and support of the members of the collecting societies are imperative to the continued operation of these organisations. The impact on member rights holders has been identified above. It cannot reasonably be justified to introduce an ECL scheme without member consent. Some collecting societies may have existing constitutions that provide for member approval of certain matters. The procedures laid down in any existing collecting society constitutions for getting member approval should not be bypassed or ignored.

The majority of UK collecting societies are member run, not for profit organisations. The input of and support of the members of the collecting society are imperative to the continued operation of these organisations. We consider that the majority of these organisations will have their own "member constitutions". It is highly likely that these constitutions require member consultation on matters relating to the structure and operation of the collecting society.

Any agreed member constitutions should not be "bypassed" to allow the organisation to apply for an ECL without consent. The existing member constitutions should be reviewed and considered when determining what should constitute "consent".

Where existing member constitutions do not specify procedures for getting member consent, then we consider that a simple majority would be the easiest qualification to apply but consideration should be given to "weighted votes", depending on the number of works a member licenses in the UK.

Rights holders outside of the UK whose works are licensed under reciprocal agreements should not be considered for this purpose.

The collecting society should demonstrate consent when applying for an ECL authorisation.

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

Collecting Societies should demonstrate that they have adopted and implemented a code of conduct with minimum standards (see further the answer to Question 35 below). Alternatively, legislation should set out these minimum standards as requirements for approval.

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

Member and non-member rights holders should receive equal treatment, other than in the distribution of unclaimed funds.

It is difficult to see any specific situation in which discriminatory treatment would be reasonable, other than the fact that non-members may not be required to benefit from the distribution of unclaimed funds (see the answer to Question 43 below). In the Nordic countries we understand it is a requirement of the ECL Scheme that rights holders not represented by the collecting society must be given equal treatment to those who are directly represented within the scheme. The law also gives them the right to claim individual remuneration.

However, if collecting societies' member constitutions impose certain conditions or requirements on member rights holders, then members may feel aggrieved that non-member rights holders receive the same benefits as the member rights holders but are not subject to the same conditions and restrictions.

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

The key concern would be collecting societies demanding unreasonable terms and pricing for the ECL licences, with little or no checks or controls, although this is a concern with the current system. We consider that the current checks and controls in place are insufficient with limited powers given to the Copyright Tribunal to deal with complaints brought by licensees. We consider the grant by the government of an ECL approval provides an opportunity to monitor the behaviour of collecting societies and enforce the code of conduct (see Question 35 below), thus providing a more tightly regulated regime.

35. **Consultation Question No. 35: Are there any other conditions you think a collecting society should commit to adhering to or other factors which the Government should be required to consider, before an ECL authorisation could be granted? Please say what these additional conditions would help achieve?**

We consider that the adoption of a code of conduct with certain minimum standards should be mandatory before a collecting society is considered for and granted an ECL approval. The code of conduct should relate to the treatment of rights holders and licensees.

There has been recent debate about collecting societies adopting codes of conduct, whether on a voluntary or compulsory basis, following complaints about a lack of transparency with the current system.

The adoption of an ECL scheme makes it even more important that collecting societies are transparent and the adoption of an ECL scheme offers an opportunity for the government effectively to ensure collecting societies adopt a

code of conduct with minimum standards. The code of conduct should relate to the treatment of both rights holders and licensees.

We consider the minimum standards in the code of conduct should include the following:

- A requirement to maintain accurate and readily available membership lists and opt out lists.
- Clear and transparent information in relation to the remuneration process, including calculations of remuneration, how to submit claims for compensation and any relevant time limits as well as searches for identification of creators and works.
- Controls around pricing and price increases.
- A clear and transparent complaints procedure for members and licensees.
- A formal ADR procedure for licensees to discuss and resolve issues relating to pricing and licence terms.
- A duty to consult members in relation to collecting society operations.
- Reporting requirements that include the following:
 - Detailed information relating to pricing, distribution policies and deductions, including what a society does with any unclaimed royalties.
 - Detailed information for non-members about how to claim compensation/ royalty payments, including time limits for doing so.
 - Clear statements of the categories of rights and rights-holders that a collecting society represents.
 - The quantity of licences held, on a sector by sector basis for each type of right.
 - Detailed reporting of complaints received by users.

On the basis that non-member rights holders will be able to claim compensation under the ECL scheme, the reporting information will have to be publicly available and easily accessible, for example on the collecting society's website.

It should not be sufficient for the collecting society merely to show that it has adopted a code of conduct in its application for ECL approval. It should also demonstrate the internal procedures and policies adopted under the code of conduct and/or demonstrate compliance with the code for a certain period of time before an ECL approval can be granted. Sanctions should be imposed for collecting societies that do not comply with the code of conduct, for example financial penalties, publishing details of breaches and the ability for the government or its nominated regulator to impose conditions on the society.

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

The adoption of an ECL scheme must be communicated through public and popular channels, for example as a minimum: (i) on the IPO website and in the IPO newsletters; (ii) on the collecting society's website and in their newsletters; and (iii) where applicable, through recognised industry bodies. Advertising in national media should be considered in order to reach the widest audience (subject to Question 37 below). It is imperative that a rights holder's right to opt out of an ECL scheme is properly and effectively communicated. The collecting society must also provide an effective communication service to answer questions raised by rights holders in relation to the ECL scheme.

Proper communication of the ECL scheme is key to its successful operation. Minimum requirements should be set down for communicating the implementation of an ECL scheme, including clear information as to what this means, which rights holders will be affected and details of how to claim compensation, including any timescales.

There should be no requirement for a rights holder to provide a reason for the decision to opt out of an ECL Scheme, except perhaps in exceptional cases (see discussion about a time limit for giving an opt out notification in the answer to Question 38 below).

The opt out need not be an "all or nothing" option and rights holders should be given the option to opt out of:

- a) all their works; or
- b) a class of work; or
- c) particular, specified works.

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

If advertising an ECL Scheme in the national media is not made mandatory across the board, it should be considered relative to the estimated size of the sector represented by the collecting society.

As set out above, we consider it is important that rights holders are given an adequate opportunity to opt out of the ECL scheme. We consider that advertising through national media would be a good channel of communication and ideally would be a requirement of ECL approval. However, we also recognise the significant cost in such advertising which, if compulsory, may deter smaller collecting societies from applying for ECL approval.

We consider that if not compulsory across the board, advertising in the national media should be considered relative to the estimated size of the sector represented by the collecting society. The more potential rights holders that will be covered by the ECL Scheme, the more justified expenditure in communicating to those rights holders should be.

Provision should be considered to allow joint advertising by collecting societies who receive ECL approval around the same time.

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

It is important that the opt out should be simple and readily available through different media at zero or negligible cost for rights holders (including disabled rights holders) without the need to state reasons.

The proposal that the opt out mechanism shall "be simple and at zero or negligible cost to the rights holder", e.g. by means of "email or a telephone call to a free phone or local number", is agreed. In a digital age, the ability to opt out through the relevant collecting society's website online should also be available.

Confirmation of an opt out notification should be sent by letter or email by the collecting society to a confirmed address of the creator so as to safeguard against false notifications (see also the answer to Question 39 below).

The notice should be provided to the collecting society. Allowing for the notification to also be made to the user (as in the current and proposed system in Sweden), may be considered to unduly complicate the issue and create a high administrative burden.

It is important that rights holders do not have to give reasons for their opt out but it is important the opt out clearly defines the effect (scope) the opt out should have (see Question 36 above).

A rights holder should be given a sufficient length of time to opt out of the ECL Scheme. However, once this period has expired, the rights holder should not be allowed to opt out at any given time, as users may have invested in using the relevant works, unless there are exceptional circumstances, for example:

- The collecting society has failed properly to communicate the ECL scheme.
- A rights holder can demonstrate there are significant reasons (for example its moral rights) to object to the use of the copyright work.
- The rights holder can demonstrate a justification for removal of the rights from new licences only.

The timescales for opt outs should run from the implementation of the scheme and from the publication of new works. If a rights holder chooses not to opt out, this should not preclude him or her from opting out their future works from the ECL scheme.

The evidence from the current system in Sweden is that very few creators actually use their right to opt out of the ECL scheme. The creators' main interests lie instead in the proper reporting of use of works and the collection and distribution of remuneration. That being said, the requirements of providing information as discussed in relation to Question 36 above should be complemented by appropriate means of opting out.

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

Yes. It is important for an ECL scheme to work that the licensee understands what is not covered by its licence. If opt outs are not properly applied or communicated licensees could easily act outside of the scope of their licence and infringe someone's work. An accessible database of opted out works/rights holders should be available for this purpose.

It should be the responsibility of the collecting societies to ensure the proper handling of opt out notifications. An opt out notification should be enforceable by the rights holder once submitted to the collecting societies and it should be for the collecting societies to indemnify the users for any costs associated with improper handling of opt out notifications leading to the need to limit the use. The opt out notifications received should be clearly communicated to the users (including potential users) by the collecting societies, either directly or by information available from searches in a database.

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

Unsophisticated rights holders who are not accustomed to commercialising their works are at higher risk of not receiving information about the ECL Scheme. It is difficult to address this, other than through the communication channels suggested in Question 36 above. It is important that communication channels also address the needs of rights holders with disabilities. Websites should cater for individuals with visual impairment and Braille materials should be made available on request.

The right to opt out should be communicated and the means set up for submitting notifications in a way considerate also to creators with disabilities.

Access by overseas rights holders and users needs also to be addressed.

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

A collecting society should take sufficient measures to locate non-member or missing rights owners, but the measures should not be so extensive and of such cost as to unreasonably reduce the remuneration due to identified rights-owners and members. A collecting society may be required to keep lists of works and its creators. All reasonable efforts should also be made to identify any mistakes in the reporting of use of works, such as wrongly spelled names or incorrectly given titles, against such lists. The proposals in relation to Orphan Works need to be considered in this context.

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

A minimum period of three years might be considered appropriate. However, a collecting society should be free to adopt a longer period.

A minimum period of three years is provided in the Nordic countries. The period seems reasonable and a collecting society should therefore be under an obligation to allow claims for remuneration for at least that time. A collecting society should, however, be free to adopt any longer period which its members consider appropriate.

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

Unclaimed funds could be used for charitable or educational purposes, for example, to improve information available to licensees and end users.

Exceptions to Copyright

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

First, we would like to make some preliminary observations that apply to private copying, and questions 67-71, in general.

- As recognised in the IPO's Copyright Consultation Report ("CCR"), any amendments to UK law will have to comply with (i) EU law, and (ii) international law. We refer in particular to:
 - the following provisions of the Infosoc Directive (2001/29/EC):
 - recital 38: indicates that the right to introduce a private copying exception is limited to the reproduction right, and to reproduction of audio, visual and audio-visual material for private use, accompanied by fair compensation;
 - article 5(2): Member States may provide for exceptions or limitations to the reproduction right "in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures" (emphasis added); and
 - the three-step test in the Berne Convention and TRIPS ("members shall confine exceptions ... to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder"; emphasis added).
- The UK government has decided that it does not intend to consider introducing a private copying levy. We agree with that position (in view of the various problems associated with such levies, which are summarised in the CCR). However, the effect of this decision is that there will be no separate scheme for ensuring fair compensation. As a result, it is vital to ensure (taking into account in particular the provisions of EU and international law mentioned in the previous bullet point) that any private copying exception causes no or negligible harm to

rightholders. This will, for example, be the case where the exception legitimises acts of copying which rightholders do not object to, and would not want (or would not practically be able) to seek to charge a separate fee for.

- It is important to bear in mind what the reasons for introducing the proposed private copying exception are, in determining how it should be formulated. It seems to us that the main reason for introducing this exception is to increase public respect for UK copyright law. The reason why the exception would tend to do this is it would render lawful acts which are undertaken by a large section (perhaps the majority) of UK society, and which society does not generally consider morally objectionable or harmful, and rights owners have not generally complained about, but which currently infringe copyright. The classic example of such an act would be an individual who transfers a CD to a computer, and then on to an iPod (which as the law stands would potentially involve at least two infringing acts). It may be that there would also be a subsidiary benefit to introducing this exception, of incentivising the design of products and software which enable individuals to undertake private copying. But we do not see this as particularly significant or certain to apply, given that electronics manufacturers have been developing and selling on the UK market a vast range of products in recent years which enable private copying, notwithstanding the fact that such copying amounts to an infringement of copyright.
- The justification for this exception is not, and should not be, simply that a lot of people undertake private copying. So for example, the fact that a significant percentage of the UK population use P2P file sharing services such as the Pirate Bay does not mean that such services should benefit from an exception. Such copying causes serious financial harm to rightholders' businesses.

In terms of the specific answer to question 67, we answer yes, as this would not be consistent with the above-mentioned provisions of EU and international law, as it would conflict with normal exploitation of the work and unreasonably prejudice the legitimate interests of the rightholder, for example by causing consumers not to pay for copies of musical or audio-visual works, as they could instead:

- obtain them via peer to peer file sharing websites;
- copy them from works owned by people they know;
- copy works they own and pass on the originals to friends.

This would inevitably cause rightholders' sales to fall, at a time when the music and media industries (not least in the UK) are already suffering greatly from online piracy.

Further, allowing individuals to copy content which they do not own would run directly contrary to the aim stated above of improving public respect for UK copyright law (as it would send a message that copying content which belongs to someone else in circumstances where the rightholder receives no compensation is perfectly acceptable).

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

We would not recommend wording the exception in this way, for the following reasons:

- there is a clear likelihood that this will cause significant damage to rightholders (which would potentially render the provision non-compliant with EU and international law as mentioned above). For example, people living in the same household may currently have various reasons to purchase more than one copy of a work: they may only be living together on a temporary basis (e.g. students, flatshare), they may want to have a copy of the work to enjoy outside the house, etc. If the exception allowed those living in the same home (and/or in the same family) to copy one another's works, less works would be bought, which would obviously harm rightholders; and
- there are difficulties with defining concepts like "domestic circle", "family", "household". This means that if these terms were used, the scope of the exception would be likely to be unclear. Given the difficulties of enforcement for rightholders in the domestic context (massive number of infringers, lack of visibility, high costs of enforcement relative to level of likely damages), consumers are likely to interpret any uncertainty as permission to copy.

It may be noted that individuals can already undertake various acts in relation to copyright works which they own, which enable other household members to enjoy them, without needing an exception from copyright infringement, for example:

- lending a work to a household member would not amount to an infringing act, provided no charge was made for the lending (the infringing act of "lending" under the CDPA only occurs if done through an establishment which is open to the public);
- playing music or films to friends or family in the home would not ordinarily amount to an infringing act, because it is not done in public.

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

Yes: private copying should be limited to copying of legally owned content for personal use, because (as mentioned above) a wider exception would cause harm to copyright owners. It seems to us that such an exception should cause minimum harm, provided (as required under EU and international law) it is also limited:

- to the reproduction right;
- to audio, visual and audio-visual works;
- to private use by the owner of the original content ("the Original");
- to use by a natural person;
- to use for ends that are neither directly nor indirectly commercial;

- so that, as under the format-shifting defences enacted in Australia (by their Copyright Amendment Act 2006), it ceases to apply if the main copy of the work is sold, hired, traded or distributed to a third party. On the disposal of the original to another person, all other copies should become infringing copies (so that it would be the owner's responsibility to delete all copies prior to disposal of the Original). The aim of this is to avoid the situation where a person acquires the Original, makes a free copy of it under the exception, and then disposes of the Original to another person (who might repeat the process), such that the rightholder would end up selling less copies;
- it should be clear in the legislation that "legally owned content" would not include streamed audio/ visual content which is simply made accessible to internet users, unless the terms of use permit the internet user to make a permanent copy.

As digital technology is constantly evolving, it is possible that permitting such private copying would cause future harm to rightsholders which is currently hard to foresee. As a result, we would recommend that there be a specific statutory requirement to keep under review the impact of the defence on rightsholders, and for the government to take appropriate measures to protect rightsholders if the exception starts unreasonably to prejudice their legitimate interests.

If, as hoped, this exception caused minimal harm to rightsholders, the costs of this amendment should also be minimal.

As mentioned above, the main benefit that should follow from this amendment would be to bring the law into line with consumer behaviour and help to reduce uncertainty over what is and is not legal, and thus increase public respect for copyright law. It may be that there would also be a subsidiary benefit, of incentivising the design of products and software which enable individuals to undertake private copying.

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

No; the exception suggested here would not provide the necessary certainty (which is important for both the public and rightsholders) as to the scope of permitted acts. Other jurisdictions, such as Australia, have provided certain and specific limitations, and such an approach (applying the limitations listed in the previous section) is recommended over referring to a "minimal harm" concept.

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

No. It should be recalled that the main reason for introducing this exception is to bring copyright law into closer line with reality and consumer expectations, and so increase respect for the law (it is not because there is some other overriding public policy reason why it is socially or economically important for individuals to be able to make copies for private use). If rightsholders wish to apply DRM, they should not be prevented from doing so by a private copying exception.

Our responses to a number of the questions posed in Chapter 7 are submitted elsewhere. We would like, however, to comment on the copyright exceptions in general, as invited to do in paragraph 7.22 of the Consultation.

The Government should not assume that the exceptions included in the Copyright Directive were intended to create “the right conditions for economic growth” (7.6) or that their introduction will necessarily “help to encourage innovation and will provide new opportunities for economic growth.” (7.8) The background to the Directive and the attitude the Court of Justice of the European Union (the “**CJEU**”) has taken to the exceptions suggests that they will not help to promote these aims in the way envisaged or hoped by the consultation. The Copyright Directive is not an exceptions regime that truly promotes and supports economic growth. Such a regime would need greater support from the EU, as the Consultation and Hargreaves Review both acknowledged.

The list of permissible exceptions in Articles 5(2) and 5(3) of the Copyright Directive was not put together with the view to creating the right conditions for economic growth or, indeed, with any intention that the Directive was permitting exceptions that would be the most beneficial to economic growth. The list was compiled for a much more pragmatic reason: “the Council has accepted taking on board a number of additional, narrowly-defined exceptions to accommodate requests from Member States” (see paragraph 35 of the Council of the European Union’s Common position of 26 July 2000, 9512/00 ADD 1). The list was drafted to avoid Member States being forced to introduce new exceptions (“This list takes due account of the different legal traditions in Member States” – Recital 32) and to allow them to retain the exceptions that they already had (see, for example, Article 5(3)(o)).

The recitals to the Copyright Directive reinforce the impression that the aims targeted by the Government in the Consultation are not those that the drafters of the Directive had in mind. For example, Recital 31 refers only to “A fair balance of rights and interests between the different categories of rightholders... and users of protected subject-matter must be safeguarded.” The Recitals which refer to the specific exceptions make it clear that the Directive’s primary concerns are protecting the rightholders preventing “harm to rightholders” and ensuring they receive “fair compensation” (see, for example, Recitals 35 and 38). This is an important proposition, because it, in part, informs the attitude that the CJEU has taken when interpreting the exceptions. It is the CJEU that, ultimately, will determine the scope of the exceptions.

The CJEU has given the exceptions a “narrow construction”: “it should be borne in mind that, according to settled case-law, the provisions of a Directive which derogate from a general principle established by that Directive must be interpreted strictly”¹. Further, the CJEU explained that “this is all the more so”² in light of the Directive’s incorporation of the Berne Convention’s three-step test³. The exceptions “must also be interpreted in the light of the need for legal certainty for authors with regard to the protection of their works.”⁴

¹ Case C-5/08 *Infopaq International v. Danske Dagblades Forening* at [56]

² *Infopaq* at [58]

³ By virtue of Article 5(5) of Directive 2001/29, exemptions are to be applied only “in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.”

⁴ *Infopaq* at [59]

The CJEU has taken this approach in a number of other rulings. The *Stichting v Opus Supplies*⁵ case is instructive:

23 With regard to the answer to the question of the identification of the person who must be regarded as responsible for paying the fair compensation, the provisions of Directive 2001/29 do not expressly address the issue of who is to pay that compensation, meaning that the Member States enjoy broad discretion when determining who must discharge that obligation.

24 That being the case, the Court has already held that the notion and level of fair compensation are linked to the harm resulting for the author from the reproduction for private use of his protected work without his authorisation. From that perspective, fair compensation must be regarded as recompense for the harm suffered by the author (*Padawan*, paragraph 40).

25 In addition, as is apparent from recital 31 in the preamble to Directive 2001/29 and from paragraph 43 of *Padawan*, a 'fair balance' must be maintained between the rights and interests of the authors, who are to receive the fair compensation, on one hand, and those of the users of protected works, on the other.

32 It should however be recalled that, according to recital 9 in the preamble to Directive 2001/29, the European Union legislature expressed its desire for a high level of protection to be guaranteed for copyright and related rights, since they are crucial to intellectual creation. Their protection helps to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large. Thus, according to recital 10 in the preamble to Directive 2001/29, if authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work.

The CJEU's narrow construction of the exceptions appears to conflict with the prior English approach to the exceptions⁶; that they are intended to strike a balance of the rights of the copyright holder with the interests of the wider public. See, for example, the statement of the Court of Appeal in *Pro Sieben*⁷:

'Criticism or review' and 'reporting current events' are expressions of wide and indefinite scope. Any attempt to plot their precise boundaries is doomed to failure. They are expressions which should be interpreted liberally.

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

Yes (to first question).

Copyright Directive (2001/29/EC, Art 5(3)(a)) enables member states to implement copyright exceptions for research. UK copyright law has limited this exception to literary, dramatic, musical or artistic works, and certain published editions (s. 29(1) and (2) CDPA). UK Government proposes that the UK should make this exception "work-neutral" by extending to sound recordings, films and broadcasts. The

⁵ C-462/09

⁶ The Canadian approach to a similar statutory framework is revealing here, as demonstrated by the *CCH Canadian* decision. "The fair dealing exception... is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively."

⁷ Per Robert Walker LJ at 614 in *Pro Sieben*

Government points out that the current law is inconsistent and prejudices research in the humanities, and that both Hargreaves and Gowers argued for this change.

We support this change for the reasons given in the Consultation.

Parody, caricature and pastiche

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

No, in answer to the first question.

In general, the CLLS supports proposed changes to the copyright regime which would better meet the expectations of users and would improve the public perception of copyright law. However, this should not be done in a way that would increase uncertainty, as this would be detrimental both to the creators and to the users. The exception should also not be defined in a way that permits uses of works which do not justify why a rights owner should not be able to control that use and seek a licence fee for it. Identifying the circumstances in which a user should be free to use a creative work and being able to justify those circumstances, in a way that is clear, predictable and fair to rights owners, should be the priority.

Given this, we do not agree that a statutory definition of parody, caricature and pastiche (together, "parody") should be included. It is commonly acknowledged in the literature that no stable definition exists. Comparing, for example, the Australian approach with the American approach shows that even legal systems do not agree. Further, even within America there has been some difficulty in identifying exactly what kinds of parodies are caught, particularly in relation to the "target and weapon" parodies. Nevertheless, common characteristics of legitimate parodies can be identified (see our response to Question 82). In any event, it can prove difficult to apply definitions to any given alleged parody in a way that would promote the economic growth (i.e. market for parodies) sought by the Consultation.

Even though we do not support the introduction of specific definitions of the terms, we feel that the exception must incorporate factors to be taken into account which would reflect the circumstances in which it can be justified that a licence is not needed. In this way, the exception itself would help to identify the circumstances in which the Consultation's apparent view (that economic growth is better served by introducing an exception for parody rather than the current situation of requiring licences to be paid to copyright owners) can be justified.

The suggested approach would guard against our concern that merely taking a substantial part of a copyright work for the purposes of "comic effect" (as referred to in paragraph 7.117) should not be sufficient for the exception to apply. If a user has merely created a funny or comic version of a work, we cannot see why this use should have a greater claim to be a free use than, for example, performing it to an audience in an expert way, making a film of the work, or translating that work. If the only motivation of the user is to create a comic version of a work, we do not see why he should not have to obtain a licence for that version. For this reason, we are concerned that the impact assessment refers to Peter Kay's version of "Is this way to Amarillo?" as being a use of a work that might benefit from the parody exception. Regardless of the benefits that may have flowed to Tony Christie's original, we would suggest that there is no good reason why Peter Kay should not have been required to obtain a licence for this use. As the Hargreaves report acknowledged, comedy is big business. As such, it should not be immune from paying royalties to incentivise the creation of works on which it relies to build that business.

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

We suggest that the exception for parody, caricature and pastiche should be framed by reference to a number of indicative characteristics which a court could use in assessing whether the exception applies.

- This approach has precedents. For example, Section 97A CPDA, which implemented Article 83 of the Copyright Directive, sets out some criteria which a court can take into account in determining whether the test has been satisfied, which were not present in the text of the Directive. The Australian Copyright Act also explicitly includes some fair dealing criteria which are generally applicable. It is not suggested that these fair dealing criteria for parody should be of more general application in the amended act because the existing corpus of case law already clearly sets out those criteria as applied to the particular legislative context.
- Further, the suggested approach would better support the Consultation's aim of promoting the conditions for economic growth. It is suggested that the better way of doing this is not simply to introduce exceptions that, in the government's view would promote economic growth, but to do so in as clear and predictable way as possible. Where neither the user nor the creator knows what the parameters of permitted use are, it is likely to lead to complicated advice, complaints, disputes and costly litigation. Clearly setting out the parameters in advance helps to narrow the issues between the parties and to measure their expectations.
- Given the potentially wide and uncertain definitions of parody, it is quite possible that whether a parody qualifies for the defence might come down to sophisticated expert evidence and, ultimately, matters of taste (particularly given the problems caused by the uncertainties inherent in the nature of parody as an art form). The law is generally reluctant to allow matters of taste to enter judicial consideration, for example, the statements in Section 4(1)(a) CPDA that the artistic works are listed are protected "irrespective of artistic quality". It is suggested that introducing a framework for the assessment of whether the exception can apply would help to avoid matters of taste entering into judgments and could promote consistent decision making. Economic growth is more likely in circumstances where would-be parodists and their backers and investors are more confident that their use is not going to be infringing.
- We note that other countries in Europe that have a specific parody defence have not taken this approach. However, we would suggest that this is not sufficient reason for the UK government not to do so. Those countries will have a long tradition of relevant case-law which identify what falls in and outside the exception. The UK does not have that benefit (in the way it does, for example, for the other fair dealing exceptions) so legislation should make up for it.

It is suggested that the defence for parody, caricature and pastiche could be framed in the following way:

Fair dealing with a work for the purpose of parody, caricature and pastiche does not infringe any copyright in the work.

In determining whether the exception applies, a court shall take into account all matters which it considers to be relevant and, amongst other things, shall have regard to:

- (a) the commercial use of the parody, caricature or pastiche;*
- (b) the dominant impression of the parody, caricature and pastiche;*
- (c) the transformative nature of the parody, caricature or pastiche, including the amount of independent creative input or commentary or criticism, whether of the work or otherwise;*
- (d) the necessity to use the work;*
- (e) the extent to which the parody, caricature or pastiche could be a substitute in the ordinary market for the work; and*
- (f) the proportion of the work taken compared to the transformative nature of the parody, caricature or pastiche.*

It is suggested that these criteria would help to minimise the negative impact on copyright owners identified in the Consultation and would identify the circumstances in which a parody would fall within the exception:

- For example, it is clear that works made under the exception would not be able to mimic original works too closely and emphasises that the work made under it would need to go further than simply creating a comic effect. Potential Impact on sales of the original work is also taken into account. For example, the "Is this the way to Amarillo?" cover version might have displaced demand for the original given its almost entirely faithful reproduction of that original and there was minimal independent creative input, criticism or commentary, as the original was merely placed in a comic setting. Use merely for entertainment should not be enough to fall within the exception.
- The criteria also seek to prevent use for purely commercial reasons such as advertising. This is aimed at situations where, while there may be some comic repositioning of the well know work, the overall dominant impression is promoting the business of the user. The suggested wording would mean, for example, that the parody of Annie Leibovitz's picture of a naked Demi Moore by the producers of the Naked Gun 33 $\frac{1}{3}$ film would not have been permitted under the proposal, contrary to the position in the US. This example also demonstrates that using a work in an unaltered way, with only a small amount of parodic overlay, may well not benefit from the defence. The amount of work taken would be high and the proportion of critical commentary or parodic purpose relative to that amount would be low.
- A key difference between a parody and a mere comic version of a work and also the key difference between a parody and, for example, an expert public performance of a work is the distance between the parody and the original and the commentary that the parody provides. This distance is generated by the author's own independent creative input which provides something more noteworthy and justifiable than a mere rehashing of the original. The need to demonstrate this distance is all the more pressing for pastiche, because the commentary element of a parody or caricature is not necessarily present.

Pastiches are more likely to be closer imitations of an original and to lack as much creative input.

The criteria seek to address the problems posed by use of some classes of work by parodists:

- For example, a parody of the lyrics of a song will inevitably have to reproduce in whole or at least a very substantial part, the musical work in that song. These could be owned by separate people. By way of comparison, music is exempted from the “free use” exception in Germany. Drafting an exception in such a way that allowed a parody of the lyrics but not use of the music for that purpose could defeat some of the purpose of the exception, as a whole class of works would be excluded from it. The exception is therefore worded to include use for the purposes of parody where that work might not itself be parodied. The fairness of using that musical work would be judged by reference to the criteria identified. The user has been saved the trouble of creating a musical work for himself; it is difficult to justify why he should always be able to make free use of it (see above in relation to the sports fan example).
- Another difficult case is artistic works, where a large portion or all of the work would need to be particularly reproduced in order to effect a parody of that work. It is suggested that the criteria identified would assist in resolving that tension because the amount of the taking would have to be justified by the dominant critical impression of the work. If, for example, the whole of the artwork was taken but only limited transformation took place, it is likely that the parody would remain a market substitute and would not contain sufficient independent and creative input to succeed as a parody. In short, the more that is taken, the more the parodic content that will be needed and the lower the harm to the rights holder.

The proposal also addresses an issue that the consultation paper failed to. That is the difficulties posed by satires whose intention is not to parody the work, “target parodies”, but to use the work to comment or criticise wider concerns, “weapon parodies”. Parody requires an original that can be imitated. Satire is not dependent on any one original work. It can be practically difficult to distinguish between instances of target and weapon parody. It should be recognised, however, that use of one work to criticize or comment on wider issues, rather than referring to the work itself, does raise different issues and has the potential to harm right owners in a different way to the target parodies.

- This is why one of the criteria refers to the necessity to use the particular work. It may often be difficult to demonstrate why a particular work in all other works was particularly suited to the target of the criticism. This is a valid concern. In circumstances where it is difficult to prove a necessity to have used that particular work, then it would be difficult to show that such use was justified. The other factors would then take on more importance in determining the fairness of the parody.
- This tension is also felt in circumstances where, for example, the melody of a song is taken but the lyrics are altered to make a particular point or where a music work or film is used in the background and sets the scene for independently created works. An example of the former is sports fans’ songs. These regularly take the melody of popular music songs and change the words to refer to the subject of their song. An example of the latter is the

various Downfall parodies. The parodists used particular scenes in the film to make a point unrelated to the film. In these circumstances, there would appear to be a good deal of independent creative input, a low level of commercial motivation and a low risk of market substitutability. On the other hand, there is no need to use that particular work and there is a low level of criticism or commentary (whether of the work or a third party). A distinction should also be drawn, for example, between commercially releasing the fans' songs (which would not be fair dealing) and the fans themselves singing them at matches (which would be fair dealing). If a TV producer used, for example, the Downfall scene in a satirical comedy programme, the defence might not apply if it could not justify why the Downfall scene in particular was used for that criticism. This is because of the commercial use and the wholesale use of the film. On the other hand, if the scene was particularly or solely suited to the criticism or commentary that the satire was trying to make, then the defence may apply.

- Another illustration was given in one of the follow up papers to the Gowers proposal to introduce a parody exception: a children's book being used in an anti-smoking campaign. It is suggested that the current criteria would not permit such use. There would be no necessity to use this particular work. The use would be heavily commercial or promotional and the dominant impression would not be one of criticism or commentary, but of gratuitous use of an unrelated story.
- An example which appears to sit on the line between target and weapon parodies is the use Barbie dolls in a US case to criticize society's views on beauty, yet at the same time to highlight and comment on the characteristics of the Barbie dolls as depicted by their manufacturer. This would, we suggest, benefit from the defence. There is some necessity to use the work and there is a heavy critical or commentary purpose behind the use.
- These kinds of examples also illustrate that the residual concept of fair dealing has some role to play independent of the individual characteristics. Gratuitous use of material should not be given carte blanche solely on the basis that there is some degree of criticism of a third party, comedy or dislocation of the original.

Applying the above criteria to the "Newport (Empire State of Mind)" parody, it is suggested that the exception would not, on balance, apply to it:

- While a substantial part of the lyrics was probably not used, all of the musical work was. The use of the music was commercial, because it was created to promote the stars of the video. The dominant impression was humour or spoof. The music was not transformed in any way. The music was not used as part of a commentary or criticism. There was no need to use this work; any number of songs could have been used to mock Newport. All or a very large part of the music was taken but there was no comment or critique in the lyrics to justify that taking. It is suggested that it may have been different if the music was taken to comment on New York itself, for example as part of a political protest.
- We accept that an argument could be made the other way, that the exception would apply to it. The definition of parody used in the Consultation was arguably met, as there was a comic repositioning of the original. The commercial use was inevitable and was directly related to the success of the

parody, rather than promoting a third party e.g. a brand or Newport itself. The lyrics were heavily transformed and the use of the music was bound up in that transformation. There was commentary, by way of deliberate exaggeration, on the regard in which Jay-Z, Alicia Keys and, potentially even, New York itself have for the city. This work was one of the best examples of that attitude. There would be no or little substitute because it targets different markets. Only the music was used and all of it had to be used otherwise it would not be possible to transform the lyrics in an effective way.

This discussion demonstrates the difficulties that rights owners, parodists, their advisers and courts would have in applying any parody exception. This difficulty should be borne in mind when assessing the benefits of introducing the exception.

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

Our response to Question 82 sets out our view that, while fair dealing does have a key role to play, it should be supplemented by other, more context-specific, considerations which would help to minimise the negative impacts to copyright owners.

The considerations discussed in Question 82 in part take their inspiration from the considerations currently considered in the fair dealing exceptions in Section 30 CDPA, as expounded in cases such as *ProSieben*. However, the US experience suggests that parodies raise context-specific concerns not raised, or raised to a different extent, not raised in other applications of the US fair use test. The concepts of parody, caricature and pastiche are also broader terms and harder to define than terms in the existing fair dealing defences (e.g. “criticism and review”). It would therefore promote certainty and predictability to include explicit references to particular characteristics a parodist should demonstrate to take advantage of the exception.

In any event, it is suggested that over-reliance on the fair dealing criteria as interpreted in existing UK case law might not withstand scrutiny from the CJEU. To the extent that the Copyright Directive defences are to be interpreted by the CJEU in a harmonised way, the freedom of the UK courts to rely on their previous fair dealing jurisprudence may be limited and, instead, UK courts may be forced by the CJEU to refer more closely to the three-step test in Article 5(5) of the Copyright Directive. The criteria suggested could apply equally to three-step test analysis as they would the fair dealing analysis. It is noteworthy in this context that Mr Justice Arnold in his consideration of the criticism or review defence in *SAS Institute* [2010] EWHC1829 remarked that, “I should record that neither counsel addressed me on Article 5(3)5 of the Information Society Directive”. He, therefore, clearly believes that UK defences have to be interpreted in light of the Directive.

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

1. Section 62 – Use of works located permanently in public places

7.228 and 7.229 Use of works located permanently in public places

Section 62 CDPA provides an exception that allows the copying of buildings, models for buildings, sculptures and works of artistic craftsmanship permanently situated in public places.

As presently drafted the wording of s62(2) states that it is the copyright "in such a work" (i.e. the work of architecture, or other artistic work, itself) that is not infringed. This limits the scope of the s62 exception so that copyright in the architect's or artist's original drawings of a building or sculpture may still be infringed when someone, for example, takes a photograph of the building or sculpture (one of the acts permitted by s62). We doubt that this limitation is intended, i.e. s62 presumably aims to provide an exemption for all relevant copyrights.

For this reason we propose that s62(2) extend beyond "such a work" to any underlying artistic work (such as a drawing), to remove the quirk in the current drafting.

2. **Section 63 – Sale of artistic works – Question 101**

Limits on section 63

Section 63 CDPA provides an exception that allows copies of artistic works to be made for the purpose of advertising the sale of the work. The exception is useful for auction houses, for example, who can use it to make and publish copies of a painting in a sales catalogue to advertise its availability for sale.

As presently drafted, s63 does not (at least expressly) allow communication to the public of the copied work, which means that reproducing copies of the artistic work for sale on the internet without authorisation from the copyright holder might infringe copyright even though other forms of advertising (such as posters) do not. That distinction seems illogical in a world where media spend is increasingly diverting away from traditional media in favour of on-line advertising. We therefore agree with an exception which is "media neutral".

Artistic works versus all works / fair dealing

As currently drafted, s63 only relates to artistic works. There is no reason in principle why it should not be extended to cover other kinds of copyright works.

Paragraph 7.215 gives an example of a type of activity that would be included under the s63 exception, if it were extended to cover the internet: "This could legitimise, for example, the use of images of second-hand books being offered for sale on the internet". However, although an illustration (for example) from a book would fall under the exception as an artistic work, a reprographic image of pages from a book may not be covered by s63 and might rather infringe, for example, s17(2) CDPA as an unauthorised copy of a literary work and s17(5) CDPA as an unauthorised copy of a typographical arrangement.

However, we would not favour extending s63 to copyright works such as sound recordings, at least unless the section were brought within the express ambit of fair dealing. (The section already has safeguards against the further use of copies, but these are hard to police in the digital era.) For example, the Act should not in our view permit the owner of a music CD to upload all of

the sound recordings on it under the pretext of advertising a sale of the physical CD, since that would facilitate infringement and interfere too severely with rightsholders' interests.

Sellers and exhibitors will usually have an incentive to adopt appropriate measures to obtain, respectively, maximum value from the sale of the work or maximum attendance at their exhibition (such as watermarked or low-quality images), which would not substitute for buying or licensing the original work. However, private individuals selling on sites such as eBay may not have the ability to use these measures.

We therefore agree that a broader exception should be made expressly subject to fair dealing criteria.

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

We would not be in favour of a prohibition on contractual override of the exceptions, especially for works in digital form.

The copyright exceptions date back to a time before the widespread availability of works in digital form and before the corresponding rise in piracy and other forms of infringement. Whilst a library's ability to allow its users to copy from physical books may have minimal impact on rightsholders, the same cannot be said for freeing up digital copying from digital copies of works.

Prohibiting contractual override would not provide a straightforward solution to the perceived difficulty of managing a large number of different contracts, since many exceptions involve case-by-case interpretation (e.g. the fair dealing exceptions). This issue can be addressed in other ways such as:

- certified licensing schemes under the CDPA;
- consortium-type contracts such as those negotiated by JISC;
- other multi-rightsholder contracts such as the licences granted by the Copyright Licensing Agency on behalf of numerous publishers; and
- the proposed Digital Copyright Exchange.

Competition law also provides a route to object to abusive licence terms (as does the Copyright Tribunal for issues within its remit).

The advantages of allowing copyright exceptions to be overridden by contracts, as a quid pro quo for access to a work (particularly in digital form) include:

For rightsholders:

- It helps protect against piracy and other forms of hard-to-police infringement. If a licensee could not be restricted from making an exempted copy, rightsholders would usually have no way of guarding against further, non-exempted copies. This has a knock-on effect on both creativity and price i.e. if rightsholders have to factor in uncontrolled copying, they will be more likely to increase prices and may be less likely to make valuable works available digitally.
- It enables rightsholders to charge users in a uniform way for a digital package of services (such as access to the work, ability to search, ability to print, ability

to cut and paste, links to other content) without having to carve out exempted acts.

- It gives rightsholders the flexibility to adopt differentiated business models (e.g. paying authors and charging users on different bases for different kinds of uses, such as downloads versus streaming), without having to factor in exempted copying in a form different from the specific one permitted by the contract. Again, this has a knock-on effect on price.

For users:

- Far greater certainty (see above – prohibiting contractual override does not get around the need to interpret the law).
- Simpler pricing structures (see above).
- More choice between business models (see above).

If the Government is minded to prohibit contractual override, then we recommend that the legislation address the following issues:

- Confirmation that obligations of confidence can still override the exceptions (since many kinds of information are made available under terms of confidence).
- Whether rightsholders can still use DRM and other technical protection measures (e.g. unique passwords to ensure that only one user accesses the licensed content).
- Whether the prohibition would be a "rule of the forum" such that even non-UK law governed contracts would have to comply with it.

Copyright clarification and notices

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

The Hargreaves Review confirmed that understanding of copyright law is poor. In other words, even areas that are legally clear are not well understood by the general public, nor often by SMEs. As the consultation paper acknowledges, many questions already being put to the IPO are not about "problem areas" but rather basic questions about copyright law. As lawyers practising in the field of intellectual property, we see clients encountering problems because of common errors. For example, these are often around securing ownership (e.g. where they commission external contractors) or adequacy of contractual rights of use. In our view, the IPO could serve a useful function simply by providing more communication about the basics of copyright law as it works in practice across different sectors, in terms and in a manner tailored to non experts. Much of this would not involve "problem areas" at all, but would help reduce confusion due to lack of basic knowledge.

We have looked at the websites of other bodies involved in copyright matters, including the US Copyright Office. Although the US system is very different due to the US copyright registration system, we found the FAQ section at <http://www.copyright.gov/help/faq/> approachable. We believe that the IPO website could be made more useful to non professionals by some simplification of design and by some rewriting of the content to make it more applied and a little less "legal".

In our view, improving basic levels of knowledge about copyright is likely to produce better results than simply focusing on areas identified by some as "problems" or

which are controversial. In our view, the greater need is for the IPO to focus on enhancing the basic guidance it already provides.

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

Increased awareness should assist all right owners and users and reduce the level of unnecessary disputes.

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

We represent IP lawyers, most of whom have fairly regular experience of copyright disputes. Many of these disputes will settle (often quickly) based on legal advice as to merits and options for resolving. Where disputes are fought, costs vary substantially depending on subject matter and complexity. Features of complex cases include:

- Complexity in the history of creation and ownership, e.g. for works with multiple contributing authors and chains of title that may not have been documented as clearly as lawyers would wish
- Non literal copying / borderline copying of a substantial part
- Underlying legal uncertainty. This is often on topics resulting from partial harmonisation of copyright law. For example, the following topics are examples of issues which have been or are the subject of recent references to the CJEU:
 - Meaning of "communication to the public"(see e.g. cases C-393/09, C-135/10, C-162/10, C403/08, C-429/08, C-283/10)
 - Scope of protection for databases following the Database Directive (see e.g. case C-604/10)
 - Whether exhaustion overrides express contractual terms in licences relating to software and other digital content (see case C-128/11)
 - Scope of protection for software (see e.g. case C-406/10)

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

We are concerned about how "problem areas" would be identified and the evidentiary basis on which the guidance would be provided. Developments in technology, culture and means of exploitation regularly raise new questions, or old questions in new lights. Many of these questions require careful consideration, and (as the consultation paper acknowledges) the answer will often be fact and context sensitive. Also, how copyright is applied in practice varies enormously between different sectors – even lawyers practising in the field typically do not profess applied expertise across all sectors that rely on copyright.

In our view, the IPO should not provide guidance on areas that are identified by some as "problem areas" without full prior and rigorous consultation with all categories of affected right owners as well as users. This should cover:

- whether there is in fact any problem (or just a misunderstanding or lack of knowledge as to the law)
- what solutions already exist for addressing the perceived problem
- the nature of the problem – this might range from uncertainty about an area of copyright law which is subject to EU harmonisation to recent changes in technology which may require time for licensing solutions to be developed and
- any consensus about how to address the issue.

Full consultation before any guidance or interpretation is provided would be entirely consistent with IPO's commitment to evidence based policy making. We anticipate that in many cases, the IPO would conclude that the "problem" is not one requiring legal interpretation or guidance at all (other than perhaps through the general copyright information section of its website).

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

We assume the IPO does not need to formalise arrangements for the important role we hope the IPO can play in improving knowledge of basic copyright law and practice. When it comes to consulting on alleged "problem areas" we suggest the IPO should formalise and publish best practice to ensure that it consults with interested parties who wish to engage in the discussion.

Since we anticipate that a number of alleged "problem areas" would prove not suitable for IPO interpretation or guidance (as opposed, in particular, to the provision of information), we do not see a need to make formal arrangements for notices at this time.

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

We recommend prioritising an overhaul of the IPO website in relation to copyright to increase its usefulness.

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

n/a

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

In our view, there is an important need for the interests of UK copyright-based industries, as well as users, to be well represented by the UK Government (including the IPO) on the European and international stage. Increasingly, UK domestic copyright law is informed by EU (and international) legislation, and the CJEU is increasingly shaping European copyright law in cases referred to it by the member

states. It is critical to preserving the UK's leadership role in many of the creative sectors in Europe that UK government representatives involved in European, international and domestic copyright reform understand copyright in an applied sense so that they can appreciate potential consequences of proposed legal reforms.

This is not to argue for an over-broad copyright law nor to say that current copyright law is perfect in all respects – it is not. Rather the need is to ensure that EU, international or domestic adjustments to the copyright system in response to new technologies and new means of exploitation are evidence based and broadly consulted on, and do not cause unnecessary negative impact on those UK industry sectors that rely on copyright.

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

In this area, there are already various options, including the Patents County Court and its small claims service, numerous IP mediators, and the possibility of getting an opinion from counsel. Because the IPO does not provide expert services in this area in the same way as it does for patents, registered trademarks and registered designs, we think the case for its offering such a service is weaker than for the rights which it is involved in granting. On balance, we are unconvinced about the need for, or benefits of, such a service.

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

n/a

114. **Which would you find more useful: general Notices on the interpretation of the law (free) or advice on your specific dispute**

See above. We favour a more approachable, user friendly and enriched copyright section to the IPO website.

CLLS would welcome the opportunity to comment on any detailed proposals, once published by the Commission and would ask to be consulted.

Other points for consideration

Access to Legal Advice by SMEs and individuals

One issue which is not referred to in the Consultation questions but which is relevant to the availability of legal advice around copyright and perhaps to the idea of Copyright Notices is the regulatory environment within which solicitors work. This is an issue which may not have been touched on simply because the government is unaware of it but it has a real impact on smaller companies seeking advice.

The largest body of professionals advising on copyright matters is solicitors, though to some extent trade mark agents and patent agents advise on this area as well. Solicitors are subject to the Solicitors Regulatory Authority Code of Conduct, its Accounts Rules and also the Money Laundering Regulations 2007 as “independent legal professionals”. Carrying out the necessary checks and procedures to ensure

compliance with these obligations when taking on a new client is a significant administrative overhead.

While it is not the intent of this submission to make representations as to the rights or wrongs of the current regulatory regime, we believe it is important for the government to be aware that the regime's practical effect is that it is increasingly common for solicitors to turn away work from new clients below a certain value. It is often simply not worth the cost and time of going through the Money Laundering Regulations process, particularly when combined with the potential for creating conflicts of interest that acting for any new client may give rise to. Inevitably it is smaller companies which suffer the effects of this and it has a knock-on effect on the rationale for the copyright reforms. If, for example, small claims tracks for dispute resolution are to succeed, parties must be able to access legal advice.

We consider this an area which the Government should consider in detail. It is possible that some checks are being carried out unnecessarily, through a sense of caution. If in fact a clarification of the applicable rules and principles could be promulgated which indicated that certain types of works were not caught by some aspect of the current regulatory regime then that might assist smaller companies seeking advice as well as those best able to advise them.

We are not able to comment on the degree to which patent and trade mark agents regard themselves as also subject to the Money Laundering Regulations as, while the definition of "independent legal professionals" in those Regulations would suggest they are for some types of work, the IPReg Code of Conduct simply states that persons subject to it should be "aware of "money laundering" legislation" (IPReg Rule 11.3), and anecdotal evidence suggests they do not typically carry out the same checks. It would seem sensible for all professionals advising on similar areas to be regulated in the same way.

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