CONSULTATION ON COPYRIGHT

RESPONSE FROM THE ALLIANCE AGAINST IP THEFT

1. INTRODUCTION

The Alliance Against Intellectual Property (IP) Theft welcomes the opportunity to respond to the Intellectual Property Office (IPO) Consultation on Copyright which outlines how the Government intends to progress the main copyright recommendations from the Hargreaves Review.

We support and echo the Government's comments in its original response to the Hargreaves Review that "Britain's future depends on harnessing knowledge and ideas to their full potential" and that "IP's contribution to the UK's economy is…both substantial and vital"[1]. In its deliberations we urge the Government to bear in mind the following:

- IP industries are a great British business and cultural success story.
- IP is essential to the creative industries which support around 1.5m jobs, contribute over £36 billion to UK Gross Valued Added (GVA) (DCMS Creative Industries Economic Estimates) and "makes a substantial contribution to UK export figures"[2].
- IP is also the basis for the £16 billion which companies invest annually in the UK economy by building brands, and allows the UK's brand-building industries (including advertising, marketing and design agencies) to generate around £1 billion in GVA through exports alone.
- Brand manufacturing still accounts for 14% of UK manufacturing and over £50billion of gross output.
- The design industry employs up to 350,000 people and UK businesses spend around £35 billion on design each year[3].
- It is people's desire for IP-rich content that will drive demand for broadband and the online economy
- Ensuring that IP rights are valued, protected, and enforced, providing businesses and investors with the requisite certainty to invest in the creative industries, will drive growth and employment.
- Fair, accessible and easy-to-understand licensing is the best way for consumers to use and enjoy creative works, and the best way for creative industries to monetise their work and develop successful businesses.

Technology companies and creative industries are sometimes portrayed as having contrary interests when it comes to the legal protections afforded to creativity. This is wrong: they have a shared interest in ensuring that creativity is protected by the law. Without this protection, creative industries will not grow. Without creativity to search for, transmit and deliver, technology companies will not grow.

The Government recognises this with its stated desire being to create the best conditions to encourage innovation and growth. However, the Alliance believes that a number of the recommendations made by Professor Hargreaves, and subsequently accepted by the Government, will not achieve these aims, particularly as the assumptions in the Hargreaves Report as to the economic growth and other benefits they will bring are flawed. We explain why below:

[1] http://www.ipo.gov.uk/ipresponse-full.pdf
[2] http://www.bis.gov.uk/assets/biscore/economics-and-statistics/docs/u/10-803-uk-trade-performance-growth-patterns
[3] http://www.ipo.gov.uk/ipresearch-designsreport1-201109.pdf

1. There are ongoing proposals to establish a voluntary Digital Copyright Exchange (DCE) with an initial feasibility study looking at the "options for developing a functional digital market in rights clearance and a source of information about rights ownership"[4]. It is therefore surprising that this is neither referenced, nor it appears taken into account, in the Copyright Consultation recommendations. A voluntary DCE has the potential to deliver a number of the benefits that the proposals in the Government paper refer to, rendering this proposed level of regulatory intervention unnecessary. Its role in driving growth and innovation may be significant and Alliance members across the different industry sectors are engaging with Richard Hooper and his team; exploring how such a concept could be transformed into reality.

2. The terms of reference of the original review were based on a flawed premise. As it started with the assumption that there was 'something' in the IP system restricting innovation and growth, the Review's subsequent focus was limited only to consideration of IP law. As we commented in our submission to the Hargreaves Review, the terms of reference did not consider or investigate other contributing factors to a lack of innovation including access to finance, employment practices, tax incentives, skills or attitudes to business risk. Moreover, Google's own research which contributed to the call for evidence found that "only a minority of those surveyed [500 SME's] were against the current [copyright] laws, with 7% thinking that copyright laws are a barrier to their business innovating, 5% thinking their business does not perform as well as it could because of the current laws, and 4% considering moving their business overseas because of the laws"[5]. Such results are a far cry from demonstrating a significant demand for changes to the current copyright licensing framework.

3. The economic analysis undertaken by the Hargreaves Review, on which this consultation's recommendations are based upon, is fundamentally flawed, with many of the assumptions contained within the impact assessments of the consultation incorrect. Any policy proposals based on this evidence will lead to imperfect and risky outcomes and will be economically damaging to the UK. We strongly recommend that further independent research and analysis be conducted before any policy directions are advanced.

4. The British creative industries are world leaders and this innovation and creativity needs to be rewarded. We urge the Government not to adopt proposals which will radically alter where the value and ownership of intellectual property lies and do little or nothing to deliver genuine and sustained economic growth in the UK.

We also remain concerned at the continuing perception that copyright is regulation and, therefore, moves to 'free up copyright' somehow fits with the Government's stated goal of reducing regulation. Copyright is not a regulation but is a property right and described as such in Section 1 of the Copyright, Designs and Patents Act 1988. Therefore, the proposed changes to copyright law will create regulation not diminish it.

[4] http://www.ipo.gov.uk/types/hargreaves/hargreaves-copyright/hargreaves-copyright-dce/hargreaves-copyright-dce-terms.htm
[5] http://www.ipo.gov.uk/ipreview-c4e-sub-googlereport.pdf

2. THE ROLE OF THE UK IP FRAMEWORK IN SUPPORTING GROWTH AND INNOVATION

The UK IP framework has proved excellent at supporting innovation and delivering growth. It has an in-built flexibility which has delivered significant growth over the past 15 years, is highly accessible and, crucially, business-model neutral – allowing for and accommodating developments in technology and consumer behaviour. It has allowed established companies to transform their businesses online, delivering further economic growth and enhancing their offer to consumers.

In addition, the Work Foundation's report, *A Creative Block?*, cites research from Frontier Economics which shows that, contrary to popular belief, there has been strong growth from start-ups in UK creative industries – further evidence of how the UK copyright framework has been supporting growth and innovation. It found that between 1995 and 2005 start ups in the creative industries contributed £31.8 billion of the £66.4 billion total turnover growth for the creative industries.[6]

A further, very tangible, example of how IP has supported growth and innovation can be seen in the numerous innovation hubs around the UK. Far from the UK failing to develop an equivalent of Silicon Valley, there are actually a number of areas where like-minded industries have come together, from Soho in London, home to world-leading businesses in video and film post-production facilitated by investment in a super-fast broadband network, to Dundee in Scotland where computer software developers have coalesced and Cambridge, home to world-leading technology companies. Nesta's report '*Creative clusters and innovation: Putting creativity on the map'* also shows how, far from innovation being stifled, digitisation is driving, organically and under the existing framework, significant innovation in the creative industries[7]. In fact, the creative industries overall display levels of innovation above the national average for all indicators.

3. RECOMMENDATIONS TO DELIVER GROWTH

Difficulties faced by rightsholders in protecting their intellectual property have a direct impact on economic growth and innovation. The European Commission's recent examination of the implementation and application of the EU Enforcement Directive found that, "proper protection of IP rights is fundamental to stimulate innovation and culture in a competitive, wealth-generating, knowledge-based economy"[8]. The inability to protect IP rights and the investment which sits alongside them, whether involving physical goods or online activities, damages legitimate sales, lowers governments' tax revenues, hurts jobs in upstream and downstream industries and damages innovation and competitiveness.

A number of studies attempt to quantify the economic loss to industry and the UK economy from IP infringement. These include:

- A report by TERA which estimated that in 2008 the UK lost €1.4 billion and 39,000 jobs in the film, TV, music and software industries from digital copyright infringement.
- Frontier Economics' report 'Impact of Counterfeiting on Governments and Consumers' conservatively estimated that counterfeiting costs the UK:
    - €4.1 billion in lost taxes and higher welfare spending
    - 380,000 jobs destroyed, with 31,000 unlikely to be able to find new jobs: and
    - €1.7 billion for every 1% increase in crime caused by counterfeiting.

[6] http://www.theworkfoundation.com/assets/docs/publications/277_A%20creative%20block.pdf
[7] http://www.nesta.org.uk/library/documents/Creative-Clusters-29Nov.pdf
[8] http://ec.europa.eu/internal_market/consultations/2011/intellectual_property_rights_en.htm

- 2009 research by Oxford Economics into film piracy found that a series of legislative changes would increase economic output by £614 million, protected the jobs of many thousands of people employed in the film industry, as well as create some 7,900 jobs in the wider economy.

One of the genuinely surprising – and hugely disappointing – features of the Hargreaves conclusions was the reluctance to recognise the obvious harm that intellectual property infringement causes to the UK, particularly given that clamping down on infringement in the UK directly benefits UK business, British jobs and the UK Exchequer. It is highly unclear whether the recommendations espoused by Professor Hargreaves, which form the backbone of the consultation document, would benefit UK businesses in quite the same way. For example, innovative UK companies are often brought by foreign companies (Bebo was brought by AOL, Lovefilm by Amazon and Seesaw by US investment firm Criterion Capital Partners). In addition, there is no guarantee that any new businesses benefiting from such a transfer of benefit away from the UK creative industries will even be based in the UK in the first place.

Therefore, we recommend the Government:

Improve the consistency and effectiveness of IP rights enforcement in the UK

- End the struggles faced by designers in the case of wholesale copying of their creativity by giving legal parity to unregistered design rights, including introducing similar criminal provisions as exist for copyright.
- Consult on appropriate measures to protect brands from misappropriation.
- Make damages awards against those who deliberately steal another's creativity a real deterrent.
- Ensure that criminal penalties for all forms of creative theft (trade mark and copyright) are evenly applied so that it is clear that such theft is serious and will be punished accordingly.
- Ensure that the criminal law makes it clear that cyberspace is not a hiding place when it comes to stealing creativity: stealing creativity over the internet will be punished as severely as stealing it in the real world.
- Ensure that money recovered from criminal cases brought against creativity thieves is given to investigators and prosecutors to fund further such cases.

Ensure IP rights can be protected and enforced online

- Encourage all stakeholders (IP rights owners, ISPs, search engines and other intermediaries) in the internet and web economy to work together to ensure legitimate businesses and consumers do not suffer at the hands of illegal sites and services.
- Educate consumers who are sharing illegal content on P2P networks by implementing the relevant provisions of the Digital Economy Act.
- Set out a clear public statement that the voluntary process relating to site blocking, search engine responsibility, digital advertising and payment providers must produce cross-industry agreement, or legislative steps will be taken.
- Ensure that online IP crime policy is dealt with nationally and coordinated centrally and feeds into the Government's plans for organised crime and cyber crime, thereby creating a coherent strategy for dealing with all criminality on the Internet.
- Establish a dedicated online crime unit with investigatory and operational powers sitting within an appropriate law enforcement agency.

4. PROPOSED REFORM TO COPYRIGHT LAW

The Alliance does not believe that there needs to be any wholesale changes to the current system of exceptions in order to deliver growth. However, we recognise that some reform might be necessary to reflect changes in technology and members of the Alliance welcome the adoption of licensing solutions to support innovation. For example, rightsholders have recommended changes to support the use of whiteboards on the premises of educational establishments and an ability for off-air recordings of broadcasts to be accessed by educational users whether studying on the premises of their educational establishment or working from elsewhere. All of this can be accommodated within the current copyright framework, negating the need for radical change.

A number of copyright exceptions already exist which play an important role in balancing societal needs with commercial interests, but the proposals in the Consultation seem predicated on the mistaken view that licensing is a cost to business.

It must be remembered that any introduction of new or the widening of the existing exceptions regime will not automatically deliver better business benefits that the adoption of flexible licensing solutions. Nor should there be an inherent presumption that the exceptions should be made at the expense of the legitimate interest of rights holders. It is vital that all exceptions continue to be measured against, and comply with, the "Berne 3 step test" (that is that exceptions to copyright should only apply in special cases, would not conflict with the normal exploitation of a work, and should not unreasonably affect the copyright holder's interests). The EU Copyright Directive[9] requires that any exceptions implemented pursuant to its terms must comply with this test, which means that any exceptions implemented by the UK Government must comply with this test. Often this can only be achieved if the exceptions are subject to displacement by the existence of an appropriate licensing scheme - as is the case with the educational exceptions (and elsewhere) in the 1988 Act.

It is important that any introduction or widening of copyright exceptions are properly considered and that the benefits which might be derived are very carefully evaluated, given the potential economic loss, disruption and cost to licensing for rightsholders. Any broader confusion and litigation costs should be factored into such an assessment if the scope of the proposed changes is in any way unclear. Exceptions need to remain just that – exceptions to the rule, adopted in special circumstances where no provision is already made by the market, as opposed to becoming the rule themselves.

5. CRITIQUE BY OXFORD ECONOMICS OF THE COPYRIGHT CONSULTATION

We respectfully draw the Government's attention to the report conducted by Oxford Economics on the Copyright Consultation and accompanying Economic Impact Assessments (IAs). This was commissioned by the Alliance given our concern that the Government has based its policy decisions on inaccurate and flawed economic evidence and analysis.

Oxford Economics identifies three main issues which, in its view, provide serious questions that need to be asked of the proposed recommendations:

1. A balanced economic framework must take into account the interests of both the users of goods and services (the "consumer") and the producers of goods and services (the "producer"). Oxford Economics identifies that while much attention has been spent understanding and quantifying consumer surplus (the benefit those who use the good or service derive from it), little effort has

[9] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML

been put into a similar understanding and evaluation of producer surplus. It has mistakenly been assumed that taking from the producer and giving to the user a) does not affect the producer surplus and the economic 'benefit' this contributes and b) will automatically lead to an increase in economic output. It has not been taken into account that an increase in consumer surplus may not lead to increased economic activity.

2. There is a distinct lack of neutrality in the application of the IAs with the tone and emphasis of the Consultation appearing strongly inclined to overturning the existing status quo. Oxford Economics acknowledges that while arguments in favour of changing existing legislation are often given lengthy consideration, arguments for the preservation of the status quo are typically given only short discussion. There is no intrinsic reason why this should be the case which leads to serious questions over the neutrality of the Consultation exercise. If the economic benefits and costs cannot be quantified or justified for policy reasons then any proposal should be in favour or retaining the status quo.

3. Connected to the above point, is the assumption that the current framework is somehow economically inefficient. In fact, this appears to be the starting point of the Consultation and, according to Oxford Economics, is a fundamental flaw. The fact that the economic inefficiency of current copyright law is *presumed* as opposed to *demonstrated* led to inaccurate assumptions being applied.

6. RESPONSE TO SPECIFIC PROPOSALS ON COPYRIGHT EXCEPTIONS

While individual Alliance members will be responding in detail to the questions posed in the document, the Alliance has the following points to make in relation to some of the proposals.

A) PRIVATE COPYING

a) Overview

The Hargreaves Review drew attention to the fact that most people are routinely transferring the content of their CDs onto portable devices – something which is technically unlawful in most instances. While this has never been a 'real world' problem – in that no-one has ever had legal action taken against them for such an act – we acknowledge that having a law in place which no-one abides by is not an ideal state of affairs (although the level of which this activity is prevalent across non-music content is unclear, and not examined in any great detail in either the Consultation document or the IA).

In addition, the proposal to apply such an exception to all types of content has the potential to severely impact other sectors such as the visual art market[10].

The Alliance has made this observation previously but will make it again: it is very concerned that a niche issue associated with the use of music by consumers is driving policy across a broad range of unrelated interests, with little or no consideration as to the impact such a policy will have.

b) Assessment by Oxford Economics

Oxford Economics raises serious questions over the evidence contained in the IA around pricing and its relation to consumer need and innovation, given that one is able, in pretty much any market and for any commodity, argue that the price is too high. Instead, what is important, argues Oxford Economics, is whether prices are efficient and producer and consumer surpluses maximised.

[10] For example, the introduction of this exception may legitimise the scanning of a postcard and its subsequent enlargement to poster size for wall display.

Other flaws highlighted by Oxford Economics:

- **Assumption of GDP gains**. Oxford Economics points out that the emphasis the Consultation places on the benefits a private copying exception may bring to new business opportunities should be treated with considerable caution as it is entirely possible that the great majority of benefit from relaxed legislation will simply accrue to recreational uses rather than spurring innovation.
- **Foreign v national benefits**. Oxford Economics pick up on the fact that no allowance appears to have been made for the fact that innovative UK companies may simply be bought up by American or other entities, meaning that the level of human and physical capital staying in the UK is a moot point.

c) Proposed solution

Where Hargreaves sees the solution purely in the heavy hand of regulation, we submit that a better solution is found in greater transparency and licensing agreements.

Licences now exist which allow content to be legally format shifted across a variety of devices, offering consumers ever greater choice and convenience. This can be seen, for example, in the inbuilt licence to copy content onto ten devices which exists with purchases of music on iTunes, the ability to transfer onto an unlimited amount of devices with music purchases from Amazon and in the subscription models of streaming services such as Spotify where accounts can be accessed across different devices.

Such innovations are also seen in the film/TV and video market. The advent of double and triple play, where consumers can purchase the DVD and Blu-ray and the DVD, Blu-ray and digital file of a film (alongside the numerous video on demand and digital home rental services), gives consumers unprecedented choice in the video entertainment market. Crucially, it creates a market structure where people only have to pay for the level of access and flexibility they desire.

The introduction this year of UltraViolet[11] has taken this choice and access to another level again. UltraViolet is a digital locker service which allows a user to access his or her content how, where and whenever he or she wants to, including downloading or streaming content on up to 12 devices. A user can also share access to that content with up to 6 members of his / her household. UltraViolet-enabled content has already been released in the UK.

Given the developments underway, driven by consumer demand and commercial market forces, we strongly question the value of, and need for, Government regulatory intervention which could, in fact, distort the market and lead to less choice, higher prices and reduced quality for consumers.

B) RESEARCH AND PRIVATE STUDY

a) Overview

The Consultation is recommending extending the current 'fair dealing' exception applying to literary, dramatic, musical or artistic works to include sound recordings, films and broadcasts.

The Alliance is concerned about extending this exception in this manner. We believe that given the high quality of film and sound recordings such an extension would bring with it the opportunity for misuse.

[11] www.uvvu.com

In addition, we are confused with the expressed justification that "obtaining permission can be an expensive and time-consuming process especially if the copyright holder is hard to trace or does not respond to a request" (7.70). Even if this is true, a specific, stated, objective of the proposed Digital Copyright Exchange is to make it easier for people to find out who owns what content. This nullifies the need to expand this exception.

b) Assessment by Oxford Economics

The Consultation appears to rationalise the need for change by pointing to technological changes and undefined 'missed opportunities'. Oxford Economics rightly questions this assumption as it is not supported by any evidence. In fact, as their report states, "the fundamental rationales for copyright remain unchanged and simply citing that other industries "miss out" due to existing arrangements does not provide an adequate reason for change". Fundamentally, according to Oxford Economics, evidence that existing arrangements are inefficient is a prerequisite in order to recommend that change is required. Such evidence is absent.

Other issues highlighted by Oxford Economics:

- **Openness to abuse**. Oxford Economics highlights the lack of attention the Consultation gives to the potential for this proposal to be abused. Piracy is a huge problem and remains very prevalent, therefore one might have expected the effect on piracy rates of widening this exception to have been explored and factored into the IA. However, it was only dealt with in passing and no attempt made to calculate the cost of preventing such abuse.
- **Consumer and producer surplus**. Again, while this proposal may result in an increase in consumer surplus it is unclear a) whether this will find its way back into the economy via commercial pursuits and b) how much of this will come at the expense of producer surplus. This calls into question the benefit to GDP predicted in the Consultation.

c) Proposed solution

The Alliance believes that existing provisions satisfy current demand from educational establishments, libraries and archives. Allowing what could equate to unlimited access to high value content of a significant entertainment nature via a right to private study, with the accompanying difficulties in monitoring its lawful application, runs the risk of creating significant opportunity for infringing activity with little in the way of safeguards to protect against this.

C) TEXT AND DATA MINING FOR RESEARCH

a) Overview

As with a number of the proposed amendments to the system of copyright exceptions, the recommendation to introduce an exception to allow for non-commercial text and data mining (TDM) ignores developments in the market.

It also appears to have stemmed from a lack of understanding as to how TDM works, and why licensing is required to manage the relationship between publishers and content miners. This proposal ignores the significant investment made by the publishing community in technology and infrastructure to support this activity and does not take account of risks or "costs" associated with this proposal:

1. At present, publishers can manage access to their content platforms and ensure that their technical integrity is not threatened. An exception would remove this ability, lead to unmanaged access for mining programmes and risk platforms crashing.
2. The current approach of managed access also allows publishers to verify the credentials of would-be miners and ensure that they are not intending to copy works for a competing commercial use and that they are, in fact, genuine researchers. As the Publishing Research

Consortium (PRC) into Journal Article Mining found, over 90% of publisher respondents report that they grant research-focused mining requests[12]. Should an exception be introduced, such verification would be resisted leaving vast amount of copyright material susceptible to widespread infringement thereby creating new enforcement issues.

3. In addition, the UK would be embarking on a course of direction which is at odds with other EU member states. This could have an adverse impact on the desire of publishers to publish research based on contracts written under UK law, given the technical and commercial risks to which their work would be exposed. More concerning though, to avoid the huge risks outlined, rightsholder may end up choosing to forgo the UK market altogether, thereby depriving UK users of access to valuable content.
4. As responses from the Publishers Association and the Publishers Licensing Society make clear, an exception for text and data mining could undermine the primary market in journal articles. Mining tools could be used and applied to whole articles, allowing third parties to reconstruct whole articles with a handful of searches. These could then be made available to a wider audience under the existing research and private study exception. The incentive for existing readers to subscribe to journals would disappear because the technology would enable them to get all the content they required in a matter of seconds, and all without payment to rights holders. This would obviously cause serious damage to UK (academic) publishers who generate over £1bn in turnover for the UK economy.
5. Far from restricting the use of new technologies for scientific research, publishers are at the very heart of text and data mining development and actively trying to facilitate this. Indeed publishers are already competing with each other to offer productivity enhancing analytics and information tools to the UK research community to make consumption easier. Given that data and text mining will become increasingly part and parcel of the normal exploitation of scientific publications any proposed exception to allow it is unlikely to pass the three step test.

b) Assessment by Oxford Economics

As with a number of the other IAs, no net costing is provided for this exception, leading to a question as to why, given this, the Government's preferred option is one which would change the status quo.

c) Proposed solution

Licensing models which are highly sensitive to the needs of users are already in place and publishers strongly support those seeking to access data for research purpose. The Publishers Association cites a survey of publishers which found that 90% of respondents routinely permit content mining, with 60% doing so in all cases. Only 12% of requests are turned down, on the basis of questionable credentials of the applicant. Similarly, in response to researchers' frustrations, the industry is in the final stages of evolving a model TDM licence that individual publishers are able to adopt and adapt on a voluntary basis[13].

Publishers are also investing in the technology necessary to support TDM, such as converting content to a format which can be understood by mining tools and maintaining the platforms and providing on-going support to content miners. Understandably, they can and will only continue to do so if there is value in it for them.

This again casts doubt as to the value and need for regulatory intervention, particularly in light of the problems the introduction of an exception would create.

[12] www.publishingresearch.net

[13] www.stm-assoc.org/2012_03_15_Sample_Licence_Text_Data_Mining.pdf

D) USE OF WORKS FOR EDUCATION

a) Overview

The Government's proposals to remove or restrict licensing currently possible under s35 and s36 of the Copyright, Designs, and Patent Act would remove a vital income stream for authors, therefore removing the incentive to continue creating. This is particularly damaging as the Government is developing a new National Curriculum. All other suppliers of materials and products into schools receive payment, whether that is for pencils, notebooks, or tables and chairs. The Alliance does not see why suppliers of creative materials should be treated any different.

The IA refers to the educational "licensing scheme problem" and argues that, in the case of "time shift recordings of broadcasts", educational establishments "pay for the right to do acts that individuals are permitted to do freely by law".

This approach appears to ignore the reasons under which s35 of the Act was introduced. This was on the basis that an exception could only fairly be applied in the absence of rights owners electing to put a licence scheme in place.

The options in the IA suggest that "allowing" for an exception for educational establishments to "time shift" recordings of broadcasts should be introduced, whilst recognising that "storage" of such recordings for educational use will still need a licence from copyright owners.

This approach will increase complexity about when a licence is needed and when an exception applies. In the last financial year all educational establishments across the UK (bar 195 primary and one secondary school) held an ERA licence. The new rules proposed would simply make the existing regime more complex and costly to administer for both rightsholders and users.

b) Assessment by Oxford Economics

The admissions made about the lack of evidence available to support the various options outlined in Impact Assessment BIS0317 on extending copyright exceptions for Educational Use are significant.

Responses from the CLA and the Educational Recording Agency will address this.

c) Proposed solution

As intimated above, the Government's proposals appear to have looked at the current licensing structure from the wrong approach. The Educational Recording Agency and the Copyright Licensing Agency (CLA) are both members of the Alliance and have set out in their respective responses the licensing and structural developments that have been or might be made which will support distance learning and whiteboard use opportunities. It is hoped that these recommendations, rather than removing or restricting the current licensing options, will prove to be the Government's chosen route forward.

In addition, rightsholders who are members of the Educational Recording Agency have proposed that s35, and the similar provisions relevant to performers (in Schedule 2), be changed so that the provisions or certified licence schemes operating under them allow educational establishment to make their libraries of off-air recordings (both audio and audio-visual) available to authorised pupils, teachers and researchers both on the premises of educational establishments and for off-site access.

These changes match the education market developments highlighted by the Hargreaves Review.

E) PARODY, CARICATURE AND PASTICHE

a) Overview

There is nothing inherently wrong with using parody to create new creative works so long as the original rightsholder receives appropriate acknowledgement and remuneration. In fact, the Government, in the Consultation, rightly acknowledges Britain's long and vibrant tradition of comedy and satire (7.100). However, we question the assertion that while British comedy and satire has moved with the times and taken advantage of new forms of expression, copyright law has not changed to reflect this; that "in a digital age, this means that parodists can often risk copyright infringement" (7.100). The definitions of, and therefore what constitutes, parody, caricature and pastiche are technology neutral.

We are also concerned that statements of belief have been presented as fact, such as the comment that "British parodists, professional and amateur, face obstacles those in other countries do not". (7.101).

Throughout the Hargreaves process advocates of such an exception have been able to point to only one example which, in their view, was a parody which fell foul of copyright law (Newport State of Mind, a *supposed* parody of the Alicia Keyes and Jay-Z track, Empire State of Mind). However, it is important to note that this would not be classed as a parody even if the Government introduced this exception. We are also constantly reminded of the existence of *The Daily Show with Jon Stewart*, as evidence that a parody exception is needed in the UK.

The impression this gives, totally erroneously we contend, is that in the UK, and British comedy programming, there is an absence of political and social satire. However, anyone who watches television knows that this cannot be further from the truth. How can it be that we have successful shows such as Have I got News for You, Mock the Week, and 10 O'clock Live if a parody exception is so critical?

Therefore, we have to question whether what is at issue here is the ease and administrative cost of getting a licence or simply a desire to avoid having to pay for using the content at all. The Impact Assessment (IA) states that "If the risks are judged to be too high and rights clearance too difficult, time-consuming or expensive, a parody work will not be released, or creators will simply not make the parody works in the place". First, this sweeping statement is not supported by any evidence that this is actually the case. Second, it ignores the fact that, if you are producing a commercial programme, paying for a licence to use or adapt copyright works are simply part of the cost of making the programme.

We also challenge the assumption that it is the role of UK law to intervene and legitimise activity which sees copyright taken and used commercially with no recompense going to the owner of that copyright. It is staggering that the Government is proposing to legitimise people using others' works for the purposes of parody while not having to "identify, seek permission from, or pay royalties to copyright owners whose works for the basis of the new parodies"[14].

The general rule must be that exceptions are only introduced where there is clear evidence of market failure or to protect legitimate societal needs, such as access for the disabled. Exceptions should not be used to avoid legitimate business expenses, such as ensuring the creator / owner of the content is either able to licence their work for parody thereby ensuring they share in its commercial success, or are able to exert their moral right and refuse its use for that purpose.

[14] http://www.ipo.gov.uk/consult-ia-bis1057.pdf

b) Assessment by Oxford Economics

In its analysis of the IA and accompanying Consultation, Oxford Economics has uncovered a number of flaws in the rationale behind the proposed change to parody law in the UK.

- **Lack of net costing and neutrality**. As outlined above, this is a theme which runs through all the IAs considered by Oxford Economics. Good economics would stipulate that if there is insufficient evidence to support changing the status quo, then the status quo should remain. This approach has not been followed in the Consultation forcing respondees in to the position of having to argue why change should not occur in the face of little or no evidence for the proposed change.
- **Assumptions of market size**. Having analysed the IA, Oxford Economics remain unclear how its authors arrived at the figures stated. In addition, Oxford Economics points out a conflation of the terms comedy and parody – parody simply being a subset of comedy while estimates have been based on the broader comedy market.
- **Assumption of commercial benefits**. Oxford Economics points out three elements that appear to either be absent in the Consultation's calculations or included erroneously:
    - Market saturation and diminishing returns;
    - The assumption that parody "travels well"; and
    - The balance between commercial and non-commercial benefits.
- **Externalities.** According to Oxford Economics, the proposed exception runs the risk of generating significant (negative) externalities which do not appear to have been adequately handled in the IA. These will affect the estimated benefits it is felt would be achieved with such an exception.

c) Proposed solution

In the absence of any evidence which indicates that the introduction of this exception will contribute to UK economic growth, any evidence which demonstrates that the current arrangements are holding back the development of parody in the UK, and given the potential for its misuse, we recommend that the status quo is maintained.

F) OTHER EXCEPTIONS PERMITTED BY EU LAW

The Consultation proposes a series of additional exceptions where currently licensing bodies exercise their discretion not to charge. The introduction and widening of exceptions in this area simply represent a transfer of value away from rightsholders and would have the effect of increasing confusion and the cost of licensing. Where licensing bodies are issuing licences for value, such exceptions would lead to harm and would be contrary to normal exploitation and in breach of the Berne Convention.

7. PROTECTING COPYRIGHT EXCEPTIONS FROM OVERRIDE BY CONTRACT

The Alliance does not support this proposal and believes it fails to understand the important role contracts play and the benefits that such contracts deliver – both to those who are party to the contract and ultimately to the end user. It also fundamentally misunderstands the nature of an "exception".

Should such a proposal be adopted, it would force rightsholder to have to take a maximum approach to licensing. By this we mean rightsholders would have to assume that the licensee intended to make full use of the exception available to them when in reality this may not be the case. Therefore, it could have the adverse effect of reducing the number of licences issued as many would find themselves priced out of the market. This would particularly impact small start ups who would find themselves unable to negotiate a competitive licence to use the content in a specific way.

We understand these views were articulated in a stakeholder meeting arranged by the IPO on 23rd February and received unanimous support and endorsement. We urge the government to take the outcome of this meeting into account in their deliberations.

8. COPYRIGHT NOTICES

The Consultation states that:

"*Government proposes to introduce a statutory obligation on the IPO to issue general Notices on areas where there is manifest confusion or misunderstanding on the scope and application of copyright law*". (8.21)

"*The Government's intention is for these Notices to become an authoritative source of copyright clarification which the Courts would take into account. They would not replace or amend either statute or case law*". (8.22)

If what is recommended here is for the IPO to have the obligation to issue factual legal clarifications then this indeed may be a useful function for them to undertake. However, it appears that what is being recommended goes far further than that, with it envisaged that the IPO become not just clarifiers of the law but interpreters of the law. If this is correct then the Alliance could not support the recommendation as it would blur the distinction between the judiciary and the legislature. While it is the role of government to frame and introduce the law, it is the role of the courts to interpret the law. Such a move would place government in the position of both passing and then interpreting copyright law.

Perhaps a better way of looking at it would be to reconsider what problem this recommendation is designed to address. If it is to reduce legal costs of small businesses then this will hopefully be achieved with the introduction of the small claims court. If it is because, on a general basis, there is a lack of clarity as to how the law allows someone to use copyright protected material then this would point to the function of IPO Notices being factual not interpretative. This is particularly relevant as the consultation document goes on to say that "*The Notices would cover matters of general interest rather than the particular of a specific dispute*". Cases which end up before the court invariably involve particulars which are specific to that case, therefore, making it unlikely that these Notices will have much of a bearing on legal costs.

We also question whether the extent to which lack of clarity on general IP issues is holding back innovation and new business models (as claimed in 8.18) and would like to see the evidence which supports this statement.

However, we could envisage a much stronger role for the IPO to play in terms of improving public understanding and awareness of copyright and IP more generally. Accordingly a statutory duty for the IPO to educate the public about intellectual property law would be more appropriate that the quasi-judicial proposal being proposed.

9. ABOUT THE ALLIANCE

Established in 1998, the Alliance Against IP Theft is a UK-based coalition of trade associations and enforcement organisations with an interest in ensuring intellectual property rights receive the protection they need and deserve. With a combined turnover of over £250 billion, our members include representatives of the audiovisual, music, games and business software, and sports industries, branded manufactured goods, publishers, retailers and designers.

The Alliance is concerned with ensuring that intellectual property rights are valued in the UK and that a robust, efficient legislative and regulatory regime exists, which enables these rights to be properly protected.

Alliance members
Anti-Copying in Design
Anti-Counterfeiting Group
Authors' Licensing and Collecting Society
British Brands Group
BPI (British Recorded Music Industry)
British Video Association
Business Software Alliance
Cinema Exhibitors Association
Copyright Licensing Agency
Design and Artists Copyright Society
Educational Recording Agency
Entertainment Retailers Association
Federation Against Copyright Theft
Film Distributors Association
Motion Picture Association
Premier League
PRS for Music
Publishers Association
Publishers Licensing Society
UK Interactive Entertainment

Supporters:
British Jewellery, Giftware & Finishing Federation
Video Standards Council

ANNEX 1: EXAMPLES OF INNOVATION

Video Entertainment and music

The Entertainment Retailers Association reports the creation of numerous new digital retail services – all of which were developed and launched under the existing copyright framework. These offer the consumer a variety of purchasing options, from streaming and downloading to own, to being able to purchase online a physical product. These include, amongst others:

- We7
- iTunes
- HMV Music
- Amazon.co.uk
- Tesco Digital
- Lovefilm
- Emusic.com
- T Mobile Downloads
- Get Games
- Blinkbox
- Netflix

The UK's video entertainment sector covers all forms of physical and digital distribution between cinema and broadcast television. It provides the largest single funding stream for the film industry and is a major contributor to the broader audiovisual sector. Consumers spent over £2.3 billion on video entertainment in 2011 and developments in technology have enabled over 50 legal digital video services to be launched providing more choice to British consumers than ever before. UltraViolet is the industry's latest cloud-based innovation, bridging the market for physical discs and online entertainment and enabling audiences to store video content in a digital locker for access on connected devices at any time.

There are now more than 70 legal digital music services in the UK offering music in a number of different formats – download to own, streaming, mobile services, super-distribution services, and cloud music services. UK record companies have licensed 20 million tracks to such services.

Video games and interactive entertainment

The current copyright framework has allowed significant growth and innovation in the video games sector. From facilitating the development of original IP in the UK (such as Little Big Planet, Tomb Raider and Grand Theft Auto) to allowing for the evolution of new business models (such as the microtransaction model or ad-supported models), the existing framework enables traditional and new businesses alike to innovate and adapt in the digital age.

The UK's IP framework has always supported the traditional 'boxed product' business model in the video games industry, delivering games to consumers through retail, to be played on consoles or on a PC. It continues to do so: *Call of Duty: Black Ops*, released in November 2010, broke new records grossing more than £113.8 million in its first week of sales, the biggest grossing week of all time for video games software. At the same time, those who dominate the traditional boxed product business model continue to thrive through innovation and adaptation in a digital age. This includes delivering their products to consumers via new digital platforms, for example Steam.

Steam is an online game platform, which allows consumers to purchase, download and play over 1,100 games from any computer. Steam represents the way in which new business models are developing to meet consumer needs in a digital age, and how older businesses – not just the new players – are able to evolve at the same time, within the current IP framework: traditional methods of distribution are evolving and boxed product purchases can now be made online, as direct

downloads for consoles and PCs. This model has been adopted in the UK, indicating once again that the current IP framework is not a barrier to the success of new business models in the UK, such as within the video games industry.

Publishing

In December 2010, Egmont Press launched, to critical acclaim, a storybook app for '*Sir Charlie Stinky Socks and the Really Big Adventure*'. Winner of the Practical Pre-School Bronze medal and shortlisted for the Red House Children's Book Award and the Cambridgeshire Children's Book Award, the app allows children to follow Sir Charlie Stinky Socks through an interactive adventure. The app also includes narration, the ability to touch various objects to hear words and sounds, a songbook and the opportunity for children to colour in the illustrations[15].

However, it is just as important for new innovative companies to be able to protect their IP. Nosy Crow is a small children's publisher which is using new digital technology to tell traditional stories. Their first app, *The Three Little Pigs*, needs a strong IP framework to protect the new ways in which the story is being told and interacted with because, unlike the vast majority of published content, they are relying on IP to protect their technology, given that the Three Little Pigs is a non-copyright work.

Innovation in content is similarly matched by innovation in delivery. For example, leading scientific publishers such as Wiley and Elsevier have developed comprehensive online access to their research. Some publishers also engaged in "chunking" – the sale of individual book chapters, providing consumers with an opportunity to sample content before purchasing the whole book.

Software

Microsoft is one of the world's leading innovative companies, but its innovation is not confined to work in the US. Microsoft Research has been involved in the development in the UK of a number of world-class innovations which are subject to UK and international copyright, patent and other IP-rights protections. One of the key factors that has led Microsoft to conduct such research in Cambridge is the UK's longstanding, robust IP system. One recent innovation that originated at Microsoft Research in Cambridge is "Kinect".

Kinect is Microsoft's natural-interface sensor technology that allows people to interact with a computer, enabling such activities as computer games to be played without handheld or keyboard controls. As the Institute of Electrical and Electronics Engineers (IEEE) reported recently, key elements of this breakthrough innovation, which 'machine-learning' experts had been trying to achieve for twenty years, were developed at Microsoft Research in Cambridge:

"Kinect wouldn't have been possible without the help of IEEE Fellow Andrew Blake and his team at Microsoft Research Cambridge, in the United Kingdom, Microsoft's flagship research lab in Europe. Blake is the managing director there. The lab came up with one of the breakthroughs that lets Kinect track a person without the person having to wear sensors—something researchers in machine learning had been working on for two decades."

Anna Bogdanowicz, The Motion Tech Behind Kinect, The Institute, (6 Jan. 2011)[16]

[15] http://itunes.apple.com/us/app/sir-charlie-stinky-socks-really/id407953805?mt=8

[16] http://www.theinstitute.ieee.org/portal/site/tionline/menuitem.130a3558587d56e8fb2275875bac26c8/index.jsp?&pName=institute_level1_article&TheCat=2201&article=tionline/legacy/inst2011/jan11/featuretech.xml&