



HM Government

GOVERNMENT POLICY STATEMENT:
Consultation on Modernising Copyright

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Executive Summary

This document sets out Government policy on modernising copyright licensing in light of the recent consultation. It indicates the Government's intention to legislate as soon as possible to allow schemes to be introduced for the commercial and non-commercial use of 'orphan' copyright works and voluntary extended collective licensing of copyright works, subject to a number of important safeguards, and to create a backstop power to require collecting societies to adopt codes of conduct based on minimum standards. It also sets out the broad parameters that the Government intends to set for these schemes. Once the necessary legislation is in place, there will be further consideration of the details of all these measures, generally through consultation, before the final schemes are laid before Parliament for approval.

Policy decisions on other issues covered by the consultation – including the Government's plans to modernise copyright through changes to the UK's copyright exceptions and the proposed copyright notices scheme – will be set out in a subsequent document later this year. Other work undertaken in response to the Hargreaves Review will be announced separately.

Introduction: copyright, growth and society

The copyright system is an important part of the UK's social and economic infrastructure. Not only is it key to the business model of many creative industries, it also impacts on the sharing of information and culture by researchers, educators, and citizens. The Government wants to ensure copyright makes the greatest possible contribution to UK economic growth and to our society.

Copyright gives authors, artists, and other creators the right to control the use of their works, and so to help earn a living from their creativity. It gives publishers, broadcasters and record companies a reason to invest in new talent, culture and content. Without copyright protection UK creators and creative industries, from film directors to video game developers, would have less incentive to create new works, to the detriment of the UK's culture and economy. The importance of this copyright investment to the UK may be even greater than previously thought; a recent study¹ suggests UK investment in copyright could be around £3.2bn (0.3% of UK Gross Value Added) higher than suggested by existing official data.

Copyright brings undoubted benefits to its owners, but has consequences for others. Restrictions on copying that are intended to protect creators and encourage investment can end up merely preventing the use of works. The Government is concerned both to provide appropriate incentives to creators and creative industries and to ease unnecessary restrictions on users of copyright works. In some circumstances there may be benefits to the UK from allowing greater access to a stock of works for creators to draw on, from reduced transaction costs and from more opportunities to knowledge, data, and cultural works.

A number of such examples were highlighted within the Hargreaves Review of Intellectual Property and Growth² (May 2011), to which the Government responded in August 2011 with a number of proposals³. The Government response indicated a desire to facilitate the legitimate use of copyright works without undue adverse impact on creators and rights owners, and to improve the flexibility of the system to deal fairly with digital technology and the potential for copying and new uses of works that it brings.

A consultation on the Government's copyright proposals was published in December 2011 and closed on 21 March 2012. The Government is grateful for the effort put into responses and the preparation of evidence; a summary of those responses was published on 14 June 2012 and is available from the IPO website⁴. However, in the course of reviewing the responses received, it became clear that a number of respondents had advanced criticisms of the activities of others in the sector, and the Government is reviewing the submissions to establish there is no potentially defamatory material in anything it may publish. Once these issues are resolved the Government will publish as many responses as it is able to do without the risk of legal recourse.

Alongside this process, work on the proposed Digital Copyright Exchange has continued under Richard Hooper, including publication of his Phase 1 report in March 2012⁵. The Government also welcomes the interest of the BIS Select Committee in this area of work, and will continue to consider the recommendations of its recent report⁶.

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

2 www.ipo.gov.uk/ipreview

3 www.ipo.gov.uk/ipresponse-full.pdf

4 www.ipo.gov.uk/types/hargreaves

5 Available from the DCE webpage at <http://www.ipo.gov.uk/hargreaves-copyright-dce>

6 www.publications.parliament.uk/pa/cm201213/cmselect/cmbis/367/36702.htm

The case for change

- The Hargreaves Review, the Government response and consultation set out a case for change based on economic growth as a principal motivator but also citing a number of broader reasons for change around fairness, the reputation of the copyright system and the consequences of increasingly widespread digital technologies.
 - The Government's intentions here have not changed: to ensure copyright provides appropriate incentives for the creation of valuable works and activities that copyright currently over-regulates to the detriment of the UK, and to make changes to tackle problems in the current system.
 - This modern legal framework is a key factor in a healthy UK copyright system along with attractive legal offers, education about IP and enforcement of IP rights.
 - Many respondents to the consultation described what they saw as the provision of attractive services in their particular sector, citing numbers of competing services or particular new offerings as examples. This was commonly put forward as an indicator of innovation in the sector concerned. Others were more sceptical that these developments were well adapted to consumer demand.
 - IPO is currently working with UK Music and other stakeholders to develop a strategy for including improved IP content within secondary education courses.
 - The Government continues to press ahead with measures to improve enforcement of copyright, including improvements to the Patents County Court (renaming it to stress its broader role in Intellectual Property disputes and introducing a small claims track in October 2012), taking action against online copyright infringement including through the Digital Economy Act and carrying out the IP Crime Strategy published alongside the Government's response to the Hargreaves Review in August 2011.
 - Against this background of action on all fronts, this paper sets out the Government's intention to legislate to modernise the legal framework around copyright licensing in the light of public consultation.
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Improvements to copyright licensing

The Government, following the Hargreaves Review, made a number of proposals to make copyright licensing more efficient and remove unnecessary barriers to the legitimate use of works while preserving the interests of right holders. These include schemes to allow use of 'orphan' works whose copyright holder cannot be found or is unknown, voluntary extended collective licensing, and introducing minimum standards of conduct for collecting societies, underpinned by a backstop power to impose a statutory code of conduct on a collecting society where required.

These measures bring some currently unlawful or unlicensed activities within the scope of legal activity, allowing licensing to occur and thus benefiting right holders and licensees alike. They have potential to cut costs and improve compliance with copyright law, and to improve confidence in the UK copyright system.

In general, these measures could be complemented by a Digital Copyright Exchange that made licensing easier, but could not or would not necessarily be achieved by such an Exchange alone. For example, a change in the law is needed for orphan works to be used.

Details of these three measures are set out below.

Orphan Works

The Government's position, following the Hargreaves Review, is that it benefits no-one to have a wealth of copyright works be entirely unusable under any circumstances because the owner of one or more rights in the work cannot be contacted. This is not simply a cultural issue; it is also a very real economic issue that potentially valuable intangible assets are not being used, and an issue of respect for copyright if they are being used unlawfully. The Government therefore proposed an orphan works scheme that allows for both commercial and cultural uses of orphan works, subject to satisfactory safeguards for the interests of both owners of 'orphan rights' and rights holders who could potentially suffer from unfair competition from an orphan works scheme. Alternatives based on toleration of unlawful copying (e.g. by decriminalising copying of orphan works) were rejected on the basis that the Government could not and would not condone such infringement; a lawful solution is needed.

Most consultation respondents agreed with the Government that a scheme should be introduced to allow the use of orphan works, that is works for which one or more of the right holders cannot be found. The scope of the scheme and how it should operate was subject to more debate.

In the light of responses, the Government intends to introduce legislation for orphan works on the broad lines it previously proposed: it will enable the use of orphan works after a diligent search and confirmed by an independent authorising body.

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

The key principles being followed are those given in the consultation document:

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

Having considered responses to the consultation, the Government's intentions are as follows:

- Diligent search before something can be used as an orphan work is key to the scheme. The Government believes that it is important to strike the right balance between a relaxed standard of diligence and for an "awaiting claim" approach, as against ensuring that absent rights owners' needs are protected. The Government is mindful of the need to ensure the process is sufficiently straightforward to be useful to potential users. The authorising body will verify the diligence of the searches.
 - Commercial and non-commercial uses of orphan works in the UK will both be permitted, both to maximise the economic potential of proposals and because making a firm distinction between the two is difficult in practice.
 - This permission should come at an appropriate price – a market rate, to the extent that one can be established (though the difficulties that may attend establishing that, for example in respect of works not created for publication that are in museums' collections, are noted).
 - This price should be payable in advance (or at agreed times if there is a royalty element) and set aside for any rights holders who may still appear even after a diligent search has not found them.
 - Licences will, necessarily, be non-exclusive.
 - Moral rights should be respected and protected. In the absence of evidence to the contrary, it will be assumed that moral rights have not been waived and that all orphan works should be attributed to their authors, where their names are known.
 - The Government does not propose to alter the UK's moral rights regime.
 - The deliberate stripping of metadata to 'orphan' works is already potentially subject to criminal sanctions and the Government will maintain that position to deter such behaviour.
 - There will be a registry of orphan works.
 - Works of unknown copyright status, such as where the work is over 70 years old and the date of death of the author is unknown, will be within scope of the scheme.
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- Given the strong indications given by museums, libraries and archives that a large part of their collections are unpublished, unique works, the Government is minded to include some unpublished works in the scope of the scheme. The scope for this will be determined in the light of concerns about privacy and the publication of works intended for publication but not yet published, for example.
 - To reduce anomalously long copyright for certain unpublished, pseudonymous and anonymous very old works, with the consequence that a number of these works will cease to be in copyright rather than being orphan works.
 - The scheme will not take the form of an exception to copyright, but will be based on authorisation by an independent body, i.e. not the same body which wishes to exploit the orphan works.
 - The UK scheme will be compatible with the emerging European system, as set out in the draft Directive, but broader in applicability (in particular allowing commercial use in the UK) to maximise potential benefits to the UK.
 - The Government will legislate in such a way that no sector or type of work is necessarily excluded from the orphan works regime, but there is flexibility to introduce different schemes for different sectors or types of work. So for example the power would make it possible to introduce an orphan works authorisation regime for analogue photographs but not for digital photographs.
 - Detailed scheme rules that deal with many of the potential abuses raised by respondents to the consultation will be prepared and further consultation will take place. Matters still to be decided include:
 - The identity of any authorising body or bodies.
 - Whether such bodies should consider possible derogatory treatment of a work in its decision to authorise, and if so the degree of scrutiny required.
 - Details of how diligent search will work, particularly the scope to quality-assure the diligence of searches across a large number of works on the basis of sampling rather than scrutiny of every single search result.
 - The extent to which recent diligent searches can be 're-used' rather than requiring a further search.
 - The term of the licence, balancing the need for reasonable certainty about use by licensees with protecting the interest of a returning 'revertant' rights holder.
 - How the scheme will use any Digital Copyright Exchange.
 - The ways in which remuneration is set aside, held, and – if unclaimed after a period of time to be determined – to whom it should go.
 - Arrangements to deal with pre-existing exclusive licenses, if these come to light after authorisation to use the work as an orphan.
 - The scope of the orphan works scheme or schemes, in terms of sectors or types of work covered.
 - The timetable for the introduction of such schemes.
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Extended Collective Licensing

To help simplify copyright licensing while protecting the interests of rights holders, the Government proposed to allow voluntary extended collective licensing (ECL) in the UK for the first time. This would mean that collecting societies that meet the necessary standards for protecting rights holders' interests could seek permission to license on behalf of rights holders who are not members, with the exception of those who opt out of the scheme.

During the consultation and in the responses to it, ECL was particularly supported by institutions that hold large archives of copyrighted work, who stated that they are often unable or unwilling to use these archives owing to prohibitive administrative costs in the current clearance system. There was also significant support for the proposal from collecting societies and from licensees, including commercial and public sector users, many of whom saw scope to reduce the complexity of the current system through ECL, although it was suggested that collecting societies which chose to operate ECL schemes would be likely to incur some additional costs.

Some rights holders, particularly in sectors where collective licensing currently plays a limited role (literary works, photography, commercial archives), were concerned that existing direct licensing models could be impacted negatively by ECL. Partially reflecting this concern, many consultation responses put emphasis on ensuring that proper protections for rights holders are in place before any collecting societies are authorised to operate ECL schemes in relation to any of the rights they manage.

The Government will therefore introduce legislation to enable voluntary ECL by collecting societies along similar lines to those proposed in the copyright consultation, including all the safeguards for the interests of right holders proposed in the consultation document:

- i) A collecting society applying for ECL will be required to demonstrate that it is significantly representative of rights holders affected by the scheme.
- ii) A collecting society applying for ECL will be required to demonstrate that it had the support of its members for the application.
- iii) A collecting society applying for ECL will need to have in place a code of conduct, to ensure minimum standards of governance, transparency and protection for non-member rights holders. (Further details of this code are set out in the next section.)
- iv) A rights holder will always retain the capacity to opt out of an ECL scheme.

The ECL regime would be entirely voluntary. No collecting society would be made to apply for it, nor would a collecting society be able to secure an authorisation for an ECL scheme without meeting the important safeguards described above.

In practice, we expect that ECL will be a more attractive option in areas where licensing is characterised by high-volume, low-value transactions with high administrative costs for individual clearance – such as those areas where collective licensing already plays a big role. Some sectors have developed other solutions, and the Government does not intend to disrupt that. ECL is an additional tool being made available for use where it makes sense for a sector to do so; it is not intended to supplant existing alternative models where these

work well. It is for collecting societies, in conjunction with their members, to decide on the scale/scope of any application against the context of the safeguards.

Further consideration will be given to details of implementation, including:

- How to define what constitutes 'representative' within a sector for the purposes of a collecting society's application.
- Ensuring that all rights holders (particularly 'vulnerable' groups such as heirs of estates, non-professionals, and foreign rights holders) have the opportunity and capacity to opt out.
- Arrangements for distribution of unclaimed royalties.

Accordingly, the Government's legislation will establish a power to make regulations for the authorisation of individual ECL schemes on application by collecting societies that have met the necessary criteria. These regulations will be consulted on and will cover the detail of implementation (including opt-out schemes and collection of royalties) and how best to implement the Government's proposed safeguards in a way that provides real protection to rights holders.

Codes of Conduct for collecting societies

Collecting societies collectively manage copyrights on behalf of rights holders, providing licences to the value of £1bn per annum. The Government recognises the valuable role of collective licensing and the work that collecting societies do on behalf of their members. However, the Hargreaves Review noted that collecting societies tend to be monopoly suppliers in the sectors in which they operate, and that there was evidence that practice could be improved in some areas. Hargreaves argued that greater protection was required both for members of collecting societies, and for their licensees.

Following the Hargreaves Review the Government proposed that, in the first instance, collecting societies self-regulate by adopting codes of conduct that incorporate minimum standards set by the Government. In tandem, the Government proposed take a reserve power that would allow it to introduce statutory codes of conduct if a collecting society failed to self-regulate effectively. This backstop power would provide for penalties for non-compliance.

Consultation on this proposal revealed some divergence of views. The vast majority of respondents valued the collective licensing system, but users (and to some extent members) described problems with the current system – particularly in relation to lack of transparency, administrative costs, and negotiation practices around licences and tariffs – that codes of conduct could address. There was overall support for the principle of codes of conduct as a means of promoting/ensuring good practice, and general agreement on the scope of the Government's proposed minimum standards, the introduction of an independent Ombudsman to adjudicate on serious complaints, and regular independent review of compliance with a code. Some respondents called for additions to the minimum standards, such as making collecting societies subject to the Freedom of Information Act.

The key point of difference was around statutory codes of conduct. Collecting societies and some rights holders favoured a purely voluntary model based on principles developed by a working group of the British Copyright Council. Considerable effort has gone into developing these proposals, and collecting societies argued that they would deliver the intended benefits of the policy. However, licensees overwhelmingly sought a statutory basis for codes of conduct, supported by the potential for penalties to ensure compliance and counteract the monopoly position of collecting societies. Their fear was that without a credible enforcement process, the codes would not have any real impact. This was seen as particularly important if collecting societies' powers were extended (e.g. via authorisation to operate ECL schemes) to allow them to licence on behalf of non-members.

In the event that a backstop power was brought into force, questions remained about the penalty system which should support it. Some respondents queried whether financial penalties were appropriate, given the risk that they would be passed onto members or licensees. Other types of penalties were suggested including removal of directors, referral to the competition authorities, creation of a supervisory body, and the competition authorities, or removal of the ability to license.

Collecting societies also argued that minimum standards need to recognise differences between sectors, and that, consequently, a single code across societies might not be appropriate. Many licensees supported a single code for reasons of clarity and consistency.

The Government values the benefits of collective licensing, and the work that collecting societies continue to undertake to improve their practices. However, evidence from the consultation demonstrates a lack of confidence in elements of the current system which reflect the monopoly status of collecting societies. Government will therefore legislate to allow the introduction, through Regulations, of a backstop power to enable the application of a statutory code of conduct. This power would be used in the event of failure by a collecting society to implement or adhere to a voluntary code which encompasses the minimum standards.

The Government will develop draft regulations for codes of conduct, both through an existing informal working group of users and collecting societies, and through wider consultation. This consultation will seek to ensure that the minimum standards are fit for purpose and reflect existing good practice, and that an effective enforcement mechanism can be constructed.

What happens now?

The Government intends to introduce legislation to enable schemes to be introduced for the use of orphan works, voluntary extended collective licensing and codes of conduct for collecting societies as soon as possible.

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Any enquiries regarding this publication should be sent to:

The Intellectual Property Office
Concept House
Cardiff Road
Newport
NP10 8QQ

Tel: 0300 300 2000
Minicom: 0300 0200 015
Fax: 01633 817 777

e-mail: copyrightconsultation@ipo.gov.uk

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