

British Copyright Council (BCC) response to CMA Call for Information: Digital Markets Taskforce

1. The BCC is a not-for-profit organisation that provides a forum for discussion on copyright law and related issues. We represent those who create, perform and manage rights across the creative industry. Our membership spans literary, dramatic, musical and artistic works, films, sound recordings and broadcasts. The purpose of the BCC is to provide a representative voice on copyright and related issues across our 29 members, who themselves represent hundreds of thousands of creators.¹
2. Intellectual Property, including copyright and respect for both registered and unregistered intellectual property rights, is integral to the scope of any new approach to promoting competition and innovation within online marketplaces. There are several factors that we view as being vital components of any framework:
 - i. recognition of the value of original works, their use and licensing;
 - ii. enforcement of rights and access to justice when licensing rules are ignored or overridden in order to prevent economic harm to grassroots creators; and
 - iii. redressing the role of online platforms within the marketplace and their responsibility for content on their platforms.These will, in our view, ensure a fair and transparent marketplace that promotes innovation and competition.
3. We encourage the Taskforce to engage with the Intellectual Property Office (IPO) and IP stakeholders to ensure that vital intellectual property support structures are not overlooked. The Government's Online Harms White Paper proposals do not specifically address IP issues, and so it is even more important that the Taskforce considers the protection of the copyright framework and its value for right owners in its work. Inclusion of these factors in the Taskforce's work will deliver benefits for both users and consumers on creative and cultural content online.

Q4. What future developments in digital technology or markets are most relevant for the Taskforce's work? Can you provide evidence as to the possible implications of the COVID-19 pandemic for digital markets both in the short and long term?

Protecting innovation

4. New software, patents and designs will be integral to the development of future technology that enables and facilitates the delivery of new online marketplaces; and content within such services and marketplaces will remain a core driver for user and consumer interest. Copyright and the framework for its recognition, protection and enforcement will lie at the heart of this.

¹ The BCC's membership: Artist's Collecting Society; Association of Authors' Agents; Association of Illustrators; Association of Learned and Professional Society Publishers; Association of Photographers; Authors' Licensing & Collecting Society; BECTU; British Association of Picture Libraries & Agencies; British Equity Collecting Society; BPI; Chartered Institute of Journalists; DACS; Directors UK; ERA; ISM; Ivors Academy; Music Publishers Association; Musicians' Union; National Union of Journalists; PISCEL; Publishers' Association; PPL; Professional Publishers Association; PRS for Music; Publishers' Licensing Services; Royal Photographic Society; Society of Artists' Agents; Society of Authors; Writer's Guild of Great Britain.

5. Whilst many eyes are on the development of data management systems, the application of Artificial Intelligence and crypto-assets of all kinds, consumers will continue to be driven by interest in original music, film, audio and audio-visual programming, art, new design and trusted published information sources. The creators and contributors of these cultural assets must be rewarded for their use within the increasingly complex digital delivery chains as genuine original variety leads to innovation. That innovation needs protection not just at a point of creation, but also against commercial and economically valuable uses by others across all digital marketplaces of the future. Without this, the foundations of the marketplace will fail to flourish, and the world leading creative economic benefits which are currently delivered by the UK creative industries will fade.
6. Prior to the Coronavirus Pandemic, the creative industries contributed £111.7 billion annually to the economy – more than the automotive, aerospace, life sciences and oil and gas industries combined.² The cultural sector has embraced digital technologies to engage new audiences through digital platforms and distribution channels, both nationally and internationally. It has also led to new forms of art, creative and cultural content, and experiences, as well as increasing access to our world-class archives and collections. For example, the National Theatre had eight million people engage through digital channels in 2018, with 60% of secondary schools signing up to its streaming service.³
7. With Coronavirus leading to the closure of many live cultural and creative spaces, there has been an uptick in the creation and consumption of online content. The Creative Industries Policy and Evidence Centre, led by NESTA, replicated the IPO's Online Copyright Infringement Tracker (OCI) survey over six weeks when social-distancing measures were at their most stringent. It found that the consumption of online content increased across music, film, TV, and e-publishing, as well as 'non-traditional' digital activities such as watching filmed performances of theatre, concerts and dance shows and looking at art, paintings and photographs online.⁴

Supporting online education

8. Online technologies have provided vital support for educational, government and research services since the start of the Coronavirus Pandemic. This has put a spotlight on the importance of copyright works being accessible for users and consumers. The differences between "commercial" and "non-commercial" uses for copyright works has therefore been tested against the copyright licensing frameworks which existed before the Pandemic and which have been applied by rights owners in response to it. This has become particularly relevant in education - members of the

² Government press release, *UK's Creative Industries contributes almost £13 million to the UK economy every hour* <https://www.gov.uk/government/news/uks-creative-industries-contributes-almost-13-million-to-the-uk-economy-every-hour>

³ DCMS (2019) *Policy Paper – Culture is Digital: June 2019 Progress Report* <https://www.gov.uk/government/publications/culture-is-digital/culture-is-digital-june-2019-progress-report>

⁴ PEC (2020) *Understanding changes to the way that we consume culture at home during COVID-19* <https://www.pec.ac.uk/policy-briefings/digital-culture-consumer-panel>

BCC licence content for educational purposes in schools and universities. Online learning had shown significant growth over the last decade; and since the COVID-19 outbreak, online learning has become central to the education sector. Therefore, the practical application of both direct and collective licensing of copyright works for use within digital delivery systems must not be overlooked as an important part of developing digital markets in the future.

9. Licensors of content across these sectors already provide valuable regular models for access to works. This has been complemented by new actions to support businesses, researchers, educators and providers of cultural content during the crisis. The actions of rightsholders, in conjunction with licensing bodies, have enabled distributors and creators to facilitate access to copyrighted content online. This adaptation to the licensing framework shows how copyright can adapt to changing circumstances.

The role of online platforms

10. The increased emphasis on online engagement reinforces the need to ensure a high level of protection for copyright and rights owners online, so that content creators are fairly rewarded for the online use of their work. However, the expansion of digital platforms has made it harder for the for rights holders within the more traditional sectors, including publishing, art and photography, live and recorded music, film, television and radio, to directly oversee how their content is distributed online and to maintain their associated revenue streams. Through collaboration, the Government and businesses have an opportunity to lead the world in shaping regulation of the digital economy. The BCC believes that these issues should be included within the Taskforce's work as the UK's copyright regime is crucial to the creative industries.
11. Copyright ensures that creators can continue creating, because it enables them to derive a livelihood from their works. A serious threat to the creative industries is copyright infringement and piracy. A 2019 report by the UK's Intellectual Property Office (IPO) and Intellectual Property Crime Group identified that "Intellectual Property Crime is a feature of organised crime and highly profitable, accounting for almost 4% of UK imports (£9.3 billion in value) and more importantly accounts for £4 billion in lost tax revenue and 60,000 UK jobs."⁵ In its 2020 Corporate Plan the IPO states that IP crime causes "Economic harm to rights-holders and allied industries supporting legitimate trade, plus unfair competition to legal traders and loss of revenue to Government in terms of tax and duty payments".⁶
12. Our members have seen the level of piracy increase further still across the music, publishing and photography sectors since the beginning of the Pandemic. Of particular concern is a reported increase in the activities of large-scale serial

⁵ IPO & IP Crime Group (2019) *IP Crime and Enforcement*
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/842351/IP-Crime-Report-2019.pdf
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/842351/IP-Crime-Report-2019.pdf

⁶ IPO (2020) *IP Enforcement 2020: Protecting creativity, supporting innovation*
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/571604/IP_Enforcement_Strategy.pdf

offenders. Determining the role of digital platforms in preventing copyright infringement should be a core consideration in the future development of the digital marketplace.

Q5. What are the anti-competitive effects that can arise from the exercise of market power by digital platforms, in particular those platforms not considered by the market study?

13. The digital age has created a situation whereby it is relatively simple for online activity to infringe the rights of an individual creator and rightsholder simply because it is often impractical for an individual rightsholder to directly follow who is making use of their work. This is because of the time and cost required to pursue infringements. This is problematic from a competition perspective as piracy exerts a competitive constraint on companies by reducing the size of the overall marketplace for legitimate market players.
14. When infringement of rights takes place on an online platform, it is only right that there is shared responsibility for tackling infringement. A shared responsibility will best address the potentially anti-competitive effects of the digital delivery chains of the future. Online platforms derive a commercial advantage from their intermediary role between creators and consumers, and are therefore in our view, best placed within the digital environment to take a more active role in efficiently counteracting unauthorised or harmful content that is made available on their platforms. If platforms do not take action to prevent infringement of copyright and related rights, economic support for initial innovation and creativity is at risk.

Q6. In relation to the code of conduct: • Would a code structure like that proposed by the market study incorporating high-level objectives, principles and supporting guidance work well across other digital markets? • To what extent would the proposals for a code of conduct put forward by the market study, based on the objectives of 'Fair trading', 'Open choices' and 'Trust and transparency', be able to tackle these effects? How, if at all, would they need to differ and why?

15. Codes of conduct in the digital marketplace have proven effective. The work of the roundtable meetings into online marketplaces, social media and online advertising under the Creative Industries Sector Deal have all shown how discussions linked to possible Codes of Conduct have led to some practical co-operative steps being taken which facilitate the protection of the rights of creators.⁷ It is beneficial for all stakeholders to agree a way forward in dialogue; but the importance of such codes must be underpinned by backstop powers in legislation and via a regulator. The forthcoming code of conduct relating to marketplaces convened by the IPO (which does not address all the issues raised in this consultation) should not preclude the individual marketplaces covered being attributed SMS status.
16. Linked to the above, we are concerned that the welcomed roundtable process on the role of online intermediaries in reducing piracy has stalled. The roundtables were

⁷ <https://www.gov.uk/government/news/ipo-supports-dcms-creative-industries-sector-deal>

supposed to have led to agreements by the end of 2018. It would be helpful for the CMA to investigate whether priority will be given to reinvigorating this initiative, or other means of reconciling the issue of platform liability, copyright infringement and the trust that users can place in whether the content they are creating, streaming and sharing is legal. Responsible behaviour by online platforms is vital for protecting users and building the confidence of individuals and businesses to continue taking advantage of the opportunities of the digital world.

Q12. What are the key areas of interaction between any new pro-competitive approach and existing and proposed regulatory regimes (such as online harms, data protection and privacy); and how can we best ensure complementarity (both at the initial design and implementation stage, and in the longer term)?

17. Harms caused by illegal economic activities affect individual consumers as well as businesses, yet economic harms are currently excluded from the scope of the proposals in the Government's Online Harms Reduction Regulator (Report) Bill.⁸ However, the Online Harms White Paper speaks to a legislative framework that could include the economic harms caused by abuses of copyright and other intellectual property laws. This should be considered when developing any new code of conduct. It is our view that this would promote transparent and fair competition across the digital marketplace for the cultural and creative sectors.

18. Should the CMA wish to discuss any of the points raised with the BCC and its members please do not hesitate to contact us [REDACTED]
[REDACTED]

⁸ House of Lords (2020) Online Harms Reduction Regular (Report) Bill
<https://publications.parliament.uk/pa/bills/lbill/58-01/022/5801022.pdf>

