



# FOCAL INTERNATIONAL

FEDERATION OF COMMERCIAL AUDIO VISUAL LIBRARIES

## Submission to the All Party Parliamentary Intellectual Property Group in response to *The Role of Government in Protecting and promoting Intellectual Property by FOCAL International*.<sup>1</sup>

This submission refers only to copyright (including the related *sui generis* database rights conferred by SI 1997/3032 as amended, including by SI 2003/2501) and not to other IP rights.

As well as to the *Consultation on Copyright*,<sup>2</sup> it refers to *Rights and Wrongs* (Digital Copyright Exchange Feasibility Study)<sup>3</sup> because it is the latest publication in the consultation process, and so far the only (albeit interim) conclusion published to date.

### 1. What should the objective of IP policy be?

The stated purpose of the current consultation is to ensure that IP rights protect firms' income (thus enabling them to attract investment) and to incentivise those whose creativity drives growth<sup>4</sup> - in other words, economic growth.

The objective of economic growth is consistent with the historical development of British copyright whose principles, first embodied in statute in 1710, were also adopted by the USA in its statute of 1790 and throughout all British territories. By contrast, starting with the French decree of 1791, the "author's right" system which developed on the continent is historically linked to "the concept of the author's personality, rather than based on the economic approach that predominated in the copyright system."<sup>5</sup>

### 2. How well co-ordinated is the development of IP policy across Government?

Although its stated aim is economic growth, IP policy does not appear to be coordinated with economic policy. The following are examples.

#### i. Lack of evidential basis of policy decisions

At the outset Hargreaves criticized previous consultations: "...here is a subject of considerable economic importance where we have not yet succeeded in grounding policy securely in evidence."<sup>6</sup>

He stated, "Government should ensure that development of the IP System is driven as far as possible by objective evidence. Policy should balance measurable economic objectives against social goals and potential benefits for rights holders against impacts on consumers and other interests. These concerns will be of particular importance in assessing future claims to extend rights or in determining desirable limits to rights."<sup>7</sup>

The "Hargreaves Hypothesis" set out the principles of a study<sup>8</sup> on which policy decisions about a Digital Copyright Exchange will be based.<sup>9</sup> It states that copyright licensing is not fit for purpose for the digital age because of barriers, and that "UK GDP should grow by £2 billion per year by 2020 if barriers in the digital copyright market were removed."<sup>10</sup> This study echoes Hargreaves on evidence, "We are seeking hard data and evidence..."<sup>11</sup>

The £2 billion growth figure is taken from Supporting Document EE (*Economic Impact of Recommendations*) to the Government's *Consultation on Copyright*<sup>12</sup> which states that "[b]y 2020, on this basis, up to an additional £2.2 billion could be provided by a digital copyright exchange."<sup>13</sup> It is not stated whether this means £2.2 billion each year, or £2.2 billion cumulatively from the date of commissioning of a DCE until 2020, perhaps about 5 years. (If the latter, £2.2 billion is unlikely to make a notable impact on the UK's annual GDP.)

"On this basis" refers to an assumed 4% increase which has been extrapolated from a Copenhagen Economics pan-EU study, by comparing the UK's GDP relative to the whole EU's. The Copenhagen study's figure on which this extrapolation is based is tentative. The study presupposes a *single digital market* across Europe. Further, the study's forecast is based on achievement of 13 *other* objectives, *all of which* have to be achieved to produce the suggested growth figure.

<sup>1</sup> FOCAL is the industry body representing commercial audiovisual footage archives. FOCAL members in the UK include AP, BBC, Bridgeman Art, British Pathé, Canal-Image UK, Corbis, Framepool, Getty Images, Huntley Archive, ITN, ITV, The Imperial War Museum, The Olympic Television Archive Bureau, PA, Sky News, Wellcome Library. Members in other countries include the Audiovisual Library of the European Commission, CBC, CNN, Discovery, HBO, Institut national de l'audiovisuel (ina), National Film Board of Canada, NBC, RAI, ZDF. Further information is at <http://www.focalint.org>.

Archive footage is an important, sometimes the most important, ingredient in many digital audiovisual productions – from TV news through documentaries and feature films to eBooks, iPad apps, games – and many educational products, online, in DVDs and apps. The UK's commercial audiovisual archive sector is a world industry leader. UK archives contain upwards of 17 million hours of footage. In 2011 UK archive footage sales totalled in excess of £112 million. Sales revenues of several larger archives each exceeded £10 million. Archives invest large amounts in digitisation. Several invest between £1 and £2 million each year. The sector supports UK digital preservation, digitisation and media asset management businesses.

<sup>2</sup> Published by the Government in December 2011.

<sup>3</sup> Published by the Government in March 2012.

<sup>4</sup> p.2 of Hargreaves: *Review of Intellectual Property and Growth: Call for Evidence*.

<sup>5</sup> J.A.L. Sterling: *World Copyright Law*, London, Sweet & Maxwell, 2008, p. 6.

<sup>6</sup> *Review of Intellectual Property and Growth: Call for Evidence*, December 2010, p.1.

<sup>7</sup> Supporting Document EE to the *Government's Response – Economic Impact of Recommendations*, p.5.

<sup>8</sup> *Digital Copyright Exchange (DCE) Feasibility Study: Call for Evidence*.

<sup>9</sup> p.1

<sup>10</sup> p.2

<sup>11</sup> p. 1

<sup>12</sup> Published December 2011.

<sup>13</sup> p.13

FOCAL INTERNATIONAL LIMITED  
Chair of Patrons: Lord Puttnam of Queensgate CBE

79 College Road Harrow Middlesex HA1 1BD UK  
t: +44 (0)20 3178 3535 f: +44 (0)20 3178 3533 e: [info@focalint.org](mailto:info@focalint.org) [www.focalint.org](http://www.focalint.org)

A UK DCE is *most* unlikely to produce a single all-media pan-European digital market by 2020. First, this Consultation deals exclusively with UK law, but much copyright licensing (including orphan works, ECL) cannot be implemented cross-border, *inter alia* because of the UK's international obligations. Secondly, important aspects of cross-border licensing (e.g. music copyright licensing) are extremely unlikely to be implemented before 2020 because of well-documented industry barriers outside the UK.<sup>14</sup>

At the end of Annex 3, on p. 64, *Rights and Wrongs* mentions that there were "a number of concerns around the validity of the [£2bn] figure ... including lack of empirical data." "7 respondents agreed that UK GDP should grow by extra £2bn per year by 2020, 41 disagreed...."

The growth assumption which is the DCE's *raison d'être* has thus been fundamentally challenged, for lack of evidence and wrong conclusion. However, *Rights and Wrongs* only mentions this at the end of an Annex, and gives no evidence in reply supporting the assumption, nor does it state that this underlying assumption will be re-examined before proceeding. It does not put forward any new economic evidence to replace this discredited figure.

Apart from a diagram on p. 15, which refers to revenue relating to a single C4 programme (according to the text) or to the UK independent production sector (according to the diagram's heading), *Rights and Wrongs* gives no revenues.

Nevertheless, the DCE Feasibility Study will carry on uninterrupted to Phase 2 – *Seeking Solutions*.<sup>15</sup> These will be solutions "to the issues with copyright licensing as identified in this report."<sup>16</sup> *Rights and Wrongs* states that "we did identify significant problems in a range of other market segments...."<sup>17</sup> "Issues" and how "significant" they are cannot be assessed in relation to economic growth, if there is inadequate economic evidence.

## ii. Lack of proportionality in assessment of issues

### Archives, libraries and museums

*Rights and Wrongs* gives an example of a museum needing permission to digitise a letter and the BL's statement that "collections could not be easily digitised since that would mean infringing the copyright of the undiscovered authors," and from that draws the conclusion that *new digital businesses are being held back; innovation is being held back*.<sup>18</sup>

This conclusion is not justified on the facts. It conflates two entirely separate issues without explaining that this is what is being done.

The *Consultation on Copyright's* proposal to extend section 42 of the Copyright Act will enable collections to be easily digitised. As an exception to copyright, this will not be a licensing issue at all. Right holders will not be involved, and will not need to be identified, contacted or paid – "exception" means that copyright protection simply does not apply, in the case of the excepted activity.

Dame Lynne Brindley's statement, "It is simple: we do not know who the rights owners are – therefore we cannot reimburse them"<sup>19</sup> – the "Key quote" which opens the study - refers to *exploitation* of rights. *Exploitation* rights do not belong to the BL, as it is a deposit library. The copyright system permits the BL – or any other person or organisation, including new digital businesses – to generate revenues for itself and the right owner by *exploiting* rights. *Rights and Wrongs* acknowledges this right owner's prerogative in paragraphs 16, 34, 35 and 36 – including acknowledging that a right owner may have valid reasons for not wanting her work to be exploited. Lady Brindley may also be referring to orphan works. A DCE ought to be helpful in both these areas. However, it is seriously misleading to suggest that these issues will prevent the BL from digitising collections easily. Whatever economic (and cultural) conclusions are drawn must take this important distinction into account.

### The audiovisual industry

*Rights and Wrongs* states that "No evidence has been put forward to the Study that new digital film services have been hampered by licensing process"<sup>20</sup> and immediately follows: "While there is no way to prove definitively that licensing issues are holding back innovation, *there is a strong possibility* that would-be entrepreneurs...." This "*possibility*" is not sourced or evidenced or costed.

*Rights and Wrongs* mentions "lack of availability of repertoire in the digital space (downloading and streaming services) compared with the physical space (DVDs, Blu-Rays)."<sup>21</sup> This is not a licensing issue as *Rights and Wrongs* claims<sup>22</sup> – if a DVD distributor can get a licence from the producer, so can an Internet distributor. The blindingly obvious reason for this lack is Internet piracy. The recent *20<sup>th</sup> Century Fox v BT* and *20<sup>th</sup> Century Fox v Newzbin* cases in the English Courts, and *The Pirate Bay* case in the Swedish Courts make this abundantly clear.

*Rights and Wrongs* acknowledges this on the next page ("the most pirated products ... are in almost all cases in the digital services repertoire"<sup>23</sup>) but discusses it in the context of a perceived negative political perception about the audiovisual industry!

<sup>14</sup> The 2009 CISAC case - *CISAC Agreement, Re* (COMP/C2/38.698) [2009] 4 C.M.L.R. 12 (CEC) - was by no means the European Commission's first attempt to bring about pan-European Internet music copyright licensing, and anyone with knowledge of the industry must realise that the possibility of obtaining a single collective licence from a single licensing body to exploit the majority of music copyrights online throughout Europe is little closer now than it was in 2009.

<sup>15</sup> p.7.

<sup>16</sup> p.10.

<sup>17</sup> p.6.

<sup>18</sup> p.24.

<sup>19</sup> p.5.

<sup>20</sup> p.28.

<sup>21</sup> p.28.

<sup>22</sup> Para. 78, p.28.

<sup>23</sup> Para. 81, on p. 29.

## Television

*Rights and Wrongs* quotes the BBC's response to the *Call for Evidence* (as does the *Consultation on Copyright*) that "it spends £10 million per year on the administrative costs of rights clearance."<sup>24</sup> The BBC states that it would cost it £72m in administrative expenses to clear 1 million hours of TV and radio programming.<sup>25</sup> This is £72 per hour. Considering that a BBC TV production costs hundreds of thousands of pounds per hour to produce, and the cost of digitizing the existing analogue footage is between £300 to £1,000 per hour, £72 per hour is relatively small. The cost of *paying for the rights*, if the BBC wishes to clear them all, as it states ("to clear the whole Archive"<sup>26</sup>) must be billions of pounds. *Rights and Wrongs* states clearly that it is about the licensing process and not about the cost of rights<sup>27</sup> - but proportionate judgment about the costs and efficiencies of a DCE must surely be made in the commercial context of what it would be used to buy and pay for.

(Rights clearance for new technologies is not a new issue: the same issue came up when cable and satellite transmission, video and again DVD were introduced.)

*Rights and Wrongs* refers to "The archive issues of the British Film Institute."<sup>28</sup> However, as in its reference to the BL, it does not distinguish between digitising and exploiting. As mentioned above, digitising for preservation can cease to be an issue if the Government implements the Consultation proposal. Exploiting the material is another matter. *Rights and Wrongs* does not clearly distinguish between ownership of the films (the reels) and ownership of the rights. Reels may have been given to the BFI. Ownership of them may not always be clear: for example, many prints of a film were distributed for simultaneous cinema exhibition, sometimes reels were not returned to the distributors, and some were "given" to the BFI by projectionists and others.

However, the *rights* in such films would seldom have been given to the BFI, which is not a commercial distributor. Licensing solutions can enable the BFI get the rights to exploit its holdings commercially – with the right owner's permission or under an orphan work solution. This distinction must be clarified and costed in order to assess the potential benefit of a DCE to the BFI. For example, many rights may be held by commercial distributors, and not be available to the BFI whether it asks for them through a DCE or individually.

The BBC and the BFI are the only mention of audiovisual footage archives in *Rights and Wrongs*. However, commercial audiovisual archives are a significant UK industry sector of which neither the BBC nor the BFI is typical. UK archives contain upwards of 17 million hours of footage; in 2011 UK archive footage sales totalled in excess of £112 million. This £112 million represents a small but crucial element of productions and their subsequent sales which run to hundreds of millions of pounds. Annual sales revenues of several larger archives each exceeded £10 million.<sup>29</sup> Therefore, it is not possible to formulate appropriate DCE solutions which include this industry sector based on the BBC and the BFI alone - and without even projections of growth which solutions only for the BBC and BFI would produce. (The only representative of the entire audiovisual creative industry on the DCE Feasibility Study Advisory Panel was from the BBC.)

## Education

The *Consultation on Copyright* proposes to expand the scope of educational exceptions to copyright,<sup>30</sup> and *Rights and Wrongs* proposes to include licensing of educational materials in the DCE.

*Rights and Wrongs* deals with two kinds of educational use of copyright materials: broadly where the teacher copies miscellaneous copyright materials and bespoke educational products containing copyright materials.<sup>31</sup> The *Consultation on Copyright* and relevant Impact Assessments do not deal with the latter at all.

In *Rights and Wrongs* weight (in amount of print and depth of discussion, in particular difficulties of licensing – but no comparative figures) is given to the former. The latter is referred to in 1 of 8 paragraphs. The impression is thus given that teachers copying (or showing copies) is the most significant educational use of copyright materials. Based on this, Phase 2 of the DCE Feasibility Study will now "examine how and whether ... [it] is possible to *make copyright licensing easier* for educational institutions."<sup>32</sup> It is not clear whether economic growth will be considered.

However, the education market is already a big, thriving part of the digital publishing economy, with big players such as Pearson and Elsevier and small, individual producers of bespoke products. This market has grown in response to "every child shall have a computer" and modern educational requirements. Copying of individual "raw" extracts – which in the audiovisual sphere are often inaccessible, anyhow - has largely been superseded by digital educational products, in physical media or online subscriptions. Educational subscription services include access to the British Pathé News collection and Espresso TV using ITN content.

Extending the educational copyright exceptions has a clear potential to disrupt this substantial market. The Impact Assessment to the *Consultation on Copyright* stated that schools and HE institutions paid £19.6m in licence fees to the CLA in 2006/7,<sup>33</sup> and that the CLA distributed £24.6m attributable to educational copying to right holders in 2008/9.<sup>34</sup> Increasing free use can be expected to impact on these amounts – but also on the educational publishing market described above. However, there is no recognition of this market, indication of its size, or the potential impact on it. The use of free copies made by schools and HE institutions, on the other hand, makes no contribution to economic growth.

<sup>24</sup> *Rights and Wrongs* p.30.

<sup>25</sup> p.7 of the BBC's Response to the *Review of Intellectual Property and Growth*.

<sup>26</sup> Para. 88, p.30

<sup>27</sup> p.18.

<sup>28</sup> Para. 75, p.28.

<sup>29</sup> FOCAL described the UK audiovisual footage archive industry in its initial submission to Hargreaves' *Call for Evidence*, its submission to the DCE Feasibility Study and its submission to the Consultation on Copyright.

<sup>30</sup> pp. 68 ff.

<sup>31</sup> pp.25-27.

<sup>32</sup> P.27.

<sup>33</sup> p.12.

<sup>34</sup> p.19.

### *Other exceptions to copyright*

The *Consultation on Copyright* generally proposes “to widen copyright exceptions with a view to modernising and opening them up to the maximum degree (within European Union (EU) law) ... to the maximum degree that is possible without undermining incentives to creators.”<sup>35</sup>

“Without undermining incentives to creators” is not the same as promoting economic growth. Opening up exceptions will result in a transfer of potential value. It is necessary to examine if and to what extent this transfer will also result in economic growth.

For example, introduction of wider quotation and parody exceptions would almost certainly result in lost fees currently paid to film and photo archives – a beneficiary would be “a user at home wanting to mash up materials found on the internet for the amusement of friends”<sup>36</sup> which is not economically productive. We refer to Oxford Economics’ *Consultation on Copyright – Comments on Economic Impacts*<sup>37</sup> which sets out problems with the economic evidence used by the Consultation as the basis for these and other proposals, including Private Copying.

Lack of adequate economic basis in *Rights and Wrongs* and *Consultation on Copyright* has produced oddly unbalanced proposals. In some cases it appears that the basis is not economic growth, but anecdotal evidence. It is then not clear how problems should be identified as such, and how potential solutions and their economic effects will be assessed. Problems will be wrongly identified, viewed subjectively and out of proportion, and adopting solutions which make life *easier* for some may produce the opposite to economic growth and be damaging to industry.

It may be that the IPO relies on economic evidence supplied by the Business Department, as a press report states, “A Business Department spokesman said: ‘We’re not backing away from the £7.9bn figure.’”<sup>38</sup>

### **3. Attempts to update the IP framework**

The patchy history from Gowers until now speaks for itself. It is unhelpful that over the last years businesses have prepared so many submissions – often including detailed economic and legal research, at considerable cost – for them to be largely unused.

In relation to formulation of policy, we highlight the late inclusion of an ECL provision in the text of the Digital Economy Bill in 2009. ECL can have extremely far-reaching implications, nationally and internationally. It is an anomaly in the copyright system, to the extent that leading up to the European Copyright Directive<sup>39</sup> special negotiations were required to permit its application to the digital environment, where it existed in the Nordic countries. The 2009 UK proposal was potentially far more extensive than the Nordic uses of ECL, and could have had enormous consequences for copyright-supported economy within the UK as well as for the UK’s international copyright relations – at inter-government, EU and WIPO levels as well as across huge areas of revenue-generating cross-border copyright commerce.

The UK (in fact, the whole world other than the Nordic countries, where their use is anyhow very restricted) has no experience of ECL at all. Yet the provision was introduced at the last minute without, as far as we could learn, any explanation being given to the areas of industry which would be affected. If economic studies and forecasts were done, they were not published.

A significant proportion of the UK’s GDP is produced by copyright-related industries. Copyright law produces a balanced relationship between copyright holder and copyright user which is the lynch-pin of copyright-based economy. National and international stability is important. Introducing changes which can fundamentally affect this balance – in the UK’s industry and between the UK and the rest of the world – is hugely significant, and deserves better than this.

### **4. How effective is the IPO?**

In our experience the IPO handles trade mark and patent applications efficiently.

We lack information to judge effectiveness of the IPO *per se* in relation to formulating and carrying out IP policy, as we do not know the IPO’s relationship to the experts who the Government has called in such as Gowers and Hargreaves, nor do we know its role within Government in formulating policies and carrying them into action. In the present consultation, Hargreaves’ initial Review was described as “independent.”<sup>40</sup> The next step, the *Consultation on Copyright*, was published by the IPO. As mentioned above, the Business Department claimed responsibility for some economic evidence.

Elsewhere in this submission we draw attention to what we believe are fundamental flaws in the process – in particular, where economic evidence is lacking or flawed yet proposed changes will alter the crucial balance between copyright holder and copyright user. We do not know the IPO’s role in that process. We think that the IPO – or some part of Government – should have had the power to demand, and ability to produce, better evidence before the current basic policy direction was set. We believe that more evidential rigour is needed going forward – including re-opening of the policy decisions have been taken thus far and re-examination of the basis on which they have been taken.

### **5. UK and European and supranational agreements**

#### *Extended Collective Licensing*

We have concerns about the treatment of Extended Collective Licensing - especially that expectations of ECLs are being raised too high.

<sup>35</sup> *Consultation on Copyright* p.6.

<sup>36</sup> *Rights and Wrongs* p.5.

<sup>37</sup> March 2012, produced for the Alliance against IP Theft.

<sup>38</sup> *Daily Telegraph* 30 March 2012 <http://www.telegraph.co.uk/finance/newsbysector/mediatechnologyandtelecoms/digital-media/9150687/Music-industry-blasts-Government-attempts-to-modernise-copyright-laws.html>

<sup>39</sup> Directive 2009/21/EC, see the preliminary paper and Recital 18.

<sup>40</sup> *Call for Evidence – Independent Review of Intellectual Property and Growth* published by the Government in December 2010.

The *Consultation on Copyright* states, "The ECL mechanism has been widely used in Nordic countries since the 1960's and has led to the simplification of rights clearance."<sup>41</sup> In Denmark there are only 12 ECLs of the kind described in the *Consultation*, and 11 which allow individual uses of works. There are fewer in other Nordic countries. They cannot be used to license foreign rights. This is not wide use.

Another contentious statement is that "ECL is also good for creators because it guarantees them remuneration where their work is used."<sup>42</sup> In the Nordic countries ECL does nothing of the kind: a right holder's claim for her fee is limited to 3 years: if she does not come forward to collect it within that period, it is forfeit, and by law she has no other remedy. On the other hand, under the UK's existing system of voluntary collective licensing (such as operated by PRS for Music) every right holder has an agreement with the CMO [collective management organisation] under which she licenses her rights and is legally entitled to her fees and can invoke all remedies for infringement of her copyright.

About users, the *Consultation* states, "... permissions might be missed, either inadvertently (because the user is unaware that the right needs to be cleared/ the rights holder is unaware of/unable to control his rights) or deliberately (because the user decides to risk being unlicensed rather than negotiate the rights clearance system). Where this happens, the user runs the risk of infringement, while the rights holder loses money due to them."<sup>43</sup> But this situation is no different under ECL than when licensing from a "normal" UK CMO. The user must check that the CMO holds the rights and individually negotiate those which it doesn't. With an "ordinary" CMO, these are the rights which the CMO can't license because it doesn't control them (because they haven't been licensed to it). With an ECL, they are also the rights which the CMO can't license because it doesn't control them (but because the right owners have opted out). Any user of a CLA licence is familiar with this situation – she has to check the CLA's website to see whether the work she wants to copy is in the CLA's repertoire. She would have to do exactly the same under an ECL. There is no practical difference for the user – the cost of checking with the CMO whether the rights can be used is exactly the same. Whether the CMO can't license the rights because the right owner hasn't granted them or has withdrawn them is immaterial to the user. But as described above there is the world of difference for the right owner, which the *Consultation* does not explain.

The *Consultation* specifically advocates ECLs for licensing foreign rights.<sup>44</sup> No Nordic ECLs extend to foreign rights. The European Commission has warned against the use of ECLs cross-border, as well as stating that it is opposed to wider application of ECL, specifically stating that collecting societies must have right holders' mandates.<sup>45</sup>

The Commission is also opposed to applying ECL generally to orphan works. However, *Rights and Wrongs* refers to orphan works in the context of ECLs in 6 places. The ECL proposal in the Digital Economy Bill also appeared in the context of orphan works. In Denmark *specific permission* is needed from the Government and is only given to include an orphan work in an existing ECL.

Therefore we wonder whether the legal and practical limitations of ECLs have been fully considered. The proposals in the *Consultation* are not specific enough to enable us to judge the areas in which ECL may be applied, or what the likely opt-out in each area may be. Therefore we fear the possibility of a repeat of the Digital Economy Bill's last minute scramble, giving inadequate time to assess the ECL provision, including unintended consequences.

The *Consultation's* Impact Assessment estimates that ECL could reduce collecting societies' operating costs by between 2 and 5%.<sup>46</sup> We do not understand what this figure can be based on, given the vagueness surrounding where ECL will be able to be used, meaning that no estimate of the cost of implementing it, of how many potential right owners are likely to opt out (meaning that individual negotiations are needed, affecting the cost of using it), or what proportion of the relevant rights are likely to be foreign (where ECL could not apply, affecting the cost of both implementing and using it) are possible yet. However, the next step is likely to be publication of draft legislation.

#### *Orphan works*

The treatment of orphan works in the *Consultation on Copyright* has not taken adequate account of the international aspect. No country can introduce an orphan work licensing scheme which will be valid for works from foreign countries, because there can be no guarantee that use of foreign orphan works licensed for use in the UK cannot be subject to successful infringement claims by foreign right holders (in UK Courts, or in foreign Courts but enforceable in the UK) or that use of UK orphan works licensed for use in foreign countries cannot be subject to successful infringement claims abroad. (Clearly UK licences could not cover use of foreign orphan works abroad.) Thus the scope of any orphan work solution enacted by the UK alone can be expected to be extremely limited in commercial usefulness and thus economic consequences, given the borderless nature of the digital world. This has been the Canadian experience.

All this is commonplace legal ground, therefore we are disappointed that no economic evidence has been given on the cross-border significance of the proposed orphan work licensing solution, as this is absolutely central to whether it is a useful tool for digital economic growth or a white elephant administration of which will be a drain on resources.

Also, clarity on whether any role is proposed for ECL in orphan work licensing is needed, well before draft legislation is published and with similar economic evidence.

#### *Relative strength of national IP rights*

It is widely held that "all of the contemporary advanced economies have strong property rights, and data shows a strong correlation between property rights, productivity, living standards and innovation."<sup>47</sup> There are opinions to the contrary.

<sup>41</sup> p.34.

<sup>42</sup> Paragraph 5.13, p.33.

<sup>43</sup> Paragraph 5.9, p.33.

<sup>44</sup> Paragraph 5.15 on p.34.

<sup>45</sup> In a speech given by Maria Martin Prat, Head of Unit "Copyright", Intellectual Property Directorate, Internal Market and Services DG, European Commission at *Upphovsrätten utveckling* in Stockholm on 2 December 2011.

<sup>46</sup> Paragraph 23, p.34.

<sup>47</sup> Harvard Business Review accessed on 15 March 2011 at [http://blogs.hbr.org/2012/03/would\\_you\\_invest\\_in\\_this\\_kid.html?awid=7588133383359027571-3271](http://blogs.hbr.org/2012/03/would_you_invest_in_this_kid.html?awid=7588133383359027571-3271).

However, governments universally act on the former proposition. It is commonplace that this is a main reason why the USA joined the Berne Convention, extended the duration of US copyright to 50 years p.m.a. in 1978, and then to 70 years p.m.a. by adopting the Sonny Bono Copyright Term Extension Act in 1998.

The Government's "proposals to widen copyright exceptions with a view to ... opening them up to the maximum degree"<sup>48</sup> would weaken UK copyright protection. So would introduction of ECL (because the right holder who has not granted a licence has no rights other than to a fee which she has not negotiated, until she withdraws her work from the licence which she cannot do retrospectively).

The economic arguments which swayed the U.S. legislature to introduce stronger copyright protection – to stem and reverse the significant outflow of copyright-generated revenues from the U.S.A. - prevailed against strong and determined opposition from supporters of the U.S.A.'s longstanding 1<sup>st</sup> Amendment tradition.

We are concerned that the *Consultation* contains no examination of these issues, and no economic evidence on which to base any conclusions about them. We fear that the proposed substantial weakening of copyright protection will result in loss to the UK economy – of revenue, of businesses which close or move abroad, and of the UK's current high placing in the digital stakes (*Rights and Wrongs*: "The UK has, for example, more digital music services operating (70+) than any other country"<sup>49</sup> – that includes the U.S.A.).

## **6. Protecting and enforcement of IP, and development of IP policy**

As stated above, the Government's copyright proposals in the *Consultation* will weaken protection.

Meanwhile, the Government is actively promoting strong enforcement of digital copyright as well as content regulation on the Internet. Recent examples are:

### *Anti-piracy*

- Judgments in *20<sup>th</sup> Century Fox v BT* and *20<sup>th</sup> Century Fox v Newzbin*
- The Government introducing the Digital Economy Act's graduated response to online copyright infringement

### *Internet regulation*

- Joint Committee on Privacy and Injunctions' call for Internet regulation.

By contrast, introducing a private copying exception, extending educational exceptions and applying them to film and sound recordings, and extending the private study and research exception in the same way will make digital copyright infringement or piracy easier to do, and will also send out the opposite of the Government's hitherto strong anti-piracy message.

Hargreaves and Hooper have mentioned "silos" within the media industry. There may also be "silos" in the Government's IP policy.

Hubert Best  
31 March 2012.

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<sup>48</sup> *Consultation on Copyright* p.6.

<sup>49</sup> p.6.