



**Consumer
Focus**
Campaigning for a fair deal

Consumer Focus response to independent review of IP and Growth

**Part 2 - The Copyright Framework:
innovation and growth through fair use,
licensing solutions and appropriate
enforcement**

March 2011

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Executive summary

Consumer Focus is the statutory consumer champion for England, Wales, Scotland and (for postal consumers) Northern Ireland. We operate across the whole of the economy, persuading businesses, public services and policy makers to put consumers at the heart of what they do.

Consumer Focus welcomes the opportunity to respond to the [Independent Review of IP and Growth](#), announced by David Cameron in November 2011 and led by Prof Ian Hargreaves (the Hargreaves review thereafter).

In order to remove barriers to growth and innovation in the copyright framework, Consumer Focus believes the Hargreaves review should recommend changes in the governance framework and copyright law. In order to address the questions posed by the review adequately, we have divided our submission into two parts: Part 1 covers the Governance framework, focusing on its institutions, the balance between IP and competition law, and the question of how collecting societies can be restrained from abusing their monopolies. Part 2 covers key changes in the copyright framework necessary to support innovation and growth, including fair use rights, contract law, licensing solutions and enforcement.

In relation to how the copyright framework can provide the foundations for innovation and growth, Part 2 of our response makes the following key recommendations:

- Introduce a non-commercial use exception for consumers
- Introduce fair dealing for parody
- Immunise fair use rights from contractual overrides
- Introduce extended collective licensing for broadcasters
- Introduce a licensing solution for orphan works
- Strengthen the mere conduit and host principle
- Introduce of a small claims track for lower value copyright infringement disputes

Consumer Focus welcomes the Hargreaves review and we encourage the review team to make UK copyright law fit for the digital age. The UK copyright framework does not currently support innovation and growth to the extent possible, and neither does it ensure a competitive market in copyrighted content and related digital technology. We believe this review is an opportunity to update key areas of the copyright framework, so that copyright regains relevance in the digital age and UK based companies are free to innovate to meet consumer demand.

Copyright law exists to encourage creativity and innovation. Copyright effectively regulates the creation, mass production, distribution, adaptation and consumption of creative content. It should therefore foster entrepreneurship, economic growth and social and commercial innovation. Consumers have a strong interest in competitive markets and a well-functioning copyright system that encourages the creation and distribution of creative content, and does not impose unnecessary cost on businesses and consumers. Copyright confers monopoly privileges on copyright owners which can be used to impose inflated retail prices on consumers, deny artists an equitable remuneration and restrict competition in other industries. It is therefore important that the copyright system strikes the appropriate balance.

Our response focuses on the role fair use rights can play in supporting innovation that takes full advantage of technological developments to meet consumer demand. In particular we are considering the benefits of a non-commercial use exception for consumers, and fair dealing for parody, pastiche, satire and homage. In relation to licensing solutions that can provide the basis for UK businesses to develop innovative products and services at low transaction costs, we outline the benefits of extended collective licensing, and support the case for a statutory underpinning cross-border licensing at EU level. Turning to proportionate enforcement we make the case for strengthening the mere conduit and host principle, without which online services could not effectively operate. To support access to justice for entrepreneurs, SMEs and consumers, we ask for the introduction of a small claims track to the Patents County Court as a matter of urgency.

Part 2 of our response therefore seeks to provide input on the following questions posed by the call for evidence.

- Is there evidence from other national frameworks to suggest how the UK (and EU) copyright systems could better support innovation?
- Is there evidence of how the UK copyright framework supports growth and innovation?
- Is there evidence of areas where the UK copyright framework does not deliver the optimal outcomes?
- Is there evidence to suggest that the current framework impacts the production and delivery of goods and services which consumers want?
- What evidence is there that the necessity / complexity / cost of obtaining permissions from existing rights holders constrains economic growth?
- To what extent are the international rules around copyright more or less important than those in the UK? How should the UK approach this matter?
- To what extent is cost of litigation a factor in the effectiveness of civil remedies?

A full list of recommendations made in Part 2 of our response in relation to establishing a copyright framework that supports innovation and growth through fair use, licensing solutions and appropriate enforcement, can be found below.

Consumer Focus recommends that the Hargreaves review:

- Introduces a technology neutral non-commercial use exception into UK law, allowing consumers to copy copyrighted content they have purchased for their own, non-commercial use, such as format-shifting
- Introduces fair dealing for parody, pastiche, satire and homage in UK copyright law, allowing the copying of copyrighted works for the purpose of creating such works and the communication to the public of the new works on a commercial and non-commercial basis
- Immunises fair use rights in UK copyright law from contractual over-rides, this should include fair dealing, permitted acts and exceptions
- Introduces exceptions that would allow the circumvention of DRM and TPM where it prevents consumers, public institutions and businesses from exercising their fair use rights established in UK copyright law
- Introduces an extended collective licensing provision for broadcast in UK law, specifically designed to facilitate the online and mobile delivery of broadcast content
- Introduces a licensing solution for orphan works, as was proposed in the Digital Economy Bill

- Supports proposals for a EU Directive on the cross-border licensing of music in the long-term
- Maintains and strengthens the mere conduit and host principle in UK law, and introduce a remedy against abuse of takedown notices
- Introduces a modified small claims track and fast track to the Patents County Court, to ensure that consumers, entrepreneurs and SMEs can resolve lower-value copyright infringement disputes cost effectively

Fair use rights for consumers – supporting innovation and economic growth through a non-commercial use exception

Consumer Focus believes that the Hargreaves review should make recommendations for the updating and future proofing of fair use rights in UK copyright law as a matter of urgency. By international comparison, the UK lags behind in terms of providing consumers, public institutions and businesses with fair use rights that would allow social and commercial innovation which effectively utilises technological developments. The last time copyright law was comprehensively updated was in 1988. More than 12 years later it is time to update UK copyright law so that it is fit for the digital age. Consumers as well as businesses have a strong interest in the development of new markets, services and products that harness digital technology to deliver content. As outlined in Part 1 of our submission, copyright licensing is central to ensuring competitive and innovative markets. But fair use rights are equally important. They allow for the use of copyrighted content without the permission of the copyright owner, where there is no economic harm, licensing would be cost ineffective and access is in the public interest. On a more basic level they ensure that copyright does not descend into absurdity. It is ridiculous that format-shifting is illegal in the UK. Aside from any chilling effect on UK based businesses developing hardware and software, it undermines the credibility of copyright in the eyes of the public, and it remains the most obvious sign of a copyright framework that is utterly outdated.

Fair use rights in international comparison: IP Watchlist 2009 and 2010

In 2009 and 2010, Consumers International (CI) undertook a survey of 16 and 34 countries respectively to compare the provision of fair use rights for the benefit of consumers, public institutions and others in copyright law. Consumer Focus has provided the UK country reports, which were analysed by Consumer International. The IP Watchlist 2011 is due to be published in April 2011. In 2009 the UK was the worst of 16 countries, principally because we lack a provision for non-commercial use in law. In 2010 the UK was the third worst of 34 countries, for the same reason. In 2011 we expect the UK to remain in the bottom half list, as format-shifting, the back-up of digital content and parody remain illegal.

In 2010 Consumers International observed that ‘Most of the best rated countries (but none of the worst rated countries) have copyright exceptions that are *broad* and *general*... in other words, they allow consumers to copy material for a range of purposes, rather than just for narrow ones like private study or news reporting. In the United States and Israel, this exception is called “fair use” – which will be discussed in much more detail. In Lebanon and Sweden it’s called “private copying” – as this implies, it only applies to individuals for their own use, but it isn’t limited to education; it extends to the use of material for leisure purposes. In both cases, it gives consumers in these countries a lot more flexibility to utilise cultural and educational materials than those in the worst-rated countries enjoy.’

In 2010 the overall rankings of the countries studied, from best (most consumer-friendly) to worst (most hostile to consumer interests), were:

- | | |
|------------------|------------------------|
| 1. India | 18. Canada |
| 2. Lebanon | 19. Philippines |
| 3. Israel | 20. Vietnam |
| 4. United States | 21. Fiji |
| 5. Indonesia | 22. Cameroon |
| 6. South Africa | 23. South Korea |
| 7. Bangladesh | 24. Ukraine |
| 8. Morocco | 25. Japan |
| 9. Sweden | 26. Egypt |
| 10. Pakistan | 27. Zambia |
| 11. China (PRC) | 28. Brazil |
| 12. Spain | 29. Argentina |
| 13. Malaysia | 30. Thailand |
| 14. New Zealand | 31. Kenya |
| 15. Australia | 32. United Kingdom |
| 16. Nigeria | 33. Jordan |
| 17. Mexico | 34. Chile ¹ |

	Scope and duration of copyright	By home users	Freedom to access and use							Freedom to share and transfer	Admin and enforcement	Overall
			For education	Online	By content creators	By the press	By libraries	By disabled users	In public affairs			
Argentina	C	F	F	C	D	B	F	C	C	B	C	C-
Australia	D	C	B	C	B	C	B	C	D	D	C	B-
Bangladesh	B	C	A	C	C	C	B	F	C	D	C	B-
Brazil	F	F	F	D	B	B	F	A	B	C	D	C-
Cameroon	B	D	C	A	B	D	F	C	B	D	D	C
Canada	C	D	B	B	D	A	B	A	D	F	C	C
Chile	F	F	F	C	D	D	F	F	F	C	C	D
China (PRC)	B	C	A	C	C	B	C	C	A	F	D	B-
Egypt	D	C	B	B	D	B	C	F	B	F	F	C
Fiji	C	D	D	B	C	B	C	F	C	F	C	C
India	B	B	B	A	A	A	B	C	C	D	A	B
Indonesia	D	B	A	A	D	A	B	A	B	D	D	B
Israel	D	D	C	A	B	A	B	C	B	C	B	B
Japan	F	C	B	C	F	B	D	A	D	C	D	C
Jordan	C	D	C	D	F	B	D	F	B	F	F	C-
Kenya	A	D	D	C	D	D	D	F	B	F	F	C-
Lebanon	C	C	C	B	B	A	B	C	A	F	B	B
Malaysia	C	C	A	D	C	B	C	C	C	C	C	B-
Mexico	D	C	B	A	C	B	B	F	C	D	D	C
Morocco	C	D	B	A	C	A	A	F	C	F	C	B-
New Zealand	D	C	C	B	C	B	B	A	B	D	C	B-
Nigeria	B	C	C	C	D	B	C	C	D	D	B	B-
Pakistan	A	D	A	F	F	A	B	F	B	F	B	B-
Philippines	D	C	D	B	D	A	B	F	B	F	D	C
South Africa	B	D	B	B	D	A	D	F	B	B	C	B-
South Korea	D	D	A	C	C	B	B	C	C	D	D	C
Spain	D	B	D	A	C	B	D	C	B	D	C	B-
Sweden	C	A	F	A	B	A	D	A	B	D	C	B-
Thailand	D	B	B	F	C	B	C	F	D	F	F	C-
Ukraine	D	B	D	A	C	D	B	C	B	F	D	C
UK	C	F	F	B	C	D	B	A	F	D	F	C-
USA	B	B	C	A	B	C	A	A	B	C	D	B
Vietnam	B	F	B	C	D	A	D	C	A	F	D	C
Zambia	C	B	D	C	D	C	D	F	B	D	D	C

By international comparison, UK copyright law is particularly restrictive in relation to fair use

¹ [Consumers International IP Watchlist Report 2010](#), a2knetwork.org

rights for 'home users', 'education' and 'public affairs'. The UK scored an F in all three categories. Fair use rights in relation to 'the press' also score low compared to other countries with a D. The UK's overall score for 'freedom to share and transfer' was D, and F for 'admin and enforcement'. The US in particular provides for a fair use rights that allow greater access to copyrighted works, scoring significantly higher in all categories, except 'admin and enforcement'. The UK's overall score was C-, with the US achieving a B, while Canada and Japan got a C.

In relation to fair use Consumers International observed that: 'There are many uses of copyright materials that are allowed under US law as "fair use", that would not be allowed under the more specific exceptions of other countries. These include new and innovative uses of copyright works, such as the production of audio and visual collages or "mash-ups", as well as more prosaic uses such as transferring music to an MP3 player, or recording your favourite television show to watch later. Businesses, too, can benefit from fair use – for example, the way in which an Internet search engine operates, by providing short excerpts from websites and thumbnail pictures of images, relies on this exception.

'The fair use exception of US law is not perfect. Because it is by nature so imprecise, it is difficult to be certain whether a given use falls within the exception or not (in fact, fair use rights have been more cynically described as 'the right to consult a lawyer'). For this reason CI advocates the adoption of a fair use exception as a supplement to existing more specific exceptions, not as a substitute for them. Fair use, in other words, should operate as a 'catch-all' exception, to ensure that consumers do not become unwitting infringers when copyright laws fall behind.

'The only other countries in our survey that have adopted a fair use exception modelled on that of the US are Israel (highlighted in last year's IP Watchlist) and the Philippines. However, evidence of movement towards the adoption of a broader "fair use"-style exception is found in a few more countries in this year's Watchlist, including Australia, India, Lebanon, Spain and Sweden. CI would like to see this trend continue, and for those exceptions to be further broadened and strengthened.'

The IP Watchlist 2010 is available on the Consumers International Access 2 Knowledge website at [IP Watchlist 2010 summary report](#). The individual country reports for the 34 countries surveyed can be found at [Country reports 2010](#).

The purpose of copyright is to encourage learning and the production and distribution of creative works, ensuring that artists and investors are remunerated and consumers have access to information and culture. Copyright gives copyright owners the sole right to commercially exploit their copyrighted works by granting the exclusive right to copy, adapt and distribute a copyrighted work. At the same time copyright exceptions and fair dealing in UK law allow consumers and others, eg educational institutions and news agencies, the fair use of copyrighted works without permission or payment in certain circumstances. These provisions protect the public interest and allow for social and commercial innovation. The fair dealing provision on criticism, review and news reporting is central to the functioning of the UK news media. The exceptions for the benefit of visually impaired people allow for the creation of accessible formats which would otherwise not be provided by the market.

However, with the emergence of ever new platforms and formats for creative content existing exceptions and fair dealing provisions in UK law have become outdated. UK copyright law currently makes everyday consumer activities, such as back-up and format-shifting of music, films and e-books, illegal. The law needs to be updated urgently if it is to remain relevant; copyright law also need to be future proof so that primary legislation does not have to be updated in step with technological advances. Ultimately copyright law should

be relevant to consumers, and provide certainty to the creative and the technology industry which innovates within the limits of the regulatory framework.

Over the past decade the use of copyrighted works by consumers has been termed 'fair use', 'private copying' or 'non-commercial use'. These terms are loosely based on existing provisions, such as the fair use defence in US law, the private use provisions in civil law in European countries and the Creative Commons license terms. The boundaries of what may constitute fair use, private copying or non-commercial use are fluid, in popular use and law. The US fair use defence sits more easily with UK law and traditions than the private use provisions and accompanying levies of civil law European countries. This is because both the UK and the US have developed their fair use and fair dealing defences on the basis of the common law principle of fair abridgement. The US fair use defence provides a general defence, with specific reference to 'criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research'.² In UK law three fair dealing defences (old English for fair use) provide for specific defences in case of criticism and review; current events reporting; and non-commercial research and private study.³ As no general fair dealing defence is provided, these provisions do not provide for the kind of flexibility the US fair use defence does. However, the open ended nature of the fair use defence has in practice led to great uncertainty about what is and what is not legal under US copyright law. Numerous fair use defence cases have reached, and divided, the Supreme Court. However, fair use in reality is only litigated in cases that have significant economic value and courts are therefore unable to set the boundaries of an open ended provision as new technologies emerge.

The perils of legal uncertainty for UK businesses is illustrated by *CBS Songs v Amstrad*. The House of Lords ended a four-year spat between Amstrad and the BPI over twin deck tape recorders, and whether Amstrad was liable for copyright infringement by consumers (see below). The case law that emerged, namely that hardware manufacturers are not liable for copyright infringement by consumers if their product has legal uses and they are not marketed for illegal purposes, provides hardware and software companies selling products and services to consumer today with some protection against liability. But the Amstrad case law is no substitute for the certainty that clear fair use rights in law provide to businesses developing products and services for consumers. Companies commonly develop products and services for consumers around fair use rights in law. Without a clear fair use right for format-shifting UK based companies risk being sued if they develop products which have no other legal function, or if they market products for the purpose of format-shifting. This is an absurd situation, especially given that products designed for format-shifting, such as the iPod and iTunes, are on sale in the UK. Format-shifting is legal in the US under the fair use defence and in continental European countries under a private use exception, and Apple designed their products on the basis that format-shifting is legal for consumers.

Case law: CBS Songs v Amstrad – Liability for copyright infringement by consumers

In 1988 the House of Lords decided whether Amstrad was liable for copyright infringement by consumers, ending a legal battle that had started four years earlier. Amstrad was accused of manufacturing twin deck tape recorders which were designed for tape-to-tape copying and advertised in a manner likely to encourage home taping and copying. CBS Songs and other record companies represented by the BPI sued Amstrad,

² [Copyright Act 1976](#), section 107 Limitations on exclusive rights: Fair use

³ [Copyright, Designs and Patents Act 1988](#), Section 29 & 30, fair dealing for non-commercial research and private study and criticism, review and news reporting

claiming that the marketing of the equipment constituted an authorisation of copyright infringement, and hence Amstrad was liable for copyright infringement committed by its customers, and damages.

Amstrad had introduced the twin deck in 1983, a year later Amstrad marketed the double deck to 'tape tapes at twice the speed of sound' and promised 'make copies in half the time'. The BPI wrote to Amstrad, stating that the company acted illegally and threatened consequences for selling the twin deck. After the BPI complained to the Advertising Standards Authority and wrote to dealers stocking the hardware, Amstrad sought a declaration that it was entitled to market the machines in the UK. However the High Court refused such a declaration, with the judge finding that while the hardware had legal uses, Amstrad had 'wholly and significantly failed' to satisfy him that the advertisement did not encourage copyright infringement. Amstrad suspended marketing pending an appeal. In 1985 the appeal court decided that Amstrad was not acting unlawfully selling twin decks, rejecting the BPI's claim that the marketing amounted to an authorisation of copyright infringement, even though Amstrad knew that the twin decks were probably used for copyright infringement. The judge ruled that what consumers do with the hardware was out of the manufacturer's control. But no declaration was issued. Amstrad founder and chief executive Alan Sugar hailed the decision as a victory and threatened to sue the BPI for defamation and disruption of Amstrad's business.⁴

In 1988 the case finally reached the House of Lords, and was decided in favour of Amstrad. Lord Templeman found that 'in the present case Amstrad did not ask anyone to use an Amstrad model in a way which would amount to an infringement'. It was held that 'sales and advertisement to the public generally of a machine which may be used for lawful or unlawful purposes, including infringement of copyright, cannot be said to "procure" all breaches of copyright thereafter by members of the public who use the machine. Generally speaking, inducement, incitement or persuasion to infringe must identifiably procure a particular infringement in order to make the defendant liable as a joint infringer.'⁵

One of the few fair use rights for the benefits of consumers in UK law is the time-shifting exception, which allows consumers to record radio and TV broadcast to listen and watch the broadcast at a more convenient time. This fair use right was introduced in 1988 as part of the Copyright, Designs and Patents Act 1988, the last comprehensive update of UK copyright law. It essentially legalised what consumers had been doing since the 1970s, ie time-shift broadcast using tape and video recorders that had become common. Technology neutral exceptions, such as that on time-shifting, allow copyright law to remain relevant as technology develops and in turn drive new technological innovation. A significant example of new products and services that have been developed on the basis of this fair use right, and would not have been possible under the Amstrad case law, is the digital video recorder (DVR). DVRs were introduced to the UK market in 2000, again by Amstrad, and BSkyB offered Amstrad DVRs to UK consumers as part of a +box subscription service in 2001. Amstrad would not have been able to introduce DVRs to the UK market in reliance on its 1988 court victory, because DVRs practically have no other purpose than to time-shift broadcast, and they were marketed for that purpose by BSkyB. The time-shifting function is central to the +box subscription business model, as it allows consumers to enjoy premium content outside the constraints of linear broadcasting. DVRs and +box subscription services, also offered by Virgin Media, had a profound effect on consumers TV consumption and the

⁴ [Twin-Cassette Battle: BPI Claims Victory](#), Billboard, Vol.97 No.46, 16 November 1985, pg.9: [Cassette decks hit by legal ruling](#), New Scientist, Vol. 106 No.1462, 27 June 1985, pg.5

⁵ Graham J.H. Smith, [Internet law and regulation](#), Sweet & Maxwell, 2007, pg.50

way in which premium content, such as Hollywood movies and high profile sports events are broadcast.

Case study: time-shifting exception for radio and TV broadcast

Time-shifting of broadcast was legalised in the Copyright, Designs and Patents Act 1988 and the exception was introduced to accommodate consumers' use of video and tape recorders. The exception is technology neutral and consumers now time-shift broadcast using DVR, which store digital TV programmes on hard disk so that they can be replayed at a later time. These are available as standalone hardware, or more commonly, as part of +box subscriptions offered by BSkyB and Virgin Media.

According to Ofcom DVR adoption has risen steadily over the past five years, increasing more than threefold from 11 percent in 2005 to 37 percent of homes in 2010. DVRs have profoundly influence consumers' viewing habits. The percentage of all TV viewing that was time-shifted through a recording device more than tripled between 2006 and 2009, from 1.7 percent to 5.9 percent. The proportion of recorded viewing among people with DVRs in their home is 15.1 percent. The proportion of all time-shifted viewing of content recorded and watched on the day of broadcast has risen fourfold over the last three years. 42 percent of consumers said that they watched a greater variety of programmes since owning a DVR and 80 percent of consumers believe that they watch more programmes that they enjoy because they have a DVR. DVRs now offer search functionality and 'push' video-on-demand. DVR hard drives are increasing in size with some now offering up to 250 hours of recording, while early generation DVRs only allowed 40 of recording.⁶

DVRs were first introduced to the UK market by Amstrad in October 2000, DVRs spread with BSkyB launching the Sky+ service in 2001. Nearly nine million DVRs have been sold since 2000 and BSkyB estimated that there were 4.4 billion instances of time-shifting in 2008. Amstrad was BSkyB main hardware supplier since 1988 and supplied the DVRs for the +box subscription packages.⁷

The challenge the UK faces is to introduce fair use rights for consumers which are narrow enough to avoid the legal uncertainty and litigation that comes with a general fair use defence. At the same time an exception in UK copyright law has to be broad enough so as to not become outdated within a matter of years. The UK should not repeat the mistake New Zealand made in 2008 when it introduced a narrow format-shifting exception for sound recordings, specifically designed to legalise the format-shifting of CDs to iPods.⁸ This means that three years later, consumers in New Zealand are breaking the law if they format-shift a film, which are now commonly watched on iPods and iPads, and when they format-shift e-books from pdf into the Kindle format. We believe that the Hargreaves review team would also benefit from considering the experience of Australia. Australia reviewed copyright law in 2005. It specifically considered whether to introduce a fair use defence similar to the provision in US law. Australia decided against introducing such an open ended provision. In 2006 it complemented its existing fair dealing provisions, which are similar to the UK provisions, with an additional fair dealing for parody and satire, two exceptions for time-

⁶ [The Communications Market 2009](#), Ofcom, August 2009, pg.40 & 100

⁷ [British Sky Broadcasting Group plc Annual report 2008](#), BSkyB, July 2008, pg.3: [The Communications Market 2009](#), Ofcom, August 2009, pg.39-40: [BSkyB buys Amstrad for £125m](#), guardian.co.uk, 31 July 2007

⁸ [Information sheet – "Personal use" copying: format- and time- shifting](#), Copyright Council of New Zealand, March 2009

shifting and format-shifting, and a number of specific exceptions for libraries.⁹ The Hargreaves review team should follow Australia's approach to the review of fair use rights: that is to start by mapping those uses it wants to legalise and then design the most appropriate copyright exception. The exception should be specific enough to only legalise uses that do not impact negatively on artists and investors in copyright, and broad enough to remain relevant as consumers enjoy copyrighted works in an ever increasing number of formats using newly emerging technologies.

The key question for the Hargreaves review team will be how to future proof any fair use rights it introduces to UK law so that they do not become outdated within a matter of years. This is particularly difficult because it is impossible to anticipate future technological developments and the emergence of new markets. The time-shifting exception is an example of a UK fair use right that has stood the test of time, principally because it was not technology specific, ie it did not specify that consumers could time-shift using tape and video recorders, it only states that consumers may time-shift broadcast. We believe that any fair use right introduced to UK law should be technology neutral and cover all formats.

Consumers format-shift and copy for personal consumption using a range of technology. To accommodate this and ensure that copyright law remains relevant over time, we believe that the UK should introduce a non-commercial use exception, covering format-shifting, back-up and any other copying consumers may do in order to enjoy the copyrighted content they have purchased on different hardware and software. Such an exception would also simplify copyright law, in that the existing back-up exception for computer programmes could be merged into the non-commercial use exception. The concept of non-commercial use will be familiar to consumers through Creative Commons licensing terms, and exists in UK law through fair dealing provision on non-commercial research and private study. The basic principle of the exception could be that if a consumer has purchased a product, they have the right to copy, shift and back-up so that they can enjoy what they have bought on whatever format or device they wish. We believe that it is more appropriate in the digital environment to term such a fair use right non-commercial use, rather than private use, a term used in continental European countries with civil law tradition. Private use exceptions were introduced in civil law European countries in the 1960s to legalise what was considered 'private use', ie use within the home.¹⁰ In an environment where consumers enjoy music, film and books on the go and the ability to enjoy content 'whenever, wherever' is one of the central digital media propositions, we believe non-commercial use more accurately reflect consumer behaviour.

⁹ Mark Davison, Ann Louise Monotti & Leanne Wiseman, [Australian Intellectual Property law](#), Cambridge University Press, 2008, pg.273

¹⁰ Graham Dutfield & Uma Suthersanen, [Global intellectual property law](#), Edward Elgar Publishing, 2008, pg.239; Natali Helberger & Bernt Hugenholtz, [No Place like Home for Making a Copy: Private Copying in European Copyright Law and Consumer Law](#), Instituut voor Informatierecht, University of Amsterdam, 2007, pg.1069

Copyright law: Consumer activities and perceptions

In 2009 Consumer Focus commissioned BMRB to conduct a face to face Omnibus among 2,026 British adults aged 15 and older. The field work was undertaken 17th-23rd September 2009.

Before telling consumers what is and what is not illegal under UK copyright law, we asked them which activities they had undertaken in the past 12 months, which activities they think are illegal under UK copyright law, and which activities they think should be illegal.

	activities	perception	actual legal status	expectation
	done in the last 12 months	'is illegal'		'should be illegal'
	GB population total	GB population total		GB population total
Copying a CD or DVD you have bought to another format so that you have a copy in more than one location	11%	26%	Illegal	14%
Making a back-up copy of computer software you have bought	11%	19%	Legal	12%
Making a back-up copy to CD, DVD or tape of any music, movies or e-books you have bought	11%	22%	Illegal	11%
Copying a CD or DVD you have bought to a computer for your own use	14%	17%	Illegal	10%
Copying a CD or DVD you have bought to a memory stick for your own use	9%	17%	Illegal	9%
Copying a CD or DVD you have bought to an iPod, mobile phone or any other mobile device for your own use	16%	15%	Illegal	9%
Recording a TV programme at home to watch at a later time (on a video recorder or Sky+ for example)	40%	4%	Legal	3%

Creative Commons licensing terms: Defining ‘non-commercial’

Many consumers will be familiar with ‘non-commercial use’ through Creative Commons (CC) licensing terms. Non-commercial is a standard CC licensing term and has proven popular with artists who licence their works under CC. CC is committed to making licenses as clear as possible for creators and consumers. Research commissioned by CC in 2009 to study consumer and creators perceptions of ‘non-commercial use’ indicates that ‘personal use at home/with friends’ was regarded as ‘definitely a non-commercial use’ by 85 per cent of consumers and 75 per cent of creators. Overall a commercial use was defined as one that makes money by seven in 10 consumers and creators.¹¹

It is important that the boundaries of a non-commercial use exception for consumers are clear. Such a fair use right would not cover the distribution or making available online of copies. As such it would not legalise peer-to-peer filesharing, even if on a non-commercial basis. Incidentally, distribution of copyrighted content through p2p networks is not regarded as legal under the fair use defence. We believe it is reasonable that consumers should be able to copy what they have purchased for consumption on different devices, but that they cannot distribute such copies to the public. On the basis of the consumer research we have undertaken we believe that such an exception would find broad support among consumers.

The UK is free to introduce a non-commercial use exception in UK law under what the InfoSoc Directive (Directive 2001/29/EC) describes as ‘private use’ in Article 5(2)(b). Copyright law across member states varies and the Directive established some minimum requirements, as well as an exhaustive list of copyright exceptions the UK may introduce for the benefit of consumers and other stakeholders. Consumer Focus believes that the UK should introduce exceptions to the full extent possible under the InfoSoc Directive, and so bring UK copyright law in line with copyright laws in other EU countries. The Directive does not allow member states to introduce general non-commercial use exceptions covering the distribution, or making available to the public, of copyrighted content. This means that it is not possible to introduce the US fair use defence in UK law, because it effectively establishes an exception for non-commercial copying and making available to the public. However, under the InfoSoc Directive the UK is free to introduce non-commercial use exceptions which allow individuals to copy for non-commercial use.

Copyright law: Consumer opinions

In 2009 Consumer Focus commissioned BMRB to conduct a face to face Omnibus among 2,026 British adults aged 15 and older. The field work was undertaken 17th-23rd September 2009.

Before we asked consumers’ opinion on copyright law we explained to them the basics of UK copyright law as it stands.

“Copyright law applies to artistic works such as books, films and music. Copyright has also been expanded to cover software and databases. In UK copyright law the copyright owner has the exclusive right to copy the work, to perform or show the work in public, to distribute copies to the public and to make adaptations of the work.

¹¹ [Defining ‘Noncommercial’ – A study of How the Online Population Understands ‘Noncommercial Use’](#) Creative Commons, September 2009 pg.56 and 73

Current UK copyright law only provides few exceptions to these exclusive rights, such as, for example, recording a TV programme to watch it at a later time. This means that even after consumers have purchased a copyrighted work they do not have the automatic right to copy the work onto another device, such as an iPod, or adapt the work, regardless of whether it is for personal use or non-commercial purposes.”

‘Please tell me the extent to which you agree or disagree with the following statements?’

	total GB population	
	Agree	Disagree
Copyright law should achieve a fair balance between the interests of artists and consumers	82%	4%
UK copyright law should be updated now that we have digital technologies	80%	5%
I’m never quite sure what is legal and illegal under current copyright law	73%	10%
I would support a campaign aimed at updating UK copyright law	63%	10%
It’s impossible to enforce current copyright law now that we have digital technologies	61%	16%
I should be able to copy copyrighted works for my own use	57%	23%
Copyright owners should have the exclusive right to make money from the copyrighted work, instead of having the exclusive right to copy, show, play, distribute and adapt copyrighted works.	55%	13%
I should be able to share copyrighted work with family	48%	29%
Copyright law, as explained, makes it illegal to have fair access to music, video and books	45%	28%
I should be able to adapt copyrighted works for my own use	41%	34%
I should be able to share copyrighted work with friends	38%	38%
UK copyright law is fine as it is	24%	46%

Private use exceptions, as they are known in the EU, require fair compensation in the event of any significant economic damage to the copyright owner. In November 2010, the European Court of Justice (ECJ) clarified that fair compensation is only required in relation to economic damage suffered by the copyright owner as a result of the private copying. The ECJ decided that:

'The purpose of fair compensation is to compensate authors adequately for the use made of their protected works without their authorisation. In order to determine the level of that compensation, account must be taken as a 'valuable criterion' – of the 'possible harm' suffered by the author as a result of the act of reproduction concerned, although prejudice which is 'minimal' does not give rise to a payment obligation. The private copying exception must therefore include a system 'to compensate for the prejudice to rightholders.'¹²

It is important to note that the InfoSoc directive does not require fair compensation in relation to economic benefits that may arise from private copying to the consumer or other industries. Therefore the BPI and the music industry are wrong to suggest, in response to Gower's recommendation for a format-shifting exception, that EU law required "compensation" for any private copying. The BPI argued that:

'We acknowledge that consumers clearly want to format shift and also place enormous value on the transferability of music. Music fans clearly deserve legal clarity in this area as well as the freedom to enjoy any music they have legitimately obtained.

But it is not only music lovers who benefit here. Enormous value is derived by those technology companies and manufacturers who enable consumers to copy. UK creators and rights owners are legally entitled to share in this value – as they hold the exclusive right to reproduce their music – but are currently excluded from the value chain.

The UK IPO's current recommendation also leaves the UK at odds with the rest of Europe. In every other major European territory, an exception for private copying is counterbalanced by mechanisms that compensate creators and rights holders.'¹³

The Hargreaves review team will have to address the issue of economic damage resulting from a non-commercial use exception. And the issue of fair compensation needs to be addressed once such a fair use right is introduced into law. We would like to highlight that EU law does not require a levy, only compensation in the event of any significant damage to copyright owners.

Levies: distorting markets and imposing significant costs on consumers

Consumer Focus opposes levies of the kind that are operational in civil law European countries because they are blunt and arbitrary, imposing significant unjustified cost on consumers. Levies existed in most countries before the introduction of the InfoSoc directive, and were originally introduced in the 1960s by German courts, on the basis that hardware manufacturers are liable for copyright infringement by consumers and that every use of copyrighted content should be compensated.¹⁴ The historic principles underlining levies in

¹² [ECJ Decides Private Copying Levies Are Not Allowed For Business Use](#), Digital Civil Rights in Europe, 3 November 2010

¹³ [Music Business Group unveils collective submission on private copying and format shifting](#), BMG press release, BPI, 8 April 2008

¹⁴ Natali Helberger & Bernt Hugenholtz, [No Place like Home for Making a Copy: Private Copying in European Copyright Law and Consumer Law](#), Instituut voor Informatierecht, University of Amsterdam, 2007, pg.1069

many EU countries are at odds with the principles of the InfoSoc directive, which was subsequently adopted. This explains the incoherent nature of levies in many EU countries and the fact that in reality they are not actually set according to economic damage caused to copyright owners. Clearly the conclusions arrived at by German courts are also at odds with UK case law on liability of hardware manufacturers.

Levies in some civil law European countries impose significant additional costs on households, and by distorting retail prices, they impact on demand and purchase of digital hardware. The Italian consumer organisation Altroconsumo has recently written about the impact levies in Italy have on household, and the cost they impose:

'In the course of a year, an average family will spend more than €100 more thanks to a new Government Decree fixing copyright levies. Unbeknown to them, consumers buying electronic goods such as blank CDs, USB keys, memory sticks or multimedia mobile phones will be forced to pay a levy for the right to make private copies. This levy is applied to compensate the authors of music, audio and video content for the alleged economic harm due to private copying. Altroconsumo believes the current rules on private copying are an aberration, because consumers pay up to three times for using the same content even only once. For example, someone legally downloading a song from iTunes, will be paying a copyright levy on the song downloaded. Then another copyright levy applies on the purchase of the PC. Finally, he or she will incur a further fee for the use of an iPod as a listening device. The cost of pleasing copyright holder associations is too much for Italian families.'¹⁵

Costo annuo dell'equo compenso per una famiglia	
Prodotti acquistati	Quota di equo compenso (in euro)
Confezione di 20 CD da 80'	5,87
Confezione di 20 DVD da 4.7 GB	8,20
Una Memory Card da 2 GB	0,10
Due Memory Card da 4 GB	0,40
Una Memory Card da 8 GB	0,24
Una chiavetta USB da 4 GB	0,36
Una chiavetta USB da 8 GB	0,72
Hard Disk esterno da 1000 GB	10,00
iPod Classic 160 GB	16,10
Lettore Mp3 16 MB	9,66
Videoregistratore con hard disk integrato da 250 GB	22,54
Un telefonino multimediale	0,90
Console videogiochi con memoria da 120 GB	6,44
Decoder DGTV con hard disk integrato da 160 GB	16,10
Hard disk esterno multimediale da 640 GB	12,88
Totale	110,51

¹⁵ [Ben 100 euro a famiglia in piu per accontentare la SIAE](#), ALtroConsumo, January 2010

With regards to fair compensation or economic damage to copyright owners, Consumer Focus would like to emphasise that the economic evidence that format-shifting causes any kind of economic damage to rights-holders simply does not exist.¹⁶ This is the conclusion of a literature review Consumer Focus commissioned in 2009, though the literature review also found that the area is significantly under-researched. We believe that the Hargreaves review team should recommend the introduction of a non-commercial use exception in UK law and that the IPO should establish the economic evidence base on whether format-shifting and the other uses legalised by such a provision cause any significant economic damage to copyright owners.

Consumer Focus recommendation for non-commercial use exception in UK law:

We recommend the introduction of a technology neutral non-commercial use exception, allowing individuals to copy copyrighted works they have legally acquired for non-commercial purposes. This would be done principally under Article 5(2)(b) of the InfoSoc Directive (Directive 2001/29/EC).

This exception should be considered to include back-up of digital media, and therefore the existing exception for the back-up of computer programmes in certain circumstances, should be merged into the non-commercial use exception. The existing exception for back-up, Section 50A of the Copyright, Designs and Patents Act, corresponds to Article 5(1) of the Computer Programmes Directive (Directive 2009/24/EC).

Consumer Focus recommends that the Hargreaves review:

- Introduces a technology neutral non-commercial use exception into UK law, allowing consumers to copy copyrighted content they have purchased for their own, non-commercial use, such as format-shifting

¹⁶ Mark Rogers, Joshua Tomalin & Ray Corrigan, [The economic impact of consumer copyright exceptions – a literature review](#), Consumer Focus, November 2010, pg.7

Fair use rights for creativity and innovation – allowing social and commercial innovation through parody

UK copyright law currently does not provide for an exception for parody, pastiche, satire and homage, and therefore anybody creating or distributing such a work is potentially liable for copyright infringement and a costly court case. Copyright protects the fixation, or the expression of an idea, not the idea itself. As such not every parody, pastiche, satire and homage of a copyrighted work will be copyright infringement. But many of these works are clearly derivative works of the original and use a substantial part of the original work on which they are based.¹⁷ We believe that the Hargreaves review should recommend for the introduction of fair dealing for the purpose of parody, pastiche, satire and homage in UK law in order to reduce the cost and chilling effect associated with relying on case law. Such works are an integral part of our lives, and are found everyday on the BBC, the theatre stage and YouTube. We believe it is time to support this kind of social and commercial innovation, and provide copyright owners with clear protection. We don't expect a fair use provision to necessarily result more works of this kind being produced, but we would expect it to reduce the cost associated with rights clearance, litigation and take down notices. Fair dealing for the purpose of parody, pastiche, satire and homage is compliant with EU law, and we believe this would be significant step towards establishing the legal framework for innovative commercial and non-commercial transformative use.

The UK is among the few industrial countries which do not have an exception for parody. Australia most recently introduced a fair dealing provision for parody and satire into copyright law in 2006,¹⁸ Belgium, Spain, Switzerland,¹⁹ and France provide for a similar exception.²⁰ Countries, which like the UK do not provide for an exception in law, commonly see litigation on the issue. In Germany courts take a lenient view on parodies in the absence of a statutory exception,²¹ while in the US court generally considers parodies to fall under the fair use defence as a form of criticism. US courts have considered parodies in a number of landmark cases, but the theoretical and practical difficulties in applying the fair use defence to parodies means that courts have not arrived at a consistent approach to parody. Varying case law, which leaves gaps of interpretation, has led to substantial uncertainty for parodists and copyright owners based in the US. The disadvantages of relying on costly court cases for the ongoing interpretation have fuelled calls for the recognition of parodies as an art form in US copyright law.²²

¹⁷ See Williamson Music Ltd v. Pearson Partnership Ltd 1987 FSR 97: Simon Stokes, [Art and Copyright](#), Hart Publishing, 2001, pg.137

¹⁸ [Copyright Act 1968](#), Section 41A

¹⁹ Pascal Kamina, [Film copyright in the European Union](#), Cambridge University Press, 2002, pg.278

²⁰ Simon Stokes, [Art and Copyright](#), Hart Publishing, 2001, pg.136

²¹ Pascal Kamina, [Film copyright in the European Union](#), Cambridge University Press, 2002, pg.278

²² Simon Stokes, [Art and Copyright](#), Hart Publishing, 2001, pg.138

The UK courts have, over the past century, established case law on parodies as copyright owners in the original work have brought court cases for copyright infringement. Case law on parody mostly focuses on whether the use of the copyrighted work was substantial. In addition courts can take into account the public interest defence and/or human rights law on freedom of expression to over-rule copyright law in a particular case. Case law is on a case by case basis and especially in relation to parody it is not possible to draw certainty from existing case law, other than the fact that what may be regarded as parody, pastiche, satire or homage can be defended in court on the basis that the use of the copyrighted work was not substantial, that it was in the public interest defence or that it falls within the right to freedom of expression.²³ In the US, parodies may be considered protected by the fair use defence as review or criticism. In the UK, parodies would not normally fall under the existing fair dealing for criticism and review, because this requires sufficient acknowledgement.²⁴



Banksy – Kate Moss 2005

The UK has a significant tradition in parody, pastiche, satire and homage in a variety of forms and mediums, including literature, stage, film, art and music. Parody, pastiche, satire and homage have been an important vehicle for social and commercial innovation, with these types of work being among the most commercially successful and well-known works in British history. Examples include T. S. Eliot's *The Waste Land*, which recontextualises elements of various previous literary works, including Dante's *The Inferno*. Sir Tom Stoppard has borrowed liberally from Shakespeare characters and plots to create famous pastiches such as *Rosencrantz and Guildenstern Are Dead* and *Shakespeare in Love*, and from George Orwell's *1984* and Federico Fellini's *8½* to create *Brazil*. Parodies frequently

eclipse the work they are based on in popularity, with the BBC television sitcom *'Allo 'Allo!* now being better known than the original BBC television drama *Secret Army* which it satirised.

Pantomime, which has a long tradition in the UK, is a mixture of parody, pastiche, satire and homage. While the folklore and fairytales from which pantomime draw inspiration are in the public domain, many of the references to contemporary culture and characters are not.²⁵ Parody, pastiche, satire and homage have also found new relevance in contemporary British urban and fine art, with artists such as Banksy and Mau Mau taking a decidedly liberal attitude towards copyright law in order to reflect on contemporary culture.

Digital technologies and the internet have fuelled the emerging mash-up culture, where consumers take parts of copyrighted work, rework them and post them online. Parody, pastiche, satire and homage have found a new home in an online culture which can be both irreverent and devoted; where samples of copyrighted works are used both to ridicule and to

²³ Ronan Deazley, [Taking forward the Gowers review of Intellectual Property: Second Stage Consultation on Copyright Exceptions](#), Intellectual Property Foresight Forum, March 2010, pg.14-15 & 30-31

²⁴ See [Copyright, Designs and Patents Act 1988](#), Section 30, fair dealing criticism, review and news reporting

²⁵ See *Topical Reference and the Unique Event* by Millie Taylor, [British pantomime performance](#), Intellect Books, 2007, pg.135

praise. User-generated content such as the *Bush and Blair's Endless Love* parody²⁶ and *ACS:Law Downfall* caricature²⁷ have become part of an online viral and meme culture which delivers a running commentary on contemporary culture. What has become known as user-generated content blurs the lines between consumers, users and entrepreneurs, with the line between social and commercial innovation becoming increasingly fluid. Now a professional DJ and producer, the London based Erol Alkan became a British pioneer of music mash-ups in the early 2000s. His *Can't Get Blue Monday Out of My Head* mash-up of Kylie Minogue's vocals in *Can't Get You out of My Head* and the instrumentals of New Order's *Blue Monday*²⁸ becoming so popular on radio and in clubs that Minogue eventually performed it live at the 2002 Brit Awards. The live track was later released as the authorised B-Side of her single by EMI.²⁹ More recently the *Newport State of Mind* parody come homage³⁰ of Jay-Z and Alicia Keys' *Empire State Of Mind* went viral and was viewed two million times in two weeks, but was eventually removed from YouTube due to a 'copyright claim' by EMI Publishing.³¹

The fact that Britain has a long tradition in parody, pastiche, satire and homage without these art forms being protected in copyright law has given rise to the argument that no such exception is needed to ensure continuous commercial and social innovation. According to the International Confederation of Music Publishers:

'While there is no express parody exception under UK law as such, an equivalent effect is achieved and has proved successful for over a century based on whether there is effective copying of a substantial part of an existing work or not. Beyond such limits clearly the exception has no place. We believe that the current system already provides for the necessary conditions to foster user-generated content and delineate the limits within which an exception applies.'³²

But the reality is that parodists and those who make their works available to the public face considerable risk of being sued for copyright infringement and hence having their works removed by internet hosts. Older case law on parody and copyright infringement suggests that, even where the use is substantial, a parody is not copyright infringement if it is in itself original.³³ However, more recent case law has held that a parody which reproduces a substantial part of an earlier work does infringe copyright.³⁴ More generally UK courts have interpreted increasingly minute parts of a copyrighted works to constitute a 'substantial part' and that their use is therefore copyright infringement.³⁵ This means that the Government

²⁶ [George Bush Tony Blair – My Endless Love](#), YouTube, January 2007

²⁷ [ACS:Law's Anti-Piracy Downfall Sends Hitler Crazy](#), Torrentfreak, 4 October 2010

²⁸ [Can't get Blue Monday Out of My Head](#), YouTube, March 2006

²⁹ Matthew Rimmer, [Digital copyright and the consumer revolution: hands off my iPod](#), Edward Elgar Publishing, 2007, pg.131-132

³⁰ [Newport parody of Empire State of Mind becomes online hit](#), Telegraph.co.uk, 23 July 2010

³¹ Greg Cochrane, [Jay-Z spoof Newport State of Mind removed from YouTube](#), BBC Radio 1, 10 August 2010

³² [The International Confederation of Music Publishers – Submission to Commission Consultation on 'Post-i2010: priorities for new strategy for European information society'](#), European Commission, October 2009, pg.7

³³ See for example *Joy Music Ltd v Sunday Pictorial Newspapers Ltd* [1960]: [Taking forward the Gowers Review of Intellectual Property: Proposed Changes to Copyright Exceptions](#), Intellectual Property Office, November 2007, pg.31

³⁴ See for example *Schweppes Ltd and Others v Wellingtons Ltd* [1984], *Williamson Music Ltd v Pearson Partnership Ltd* [1987]: [Taking forward the Gowers Review of Intellectual Property](#), Intellectual Property Office, 2009, pg.31

³⁵ Fiona Macmillan, [New directions in copyright law](#), Volume 6, Edward Elgar Publishing, 2007, pg.68-69; Graham J.H. Smith, [Internet law and regulation](#), Sweet & Maxwell, 2007, pg.45

cannot continue to defer the parody problem to the courts. And courts cannot be relied on for the continuous protection of an important part of British culture by finding the appropriate balance between the interest of parodists and copyright owners. When *Newport State of Mind* was taken offline, the IPO published this commentary from Steve Kunczewicz of HBJ Gateley Wareing LLP:

'Parody is, however, a notoriously difficult defence to run... The general rule is that the more of the original copyright work which the parody uses, the harder it is to argue that it doesn't infringe. "Newport State Of Mind" uses a virtually identical melody to Jay-Z's original even though the lyrics are very different, and it's probably this line of attack which EMI have used to get the video removed... This is the essential legal problem with parodies – they need to be close enough to the original to be recognised by their audience as a parody in the first place, which means that they will almost inevitably infringe copyright. Even though some cases have argued that parodies contain enough original thought and creativity to be recognised as "works" in their own right, the position is nowhere near clear enough for this particular parody to be worth the risk... Although Parody has been due for reform for well over 20 years, which was on the agenda in the wake of the Gowers Review of Intellectual Property in 2006, the only way to be sure of avoiding an infringement claim is to get permission from the original artist. Similarly, the only way for platforms and websites to be sure that they aren't drawn into such a claim is to remove any potentially infringing content as quickly as possible. Until the position changes, parody markers will have to play by the rules, even if they believe them to be a bad joke. The punchline could be a damages claim which far outweighs any attention or revenue which they generate.'³⁶

The parody problem is one of market failure, as many copyright owners are unlikely to grant licences to permit the creation of parodies, pastiches, satires and homages.³⁷ Rights clearance is overly complex and associated with high licensing transaction costs. Relying on the courts, to resolve instances where copyright owners choose to sue, aggravates the market failure because the UK is one of the most expensive countries in the world to resolve copyright disputes through the courts. As a consequence only creators and publishers with the necessary financial resources, and taste for lengthy court cases, will risk producing and distributing such works on a commercial basis. SMEs and those organisations lacking an in-house legal team will shy away from the substantial legal risk associated with any parody, pastiche, satire or homage. Museums and galleries frequently refuse to display or commission works which incorporate elements of other works for fear of being sued for copyright infringement. The argument that this merely reflects 'bad legal advice'³⁸ ignores the fact that most museums and galleries won't be able to afford legal advice in the first place, let alone defending a parody, pastiche, satire or homage in the High Court.

The legal uncertainty surrounding such works has a chilling effect on commercial and social innovation, and further brings copyright law into disrepute in the eyes of consumers. In the absence of a fair dealing defence for parody, pastiche, satire and homage in statute law, which clarifies what parodists can and can't not do with copyrighted content, consumers will continue to knowingly or unknowingly engage in copyright infringement when they express themselves through mash-ups and user-generated content. As more and more consumers

³⁶ Steve Kunczewicz, '[Newport State of Mind](#)', [old Parody issues](#), Intellectual Property Office, September 2010

³⁷ Simon Stokes, [Art and Copyright](#), Hart Publishing, 2001, pg.139

³⁸ [Taking Forward the Gowers Review of Intellectual Property: Second Stage Consultation on Copyright Exceptions](#), Intellectual Property Office, December 2009, pg.42

create and share user-generated content the creative and digital technology industries will continue the notice and take down merry-go-round. Internet hosts who allow consumers and entrepreneurs to make their creative works available to the public will continue to oblige when copyright owners send take down requests, rather than defending their users' content in the High Court.

Parodies, pastiches, satires and homages are effectively illegal in the UK, despite there being no evidence to suggest that they harm the economic interest of copyright owners. Parodies are transformative works; they are new works, which are not market substitutes for the original work.³⁹ As such the potential economic harm from parodies, pastiches, satires or homages is bound to be limited. There is no evidence in economic literature to suggest that such works, or user-generated content more generally, cause any economic harm to copyright owners.⁴⁰ Anecdotal evidence would suggest that instead parodies, pastiches, satires and homages can lead to increasing demand for the works they borrow from.⁴¹

According to the BBC providing for a fair dealing defence for parody, pastiche, satire and homage would 'facilitate the broadcast and sale of programmes',⁴² but the arguments for such a defence should not only be cast narrowly in economic terms. A fair dealing defence for parody, pastiche, satire and homage would remove the structural barriers to continuous commercial and social innovation. It would allow the UK to nurture a form of creativity that is inherent in our culture. Aside from considering a possible fair dealing defence purely in terms of its ability to monetise culture, the Government should recognise, and celebrate, parody, pastiche, satire and homage as inherently British and worthy of protection. When Australia introduced a fair dealing defence for parody and satire in 2006 the Australian attorney-general Philip Ruddock explicitly recognised the cultural significance the change in the law he was proposing:

'Australians have always had an irreverent streak. Our cartoonists ensure sacred cows don't stay sacred for very long and comedians are merciless on those in public life. An integral part of their armoury is parody and satire... However, our copyright laws have until now done very little to protect the way people use others' works or images to parody and satirise others in the name of entertainment. I have a Bill currently before the Senate which will ensure Australia's fine tradition of satire is safe.'⁴³

Therefore Consumer Focus would like to see the introduction of a fair dealing defence for parody, pastiche, satire and homage in UK law. This provision should allow the use of copyrighted works for the purpose of a parody, pastiche, satire and homage, as well as the distribution and communication to the public of the new work. This provision should be technology neutral, cover all types of work, and courts would apply the usual fair dealing criteria, ie whether the use was substantial, in the public interest, and whether the use had a

³⁹ Simon Stokes, [Art and Copyright](#), Hart Publishing, 2001, pg.139

⁴⁰ Mark Rogers, Joshua Tomalin & Ray Corrigan, [The economic impact of consumer copyright exceptions – a literature review](#), Consumer Focus, November 2010, pg.7

⁴¹ See for example the Novel *St. Elmo* (1866) by Augusta Jane Evans. The original publisher G.W. Carleton commissioned Charles H. Webb to write a parody of the novel to increase its popularity. The parody *St. Twelmo, or the Cuneiform Cyclopedist of Chattanooga* (1868) became a success in its own right, while *St. Elmo* went on to become one of the most popular novels in the US.

Jessica Rosalind Feldman, [Victorian modernism: pragmatism and the varieties of aesthetic experience](#), Cambridge University Press, 2002, pg.146-146: Matthew Rimmer, [Digital copyright and the consumer revolution: hands off my iPod](#), Edward Elgar Publishing, 2007, pg.142-143

⁴² [Gowers Review of Intellectual Property](#), HM Treasury, December 2006, pg.68

⁴³ Matthew Rimmer, [Digital copyright and the consumer revolution: hands off my iPod](#), Edward Elgar Publishing, 2007, pg.142

significant negative economic impact on the copyright owner. Such a provision would cover user generated content, as well as parody, pastiche, satire and homage which are created and distributed in a commercial context. Such an exception would be consistent with Article 5(3)(k) of the InfoSoc Directive (Directive 2001/29/EC) which allows for such an exception to the right of reproduction and making available, without the 'fair compensation' for economic damage required for private use exceptions.⁴⁴ Such a provision would ensure that the UK maintains a competitive and vibrant creative culture, where the creative and digital technology industries are free to support commercial and social innovation. It would give UK based creators and those making their works available to the public, the same legal certainty awarded to such works in other industrial countries.

Consumer Focus recommends that the Hargreaves review:

- Introduce fair dealing for parody, pastiche, satire and homage in UK copyright law, allowing the copying of copyrighted works for the purpose of creating such works and the communication to the public of the new works on a commercial and non-commercial basis

⁴⁴ [InfoSoc Directive \(Directive 2001/29/EC\)](#), Article 5(3)(k)

Immunising fair use rights from contractual overrides and DRM – ensuring access and competition

In order for consumers and UK based businesses to reap the full benefits of new fair use rights introduced to UK law, it is important that fair use rights, ie exceptions and fair dealing, are made immune from contractual over-rides. Currently the fair use rights granted to consumers, public institutions and businesses can be denied through contract law and are commonly restricted through licensing. For example, when a consumer purchases a music MP3, the standard terms and conditions will outline what the consumer may do with the product, such as for example make one copy for person use, or to not copy the MP3 at all. In New Zealand copyright owners are explicitly permitted to over-ride the format-shifting exception for sound recordings through contracts⁴⁵ which they may do simply by writing on the CD cover that consumers may not format-shift the CD. We believe that it would be counterproductive to introduce new fair use rights to UK law, if they can be simply taken away through licensing terms or standard terms and conditions.

Format-shifting is central to maintaining a competitive market in copyrighted content and associated software and hardware markets. It prevents companies from locking consumers into proprietary formats, and hence increase switching costs. While most digital music is sold in MP3 format, a common format for hardware and software, some companies, such as Apple, sell digital music in their proprietary format, eg AAC or .m4a, and Apple Lossless. Proprietary formats are commonly only supported by the hardware and software of the relevant company. A consumer who has purchased all their digital music from Apple's iTunes would not be able to format shift the music files into MP3, so they would have to repurchase all their music in MP3 if they wanted to switch from an iPod to a Sony MP3 player. Effectively, they would be prevented from switching hardware and software, which would stifle competition and the ability of companies to challenge the dominance of incumbents. A similar situation arises in relation to Amazon's e-books and Kindle hardware. Amazon sells its e-books in the proprietary Kindle format (AZW). The terms and conditions attached to e-books sold by Amazon, state that consumers who have purchased the 'Digital Content' may 'keep a permanent copy of the applicable Digital Content and to view, use, and display such Digital Content an unlimited number of times, solely on the Device or as authorized by Amazon as part of the Service and solely for your personal, non-commercial use.' Consumers are not allowed to format-shift their e-book.⁴⁶ Hence, in theory, consumers who have purchased an Kindle e-book may only use it on software and devices authorised by Amazon. This clearly restricts consumers in their choice of hardware and software they may use to read the e-book they have purchased.

Therefore we believe that the UK should follow the example of Belgium and Portugal, where fair rights in copyright law are immunised against contractual overrides. In this context we also believe the Hargreaves review should reconsider the existing provisions in UK law on

⁴⁵ [Information sheet – 'Personal use' copying: format- and time- shifting](#), Copyright Council of New Zealand, March 2009

⁴⁶ See [Amazon Kindle: licensing Agreement and Terms of Use](#), amazon.co.uk, 9 February 2009

the circumvention of Digital Rights Management (DRM), or Technological Protection Measures (TPM), which are frequently attached to digital content, such as music, film, e-books and software. Currently section 296ZE of the Copyright, Designs and Patents Act 1988 provides for a 'remedy where effective technological measures prevent permitted acts'. Essentially if a consumer is prevented from using a copyrighted work, other than a computer program, under the existing exceptions in UK law by a DRM, they may complain to the Secretary of State who can make a direction compelling the copyright owner to lift the DRM voluntarily or by agreement.⁴⁷ We are not aware that this provision has ever been used to any effect, or indeed ensures that consumers, public institutions and businesses can exercise their user rights under copyright law. Significantly, the provision does not apply to fair dealing, which is of particular relevance in relation to education and research, by way of providing fair dealing for non-commercial research and private study.

We believe that the Hargreaves review team should follow Australia's approach; it has recently announced that it will examine policy issues relating to the circumvention on technological protection measures. Specifically, Australia will consider the introduction of additional exceptions to allow circumvention of technological protection measures. Australian copyright law already provides a number of exceptions that allow the circumvention of TPMs for a range of purposes identified as being in the public interest.⁴⁸ This includes circumstances where:

- a user has permission from the copyright owner or exclusive licensee to circumvent the TPM
- the circumvention is for the purpose of:
 - achieving interoperability of an independent creates computer program with the original program
 - identifying and analysing flaws and vulnerabilities of encryption technology
 - testing, investigating or correcting the security of a computer, computer system or computer network
 - providing online privacy
 - allowing libraries, archives and educational institutions to make a decision as to whether they want to buy the copyrighted material⁴⁹

The current review of Australian copyright law will examine whether to introduce an additional exception to allow circumvention of technological protection measures for certain education purposes. In particular, this would be whether to introduce an exception that would allow schools to change the format of films from DVD to MP4 for teaching purposes.⁵⁰

⁴⁷ [Copyright, Designs and Patents Act 1988](#), Section 296ZD Rights and remedies in respect of devices and services designed to circumvent technological measures

⁴⁸ [Address to the Blue Sky Conference on future directions in Copyright law](#), Australian Attorney General's Department, 25 February 2011

⁴⁹ Mark Davison, Ann Louise Monotti & Leanne Wiseman, [Australian Intellectual Property law](#), Cambridge University Press, 2008, pg.231

⁵⁰ [Address to the Blue Sky Conference on future directions in Copyright law](#), Australian Attorney General's Department, 25 February 2011

Consumer Focus recommends that the Hargreaves review:

- Immunises fair use rights in UK copyright law from contractual over-rides, this should include fair dealing, permitted acts and exceptions
- Introduces exceptions that would allow the circumvention of DRM and TPM where it prevents consumers, public institutions and businesses from exercising their fair use rights established in UK copyright law

Collective rights management solutions – extended collective licensing for broadcasters

In the light of the overly complex copyright licensing system, which imposes excessive costs and prevents consumers from accessing content, Consumer Focus supports extended collective licensing provisions for broadcast. Extended collective licensing was designed to enable mass use of copyrighted content – it provides consumers with access to creative works, ensuring that creators and copyright owners receive remuneration and allows the content provider to respond quickly to consumer demand. As a collective rights management method it effectively counters market failure by providing the means of facilitating smooth rights clearance. As such it seeks to reduce instances where the licensing transaction costs associated with prior rights clearance make the use of works financially unviable.⁵¹ Such licensing schemes have been in operation in Nordic countries since the 1960s and have been successful particularly with regards to broadcast.⁵² Pre-clearance of copyright for mass use of films produced for TV broadcast can be so prohibitively time consuming that many broadcasters such as the BBC and Channel 4 are unable to rebroadcast or make their vast archives available online.

Consumer Focus supported the extended collective licensing provision in the Digital Economy Bill, which would have enabled extended collective licensing for all types of content and uses. We regret that the provision was removed from the bill, though we accept that the tight timeframe within which the bill was made law in advance of the last general election did not allow for the necessary debate and scrutiny. We believe that extended collective licensing in the long run has the potential to deliver cost effective rights clearance for a wide range of contents and uses. However, we believe that the Hargreaves review should recommend for an extended collective licensing provision that would allow for the establishment of such schemes for broadcast content. There is some need to establish trust and confidence in collective rights management solutions run by collecting societies. The UK currently lacks an innovative and effective collective rights management framework, and many UK collecting societies would currently not be able to offer such schemes. Understandably, there is some nervousness about relying on collecting societies to administer a complex licensing scheme. However, extended collective licensing for broadcast has a strong track record in Nordic countries, and introducing such a scheme in the UK would build confidence and build the capacity of collecting societies to effectively administer rights in the interest of their members and users.

⁵¹ Christian Rydning, *Extended Collective Licences – The Compatibility of the Nordic Solution with the International Conventions and EC Law*, Complex 3/10, Norwegian Research Centre for Computer and Law, 2010, pg.1, 11 & 22

⁵² Daniel Gervais, [Application of an Extended Collective Licensing Regime in Canada: Principles and Issues Relating to Implementation - Study prepared for the Department of Canadian Heritage](#). University of Ottawa, 2003, pg.16

Extended collective licences are negotiated between broadcasters and collecting societies on the basis of enabling legislation in copyright law. The enabling legislation provides the legal basis for collecting societies to issue 'extended licences' covering the works of creators who are not members of the collecting society, in addition to the rights of their members. Under extended collective licensing enabling legislation collecting societies which are deemed sufficiently representative can represent all copyright and related rights owners in a specific category of works on a non-exclusive basis.⁵³ The enabling legislation also gives non-members the right to be remunerated by the collecting society, just as members are,⁵⁴ therefore the collecting societies ensure that all creators are equitably remunerated. Extended collective licensing operates on an opt-out basis, and creators can ask for their work not to be included in the extended collective licence.⁵⁵ In Scandinavia, broadcasters have seen very few instances of creators opting out of the licence and the schemes are regarded as working well by broadcasters, collecting societies and creators. Extended collective licensing in Scandinavia has:

- Simplified the issue for users and rights holders
- Improved access for users
- Reduced administration leading to more efficient collection and possibly improved remuneration
- Guaranteed remuneration for the rights holder
- Led to legal certainty for users and rights administrators.⁵⁶

Digital Economy Bill: impact assessment for extended collective licensing

The provision for extended collective licensing in the Digital Economy Bill, which was removed in the wash-up just before the last election, and hence did not become law, would have allowed the establishment of such schemes for all content types and uses. According to the impact assessment 'the current rights clearance system involves multiple users and rights holders giving rise to co-ordination problems thus preventing rights holders and users from making optimal use of copyright works. Government intervention is required to help simplify this complex system and strengthen it to cope with volumes of rights used in digital platforms.' The policy objective of the provision was to make 'the problem of rights clearance in the digital age easier by streamlining licensing procedures.'⁵⁷

The efforts of the BBC to clear all necessary rights for the iPlayer are mentioned in the impact assessment as an example of the type of situation extended collective licensing is designed to remedy. The popular on demand online catch up service, has a daily average of 1.5 million streams and downloads requested by users. It took five years to create a framework in which the rights for 1,000 hours of content are now potentially cleared to be made available weekly on the iPlayer across multiple platforms. The BBC employs a

⁵³ Ibid, pg.5

⁵⁴ Ibid, pg.19

⁵⁵ Daniel Gervais ed, [Collective Management of Copyright and Related Rights](#), Kulwer Law International, 2006, pg.265-266

⁵⁶ Digital Economy Bill Impact assessment, Department for Business, Innovation & Skills, November 2009, pg.194-195

⁵⁷ Ibid, pg.20

small team of copyright licensing professionals on an ongoing basis to check and cross check rights availability of content. Inability to obtain all necessary licences in time means that some broadcast will be withheld from the service because the rights have not been secured in time. The impact assessment cited the example of KOPINOR, a large umbrella for Norwegian collecting societies, as example of the potential benefits extended collective licensing can offer. KOPINOR recently concluded a complex agreement with the Norwegian National Library for making approximately 50,000 works by Norwegian authors available on the internet. This took two months to conclude, because this type of content and use is covered by extended collective licensing in Norway. The time it took to clear all rights through the negotiation of an extended collective license is in stark contrast to the BBC's experience when making their content available online.

According to the impact assessment extended collective licensing would reduce transaction cost for both the broadcaster and the collecting society. UK collecting societies commonly charge members administrative fees, which are deducted from the royalties they collect on member's behalf. In the UK these administrative fees are typically between 10 per cent and 25 per cent. In relation to the extended collective licensing provision in the Digital Economy Bill one collecting society has estimated a £20k reduction in administration costs in a certain part of its operations. Another UK collecting society analyse costs as a percentage of revenue and estimated that in its sector the existing rights clearance model generates costs typically 15 to 20 per cent, whereas extended collective licensing schemes could typically result in costs of 10 to 15 per cent.⁵⁸

Extended collective licensing could unlock vast quantities of archived broadcasts; allowing broadcasters to innovate based on old material, creating a new income stream for creators and producers of broadcasts, who are frequently SMEs, and giving consumers access to historically significant material and classic entertainment. We believe that the extended collective licensing solution for broadcasters should not only cover re-use via satellite and cable broadcast, but also online and mobile use. This would unlock the innovative potential of broadcasters' archives, as they would be able to provide access through catch-up services such as 4oD and other platforms such as YouTube. Enacting extended collective licensing enabling legislation for broadcast, so that broadcasters and collecting societies can negotiate appropriate extended collective licenses for various types of content and uses, would help to build confidence in this collective rights management method. Extended collective licensing is particularly appropriate for mass use and would be able to resolve the high licensing transaction costs associated with multi-media content. We believe that it is a necessary step to ensure that UK collecting societies provide innovative licensing solutions which allow the creative and technology industries to take advantage of new technological developments.

As highlighted in Part 1 of our response, collecting societies are monopolies, and they must be effectively restrained from abusing their monopoly to stifle competition and innovation in the wide range of markets and industries they affect. The UK currently lacks a working institutional governance framework to ensure that collecting societies remain compliant with relevant competition law. In Part 1 of our response we have set out overwhelming need for collecting societies to adhere to minimum standards through a code of practice. Providing for extended collective licensing for broadcast would engage multitude of collecting societies, including for music, film, photography and newspapers. In order to ensure that collecting societies issuing extended collective licences do not abuse their monopoly vis-a-vis their members, the non-members whose works are covered in the licence, and the broadcasters,

⁵⁸ Ibid, pg.192-195

a extended collective likening provision should ensure that they adhere to minimum standards. Extended collective licensing as such enhances competition and innovation, as it is likely to increase the range of services broadcasters will be able to offer around the re-use of their broadcasting archive, especially online and mobile.⁵⁹ We believe that in the short-term a provision for extended collective licensing covering broadcast would not only build confidence in this innovative licensing solution, but also deliver significant innovation in on demand online and mobile services for broadcast content. Consumer demand for such services has been established through the existing online catch-up services, and this demand should be met through the innovative use of digital technology.

Consumer Focus recommends that the Hargreaves review:

- Introduces an extended collective licensing provision for broadcast in UK law, specifically designed to facilitate the online and mobile delivery of broadcast content

⁵⁹ Ibid, pg.198

Finding a solution for orphan works – unlocking our cultural heritage for social and commercial innovation

Current copyright law prevents access to and use of ‘orphan works’, works which are in copyright, but the owner can no longer be located. This creates another barrier to the development of a dynamic market, social innovation and preserving our cultural heritage. Orphan works are typically old and of historical value rather than commercial value. They are maintained by museums, libraries and archives, with the British Library and the BBC housing thousands of orphaned books and films, which can’t be accessed or used by academia, documentary makers or the public at large. We therefore believe that the Hargreaves review should recommend a licensing solution for orphan works, so that they can be used for non-commercial and commercial purposes while still in copyright.

Consumer Focus was supportive of the orphan works licensing solution in the Digital Economy Bill and we believe that the Hargreaves review should recommend the introduction of the provision into UK copyright law. Internationally, the most common approach, and the least satisfactory one, is to make no provision for orphan works at all. The IP Watchlist 2010 found that there are essentially two approaches to orphan works. Argentina, Brazil and Chile provide for orphan works to pass into the public domain, making them free for use by anybody. In Mexico the law provides that the copyright in the work, which would otherwise still be in copyright, is restored should the author come forward. The alternative to the public domain approach is the licensing approach followed in Bangladesh, Canada, India (for certain works) and South Korea. Orphan works are licensed from a central authority, normally upon proof that all reasonable measures to locate the author have been taken without success. The copyright owner can normally come forward to claim royalties from the authority within a given time, eg in Canada within five years.⁶⁰

We believe that the UK should adopt a licensing approach to orphan works, supervised by a central authority, which we believe should be the IPO. In relation to funds that are generated from the licensing of orphan works, but not claimed by copyright owners within a certain period of time, we believe that the money should be made available for the ongoing preservation of orphan works. Many of these works are very old, and need to be restored and archived in different formats to ensure their continuous survival. Such preservation work is expensive, and currently paid for by libraries, museums and archives. As these institutions face substantial budget cuts in the coming years it is vital that any money generated from the licensing of orphan works and not claimed is made available to these institutions.

⁶⁰ [IP Watchlist 2010 summary report](#), Consumer International, April 2010, pg.6

Digital economy bill proposal: an effective licensing solution for orphan works

116A Licensing of orphan works

(1) The Secretary of State may by regulations provide for authorising a licensing body or other person to do, or to grant licences to do, acts in relation to an orphan work which would otherwise require the consent of the copyright owner.

(2) An authorisation or licence under the regulations in favour of any person must not preclude any authorisation or licence in favour of another person.

(3) The regulations may provide for the treatment of royalties or other sums paid in respect of an authorisation or licence, including –

(a) the deduction of administrative costs

(b) the period for which sums must be held for the copyright owner;

(c) the treatment of sums after that period (as bona vacantia or otherwise)

(4) The regulations may provide for determining the rights and obligations of any person if a work ceases to be an orphan work.

(5) The regulations may provide for the Secretary of State to determine whether any requirement of the regulations for a person's becoming or remaining authorised has been met or ceased to be met.

(6) In this Part references to a work as or as ceasing to be an orphan work are to be read in accordance with regulations made by the Secretary of State.

(7) Regulations under subsection (6) may operate by reference to guidance published from time to time by any person.

In order to ensure that a licensing solution for orphan works generates maximum benefits for the digital economy, and supports social and commercial innovation, it is crucial that orphan works can be licensed for commercial use. Demands for orphan works to be only licensed for non-commercial use ignore the fact that many cultural and educational activities now occur within a commercial context. This includes commercial research by academic institutions and commercial documentaries for popular consumption.

Consumer Focus recommends that the Hargreaves review:

- Introduces a licensing solution for orphan works, as was proposed in the Digital Economy Bill

Collective rights management solutions – securing UK export opportunities through cross-border licensing at EU level

As outlined in detail in Part 1 of our response, EU competition authorities have in the past 10 years sought to secure cross-border licensing by collecting societies for music for digital and online delivery. But most EU collecting societies, including the UK collecting society PRS, have to date refused to amend reciprocal representation agreements in compliance with competition law to facilitate the cross border licensing of content across the EU. In 2005 the European Commission concluded that 'if left entirely to the market, innovative and dynamic structures at EU level for cross-border collective management of legitimate online music services would not emerge. This applies to both cross-border licensing and cross-border distribution of royalties.'⁶¹ The European Commission has identified a number of anti-competitive practices by collecting societies which prevent cross-border licensing of music, including territorial restrictions, discrimination in cross-border distribution of royalties, and membership rules which restrict cross-border licensing. By not offering the creative and digital technology industries the appropriate licences, collecting societies are limiting the emergence of new products, markets and technical development to the prejudice of consumers. To mitigate this apparent market failure resulting from collecting societies abusing their monopoly, the European Commission intends to bring forward a Directive on cross-border licensing in 2011. As outlined in Part 1 of our response, we believe that the UK is missing out on a significant export market due to the refusal of collecting societies to facilitate cross-border licensing, particularly in music. We therefore believe that the Hargreaves review, in addition to recommending minimum standards for UK collecting societies through a code of practice, should recommend that the UK supports the European Commission's proposal for a Directive on cross-border licensing.

To date CISAC members, including the UK collecting society PRS, have refused to amend their model contract to allow cross-border licensing of music for online distribution in the EU. Similarly the international cross-border licensing of copyrighted content has been frustrated by collecting societies' refusal to draw up appropriate reciprocal representation agreements in compliance with competition law. In 2004 EU competition authorities started to investigate the Santiago Agreement, a model contract established in 2000 between collecting societies worldwide for the licensing of online content. EU competition authorities raised concerns that collecting societies were only permitted to issue global licences for online content to users whose services were 'installed' in their territory. Hence the agreement would give collecting societies a territorial monopoly and prevent users from obtaining a global licence from the

⁶¹ [Commission Staff Working Document: Study on a Community Initiative on the Cross-Border Collective Management of Copyright](#), Commission of the European Communities, Brussels, 7 July 2005, pg.23

collecting society of their choice.⁶² The investigation into the Santiago Agreement has yet to be concluded,⁶³

EU competition case law: CISAC and cross-border licensing of online music

Cross-border relations between collecting societies within the EU are strongly influenced by the advice of international associations, particularly the International Confederation of Societies of Authors and Composers (CISAC), which represents writers and publisher societies. Reciprocal representation agreements between national collecting societies are based on model contracts supplied by the international organisations.⁶⁴ Two separate complaints, one by the radio broadcaster RTL and one by the UK-based

online music service Music Choice Europe, led to *CISAC* (2006), a landmark case on cross-border licensing of online music. Music Choice had filed a complaint in 2003 in relation to a model contract for public performance rights between collecting society members of CISAC. EU competition authorities ruled that the model contract used by CISAC members in 24 EU member states, including the UK's PRS, violated Article 81 of the EC Treaty. The model contract related to the rights to perform copyright protected music to the public, including online, via broadcast, satellite and cable. The Commission found that the territorial restrictions imposed by the contract created an obstacle to cross-border licensing by preventing users obtaining multi-territorial and multi-repertoire licences. These territorial restrictions prevented collecting societies from accepting foreign members and giving users based in other member states licences for their music repertoire. In finding that the model contract had violated competition law, the EU competition authorities confirmed case law from *GEMA 1* and *Tournier*. In relation to internet, satellite and cable broadcasting in particular, it was found that the collecting societies had not complied with the case law established in *Tournier* and *Lucazeau*; that the monitoring of use by a licence does not require that the user is based in the same member state as the collecting society.

The competition authorities concluded that collecting societies have the technical capacity to issue cross-border licences, but that the model contract established 'mutually guaranteed territorial monopolies for the licensing of public performance rights', allowing CISAC members to charge administrative costs on the same repertoire 'without facing competitive pressure' from other collecting societies. It was found that CISAC members had acted in a concerted way to prevent any competition between themselves regarding the management of music distribution rights by internet, cable and satellite, and to prevent cross-border licensing in the EU. CISAC members were ordered to make appropriate changes to their model contract,⁶⁵ but CISAC appealed the interim measures in 2008. In August 2010 the appeal was dismissed,⁶⁶ though a further appeal has been launched.

⁶² Daniel Gervais ed, [Collective Management of Copyright and Related Rights](#), Kulwer Law International, 2006, pg.146–147

⁶³ See [38126 Santiago Agreement](#), European Commission

⁶⁴ Nigel Parker, [Music business: infrastructure, practice and law](#), Sweet & Maxwell, 2004, pg.208

⁶⁵ Daniel Gervais ed, [Collective Management of Copyright and Related Rights](#), Kulwer Law International, 2006, pg.146–149; [Notice published pursuant to Article 27\(4\) of Council Regulation No 1/2003 in Case COMP/38698 – CISAC](#) (2007/C 128/06), European Commission

⁶⁶ [Competition: Court of Justice dismisses appeal against refusal of interim measures in CISAC appeal](#), Roschier Attorneys Ltd, LEX Universal, September 2010

In early 2011 the European Commission plans to bring forward a 'Framework directive on collective rights management for use of music online'.⁶⁷ This directive is designed to enable copyright owners to assign their exploitation rights to any collecting society of their choice within the EU, which in turn can grant cross-border licences for the EU, and worldwide were possible.⁶⁸ Consumer Focus and the European consumer organisation BEUC support this proposal. Collecting societies across the EU have, for the last 10 years, resisted appropriate business agreements to facilitate a competitive and innovative market in digital content that meets consumer demand by responding to technological developments. We believe that a directive is necessary to establish a licensing framework that fosters innovation and economic growth by harnessing the potential of the internet.

Cross-border licensing will further enhance the role of collecting societies and the Directive is likely to include minimum standards to prevent collecting societies from abusing their monopoly and engaging in anti-competitive behaviour in relation to cross-border licensing. As outlined in Part 1 of our response, the UK is currently among the minority of EU member states which does not mandate minimum standards for collecting societies and it will take several years until the proposed Directive would be implemented in law. As previously outlined, we believe that the UK's minimal approach to the supervision of collecting societies puts the UK at a disadvantage as collecting societies across the EU are increasingly competing with each other. Therefore the UK should in the short-term impose minimum standards on UK collecting societies with a view to facilitate cross-border licensing, and in the long-term support a European Directive on the cross-border licensing of music.

Consumer Focus recommends that the Hargreaves review:

- Supports proposals for a EU Directive on the cross-border licensing of music in the long-term

⁶⁷ [Roadmap: Framework directive on collective rights management for use of music online](#), DG Markt, European Commission, September 2010

⁶⁸ Peter Brownlow, [European Developments in Collective Rights](#), Bird & Bird, May 2008

Mere conduit and host principle – ensuring a viable digital economy through safe harbour provisions

The digital economy operates in a network economy, and online content is delivered and made accessible by conduits and hosts, ie intermediaries. Intermediaries, such as ISPs and platforms such as Facebook, Twitter, YouTube and eBay, rely on what are known as safe harbour provisions. These provisions shield them from liability for the content that runs over their networks, is temporarily stored on their servers, or is hosted by them under certain conditions. ISPs are of particular importance, especially as ‘internet service provider’ is considered in its wider, and actual meaning, as any institution or individual who provides internet access service to others. Libraries, schools, employers, coffee shops, and consumers with open Wi-Fi, all provide internet access service to the public.

The debate on internet service provider liability for copyright infringement committed by others using their service has become a central point of debate in the UK through the Digital Economy Act. The Act, currently subject to judicial review, provides for the disconnection of ‘subscribers’ if allegations of copyright infringement on their connection has reached a certain threshold. The Act also potentially provides for blocking injunctions, forcing ISPs to block access to websites which host or provide access to a ‘substantial amount’ of copyright infringing material, have done so in the past, or are likely to do so in the future. Copyright varies from country to country, and while much of the user generated content on YouTube would fall within the fair use defence in the US, a substantial amount of what is uploaded on YouTube by users would infringe copyright according to UK copyright law. The chilling effect of such provisions would be substantial, not least because hosts and ISPs would incur the legal cost of trying to defend themselves against injunctions. Whether the web-blocking provisions of the Digital Economy Act are actually technically workable is currently subject to review by Ofcom⁶⁹ and beyond technical difficulties of implementation, we believe they are fundamentally the wrong approach.

In Turkey the blocking of MySpace and last.fm as part of a criminal investigation into these sites distributing music without respecting the rights of their authors, has recently led to a legal challenge regarding internet censorship. Yaman Akdeniz is currently bringing a legal challenge on the basis that all content hosted by these sites has been blocked, even though these sites gave access to a substantial amount of material and information in full compliance with relevant legislation and copyright. Akdeniz argues that the access restriction measures are disproportionately affecting the right to freedom of expression, ie the right to receive and impart information.⁷⁰ The legal challenge in Turkey exemplifies the problem with the web-blocking provisions of the Digital Economy Act, which would see all consumers prevented from accessing the legal content hosted by sites that are blocked.

⁶⁹ [Ofcom to review sections of Digital Economy Act](#), Department for Culture, Media and Sports, February 2011

⁷⁰ Yaman Akdeniz, [Report of the OSCE Representative on Freedom of the Media on Turkey and Internet](#), Censorship, Organisation for Security and Co-operation in Europe, pg.23

Internet service providers are mere conduits of information, not publishers. They operate akin to the postal service, not a broadcaster, who has actual editorial control over what they broadcast. Internet service providers do not have editorial control over content posted on their servers by consumers and businesses. As such Consumer Focus believes that internet service providers should not be held responsible for content they carry unknowingly. We do not believe that internet service providers should be made responsible for proactively regulating or monitoring content they carry. It is neither appropriate, nor desirable, to make internet service providers judge and jury over the legality, suitability or appropriateness of the content they carry or is contained on their servers.

Consumer Focus believes that the mere conduit principle, as enshrined in Article 12 of the E-Commerce Directive (Directive 2000/31/EC), is still appropriate and should be maintained. The principle has effect under UK law, and makes specific provisions for ISP liability. It states that:

'Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, Member States shall ensure that the service provider is not liable for the information transmitted, on condition that the provider:

(a) does not initiate the transmission;

(b) does not select the receiver of the transmission; and

(c) does not select or modify the information contained in the transmission.'⁷¹

The acts of transmission and of provision of access include the automatic, intermediate and transient storage of the information transmitted in so far as this takes place for the sole purpose of carrying out the transmission in the communication network, and provided that the information is not stored for any period longer than is reasonably necessary for the transmission.⁷² Article 15 of the E-Commerce Directive furthermore provides that 'Member States shall not impose a general obligation on providers, when providing the services..., to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.'⁷³

Appropriate safe harbour provisions for internet service providers and hosts are central to facilitate and protect an innovative and competitive digital economy. In order to mitigate the chilling effect that can arise from frivolous notice and takedown requests, we believe the UK should strengthen the mere conduit and host provisions in UK law, by adding a provision that would make a claimant liable for cost and damages if wrong claims of copyright infringement are made. This would act as a deterrent and allow ISPs and other to recover cost incurred from processing the wrong takedown request and act as a deterrent to frivolous notice and take down requests wrongly alleging copyright infringement. Such a provision exists in US law⁷⁴ and is used to protect ISPs and hosts from the abuse of take down notices. Abuse of take down notices claiming copyright infringement is widespread, a 2009 US study found that 57 per cent of takedown notices sent to Google to demand removal of links in the index were sent by businesses targeting apparent competitors. Hence takedown notices may be used for anti-competitive ends. The study also found a high number of flawed take down notices, including:

⁷¹ [E-commerce Directive \(Directive 2000/31/EC\)](#), Article 12(1)(a)-(c)

⁷² [E-commerce Directive \(Directive 2000/31/EC\)](#), Article 12(2)

⁷³ [E-commerce Directive \(Directive 2000/31/EC\)](#), Article 15(1)

⁷⁴ [Copyright Act 1976](#), Section 512(f)

- 30 per cent of notices demanded takedown for claims that presented an obvious question for a court (a clear fair use argument, complaints about ‘uncopyrightable’ material, and the like)
- Notices to traditional ISPs included a substantial number of demands to remove files from peer-to-peer networks (which are not actually covered under the takedown statute, and which an OSP can only honour by terminating the target’s internet access entirely)
- One out of 11 included significant statutory flaws that render the notice unusable (for example, failing to adequately identify infringing material)⁷⁵

Consumer Focus recommends that the Hargreaves review:

- Maintains and strengthens the mere conduit and host principle in UK law, and introduces a remedy against abuse of takedown notices

⁷⁵ Jennifer Urban & Laura Quilter, [Efficient Process or “Chilling Effect”? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act, Summary Report](#), MyLawPortal, 2009, pg.2

The Patents County Court – cost effective resolution of lower value copyright infringement disputes through a small claims track

Consumer Focus believes that the Hargreaves review should push ahead with the ongoing reforms of the Patents County Court (PCC). This will soon to be renamed the Intellectual Property County Court to more accurately describe its jurisdiction over lower value patents, copyright, design and trade mark disputes. Specifically, the Hargreaves review should support the recommendations of reform made by Justice Jackson on the introduction of a modified small and fast track PCC. As the primary forum for lower value intellectual property disputes the PCC is playing an increasingly important role in ensuring that consumers, as well as entrepreneurs, SMEs and small scale copyright owners such as photographers, have access to justice.

The Gowers review only reviewed the Patents County Court in passing, with further work in relation to establishing appropriate procedures for lower value IP disputes being deferred to the department for Constitutional Affairs.⁷⁶ The work is currently being taken forward by the Ministry of Justice (MoJ). However Consumer Focus is concerned that there are no concrete plans to implement the most significant recommendation for consumers Justice Jackson made in relation to intellectual property litigation in his 'Review of Civil Litigation Costs'. The MoJ recently stated that consideration of Justice Jackson's 'recommendations to introduce a modified small and fast track specifically for patents county courts is pending an assessment of the success of the new streamlined process.'⁷⁷ The new streamlined process, along with other changes to the rules and procedures, has been introduced to the PCC very recently, on 1 October 2010, and we are therefore concerned that postponing consideration for the introduction of a modified small claims track until the success of the new streamlined process is fully assessed could lead to significant delays. In the past four months, 27 consumers have been sued in the PCC for alleged copyright infringement through peer-to-peer filesharing. And with the implementation of the Digital Economy Act 2010 initial obligations code at the end of 2011 we expect a significant increase of such cases being brought before the PCC. Therefore the introduction of a modified small claims track to the PCC specifically designed to accommodate consumers acting as defendants in lower value copyright litigation is a matter of urgency.

Over the past eight years consumers have become the target of lower value copyright infringement litigation in relation to alleged copyright infringement through peer-to-peer filesharing. With the implementation of the initial obligations code of the Digital Economy Act 2010 the PCC is likely to see an increase in such cases. Cases in which consumers are alleged to have infringed copyright through peer-to-peer filesharing will usually have a value of up to £5,000 and we believe that a modified small claims track for the PCC is vital in

⁷⁶ [Gowers Review of Intellectual Property](#), HM Treasury, December 2006, pg.9

⁷⁷ [Proposals for reform of Civil Litigation Funding and Costs in England and Wales, Implementation of Lord Justice Jackson's recommendations](#), Ministry of Justice, November 2010, pg.90

ensuring that these consumers have access to justice and are in a position to defend themselves. The cases brought by MediaCAT and their solicitors ACS:Law against 27 consumers for alleged copyright infringement through peer-to-peer filesharing⁷⁸ have been dealt with under the new rules and procedures. As we have highlighted in our recent response to the IPO's consultation on setting the value of claims heard in the PCC, we believe that these changes are likely to be for the benefit of consumers because they are designed to reduce the cost of copyright litigation.⁷⁹ However, copyright litigation in the PCC is still unaffordable for the average consumer. Consumer Focus has followed the 27 cases closely and while we welcome the active case management by PCC Judge Birss QC, the cases highlight fundamental problems in relation to consumers who are defendants in a process designed for commercial entities. The most significant problems relate to the lack of access defendants have to information about the process and the problem of accommodating defendants who are not represented by a lawyer in a process that assumes that all parties have legal representation.

According to the Intellectual Property Court Users Committee (IPCUC) the recent changes to the PCC rules and procedures were mainly designed to address 'the long-standing concerns about the high cost of intellectual property litigation in the United Kingdom, particularly for small and medium sized-enterprises'.⁸⁰ As the IPCUC points out, the PCC was created by Parliament to serve the interests of SMEs by providing an affordable forum for lower value intellectual property disputes.⁸¹ Imposing a limit of £500,000 on the financial remedies available in the PCC⁸² will reinforce the desire to make the PCC a cost-effective forum to resolve lower-value intellectual property disputes.⁸³ But lower-value copyright infringement disputes now involve consumers, and therefore the needs of consumers should receive greater consideration in the ongoing reform of the PCC.

Historically copyright infringement disputes have only occurred in the course of business, with both defendants and claimants being commercial entities. With the proliferation of digital technologies consumers are now able, for the first time in history, to infringe copyright to a significant degree and unwittingly. To date consumers have been defendants in copyright infringement disputes in the High Court and the County Courts, and all cases we are aware of show significant shortcomings and impose prohibiting costs on consumers. Given this significant development in the nature of lower-value copyright infringement disputes it is vital that the interests of consumers are properly considered. The PCC should aim to provide consumers and copyright owners with a cost-effective and proportionate avenue to resolve such disputes.

⁷⁸ See [MediaCat Limited v A, B, C, D, E, F and G](#), Patents County Court, [2010] EWPC 17, 1 December 2010; [MediaCat Limited v Allan Billington](#), Patents County Court, [2010] EWPC 18, 17 December 2010; Josh Halliday, [ACS:Law ceases claims against illegal filesharers](#), guardian.co.uk, 25 January 2011

⁷⁹ See [Consumer Focus response on setting the value of claims heard in the Patents County Court](#), Consumer Focus, December 2010

⁸⁰ Intellectual Property Court Users Committee, [Working Group's final report on proposals for reform of the Patents County Court](#), July 2009, pg.5

⁸¹ *Ibid*, pg.6

⁸² [Setting the Limit: Consultation on setting the limit on the value of claims heard in the Patents County Court](#), Intellectual Property Office, October 2010, pg.12

⁸³ Intellectual Property Court Users Committee, [Working Group's final report on proposals for reform of the Patents County Court](#), July 2009 pg.7

Consumers as defendants in lower value copyright infringement disputes: the cost of justice

In 2005 members of the British Phonographic Industry (BPI) initiated proceedings in the High Court against six consumers for civil copyright infringement through peer to peer file-sharing, known as Polydor Limited and Ors v Woodhouse and Ors, or alternatively Polydor Limited and Ors v Brown and Ors. In relation to two defendants a summary judgement was made, the cases against the remaining four defendants were discontinued or settled out of court. In the case of Nigel Woodhouse the High Court issued a summary judgement awarded costs and damages. The damages were not determined, though £14,309.52 of the claimant's cost were allowed. In the case of Michael Bowles a summary judgement was awarded with no provision on damages, but Mr Justice Lawrence Collins provided on costs that 'I will order that no action be taken to enforce for two months, and that Mr Bowles have permission that – if he cannot agree with the claimant's schedule for payment by instalments – he can apply to the court. But I will express the wish that you do take serious account of his personal circumstances and do not simply use him as an example to the rest.' There are no records in the court files that the claimants sought damages or cost from Michael Bowles.⁸⁴

In early July 2008 Davenport Lyons on behalf of Topware Interactive reportedly obtained a summary judgement against four individuals accused of infringing the copyright of the video game Pinball 3D through a peer-to-peer file-sharing network. The defendants were not present or represented, and reportedly £750 in interim damages and £2,000 in interim costs were awarded against each in default judgements.⁸⁵ In late July 2008 Davenport Lyons obtained a further default judgement against Isabella Barwinska. The defendant was not present or represented, and the PCC awarded damages of £6,086.56 and costs of £10,000.⁸⁶ Isabella Barwinska was reportedly an unemployed, single mother of two living in Canning Town. Following the default judgement Davenport Lyons reportedly threatened that non-payment by Isabella Barwinska would result in further legal action.⁸⁷ Subsequently the Solicitors Regulation Authority (SRA) has referred David Gore of Davenport Lyons and Brian Millar formally of Davenport Lyons to the Solicitors Disciplinary Tribunal. In its statement of claim the SRA reportedly argues that between 2006 and 2009 David Gore and Brian Miller were responsible for initiating litigation against thousands of web users alleged to have been involved in copyright infringement through peer-to-peer file-sharing, even though they knew there was no sufficient evidence to support some of the claims.⁸⁸

⁸⁴ Polydor Limited and Ors v Woodhouse and Ors court record documents, obtained by Consumer Focus

⁸⁵ Joshua Rozenberg, [Court victory for computer games firm in crackdown on illegal downloads](#), London Evening Standard, 1 July 2008: [Court orders woman to pay £16,000 for file-sharing](#), Out-Law, Prinsent Masons, 19 August

⁸⁶ [Topware Interactive Inc – Order Claim No: PAT08023](#), Patents County Court, 21 July 2008

⁸⁷ Charlotte Cardingham, [£16,000 \(\\$32,000\) Fine for first Brit convicted of illegal file sharing](#), 19 August 2008

⁸⁸ [Anti-piracy lawyers knowingly targeted innocent web users, SRA says](#), Solicitors Journal, 18 November

Consumer Focus is concerned that in the past the threat of court proceedings, particularly in the High Court, has been used to pressurise entirely innocent consumers into settling claims of copyright infringement rather than defending their case in court. We are also concerned that consumers, who may not have been entirely innocent, settled for amounts that are disproportionate to the damage caused by the infringement for fear of being exposed to substantial costs if they defended their case in court. There is an overriding need for consumers to be able to deal with lower-value copyright disputes without the fearful jeopardy of potential costs in the High Court or the PCC multi-track running to many tens of thousands of pounds, or higher. The PCC process should be designed to not put consumers at a grave disadvantage and we believe that a modified small claims track is most appropriate in meeting the needs of consumers. Entrepreneurs and SMEs who face the threat of litigation over copyright infringement claims will find themselves in the same situation as consumers, and introducing a cost effective small claims track and fast track to the PCC will help to mitigate the chilling effect the threat of litigation is likely to have. We recommend that the Hargreaves review team looks closely at Justice Jackson's final report, which contains data on the cost of litigation in relation to entrepreneurs and SMEs.

In our recent response to the MOJ's consultation on taking forward Justice Jackson's recommendations we asked the MOJ to undertake a review into whether, in respect to copyright disputes involving consumers, the PCC performs against its objective of providing an affordable forum for litigation and providing access to justice. This includes the few cases which have been processed under the old rules and procedures, and the 27 cases which have been brought under the new rules and procedures since 1 October 2010. This review should commence immediately and inform the introduction of a modified small claims track to the PCC, as recommended by Justice Jackson. The Hargreaves review team should engage with the MOJ on the PCC reforms to reduce the cost of litigation and so increase the effectiveness of existing civil remedies. It is important that the review builds on the work done by the IPCUC and Justice Jackson and that the MOJ works closely with the IPO to introduce a modified small claims track to the PCC as soon as possible.

While the recent changes to the PCC's rules and procedures will lower the cost of copyright litigation they are in themselves not sufficient to provide SMEs, entrepreneurs or consumers with a cost effective forum to resolve intellectual property disputes. County Courts usually provide for three tracks through which a claim can be pursued:

- Small claims track – generally for lower-value and less complex claims with a value of up to £5,000 although there are some exceptions
- Fast track – claims with a value of between £5,000 and £25,000
- Multi-track – very complex claims with a value of £25,000 or more⁸⁹

However, the Civil Procedure Rules CPR 63.1(3) currently requires that any intellectual property claim is classified as multi-track and are therefore ineligible to be determined under a small claims basis. This means that the PCC cannot currently provide a small claims track or fast track for copyright infringement disputes. Disputes must be pursued through multi-track regardless of their complexity or the wish of the claimant or defendant.

The small claims track has the benefit of no legal costs on either side, and does not require either side to instruct a solicitor. It was originally introduced to County Courts in England and Wales to allow consumers to bring claims. Lord Justice Jackson has recommended that a modified small claims track is introduced to the PCC so that freelancers, such as a

⁸⁹ EX 305 – [The fast track and the multi-track in civil courts](#), Her Majesty's Court Service, 2009, pg.1

photographer whose photographs have been downloaded from the internet and reproduced without permission, can pursue their claim in the PCC representing themselves.⁹⁰ We support this recommendation, but would like the MoJ to also consider a modified small claims track for the PCC specifically designed to allow consumers to defend themselves in copyright infringement disputes.

Consumer Focus recommends that the Hargreaves review:

- Introduces a modified small claims track and fast track to the Patents County Court, to ensure that consumers, entrepreneurs and SMEs can resolve lower-value copyright infringement disputes cost effectively

⁹⁰ Lord Justice Jackson, [Review of civil litigation costs: final report](#), Ministry of Justice, December 2009, pg.255–256



Consumer Focus response to Independent Review of IP and Growth

Part 2 - The Copyright Framework: innovation and growth through fair use, licensing solutions and appropriate enforcement

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