



The Hargreaves Review of Intellectual Property

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The Hargreaves Review of Intellectual Property was published in May 2011 under the title [Digital Opportunity](#). It made wide-ranging recommendations, which the Government broadly accepted. There was a subsequent public consultation on implementing the proposals, to which the Government responded in two parts, in July 2012 and December 2012. The Commons Business, Innovation and Skills Committee has also conducted an inquiry into the Hargreaves proposals. One of the proposals, for a Digital Copyright Exchange, was set aside for separate consideration. Richard Hooper was appointed to lead a feasibility study into this proposal and Mr Hooper has now published two reports containing his findings and recommendations.

This note considers, on the basis of published Impact Assessments, which of the Hargreaves recommendations would require primary, and which secondary, legislation. At Committee stage of the *Enterprise and Regulatory Reform Bill 2012-13*, the Government added two new clauses to the Bill which appear to be a first move toward implementing Hargreaves. These enabling measures, affecting so-called “orphan works” and extended collective licensing, are now enshrined in the [2013 Act](#) but will not take effect until the necessary regulations have been developed, opened to public consultation and approved by Parliament.

The second Government response document (December 2012) announced a number of changes which are intended to introduce greater “freedoms in copyright law to allow third parties to use copyright works for a variety of economically and/or socially valuable purposes without the need to seek permission from copyright owners”. Secondary legislation to introduce these changes will be introduced in 2013. Prior to this, the Government will publish the draft regulations for technical review.

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1 Introduction

Successive UK governments have instigated reviews on intellectual property. The [Gowers Review of Intellectual Property](#) reported in December 2006. A further report appeared in 2009.¹ Following the change of government, in November 2010 the Prime Minister announced an independent review of how the intellectual property framework supports growth and innovation. Chaired by Professor Ian Hargreaves and assisted by a panel of experts, the review reported to Government in May 2011.²

2 The Hargreaves Report

A press release summarised the Report's main recommendations:

Changes to Intellectual Property systems could add up to £7.9 billion to the UK's economy, the first report looking at how it can drive growth said today.

The publication of Digital Opportunity follows a six-month independent review of IP and Growth, led by Professor Ian Hargreaves. He was asked to consider how the national and international IP system can best work to promote innovation and growth.

His recommendations aim to give the UK a competitive advantage – and put it on a par with international competitors. Taken together, they have the potential to add up to 0.6 per cent to annual GDP and to cut the costs of doing business with IP-related business by £750m within a decade.

(...)

Hargreaves Review Recommendations

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

2. **International priorities.** The UK should resolutely pursue its international interests in IP, particularly with respect to emerging economies such as China and Review of Intellectual Property and Growth India, based upon positions grounded in economic evidence. It should attach the highest immediate priority to achieving a unified EU patent court and EU patent system, which promises significant economic benefits to UK business. The UK should work to make the Patent Cooperation Treaty a more effective vehicle for international processing of patent applications.

3. **Copyright licensing.** In order to boost UK firms' access to transparent, contestable and global digital markets, the UK should establish a cross sectoral Digital Copyright Exchange. Government should appoint a senior figure to oversee its design and implementation by the end of 2012. A range of incentives and disincentives will be needed to encourage rights holders and others to take part. Governance should reflect the interests of participants, working to an agreed code of practice. The UK should support moves by the European Commission to establish a framework for cross border copyright licensing, with clear benefits to the UK as a major exporter of copyright works. Collecting societies should be required by law to adopt codes of practice,

¹ Intellectual Property Office/Department for Business, Innovation and Skills, [© the way ahead: a strategy for copyright in the digital age](#), October 2009

² Intellectual Property Office, [Digital opportunity: a review of intellectual property and growth](#), May 2011

approved by the IPO and the UK competition authorities, to ensure that they operate in a way that is consistent with the further development of efficient, open markets.

4. Orphan works. The Government should legislate to enable licensing of orphan works. This should establish extended collective licensing for mass licensing of orphan works, and a clearance procedure for use of individual works. In both cases, a work should only be treated as an orphan if it cannot be found by search of the databases involved in the proposed Digital Copyright Exchange.

5. Limits to copyright. Government should firmly resist over-regulation of activities which do not prejudice the central objective of copyright, namely the provision of incentives to creators. Government should deliver copyright exceptions at national level to realise all the opportunities within the EU framework, including format shifting, parody, non-commercial research, and library archiving. The UK should also promote at EU level an exception to support text and data analytics. The UK should give a lead at EU level to develop a further copyright exception designed to build into the EU framework adaptability to new technologies. This would be designed to allow uses enabled by technology of works in ways which do not directly trade on the underlying creative and expressive purpose of the work. The Government should also legislate to ensure that these and other copyright exceptions are protected from override by contract.

6. Patent thickets and other obstructions to innovation. In order to limit the effects of these barriers to innovation, the Government should: take a leading role in promoting international efforts to cut backlogs and manage the boom in patent applications by further extending "work sharing" with patent offices in other countries; work to ensure patents are not extended into sectors, such as non-technical computer programs and business methods, which they do not currently cover, without clear evidence of benefit; investigate ways of limiting adverse consequences of patent thickets, including by working with international partners to establish a patent fee Review of Intellectual Property and Growth structure set by reference to innovation and growth goals rather than solely by reference to patent office running costs. The structure of patent renewal fees might be adjusted to encourage patentees to assess more carefully the value of maintaining lower value patents, so reducing the density of "patent thickets".

7. The design industry. The role of IP in supporting this important branch of the creative economy has been neglected. In the next 12 months, the IPO should conduct an evidence based assessment of the relationship between design rights and innovation, with a view to establishing a firmer basis for evaluating policy at the UK and European level. The assessment should include exploration with design interests of whether access to the proposed Digital Copyright Exchange would help creators protect and market their designs and help users better achieve legally compliant access to designs.

8. Enforcement of IP rights. The Government should pursue an integrated approach based upon enforcement, education and, crucially, measures to strengthen and grow legitimate markets in copyright and other IP protected fields. When the enforcement regime set out in the DEA becomes operational next year its impact should be carefully monitored and compared with experience in other countries, in order to provide the insight needed to adjust enforcement mechanisms as market conditions evolve. This is urgent and Ofcom should not wait until then to establish its benchmarks and begin building data on trends. In order to support copyright holders in enforcing their rights the Government should introduce a small claims track for low monetary value IP claims in the Patents County Court.

9. **Small firm access to IP advice.** The IPO should draw up plans to improve accessibility of the IP system to smaller companies who will benefit from it. This should involve access to lower cost providers of integrated IP legal and commercial advice.

10. **An IP system responsive to change.** The IPO should be given the necessary powers and mandate in law to ensure that it focuses on its central task of ensuring that the UK's IP system promotes innovation and growth through efficient, contestable markets. It should be empowered to issue statutory opinions where these will help clarify copyright law. As an element of improved transparency and adaptability, Government should ensure that by the end of 2013, the IPO publishes an assessment of the impact of those measures advocated in this review which have been accepted by Government.³

3 Consulting on implementation

The Government broadly accepted all of the Hargreaves recommendations. There was a subsequent consultation on implementing the proposals, launched in December 2011.⁴ The forward to the [Consultation](#) stated that the Government intended to respond to the Consultation and make formal proposals for legislation or other action in an IP and Growth White Paper in spring 2012. It further stated that the White Paper would also serve as a progress report on other work arising from the Hargreaves Review, whether ultimately leading to legislation or not.

Section 2 of the Consultation, "About this consultation", explained why the recommendation from the Hargreaves Report for a Digital Copyright Exchange was not included:

Professor Hargreaves's principal recommendation in this space was for a Digital Copyright Exchange (DCE), a marketplace where ownership of copyrights could be advertised and rights licensed.

(...)

The Government does not see the creation of the DCE as primarily a legislative task. The DCE is therefore not the subject of this consultation, though it would enhance the impact of several of its proposals.

As a separate exercise, the Government appointed Richard Hooper to lead an independent feasibility study into the development of a DCE. Mr Hooper published his first "diagnostic" report in March 2012 and a final report, advocating the creation of a "digital hub", in July.⁵

Section 2 of the Consultation document also explained which recommendations from the Hargreaves Report were included in the Consultation:

This consultation deals with the other Hargreaves recommendations for UK copyright on which the Government proposes to legislate or is considering legislation. It sets out how the Government proposes to act on:

- Orphan works
- Extended collective licensing
- Codes of conduct for collecting societies

³ Intellectual Property Office press release, [The Hargreaves Report shows potential to boost economy](#), 18 May 2011

⁴ Intellectual Property Office, [Consultation on Copyright](#), 14 December 2011

⁵ IPO, [Digital Copyright Exchange Feasibility Study](#)

- • Exceptions to copyright within the scope of the Information Society Directive, including private copying, non-commercial research, archiving and parody
- • A copyright notices service from the IPO

(...)

This consultation does not cover other copyright issues arising from the Hargreaves Review on which EU-level action would be required.

An important consideration is whether implementing the proposals would require primary legislation or could be achieved through secondary legislation.⁶ The following comments highlights which proposals fall into which category.

3.1 Orphan works

According to the Consultation, orphan works have been defined by the Copyright Tribunal as works that are in copyright and where the copyright holders remain un-located after a diligent search. The Government is proposing new legislation that will enable the use of individual orphan works after a diligent search and confirmed by an authorising body such as a collecting society or a public body like the Copyright Tribunal.⁷

The Consultation states that legal provision would need to be made for an organisation or organisations to authorise the use of orphan works following a diligent search.⁸

According to the impact assessment prepared by the Intellectual Property Office (IPO) in connection with the Consultation, the implementation of an “orphan works solution” will require an amendment to the existing copyright law and will therefore not be effected *merely* by the introduction of new regulations.⁹

The impact assessment indicates that this would be a matter of primary legislation.¹⁰

3.2 Extended collective licensing

The Consultation document states:

The Government is proposing new legislation that would introduce voluntary extended collective licensing in the UK. It would allow collecting societies that wish to operate an extended licensing scheme in relation to particular rights and uses of rights within the UK to apply for an authorisation from Government to do so. This authorisation would be subject to certain criteria being met by the collecting society. Once authorised, the collecting society would be able to act not just for its members, but also for rights holders who are not members, with the exception of those who opt out of the ECL scheme.¹¹

The impact assessment prepared by the IPO in connection with the Consultation gives two options relating to legislation.

⁶ “Delegated” or “secondary” legislation allows the Government to make changes to the law using powers conferred by an Act of Parliament (“primary legislation”).

⁷ IPO, Consultation on Copyright, December 2011 Para 4.10, p18

⁸ IPO, Consultation on Copyright, December 2011 Para 4.33, p25

⁹ IPO [Impact Assessment, Orphan Works BIS1063](#), 20 October 2011

¹⁰ For subsequent developments, see below, section 6

¹¹ IPO, Consultation on Copyright, December 2011 Para 5.17, p35

- Option 1 - Amend existing copyright legislation. This is likely to be a protracted process requiring agreement on the European and international fronts with no guarantee of success.
- Option 2 - Introduce legislation that will allow collective licensing to take place on an "opt out" rather than an "opt in" basis to expedite rights clearance and reduce transaction costs.¹²

Option 2 is stated to be the preferred option as it “achieves policy objectives and the intended effects in a relatively short time frame”.

The impact assessment states:

... the government intends to introduce a legislative package that would include provisions for extended collective licensing. The legislation would be in the form of an enabling power that would allow the Secretary of State to make, by regulation, provision for collecting societies to apply to be authorised to run extended collective licensing schemes. This would be used for the mass clearance of orphan works in those areas where the government introduces provisions for orphan works after consultation with stakeholders. An enabling power is necessary: it allows for some future proofing in an area of policy that can often struggle to keep up with the pace of technological changes. However, the regulations will be published and widely consulted on. These proposals are subject to securing an appropriate legislative slot at the earliest opportunity.¹³

The impact assessment indicates that this would be a matter of primary legislation.¹⁴

3.3 Codes of conduct for collecting societies

The Consultation states:

The Government proposes that, in the first instance, collecting societies self-regulate by adopting codes of conduct that incorporate minimum standards set by the government. In tandem, the Government intends to introduce legislation that will give the government a backstop power to put in place statutory codes of conduct for any collecting society that fails to self-regulate effectively. The backstop power will provide for penalties for non-compliance.¹⁵

The impact assessment prepared by the IPO in connection with the Consultation, states that in parallel to collecting societies¹⁶ being given an opportunity to put in place codes of conduct to regulate themselves,

... the government intends to prepare proposals to take a backstop power, enshrined in legislation, to regulate those collecting societies which fail by a set date to put in place codes of conduct that comply with governmental guidelines (or that fail to adhere to codes that have been put in place). The power will allow the government to impose statutory codes of conduct for collecting societies falling into these two categories.¹⁷

¹² IPO [Impact Assessment, Extended Collective Licensing BIS1054](#), 31 October 2011

¹³ IPO [Impact Assessment, Extended Collective Licensing BIS1054](#), 31 October 2011

¹⁴ For subsequent developments, see below, section 6

¹⁵ IPO, Consultation on Copyright, December 2011 Para 6.16, p44

¹⁶ The term refers to bodies such as the Performing Rights Society, the Copyright Licensing Agency and the Publishers' Licensing Society which collect copyright fees on behalf of their members

¹⁷ IPO [Impact Assessment, Codes of Conduct BIS0313](#), 24 October 2011

The impact assessment indicates that this would be a matter of primary legislation.¹⁸

3.4 Exceptions to copyright

The Consultation document states that the Government “intends to explore the scope for widening copyright exceptions within EU law, with a view to modernising and opening up copyright exceptions to the maximum degree”.¹⁹

The impact assessment prepared by the IPO for changes to the exceptions, examines the case for exceptions that permit: social institutions (e.g. hospitals) to record broadcasts; use of copyright works during religious/official celebrations; use for the sale/exhibition of artistic works; use for the demonstration or repair of equipment (e.g. consumer electronics). It states that for each of these the Copyright Directive permits the UK to implement a wider exception than it currently has, and states that the Government plans to take “full advantage” of this.

It indicates that changes to the scope of exceptions would be a matter of secondary legislation.

The Consultation also proposes simplification of copyright exceptions.

The Copyright Act currently provides only 13 Sections setting out the acts restricted by copyright, compared to 66 Sections setting out the acts permitted by exceptions. Many exceptions have been implemented in ways that are complex and difficult to understand and need to be read in conjunction with additional, supporting legislation³⁷, and some may be subject to additional licences.³⁸ Complex exceptions cause confusion and generate administrative costs and legal risks to those who ought to benefit from them. The Government would like to take every opportunity to make exceptions as clear and straightforward as possible.

One way to introduce greater clarity into the copyright exceptions could be to use the terminology of the EU Copyright Directive to a greater extent. This is the Government’s preferred approach to implementing EU legislation, and has long been recommended by the Patent Judges of England and Wales. The volume of legislation on exceptions could also be reduced in order to make them easier to access and understand.²⁰

The consultation document looks at the types of exceptions under consideration grouped into categories based on the optional exceptions permitted by the Copyright Directive (and there is an IPO impact assessment for each area).

3.5 Private copying

The consultation states:

We propose to create a new exception to copyright that allows people to copy creative content for private, non-commercial use. To be future-proof, we intend this exception to be technology, format and platform neutral, permitting private copying of any type of copyright work to any type of device or medium. We will ensure that such an exception is sufficiently narrow so that any harm caused to copyright owners through private copying is minimised, and therefore do not intend to introduce a levy on electronic devices or blank media, as exists in some other EU states.²¹

¹⁸ For subsequent developments, see below, section 6

¹⁹ IPO, Consultation on Copyright, December 2011 Para 7.13, p58

²⁰ IPO, Consultation on Copyright, December 2011 Para 7.17-7.18 pp59-60

²¹ IPO, Consultation on Copyright, December 2011 Para 7.39, p65

The IPO impact assessment indicates that changes to the scope of exceptions would be a matter of secondary legislation.²²

3.6 Preservation by libraries and archives

The Consultation document proposes the following:

Widening our existing preservation exception

7.66 For the reasons described above, the proposal is to extend Section 42 of the Copyright Act to make it easier to preserve a wide range of media for future generations. In addition it is proposed this exception is amended so that it applies to audiovisual works and sound recordings as well as literary, dramatic or musical works, and so that multiple copies can be made. Finally it is also proposed to allow museums and galleries to benefit from this exception as well as libraries and archives.

Making it easier to preserve broadcasts and folk songs

7.67 The Government proposes to simplify Sections 61 and 75 of the Copyright Act to make it easier to archive broadcasts and folk songs. This could be done by making it easier to become a designated body under these provisions, for example, by delegating authority to do this to the Comptroller General of the Intellectual Property Office, or by removing the need for formal designation altogether. Alternatively, it may be possible to further simplify these provisions by merging them with the more general preservation exception of Section 42.²³

The impact assessment indicates that these changes would be a matter of primary legislation.²⁴

3.7 Research and private study

The Government proposes to amend the UK's current research exception so that people will be able to copy a wider range of works for non-commercial research and private study.²⁵ The current research exception is contained in section 29 of the *Copyright, Designs and Patents Act 1988*.

The IPO's impact assessment states that "the proposal would be implemented through UK secondary legislation after full consultation, as part of a wider package, minimising additional specific costs".²⁶

3.8 Text and data mining for research

The Government proposes to make it possible for whole works to be copied for the purpose of data mining for non-commercial research.

A new exception for text and data analytics

This proposal seeks to introduce a new non-commercial research exception that permits copying for text and data analytics, to the extent that this is possible under EU law. The exception would be limited further so that it applies only to uses of technology

²² IPO Impact Assessment, [Copyright exception for private copying BIS1055](#), 01 November 2011

²³ IPO, Consultation on Copyright, December 2011 Para 7.67, p72

²⁴ IPO Impact Assessment, [Copyright exception for archiving and preservation BIS0306](#), 24 October 2011

²⁵ IPO, Consultation on Copyright, December 2011 Para 7.77, p76

²⁶ IPO Impact Assessment, [Extend exception for copying for research and private study BIS0311](#), 24 October 2011

that do not unduly prejudice the primary market for or value of the copyright works being copied.²⁷

The IPO's impact assessment states that "the proposal would be implemented through UK secondary legislation after full consultation, as part of a wider package, minimising additional specific costs".²⁸

3.9 Parody, caricature and pastiche

The consultation states:

The Government has accepted the Review's recommendation and intends to introduce an exception for parody. It is consulting on the most appropriate scope and safeguards for this exception.²⁹

The IPO impact assessment indicates that this change would be a matter of secondary legislation.³⁰

3.10 Use of works for education

The *Copyright, Designs and Patents Act 1988* contains various exceptions that allow educational establishments to carry out certain acts that would otherwise infringe copyright.³¹ The Government proposes to expand these exceptions:

To take greater advantage of the opportunities provided within the EU framework the Government is proposing to expand these exceptions. The Hargreaves Review did not make specific recommendations as regards the education exceptions, so the following proposals are those that appear to deliver the greatest benefits. However, the Government has not ruled out other proposals, and it particularly welcomes data that helps to assess the costs and benefits of these proposals.³²

The Government proposes:

- Expanding the works and technologies covered by education exceptions
- Increasing the proportion of a copyright work that can be copied
- Enabling distance learners to access educational materials
- Widening the definition of an educational establishment
- Removing the ability of licensing arrangements to restrict the use of exceptions

The IPO impact assessment indicates that these changes would be a matter of secondary legislation.³³

²⁷ IPO, Consultation on Copyright, December 2011 Para 7.97, p81

²⁸ IPO Impact Assessment, [Exception for copying of works for use by text and data analytics BIS0312](#), 24 October 2011

²⁹ IPO, Consultation on Copyright, December 2011 Para 7.115, p86

³⁰ IPO Impact Assessment, [Copyright exception for parody BIS1057](#), 24 October 2011

³¹ *Copyright Designs and Patents Act*, 1968 (as amended) s32 to 36A

³² IPO, Consultation on Copyright, December 2011 Para 7.138, p92

³³ IPO Impact Assessment, [Extending Copyright Exceptions for Educational Use BIS0317](#), 2 November 2011

3.11 Copyright exceptions for people with disabilities

The Government proposes to expand the UK's exceptions that benefit people with disabilities to take greater advantage of the opportunities offered by the EU framework. It states, in the Consultation document, that it believes that the key principle underpinning these exceptions is that the exceptions should only apply to the extent that commercial accessible copies are not available and that it does not intend to alter this approach.³⁴

On enabling more people to benefit from these exceptions the consultation says:

The Government would like to address this issue by expanding the scope of the UK's disability exceptions. This could be done by broadening the definition of a visually impaired person to bring it in to line with international definitions as described above. Even more people would be able to benefit from these exceptions if they were broadened to cover anyone with a disability. This would also allow us to consolidate and simplify the two current types of exception (visually impaired and subtitling), and is currently the Government's preferred course of action.³⁵

On applying the exceptions to more types of work, the consultation says:

The current exceptions cover limited types of works. The exception for visually impaired people applies in respect of literary, dramatic, musical or artistic works but works such as films are not included. Expanding the type of works covered would allow disabled people or those acting on their behalf to make accessible copies of a much broader range of copyright material. For example, an expanded section might support the provision of audio descriptions of films. The Government proposes to extend the disability exceptions so that they cover more works in order to maximise their benefits.³⁶

The Government also proposes preventing licensing schemes from taking precedence over exceptions for disabled people.

The IPO impact assessment indicates that these changes would be a matter of secondary legislation.³⁷

3.12 Use of works for quotation and reporting current events

The Government proposes³⁸ to update exceptions to copyright that currently permit extracts of copyright works to be copied for criticism, review and news reporting. These exceptions are currently contained in section 30 of the *Copyright, Designs and Patents Act 1988* and in the Copyright Directive.³⁹

The impact assessment from the IPO identifies the Government's intention to introduce "an exception permitting fair dealing with any extract or quotation, to the necessary extent, as long as sources are identified". The impact assessment indicates that these changes would be a matter of primary legislation.⁴⁰

³⁴ IPO, Consultation on Copyright, December 2011 Para 7.172, p100

³⁵ IPO, Consultation on Copyright, December 2011 Para 7.173, p100

³⁶ IPO, Consultation on Copyright, December 2011 Para 7.174, p100

³⁷ IPO Impact Assessment, [Extending Copyright Exceptions for Disabled People BIS0308](#), 24 October 2011

³⁸ IPO, Consultation on Copyright, December 2011 Para 7.191, p105

³⁹ Copyright in the Information Society 2001/29/EC, Article (5)(3)(f)

⁴⁰ IPO Impact Assessment, [Exception for use of quotations or extracts of copyright works BIS0310](#), 24 October 2011

3.13 Use of works for public administration and reporting

The *Copyright, Designs and Patents Act 1988* provides exceptions to copyright that allow public bodies to carry out their duties. In general they relate only to the making of copies and distributing physical copies and do not permit the making available of materials online. The Copyright Directive allows for these exceptions for public bodies to cover making available copies on the internet, as well as the issuing of physical copies.

... the Government proposes to amend the current UK exceptions for public administration and reporting to permit the publication of relevant documents online. This will help to improve government transparency and enable the provision of new services to the public.⁴¹

The IPO's intention, as identified in their impact assessment, is to amend the current copyright exception for public administration and reporting to permit the publication of relevant third-party documents online.⁴²

3.14 Protecting copyright exceptions from override by contract

The Consultation states that the Government proposes introducing a clause, applying to every exception provided by the *Copyright, Designs and Patents Act 1988*, which would make clear that any contract term purporting to prohibit or restrict the use of an exception is unenforceable.⁴³

The impact assessment prepared by the IPO states that the proposal would be implemented through UK primary legislation after full consultation, as part of a wider package, minimising additional specific costs.⁴⁴

3.15 Copyright notices

The Government proposes to introduce a Copyright Notice Service which would give the Intellectual Property Office (IPO) a statutory function to publish formal opinions on UK copyright law and its application. The consultation states:

In line with the Hargreaves Review recommendation 10, the Government therefore proposes to introduce a statutory obligation on the IPO to issue general Notices on areas where there is manifest confusion or misunderstanding on the scope and application of copyright law. These Notices would be provided in response to issues raised with the IPO or on the IPO's own initiative. The IPO should have clear, published rules and procedures for when it should respond to a request for a Notice.⁴⁵

The Government proposes for courts to have regard to the new notices:

We have considered whether a specific legal obligation should be introduced to ensure that the Courts have regard to these Notices. We note, for example, that there is a legal obligation for the Courts to have regard to any relevant decision or statement of the European Commission in competition law proceedings⁹². We propose a similar obligation on the Courts to have regard to the IPO's Copyright Notices.

⁴¹ IPO, Consultation on Copyright, December 2011 Para 7.206, p108

⁴² IPO Impact Assessment, [Use of works for public administration and reporting BIS0309](#), 24 October 2011

⁴³ IPO, Consultation on Copyright, December 2011 Para 7.249, p119

⁴⁴ IPO Impact Assessment, [Protecting copyright exceptions from override by contract BIS0315](#), 1 November 2011

⁴⁵ IPO, Consultation on Copyright, December 2011 Para 8.21, p124

The impact assessment for this proposal indicates that it would require primary legislation. It states:

The Copyright Notice Service would be statutory. The proposal is for:

- the IPO to issue these Notices pursuant to a new statutory duty to do so; and
- the IPO to have detailed legislative rules and procedures for when it must respond to a request for a Notice.

Although there is a non-legislative option here, the authority a legislative Notice service would give the IPO is considered preferable because it will result in greater net benefits and increase legal certainty to the desired level but we welcome views on this at consultation. Both options are beneficial to business, but by preferring the legislative route, this policy option offers a higher probability of greater benefits being achieved.⁴⁶

4 Government responses to the consultation

The Government's initial response to the consultation exercise was published in July 2012.⁴⁷ It indicated the Government's intention to legislate as soon as possible to allow schemes to be introduced for the commercial and non-commercial use of "orphan" works and voluntary extended collective licensing of copyright works, and to create a backstop power to require collecting societies to adopt codes of conduct based on minimum standards. It also set out the broad parameters that the Government intends to set for these schemes. It promised that, once the necessary legislation is in place, there would be further consideration of the details of all these measures, generally through consultation, before the final schemes are laid before Parliament for approval. The initial response also stated that policy decisions on other issues covered by the consultation – including the Government's plans to modernise copyright through changes to the UK's copyright exceptions and the proposed copyright notices scheme – would be set out in a subsequent document later in the year.

In December 2012, the Government published the final part of its response to the copyright consultation.⁴⁸ The document sets out Government decisions on changes to the framework for copyright exceptions. These changes are intended to introduce greater "freedoms in copyright law to allow third parties to use copyright works for a variety of economically and/or socially valuable purposes without the need to seek permission from copyright owners". Protections for the interests of copyright owners and creators would be built in to the revised framework. It was announced that secondary legislation to introduce these changes will be introduced in 2013. Prior to this, the Government will publish the draft regulations for technical review.⁴⁹

These are the areas in which change is proposed by way of regulation:

Private copying - to permit people to copy digital content they have bought onto any medium or device that they own, but strictly for their own personal use such as transferring their music collection or eBooks to their tablet, phone or to a private cloud;

Education - to simplify copyright licensing for the education sector and make it easier for teachers to use copyright materials on interactive whiteboards and similar

⁴⁶ IPO Impact Assessment, [Copyright Notices BIS1056](#), 18 November 2011

⁴⁷ HM Government, [Government policy statement: consultation on modernising copyright](#), July 2012

⁴⁸ HM Government, [Modernising copyright: a modern, robust and flexible framework](#), December 2012

⁴⁹ [HC Deb 20 December 2012 c123WS](#)

technology in classrooms and provide access to copyright works over secure networks to support the growing demand for distance learning handouts for students;

Quotation and news reporting - to create a more general permission for quotation of copyright works for any purpose, as long as the use of a particular quotation is "fair dealing" and its source is acknowledged;

Parody, caricature and pastiche - to allow limited copying on a fair dealing basis which would allow genuine parody, but prohibit copying disguised as parody;

Research and private study - to allow sound recordings, films and broadcasts to be copied for non-commercial research and private study purposes without permission from the copyright holder. This includes both user copying and library copying;

Data analytics for non-commercial research - to allow non-commercial researchers to use computers to study published research results and other data without copyright law interfering;

Access for people with disabilities - to allow people with disabilities the right to obtain copyright works in accessible formats where a suitable one is not already on the market;

Archiving and preservation - to allow museums, galleries, libraries and archives to preserve any type of copyright work that is in their permanent collection which cannot readily be replaced; and

Public administration - to widen existing exceptions to enable more public bodies to share proactively third party information online, which would reflect the existing position in relation to the use of paper copies.⁵⁰

In addition the Government will introduce a new, *non*-statutory system for clarifying areas where there is confusion or misunderstanding on the scope and application of copyright law. Copyright notices will issued by the Intellectual Property Office (IPO). These notices are intended to clarify, but not make new law.

[Impact assessments](#) associated with the December 2012 announcement are available on the IPO website. Regarding the timetable for implementation, we are told that the Government

... intends to introduce the measures in the smallest possible number of statutory instruments to minimise disruption to stakeholders, make best use of Parliamentary time and ensure that the revised system is implemented in a clear and consistent manner. The intention is that measures will come into force in October 2013.⁵¹

5 Commons BIS Committee report

The Commons Business, Innovation and Skills (BIS) Committee also undertook an inquiry into the Hargreaves recommendations and reported in June 2012.⁵² Among the report's conclusions were the following (accompanied by comments from Adrian Bailey, Chairman of the Committee):

1. On copyright exceptions

⁵⁰ IPO press notice, [Consumers given more copyright freedom](#), 20 December 2012

⁵¹ HM Government, [Modernising copyright: a modern, robust and flexible framework](#), December 2012, p6

⁵² Business, Innovation and Skills Committee, [The Hargreaves Review of Intellectual Property: where next?](#) 27 June 2012, HC 367-I

The Committee believes further work remains to be done in analysing whether the economic benefits of a parody exception would be as extensive as claimed. However, other grounds may yet support a change to the law.

"This is an important area, because it is one where extending what is legally permissible would probably help improve public respect for copyright law."

2. On content mining:

The Committee agrees that the ability to read published scientific data automatically is useful and needs to be opened up. The Committee recommends a further look at cooperative licensing models before any wholesale exception is implemented.

"By adopting a licensing approach, the Government has the chance to address technical feasibility and security issues while supporting the successful UK publishing sector."

3. On the Digital Copyright Exchange

The Committee encourages the Government to push forward with this idea provided the system is kept simple and there is a proper cost/benefit analysis.

"The Digital Copyright Exchange has great potential to rationalise the current confusing process of rights access. However, there is some risk of over-complication and consequent cost."

4. On the Government's approach to negotiations on the Unified Patents Court:

The Committee is concerned about the Government's approach on this. A unified patent and litigation system could bring many benefits, particularly if the central court were situated in London, but the current proposals have not been welcomed by practitioners or industry.

"The current proposed framework risks increasing costs and exposure for UK business and a clear vision of how to minimise those risks is lacking. Given the status of negotiations, this situation needs addressing urgently."⁵³

The Government's response to the Committee report appeared in September 2012.⁵⁴

6 The *Enterprise and Regulatory Reform Act 2013*

The *Enterprise and Regulatory Reform Bill 2012-13* was published on 23 May 2012. Two clauses in the original Bill (55 and 56) concerned copyright.⁵⁵ In the Committee session on 12 July, the Opposition pressed the Minister on whether the copyright measures in the Bill were designed to implement Hargreaves' recommendations. The Minister (Norman Lamb) replied that clauses 55 and 56 were "not part of the wider Hargreaves work". He continued: "The Government will make announcements about the outcome of that review and their response to it in due course."⁵⁶ At Committee stage the Government tabled three new clauses and an accompanying Schedule. These were debated on the final day of Committee stage and led to some lively exchanges, since, as the Minister was happy to confirm, two of the new clauses did, in fact, implement proposals in the Hargreaves report. He described these as

⁵³ [Committee publishes report on the Hargreaves Review of Intellectual Property](#), 27 June 2012

⁵⁴ [The Hargreaves Review of Intellectual Property: where next? Government's response to the Committee's 1st report of Session 2012-13](#), 18 September 2012, HC 579 2012-13,

⁵⁵ See Library Research Paper 12/33, [Enterprise and Regulatory Reform Bill](#), 7 June 2012, pp72-4

⁵⁶ [PBC Deb 12 July 2012 c628](#)

the “first tranche of proposals”, adding that “decisions on the rest of the consultation, including copyright exceptions, will be announced later in the year”.⁵⁷

The new clauses addressed areas of copyright law different from those touched on in clauses 55 and 56. The Minister introduced the new clauses in considerable detail at the 17 July session.⁵⁸ In brief, **New Clauses 11**,⁵⁹ **13**⁶⁰ and **Schedule 1**⁶¹ allow the creation of “orphan works” schemes to open access to potentially valuable material that currently cannot be licensed or used; put in place a voluntary regime for extending “collective licensing” to help reduce complexities in the licensing system; and reserve a power to introduce statutory codes of conduct for collecting societies if they fail to operate to minimum standards. (**New clause 12**,⁶² which is unrelated to Hargreaves, is a response to the introduction of [European Directive 2011/77/EU](#). The Directive extends the copyright term of protection for sound recordings and performers’ rights from 50 to 70 years. The clause enables the Government to implement the Directive whilst retaining existing UK penalties for copyright infringement.)⁶³

The [Enterprise and Regulatory Reform Act 2013](#) received Royal Assent on 25 April 2013. The regulations that would bring the copyright-related provisions into force have yet to be laid. Thus, although the enabling Act is now law, it will only have an impact once rules for orphan works and extended collective licensing schemes have been developed, opened to public consultation and approved by Parliament. This is not expected to happen before 2014. It is therefore a little early to say exactly what effect the Act will have, for example on “orphaned” digital photographs, about which there has been speculation in the media.⁶⁴

For the latest updates, see the website of the Intellectual Property Office, which has a section on “[Hargreaves implementation: copyright](#)”, with links to the key documents. Another section, “[Hargreaves implementation: designs](#)”, introduces changes to the UK design protection framework which will be legislated for in the *Intellectual Property Bill [HL]* in the new session.

⁵⁷ [PBC Deb 17 July 2012 c710](#)

⁵⁸ [PBC Deb 17 July 2012 cc711-12](#)

⁵⁹ Now section 76 in the 2013 Act

⁶⁰ Now section 77 in the 2013 Act

⁶¹ Now Schedule 22 in the 2013 Act

⁶² Now section 75 in the 2013 Act

⁶³ For a summary of the debates see Library Research Paper 12/56, [Enterprise and Regulatory Reform Bill: Committee Stage Report](#), 3 October 2012, pp34-7.

⁶⁴ The Intellectual Property Office has published a [news item](#) on the Act and photographers, with a related “[myth and fact](#)” information document