

# **United Kingdom Independent Review of Intellectual Property and Growth**

## **Comments of the Motion Picture Association**



**4 March 2011**

## Table of Contents

<b>Executive Summary</b> .....	<b>2</b>
<b>Introduction</b> .....	<b>4</b>
<b>Copyright and the audiovisual industry</b> .....	<b>5</b>
<b>IP as a driver of innovation and growth</b> .....	<b>8</b>
<b>Fair Use - summary</b> .....	<b>11</b>
<b>Fair Use and the growth of online services</b> .....	<b>13</b>
<b>Economics and IP</b> .....	<b>15</b>
<b>Current issues</b> .....	<b>18</b>
Exceptions.....	18
Territoriality.....	20
Role of intermediaries .....	21
Enforcement .....	23
IP and Competition Law .....	25
<b>UK copyright policy</b> .....	<b>26</b>
<b>Conclusions for UK IP framework</b> .....	<b>27</b>
<b>Annex</b> .....	<b>(attached)</b>
– MPA Response to the UK IPO Consultation: Taking Forward the Gowers Review of IP – 2nd Stage Consultation Copyright Exceptions (31 March 2010)	
– Note on the Fair Use doctrine, by Steven J. Metalitz, Attorney	
– Legal Opinion, “Purported European “Hostility” to Search Engines”, by Brigitte Lindner, Rechtsanwältin	

## Executive Summary

- The MPA cautiously welcomes this further Review of IP law at this crucial juncture in the development of the information society and the knowledge economy. The need to protect the return on the substantial investment required to produce and distribute IP was never more pronounced.
- The UK copyright framework is generally fit for purpose to promote entrepreneurialism, economic growth and social and commercial innovation. In many respects, it provides more incentives for investment than other EU Member States. The UK system of specific exceptions and strong exclusive rights provides the necessary conditions, certainty and flexibility to foster new online business models.
- Licensing of audiovisual content is facilitated by the legal recognition of the producer as the holder of economic rights of exploitation of the work. This underpins the ability of producers to raise finance for the production of works, provides legal certainty and ensures that the market for licensing audiovisual works functions well.
- The greatest barrier to growth in the creative industries is copyright infringement on the Internet which threatens to deprive our members of their rights and drain the content sector of its revenues thereby deterring investment in new content, costing jobs and depriving the Exchequer of tax proceeds. Piracy grows the criminal economy at the expense of legitimate business and causes social harm beyond losses to the copyright sector.
- The creation of a legal online market in creative works entails the cooperation of ISPs with copyright holders. The UK Government deserves credit for acknowledging this truth in the enactment of the Digital Economy Act 2010. The priority is now effective implementation of all aspects of the relevant provisions of the DEA while keeping costs at a minimum.
- The IP sector is a driver of innovation as well as pure content creation. IP protections themselves are a driver of innovation, a fact which is borne out in recent research. Stronger IP protections are associated with technology transfer, foreign direct investment and economic development.

- New commercial users such as search engines, social media, UGCs, ad brokers, access providers, online marketplaces and auction sites, payment processors, software developers, equipment and chip manufacturers in the UK have experienced massive growth in recent years underpinned by the current legal system, including the IP regime – and content protected by that regime.
- The UK legal system provides the necessary framework for new legal internet-based business models. According to the European Audiovisual Observatory, the UK leads Europe in new legal digital content services<sup>1</sup>. What needs to be examined is how Internet intermediaries can be encouraged to work with content owners to promote the development of innovative legal services that are not undermined by illegal activities online.
- To better enable new legal business models, the UK IP framework should **continue** to:
  - Incentivise investment in new content
  - Support exclusive rights in order to finance, produce and distribute that content
  - Function on the basis of contractual freedom and copyright territoriality
  - Ensure that copyright exceptions are applied in a predictable manner and that appropriate rules to conciliate the use of technological measures and exceptions are in place.
- The marketplace is developing innovative approaches to facilitate automated licensing mechanisms and other forms of permissions. These innovative solutions should be supported by Government as a practical means of facilitating licensing on the Internet.
- Effective enforcement is vital to ensuring that the IP system functions properly and to create a supportive environment for investment in innovative legitimate delivery services. The Review should consider ways to increase the possibilities for effective civil and criminal IP enforcement while reducing the cost and complexity of such enforcement. Detailed proposals for specific adjustments are described below.
- With growth in developing countries outpacing that of most developed countries, opportunities for UK businesses to invest in countries such as Brazil, Russia, India and China are potentially enormous. The UK should therefore promote the implementation of policies that support the growth of media and creative industries in those countries, such as robust IP protection that includes the full implementation of the 1996 WIPO Internet Treaties.

\*

---

<sup>1</sup> <http://www.obs.coe.int/about/oea/pr/vod2009.html>

## Introduction

The Motion Picture Association<sup>2</sup> cautiously welcomes the establishment of the Independent Review of Intellectual Property and Growth (“the Review”). While the institution of the Review testifies to the UK Government’s recognition of the importance of the creative industries and the crucial role of intellectual property policy in the future growth of the UK economy as a whole, it also creates an urgent concern that IP protections are not weakened so as to provide cheaper or free content to downstream businesses that take advantage of protected works. We therefore welcome the focus on growth and on objective economic argument.

As commercial companies operating in a harshly competitive environment in which, as recent history has shown, no business is “too big to fail”, the MPA’s member companies strongly support a focus on sustained economic growth. Changes to copyright laws proposed by certain academics and pressure groups threaten to undermine the entrepreneurial focus that has characterized UK copyright from the Statute of Anne down to the Copyright, Designs and Patents Act 1988. The UK remains one of the European copyright jurisdictions most open to creative businesses and innovation in general.

Given that the focus of the Review is the suitability of the IP system to contribute to growth and innovation, we believe that both objective evidence and economic analysis demonstrate that the UK IP framework remains largely “fit for purpose”.

That said, there is room for improvement, especially in relation to enforcement. The UK audiovisual sector (film and television) is estimated to suffer revenue losses of about £500m a year through piracy<sup>3</sup>. A 2009 analysis by Oxford Economics for the audiovisual sector showed that implementation of reforms to strengthen enforcement would “provide direct gross revenue benefits to the AV sector of £268 million as well as benefits spread throughout the entire UK economy via ‘multiplier effects,’ creating a total of £614 million in revenues to all industries, £310 million in GDP, 7,900 jobs and £155 million in taxes to government”.<sup>4</sup>

---

<sup>2</sup> MPA is a trade association **representing the six major international producers and distributors of films, home entertainment and television programmes**: Paramount Pictures Corporation, Sony Pictures Entertainment Inc, Twentieth Century Fox Film Corporation, Universal City Studios LLLP, Walt Disney Studios Motion Pictures and Warner Bros. Entertainment Inc.

<sup>3</sup> *Building a Digital Economy: the importance of saving jobs in the EU’s Creative Industries* TERA Consultants, 2010: <http://www.creativecoalitioncampaign.org.uk/library/files/FINAL%20Full%20Study%20TERA.pdf>. See also: [http://www.ukfilmcouncil.org.uk/media/pdf/g/m/Ipsos\\_Piracy\\_UK\\_2007.pdf](http://www.ukfilmcouncil.org.uk/media/pdf/g/m/Ipsos_Piracy_UK_2007.pdf)

<sup>4</sup> *Economic impact of legislative reform to reduce audio-visual piracy* (2009) Oxford Economics: [http://www.bva.org.uk/files/images/AV\\_Piracy\\_Final\\_Report\\_-\\_FINAL.pdf](http://www.bva.org.uk/files/images/AV_Piracy_Final_Report_-_FINAL.pdf)

We do not accept that there is objective evidence to support the proposition that copyright protection in the UK creates any barriers to innovation. On the contrary, the exploitable value of massive amounts of innovation, especially “soft innovation”<sup>5</sup>, in the creative industries would be reduced by a weakening of protection. It is understandable that online businesses whose revenues are in part based on the exploitation of copyright works would want to lower their expenses by weakening protection, but this simply represents a transfer of economic value from one side of the industry to another rather than generating economic growth.<sup>6</sup> On the other hand, the effects of weakening intellectual property protection for those businesses whose very existence depends on it would have strongly negative effects on the UK economy.

The focus must be on preserving and enhancing the conditions in which the market is able to do its work. This is a major theme of this submission. The MPA believes that the Review provides an opportunity to confirm an objective, commerce-orientated direction for copyright policy in the UK.

### **Copyright and the audiovisual industry**

The audiovisual industry is founded on the exploitation of copyright. From production, through distribution and cinema exhibition, to all other forms of consumption which are increasingly online, all actors in the value chain are engaged in the licensing of copyright. Similar statements could be made about the music, games, book and periodical publishing and business software industries.

The film industry segments its markets by willingness-to-pay, using a release chronology that is the subject of commercial negotiations with exhibitors and other retail distributors. Following conventional economic theory, content is made available in different forms and at different times in accordance with the demand elasticity of different market segments. Despite vigorous efforts by the industry to prevent it, piracy takes advantage of this model, making films available prior to legitimate release – sometimes far in advance<sup>7</sup>. This is problematic for major studios and independent film-makers alike.<sup>8</sup> It is important to bear in mind that film piracy is a significant area of activity for international organised crime, bringing many negative social consequences beyond the economic difficulties of the film industry itself.<sup>9</sup>

---

<sup>5</sup> NESTA Research Report, *Soft Innovation: towards a more complete picture of innovative change* (July 2009) <http://www.nesta.org.uk/library/documents/Report%2022%20-%20Soft%20Innovation%20v9.pdf>

<sup>6</sup> *YouTube music video row heats up*: <http://news.bbc.co.uk/1/hi/7942045.stm>

<sup>7</sup> “Hurt Locker” lawsuit target pirates Reuters, 11 May 2010: <http://www.reuters.com/article/2010/05/12/us-hurtlocker-idUSTRE64B0AU20100512>; *Indie filmmakers: Piracy and Google threaten us* CNET, 20 September 2010: [http://news.cnet.com/8301-31001\\_3-20016920-261.html](http://news.cnet.com/8301-31001_3-20016920-261.html)

<sup>8</sup> *Independent filmmakers feel the squeeze of piracy* Los Angeles Times, 28 September 2010: <http://articles.latimes.com/2010/sep/28/business/la-fi-ct-film-pirate-20100928>

<sup>9</sup> *Film Piracy, Organized Crime, and Terrorism*, (2009) RAND Corporation: <http://www.rand.org/pubs/monographs/MG742.html>.

That said, the film industry has proven time and again that it can adapt to technological change – one example is changes in media chronology or windows, which have reduced in recent years and continue to be the subject of frequent experimentation by individual distributors.<sup>10</sup>

For established film studios and television companies, the asset-base from which new infrastructure is financed comprises libraries of existing works and the value of existing licences. For independent producers, new productions are financed by licensing different territorial or language-rights in different modes of exploitation to distribution partners before the camera even begins to roll (pre-sale of rights). Copyright is truly the life-blood of the industry and its value is a function of the exchange value of the rights owned by participating firms. That value is strongly affected by the enforceability of those rights, since the value of a licence is entirely dependent on the recoverability of revenues from consumers of the licensed work. In piracy-ridden territories, rights may more-or-less cease to be saleable (as in certain developing countries) and the local industry is effectively blocked from realising meaningful development.

The value of the UK film industry is large<sup>11</sup> and it attracts substantial investment from international filmmakers, mainly Hollywood studios, amounting to *£928.9 million* in 2010 (an increase of 15% over 2009). Beyond its direct and indirect contributions to GDP, it provides employment for highly qualified workers and, as a particularly international activity, gives UK business access to advanced production and post-production technologies. With growth in developing countries outpacing that of most developed countries, opportunities for UK businesses to invest in countries such as Brazil, Russia, India and China are potentially enormous. The UK should therefore promote the implementation of policies that support the growth of media and creative industries in those countries, such as robust IP protection that includes the full implementation of the 1996 WIPO Internet Treaties.

Despite enormous competition from the pirate market, there has been growth in the number of Video-on-Demand (VoD) services. Although the total size of the VoD and near-VoD market remains small at £124m, but there is rapid growth and the potential is obviously huge.<sup>12</sup> The UK Film Council reports that as at March 2010, 32 VoD film services could be identified compared with 17 in March 2009. Ten of those services offered more than 1,000 film titles, compared to five in March 2009.<sup>13</sup>

---

<sup>10</sup> <http://www.natoonline.org/Release%20Windows/2010/Q2%202010/Major%20Studio%20Windows%20Chart%209.10.pdf>  
See also: <http://www.btigresearch.com/2010/08/19/dvd-to-vod-window-goes-poor-even-before-brian-roberts-goes-hollywood/>

<sup>11</sup> *Economic Impact of the UK Film Industry* 3rd Edition, 2010:

[http://www.ukfilmcouncil.org.uk/media/pdf/i/r/The\\_Economic\\_Impact\\_of\\_the\\_UK\\_Film\\_Industry\\_-\\_June\\_2010.pdf](http://www.ukfilmcouncil.org.uk/media/pdf/i/r/The_Economic_Impact_of_the_UK_Film_Industry_-_June_2010.pdf)

<sup>12</sup> In contrast, TERA Consultants estimated the loss to the legitimate VoD/Pay-per-View industry through piracy at €77m per annum: see note 3 above.

<sup>13</sup> <http://sy10.ukfilmcouncil.org/12.2.asp>

It is critical to note though that the long-term commercial viability of these innovative services is jeopardized primarily by piracy, not the UK IP framework. Piracy results in a market failure in that pirate sites do not pay licensing fees to copyright owners and often do not comply with other regulatory obligations, e.g. consumer protection, data protection and tax laws, while legitimate sites do. Moreover, legitimate sites must find a sufficient revenue stream to cover these costs that pirate sites do not incur. This market failure is highlighted by the fact that 10 standalone transactional Web-based movie stores went out of business in 2009.<sup>14</sup> In some countries the effects of piracy have become so pronounced as to affect the macroeconomic structure. In South Korea, the effects of ubiquitous high-speed broadband and of unlawful downloading have effectively prevented the DVD business from ever coming into existence<sup>15</sup>. In Spain, thanks to rampant piracy over the last 5 years, consumer spending on video has fallen from around €700m (2005) to €400m (2010).<sup>16</sup>

It should also be mentioned that the same principle of enforceability applies to enterprises outside the creative industries. High technology start-ups, such as those moving out of University research departments or those funded by venture capital (where it is available), are essentially selling intellectual property rights – but to investors, rather than to others in the commercial value chain.

The value of the film industry is entirely based on the reliable exploitability of copyright works. This is particularly the case today as industry players in their different ways innovate commercially with new online distribution systems. It is important to appreciate that licensing arrangements are working well in the audiovisual digital market, due to the centralised and transparent consolidation of rights in film producers. UK law should support the continued recognition of the producer as central right holder, so as to facilitate licensing and new online business models. At this time it is particularly important not to introduce uncertainty into this area.

A key objective of this submission is to ensure that the Review is aware of the importance and sophistication of technological innovation in the film and other copyright industries. Film has always been a technology business. Indeed, since the creation of the DVD in the 1990s, the largely unseen work of industry technologists in cross-industry bodies has continued to facilitate new means of distribution of audiovisual works, such as the Digital Video Broadcasting Project,<sup>17</sup> Ultraviolet<sup>18</sup> and KeyChest<sup>19</sup>.

---

<sup>14</sup> BSAC UK Movie Market Update

<sup>15</sup> *The Death of the Korean DVD Industry: A Sign of Things to Come in the U.S.?* Janko Roetgers, Gigaom.com, 3 September 2008: <http://gigaom.com/video/the-death-of-the-korean-dvd-industry-a-sign-of-things-to-come-in-the-us/>

<sup>16</sup> International Video Federation, European Video Yearbook 2010

<sup>17</sup> <http://www.dvb.org/>

Digital Rights Management (DRM) technologies enable content providers to satisfy consumer demand in the market in a responsive and efficient way by permitting new interactive offers that would not otherwise be possible. Similar examples in the wider context of the copyright industries include the Automated Content Access Protocol, Open Digital Rights Language and ONIX-PL.<sup>20</sup> These advances promise to reduce transaction costs and increase economic activity, assuming, that is, that copyright law is not weakened so as to render such consumer uses unlicensable. These innovative approaches allow the content industries to ensure that their rights are protected, thereby ensuring that they can continue to be strong contributors to the UK GDP and job market.

### **IP as a driver of innovation and growth**

While the link between providing incentives to creators and inventors to encourage creation of further works has been long acknowledged, there has been a shift towards uncovering evidence of the link between such protections and positive effects such as innovation, growth and development.<sup>21</sup> Innovation is best encouraged through a holistic approach that does not focus solely on one characteristic of a particular legal regime.

To this end, we must distinguish between the pioneer and the pirate. Exceptions and limitations are an important part of any copyright regime, but should not allow or facilitate free riding at the detriment of creators of protected content. Instead, the role of exceptions is to ensure the appropriate balance between copyright and certain public interests (for example, accessibility for the disabled, education, research, etc). Providing incentives to consumers to take advantage of creative goods at little or no cost leads to “a deficit of incentives to create as producers anticipate underpayment” and consequently, an underproduction of creative goods.<sup>22</sup> If innovation is to be encouraged, it should not be at the expense of innovators in the creative field who have become saddled with increased costs to enforce their rights, while entrepreneurs intentionally profit from providing low or zero cost access to works. A meaningful copyright system must establish the liability of such entrepreneurs.<sup>23</sup>

---

<sup>18</sup> <http://www.uvuu.com/>

<sup>19</sup> <http://www.reuters.com/article/2010/01/06/us-disney-keychest-idUSTRE60508P20100106>

<sup>20</sup> <http://www.the-acap.org/>

<sup>21</sup> See Maskus, Dougherty and Mertha in *Intellectual Property and Development, Lessons from Recent Economic Research, in Intellectual Property Rights and Economic Development in China*, 2005 at p. 299: “In an environment of weak [IPR] protection, it is difficult to foster attitudes of creativity, invention and risk taking. Rather the economy stagnates in a mode favoring copying and counterfeiting”. See also David Gould and William Gruben, *The Role of Intellectual Property Rights in Economic Growth*, 48 *Journal of Development Economics* 323, 1996 at p.345, “...stronger intellectual property rights corresponds to economic growth in a cross-country sample”.

<sup>22</sup> Professor Olivier Bomsel, *When Internet Meets Entertainment: The Economics of Digital Media Industries*, 2006, pp 12-13.

<sup>23</sup> Jane Ginsburg, *Separating the Sony Sheep from the Grokster Goats: Reckoning the Future Business Plans of Copyright-Dependent Technology Entrepreneurs*, 50 *Arizona Law Review* 577, at p. 578.

It is certainly the case that digital innovators may not, when developing their concepts and ideas, have a complete understanding of copyright law, which may create difficulties when they bring their products to market and develop them into commercial propositions. It is important, therefore, that they seek the necessary advice and understanding in good time to avoid such frustrations, and to enable them to secure the rights they need for their new digital businesses. Rights clearances are a necessary and inevitable part of R&D processes in many industries, and should not be watered down or removed simply because they present a cost to others.

The particular characteristics of the different types of intellectual property rights and the nature of the industries in which they are relevant should also be taken into account in determining their impact on innovation. Copyright protects *original* works and only the expression of such works, rather than the ideas contained in them. The cultural contribution of creative authors feeds into subsequent creations without any need for permission from the original author. The discussion by anti-IP campaigners of the re-use of protected content by subsequent innovators seems to be based on a crude analogy with the patent sector, where indeed the strong monopoly of patents may require one innovator to license an earlier innovation (though this should normally be in the interests of both parties). This is not how innovation works in the copyright sector. Pinter did not “copy” Beckett, though the influence is clear. Indeed, if Pinter *had* copied Beckett, he would not have been regarded as innovative. We need to abandon reductive metaphors more suited to the world of patents. Cultural progress does not implicate the exclusive rights protected by copyright, save that it provides the income necessary to allow authors to live from their creativity.

The traditional study of innovation, focused on measuring patenting and R&D expenditure, may overlook the importance of “soft innovation” in economic growth<sup>24</sup>. The creative industries are highly innovative in this sense and the synergies with “hard innovation” are extensive. The film industry has pioneered technological innovation through partnerships with technology and consumer electronics firms, as for example the DVD, Blu-Ray, Digital Cinema, 3D, DRM systems and, most recently, the UltraViolet digital access system.<sup>25</sup> The massive consumer market for home entertainment technology is an obvious example of such synergy. Further, as Prof. Olivier Bomsel identified as long ago as 2004, the roll-out of broadband across developed economies was largely subsidized by the copyright industries, a subsidy that, whatever its social justification in earlier years, is entirely unjustified in a mature broadband market.<sup>26</sup>

---

<sup>24</sup> See note 5 above.

<sup>25</sup> <http://www.uvvu.com>

<sup>26</sup> *Enjeux économiques de la distribution des contenus* (2004) <http://www.cerna.ensmp.fr/Documents/OBetalii-P2P.pdf>. See also: *Decreasing Copyright Enforcement Costs: the scope of a graduated response*, (2009) RERCI vol. 6(2), pp. 13-29: <http://www.cerna.ensmp.fr/images/stories/media/Rerci.pdf>.

The suggestion has been made that exceptions and limitations have encouraged the development of new business models and innovation. However, while the positive link between the creation of incentives in the form of intellectual property rights for creation and innovation has been established<sup>27</sup>, the correlation between exceptions and innovation has not. Further, the connection between touted innovations and the US doctrine of Fair Use is usually a non-sequitur (see Annex – papers attached on (1) US fair use; (2) rebutting notion that the European copyright is hostile to search engines). While innovations such as peer-to-peer file transfer technology and other forms of online distribution may have been popularized through their use to share copyright works, that use never conceivably fell within any Fair Use exception, as US courts repeatedly found, from the Napster case onwards. Nor is there any evidence that the many legitimate uses of such technology were not more than sufficient to permit their commercialization.

Clear delineation of the scope of IP rights (including the scope of any limitations or exceptions) facilitates licensing on a level playing field without the need for further judicial intervention. This encourages competition and diversity in the marketplace by not conferring an advantage on the first entrant to litigate or settle in relation to the scope of IP rights.<sup>28</sup> Markets should strive to encourage innovation while discouraging parasitic profiteers.

The growth of services such as Apple iTunes and Netflix amongst a number of other online digital content initiatives such as Hulu and TV Everywhere in the US shows that legitimate online businesses will emerge in a free market, provided that they are organised at the necessary level of professionalism with adequate investment and can rely on a stable marketplace within a broadly entrepreneurial copyright regime, such as that of the UK.<sup>29</sup> Their main challenge comes from illegal offers online.

It may be that small operators will find it inconvenient to obtain permissions in that the transaction costs may or may not make it efficient for licensors to cater to their needs, but it is not *difficult* for such operators to do so, nor is there any evidence that this issue has constrained the development of new businesses.

---

<sup>27</sup> See, for example, United Nations Conference on Trade and Development, Periodic Report 1986: *Policies, Laws, and Regulations on Transfer, Application, and Development of Technology*, TD/B/C.6/133 (1986); United Nations Commission on Transnational Corporations, *New Issues in the Uruguay Round of Multilateral Trade Negotiations*, E.90.II.A.15 (1989); UNCTNC, *The Determinants of Foreign Direct Investment: A Survey of Evidence*, E.92.II.A.2.

<sup>28</sup> See Dr. George Barker, *Cloud Computing and Online Search and Advertising Markets: Obstacles to Competition*, ANU Center for Law and Economics, Working Paper No.2, 2010, referring to Google's advantage and market power over other entrants to the search market in light of the Google Books settlement:  
[http://law.anu.edu.au/cle/Papers/2010No1\\_Search&Online\\_Advertising\\_Overview\\_of\\_Industry\\_v2.0.pdf](http://law.anu.edu.au/cle/Papers/2010No1_Search&Online_Advertising_Overview_of_Industry_v2.0.pdf).

<sup>29</sup> *Netflix Surpasses 20 Million Subscriber Mark; Q4 Revenue Up 34%*, Hollywood Reporter, 26 January 2011:  
<http://www.hollywoodreporter.com/news/netflix-surpasses-20-million-subscriber-76371>

An instance of a fully licensed innovative online distributor in the UK is MyVideoRights.com, backed by experienced media figures, and there are many other examples, large and small, such as Apple iTunes, Blinkbox and Lovefilm.com (recently acquired by the retail behemoth Amazon).

### **“Fair Use” – summary**

As the Review has been specifically asked to consider the issue of the American concept of a copyright exception for “Fair Use”, we offer some specific comments on the doctrine. Two supporting papers, one by leading US copyright expert, Steve Metalitz, and another by leading EU copyright expert, Brigitte Linder, are annexed to this submission.

Fair Use is a defence to what might otherwise be a copyright infringement (in practice it operates as a limitation on exclusive rights granted under the US Copyright Act). The doctrine dates back to a famous opinion of Justice Story in *Folsom v. Marsh* (1841)<sup>30</sup>. It was then developed by well over a century of case-law and finally codified in §107 of the US Copyright Act in 1976. §107 is a statutory test applied by the Courts. It comprises four non-exclusive factors to determine whether a particular use of a protected work is “fair”:

- the purpose and character of the use, including whether such use is of commercial nature or is for non- profit educational purposes;
- the nature of the copyright work;
- the amount and substantiality of the portion used in relation to the copyright work as a whole;
- the effect of the use upon the potential market for, or value of, the copyright work.

The US Copyright Act also contains 15 specific and narrow exceptions that provide a defense to copyright infringement by particular users (e.g., qualifying libraries, archives) and for particular acts.

As a result, this ostensibly “flexible” system is actually a fact-intensive, detailed code. According to the US Copyright Office, “[t]he distinction between fair use and infringement may be unclear and not easily defined.” It advises that “[t]he safest course is always to get permission from the copyright owner before using copyrighted material.” Recognising that this is not always practicable, the Copyright Office then suggests that “use of copyrighted material should be avoided unless the doctrine of fair use would clearly apply to the situation.... If there is any doubt, it is advisable to consult an attorney.”

---

<sup>30</sup> *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841).

Fair Use is subject to international norms (Berne Convention, TRIPs Agreement, WIPO Internet Treaties) including the so-called 3-Step Test, which defines the permissible scope of national exceptions. US law is subject to the same international rules as the UK. The EU system is governed by the Copyright Directive 2001/29/EC<sup>31</sup>, which contains specific, detailed statutory exceptions (over 20 optional and one mandatory) which Member States must implement into national law. It incorporates the 3-Step Test, which defines the scope of permissible exceptions:

*(5) The exceptions and limitations provided for in [the Directive] shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.*

The 3-Step Test grants a measure of flexibility to national legislators and the courts. It acts as a filter to define the permitted scope of statutory exceptions so as to prevent them from undermining the economic value of the exclusive rights to which they append. The 3-Step Test has been explicitly enacted in many EU Member States and is applied by the courts in others, given the binding effect of the Directive.

When comparing different approaches to copyright exceptions, it is important also to bear in mind the scope of the damages remedy in the UK and under the EU *acquis*. Section 97(1) of the UK Act protects an innocent infringer (one who had no reason to believe that copyright subsisted in the copied work) from any liability in damages. Article 13 of Directive 2004/48/EC on the Enforcement of Intellectual Property Rights requires Member States to impose liability in damages on an “infringer who knowingly, or with reasonable grounds to know, engaged in an infringing activity”. This contrasts with the US system (in which registration of copyright still plays an important part), in which there is no escape from liability on such grounds. Defendant's innocence would almost certainly affect statutory damages though, if those were chosen

Although we will address the economics of copyright in greater detail below, it is worth noting at this point that exceptions (other than pure social policy exceptions, such as those benefiting disabled users) operate in the space in which licensing transactions are not possible or desirable. Thus, as the US Supreme Court explained in relation to Fair Use in its decision in *Harper & Row v Nation Enterprises*<sup>32</sup>:

---

<sup>31</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML>

<sup>32</sup> 471 U.S. 539 (1985): <http://supreme.justia.com/us/471/539/case.html>

*...to negate fair use, one need only show that, if the challenged use 'should become widespread, it would adversely affect the **potential** market for the copyrighted work.'* *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. at 464 U. S. 451 (emphasis added); *id.* at 464 U. S. 484, and n. 36 (collecting cases) (dissenting opinion). This inquiry must take account not only of harm to the original, but also of harm to the market for derivative works.

It is often argued that the EU system is much more rigid than the US system since US courts have more flexibility. However, the US system has its own weaknesses including in particular legal uncertainty and the delay and cost of establishing basic regulatory principles through protracted litigation. Fair use tends to be determined on a case-by-case basis, with each case being examined on its merits thereby making *a priori* analysis problematic and the different Federal circuits reaching sometimes conflicting positions. In this process, economic analysis plays a limited role and may be distorted through the pressures of adversarial litigation.

The MPAA is fully supportive of the Fair Use doctrine as a solution for the US, underpinned as it is by the United States Constitution, U.S. tort law and more than a century of case law. Any national system of exceptions must in any event function in compliance with international copyright norms. However, regulation through litigation is an established part of the regulatory system in the US in many fields of social importance. In the copyright field, it does not promote certainty and may grant an advantage to first-movers and deep-pocketed incumbents. The UK and European regulatory approach is not the same and it would not necessarily be easy or beneficial to transpose the US approach to a foreign context, even if the Fair Use doctrine had theoretical appeal.

### **Fair Use and Growth of Online Services**

The suggestion that the US doctrine of "fair use" was indispensable to the success of major US search engines is unsustainable. For example, Google was a well-established success long before its entitlement – if any – to rely on the Fair Use doctrine was substantially litigated in the US. In any case, most of the content on the Internet is clearly licensed for reproduction by search engines. Furthermore, in both the US and the EU unlicensed cached copies give rise to no liability in damages, thanks to the "safe harbors" provided by the Digital Copyright Millennium Act (1998) and Electronic Commerce Directive (2000). Further still, in contrast to their positions in their home jurisdiction, major US search engines have not reportedly been sued for copyright infringement in the UK.

More significant by far in Google's success is the fact that in 1999 the company received \$25,000,000 of funding from Silicon Valley venture capitalists, following three years of nurturing by the Stanford University Office of Technology Licensing. The company went on to a successful flotation on the stock exchange in 2004. It also should be borne in mind that Google and other online giants are major beneficiaries of intellectual property rights. "Google" is the owner of hundreds of patents in the U.S., among which feature useful technologies for preventing copyright infringement.<sup>33</sup> It also owns 192 registered trade marks in the US alone<sup>34</sup>. As its founders observed in their 2004 IPO Prospectus:

*We rely on a combination of patent, trademark, copyright and trade secret laws in the U.S. and other jurisdictions as well as confidentiality procedures and contractual provisions to protect our proprietary technology and our brand... we rigorously control access to proprietary technology.*<sup>35</sup>

Google's business was founded on the PageRank patent (US Patent 6,285,999)<sup>36</sup>, protecting an invention devised by Larry Page while at Stanford University and licensed to Google by the university. Stanford received 1.8m shares in Google, Inc in return for the licence, which the university sold for \$336m in 2005.<sup>37</sup> Google is a story of the value of a free market in intellectual property and the importance of competent technology transfer support at research universities.

The domestic economic conditions for US business, including its huge venture capital market, tolerance of high risk, entrepreneurial climate and bankruptcy laws, offer a more compelling and obvious explanation for the success of US Internet companies. It is not a coincidence that the US has many leading global businesses that rely on the protection of copyright – Microsoft and other software companies, the major film studios, the major record labels and the leading interactive games firms, for example. The success of all these businesses on the global stage is a function of the strengths of the US as a free-market for both risk capital and retail enterprise. In truth, fair use is prominent in the debate about copyright because of its attractiveness to civil society activists. Its role in an objective economic analysis of the growth effects of copyright law is very limited.

---

<sup>33</sup> <http://patft.uspto.gov/netacgi/nph-Parser?Sect1=PTO2&Sect2=HITOFF&p=1&u=/netahtml/PTO/search-bool.html&r=0&f=S&l=50&TERM1=google&FIELD1=ASNM&co1=AND&TERM2=&FIELD2=&d=PTXT>

<sup>34</sup> <http://tinyurl.com/4j4ydm9>

<sup>35</sup> p. 67, Google IPO Prospectus: <http://www.buec.udel.edu/pollacks/Acct351/handouts/SEC%20Form%20S-1%20filed%20by%20Google.pdf>

<sup>36</sup> <http://patft.uspto.gov/netacgi/nph-Parser?Sect1=PTO2&Sect2=HITOFF&p=1&u=/netahtml/PTO/search-bool.html&r=1&f=G&l=50&co1=AND&d=PTXT&s1=6285999.PN.&OS=PN/6285999&RS=PN/6285999>

<sup>37</sup> [http://www.redorbit.com/news/education/318480/stanford\\_earns\\_336\\_million\\_off\\_google\\_stock/](http://www.redorbit.com/news/education/318480/stanford_earns_336_million_off_google_stock/)

We applaud Google's innovative spirit and believe that they should be able to protect their inventions to ensure their continued success. We would hope that they too would respect the creative endeavours of our members which involve significant investment and risk, thereby justifying the protection of our intellectual property. We believe strongly that we have shared interests in that Google and many other innovative service providers succeed because we provide the content that Internet users crave.

### **Economics and IP**

Although commonly referred to as a monopoly, copyright is only monopolistic in a weak sense, in the same way as the owner of any piece of property has a monopoly over its use. Copyright works are in theory and practice highly *substitutable* and lend themselves to encouraging competition. In theory, because there is no liability for producing a similar or even identical work, provided it is done without copying; and in practice, because, to put it crudely, if you want to spend an evening relaxing with a Western or a romantic comedy, no copyright holder can force you to watch his Western or romantic comedy – a free market in copyright goods offers a wide choice of competing offerings.

These are *experiential* goods and the experience – those archetypal emotions that we experience in the cinema – is obtainable from many different suppliers at any particular time. The contrast with patents is obvious. If the patent system is working correctly, patented technology is not substitutable, as it is wholly novel, monopolises the idea and is protected from unlicensed use even if independently discovered by the user. Copyright, on the other hand, only grants an exclusive right to a particular expression of an idea. Others are free to develop other expressions of that idea. As Prof. Demsetz points out<sup>38</sup>, copyright does *not* confer price-setting power on the copyright owner: the free-rider problem for incentives is genuine.

In the physical economy of cinemas, DVD retail and broadcasting, copyright works are effectively excludable, as it is relatively easy to prevent unauthorised access. In the online world, however, the marginal cost of production and diffusion of copies is zero and online service providers generally decline to use known methods of preventing illegal distribution of copies.<sup>39</sup> Accordingly, such works are – not uniformly, but to a considerable extent - non-excludable. Once a single copy is made available, the potential for making and distributing additional copies is virtually limitless. As a result of this non-excludability, the capacity of copyright works to serve as the subject-matter of economic exchange in the online environment is significantly impaired.

---

<sup>38</sup> *Creativity and the economics of the copyright controversy* Demsetz, H. (2009) RERC 6(2), pp 5-12: <http://www.serci.org/default.asp>.

<sup>39</sup> Of course, consumer piracy is not cost-free: the user must pay his broadband provider for high-speed access to the Internet and purchase a range of other information technology and consumer electronics equipment.

There are many businesses, such as Apple iTunes and Netflix, already engaged in licensing online content. There are known technologies for the licensing of copyright content in the online environment, such as the YouTube Video ID fingerprinting system<sup>40</sup>, which mean that what was once a use that could not be subject of a transaction now can be.

Further examples of relevant technology would include Google's patented fingerprinting method<sup>41</sup> or its patented system for controlling access to online books, for copyright and other purposes<sup>42</sup>. Content management technologies not only enable right holders to license their works in the digital environment, but there will be a growing market for innovative technology providers to sell such solutions. An overbroad application of exceptions would damage both markets.

The marketplace is developing innovative approaches to facilitate automated licensing mechanisms and other forms of permissions. Technical specifications through rights management information can identify if and how content can be used in a machine readable way. There are many examples of such specifications. One that is directly relevant to the movie industry is Ultraviolet, an interoperable standard that allows users to share content in a secure way among devices in the home and on mobile devices. Other examples include Open Digital Rights Language, Automated Content Access Protocol and ONIX-PL. These innovative approaches allow the content industries to ensure that their rights are protected, thereby ensuring that they can continue to be strong contributors to the UK GDP and job market. At the same time, readily available permissions give technology companies and start-ups certainty that they are using content within the licences granted by the copyright owner, so they too can thrive. A key public policy should be to encourage respect for these rights management regimes.

The issue of excludability is why enforcement is directly relevant to economic growth. If copyright is not enforced – whether through prevention or deterrence – it cannot be licensed in the market. Competition is not served by encouraging free riders, such as those who facilitate the unauthorized sharing of copyright works, or link to websites where pirated material can be found or facilitate the unlicensed streaming of content. Even such pirate offerings require a steady infusion of new works.

---

<sup>40</sup> <http://www.youtube.com/t/contentid>

<sup>41</sup> US Patent #7,366,718: <http://patft.uspto.gov/netacgi/nph-Parser?Sect1=PTO2&Sect2=HITOFF&u=/netahtml/PTO/search-adv.htm&r=497&f=G&l=50&d=PTXT&s1=google.ASNM.&p=10&OS=AN/google&RS=AN/google>

<sup>42</sup> US Patent #7,664,751: <http://patft.uspto.gov/netacgi/nph-Parser?Sect1=PTO2&Sect2=HITOFF&p=1&u=/netahtml/PTO/search-bool.html&r=1&f=G&l=50&co1=AND&d=PTXT&s1=7,664,751.PN.&OS=PN/7,664,751&RS=PN/7,664,751>

Where the incentive to create such works is undermined, the long term sustainability of content production and distribution is brought into question. It should also be noted that the number of films produced by the major studios per year has declined, as save in exceptional services it becomes hard for anything other than “event pictures” to succeed. The film industry can only afford to produce films for the PirateBay for so long.

Transaction costs are an important element in the economics of copyright. In the field of copyright licensing, the economies of scale created by consolidation of rights in the producer to facilitate centralised licensing are clear. Economic reality reflects this in the existence of major studios and labels. This form of free market organisation favours licensees, as licensors have an incentive not merely to reduce their own costs of business but also to maximise the availability and simplicity of licensing for those who can make efficient economic use of the licensed rights. Thus, we find that in fact the system for licensing online uses of films works well and substantial businesses, such as Apple iTunes, Lovefilm, Blinkbox and Netflix have grown up as a result. It is certainly questionable whether these businesses could have grown as quickly if the major licensors of content had been situated in a civil law jurisdiction, but question is moot: the UK is not such a jurisdiction.

Part of the transaction costs of right holders is the cost of enforcement, which can be exceptionally high for right holder claimants in the UK. These costs work to insulate minor infringers from enforcement. From an economic perspective, where rational right holders believe that the costs of enforcement are likely to create a net benefit, they will incur them – otherwise, not. Hence, there is an automatic regulator of enforcement, conditioned on economic utility.

An alternative approach to the reduction of transaction costs for licensees is the collecting society. In the UK, collecting societies are largely voluntary and well-run. However, the collecting society is a sub-optimal solution. Collecting societies are in any event mainly active in the music sector, due to the nature of music copyright law and the nature of music consumption and distribution, which involves the need to license a multiplicity of works, each of which involves multiple right holders, depending on what the licensed use entails. Furthermore, whereas a studio or label has an interest both in reducing its own costs and in reducing prices below those of its competitors so as to maximise consumption, the collecting society is less affected by such incentives. Moreover, producers must constantly invest their returns in new works.

## Current issues

### Exceptions

The MPA does not seek to criticise established exceptions to copyright protection under UK law. We recognise that exceptions are part of the inherent balance in the copyright system. Indeed, in a recent submission, we have signalled support for several changes to UK copyright (see “MPA Response to the UK IPO Consultation: Taking Forward the Gowers Review of IP – 2nd Stage Consultation Copyright Exceptions (31 March 2010)” in Annex).

Certain social policies are served by such exceptions, which under the Copyright Directive are in any case subject to the 3-Step Test (see Article 5.5 of the Copyright Directive)<sup>43</sup>. We would suggest, however, that it would introduce a valuable measure of flexibility, while also ensuring full compliance with the UK’s obligation to implement the Copyright Directive, if the 3-Step Test were explicitly introduced into the 1988 Act. Note that we do not propose that an open-ended test for exceptions be adopted, but rather it should be clear that existing fair dealing exceptions are subject to the 3-Step Test as a means to improve their flexibility. If the question is the competitiveness of British industry, it is clear that the introduction of an open-ended regime for exceptions would not enhance UK GDP. Objective analysis demonstrates that changes to enforcement practices, on the other hand, would have a direct benefit to the economy.<sup>44</sup>

We turn specifically to the issue of mash-ups, which are usually cited as a justification for introducing new exceptions. These derivative works are usually reversionings of commercial works, such as the independent German film, *Der Untergang* (“Downfall”), which has been the subject of many amusing English subtitles. We would emphasise that the MPA does not regard mash-ups as central to the discussion about copyright reform or a matter of great concern to its members. However, proponents of expanded exceptions, such as Laurence Lessig, rely very heavily on the social and economic importance of such “transformative uses”.

Before addressing the issue directly, it is useful look at the actual use of unlicensed distribution networks. An examination of the “top 100” videos on any notorious pirate site, such as [www.thepiratebay.org](http://www.thepiratebay.org)<sup>45</sup>, will show where consumer interest lies. There do not appear to be *any* user-generated works at all. All that is of interest to the free spirits of file-sharing is high-quality, professionally-made content, such as “Tangled” or “The Green Hornet”, preferably ahead of their availability in licensed channels.

---

<sup>43</sup> See also TRIPS Article 13, WIPO Copyright Treaty Article 10 and Berne Convention Article 9(2).

<sup>44</sup> Oxford Economics (2009): see note 4 above.

<sup>45</sup> Accessed on 6 February 2011

Type	Name	SE	LE
Video (Mexico)	Elmer (2010) MP4-1080P	10626	14915
Video (Mexico)	Cultura's Tronco(2010)5 Una web ExtraTorrentRG	14828	14023
Video (Mexico)	Elmer (2010) MP4-1080P	12828	13293
Video (TV Shows)	The Big Bang Theory S04E14 The Thompson Catalog (HDV-FGM)	12873	2072
Video (TV Shows)	Historical Series of the Group FC (HDV-KOD-ASP-RTV)	12803	8943
Video (Mexico)	TORRENT 2010 MP4-1080P	12799	18063
Video (TV Shows)	Elmer (2010) MP4-1080P	10703	7749
Video (TV Shows)	Elmer (2010) MP4-1080P	7648	4482
Video (TV Shows)	The Vampire Diaries S02E13 Daddy Issues (HDV-FGM-Serv)	47218	4517
Video (Mexico)	Elmer (2010) MP4-1080P	10029	10715
Video (Mexico)	The Green-Eyed Monster (2010) TORRENT-1080P	12828	8242

Thepiratebay.org: Top Videos  
 (column "SE" shows users offering the work, column "LE" shows users downloading the work)

The question arises, why are the only transformative works (or user-created works of any kind) on YouTube works that cost virtually nothing to make? The answer relates to incentives. Such works are rarely attractive enough to license commercially and it is hence impossible to justify expending time or money on production.

Mash-ups are thus a poor justification for overhauling copyright exceptions. This is not to say that there is no market for mash-ups. There has been at least one successful commercial mash-up, the Steve Martin film, *Dead Men Don't Wear Plaid*<sup>46</sup>. The mash-ups on which the anti-copyright argument rests are amusing, but usually unlicensable, amateur works for which their authors correctly understand (though they may hope otherwise) that there is unlikely to be much of market. If – unusually - there is a market for a mash-up, it will pay the producer to negotiate a licence for use of the underlying works and, indeed, to engage workers and invest in production values. If there is no market for a given mash-up, there is no measurable addition to GDP as a result of the making of the work beyond of course the advertising revenue, if any, earned by the third-party platform operator.

One could not realistically create an exception only for mash-ups that were economically worthless. However, if all mash-ups were exempted from copyright, that would obviously allow free-riding and prevent licensing transactions that would otherwise enhance GDP. A balanced approach lies somewhere between these two extremes to facilitate the creation of non-commercial works while not harming existing protections for interests in the larger works. If after an analysis of the scope for such activities under current copyright exceptions, it is determined that some changes are required, the EU copyright regime provides the UK with the

<sup>46</sup> <http://www.imdb.com/title/tt0083798/>. The market has developed licensed possibilities for the creation of mash-ups too: [www.masher.com](http://www.masher.com).

requisite flexibility. It should be mentioned, however, that it would be necessary to consider the rights of performers in making any such adjustments.

### Territoriality

The divisibility of copyright allows a market in rights to operate, as, for example, when an independent producer raises finance for his film by pre-selling different territories and different channels (theatrical, DVD/Blu-ray, television, VoD) to different purchasers. It means that a film can be licensed for Gaelic speakers, if that makes commercial sense; or residents of Hull; or persons using a peer-to-peer service. It is this divisibility which makes it possible for different business models to operate and for price-setting to respond to elasticity of demand.

If this leads to illegitimate partitioning of the market or an abuse of dominant position, competition law is fully able to rectify the situation, but as the European Court of Justice has repeatedly held no such partitioning arises *a priori* from the possibility of licensing at the territorial or sub-territorial level<sup>47</sup>.

Unfortunately, there is considerable confusion about the significance of territoriality in relation to copyright. In its *Communication on Creative Content Online in the Single Market*<sup>48</sup>, the European Commission asserted:

*The online environment allows content services to be made available across the Internal Market. However, the lack of multi-territory copyright licences makes it difficult for online services to fully benefit from the Internal Market potential.*

These concerns are particularly acute in relation to broadcasting, and have spawned much litigation, some currently pending before the European Court of Justice, as to satellite broadcasting of sports. In an attempt to address this perceived problem, Dutch academics Mireille Van Eechoud and Bernd Hugenholtz have sought to argue that there should be an overriding EU copyright regulation imposing a uniform law across the EU, in order to address the supposed problem of territoriality.<sup>49</sup> While there does not appear to be any political will to adopt such a regulation, the UK copyright sector would be a clear loser if it were to go forward.

Unfortunately, those who advocate this position do not adequately take into account the way licensing works in reality. The introduction of a single European copyright law would make no difference to the partition or non-partition of the European market for copyright licences – nor would it be beneficial for European economies if that were to happen. It has to be said that in

---

<sup>47</sup> See, for instance: *Warner Brothers Inc. and Metronome Video ApS v Erik Viuff Christiansen*, ECJ, 17 May 1988 (Case 158/86)

<sup>48</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52007DC0836:EN:NOT>

<sup>49</sup> *Harmonizing European Copyright Law; the challenge of better law-making*, Kluwer 2009.

relation to copyright, at least, this concern is misconceived. In any event, pan-European rights are available from major right holders on commercial terms.

What seems to be overlooked is that even if one defined copyright as inalienable, save at the EU level, this would not prevent licensing on the same basis as – rightly – currently occurs, which is by region, type of use or language. What lurks behind the territoriality debate is really just commercial users seeking to weaken copyright in order to lower their own costs. Given the way that film is financed, produced and exploited, by licensing the work territory by territory, this is a short term view. It also benefits larger distributors to the detriment of smaller ones. The larger distributors will be able to offer a larger fee for pan-European works which a smaller distributor will be unable to match, even though the aggregate of smaller distributors will be able to offer a greater aggregate license fee, and each in its local territory may be better able to serve its local customers.

#### Role of Intermediaries

The MPA believes that the course set by the 2010 Act is an appropriate response to a major obstacle to growth in the online economy and invites the Review explicitly to endorse it.

ISPs in the UK, other EU Member States and the US are protected from many of the usual liabilities attendant on the exploitation of copyright content through the Electronic Commerce Directive and the Digital Millennium Copyright Act. These measures represent only half the task of constructing a sustainable regime for electronic commerce. The other half, which has taken longer to complete, is to define the responsibilities of online intermediaries in relation to protected content. The privileges for ISPs established by the E-Commerce Directive were meant to incentivise co-operation to address online piracy but in this regard they have failed despite explicit recognition in the Copyright Directive that ISPs are “best placed to bring such infringing activities to an end” (see Recital 59).

The process in the UK of seeking voluntary solutions to online piracy has been long. Industry attempts from 2006 to broker a commercial solution failed in 2008. Not long afterwards, in accordance with recommendation 39 of the Gowers Review<sup>50</sup>, Government persuaded the record and film industries and the leading ISPs to sign a Memorandum of Understanding, with a view to agreeing a process for dealing with repeat infringers. This failed to produce agreement, despite Herculean efforts by Ofcom and right holders. Finally, the Digital Economy Act 2010 was passed to compel ISPs to take some responsibility for the infringing use of their networks. However, more recently, two major ISPs have challenged the DEA before the Courts.

---

<sup>50</sup> <http://www.official-documents.gov.uk/document/other/0118404830/0118404830.pdf>

Peer-to-peer file-sharing continues to account for at least 25% of all broadband traffic worldwide.<sup>51</sup> Surveys have established that more or less all video traffic via BitTorrent is of pirated material<sup>52</sup>. More recently, a new study from Envisional has found that “approximately 23.8% of global Internet traffic is infringing with BitTorrent specifically accounting for almost half of that amount (representing 11.4% of global Internet traffic)”.<sup>53</sup> This is hence a phenomenon that bears not merely on the viability of legitimate online services, but also on the management of network traffic. ISPs assert that they have no desire to accommodate pirate traffic, as it slows legitimate users. Indeed, they often use traffic-shaping (or “Quality of Service”) technology to manage this traffic – though *not* in order to prevent the transfer of infringing content as such<sup>54</sup>.

It is worth noting that there is really no controversy over the basic solution to online piracy – the only question is *whether* to address it. Among those in favour of addressing it, one group, the right holders, generally argue for the imposition of obligations on ISPs either to facilitate enforcement or, to prevent infringement by the use of existing technological methods. Opponents of such measures often argue for a compulsory licence in order to legalise file-sharing (it is fair to say that there are fewer advocates for this in the UK than in, say, France). The imposition of a compulsory license for the Internet would be contrary to EU and international norms. Further, as an enforced subsidy of licensees at the expense of licensors, it would damage the market-based system which incentivises creation of new works in a high-risk environment. All that notwithstanding, both points of view recognise that ISPs have a role to play, by compulsion if need be. Governments around the world, including that of the UK, have reached this inevitable conclusion.

We have been here before. With every change in technology that creates a new means of exploiting creative content, copyright law develops to force authors and new industries to the table to negotiate how revenues from the new form of exploitation will flow back to right owners. So the piano roll, cinematograph, radio, video-cassette and satellite broadcasting have produced extensions to copyright law with this effect. It is hard to contest the proposition that the growth of the entertainment industry over the last 100 years and the vast array of consumer choice are a result of this legislative progress.

---

<sup>51</sup> Cisco Systems Visual Networking Index: Usage Study (Oct. 2010), [http://www.cisco.com/en/US/solutions/collateral/ns341/ns525/ns537/ns705/Cisco\\_VNI\\_Usage\\_WP.html](http://www.cisco.com/en/US/solutions/collateral/ns341/ns525/ns537/ns705/Cisco_VNI_Usage_WP.html)

<sup>52</sup> See, e.g., TNS Survey for Bescherming Rechten Entertainment Industrie Nederland, June 2008.

<sup>53</sup> See [http://documents.envisional.com/docs/Envisional-Internet\\_Usage\\_Report-Summary.pdf](http://documents.envisional.com/docs/Envisional-Internet_Usage_Report-Summary.pdf)

<sup>54</sup> Although ISPs do use technological measures to block access to other unlawful sites, be they sources of spam, malware or child abuse images, where there is a clear PR risk to them in the tolerance of such traffic.

The attitude of ISPs is entirely rational, as explained by Professor Bomsel.<sup>55</sup> It is they who gain the benefit of selling high bandwidth packages to users. However, this creates a serious and illegitimate drain on content producers and unfair competition against those seeking to develop legal digital distribution platforms.

### Enforcement

Film industries suffer from piracy where there are insufficient legal protections or a lack of enforcement. Innovation does not occur in markets where piracy is rampant, even where a large indigenous film industry evidences huge demand – as in India, Egypt and Nigeria. The impossibility of a return on investment in research or infrastructure stifles investment (including foreign investment<sup>56</sup>), growth and exploitation, despite a rich and diverse resource of talent.

As mentioned above, using a conservative survey methodology it is estimated that annual losses to the UK audiovisual sector from unauthorised consumption are around £500m.<sup>57</sup> Public education campaigns on behalf of the sector by the Industry Trust for IP Awareness<sup>58</sup> have had encouraging, measurable effects on public attitudes and have been important in legitimising the protection of copyright. However, the underlying reality of piracy as experienced by consumers in their daily lives can be altered only by enforcement activity.

Although the UK copyright framework, within the limits imposed by the European *acquis*, is largely fit for purpose, there are significant areas where the law can be simplified and strengthened. These are mainly technical adjustments that would clarify or rectify difficulties found in practice. The MPA proposes that the UK should:

- Grant professional industry bodies standing to apply for site-blocking injunctions against ISPs. While it is already possible to secure such injunctions pursuant to section 97A of the 1988 Act and there is currently a relevant case pending before the High Court, bodies such as the Federation Against Copyright Theft, which carries out its work to the highest policing standards, do not have *locus standi* to make application to a court for an order (cf., Recital 18 and Article 4 of Directive 2004/48/EC).

---

<sup>55</sup> See notes 22 and 26 above.

<sup>56</sup> Edwin Mansfield, *Intellectual Property Protection, Direct Investment, and Technology Transfer: Germany, Japan, and the United States*, International Finance Corporation Discussion Paper, No. 27 (1995); Jeong-Yeon Lee and Edwin Mansfield, *Intellectual Property and U.S. Foreign Direct Investment*, *Review of Economics and Statistics*, 78, (1996): 181, <http://www.jstor.org/pss/2109919>.

<sup>57</sup> See note 3 above.

<sup>58</sup> <http://www.copyrightaware.co.uk/>

- Introduce statutory damages in civil cases on the US/Canadian model. It is not reasonable that all of the burden should be placed on right holders to prove losses from infringing activity, when only the defendant knows the true scale of his infringement and profits. As a less satisfactory solution, there should be a presumption that the retail value of a reproduced work is the measure of damages. Until 1989, the UK had conversion damages - that is, the infringing book or record was deemed to be the property of the right holder and damages for conversion were recoverable. This meant that the infringer did not have an incentive to risk infringement on the theory that, if caught, he might have only to disgorge his illegal profits. A presumption of this sort would reinstate the remedy in more flexible form.
- Introduce a specific offence of commercial facilitation of infringement. The prosecution of pirate facilitator web sites is difficult, even where these sites build large businesses on the back of mass infringement by consumers. In civil law jurisdictions, the act of making an unlicensed down- or upload is commonly a criminal act. Pirate web site operators (like the Swedish operators of the Piratebay) are hence guilty as accessories to the innumerable crimes of their users. In the UK, however, the offences set out in section 107 of the 1988 Act are ill-adapted to this approach, as the simple act of downloading is merely a civil infringement. One cannot add the commercial intent of the facilitator to the civil infringement of the user in order to find the facilitator guilty of a statutory offence under the Act. Hence right holders have to have recourse to the common law offence of "conspiracy to defraud", which in the online context can be difficult for juries (and sometimes judges) to apply. What is needed is to create a stand-alone offence of *in the course of a business knowingly authorising, procuring or inducing the infringement of copyright in the UK*.
- Clarify section 73 of the 1988 Act, to ensure that broadcasters can take action against unauthorised transmissions of their signals via the Internet. At present, it might be argued that such retransmission should be regarded as falling within the exemption set out in section 73(3) of the Act.
- Make it a civil infringement to *receive* in the UK a communication to the public which, if initiated in the UK would be an infringement and is in fact made without the consent of any person entitled to the communication to the public right (or its substantial equivalent) in the place of transmission. Many judges believe that receipt of a stream entails an infringement of the reproduction right (the image is reproduced on user's screen; and also in RAM). At least one court has held that making available takes place only in the place of transmission (a view that does not appear consistent with Directive 2001/29/EC). (Note: unauthorised reception of conditional access-protected TV is

already a criminal offence in the UK: s. 297(1), CDPA; s. 296ZA makes it a civil infringement to circumvent DRM.)

- A key public policy should be to encourage respect for the automated machine readable rights management mechanisms that have been developed by industry.

### IP and Competition Law

The MPA has already outlined, in this submission, the objectives and economics of copyright, how these underpin the audiovisual sector and the importance of a clear delineation of IP rights. The MPA has also touched upon the safeguards that competition law provides.

However, in relation to the specific interface between IP and competition law, the MPA wishes to make the following general observations.

At first glance, it may appear that there is an inherent conflict between IP and competition law. On the contrary, it is widely recognised that both IP and competition law share the same fundamental goals of promoting consumer welfare and an efficient allocation of resources through innovation.

The current balance between IP and competition law works well because these areas of law work in tandem. IP encourages parties to innovate and gives them protection, certainty, and flexibility to then commercialise their new work. Competition law, in turn, provides principles for ensuring parties act in a competitively fair manner so that new proprietary technologies, products, and services are bought, sold, and licensed within a competitive environment. This competitive pressure stimulates innovation, which benefits consumers.

The benefits of IP rights, and in particular, copyright, are that, underpinned by contractual freedom, they allow rights holders the freedom to license their works and to respond flexibly to technological evolution and changing consumer demand. In the audiovisual sector, nascent markets are emerging through the development of new technology and media platforms, particularly in relation to the internet, and it is currently unclear which business models and platforms will eventually succeed. Moreover, the sector faces sophisticated and widespread piracy which threatens to undermine confidence and investment in these new platforms.

While competition laws act as a safeguard against anti-competitive exploitation of IP rights, great care needs to be taken with any changes to the interaction between IP and competition law. As a general principle, to maintain the benefits that IP rights bring to rights holders, licensees and consumers, the scope and exercise of IP rights should not be eroded by regulation. For example, regulatory intervention imposing particular licensing models might undermine competition by hindering the organic development of different business models and distribution platforms. It could also compromise the ability of rights holders to recoup their significant upfront investments by managing the exploitation of their content and thereby compromise their ability to innovate which, ultimately, may negatively affect consumer choice. The current competition laws provide the necessary framework within which to consider any specific competition concerns relating to the exploitation of IP rights.

### **UK copyright policy**

A key part of the IP framework is the structure of government or government-sponsored policy-making. The MPA welcomed the creation of the Strategic Advisory Board for Intellectual Property, given its explicit mandate to “consider what best meets the needs of the UK economy and [will] help improve the competitiveness of UK industry”. SABIP was expected to carry out useful research that would assist government in its ambition to foster growth in the creative industries.

Even where the ultimate objective of enquiry is to support economic growth, non-specialist economists seem to have difficulty in addressing the nuances of intellectual property.<sup>59</sup> A reductive incentives-based analysis is adopted, in which the sole metric of copyright’s contribution to welfare is the number of copyright works produced.<sup>60</sup> This approach, which equated the interests of illegal downloaders with those of legitimate economic actors, exemplifies the mindset of certain academics interested in this fashionable issue. Unfortunately, this school of thought influenced too much of SABIP’s work, resulting in a loss of credibility among the business community.

Copyright policy needs to start with a clean sheet and with a better understanding of, and relationship with, the industries that it supports. However, the notion that policy-making should engage directly with economic theory is sound. Such an engagement must proceed from a real understanding of the complexities of intellectual property.

---

<sup>59</sup> See note 38 above.

<sup>60</sup> See, by way of bad example, *The Economics of Copyright and Digitisation: A Report on the Literature and the Need for Further Research* (March 2010): <http://www.ipo.gov.uk/ipresearch-economics-201005.pdf>

## Conclusions for UK IP framework

While lessons can be learned from the experience of the US, we should be wary of according a totemic status to 1990s Silicon Valley<sup>61</sup>. The UK has its own strengths and peculiarities and in any case the world has moved on in Silicon Valley since the 1990s.<sup>62</sup> Weakening copyright protection will not assist UK entrepreneurs and will damage the businesses of many in the creative industries. Building a business on the misuse of another's intellectual property is neither economically sound nor particularly entrepreneurial. The hard fact is that developing a successful online business requires the same inputs as any other business: finance, professional organization and an attractive product. Business growth and innovation depends on the entire economic environment of a given jurisdiction.

The MPA invites the Review to accept the substantive suggestions proposed above for adjustments to the 1988 Act and would be happy to elaborate upon its proposals as necessary. In relation to the specific question whether copyright law in the UK is an obstacle to innovation, it is submitted that both theory and practice demonstrate that this is not the case and that, to a great extent, the UK intellectual property framework is appropriate to permit the continued growth of the UK economy, including its vital creative industries.

\* \* \*

---

<sup>61</sup> *Silicon comes to Stratford: Developing London's 'Tech City'* Wired, 21 January 2011: <http://www.wired.co.uk/magazine/archive/2011/02/start/silicon-roundabout?page=4>.

<sup>62</sup> *Technology: a dip in the Valley* Financial Times, 19 January 2011: <http://www.ft.com/cms/s/0/33902778-2405-11e0-bef0-00144feab49a.html#axzz1DCSpDSoF>

## **MPA briefing note - the Hargreaves Review of Intellectual Property and Growth**

This briefing paper summarises the Motion Picture Association’s position on a number of recommendations made by the Independent Review on Intellectual Property (IP) led by Professor Ian Hargreaves. We look forward to engaging in the policy process at both the UK and EU levels as parliamentarians respond to the recommendations and their potential implementation.

### **Introduction**

The MPA is an international trade association that serves the interests of major companies that invest in, produce, distribute and market audio-visual content. Our members are active across European markets as well as the US and contribute towards the nearly two million jobs that exist in the UK creative industries which accounts for 7% of GDP.

The Hargreaves report covers a lot of ground, and some of its recommendations, in relation to introducing uncontroversial exceptions in the Copyright Directive into UK law, make sense. However, there are a number of deeply worrying measures suggested including the linkage of a Digital Copyright Exchange (DCE) to enforcement, a wide-ranging format-shifting exception that would damage the innovation of new business models as well as the creation of a new exception which may inadvertently legitimise illegal websites. We welcome the endorsement the report gives to the value of IP, but would emphasise from the outset that the manner of its implementation will go a long way to determining the success of the measures.

Please find below an outline of our position in response to the most relevant recommendations.

### **Specific response to recommendations**

#### **“Digital Copyright Exchange” (DCE) – MPA supports a purely voluntary and limited DCE for certain types of content**

- Any policy response to this proposal must be led by the private sector so that it can be tailored to commercial realities, taking into account the varying natures of different copyright sectors as well as a number of important legal issues (including competition law). In the AV sector, a common licensing platform may confront challenges, the most important of which is that it could undermine existing licensing arrangements and harm innovation and growth.
- Instead, to address the defects in licensing procedures that Hargreaves identified the DCE could act as a directory of copyright interests and licensors’ contact details and it could also serve as a signpost system which could direct users to information regarding the content owner and how the content can be licensed.
- Hargreaves also suggests limiting participation in the Digital Economy Act only to those works which are listed via the DCE. This contravenes aspects of international law.

#### **Legislate to enable licensing of orphan works – MPA supports a sector specific approach**

- We agree with Hargreaves that the problem of Orphan Works needs to be tackled. But the specific suggestion the report makes potentially opens the door to practices that would diminish rather than increase the amount of economic activity that arises from in-copyright works.
- We would urge the UK Government to agree this at EU level, excluding AV works and ensuring a robust requirement for diligent search.

**Introduce the maximum copyright exceptions compatible with the EU framework, parody, non-commercial research, and library archiving;**

- The exceptions for non-commercial research and library archiving represent sensible tidying up of existing law and are within the scope of the Copyright Directive. We support their introduction in the UK subject to certain conditions and adequate Parliamentary scrutiny.

**Format shifting – MPA opposes introduction of format shifting exception applicable to Audio Visual works**

- The format-shifting exception makes sense for some forms of content but not all. In the audio-visual sector, new business models for the delivery of content online<sup>1</sup> – exactly the kind of innovation that the report praises elsewhere - would be inhibited by such a blanket exception. This exception, in the Report’s view, ought to override the law of contract between a copyright owner and its customers. We reject this idea in principle and in practice because we are investing in new models of distribution for our content, including providing format-shiftable digital copies in a secure manner that offer consumers different means to enjoy our films at different price points and this would undermine such business investments.

**Give a lead at EU level to develop a further copyright exception for “non-consumptive” use designed to build into the EU framework adaptability to new technologies – MPA opposes this measure**

- This proposal effectively asks for the introduction of a broad category of “fair” uses at EU level for large multi-national technology companies that exceed the “Fair Use” doctrine in the US. The risk of such a broadly-defined exception is that when rights holders are not allowed to exploit (or prohibit) newly-enabled uses of their works, they will be disincentivised not only from cooperating with technology and service providers to find such new uses, but also from creating new works.
- Rogue platforms would also be likely to invoke such an exception as a defence in copyright infringement cases thereby further complicating online enforcement efforts.

**Monitor (through Ofcom) the impact of the DEA, in order to provide the insight needed to adjust enforcement mechanisms as market conditions evolve – MPA supports this but more action is needed**

- Ofcom is already required in the DEA to assess the impact of the legislation, quarterly and yearly, and to establish the benchmarks that Hargreaves recommends. We agree with the report that consumer education and making content available in legal ways are important parts of the transition to a digital world.

**Evidence – MPA supports the need for objective evidence**

- We firmly agree that policy should indeed be driven by objective evidence. Throughout the Report, Hargreaves calls for an evidence based approach. It is therefore surprising that the Review appears to ignore the contents of its own research on the VoD sector<sup>2</sup>, which challenges the notion that there is any serious problem with licensing in the audio-visual sector and indicates that the UK copyright regime is supportive of investment. Instead the report makes a number of recommendations based on that could damage this stability based on a little evidence.

---

<sup>1</sup> Such as Ultraviolet

<sup>2</sup> *The VoD Sector. Copyright Issues*, PACEC 2011: <http://www.ipso.gov.uk/ipreview-doc-i.pdf>

# UK Growth Review – Digital and Creative Industries

## MPA Response – December 2010

### Background and summary

The MPA<sup>1</sup> welcomes the UK Government's Growth Review, a timely and appropriate attempt to identify and nurture the drivers of growth and job creation in the UK economy. Our members appreciate the recognition the Government has given to the importance of the creative sector in particular and the role it can play in helping the UK economy sustain its return to growth.

As successive ministers and policy processes in recent years have recognised, the creative industries represent one of the most innovative and dynamic sectors of the UK economy, generating output that creates billions in revenue and entertains millions of people. In 2009, officials estimated the creative sector's contribution to UK GDP as being 8%<sup>2</sup>. The wider contribution of the entertainment sector in the UK is evidenced by its role in exporting British talent worldwide and safeguarding the country's position as a global creative hub.

Importantly, given the current economic situation, the creative industries underpin many hundreds of thousands of jobs in the UK, across all stages of the supply chain, from pre-production to retail. A major priority for Government must be to work in partnership with employers to safeguard existing jobs and create new ones.

### IP framework

The central issue we wish to raise in this submission relates to a subject, intellectual property (IP) protection, on which the Government is also consulting separately and in greater detail<sup>3</sup>. Specifically, we are concerned at how the range and type of applicable IP rights – which as recently as last year received a fresh seal of approval by ministers and officials – can be enforced in a digital environment. This is the key policy challenge for our industry, and one that resulted in the Digital Economy Act, granted Royal Assent last April.

IP – copyright in particular – is the cornerstone of our members' businesses. It enables them to secure a return on the investments they make, to justify reinvesting profit in subsequent years and to continue a virtuous cycle of growth and reinvestment that has proved itself of immeasurable benefit to the economy, the exchequer and the workforce for decades.

---

<sup>1</sup> The MPA is an international trade association that serves the interests of the major companies that invest in, produce, distribute and market audio-visual content. Our members are active across European markets and the US and contribute towards the nearly two million jobs that exist in the UK creative industries. Our members include the following companies – Walt Disney Studios, Twentieth Century Fox Film Corporation, NBC Universal, Sony Pictures, Paramount Pictures and Warner Bros Entertainment.

<sup>2</sup> Copyright: The Future, Department of Innovation Universities and Skills, 2009

<sup>3</sup> Both MPA and certain of its members will be contributing to that review in due course.

In that context, the single biggest barrier to the future growth of industries based on knowledge and creative endeavour in the UK, is the incidence of copyright infringement, in particular its online forms. ‘Clearing the undergrowth’ was how one former minister memorably described the process of tackling infringement and thereby allowing innovation and growth to flourish.<sup>4</sup> This is a description we endorse. Specifically, we argue that;

- this barrier to growth – online infringement – needs to be removed to allow the UK’s creative industries to maximise the potential of exciting and innovative opportunities afforded by online distribution
- suggestions that the UK’s current IP regime needs or is capable of a major upheaval are unfounded.

On the latter point, you will be aware that the Government has looked at this several times in recent years. It did so in Digital Britain throughout 2009, a report that concluded the system was ‘broadly fit for purpose’. Earlier, the 2006 Gowers Review was a more detailed and fundamental review of how the entire IP system was working in the digital age.

These two reports are useful guides, since they both took ‘the existing international copyright framework at EU and world level as the backdrop’, and both restricted their recommendations to what could be done within the UK to ensure the copyright system was effectively promoting innovation, growth and investment in creativity. Since the international and European frameworks remain unchanged, we strongly urge the current review to reach the same conclusion.

### **Addressing key elements in this review’s Terms of Reference:**

In addition to the general remarks above, there is one specific item within this review’s Terms of Reference (TOR) that relate to the nature of the businesses our organisation represents namely, ‘adapting the intellectual property regime to the rise of the internet and its threat to our ability to protect and monetise creativity’.

#### ***Adapting the IP regime***

On this, the TOR asks how the international regulatory regime, including intellectual property, can adapt to the rise of the internet and enable companies to protect and monetise the creativity they invest in.

We say that, in part driven by the territoriality of copyright and the helpful attitude of successive British Governments, the UK currently has a robust IP regime that helps to

---

<sup>4</sup> Lord Carter of Barnes, Digital Britain White Paper, June 2009.



protect the work of creators, ensuring they are properly rewarded for their work. As the TOR recognise, the creative sector depends upon IP to enable creators and companies to

continue to invest in high-value content for the UK market. Given the European origins of much UK copyright law, there is in any case almost no scope for changing it unless effort is directed at the European institutions.

Of course, as has been well-documented, digital technology has brought many new challenges in this area. As a result, it is vitally important that enforcement mechanisms within the IP system adapt to exploit the opportunities and tackle the challenges of this new reality. Enforcing the agreed and fit-for-purpose rules that currently exist should be the first priority of ministers tasked with driving growth in the creative sector – that is the way to ‘clear the undergrowth’ of illegal activity and enable growth and innovation to flourish. At the same time, creators and investors – the essential drivers of growth in our sector – must retain an incentive to develop new creative output.

### **Specific remarks concerning implementation of the Digital Economy Act 2010**

As we note above, long before this review and the concurrent IP review under Professor Ian Hargreaves, the Treasury’s review of IP under Gowers made a number of recommendations in this area which have since begun to be implemented – any new policy proposals are not being produced in a policy vacuum. On the contrary, legislation to underpin a new approach to reducing online copyright infringement was passed into law this spring and is now in the delivery and implementation phase.

We have a number of concerns as to the manner of implementation (as opposed to the underlying statute), which we have raised already with the relevant Ministers and officials and on which we will continue to make representations as the various strands of implementation progress.

***It is this effective implementation that would represent the clearest signal that the UK Government was committed to an effective and durable IP regime and therefore to growth in the creative sector of the UK economy.***

To summarise those implementation concerns briefly<sup>5</sup>:

#### **Delivering notice-sending**

- The MPA welcomes the passage of the Digital Economy Act 2010 as the first step in tackling the specific problem of illegal peer-to-peer (P2P) file sharing in the UK.

---

<sup>5</sup> We and our members are of course happy to elaborate further on these issue to any officials or ministers not familiar with position we have been articulating.

- Following Royal Assent earlier this year, it is important that the DEA is now implemented in full in order to significantly reduce illegal P2P.
- It is important that in implementing the first stage of the notice-sending regime, the costs of the system are kept to a level that ensures maximum participation by rights holders in order that the system works as intended to reduce infringement.
- In particular, we are extremely concerned that, if implemented as currently envisaged, the cost of the appeals process may limit significantly the potential number of Content Infringement Reports to be sent by rights holders and undermine the viability of the entire system by causing the appeals process to be unmanageable.
- Should 'phase one' [the sending of notices to those whose internet accounts have been used for accessing copyright content illegally online] fail to achieve the required reduction in online piracy, it is vital that the Government moves swiftly to introduce 'phase two' as outlined in the DEA. This is the imposition by internet service providers of technical measures such as restricting a user's internet access by throttling their bandwidth, or for those who continue to infringe, despite repeated notifications and warnings, temporarily suspending their account.

## Conclusion

The protection of IP rights in a digital age is a central issue for the creative industries and we therefore welcome the Government's commitment to ensuring that the correct framework is in place to protect IP and promote the creative industries as an engine for growth in the UK.

A recent independent report from TERA consultants made clear that the creative industries contribute 2.7 million jobs and €175 billion to the UK economy. However the same report also confirmed that piracy was responsible for retail losses of €1.4 billion in the UK in 2008 and resulted in 39,000 job losses.<sup>6</sup> This shows that the greatest and most pressing threat to future growth is the enforcement of the law around IP which is damaging growth, costing jobs, creating substantial investor uncertainty and stifling innovation in our sector.

Therefore, a major priority for a Government committed to a durable IP system should be to help remove the threat posed by online infringement by ensuring effective implementation of the provisions within the Digital Economy Act. The MPA look forward to working with Government in this regard.

---

<sup>6</sup> Building a Digital Economy: The Importance of Saving Jobs in the EU's Creative Industries, study conducted by TERA Consultants, March 2010