

Supporting Document Q

Fair use and the Independent Review

When the Prime Minister launched the review in November 2010 he made specific reference to the function of the fair use defence to charges of copyright infringement available in the US legal system. The review was charged with, among other duties, “investigating what are the benefits of “fair use” exceptions to copyright and how these might be achieved in the UK”.

The *Call for Evidence* published in December, asked “*Is there evidence from other national frameworks to suggest how the UK (and EU) copyright systems could better support innovation? e.g. comparisons with the USA’s system (including “fair use”) along with other jurisdictions in Asia and Europe.*”

The question of adaptability of the copyright system to technological change and the example of fair use in that respect are considered in Chapter 5 of the Report.

Below is a selection of comments taken from the 247 submissions which related to copyright. The responses to the *Call for Evidence* presented in this document are intended to be illustrative of views represented in these submissions rather than an exhaustive inventory.

“Create a fair use exception in IP law for commercially insignificant infringement i.e. any use of IP where the component of IP in dispute either does not represent a significant or necessary component of the allegedly infringing product?” *Mike Anderson Submission*

“The national IP system has a crucial role to play in supporting education and hereby promoting entrepreneurialism, economic growth and social and commercial innovation. We urge the Review to consider the “fair use” exceptions to copyright as we feel that they are no longer fit for purpose in the digital context of 21st century education. Our particular concern is that the current intellectual property framework makes no provision for the use of images in education. Although rights owners might be resistant to these proposals, experience in the US shows that educational institutions both create their own image collections under “fair use” provisions and subscribe to image libraries like ARTstor (ARTstor has over 1,000 US subscribers).” *Association of Curators of Art and Design Images and Art Libraries Society submission*

“We are equally convinced that should Fair Use provisions, of the kind established in the USA, be brought into UK Copyright Law so that rights owners cannot control certain usage of their IP (and the question immediately arises as to how such a change in UK legislation would be viewed in the EU) the act of creativity will go on regardless.” *Association of Independent Music submission*

“Need for a kind of legal ‘safe haven’ as the Highway Code (perhaps we can call it the Superhighway Code) does and apply both the users and publishers of IP.
In this section I am including all appropriate CDPA exceptions in the term ‘fair dealing’. The argument that the US model of fair use encourages litigation has no doubt been put. I would add that this needs to be seen in the context of a society which seems (to us ‘over here’) to like litigating. We don’t so much, do we? We like a nice clear set of rules to work with (and around maybe). Taking fair use out of its broader constitutional and cultural context may be unwise. That said, I have found Google’s digitisation of works extremely useful in my research. I have also been surprised to find my work available through Google books but I have no evidence as to that it has damaged my meagre income from such works. So maybe I’ve come out even. Perhaps the best solution is to look at the results desired from a fair use environment and to fit them into a fair dealing context. Could not rights of parody and format shifting be added to UK law? Plan for the expected instances and cases rather than importing a foreign solution and hoping it fits.” *ATSF submission*

“The introduction of a fair use style exception in the UK would be likely to reduce business certainty and increase the costs to business of litigation, with a potentially harmful impact on growth and innovation. Neither of these outcomes appears consistent with government policy towards the business community, in particular for small and medium sized enterprises. Fair use leads to a system of “economic regulation by litigation”. Delegating complex issues of economic policy to courts to decide in fact-specific litigation is not the optimal approach to IP regulation – which is why countries such as Australia have recently rejected the implementation of a fair use exception. Any comparison of the effectiveness of IP frameworks in driving innovation must in any event consider all aspects of a country’s IP framework, not just individual elements such as fair use in isolation.” *BPI submission*¹

“The economic contribution of industries relying on “fair use” in the US economy which derive their income from areas left unregulated by copyright has been estimated to contribute at least 16 per cent of GDP. This is significantly higher than the “contribution” from the UK’s creative industries of 8 per cent but includes significant industrial sectors that have failed to emerge in the UK. Those sectors benefiting from “fair use” include companies which produce consumer equipment which allow individual copying of copyrighted programming (semiconductors, computers and communications equipment); schools and universities; software developers; and internet search and web hosting providers.

In short, fair use provisions in the US have permitted a range of activities that are critical to many high technology businesses and have been central to the foundation of the internet economy. While “fair use” is not a concept used in EU and UK law, there is a range of exceptions and limitations which provides some of the same potential benefits.

We believe that an accommodation can be reached between all interested parties to develop new services, which also recognize the normative framework at the heart of copyright. This would require some broad shared understanding about the “fair use” of copyright material in the development phase of new services. In our discussions with the University of Nottingham Digital Economy Centre about experimenting with new areas of use for Archival materials.

Orphan works: We believe that a trial of a voluntary pre-commercial “fair use” permissions regime would enable much greater experimentation with new services whereby in the research and development period for such a service a “research licence” could be granted.” *British Film institute submission*

“However, in the current debate, there has been a call for the introduction of a much wider US style “fair use” defence, which would benefit users of digital content. It is argued this would drive economic growth by increasing legal certainty around commercial use of rights; however, there are significant flaws in this argument based on the experience in the United States. Fundamentally, the suggestion of a US style “fair use” exception does not address the problem of consumers’ non-commercial use in specific instances. Rather, a US “fair use” exemption is designed to create a wider, vague commercial exemption that extends beyond the established exceptions such as educational exceptions, research and private study or parody. We believe that any exceptions need to be fully justified, and need to be clearly defined.

It is worth considering the implications of the “fair use” defence’s operation in the United States. It is a doctrinal exemption and it is argued it is deliberately vague. It is for the Courts to apply on a case-by-case basis building on case law dating back over 170 years. This seems to run contrary to the way in which EU and UK exemptions work.” *British Sky Broadcasting Group Plc submission*

“Digital Economy Act 2010: the development of new business models has been hampered by the Act itself and by uncertainty about its compatibility with EU law. Avoid precipitous action on fair use. Arguments over fair use/ fair dealing issues over many years have been detailed and protracted. BT does not think we should upset the delicate balance by making substantial changes in these areas. Copyright covers much more than just artistic, musical and literary content and changes to the fair dealing regime could harm.” *British Telecom submission*

“The collective economic significance of all industries depending on fair use or related limitations and exceptions is overwhelming. Research conducted in 2010 concluded that industries depending upon the various balancing provisions in U.S. copyright law (“fair use industries”) produce revenue of \$4.7 trillion, generating \$2.2 trillion in “value added” to the U.S. economy. This figure represented one-sixth of total 2007 U.S. GDP. Fair use industries also grew faster than the overall economy, accounting for 23 percent of U.S. real economic growth from 2002 to 2007.

The lower proportion in Europe, when compared to the United States, may be explained by the fact that more robust, and harmonious limitations and exceptions have created more robust fair use-dependent industries in the United States, such as the Internet sector. Search providers have been subjected to litigation for indexing and caching activity. Some courts have held that such copying is non-volitional, and therefore not a “copy” within the sense that the copyright laws intend, other courts have blessed this copying on the basis of fair use. In *Kelly v. Arriba Soft Corp.*, a search engine was sued by a photographer who claimed that the engine’s “thumbnailing” of photographs posted to his website infringed copyright. The appeals court in *Kelly* concluded that the copying was a transformative fair use which would “improv[e] access to information on the internet.

A flexible exception applying as a rule of reason would allow copyright to adapt more easily to this type of problem than specific statutory exemptions. Under U.S. law, fair use is an “equitable rule of reason” which permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which the law is designed to foster. Whether a given use is “fair”, and thereby not infringing, is traditionally evaluated by using a standardized robot.txt file or a “no archiving” metatag computer code which tells search engine computers engaged in automated copying of websites not to copy the website in question. This allows websites to opt out, but establishes a default rule in favor of fair use.

The ‘Betamax’ case, *Sony Corp. v. Universal City Studios, Inc.* – which was followed by the somewhat factually similar *CBS v. Amstrad* decision in the United Kingdom – is one of the most famous illustrations of how industrial activity, given protected by a copyright exception, can foster economic growth for both rightsholder industries as well as new industries. Originally, the movie industries famously resisted consumer video. It took a decision by the Supreme Court of the United States to exonerate Sony’s manufacture of early videocassette recorders, largely viewing home taping by consumers as fair use. This created a marketplace dependent upon a copyright limitation, which rightsholders had originally wanted to eliminate. Today, however, home video revenues frequently dwarf theatre revenues. Instead of destroying the movie industry, home video saved it.” *Computers & Communications Industry Association submission*

“I cannot see how another states law can be simply slotted onto other state laws without mass upheavals. Otherwise we would all have the same laws in place based on take up alone or success rates on convictions or ability to imprison the guilty. Currently we have a massive ‘unfair use’ being in place which is that of a competing open ‘free for all market’ of IP music/film content. This has been allowed to fertilise itself over the last 14 years online via hosting packages and search engines (the delivery mechanism).” *Deep Recording Studios submission*

“To determine to what extent the fair use doctrine has affected U.S. innovation, it is important first to understand the limited scope of the doctrine under U.S. copyright law. As detailed in Steven Metalitz’s attachment to the Comments of the Motion Picture Association, the fair use doctrine provides only a narrow affirmative defense to copyright infringement, and applies most frequently to small samples of creative work used for commentary, education, and parody. The applicability of the defense is determined by statute and, more importantly, by over 170 years of legal precedent. Whether any particular infringement is protected as “fair use” is determined by a fact-intensive, case-by-case analysis of the infringement, based on four factors: (1) the purpose and character of the use, (2) the nature of the copyrighted work, (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and (4) the effect of the use upon the potential market for or value of the copyrighted work.

Fair use developed as part of a broader copyright framework, and its effectiveness as a legal doctrine cannot be divorced from the entirety of U.S. copyright law. To the extent technological innovation has blossomed under the U.S. copyright regime, all aspects of U.S. copyright law, including substantial penalties for copyright infringement, the anti-circumvention provisions of the DMCA (Digital Millennium Copyright Act), copyright term extension, domain seizures, and recent legal opinions regarding peer-to-peer file-sharing networks, have contributed. One simply cannot examine the alleged link between fair use and technological innovation without viewing that doctrine in the broader context of U.S. copyright law. Moreover, one cannot disregard the other hospitable factors that have influenced technology growth in the U.S., including universities with the willingness and ability to provide start-up money and resources, sophisticated and tech-savvy venture capital, access to highly trained and educated individuals, and a high-risk, high-reward U.S. business environment. Artists rely on fair use, and the free and open exchange of ideas that is fostered by it, to create original works.

Directors often speak about films or other directors that have influenced and inspired them. But to be inspired by an idea, vision, or technique is fundamentally different from assuming a right to wholesale use of another’s artistic work. U.S. filmmakers know that they can rely on well-established legal framework, including voluminous case law precedents, for guidance regarding the fair use of copyrighted works and this guidance is its own form of creative protection. As a result, litigation tends to proceed only at the margins of fair use doctrine, and most disputed uses are resolved via commercial agreements. The films and TV programs that exist thanks to copyright law, including the carefully circumscribed “fair use” doctrine, are irrefutable proof of both its profound importance and its success.” *Directors Guild of America submission*

“The Review asks about the UK’s doctrine of fair dealing suggesting it would be more beneficial for the UK were the legal regime to more closely resemble the US fair use doctrine. The UK’s fair dealing exceptions provide for conditional copyright exceptions in certain circumstances, are clear and, we believe, of benefit to both users and rights owners.

This contrasts with the US approach of applying a fair use doctrine to certain exceptions which leaves rights owners and users much more exposed to legal interpretation around the scope of individual exceptions. Fair use is less certain than the EU approach to defining the scope of exceptions more clearly. Licensing schemes operating with reference to such definitions can provide even greater certainty. This more specific approach reduces litigation and legal costs.” *Directors UK submission*

“Copyright laws are already very similar across the world’s strongest content and digital markets, including the UK, due to the normalising effect of a number of international treaties. For example, the principles for “fair use” for commentary and criticism do not significantly differ from the EU “fair dealing” exception for criticism and review. This consistency in national copyright laws provides security for creators and convenience for innovators in a global market for content.

Furthermore, adopting the US concept of “fair use”, as a general exception to UK copyright law would be problematic as it could lead to a protracted period of litigation in order to develop the case law needed to settle the scope of the exception, as has been the case in the US.

In the mean time the introduction of fair use in the UK could deprive rights holders of established revenue streams in existing markets and could stifle the development and launch of new products.” *Equity submission*

“Google, for example, a patent-based business in itself, has not been sued for copyright infringement in the UK. It has been in the US, although it was a major commercial success before it invoked the US fair use doctrine. In practice, the essential springboard for the economic success of businesses in the US and worldwide, from software and games developers to film and music publishers, is a robust system of IP rights. Naturally other factors, such as access to capital and tax incentives, also play their part.” *Film Distributors Association Limited submission*

“We believe that the existing UK copyright system provides effective support for innovation within the UK content licensing industry. Based on our experience, we cannot point to one particular regime which we regard as better supporting innovation than others. We have not seen alternative regimes, e.g. the US “fair use” system, act as a greater spur for innovation amongst suppliers or customers than the UK regime. We do not consider that the adoption of a US style “fair use” regime in the UK would aid innovation within the UK content licensing industry. The US fair use defence is a fact specific defence which gives rise to considerable uncertainty as to its application to particular circumstances. The availability of a fair use defence in the US frequently results in users of images incorrectly concluding that a licence from the copyright owner is not required, which disrupts the process of direct licensing by copyright owners and increases the need for them to bring legal proceedings to enforce their rights.

The prescriptive nature of the UK’s fair dealing defences to copyright infringement offers far greater clarity than would be available under a fair use defence regime as to the circumstances in which a licence from a copyright owner is required. The prescriptive nature of the fair dealing regime limits instances of unintentional copyright infringement and reduces the need for copyright enforcement litigation.

Given the existing substantial problem of unauthorised use of copyright works online, we would urge great caution with regard to any legislative reform which risks removing the relative legal certainty provided by the current regime. The implementation in the UK of a fair use style defence runs the risk of acting as hindrance to further innovation within the content licensing industry. To the extent that the owners of copyright works lose confidence in their ability effectively to protect and enforce their rights in their content, it may generate a more cautious approach.” *Getty Images submission*

“While it would not be in keeping with the legal traditions of the United Kingdom to have a very broad “fair use” copyright exception that would encompass some commercial uses of copyright materials, it is submitted that the current United Kingdom copyright laws should be amended in a similar manner to the copyright law of Japan (Japan Copyright Act 2010, Article 47 septies) to allow certain limited types of “fair use”, such as automated data analytics, for purposes that do not harm the economic interests of the rightholders.” *IBM submission*

“We understand that consideration is being given to adopting certain features of a US-style “Fair Use” system in the UK. There are (inevitably) differing business views on whether a fair use system would be of benefit to the UK economy. As such, we would encourage the Government to ensure that any measures under consideration are subjected to a thorough impact analysis in consultation with industry. We suggest that particular attention should be paid to the following points:

- a) Differences in exceptions Fair Use lists exceptions to copyright for purposes viewed as beneficial to society, such as news reporting, teaching, and research. However, it does not exclude other exceptions, which can be interpreted to include other broader Fair Use exceptions. This may prove problematic for the UK as Fair Dealing only applies to three designated exceptions.
- a) Non-commercial use European copyright was harmonised in the EU Copyright Directive 2001 The non-commercial use factor can also be seen in the current version of the Berne Convention. This emphasis on non-commercial use can be contrasted to recent US jurisprudence, where importance is placed on “transformative” aspects of Fair Use rather than non-commercial aspects.
- a) Increase in litigation and costs for business Importing aspects of US Fair Use into Europe and the UK could well lead to an increase in disputes and litigations, as well as other associated costs.

This is hardly desirable for UK business, particularly in the current economic climate. We would also like to underscore that the importation of some or all of the elements of US Fair Use system to the UK may create legal uncertainty for UK businesses until a large body of case-law has developed around the new regime. This may ultimately have a detrimental effect on innovation and new business models. This situation can be contrasted to the large amount of case law built up over many decades on the use and interpretation of the 1911 Copyright Act. Finally, and potentially most importantly, it is noted that as EU copyright law was harmonised in line with the 2001 Directive, any UK recommendations on the importation of aspects of US Fair Use would have to be agreed upon at EU level by all 27 Member States.” *ICC United Kingdom submission*

“The IPA would recommend consideration of the legal position in relation to use of parody/satire based upon copyright works. In particular, we would encourage a review of the effect in other markets where parody already exists as a fair use exemption. The IPA notes that the recorded response to an IPO consultation on the issue of the introduction of a parody exemption in 2008, was of polarized opinion, with almost equal numbers of positive and negative responses being received.” *Institute of Practitioners in Advertising Submission*

“Areas to consider is the particular IP environment available in the US compared to the UK including “fair use” under copyright, a record of copyright works and the ability to patent a greater field of IT and business models. It is acknowledged that there will be constraints for the UK in these areas in relation to European harmonisation but that should not prevent a greater understanding of the opportunity” *Intellectual Property Awareness Network submission*

"The Call For Evidence mentions investigating the benefits of "fair use" exception to copyright. I have some real concerns about that:- First, the differences between the US "fair use" exception and the various exceptions in UK copyright law are more apparent than real, compare US cases on "fair use" for commentary and criticism with UK cases on the "fair dealing" exception for criticism and review. Second, a lot of emphasis is placed on the concept of "transformational use" developed by the US Supreme Court in a line of cases on fair use. We don't have time for a detailed discussion but it would be misleading to represent it as a simple facilitator for the creation of new works derived from existing ones." *Laurence Kaye Solicitors submission*

"Maintaining and ideally expanding the fair use rules in copyright is an essential starting point which would promote creativity and innovation. The research exemption also needs to be clarified at the European level. 6. Furthermore, it must be recognised that the commercial and contractual legal system in each country adds complexity." *Universities UK and the Association of University Research and Industry Links submission*

"There is a need to set an equitable balance between "fair use" and "infringement". There is a risk that any relaxation of the existing copyright protection regime could become a counterfeiters' charter by creating a veneer of legitimacy for criminal activities." *Trading Standards Institute, Association of Chief Trading Standards Officers and Trading Standards North West submission*

"....He calls for an extension to fair dealing provisions to bring them into line with the fair use doctrine. The second statement is from Professor Nick Cock, some key points of him are. The difficulties of applying fair dealing provisions in the study of music and sound recordings. The uncertainty because, fair dealing allows to reproduce a small proportion of a copyright work but the definition of small is not clear. The ignorance on the law in part of researchers, publishers and right holders a online document of guidance is needed.

Comparisons with the USA's system (including "fair use") along with other jurisdictions in Asia and Europe. Some key points from the research paper with the title: Is "fair use" an Option for U.K. copyright legislation <http://www.wirtschaftsrecht.uni-halle.de/Heft71.pdf> The fair dealing defence is seen as to be rather rigid and complex The Features of a fair use test are: Flexibility, Breadth, Simplicity (This features entail also disadvantages, like uncertainty and unpredictability). A simple fair use test is inconsistent with: art. 9 (2) Berne Convention, art.13 TRIPS Directive 2001/29/EC and judicial attitudes toward towards the interpretation of copyright exceptions need to change, to benefit from the features of a fair use test.

It is questionable if a mere introduction of a fair use test lead to such a change. In their opinion the fair dealing provisions should not be replaced by a simple fair use test. There suggested approach is that judges should construe the fair dealing defence more liberally (a recent example is mentioned in the source)." *Frank Timeus submission*

“The service they [Google] provide depends on taking a snapshot of all the content on the internet at any one time and they feel our copyright system is not as friendly to this sort of innovation as it is in the United States. Over there, they have what are called ‘fair use’ provisions, which some people believe gives companies more breathing space to create new products and services”. The IPO has explicitly identified Google as the main driver of the review.

The CBI identified several factors which need to be addressed in order to encourage growth in the UK: need for a stable and competitive tax framework improve access to finance for start-up IP-intensive companies increase the supply of long-term development capital Uncertainty and expense of fair use in the US Fair use has been trumpeted as a simple and dynamic doctrine which can keep pace with technological developments. In our view, fair use is not the panacea that some proclaim and, indeed, has considerable disadvantages.

If we imported US fair use would we also take from its jurisprudence (whilst side-stepping the Constitution)? If this new exception were to be introduced it would add a general exception which would sit uncomfortably alongside the UK’s existing individual exceptions. UK’s fair dealing provisions Of particular relevance, where the line is to be drawn between the exclusive rights of copyright owners and the public’s need for access.

This process often involves rights of large groups; and it is the pre-legislative stage that assures that proponents of each side can expound and defend their interests” [Is “fair use” an option for UK copyright legislation? (November 2007) Martin Brenncke, Martin-Luther-Universitat] One useful approach may be to establish fair dealing best practices for specific industry sectors. EC law and international obligations At EU level there is a belief that the US fair use exception contravenes the Berne Convention’s “three-step test” because it is too broad to qualify as a “special case” [Art 9(2)(a)].

In addition, the unlimited potential scope of users who can rely on the fair use doctrine renders it insufficiently limited in its ambit to constitute a “certain special case”. Unique features of the US copyright landscape The US copyright framework has a number of unique elements which do not feature in UK law, and which act as a counterpoint to fair use. These include Hot news: The power of instant communication afforded by the internet has reignited the hot news misappropriation debate. This common law doctrine which is not a feature of the UK legal landscape - acknowledges a quasi-property right in the news that a company has gathered.

As you know, Gowers recommended a new exception for “creative, transformative and derivative works” within the parameters of the Berne Convention (a.k.a the mashing? exception) but stopped short of proposing a broad fair use doctrine. In response the industry said that in part, the answer lies in tagging content and the setting of machine-readable permissions for the commercial and non-commercial use of works becoming more widespread.” *The Newspaper Society submission*

“In our view, exceptions to copyright protection should not be allowed to be overridden by usage restrictions imposed by rights holders and should be broadened to ensure users’ fair use in the digital age. We also believe that steps need to be taken, enforced if necessary, that would improve the rights clearance process and assist the transition to the new, sustainable business models that the market is so clearly demanding.” *The Mobile Broadband Group submission*

“The economic rationale for constraining the application of exceptions to copyright is dealt with in the PwC report in Section 5 (“Copyright exceptions, fair dealing and fair use”). It cites the example of a broad exception for digital copying for libraries in Australia which stifled the Australian digital publishing industry as incentives to invest were weakened. It notes that “where consumers’ demands could be met by a collective licensing scheme, exceptions should be to the mutual benefit of users and copyright owners (as recognised by the Gowers 2nd Stage Consultation) and should not be jeopardised by further extensions to copyright exceptions or the adoption of a different approach to the framing or interpretation of those exceptions.

The “fair use” defence is less certain in its application than fair dealing as currently constructed, leaving both copyright owners and users unsure of its limits. This leads to increased litigation and therefore loads costs into the activities of users and copyright owners alike.

There seems to be no evidence to support the view that the fair use regime explains why major search engines such as Google have launched in the US and not in the UK (or even Europe). In fact it is only in the US that the core search engine function of Google has been subject to litigation (Field vs. Google; Perfect 10 vs. Google.) In fact the current ViaCom case in the US is looking at the extent to which the US “safe harbour” provisions would apply (which might be compared to the defences under the EU E-Commerce Directive) and thus is not dependent on a particular analysis of fair use.

Collective licensing: whatever system is used, there will always be some doubt about the limits of any copyright exception. Whilst it is clearly desirable to limit this area of doubt as much as possible, collective licensing can offer the certainty that users need. The PwC report (Section 5, “Copyright exceptions, fair dealing and fair use”) comments on the additional costs of a fair use system and lists some of the other factors that have been cited as producing a climate that has encouraged invest investment and risk taking and hence new product development in the US

Reliance has to be placed instead on an extensive body of case law but ultimately the final determination as to what amounts to fair use is entirely a matter for judicial decision. A rights owner therefore has little choice but to issue proceedings and litigate the matter if it suspects that a user is over-reaching the limits of fair use.

As the extent of existing case law indicates, the interpretation of fair use is heavily litigated. This is a costly process that is not remotely affordable for the majority of copyright owners or for small businesses which may be sued by copyright owners. It also becomes a cost of starting up a new business that needs to be built into any new business model. *The Copyright Licensing Agency submission*

We refer to the overview of the incidence of litigating fair use in the US on the one hand and fair dealing in the UK on the other, together with the costs of doing so, set out in the BCC's response. In the light of the current policy in government and in the courts to reduce the volume of costly litigation, the prospect of introducing a fair use exception, which would inevitably result in increased and costly litigation, amounts to a surprising departure from current thinking.

The fair dealing system has provided sufficient clarity on which to found the scope of the licensing operations at the centre of the work of PLS, CLA, ALCS and DACS. The construction of the fair use exception offers no certainty and would throw into question what activities could be licensable. This would severely undermine the basis for the current collective licensing scheme and any further development of it and jeopardise the important income it generates for publishers and authors. We urge that very careful consideration is given to the full impact on the creative industries and developing businesses alike of introducing fair use into the UK. *The Copyright Licensing Agency submission*

“Much has been made of the suggestion that the UK should adopt a “fair use” defence to copyright, either in addition to or instead of the current defences. Fair use is (almost by definition) an equitable defence and as such is likely to merely add to the uncertainty and confusion over copyright. As a defence, fair use works best when dealings with equal parties, as judgments are more likely to be made based on the arguers rather than the arguments. Fair Use and Unbalanced Parties - hypothetical examples. There are two particular examples of note; in a situation where a small party (A) - an individual or SME - is using copyrighted material in a particular way and receive a threat of legal action from the copyright owner (B) - a much larger organisation. While A may claim fair use, if B disagrees, A may be unwilling or unable to spend the resources to defend themselves in court and successfully argue that the use was fair.

Secondly, a situation where the roles are reversed (for example, a photographer with their picture being used by a major news agency), where the larger party might claim fair use as a defence, and although the copyright owner may feel otherwise, they are unable to invest the resources required to challenge the defence. The “fair use” defence will likely be even harder to argue with no domestic case law to base decisions on. While there is some (limited) case law on the current “fair dealing” even this is uncertain enough to cause confusion. Making the possible defences even less precise is unlikely to be of much benefit to the general public or SMEs.

Righthaven and Fair Use. Recently there have been a number of cases of copyright infringement brought in the US by Righthaven LLC, a Las Vegas-based company. In many of the cases the defence of “fair use” has been raised and despite it being relatively clear the defence was valid, the cases were brought. Without a clear definition of the defence, it is much harder to argue it outside (or inside) a court. A selection of articles containing Righthaven and “fair use” is easily obtainable. Source: Righthavenlawsuits.com The Party recommends that, rather than creating imprecise, broad defences, copyright law be changed to give positive rights, rather than negative rights.” *Pirate Party UK submission*

“It is the experience of our members that European copyright law in general is rather more sophisticated than that of the USA, and indeed more consistent in its application by the courts, thus reducing the costs of doing business in this field. The American doctrine of “fair use” for example is very inconsistently interpreted in the courts, and that uncertainty, whilst not restricting large corporations and multi-nationals who have the resources to risk lawsuits, can be restrictive for small or medium businesses. The UK economy relies heavily on small and medium sized b David Cameron when he announced this enquiry last November, that “Google have said they could never have started their company in Britain. They feel our copyright system is not as friendly to this sort of innovation as it is in the United States. Over there they have what are called “fair use” provisions, which some people believe gives companies more breathing space to create new products and services.” has led to a number of contentions in this enquiry (such as question 9 in the Evidence: copyright section), although that original contention does not stand up to scrutiny.

The “fair use” provisions in the US are actually similar to the “fair dealings” in the UK. These provisions are described as limitations to the exclusivity of copyright. Commercial use is outside the scope of fair use or fair dealing, for example. The difference between the US and UK 3 systems is that the UK system is more prescriptive. The US system may appear more flexible, because there is the ability for each case to be debated for its own merits, often in the courts. Clearly, a good business for lawyers! However, the reality is that the outcome on “fair use” application varies from case to case, from state to state as well. (Also, the decisions made are based on precedent gathered over the last hundred and fifty years.) Further, copyright provisions are of course multi-territorial.” *Personal Managers Association submission*

“As an academic institution, a broadening of the current UK fair dealing provisions more in line with the US model of “fair use” would be welcomed, particularly around the use of academic publications, but this should be weighed along with the issues around protecting software via copyright only. If too much freedom is permitted it would limit the value of the right” *Office of the Vice-Provost - Enterprise - University College London submission*

“Our inability to provide the level of access to copyright material which is required by many of our users. This causes immense frustration to many researchers and will often impact on their ability to complete their work as initially planned. David Cameron has asked if the UK requires a fair use exception, such as is available in the US. However it is extremely unlikely that such an exception could be introduced unilaterally by a member of the EU. Also the US model, while offering a level of flexibility which is not available within current UK exceptions.” *National Library of Scotland submission*

“Technology is increasingly “synchronous” and to be fit-for-purpose copyright must be medium “neutral”. Still images are one of the greatest difficulties for schools to deal with. In terms of international usage a move towards permitting low-resolution, secondary images to fall within Fair Use/Dealing - which is to many people already a default position - needs to be supported, or not inhibited, by regulation. Pupils and teachers store, distribute, share and publish materials through an ever expanding array of digital devices and platforms in long-term projects and “on-the-fly” and group working - the very thing ‘Copyright’ often restricts. The NEN considers that a new Education Use framework for Copyright and Licensing is required and that further amendments or additions to the CPDA as currently set out will only make things more unmanageable.

Fair Dealing and Fair Use NEN has looked carefully at provision of support about copyright for schools in other countries (USA, Europe and the ‘commonwealth’ countries) and find a ‘same only different’ situation. The challenges of the new digital world apply to everyone but the framework for education and teaching use is different in some countries. ‘Fair Use’ in the USA presents a better framework from which students and teachers can assess a situation and come to a working resolution of how to use other peoples resources while permitting legitimate creative development. By adopting an overarching framework and a principle of ‘transformation’ it better supports learning and creative development. Fair Use also provides a better framework for developing teaching and guidance about copyright and gives school a more effective lever for developing the ethical basis of copyright itself in the digital age.

The NEN proposes a step change in Education provision rewritten in terms of “learning and teaching” and the technologies of today. It should being with National Education Network March 2011 Page 6 of 7 consideration of the ‘Fair Use’ framework and improve on that and the current UK ‘Fair Dealing’ model. Licences The UK operates a number of ‘blanket licences’ linked to the CPDA which most UK schools subscribe to; these include CLA (paper and scanning), ERA (broadcast recording); NLA (newspapers) ; PRS and PPL (music) - and us avoid or simply ignore it’s entanglements for education and non-commercial uses. What is considered here for Blanket Licences, should lead directly and simply to licences for specific needs using a multi-level filter based on education use; learning; innovation/research; exploitation; in short Fair Use/Production Use. The access boundaries for an integrated framework might cover: self; class/group; location; secure authenticated environment; restricted distribution; public. The categories for an integrated framework might cover; self; group; direct teaching; collaborative restricted publishing.” *National Education Network submission*

“Copyright is to encourage the creation of new work there is surely no incentive provided by terms lasting beyond the death of the creator. Copyright should either expire with the creator or be a fixed term from publication (as indeed it was originally). This of course depends on EU law. “Fair use” clauses should be introduced. Incidental inclusions private copying small samples and the like should not be offences. The guiding principle should be whether an existing work has been used (as opposed to referenced) in order to dent its owner of legitimate incomes.” *Peter Nagle submission*

“The NLA believes that there is no prima facie case for adopting a US-style “fair use” policy for copyright. In many ways we have not dissimilar provisions in “fair dealing”. The application of both fair use and fair dealing have been shaped by many years of litigation in each country leading to different outcomes in terms of how the law is applied. However we do not believe it is the case that using the law to introduce further exceptions to copyright is desirable nor will it necessarily lead to the outcomes set out as objectives in the Review’s terms of reference. In terms of web-publishing, there is substantial confusion over the application and limits of fair use in the US. Meanwhile the UK, where the law operates a more restrictive fair dealing provision, has seen a profusion of innovative aggregators and entrepreneurs develop in the web content market. Furthermore, UK copyright law has provided a framework in which UK publishers have invested heavily.

The thesis has been advanced by some that the US market for news and other content services is more innovative as a result of a looser and enabling “fair use” doctrine, with the implied suggestion that the UK would benefit from revisions to copyright law to follow the US model. The assumptions behind this need careful examination: - Is the UK legal environment more restrictive than US, and if so, has this impacted news services? The key difference between the US and UK is the definition and interpretation of “fair use” v the UK “fair dealing”. Neither system sets out users rights with any certainty, but the US law is in general more permissive in its application. http://en.wikipedia.org/wiki/Fair_use. Judgements on web news cases in the US have shown considerable confusion on where the limits of fair use lie. While there are powerful lobbies chiefly the search engines arguing for a broadest possible interpretation of fair use, the notion that US law favours innovation and that innovation is best served by watering down copyright law is simplistic at best.” *Newspaper licensing Agency submission*

“UK Copyright could have become a “company killer” for Scibella. One option is to incorporate Scibella in the USA, and proceed without seeking the permission of all the UK public sector research organisations. Under S.107 of the USA copyright act, “fair use”, I believe I could have a defence against claims that I had infringed copyright which would not be available to me under UK copyright law.

“Fair-Use” in its US form is powerful and flexible. There is no codification of copyright exemptions as in UK/EU copyright only four factors to be taken into consideration in establishing whether infringement has occurred. Nothing is forbidden because it is not listed. But the obverse is that nothing bad for small innovative firms who can’t afford them. Given the litigious nature of the US copyright environment, “copyright trolls” etc. I do not want to be a naive young fish in a pool of sharks so incorporation in the USA is an option of last resort. Could any aspects of US “Fair Use” be introduced into the very different environment of UK/EU legislation? In the Gowers Review of Intellectual Property 2006 [11] sections 4.85 to 4.87 cover “fair-use” in the USA and transformative works. Gowers explicitly links transformative works with economic innovation “In the USA, the fair use exception allows “transformative works”. The purpose of this exception is to enable creators to rework material for a new purpose or with a new meaning. Such new works can create new value, and can even create new markets”

The result could be to eventually establish a UK version of “fair-use”, at least for transformative works, but fair-use contained within a more defined framework than in the USA and, therefore, at a lower risk of excessive litigation.” *SCIBELLA submission*

“We urge that any conclusions regarding what fair use has, and has not enabled in the United States vs. the United Kingdom be drawn with great care. It does not follow that to the extent a particular activity has not emerged in the UK which has appeared in the US that the absence was caused by copyright law.

Reed Elsevier businesses operate on a global basis. 55% of our revenues are derived from the US and we operate as effectively under the US copyright system as the UK one. We do not therefore have any fundamental difficulty with the fair use doctrine per se as traditionally applied by the US courts. With respect to the direct comparison between the US fair use and UK fair dealing provisions, both follow the same common law tradition and have evolved over time to take account of changes in technology. The incentive-driven policies of each body of law are the same. United States copyright law, like its UK counterpart, proceeds from the assumption that to profit from the exploitation of copyrights will ensure to the public benefit by resulting in the proliferation of knowledge. Similarly, fair use, like fair dealing, represents an exception to the copyright owner’s exclusive rights to a claim of copyright infringement, and excuses otherwise infringing uses when those uses do not meaningfully interfere with the exercise of those rights.

But to the extent comparisons between UK fair dealing and US fair use law are made, we believe that certain key points must be kept in mind. The underlying basis for the US fair use exception for infringement liability does not generally arise when an intermediary attempts to become the content provider and usurp the author’s control over expression that s/he creates. Although the fair use doctrine permits a wide variety of uses, including those made for profit, it does not permit an unauthorized user to supplant the copyright owner’s current market or reasonable, likely-to-be-established markets for his work by merely reproducing and repackaging the original work or significant

Nonetheless, we recognise that search engines have become a de facto public utility and it may be desirable for their copying for indexing functions to be legitimised if necessary. We would be very concerned however at any importation of what Google characterize as “fair use” into UK law that would permit for example, the digitisation of entire works without permission or payment, as was the situation in the Google Library Books case brought against Google by publishers and authors in the US in 2005. (Case No 05 CV 8156 DC).

The defendant’s view of fair use in that case, reliant on earlier decisions, was that it was protected from liability as although it was copying the entirety of an offline work it was only displaying “snippets” and in any event it responded to notice and take downs. The effect of such a viewpoint is obvious and devastating and harm. A person looking for a particular point of research information may, rather than using an authorised copy, simply obtain the relevant quote. That approach allows Google to copy an entire restaurant guide because its users only want to know about one particular restaurant a “snippet”. Fair use in the US has never condoned this type of activity, and it would represent the most basic distortion of the fair use doctrine if it did. *Association of Illustrators submission*

It is reasonable to assume that any incorporation of a fair use regime into UK/EU law would lead to an upsurge in litigation by so called “internet innovators” who have eschewed such lawsuits to date in Europe under the more limited fair dealing non commercial use categories. LexisNexis holds records of some 233 cases in the US that went to trial around the complexities of fair use interpretation, with likely many thousands more being settled before reaching court. Google is paying out some US\$30m as part of the Google Library Books settlement litigation and legal costs. Companies with deep pockets can undertake the management and financial costs of pursuing such cases, start up SME’s certainly cannot. As the current framework has served the content industry well for centuries, there is a concern that calls for so called “fair use” in the UK are in fact shorthand for companies with business models that do not rely on remuneration for content to be able to take and benefit from the property of others without seeking authorisation, nor presumably, offering payment.” *Reed Elsevier submission*

“AOI support “fair dealing” as an effective exception to copyright. The following case study highlights the importance of artists retaining control of use of their artwork, even in thumbnail form online, and therefore control the economic remove the images, citing the copyright exception of criticism and review. However this does not appear valid as there is no criticism and review text on the page with her paintings. She may be able to get him to remove these images from the site as their display is infringing her copyright. “Fair use” could allow the website controller to keep her images up on his website indefinitely without any redress from the illustrator, therefore potentially compromising her income from commissioners dealing in works for children.” *Association of Illustrators submission*

“This particularly affects internet based business models where many of the rights are not registered and some IP is open source while other areas are strongly protected by global companies. Areas to consider is the particular IP environment available in the US compared to the UK including “fair use” under copyright, a record of copyright works and the ability to patent a greater field of IT and business models. It is acknowledged that there will be constraints for the UK in these areas in relation to European harmonisation” *Intellectual Property Area Network submission*

“We need to keep the UK’s clear and unambiguous Fair Dealing provisions. One of the most frequent failures and costs in simple copyright cases in the USA are caused by lawyers” arguments over their complex and broad Fair Use clauses. A Copyright Act without such loopholes is good while an Act with loopholes will more often be exploited by the unscrupulous. Strong copyright protection of photographs is also good for society as a whole” *Atmosphere submission*

Exceptions must be measured against the so-called Berne “three-step” test, e.g. special cases that are narrowly crafted to minimise conflict with the normal exploitation of rights, and must ensure minimal prejudice to the scope of rights granted by copyright law. The UK is not substantially different in its emphasis on “fair dealing” purposes such as criticism, journalism or non-commercial research than are other jurisdictions, including the US. Indeed “fair dealing” and the US “fair use” principles have much in common: they both derive from common-law principles that have evolved to take into account changes in the perceptions of uses that might be socially beneficial; and they both encourage the discovery and discussion of ideas, developments and news, while discouraging the copying of the entirety or substantial parts of copyright works for commercial purposes.

Although the UK fair dealing doctrine (itself part of a broader common-law tradition of findings by courts that certain uses are “fair” and reasonable) and the US fair use doctrine have the same common-law parentage and orientation, the legal environments are quite different. The US legal environment involves more risk and uncertainty, demonstrated in part by the higher volume of US litigation generally, and significant expense for both plaintiff and defendant, and thus an environment that may favour the well-financed Internet-based risk taker. More copyright infringement cases are brought and decided in the US and our analysis shows ten times the number of “Fair Use” decisions in the US than “Fair Dealing” decisions in the UK.

US copyright law assumes the infringing nature of such activity when done by an intermediary without authorisation, and provides the intermediary with a statutory “safe harbour” from available remedies if the intermediary complies with certain required steps. These decisions do not rely on fair use but instead specific statutory exceptions available under the law or affirmative, commonly accepted procedures that the copyright owner has taken to permit an intermediary to make his works available. STM would be gravely concerned by any characterisation of “fair use” that would permit, for example, the digitisation of entire collections of printed works without permission or payment. That was the situation in the Google book search case noted above. Google and its supporters relied on the “thumbnail” cases from the 9th Circuit in its briefings and public positioning, and made the argument that the copying of the entirety of print works was a fair use given that it was only displaying “snippets” of such works online, and that in any event it responded to rights-holders’ requests for takedowns.

Supporters of the Google project argued that the scanning and indexing was more transformative than exploitative, and indeed that the project would create a new market for older content not yet available digitally. None of the US cases that have found a fair use defence, however, have ever involved such massive copying, and it is our view that the assertion that such copying for commercial purposes could be fair use would represent such a distortion of the doctrine as to eviscerate it.

The Call for Evidence raises the question as to whether “fair use” principles of US copyright law are superior to UK “fair dealing” in enabling businesses to launch and succeed. Given the significant uncertainties in copyright litigation, the differences in interpretation and doctrinal splits among US circuit courts.” *Scientific, Technical and Medical Publishers submission*

“Previous reviews of intellectual property (notably the Gowers Review, 2006) have proposed changes which would improve the operation of the intellectual property regime. These recommendations should be implemented as swiftly as possible. Introducing an American style fair use exception, either in whole or in part, would create damaging levels of commercial uncertainty and legal ambiguity. There is no evidence that it would have a positive effect on overall levels of innovation and growth.

As to the specific proposal to introduce a broader, American style fair-use exception; in principle there is no widespread opposition to this among the UK publishing sector, with a number of senior company executives believing that the question has merit. Indeed, for many of our member companies with operations in the US, fair-use is a fact of life and in many cases seen as beneficial. However, upon examination and close reflection, most are of the opinion that in practice, the mechanics of such a modification render (fair, use) difficult to introduce into the UK without the need for subsequent litigation to establish precedent and that in any event, would entail a long delay whilst necessary changes were affected in EU law even if that were possible. Any identifiable advantage to the introduction of a more flexible fair use provision would thus be instantly eliminated and reversed by the huge disadvantages associated with adaptation.

Fair Use Provision: a discussion of how radical modification to UK Copyright Law, such as the introduction of a fair-use provision, would be harmful not just to the sector but the wider economy.”

The Publishers Association Limited submission

“UK Intellectual Property Office (IPO) regarding possible changes to the scope of educational and library preservation copyright exceptions should be followed up using the flexibility that already exists within EU legislation. Such an approach is preferable to a US style “fair use” doctrine. The lack of legal precedent in defining the scope of “fair use” relevant to law within the UK is likely to increase burdens for rights owners and users. This is because they will have to turn to the courts for interpretation of “fairness” within the scope of a new doctrine. Rather than promoting creativity and innovation by new businesses, fair use favours existing large businesses who can afford to litigate. Instead, evolving the scope of exceptions, such as the educational exceptions currently permitted under s.35 and s.36 of the Copyright, Designs and Patents Act 1988 (CDPA).

As highlighted below, there is not the same level of access to money for investment in creative development as there is in the States. Such access to money can support those with deep pockets to test the market boundaries of fair use. Within the UK any move toward a “fair use” exception would almost certainly benefit established businesses and others that can afford to test the boundaries of the scope of “fair use” at the expense of the smaller companies who have traditionally relied upon the legislative definitions to help support recognition and respect for their rights, promoting participation in collective licensing as a solution.” *Professional Publishers Association submission*

“For areas other than enforcement, the Review Team have particularly invited comment on the fair use doctrine applied for certain copyright exceptions and limitations in the US.” PPA is surprised that such emphasis is being placed on “fair use” when there is no evidence of market failure in relation to the UK doctrine of fair dealing. Furthermore, a background of US case law which has developed over a number of years, establishing legal precedents (at great expense) that are not applicable to the UK. The same path of litigation would be likely follow in the UK should fair use be introduced, despite there being significant cultural differences in respect of litigation in the UK compared to the US. So rather than seeking to introduce a new doctrine for exceptions, evolution in application and, where relevant for new technologies, the extent of exceptions within the UK.

Where relevant for new technologies, the extent of exceptions within the UK should be pursued (as indicated from responses to the various recent consultations looking at educational exceptions relevant to support distance learning and copying for library archive preservation). If fair use was to be introduced as a UK doctrine to provide wider scope for exceptions to the rights of the companies at the root of creative innovation, this would stifle the very growth that remains such a specific part of the UK’s international success within the creative industries.

The US approach of applying a “fair use” doctrine to certain exceptions still has to be read in the light of the three step test. However the “fair use” approach leaves rights owners and users much more exposed to “legal interpretation” around the scope of individual exceptions. “Fair use” is less certain than the EU approach of defining the scope of exceptions more clearly. Better defined exceptions reduce litigation and legal costs, whilst ensuring that systems for fair compensation and licensing can operate.” *Professional Publishers Association submission*

“While the positive link between the creation of incentives in the form of intellectual property rights for creation and innovation has been established 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.

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).

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). 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. 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).

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.” 30 *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.” *Motion Picture Association submission*

“The USA’s “fair use” system seems to be fairer for SMEs in particular. However there are still a number of cases where businesses have faced litigation over the interpretation of “fair use”, so it is not a full answer.

A clear description in everyday language on what is allowed in the usage of media and materials, such as the US’s Fair Use, would be helpful to reduce the level of legal interpretation, agreed default permissions in some areas. Some form of blanket permission would be very useful, providing it is structured in an easy to use form and not prohibitively expensive for SMEs to set up and apply.”

GBatBMedia submission

“Our experience in researching the many new business models which are emerging in the creative industries lead us to believe that there are many dangers in pursuing a “fair use”.

We do not think that a charitable or not-for-profit organisation should be entitled to exceptions. We also question the need for a change in the overall legal framework, given that Creative Commons provides one of a number of means open to IP originators to enable fair use to be realised in practice through a specific licensing arrangement. However, we do recognise that enforceability is a consideration here too.” *Inngot submission*

“Ultimately if we want them to enter into a new deal with us in the digital age, we have got to give them some ground; we have to recognise that their love of music is why they are swapping songs” adding that “it would really help things if we could develop a fair use law.” If Parliament and the entertainment companies are finding themselves helpless to control the online communities that characterise the 21st century they only have themselves to blame. Lord Macaulay predicted all of this 170 years ago when faced with a similar unjustified strengthening.” *Anthony Hamer-Hodges submission*

“The introduction of a copyright-aware internet implies the need for more widespread education on rights alongside the wider need for greater digital awareness. Government clearly has an important role to play in this. Regarding the introduction of a fair use exception, there has to be a more honest debate about the wishes of the various stakeholders that may benefit or lose as a result of introducing a major change to our copyright law becomes a classic “Hobson’s Choice” as Google Search has become the de facto gateway to the internet for the vast majority of internet searches. The second part of David Cameron’s statement is equally concerning: “Over there (US) they have what are called “fair-use” provisions which some people believe gives companies more breathing space to create new products and services”.

When matched against the first statement about possible barriers arising from our IP laws, it seems axiomatic that what Google and others may be looking for is something that would go far beyond what the US law regards as fair use; as their business models have evolved beyond indexing for search purposes, they are in effect asking for an exception to legitimise the repurposing of copyright protected material, free of restriction or conditions, and for free.” *European Publisher’s Council submission*

“Viewing across screens, time or region need to be re-assessed to avoid unreasonable price increases. Format and platform shifting & fair use. Platform, format and time shifting of legitimate content should fall under a “fair use” doctrine. This repurposing of legally acquired content that does not change the initial right to use, within the private sphere should not trigger levies. Fair use should always avoid double taxation. The remuneration principle, where applicable, for the act of copying should reflect copying of legally acquired content only. On Private copy levies Fair rewards through market-based royalties.” *Ericsson submission*

“The main area of debate at the Beacon Project workshops concerned the US rules on “fair use” and its potential applicability to the UK. In each of the main workshops expert advice was provided in order to guide the debate.

In terms of problems with the legislative environment, the safe harbour provision of the US DMCA allows YouTube to run and not be liable for infringing works uploaded, but a British website would not have the same protection. The Fair Use of media for review works well in traditional TV/DVD/publishing environment but needs clarification for the digital age. Mash-up in particular is an area that should be encouraged perhaps under a dual - fair use remix for non-profit is available free, but fair-use remix that profits the artist will need to share half their revenues proportionally with the remixed original work.” *Creative Industries KTN submission*

“Implicit seems to be assumption that the UK is an environment that stifles, or is potentially stifling for, innovation and in further pointing to the US concept of ‘fair use’ it suggests that a liberalisation of copyright law may be one way of achieving this. We do not see a lack of innovation in the UK. iTunes launched in the UK (both music and film) very shortly after the US and in advance of almost every other country in the world.” *Momentum Pictures submission*

“The Intellectual Property law to a less litigation based, more codified, regime that concentrates on reward for content producers through open exploitation of the Intellectual Property. Of those initiatives we would like to focus on those opportunities presented by the best practice in American Fair Use doctrines, the opportunity to re-examine and support those Gower’s proposals as yet unimplemented which support UKTV’s goals, and the extension of the principles of the collecting societies to cover cross platform usage of cleared material.

At present the UK the Intellectual Property regime does permit the use of copyright material without consent within the limited confines of criticism and comment on the copyright within a particular clip, such as using a clip from Stanley Kubrick’s Clockwork Orange film to allow discussion of the performance within it. There is also no clarity as to whether a review can be a purely visual or if it can only be conducted through a literary review. By contrast The US doctrine of Fair Use allows a freer quotational use of literary and visual content defined as fair use for commentary and criticism, i.e. it can be used as illustrative commentary in its own right, not only as a comment on itself. The difference may seem slight, but in effect the allowance to permit material to be used for commentary removes the incentive for litigation across a host of programme

We would recommend the Hargreaves review takes account of those codes of best practice in the US such as the “Documentary Filmmaker’s Statement of Best Practices in Fair Use” a code prepared by the Washington College of Law and ratified by leading documentary filmmaker’s representative bodies (these documents are available from www.cenferforsocialmedia.org/fair-use.)” *UKTV submission*

“The Review has cast the alleged problem in too simplistic a way and has failed to consider the other factors that have resulted in differences between the UK and other territories in terms of digital development. For example, rather than the existence of “fair dealing” in the UK (rather than “fair use” in the US) preventing Google from setting up in the UK, is it not far more likely that other much more significant factors led to Google -and thousands of other new media and technology companies -starting life in California: access to venture capital; a culture of entrepreneurship; well funded and IT software engineers?

SCBG recommends that the Review undertakes work to establish whether these factors were in fact the primary cause of Google’s establishment in California, so as to rule out whether a particularly favourable Californian IP regime was a contributor. Continuing to focus on the “fair use” versus “fair dealing” theory with regards Google also fails to address the fact that while Google started in the US, it has gone on to achieve c. 80% market share in the UK, even with these so-called IP disadvantages” *Satellite and Cable Broadcasters Group submission*

1 The BPI have also provided as an Annex to their submission a paper by Professor Graeme Austin on Fair Use

