

(When) Is Copyright Reform Possible? Lessons from the Hargreaves Review*

James Boyle

In the five months we have had to compile the Review, we have sought never to lose sight of David Cameron's "exam question". Could it be true that laws designed more than three centuries ago with the express purpose of creating economic incentives for innovation by protecting creators' rights are today obstructing innovation and economic growth? The short answer is: yes. We have found that the UK's intellectual property framework, especially with regard to copyright, is falling behind what is needed. Copyright, once the exclusive concern of authors and their publishers, is today preventing medical researchers studying data and text in pursuit of new treatments. Copying has become basic to numerous industrial processes, as well as to a burgeoning service economy based upon the internet. The UK cannot afford to let a legal framework designed around artists impede vigorous participation in these emerging business sectors. **Ian Hargreaves, *Foreword: Hargreaves Review* (2011).**¹

I

The Structure of Copyright Policy Making

Is copyright reform possible? Copyright scholars can give a litany of the features of the copyright system that seem deeply problematic.

- We have repeatedly extended copyright retrospectively. This clearly provides no new incentives to those who have already created – many of whom are dead. It benefits only a tiny number of authors, those whose creations are still economically viable after the end of the existing term, but locks up vast numbers of orphan works – still under copyright, but with unknown rights-holders – and makes the digitization of 20th century culture all but impossible. This is social

· James Boyle © 2015. Licensed freely under a [CC BY license](#). This is a draft of a chapter to be published in a book on international intellectual property reform edited by Ruth Okediji. This essay would not have been possible without incredibly helpful comments about the UK process from Lionel Bently, Andres Guadamuz and Ian Hargreaves. In addition, the IPO staff and my fellow "advisers" provided invaluable information. Jack Knight, John de Figueiredo, and Jennifer Jenkins gave very useful editorial feedback. The title of the paper is a reference (and *homage*) to Pam Samuelson's extremely thought-provoking article, *Is Copyright Reform Possible* 126 HARVARD LAW REVIEW 740 (2013). Apart from Pam's work, Bernt Hugenholtz's *oeuvre* was a continuing inspiration. Needless to say, none of those I thank are responsible for my conclusions or for the errors or omissions that remain.

¹ IAN HARGREAVES, *DIGITAL OPPORTUNITY: A REVIEW OF INTELLECTUAL PROPERTY AND GROWTH* 1 (2011) (hereinafter HARGREAVES, *DIGITAL OPPORTUNITY*).

- policy that imposes large social cost, with tiny private benefits, one that flies directly against copyright's central rationale of promoting *access* to works.²
- The copyright term is far too long – at least if copyright is judged by its effective incentives.³ A copyright term that required renewal – which used to be the US system – would provide almost all of the benefits to those copyright owners whose works remained valuable, while leaving the rest of society free of the dead weight loss of the very long term for all other works. Far from adopting such a system, we have made it impossible by treaty.
 - Copyright used to require formalities – which cut down on search costs (important in solving licensing problems or orphan works tangles) while requiring an affirmative act to enter the domain of copyright.⁴ Again, we have abolished these requirements and made their reintroduction extremely difficult because of our treaty obligations. As an added “benefit” this sweeps all of informal culture into copyright. Every home movie, blog entry, diary or snapshot is pulled into copyright's domain, irrespective of the wishes of the creator. This will create nightmarish orphan works problems for the documentarians, historians, and archivists of the future.
 - We make copyright policy in an evidence-free environment;⁵ depending on anecdote and, to quote the Hargreaves Review, “lobbynamics,” and never revisiting our policies to see if they produced the benefits claimed for them. We have repeatedly extended rights and strengthened penalties without evidence that this is cost-justified or indeed that costs do not outweigh benefits.
 - We say we harmonize copyright internationally but generally harmonize only the rights, which are mandatory, while making exceptions optional. This leaves a terrain that is in fact *not* harmonized. Think of a practice that depends on a limitation or exception – that decompilation of software is fair use, for example – present in one country but not another. More generally, the disparate treatment of rights and exceptions ignores the fact that the limitations on copyright are as central a feature of its operation as the rights themselves.
 - We allow technological happenstance to sweep activities in and out of copyright's domain without considering whether it promotes copyright's goals to do so. To read a paper book or to turn a light on, I commit no “copyright significant act.” But to read a *digital* text or turn on a *software* switch I must create a temporary and limited copy of the work involved. Should the copyright holder therefore be able to regulate my activity in a fine-tuned and granular way? For example, by conditioning my *license* to use the program or book on all kinds of conditions that copyright law itself does not impose?

² See, e.g., JAMES BOYLE, *THE PUBLIC DOMAIN* 222–229 (2008), and sources cited therein.

³ See, e.g., Raymond Shih Ray Ku et al., *Does Copyright Law Promote Creativity? An Empirical Analysis of Copyright's Bounty*, 62 VAND. L. REV. 1669 (2009); Paul J. Heald, *How Copyright Keeps Works Disappeared* (Ill. Public L. Research Paper No. 13-54, 2013); and, Ivan Png & Qui-Hong Wang, *Copyright Law and the Supply of Creative Work: Evidence from the Movies* (2009).

⁴ Jessica Litman, *Sharing and Stealing*, 27 HASTINGS COMM. & ENT. L.J. 1, 14–18 (2004).

⁵ BOYLE, *supra* note 2 at 208-229.

- We now have the ability to do digital “text-mining” in a way that seems to have enormous scientific potential, cross referencing discoveries in unrelated fields that no human eye could discover. But that text-mining is hobbled by the licenses and digital fences that encumber scientific texts – frequently texts that lay out the results of publicly funded research. Those licenses and digital fences are backstopped, ultimately, by copyright.
- We say we want to provide new, legal, ways of streaming and providing access to digital content internationally, but the businesses that try to do so find themselves in a Gordian knot of licenses and collecting societies, each country with its own particular set of rules. As technologies have developed, copyright has added right after right, intermediary after intermediary. If someone wants to play a song on the radio in France, the process is clear and the number of rights involved limited. But if someone wants to *stream* a song across all Europe? That is a nightmare. Consumers want cheap and legal access to content. Artists and distributors want to enable it. But the law (and the intermediaries built to collect the revenue streams which each right enables) have combined to produce a tangled anti-commons through which it is hard to make progress.

Each copyright scholar has their own list of the flaws in our copyright policy, though the ones above would probably be common to many of them. To be sure, not all of these are uncontroversial. Retrospective copyright term extension or the treatment of orphan works is one thing – that meets with almost universal disapproval from anyone whose scholarly focus is on copyright’s instrumental effects. Even many rights-holders find the orphan works effects an embarrassment when they lobby for yet another increased copyright term. But text mining, or licensing reform are more complex. In those cases, rights holders and intermediaries such as collecting societies may have strong reasons to prefer the status quo, even if it is socially wasteful. As for evidence-based policy making, that attracts little support from rights holders – in part because they correctly perceive that in those areas where the data is clear, it is likely to provide no support for the rights they cherish. The empirical studies on the effects of copyright term extension, the availability of public domain works as opposed to those under copyright, and the EU’s study on the effect of the Database Directive are all cases in point.⁶

To some, these problems are explained by a simple “public choice” theory of regulation. Mancur Olson’s *The Logic of Collective Action*⁷ provides an elegant, almost algebraic, account: repeat players with highly concentrated economic interests will lobby effectively for those interests, while an unorganized and under-informed public, whose interests are individually small but collectively larger than the repeat players, will thus be the victims of policies that are socially irrational yet which convey great benefits to the lobbyists. Copyright adds to this happy account of ubiquitous legislative malfunction the added attraction that its focus is partly on technological innovation. By definition, the industries of the future are not present at the bargaining table and thus their technologies

⁶ See, e.g., BOYLE, *supra* note 2, at 209–213, 217–220, 225–29; empirical studies *supra* note 3.

⁷ MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965).

will be vulnerable to incumbents who may wish to legislatively hamper them in order to preserve a current business model.

One can add to these two factors, the scholarship on regulatory capture⁸: Regulators grow comfortable with those whose industries they regulate. Increasingly, they will come to adopt their world-views. Partly, this can be explained as a rational reaction to the future benefits to be gleaned when they leave public service and go to work for the companies they once regulated. (A recent article on the “revolving door” between the US Trade Representatives Office and the content and pharmaceutical industries provides some eye-opening examples.⁹) A public servant who unceasingly promotes the interests of the rights-holders while in office will not want for lucrative employment after her departure. But it is also a form of “herd psychology.” If one is surrounded, every day, by a group whose ideological tenets, economic baselines, and assumptions about the effects of regulation are homogeneous, it will produce cognitive dissonance to take a contrary position, even when the evidence clearly indicates that position has merit.

To be sure, not all lobbying is socially dysfunctional. Some is actively beneficial. Corporate lobbying brings important perspectives before regulators. It may help to solve coordination problems – effectively representing scattered creators, such as songwriters, whose interests might otherwise get lost in the process. Collective action problems can also work in reverse – when a diffuse population can cause *harm* rather than benefit to incumbents, harm that is individually small but collectively substantial. Technology can give private individuals around the world the power to cause economic harm -- for example by illicit downloading – on a scale that was formerly the preserve of industrial enterprises. Rights-holders see themselves locked in combat to repair that damage – the extent of which is hotly debated, as the Hargreaves Review carefully notes. Given that framing, they may see their comparative over-representation in the policy making process, and their hold on both the worldview and the future job prospects of policy makers, as a necessary balance to the massive, decentralized danger posed by the internet. (This of course does not explain the policy making in the areas where such threats are absent.)

Of course there are some offsetting forces to the processes I am describing here, two of which demand particular attention. First, the consumer electronics industry and online intermediaries sometimes provide a counterweight in the policy-making process to some of the proposals put forward by copyright holders.¹⁰ Google and Apple now had a

⁸ For a nice review of the literature see, Ernesto Dal Bó, *Regulatory Capture: A Review*, OXFORD REVIEW OF ECONOMIC POLICY (Summer) 22 (2): 203-22 (2006).

⁹ Timothy B. Lee, “Here’s why Obama trade negotiators push the interests of Hollywood and drug companies,” THE WASHINGTON POST, Nov. 26, 2013, *available at* <http://www.washingtonpost.com/blogs/the-switch/wp/2013/11/26/heres-why-obama-trade-negotiators-push-the-interests-of-hollywood-and-drug-companies/> (last accessed Dec. 9, 2014).

¹⁰ It is worth noting that this was very nearly not the case. The consumer electronics industry has flourished partly because of the protection of rules like that put forward in the *Sony* case – even if the *predominant* use of a product is to infringe copyright, the manufacturer is not liable if it has current or possible future substantial non infringing

seat at the table and *their* interests include having the freedom to do things that copyright law might attempt to prohibit – the making of backup copies of your library of songs, or copying the entire web every day in order to index it, for example. In fact, the Hargreaves Review was apparently begun because of conversations that David Cameron, the British Prime Minister, had with the founders of Google.¹¹ Second, copyright law has been transformed in the last 40 years from an arcane form of inter-industry horizontal regulation into a body of laws that affects citizens on a daily basis in their technological and digital interactions. The result has been an increasing level of popular engagement with issues ranging from access to knowledge to internet regulation.¹²

These two changes are important – clearly very important in the case of online intermediaries, and particularly so in the case of this Review. I will discuss that point further in my conclusion. Nevertheless the changes have palpable limits. The process of democratic engagement is still in its infancy. The intermediaries and consumer electronics companies have a wide range of economic and policy interests, including as rights-holders themselves. Intellectual property issues do not have the primacy for them that they do with the content industries. More importantly, their agendas do not cover all of the policies involved, nor do they inevitably reflect the public interest, merely a different private interest than that presented by the content industry. At the moment, that often aligns with many of those seeking to defend an open internet and a vibrant technological industry but this is hardly something on which one can depend. Moreover, despite these important counterweights, the dominant voice in intellectual property policy-making is still that of rights-holders. The dominant *philosophy* is that of maximalism – in which increases in rights are always presumed to produce increases in innovation, and where exceptions are viewed with a grudging hostility. To quote the Hargreaves Review:

In the case of IP policy and specifically copyright policy, however, there is no doubt that the persuasive powers of celebrities and important UK creative companies have distorted policy outcomes. Further distortion arises from the fact (not unique to this sector) that there is a striking asymmetry of interest between rights holders, for whom IP issues are of paramount importance, and consumers for whom they have been of passing interest only until the emergence of the internet as a focus for competing technological, economic, business and cultural concerns.¹³

uses. (Think of an iPod that can contain 10,000 songs – how much would that cost to fill *legally*?) In the online world, without the exceptions and limitations provided by the DMCA's 512 and the European E-Commerce Directive, Google, YouTube and Facebook would be impossible in their current form, as would most Internet Service Providers. Both of those safe harbours were very close battles. *Sony* was a 5–4 decision. The WIPO Copyright Treaties contain no requirement for safe harbours and the Clinton Administration's original plans for copyright online promoted the idea of strict liability for all intermediaries.

¹¹ HARGREAVES, DIGITAL OPPORTUNITY, *supra* note 1, at 44.

¹² See, e.g., Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 YALE L.J. 804 (2008).

¹³ HARGREAVES, DIGITAL OPPORTUNITY, *supra* note 1, at 93.

In my case, all of this sets the stage for a particular encounter with the policy making process. I was one of five outside experts asked to advise the Hargreaves Review, a comprehensive review of intellectual property ordered by the British government in 2011. I wish to temper your expectations. The Hargreaves Review is very far indeed from being a solution to the problems I described earlier. But it did address some of them. In this essay, I will lay out the main findings of the Review, which ranged from the structure of the copyright policy-making process, to orphan works reform, the legality of data mining, educational use and copyright licensing. I hope these conclusions may be of interest for their own sake to copyright scholars around the world. After doing so, I will spend a little while discussing whether this personal experience caused any revision in or inflection of my scholarly assessment of the possibilities of copyright reform. The experience is merely an N of one, of course. No general conclusions can be deduced from it. On the other hand, it is an N of one and not zero.

II The Review

It started with an email titled “Invitation from Baroness Wilcox.” That went immediately into the spam folder that contains “invitations” from Saudi princes with investment schemes, the sons of Nigerian oil ministers with pressing needs for foreign bank accounts, and Ukrainian girls “who just need a friend.” Then my subconscious tickled me – was Baroness Wilcox not the Undersecretary of State responsible for the Hargreaves Review of Intellectual Property – the comprehensive review of Britain’s intellectual property regime recently announced by David Cameron? The email was a real one – an invitation to be one of the five expert advisors to that Review.¹⁴ Though the invitation was obviously an honour, the decision whether to accept was more complex. Partly because of the dynamics of the policy-making process, participating in such projects is often deeply frustrating for academics. In 2006 the UK had conducted another review of intellectual property. Called the Gowers Review, it had conducted a thoroughgoing study of the field. The analysis was of an extremely high quality; the empirical analysis of the effects of copyright extension for sound recordings, for example, was state of the art. The Gowers Review called for 54 specific reforms of British law, and proposed that, in general, intellectual property policy needed to become more data-driven. Academics loved it. Its suggestions were thoughtful, clearly laid out and well-grounded in the data. The majority of them were also ignored.

This fate is by no means unusual. To participate in such efforts is normally to spend a great deal of time trying to make thoughtful arguments in the text of the report, most of which will be removed by the political compromises of the drafting process and then to see the few suggestions that do survive fail to become law. The Hargreaves Review turned out to be rather different.

A.) Evidence Based Policy Making

¹⁴ The other four experts – whose comments I found extremely useful – were Roger Burt, Mark Schankerman, David Gann, and Tom Loosemore.

Evidence. Government should ensure that development of the IP System is driven as far as possible by objective evidence. Policy should balance measurable economic objectives against social goals and potential benefits for rights holders against impacts on consumers and other interests. These concerns will be of particular importance in assessing future claims to extend rights or in determining desirable limits to rights.¹⁵

To those unfamiliar with intellectual property policy, these words seem like the merest *pabulum*. Insiders know better. As I explained earlier, in the strange world of copyright policy it is controversial to suggest that the debate on extension or limitation of rights should be driven by evidence and by a utilitarian calculation of social and economic costs and benefits, or to suggest that extensions of rights can have negative impacts on consumers and other interests. The Hargreaves Review followed Gowers in embracing a largely utilitarian framework, rather than one based on moral rights, and an evidence-based framework which considers both incentive effects and negative externalities on consumers, competing business models and other technologies.¹⁶ For me, this was one of the most important aspects of the Review and one of the places in which my advice was most “forceful.” (The experts offered advice to the Review team, but it was agreed that we would not be bound by its conclusions.)

I was impressed by the quality and professionalism of the staff at the Intellectual Property Office, the UK’s equivalent of the PTO, by their knowledge of the academic literature and the sophistication of their economic analysis of the problems we discussed. The IPO had already made a considerable effort to hire professional economists and to harness their insights. The staff had already reviewed and digested the empirical literature and the Review itself produced several studies. One of the other advisors, Professor Mark Schankerman of LSE, was himself an expert in the economic and empirical investigation of intellectual property. Finally, the framework of the Review was built around the call for evidence from stakeholders – which put great stress on the importance of submitting *data* – the submissions by library bodies were particularly strong in this regard. But how far can an evidence-based approach go? The Review’s conclusions here were thoughtful:

There are three main practical obstacles to using evidence on the economic impacts of IP: [1] There are areas of IPRs on which data is simply difficult to assemble.... [2] The most controversial policy questions usually arise in areas (such as computer programs, digital communication and biosciences) which are new and inherently uncertain because they involve new technologies or new markets whose characteristics are not well understood or measured. [3] Much of the data needed to develop empirical evidence on copyright and designs is privately held. It enters the public domain chiefly in the form of “evidence” supporting the arguments of lobbyists (“lobbynomics”) rather than as independently verified research conclusions. Dealing with these obstacles requires an approach to evidence which makes the most of the available research where data can be developed, applies the lessons learned in those areas where we do

¹⁵ HARGREAVES, DIGITAL OPPORTUNITY, *supra* note 1, at 8.

¹⁶ *Id.* at 6–7, 21–22.

have data to areas where we don't, in ways which make credible use of economic theory, [and] demands standards of transparency and openness in both methodology and data. It also presupposes an institutional environment which encourages the relevant public authorities to build, present and act upon the evidence. This cannot be achieved if relevant institutions of Government lack access to the data upon which corporate lobbying and other positions are constructed.¹⁷

All of this is welcome – it was not long ago that the both World Intellectual Property Organization and the IPO themselves hired their first economists. But will it play out in reality? The Gowers Review was equally forceful in stressing the importance of data to policy. One of its most compelling examples was an exhaustive study – both economic modeling and empirical research – that came down firmly against retrospective extension of copyright terms. There was a proposal on the table to extend the term of copyrights over sound recordings. Gowers also pointed out the very limited benefits that any such extension would give to its supposed beneficiaries, the musicians themselves. Effectively ignoring this advice, the government then supported sound recording copyright term extension at the EU level. So, even if evidence of economic effects begins to trickle into the policy-making process, is anyone listening? I came to believe that this would depend in part on the culture among professional civil servants – in this case in the IPO. The pressures towards institutional capture will always be there, of course, but Hargreaves at least took a step towards stressing the need for an institution that did not think that its “clients” were only the rights holders. To repeat, and expand upon, a quote from the Review that I used earlier:

Lobbying is a feature of all political systems and as a way of informing and organising debate it brings many benefits. *In the case of IP policy and specifically copyright policy, however, there is no doubt that the persuasive powers of celebrities and important UK creative companies have distorted policy outcomes. Further distortion arises from the fact (not unique to this sector) that there is a striking asymmetry of interest between rights holders, for whom IP issues are of paramount importance, and consumers for whom they have been of passing interest only until the emergence of the internet as a focus for competing technological, economic, business and cultural concerns.*¹⁸

I was shocked by how harshly critical the Review was willing to be of the current policy making process and, in particular, how frank it was about the distorting pressures I mentioned in my introduction. (Note the neat paraphrase of Olson's collective action theory which was discussed at the beginning of this article.) The Review closed by calling for the IPO to have a role in “future-proofing” the copyright system, providing advice and data on proposed reforms and offering advisory opinions on the interpretation of copyright law. It also proposed that the IPO have a role in assessing after the fact the impact of any policy changes made as a result of the Review. For many years I have been arguing that it should be a basic principle of copyright policy-making that we undertake prospective weighing of costs and benefits and then a retrospective “environmental

¹⁷ *Id.* at 18–19.

¹⁸ *Id.* at 93 (emphasis added).

impact assessment” of actual effects. It is too soon to tell whether this version of that call will produce more real world results than other similar ones in the past.

B.) Limitations and Exceptions

Government should firmly resist over-regulation of activities which do not prejudice the central objective of copyright, namely the provision of incentives to creators. Government should deliver copyright exceptions at national level to realise all the opportunities within the EU framework, including format shifting, parody, non-commercial research, and library archiving. The UK should also promote at EU level an exception to support text and data analytics. The UK should give a lead at EU level to develop a further copyright exception designed to build into the EU framework adaptability to new technologies. This would be designed to allow uses enabled by technology of works in ways which do not directly trade on the underlying creative and expressive purpose of the work. The Government should also legislate to ensure that these and other copyright exceptions are protected from override by contract.¹⁹

The central focus of the Hargreaves Review was on exceptions and limitations to copyright. UK copyright law has a “closed-end” list of copyright limitations – the fair dealing provisions. Sections 28-31 of the Copyright, Designs and Patents Act of 1988²⁰ provide the basic structure, and are followed by a series of particular exemptions from copyright liability. To US eyes two things are notable. First, the structure of the system; this is a closed list not, as in the United States, an open ended provision with a series of factors that can be applied flexibly to new problems and new technologies. Second, the list is remarkably incomplete; for example, there was no exception for parody, for “format shifting,” for “text mining” for academic research, for library archiving or for access to copyrighted works by those with disabilities.

It was the first point – the closed nature of copyright’s exceptions – that was the main origin of the Hargreaves Review. In a speech quoted prominently in the Review itself, David Cameron, the British Prime Minister provided the basic rationale.

The founders of Google have said they could never have started their company in Britain. The service they 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”

¹⁹ *Id.* at 99.

²⁰ Copyright, Designs and Patents Act, 1988, c. 48, *available at* <http://www.legislation.gov.uk/ukpga/1988/48/enacted> (as enacted); Copyright, Designs and Patents Act, 1988, c. 48, *available at* <http://www.legislation.gov.uk/ukpga/1988/48> (as amended) (last accessed Dec. 9, 2014). In addition, sections 32–76 provide an additional closed list of actions that do not infringe copyright.

provisions, which some people believe gives companies more breathing space to create new products and services.²¹

Cameron's assessment was both right and wrong. Fair use *had* enabled US copyright law to adapt to new technologies. In cases involving video recorders, decompilation of computer programs, search engine "spiders" and image thumbnails, and even the gargantuan Google Book search project, fair use's four factors and flexible, teleological structure had been used to carve out breathing space for new technologies without prejudicing the central incentives provided to copyright holders. For example, reverse engineering a physical product violates no intellectual property right and promotes competition. Reverse engineering a *software* product requires the creation of a copy during the process of decompilation. Is competition and the promotion of interoperability therefore forbidden? Courts used fair use to say "no." As I have observed elsewhere,²² fair use became the "duct tape" of copyright – used everywhere there was a problem of technologies being pulled into copyright's domain in ways that might actually retard rather than promote progress and no prospect of an immediate legislative fix. Fair use allowed US law to, in the words of the Review "resist over-regulation of activities which do not prejudice the central objective of copyright, namely the provision of incentives to creators." But Cameron's comments – and those of Google's founders if they were reported accurately – were also an oversimplification. Fair use was an important limitation but others – particularly the "safe harbors" contained in Section 512 of the US Copyright Act and in the E-commerce Directive in the EU – were also vital. The thrust of the question was correct however: how to "future-proof" copyright?

Fair use attracted passionate, almost hysterical opposition "on the grounds that it would bring... massive legal uncertainty because of its roots in American case law; an American style proliferation of high cost litigation; and a further round of confusion for suppliers and purchasers of copyright goods." While conceding these were concerns, the Review noted sardonically,

In response to the arguments against Fair Use, it is also worth noting that the creative industries continue to flourish in the US in the context of copyright law which includes Fair Use. It is likewise true that many large UK creative companies operate very successfully on both sides of the Atlantic in spite of these differences in law. This may indicate that the differences in the American and European legal approaches to copyright

²¹ David Cameron, November 2010, announcing the Review of IP and Growth. Quoted in HARGREAVES, DIGITAL OPPORTUNITY, *supra* note 1, at 44. The Review added an important caution, however. "Does this mean, as is sometimes implied, that if only the UK could adopt Fair Use, East London would quickly become a rival to Silicon Valley? The answer to this is: certainly not. We were told repeatedly in our American interviews, that the success of high technology companies in Silicon Valley owes more to attitudes to business risk and investor culture, not to mention other complex issues of economic geography, than it does to the shape of IP law. In practice, it is difficult to distinguish between the importance of different elements in successful industrial clusters of the Silicon Valley type. This does not mean that IP issues are unimportant for the success of innovative, high technology businesses." *Id.* at 45.

²² BOYLE, *supra* note 2, at 120.

are less troublesome than polarised debate suggests. But this does not stop important American creative businesses, such as the film industry, arguing passionately that the UK and Europe should resist the adoption of the same US style Fair Use approach with which these firms coexist in their home market.²³

(For those who do not speak British as their first language, the last sentence can be fairly translated as “Cough. [*sotto voce*] ‘*Hypocrites!*’ Cough.” That is, however an unofficial translation, not sanctioned by the authors of the Review.) The legal staff of the IPO ultimately concluded that – whether or not it was a good *idea* – adopting a US style, flexible fair use standard was incompatible with the general EU Copyright Directive.²⁴ That is not an unreasonable interpretation, although I disagree. First, the EU Copyright Directive is hardly a model of clarity. In the words of the inimitable Bernt Hugenholtz:

Surprisingly, the Directive does deal extensively with an issue mentioned only incidentally in the Green Paper: copyright exemptions, or ‘exceptions’ as the Commission prefers to call them (*nomen est omen*). In view of the vast differences in purpose, wording and scope of limitations existing at the national level, many of which reflect local cultural traditions or business practices, one would have expected some more study and reflection before stirring up this hornet’s nest... As any less ambitious person could have foreseen, combining these various projects into a single legislative package has turned out to be a disastrous mistake. The intense pressure from the copyright industries and, particularly, from the United States (where the main right holders of the world reside), to finish the job as quickly as possible, has not allowed the Member States and their parliaments, or even the European Parliament, to adequately reflect upon the many questions put before them. The result of this over-ambitious undertaking has been predictable. The Directive is a badly drafted, compromise-ridden, ambiguous piece of legislation. It does not increase ‘legal certainty’, a goal repeatedly stated in the Directive’s Recitals (Recitals 4, 6, 7 and 21), but instead creates new uncertainties by using vague and in places almost unintelligible language.²⁵

Second, the Directive relies on the Berne “three step test” “It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.” But the test contains a well-known circularity. The limitations on copyright will *define* the “normal exploitation of the work” and the “legitimate interests of the author.” If I have a right to copy your work for educational use, then licensing educational copies will not be something within the “normal exploitation of the work”

²³ HARGREAVES, DIGITAL OPPORTUNITY, *supra* note 1, at 45.

²⁴ 2001 O.J. (L 167/10) Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

²⁵ Bernt P. Hugenholtz, *Why the Copyright Directive is Unimportant, and Possibly Invalid*, 11 EUR. INTEL. PROP. R. 501 (2000), available at <http://dare.uva.nl/document/2/9021> (last accessed Dec. 9, 2014).

and the right to prevent that copying will not be an interference with “the legitimate interest of the copyright holder.” There are lengthy debates on how to interpret these words so as to make them less circular – ovoid, perhaps – but I will not enter them here. Suffice it to say, that I believed that there were ways to implement a flexible fair use standard within the EU system.²⁶ The Review team took the opposite position.

Now we get to a point – and this is relevant for the discussion of the limits to copyright policy-making – where, in my view Ian Hargreaves exercised considerable political skill. (What follows is entirely my subjective interpretation of events and should be imputed neither to him or the IPO team.) The opposition to fair use was intense. The Review team had concluded early on that a fully flexible US style fair use provision was legally impossible under EU law. The Review process effectively made fair use the “punching bag,” focusing all opposition upon it, while actually introducing support for a relatively substantial set of limitations and exceptions. “Legalized text-mining for research purposes, that can’t be forbidden by contract?” “Sure, but no fair use.” “Caricature, pastiche and parody?” “Sure, but no fair use.” Private copying and format shifting? “Sure, but no fair use.” Copying for private study? Educational exceptions? Library archiving? Exceptions for the visually impaired or disabled? “Sure, but no fair use.” “Support for an EU-wide change to introduce more general technology sensitive flexibilities into a copyright?” “Perhaps, but no fair use.” Hargreaves was able to use the fixation on the *label* “fair use” and the implication of the Prime Minister’s strong support for reform to introduce more flexibilities. The Review proposed a “twin track approach.”

In order to make progress at the necessary rate, the UK needs to adopt a twin track approach: pursuing urgently specific exceptions where these are feasible within the current EU framework, and, at the same time, exploring with our EU partners a new mechanism in copyright law to create a built-in adaptability to future technologies which, by definition, cannot be foreseen in precise detail by today’s policy-makers. This latter change will need to be made at EU level, as it does not fall within the current exceptions permitted under EU law. We strongly commend it to the Government: the alternative, a policy process whereby every beneficial new copying application of digital technology waits years for a bespoke exception, will be a poor second best.²⁷

On the first point, the Review argued that we must decouple those occasions when a new technology enters copyright’s world because it just so happens that the technology itself requires copying in order to function, from those occasions where the technology is actually infringing on the author’s interests in the traditional exploitation or control of her work.

We therefore recommend... that the Government should press at EU level for the introduction of an exception allowing uses of a work enabled by technology which do not directly trade on the underlying creative and expressive purpose of the work (this has been referred to as “non-consumptive” use). The idea is to

²⁶ My own analysis was strongly influenced by an incisive discussion of the issue provided to the Review by Lionel Bently, the Herchel Smith Professor of Intellectual Property at Cambridge.

²⁷ HARGREAVES, *DIGITAL OPPORTUNITY*, *supra* note 1, at 47.

encompass the uses of copyright works where copying is really only carried out as part of the way the technology works. For instance, in data mining or search engine indexing, copies need to be created for the computer to be able to analyse; the technology provides a substitute for someone reading all the documents. This is not about overriding the aim of copyright – these uses do not compete with the normal exploitation of the work itself – indeed, they may facilitate it. Nor is copyright intended to restrict use of facts. That these new uses happen to fall within the scope of copyright regulation is essentially a side effect of how copyright has been defined, rather than being directly relevant to what copyright is supposed to protect.²⁸

Thus the Review does advocate a future-oriented, open-ended, non technology specific exception but concludes this must be done at the European level.

When it came to the specific exemptions for research, text mining and so forth, the focus that the Review put on gathering evidence proved its worth. I will quote just one example, because I think it goes to the reasons that the Report was able to gain support for the exceptions and limitations it put forward. The evidentiary submissions gave a clear sense of both the arbitrariness and the human costs of the current formalistic system, and the Review was able to use those stories to make its point. Here is one example drawn from its pages.

About five per cent of the world's population is infected with malaria, a parasitic infection which kills around 800,000 people annually (mainly children)...During the first half of the twentieth century tens of thousands of patients with neurosyphilis were intentionally infected with malaria. This treatment, which cured a proportion of patients, is unique in the history of medicine, and the resulting literature contains a wealth of knowledge relating to the biology of the disease. The Mahidol-Oxford Tropical Medicine Research Unit, based in Thailand and supported by the Wellcome Trust, is interested in making generally available to researchers a set of some 1,000 journal papers from the first half of the twentieth century describing malaria in indigenous peoples, soldiers, and details of malaria therapy – a unique and unrepeatable experiment. This information offers potentially significant insights for the development of methods for preventing and treating malaria today. It is often impossible to establish who are the copyright holders in these articles, many of which appeared in long defunct journals – they are orphan works. Copying them to make them generally available in online form would break the law. Reproducing individual illustrations and diagrams in articles is not possible. If the orphan works problem could be overcome it would still not be possible to text mine them – copy the articles in order to run software seeking patterns and associations which would assist researchers – without permission from the copyright holders who can be found, since there is no exception covering text mining. Even overcoming those obstacles would not guarantee that text mining would be possible in future cases. For that any new text mining exception must also include provision to override any attempt to set it aside in the words of a contract.²⁹

²⁸ *Id.*

²⁹ *Id.* at 46–47.

The Review proposed all of the specific limitations I have described -- from private copying and private use for research, through format shifting, parody, pastiche, caricature, archival copying, educational use, use in public administration, text mining and limitations to enable the making of copies for the visually impaired. Even more strikingly, these proposals did not merely languish in a dusty report on a shelf. They were eventually enacted into law, through secondary legislation.³⁰ I was, to use the technical legal jargon, “gobsmacked.” My hope – based on painful observation of prior “Reviews” – was to fight to get a few true sentences into a report that would then be ignored by the legislature and the civil service but *perhaps* make the next report or review a little easier. The implementation of the Hargreaves Review has huge limitations but it is perhaps sad to say, achieving any *actual* reform whatsoever was something I simply never envisaged.

Text-mining for academic, and particularly scientific, research was the exception that I focused on most intently during our discussion in the Review drafting process. (I will come to the treatment of orphan works, another central focus, in a moment.) Some years ago, John Wilbanks and I laid out the reasons why text-mining (among other techniques for increasing the power and speed of research) is *so* important, why it has such enormous promise to save lives.³¹ The quotation earlier about malaria research gives some sense of this, yet the potential is even greater than that quotation indicates. But for text mining to achieve its potential, it first has to be legal.

On the one hand, the text mining provision has limitations. It only applies to non commercial text mining – for example, academic research. Thus commercial entities such as Google cannot take advantage of it. And it only applies to text mining on documents you already have in your possession. (No hacking through digital fences in order to text-mine.) On the other hand, the provision most important to me – that the exception could

³⁰ See, e.g., The Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014, S.I. 2014/2361, available at <http://www.legislation.gov.uk/uksi/2014/2361/contents/made>; The Copyright and Rights in Performances (Quotation and Parody) Regulations 2014, S.I. 2014/2356, available at <http://www.legislation.gov.uk/uksi/2014/2356/contents/made>; The Copyright and Rights in Performances (Disability) Regulations 2014, S.I. 2014/1384, available at <http://www.legislation.gov.uk/uksi/2014/1384/contents/made>; The Copyright (Public Administration) Regulations 2014, S.I. 2014/1385, available at <http://www.legislation.gov.uk/uksi/2014/1385/contents/made>; The Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014, S.I. 2014/1372, available at <http://www.legislation.gov.uk/uksi/2014/1372/contents/made> (last accessed Dec. 9, 2014).

³¹ JOHN WILBANKS & JAMES BOYLE, INTRODUCTION TO SCIENCE COMMONS (2006), available at http://sciencecommons.org/wp-content/uploads/ScienceCommons_Concept_Paper.pdf (last accessed Dec. 9, 2014). Science Commons – a part of Creative Commons – was founded to implement this vision and made some progress. Sadly, much of that work remains undone. The science efforts have been reintegrated within the larger organization.

not be contractually waived – made it through the Review drafting process and into the implementing legislation. It is a beginning.

C.) Orphan Works

As the Hargreaves Review was being drafted, the EU was debating an Orphan Works Directive.³² The best that can be said about it is that it is a start -- which is more than the United States has managed. As we discussed the EU scheme during the Review process, it became clear that it was going to have some significant shortcomings. In brief, the scheme is heavily institutional, statist, and inflexible. Its provisions can really only be used by educational and cultural heritage institutions, only for non-profit purposes, with lengthy and costly licensing provisions designed to protect the monetary interests of – almost certainly – non-existent rights holders. The EU seemed never to grasp the idea that *citizens* also need to have access to orphan works, for uses that almost certainly present no threat to any living rights holder.

Laws cannot choose to prevent error, but they can choose *where* errors occur. The presumption of innocence is a classic example. Orphan works reform can choose to focus on false positives or false negatives. Should a large scale digitization be made almost impossibly costly because of the possibility that one rights holder would turn up? Or is that result even more of a social cost than the *possibility* that the revenant rights holder be undercompensated – something which itself could be solved by risk-spreading insurance? Unfortunately, the Directive’s provisions effectively picked the former option. European libraries in particular have been extremely disappointed with its provisions.

Orphan works pose significant challenges because they prevent libraries from making these works available to their users in digital formats. European library groups welcomed the desire to seek solutions to the orphan works problem, and put forward practical proposals that would enable the unlocking of culturally valuable collections for the benefit of all. The library community believes that the Directive will be useful only for small scale, niche projects, and regrets that the aim to facilitate large-scale digitization of Europe’s cultural and educational heritage ... has not been achieved. The main problem is the presumption that the re-use of orphan works is likely to be unfair to their untraceable rightholders, and should be restricted as far as possible.³³

Among the many other problems listed are the onerous search and record keeping requirements, the need separately to clear “included works” (for examples drawings or pictures in a book) the absence of sensitivity to the scale of a project and so on. To be

³² 2012 O.J. (L 299/5) Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works. *See also*, European Commission, “The EU Single Market: Orphan works,” available at http://ec.europa.eu/internal_market/copyright/orphan_works/index_en.htm (last accessed Dec. 9, 2014).

³³ Electronic Information for Libraries (EIFL), “The European Orphan Works Directive – an EIFL Guide,” available at http://www.eifl.net/european-orphan-works-directive-eifl-guide#directive_problems (last accessed Dec. 9, 2014).

fair, at least Europe has made a start on the problem of orphan works, which is something the US has conspicuously failed to do.

The Review team realized early on that the EU approach was not going to be enough. We did not know exactly what the final Directive would look like, but it was clear that the focus would be on institutions (particularly state institutions) and on non profit uses. Consequently, the Hargreaves Review pushed for a complementary approach, one that would allow individual uses and for profit uses. So far, so good. Unfortunately, though it is too soon to be certain, the implementation of that idea seems to have taken the same attitude towards risk that the EU Directive took.

My suggestions to the Review were based on the idea of a legal privilege. Entities that wanted to use an orphan work would have to go through the stages of a diligent search – though the search requirements would “scale” to the project involved. A mass non-profit digitization for archival purposes would, of necessity, have fewer search requirements than the for-profit use of a single work; otherwise the digitization would be impossible. The privilege would allow *individuals* to exhume works from the cultural graveyard, so that the decentralized citizen archivists of the Net could add their enthusiasms to the efforts of the great state repositories. If a rights holder did appear, despite the diligent search, liability would be “capped” at a statutory *post hoc* payment schedule. If there were a “license” to use the orphan work, that license should be viewed – in essence as an insurance scheme that used the law of large numbers to spread the (small) risk over the entire risk pool, thus requiring minimal *premia* but guaranteeing adequate compensation. In other words, if I wish to license an orphan work, I do not pay the price of that work were it to be guarded by an assiduous rights holder, but rather that price discounted by the considerable likelihood that *there is no rights holder at all*. Finally, if the rights holder insisted, there would be the alternative of a “takedown”, except in cases where a derivative work had been created. In that case, a mutually agreeable “fair and reasonable royalty” would be negotiated, depending on the relative creative contributions of the parties involved.

The drafters of the Review chose to go with expanded collective licensing *ex ante*, rather than limited liability *post hoc*. The difference was acute. With collective licensing *ex ante*, I have to pay to use *even though it is most likely that no rights holder exists!* European governments love requiring licenses to do things nearly as much as they like creating state bodies or collection societies to administer those licenses. (I say this as a European myself.) This was no exception.

To its credit, the UK government actually did implement the Review’s proposals. They did allow individual use and for profit use, complementing the EU Directive’s proposals. With great fanfare, “UK Opens Access to 91 million Orphan Works” said the press release,³⁴ the licensing scheme was announced in October of 2014. But the details remain fuzzy. Licenses are to be provided at “market rates.” What does that mean? In a rational licensing scheme, users would be charged a fee set at a level that would be adequate – on the level of the entire *scheme* -- to compensate a revenant rights holder

³⁴ Department for Business, Innovation & Skills, Intellectual Property Office and Baroness Neville Rolfe, “UK opens access to 91 million orphan works,” Oct. 29, 2014, available at <https://www.gov.uk/government/news/uk-opens-access-to-91-million-orphan-works> (last accessed Dec. 9, 2014).

should one appear. This would, of course, be discounted by the probability that a rights holder would not in fact appear. Thus if there was a 1/1000 chance a rights holder would make a claim, and a market rate for such a (post hoc) license would be 10,000 pounds, I would be able to purchase the license for ten pounds. If the rights holder did appear, she would be fully compensated by the licensing scheme. The 999 users who rescued a work from its orphan work purgatory would pay the fees that compensated the 1000th rights owner who in fact did appear asking payment. Works would be used and not overpriced – thus satisfying the firm directive of (and to) the Review that we consider public benefit – the public availability of the works, which in all probability have no rights holders, balanced against the payment of those rights holders should they appear. Works would be available. Rights holders would be fully compensated. Is that what market rate means here?

Sadly, it appears that the answer is “no.” At least so far. One of my major criticisms of the implementation of the Review’s ideas is its plan for pricing orphan works licenses. At present, (the licensing scheme is in beta test, so there is hope that this may change), the IPO seems to understand “market rate” to mean the full, undiscounted, cost of a license – even though the probability is that no one will appear to demand payment. But this is an obvious economic mistake. Imagine a world of uncertain property rights in *physical* land. Land records are in disarray. As a result, half of the land in the UK is being dramatically under-used. Fields lie fallow, for why till and plant if you are unsure whether your labour will result in a trespass suit? No one builds on open plots. The cost of usable land, food grown on that land, houses and other property-related goods is thus distorted, to the great benefit of those who do in fact hold clear title and the great cost of the public.

After many years of dithering, responding to this obvious social irrationality and economic dead weight loss, the government finally introduces an orphan fields scheme. People may apply to the Indeterminate Property Office for a “license” to use the land. Two proposals for pricing the licenses are put forward. One follows my suggestion – licenses are to be discounted by the risk that the land owner will appear. This can be estimated at first, but will become more and more certain as the scheme goes into effect and is publicized. The second, strongly supported by those who have clear title to their lands, is very different. They *like* the distorted market that exists. Even though the legal system (by having irrational title rules) has created the distortion in the first place, and even though the legal system (through the Indeterminate Property Office) has been charged with *fixing* this problem, the incumbent land owners propose a different rule. They say that the license for the right to use these new, “orphan plots” should be priced at current market rates for *known* plots, thus using as a baseline entitlement the very distortion that the scheme was set up to remedy. The result, as they well know, will be to chill the usage of these orphan plots – indeed *that is their goal*. They defend their proposal by saying no new scheme should negatively impact their current business model – that is, they assert a “right” to the profit margin they receive under the current – distorted – scheme, which the IPO has been told to remedy.

Unfortunately, after heavy lobbying by incumbent rights holders, the actual IPO seems to have bought this line of reasoning – at least in its beta test. Its licenses will be at full market rates, lest the business models of current rights holders be affected. This effectively assumes an “entitlement” to the profits available in a distorted market. My

price for licensing my photo of the Eiffel Tower can be set high because copyright law says that all those ownerless snapshots from years past cannot be used. And I am entitled to have this irrationality continue! Indeed the government should step in and help me! Nice work if you can get it.

Just to be clear, the current pricing scheme is distorted in two ways. First, it assumes as a reference for the license cost the current prices of copyrighted works in an, admittedly distorted, market. Prices under conditions of unnecessary and irrational state mandated “shortage” are obviously artificially inflated and thus are an inappropriate baseline. Second, it fails to discount for risk – that is, for the probability that there is no rights holder out there. The market price for a license should not be the full cost of a currently available work any more than the market price for home-owner’s annual fire insurance premia should be the *full cost of the house*. If the government mandated that as a price for home-owner’s insurance it would of course distort the market, guaranteeing that insurance was under-used, just as orphan works will be under this scheme. But this ignores the metric of public benefit. Rather than fix a market in which many valuable cultural items are unavailable, it prolongs it, market distortions and all. Many institutions proposing large scale digitization of orphan works believe that – as a result – this orphan works reform will suffer from the same problems as the EU Directive or actually be less effective. As for the commercial use of orphan works, I would predict a resounding failure. The bold promise of “91 million orphan works” made available will not be realized. On this one, the IPO’s implementation of the Hargreaves Review deserves – at best – a gentleman’s “D” grade. We can only hope that better sense will prevail.

Perhaps the economists in the IPO can explain that one does not fix distorted markets by setting as a moral baseline an entitlement among incumbents to the distorted price. Nor does one fix them by ignoring in the pricing the very issue that made the orphan works problem so tragic in the first place; in all probability there is no rights owner to compensate and thus the works should be available at a price no higher than necessary, on the level of the entire licensing scheme, to compensate one should she return. That price, needless to say, is not the *full* price.

D.) Patent Thickets

Many scholars have pointed out the dysfunctions of our current patent system.³⁵ The Hargreaves Review was largely focused on copyright and so expectations should be adjusted appropriately. Nevertheless, some positive recommendations (from my point of view) emerged. The first was with a focus on “patent thickets,” or the so-called “anti-

³⁵ See, e.g., BOYLE, *supra* note 2, at 251–53; James Boyle, *Open Source Innovation, Patent Injunctions, and the Public Interest*, DUKE L. & TECH. R. 30 (2012); Arti K. Rai, *Who’s Afraid of the Federal Circuit?*, 121 YALE L.J. 335 (2011); Robert P. Merges, *As Many as Six Impossible Patent before Breakfast: Property Rights for Business Concepts and Patent System Reform*, 14 BERKELEY TECH. L.J. 577 (1999); JAMES BESSEN & MICHAEL J. MEURER, *PATENT FAILURE: HOW JUDGES, BUREAUCRATS, AND LAWYERS PUT INNOVATORS AT RISK* (2009); ADAM B. JAFFE & JOSH LERNER, *INNOVATION AND ITS DISCONTENTS: HOW OUR BROKEN PATENT SYSTEM IS ENDANGERING INNOVATION AND PROGRESS, AND WHAT TO DO ABOUT IT* (2004).

commons,” in which a proliferation of rights actually blocks innovation. The second was a strong statement on the inadvisability of patents offered in areas in which scholars have generally found them to be of low utility, such as business methods and “non technical” computer software. The most objectionable members of the latter class of patents attempt to elude restrictions on patentable subject matter by adding to a simple algorithmic instruction the words “by means of a computer.”

Patent thickets and other obstructions to innovation: In order to limit the effects of these barriers to innovation, the Government should: take a leading role in promoting international efforts to cut backlogs and manage the boom in patent applications by further extending “work sharing” with patent offices in other countries; *work to ensure patents are not extended into sectors, such as non-technical computer programs and business methods, which they do not currently cover, without clear evidence of benefit*; investigate ways of limiting adverse consequences of patent thickets, including by working with international partners to establish a patent fee structure set by reference to innovation and growth goals rather than solely by reference to patent office running costs. *The structure of patent renewal fees might be adjusted to encourage patentees to assess more carefully the value of maintaining lower value patents, so reducing the density of patent thickets.*³⁶

Since the IPO is the UK’s equivalent of the PTO, one might hope that these recommendations will gain some real traction. The experimentation with patent renewal fees as a way of curtailing lower value seems very promising, but the resolution to avoid the “subject matter creep” that has so beset the US system is of particular importance.³⁷

E. Miscellaneous Recommendations:

The Hargreaves Review process had limits. Until the penultimate draft, I had hopes that it would hold firm to the empirical evidence that increasing severity of penalties and upping enforcement was an ineffective method of ensuring compliance with copyright laws. These efforts largely fail to achieve their goals, though they do produce costs – both to privacy and to speech technologies. On balance, it is better to provide cheap, convenient and legal access to copyrighted works, something that has been shown to reduce illicit copying but something that copyright’s spectacular tangle of rights makes particularly hard in areas such as music. The final draft of the Review was weaker on this point and while it did stress the importance of legal access it did not come out firmly against the belief that the cure for copyright’s ills is ever more severe penalties.

A relatively visionary “pro-business” aspect of the Review, and one I supported, though with doubts about the practicality of its implementation, was the creation of a Digital Rights Exchange.

³⁶ HARGREAVES, DIGITAL OPPORTUNITY, *supra* note 1, at 63. [emphasis added]

³⁷ For some graphs giving sobering empirical evidence of the effects of those tendencies on the US system see James Boyle & Jennifer Jenkins, Intellectual Property: An Open Coursebook 635-637 (2014).

Numerous responses to the Review's Call for Evidence drew attention to defects in licensing procedures, among them those of the CBI, News Corporation, Pearson, Reed Elsevier, an alliance of UK photographers and the European Publishers Council. Having studied these and several other proposals, including the Google Books Agreement recently struck down by the courts in the United States, the Review proposes that Government brings together rights holders and other business interests to create in the UK the world's first Digital Copyright Exchange. This will make it easier for rights owners, small and large, to sell licences in their work and for others to buy them. It will make market transactions faster, more automated and cheaper. The result will be a UK market in digital copyright which is better informed and more readily capable of resolving disputes without costly litigation.

The difficulty, of course, is that many of the obstacles to such an exchange are intermediaries who currently *profit* from the inefficiencies in the licensing system and would not necessarily be happy to be replaced by a "one stop shop" of easy and transparent digital licensing. The government followed up on this proposal with a feasibility study by Richard Hooper and Dr. Ros Lynch.³⁸ That report concluded that industry had already begun streamlining the licensing process since the Hargreaves Review and that a "non-profit, industry led" Digital Hub should be created to continue the effort. The government has allocated 150,000 pounds to this effort,³⁹ which seems obviously insufficient. It is unclear whether, in the absence of strong pressure by government threatening legal reform and the simplification of licensing rights, an "industry led" process will ever overcome inertia long enough to transform the current system. That is particularly true of particularly of one whose members include those who are currently profiting from the friction in the current system, The Digital Rights Exchange remains, at the moment, an aspiration.

Finally, the Review team was the subject of heavy lobbying for increased design protection. Its actual recommendation was largely for further study, though with some suggestion that design rights be strengthened and harmonized.

Recommendation: The design industry. The role of IP in supporting this important branch of the creative economy has been neglected. In the next 12 months, the IPO should conduct an evidence based assessment of the relationship between design rights and innovation, with a view to establishing a firmer basis for evaluating policy at the UK and European level. The assessment should include exploration with design interests of whether access to the proposed Digital Copyright Exchange would help creators protect and market their designs and help users better achieve legally compliant access to designs.⁴⁰

³⁸ Richard Hooper & Ros Lynch, *Copyright Works: Streamlining Copyright Licensing for the Digital Age* <http://www.copyrighthub.co.uk/Documents/dce-report-phase2.aspx>

³⁹ Helen Wilkins, *The UK's Copyright Hub and Digital Exchange* <http://www.own-it.org/news/the-uk-s-copyright-hub-and-digital-rights-exchange>

⁴⁰ HARGREAVES, DIGITAL OPPORTUNITY, *supra* note 1, at 66.

Unfortunately, despite interesting evidence that at least in some types of design, *weaker* protection has actually fuelled innovation,⁴¹ the main upshot was that new liability for design infringements – including criminal liability – was introduced in the Intellectual Property Act of 2014.

III Lessons for Reform?

Are there any lessons we can draw from the Hargreaves Review about intellectual property policy-making and the possibilities for copyright reform more generally? In the strict sense, no. As I said before, the Review was an “N of one.” On the other hand, it did some things that seemed very unlikely given the normal world of copyright policy making that I described in the first part of this chapter. It was strikingly straightforward about the “distortions” in our policy produced by the lobbying of the content industry. (Indeed, it placed more emphasis on the role of that lobbying than I would. I think the sincerely held ideology of intellectual property maximalism – “more rights equals more innovation” – is at least as much to blame.) It produced not just a robust defense of evidence-based policy making, but an institutional location for that evidence-based policy making. The jury is still out on whether the IPO will enthusiastically continue – or be *allowed* to continue – with this role, but it is a significant beginning. Most importantly, unlike other reviews of copyright policy, the Hargreaves Review got most of its central recommendations implemented into law in a relatively short period of time. Billed as the “fair use” review, it concluded that a general flexible fair use provision would be desirable, but had to be pursued at the EU level. Yet it not only put forward, but got implemented, fairly far reaching proposals on limitations and exceptions. These ranged from format shifting, private copying and academic text-mining to educational use and greater access to copyrighted works for those with disabilities. The text mining limitation strikes me as particularly significant. The Hargreaves Review also proposed and got implemented significant orphan works reform. That scheme will not in fact produce the revolution in access that the IPO’s press release suggested, but it is an important complement to the EU Orphan Works Directive and perhaps a building block for future further reforms. It is certainly a step ahead of anything the US has been able to do.

Why did these things happen? Is this a “black swan” event – so unlikely that it tells us little about the normal functioning of the system? I think that five factors came together to make the Review’s proposals (and their implementation) more likely.

1.) Counterbalancing Interests/Counterbalancing *Worldviews*: For the first time in UK copyright policy making, policy makers were made *fully* aware that there was a powerful industry force, or set of industry forces, counterbalancing the lobbying but also the worldview, the *perspective*, of the content industry. This counterbalance was complicated. Take Google’s role. The Hargreaves Review was billed by some as the “Google Review” – because of David Cameron’s comments and the admiration held by some of his team for Google-style disruptive innovation. This appellation was given

⁴¹ See Kal Raustiala & Christopher Sprigman, *The Piracy Paradox* 92 VIRGINIA LAW REVIEW, 1687 (2006).

greater credibility by the fact that Google did push for similar Reviews in other countries, such as Ireland. I can say that, from the inside, the reality seemed much more complex.

In European politics to say “Google is behind this” is to produce kneejerk and sometimes frankly paranoid hostility. It evokes a cluster of fears: from perceived American industry dominance, to privacy concerns, to claims of monopoly. The EU has just finished imposing a well-intentioned but poorly thought out “right to be forgotten” that makes the job of both search engines and newspaper archives incredibly complex and is currently debating imposing far-reaching competition law limitations on Google. Thinking that having Google behind something was automatically a *plus* from a European perspective, is like thinking that “the Microsoft Review of Antitrust Law” or “the Exxon Review of Environmental Law” would be an unequivocal plus in US politics.

From my own very limited point of view, while Google was extremely important in starting the Review process, the actual recommendations succeeded in part despite, rather than because of, Google’s specific lobbying. Instead, the effective argument was an existence proof posed by a whole *range* of industries. From search engines and social media sites, to user generated content portals and consumer electronic industries there were a set of actually existing institutions worth billions of pounds that could say “without the limitations and exceptions in copyright our technologies and platforms for speech would have been stifled.” The argument that won the day was that copyright would hold back technology and innovation in ways that would be against British national interests and would slow entrepreneurial experimentation in the high tech industries. As well as “more rights equals more innovation” policy makers were also hearing “tangles of outmoded rights slow technological development against the public interest.” And the sound bite – “a strict application of copyright law in the way favored by the content industry would have made the world wide web as we know it illegal” – was simple and fairly obviously true. Lobbying from well-known tech companies was clearly important, but contrary to the facile cynicism of political insiders (and some political scientists) ideas and worldviews also mattered a great deal.

2.) A Perception of Political Support from the Top: The Review started with a clear display of support from the Prime Minister. The bureaucratic and legislative importance of this cannot be overstated. Whether that support was in fact maintained at the same level, or whether reform was a high priority, is a more complex question but the very complexity of the question gave Ian Hargreaves and the IPO staff a great deal more leeway. One can contrast this with the US. President Obama sent a number of signals that he “understood the digital world.” He appointed some excellent people. There was even some progress on patent reform. On copyright, however, the situation quickly returned to the *status quo ante*. From secret intellectual property treaties to “copyright czars” drawn exclusively from former (and subsequent) representatives of the content industries, the Administration’s policies were far from balanced. In fact, despite claiming sympathy with the digital world, the Administration was apparently as shocked as the content industry by the massive wave of protest against SOPA (the Stop Online Piracy Act.) Colleagues who worked in government tell me that the Vice President’s office was perceived to be a robust friend of the content industry. Whatever the truth of that point, the perception proved powerful in squelching efforts towards reform, just as the perception of Cameron’s support proved vital in encouraging it.

3.) A Skilled Professional Staff and a (Relatively) Apolitical Institutional Structure:

I cannot say enough about the sophistication, quality and professionalism of the people I worked with at the IPO. They were extremely well-read in the relevant academic disciplines. They had a wide range of backgrounds – from economics to literature. They approached the task of the Review with what seemed to be a long-throttled frustration with some of the manifest irrationalities of the current copyright system (such as our treatment of orphan works.) Above all, they wanted to get it right, to make the system work for all of its stakeholders – including the public, which was refreshing. Let me say quickly that I have long also been impressed by the quality of people working for the US government. The difference is a matter of how much those people could *achieve*. Here the IPO had managed to defend a norm of independent professionalism that made it less likely a political appointee could merely order his staff to parrot industry talking points, or that all proposals would be seen as mere rhetoric overlying some industry agenda. They had just a little more working-room and that proved vital.

Fundamentally, and with some regret given where I currently live, I found that the culture of British politics was less debased than that of the US. Every staffer was not assumed to be implicitly lobbying for an industry job on exit. Every academic was not assumed to be a hired gun for some industry group. Expertise was given due weight, but so was genuine (rather than astroturfed) popular support. Cynicism did not strangle every reform effort. (Of course, if the IPO is *successful* in carving out an important, independent, evidence based role in intellectual property policy, the pressures to co-opt it will increase.) We all know that there are both benefits and problems – ranging from insularity to the danger of professional blindness – in relying on expertise-based administration. But politics is always a matter of “worse than what?” Given the woeful state of our current copyright policy-making structure, encouraging a more balanced, expertise-based, institutional structure would clearly be a plus.

4.) Popular Engagement with Copyright:

I once wrote that we needed the equivalent of an environmental movement for intellectual property, encompassing both an intellectual movement (ecology, the economics of externalities) and a political transformation through the creation of a conceptual linkage (connecting the perceived self interest of hunters and birdwatchers, hikers and organic food lovers.) The world of intellectual property has certainly not been transformed in that way *yet* but it is very different from what it was 20 years ago. Citizens are forced – willy nilly – into the world of copyright. They find that its rules are not what they believed them to be. For example, the Review heard again and again the popular perception was that there already *was* a private copying and format shifting privilege. Every copyright professor could make the same point about the reactions of lay people – and even law students and lawyers – to the actual rules of copyright. When given the historical nugget that, during the first attempts to adapt copyright law to the internet in the 1990’s, the original proposal of the content industries was for strict liability for all online copies, my students respond derisively “that would make Google illegal! That would make the internet illegal!” (Yes, that was the *idea*.)

The basic point is simple. Citizens’ relationship to copyright law has changed. Now individual citizens can point to particular technologies, particular speech tools, that

they use every day that depend on copyright's limitations and exceptions. The Review was clearly affected, often in ways that were hard to quantify, by this change. It might be an MP learning that ripping his legally purchased CD's onto his iPhone was breaking the law, or a staffer hearing that there was no exception in UK copyright law for parody – even if it were on Youtube. It might be a journalist who had seen the role of social media – unfiltered social media – in the Arab Spring. It might be an historian who used Google Book Search or Ngrams or a scientist who wanted to text mine his journal articles on malaria and was told that *copyright law* forbade it. For all of those people, the ideas that the rules and the technologies of the digital age should be defined solely around the interests of the content industry seemed... well, silly. That had its effect. (It was also humbling. Learning from the IPO staff that an eight year series of articles I wrote for the Financial Times were more influential than all the scholarship behind that articles was both the kind of smack to the ego that every academic needs periodically and a reminder of the need to *communicate* what we learn as scholars.)

5.) Policy Entrepreneurship: The Right Person at the Right Time: Last, but not least, the Hargreaves Review convinced me that – sometimes – individuals matter, that acts of *policy* entrepreneurship as well as business entrepreneurship can be transformative. I did not know Ian Hargreaves before the Review and I have hardly seen him since. Nevertheless, his political skill in negotiating the process seemed clearly to make a difference. For those who imagine that politics is all the objective correlation of lobbying, money and opinion polls this point seems dubious. But at many stages of the process – when 10 Downing Street's attention was elsewhere, when there was a drumbeat of attacks on fair use, when the IPO staff could have bought into the process or could have doubted it – Hargreaves was consummately skillful. The human touch still matters. For me, this is reassuring.

Conclusion: I hope that both the specific reforms put forward by the Hargreaves Review and the thoughts I have offered here on the more general possibility of reform are of some interest. But on the latter point, even if my assessment is correct, how common are the factors I list here? Clearly, not very. Yet I think there are two mildly positive takeaways. First, it is *possible* to break the logjam apparently dictated by collective action problems, ideologies of maximalism, impenetrable subject matter, revolving doors and so on. The results may not be all we would wish: they certainly were not with the Hargreaves Review.⁴² But it is not impossible for us to reform copyright law to make it a little more rational – just very, very hard. Second, in at least some of the factors I list here – particularly the rise of countervailing worldviews and increasing popular engagement – the process seems to be continuing and even accelerating. Neither of these points is cause for resounding optimism, but both of them are far more positive than the current consensus in the academic literature on the possibilities of reform.

⁴² The patent reform process that resulted in the America Invents Act – which had many very real defects but still did some good, might be another example. That process also shared many of the five factors I mentioned here.