



CREATE Working Paper 2013/1 (January 2013)

# What Constitutes Evidence for Copyright Policy?

## Digital Conference Proceedings

### 8 November, 2012 – Bournemouth University

---

#### Editors

Martin Kretschmer  
University of Glasgow  
martin@create.ac.uk

Ruth Towse  
Bournemouth University  
ruth.towse@gmail.com

---

CREATE Working Paper Series DOI: 10.5281/zenodo.8371.

This release was supported by the RCUK funded *Centre for Copyright and New Business Models in the Creative Economy (CREATE)*, AHRC Grant Number AH/K000179/1.

The Symposium 'What constitutes evidence for copyright policy?' held at Bournemouth University on 8 November, 2012 was part of the ESRC Festival of Social Science. It was organised by Professors Ruth Towse and Martin Kretschmer as a cooperative initiative between the Centre for IP Policy and Management at BU and CREATE, University of Glasgow with the aim of exploring the concept of evidence as employed in copyright policy-making, and challenge the concept from a social science perspective. A web resource offers transcripts and short videos of the discussion, an introductory essay, and a bibliography. The aim was to produce an orientation point in the contested debate about 'evidence-based' copyright reform. This document is the authoritative, paginated and citable version of the proceedings (available for download at [www.copyrightevidence.org/create/esrc\\_evidence\\_symposium](http://www.copyrightevidence.org/create/esrc_evidence_symposium)).

The Symposium took the form of four panels with specific professional and disciplinary groups: policy-makers, stakeholders, social scientists and law professors with an open session to enable wider audience participation. Each panel speaker was asked to give a short opening statement, setting out what constitutes evidence from their disciplinary perspective, using the UK Intellectual Property Office's guidance document on standards of evidence ('clear, verifiable and able to be peer-reviewed') as a starting point for their contribution.

## About this Resource

This resource was produced by CREATE, the RCUK Centre for Copyright and New Business Models in the Creative Economy ([www.create.ac.uk](http://www.create.ac.uk)) in collaboration with the Centre for IP Policy & Management ([www.cippm.org.uk](http://www.cippm.org.uk)), and the Centre for Excellence in Media Practice ([www.cemp.ac.uk](http://www.cemp.ac.uk)), Bournemouth University.

*Digital production team*

*Line Producer: Bartolomeo Meletti*

*Camera operator: Sophie Clements*

*Proceeds editor: Hayleigh Bosher*

*Web editors: Matthew Barr, Andrew McHugh*

*Executive Producers: Kris Erickson (CEMP), Dinusha*

*Mendis (CIPPM), Sukhpreet Singh (CREATE)*

The full digital resource is available from:

**[www.copyrightevidence.org/create/esrc\\_evidence\\_symposium](http://www.copyrightevidence.org/create/esrc_evidence_symposium)**

## Citation Guideline

Please cite this resource as:

Kretschmer, M. and Towse, R. (eds) (2013)

**What Constitutes Evidence for Copyright Policy?**

Digital proceedings of ESRC symposium

[www.copyrightevidence.org/create/esrc\\_evidence\\_symposium](http://www.copyrightevidence.org/create/esrc_evidence_symposium)

# CONTENTS

<b>PART I -INTRODUCTION .....</b>	<b>4</b>
1)      INTRODUCTIONAL ESSAY (M. KRETSCHMER AND R. TOWSE).....	5
 <b>PART II - EDITED TRANSCRIPT OF PANEL DISCUSSIONS.....</b>	<b>13</b>
2)      WELCOME (S. WESTON AND D. MENDIS) .....	14
3)      SETTING THE SCENE (R. TOWSE).....	16
4)      EXAMPLE: THE PARODY PROJECT (K. ERICKSON AND M. KRETSCHMER).....	20
5)      PANEL 1. POLICY-MAKERS' VIEW ON EVIDENCE FOR EVIDENCE-BASED POLICY (N. MUNN, P. HALL, L. HUMPHRIES AND M. KRETSCHMER) .....	28
6)      PANEL 2. STAKE-HOLDERS' VIEW OF EVIDENCE FOR COPYRIGHT POLICY (P. BRADWELL, F. LOWE, A. PRODGER, J. SILVER, H. BAKHSHI) .....	46
7)      PANEL 3. SOCIAL SCIENTISTS' VIEW OF EVIDENCE FOR COPYRIGHT POLICY (C. HANDKE, T. HOEHN, J. POORT, N. SEARLE, D. SECCHI, P. SCHLESINGER) .....	67
8)      OPEN DISCUSSION WITH AUDIENCE (C. WAEDELDE) .....	92
9)      PANEL 4. LAWYERS' RESPONSE TO EVIDENCE FOR EVIDENCE-BASED COPYRIGHT POLICY (E. DERCLAYE, L. EDWARDS, P. HEALD, R. JACOB) .....	100
10)     BIBLIOGRAPHY .....	128

# **Part I - Introduction**

# INTRODUCTORY ESSAY

*Martin Kretschmer and Ruth Towse*

## ***Evidence-based policy***

‘Evidence-based policy’ has become a mantra of many governments that may determine, justify, illuminate or act as smoke screen for projected changes to a specific policy. In economic terms this means that net benefits should be calculated by estimating the expected future returns from a potential change discounted into the present value and compared with estimated costs to those affected: this is sometimes called ‘impact analysis’. Its ‘shadow’ side is ‘policy-based evidence’, whereby selective facts are offered in support of a predetermined government position. Actual practice probably veers between the two. The increased focus on evidence has been a boon to economic consultancies and to lobbyists. But to many the meaning of ‘evidence’ remains unclear. Put bluntly: is it just a rhetorical device? (it’s ‘evidence’ if you like it, ‘lobbying’ if you don’t); Or is ‘evidence’ a useful social science concept for understanding human behaviour, and evaluating different normative paths?

To base policy on evidence, reasonable as it sounds, is certainly not an uncontested ambition. While it is easy to dismiss ‘ideological standpoints, prejudices, or speculative conjecture’ (Davies, 2004: 3), it is much harder to conceive of a rational politics that is not utopian or authoritarian. H. G. Wells famously evoked a Samurai class to practise a ‘more powerful and efficient method of control than electoral methods can give’ (Wells, 1905: ch.9, s.1).

In the UK ‘evidence-based policy’ continues to be a requirement for every department of government and applies also to policy on copyright, which in the past was a policy arena quite immune from cost-benefit analysis. The last few years have seen several independent enquiries set up by the UK Government to provide evidence-based policy recommendations; each had a somewhat different emphasis:

Gowers (2006) was to examine all elements of IP with a view to ensuring that it 'provides incentives while minimizing inefficiencies'; Hargreaves (2011) was charged with considering whether the IP system was sufficiently well designed to promote innovation and growth in the UK economy and, following its recommendation to set up a central digital copyright exchange (DCE), Hooper (2012a,b) was asked to consider whether copyright licensing was fit for purpose in the digital age and explore the feasibility of the DCE.

These enquiries invited submissions of evidence from interested parties, commissioned their own research, conducted workshops with stakeholders and lobby groups and met with a range of experts and ordinary citizens in order to gather a broad view. All this information is amalgamated and assessed by the Intellectual Property Office (IPO) in order to make its recommendations to Government.

The Hargreaves report specifically recommended making this process more rigorous. Recommendation 1 reads (2011, p. 8): '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.'

This led to the IPO publishing its own rules of good evidence. The guidelines state the aspiration 'that evidence used to inform public policy, or intended to inform government, meets the following three criteria: that it be clear, verifiable and able to be peer-reviewed' (IPO, 2011). These standards mirror those advocated for academic research and publications. The IPO also invited suggestions on other types of evidence, including individual experience and ideas, explicitly recognising that submitting evidence is time-consuming and costly.

### ***Brief for the Symposium***

Copyright has become a controversial issue: having once been the concern of a few specialised lawyers and businesses in the creative

industries, such as film and sound recording, that could be consulted relatively easily, it now regulates a huge range of creative activities both professional and amateur and all those consuming their output. Now everyone has a stake in the way the law works. That has brought copyright to the attention of economists, sociologists and academics working in cultural and media studies and each discipline has somewhat different criteria for evidence, all of which may have validity for policy purposes. In addition, the law has changed to adjust to new technologies of production and consumption and continues to be changed, requiring discussion of what is appropriate to satisfy a broad range of societal interests as well as to promote beneficial technical change. The advance of digitization and internet distribution have called into question whether copyright can be adapted in a way that is acceptable to all these stakeholders and what the impact of changes will have on creators, the industries supporting them and those using and consuming their products.

Even the purpose of copyright has come into question. Some would see copyright as a means of enabling authors and performers to earn a reward for their creativity, skill and talent while others view it as a means of supporting the industries that exploit them by bringing that work to market. Some regard this as being achieved harmoniously and others see hard bargaining as the only way. New kinds of licensing and new ways of administering copyright have become possible with digitization. Government attitudes have also shifted with the increasing promotion of the creative and knowledge economy as a source of growth and employment in a post-industrial era. That stance emphasises the economic importance of copyright in these industries.

It is in this context that this Symposium was organised on 8 November 2012, as part of the ESRC Social Science Festival. The purpose of the event was to scrutinise the ambition of evidence-based policy and consider its relevance to copyright policy. The organisers, Professor Ruth Towse of the Centre for IP Policy & Management (CIPPM) at Bournemouth University and Professor Martin Kretschmer of CREATe, the Centre for Copyright and New Business Models at the University of Glasgow (and formerly director of CIPPM), have emphasised the need for empirical evidence in their academic research and consultation on



copyright, which has included the effects of copyright policy on creators' and performers' earnings, on the operation of the creative industries and on copyright institutions such as collecting societies. In 2010/11, Martin had a one year ESRC-funded internship at the IPO and has subsequently conducted several empirical studies for the IPO (Kretschmer, 2011; Erickson, Kretschmer & Mendis, 2013; Homberg, Favale & Kretschmer, 2013) and Ruth has published several papers evaluating the state of economic evidence on copyright in the academic literature, one commenting on the IPO's own figures on the Hargreaves recommendations and another on the digital copyright exchange (DCE) proposal (Towse, 2011, 2012).

The Symposium took the form of several panels of specific groups: policy-makers, stakeholders, social scientists and law professors with an open session to enable wider audience participation. The whole day was tightly focused on one, and only one question: what constitutes evidence? It was emphasised that it was not about good copyright policy (what the law ought to be), but about the nature of evidence. Each panel speaker was asked to give a short opening statement, setting out what constitutes evidence from their disciplinary perspective, using the IPO's guidance document on standards of evidence ('clear, verifiable and able to be peer-reviewed') as a starting point to agree or disagree with.

A set of specific sub-questions was asked:

- (i) To what extent does the question matter to which evidence is sought?
- (ii) Is the past a guide to the future?
- (iii) Is anecdotal evidence bad evidence? When is an anecdote a counter-factual?
- (iv) Are numbers better evidence? If not, why not?
- (v) How do you weigh arguments? Are there formal trade-offs?
- (vi) Are appeals to shared values evidence?

The responses to the Hargreaves Copyright Consultation (2011), and the official summary thereof were circulated as prior reading. Another recent policy initiative discussed at the Symposium was the UK Cabinet Office's open standards consultation where Favale & Kretschmer

(2012) attempted to contribute an analysis of consultation responses using social science methods.

The intention to produce digital proceedings of the Symposium was clear from the beginning, in order to create a citeable source that may form an orientation point in the heated debate around copyright reform. A light form of peer review took place by circulating full transcripts for review and comment, checking research cited in the discussion, and adding a bibliography.

### ***What did we learn?***

Economists clearly favour a scientific method whereby hypotheses based on theoretical postulates are tested against objectively selected quantitative data while other social scientists would consider social norms and the power structure as relevant. Those working in government expressed a preference for a participatory process in which all types of qualitative information could be moulded into an overall set of evidence that was implicitly weighted and interpreted in terms of the governmental framework. Acceptable evidence could be qualitative, quantitative, experiential and even of the 'story' type. A distinction can be made here between an ethnographic approach in which close observation is valid evidence and anecdotal evidence that may illustrate but is not generalisable. There is, however, an inevitable tension between specificity and generalisability. Among the academics there was the view that a wide variety of qualitative and quantitative approaches are valid and may be necessary to offer a rounded picture; and that no data sources need to be privileged. However, crucial data were often perceived to be held by firms and collecting societies that may have an interest in controlling access and use for their own policy purposes.

This led to a discussion of the matter of bias in evidence. While evidence produced by interested parties should not be dismissed out of hand as tainted as it could have validity in its own terms, it is also the case that identifying where data manipulation or other bias is present may be exceedingly time-consuming. Experiments were suggested as a methodology that enables sidestepping some of these issues. The need

for replication or at least replicability was seen as important, meaning that testing a hypothesis with evidence could in principle be repeated and, indeed, such tests were desirable from the methodological point of view – the ‘verifiability’ advocated by the IPO’s *Guide to Good Evidence*.

By way of introduction, Kris Erickson and Martin Kretschmer presented their study commissioned by the IPO on the economic effects of parody (a parody defence to copyright infringement is currently *not* provided by UK law) to demonstrate how they set about the research and interpreted the results to produce evidence for policy purposes. This presentation was referred to by several speakers subsequently as being illuminating, suggesting that presentations of this sort could demonstrate how academics conceive of research. The difficulty of obtaining data for research on copyright was also an issue, though public consultations in the UK make submissions available as a default. While this has enabled researchers to trawl through submissions, respondents are not required to make all their data public though, and may submit in confidence. The context of evidence may be significant for interpreting its meaning. Some participants had difficulty in accepting the basic requirement of social science that generalisation is essential. Nor may it be possible for the government to have an overall unity of approach to policy-making: the example came up of the difference between applying the rules for competition policy and for copyright.

The conditions for good quality research meeting academic standards are hard to achieve in a policy-making setting. Government usually has a relatively short time frame and wants answers much more quickly than that which is usual for academic research. Commissioned research often has a short turnover time that favours professional consultancies over academia. The same applies to stakeholder evidence – those who are well financed to present data and other evidence have the advantage in a short time frame over those who cannot spend the resources to get it. This may put small enterprises and consumer groups at a disadvantage, especially in comparison to large well-funded industry lobbying bodies, including international organisations that seek to influence policy. Besides the several enquiries in the UK, evidence is also frequently sought by the EU and international fora,

with the result that evidence is not targeted to a specific enquiry. Often the same evidence is presented in a generalised manner to the current body asking for it. The UK government sees stimulating economic growth as the objective of policy, including for copyright; others have different objectives, such as enabling the EU common market to function.

Several conclusions can be drawn from the Symposium. It was hard to avoid the impression that there is very little truly objective evidence and therefore judgement was required to assess evidence for policy purposes. Though there was apparent agreement on the wide range of methodological approaches, a pick-and-mix approach (as often adopted in government summaries of consultation evidence) has to be misleading. There is a tremendous difference between the scientific method of testing with that of a mash-up of evidence of all sorts that requires policy-makers to adopt an unspecified set of weights depending on the stance of the current Government.

Two proposals to improve evidence-based policy-making in the field of copyright emerged.

### ***Quality filter***

In order to address the potential bias of evidence submitted to public consultations on copyright, a quality filter may be needed. It was felt that the legal concept of admissible evidence for litigation (in the common law tradition) here was *not* very helpful, as it allows anything that is potentially persuasive to bear on the findings of fact. Some argued that a more interventionist stance was needed, as in judge-led public enquiries where evidence may be examined under oath. Others felt that a small panel of independent scientific advisers could be tasked with sifting and reviewing the quality of submissions.

### ***Process design***

A second promising idea may focus on the *process* of assembling evidence, rather than on the assessment of the *quality* of submitted evidence. This might require a careful articulation of

the burden of proof for change, and the opening up of public consultations beyond organised stakeholder groups. If at the heart of copyright law is a trade-off between under-production and under-use of creative goods, the process of policy-making may have to reach out consciously to a much wider range of digital innovators and users, and perhaps direct resources for producing evidence into new areas.

In the recent past, the UK government has repeatedly adopted copyright policies in contravention of the findings of independent research, for example in supporting copyright term extension for sound recordings from 50 to 70 years against its own commissioned review of the evidence (CIPIL, 2006; Directive 2011/77/EU), and introducing without any evidence base a provision that would extend copyright in the artistic features of mass-produced designs from 25 to life-plus-70 years (Bently et al., 2012; Clause 56 of the Enterprise and Regulatory Reform Bill, currently before Parliament). The Intellectual Property Office laudably aspires to clarity, verifiability and the potential of peer-review for evidence submitted but those characteristics cannot be said to apply to the policy-making process itself: there policy-based evidence still appears as valid as evidence-based policy.

## **Part II - Edited Transcript of Panel Discussions**

# WELCOME

*Sally Weston and Dr. Dinusha Mendis*

## ***Sally Weston (BU Head of Law)***

Good morning, and welcome to Bournemouth University for this symposium. It is a privilege and a pleasure to welcome such a distinguished group of speakers for this ESRC Social Science Festival event. We are delighted to host this event, which brings policy-makers, stakeholders, social scientists and lawyers together to discuss what constitutes evidence for copyright. This is the 11<sup>th</sup> symposium to be held by CIPPM at Bournemouth University. When I looked back at the first symposium in 2001, I see that its title was *The New Feudalism of Ideas* ([www.cippm.org.uk/symposia/2001.html](http://www.cippm.org.uk/symposia/2001.html)). It correctly predicted that property rights would be increasingly concentrated in global companies, with permissions granted for specific temporary rights of use. This was before Amazon and Google became household names. I am confident that today's symposium will be as insightful as the previous events. This is a bittersweet day for us; it is Martin's last day at Bournemouth before he takes up his new role as Director of CREATe at Glasgow University. Martin co-founded CIPPM with Ruth Soetendorp over 12 years ago and worked to see it rise to its preeminent position.

I look forward to a challenging and inspiring discussion.

## ***Guide to Digital Interaction: Dr Dinusha Mendis (BU)***

I just have a few points to make about the technology today. We want to ensure that the discussion continues after today; we want to be able to cite the event, we would like to make some vid-casts available. However, we will not do any of that without your consent. Once we have edited the videos, we will get in touch with you, we will ask for your permission first, and then we hope to produce digital proceedings.

And secondly, in continuing this discussion as well, we want to use social media platforms, in particular Twitter, so the hashtag for all who want to tweet today, if you would like to, the hashtag is #CIPPM2012 (<http://storify.com/cippm/my-title>), so please do enter in the discussion with us. And enjoy the event.



# SETTING THE SCENE

*Professor Ruth Towse (BU)*

We seem to have a very formal kind of organisation for what we hope will be rather an informal discussion, so I'm going to start that off by sitting down. And you may notice that although everybody's been told to speak for five to ten minutes, I am going to speak for 15! So why organise something if you can't take advantage of it!

I thought I'd start on a slightly personal note, in fact, because the motivation for my contribution to this event has been my own work, which started with empirical work on artists' labour markets in the 1990s. We tend to use the word artist, meaning anyone – performing artists, crafts people and so on – in cultural economics, it's a bit of a loose term. I'm an economist, I work in a field called Cultural Economics, and I gradually moved into the economics of copyright. I realised that copyright was, or was supposed to be, a source of income for creators of all kinds.

In the 1990s there was no evidence to be found on copyright and there was no interest in the economics of copyright. I think the only source that we could find was the old Monopolies and Mergers Commission's investigations into the music industry (Monopolies and Mergers Commission, 1988, 1994, 1996); I met Martin in those days and we were both using the same sources of evidence. But the other source of evidence, really, was going to collecting societies, going to Musicians' Union and so on, and to try and talk them into helping out (Taylor and Towse, 1998).

Now, I think the real stimulus to interest in copyright itself, and particularly in the economics of copyright, has been unauthorised use: piracy, as it's widely known – though I don't like that term very much; that brought in the economists, and by the end of the last century, the late 1990s, there was also the interest in the creative industries. The DCMS in the UK managed to make a big ministry out of what had been a rather small Office of Arts and Libraries, and I think grabbed from

various ministries and became a really very big department when the whole creative industries 'paradigm' began. I worked in that area and there was a lot of interest in getting the right figures and data, how big they are and how fast they're growing, and so on and so forth.

I was then invited by the World Intellectual Property Organisation to work on their 2003 *Guide to measuring the contributions of the copyright based industries to GDP* – gross domestic product or national income. And during the week, when we were holed up in a hotel and made to work every day from 9 to 5 – something that academics are not very good at doing – the difficulties and the ambiguities of doing this kind of exercise became abundantly clear, and in particular, the potential for producing misleading data. So that and various commissions and consultancies that I've been involved in, led me to realise that often the questions the policy-makers are asking of economists can't be answered with the kind of clarity and exactitude that I think they hope to see. Researchers, especially the consultancies, produce figures that then get bandied about, even though the people who have produced them carefully say, 'Well, we can't be sure about this, it's based on this assumption and that assumption,' but nevertheless, that is the figure that's wanted and that is what gets out there. One of my examples of this was that I was asked to do this for one government: What is the value of copyright to our country? Well, I mean how could an economist answer that question? (Towse, 2011).

So, above all, what do we want evidence for, what do we want to do with evidence? Well, as an economist, I would say we're looking for causality. What is copyright for? The economic point of view of copyright is that it's an incentive. Well, is it an incentive? Are we just propping up industries, or are we truly stimulating creators? Causality is what economists attempt to look for, by formulating theoretically based hypotheses and finding relevant data to test them. This could be surveys, or it could be official figures, but the point is that facts do not speak for themselves. To become evidence, data must be related to behaviour, and even then we can't prove something, we can just provide evidence that does not refute that hypothesis. In fact, all social science students, at least at the Masters level, will have had courses in research methods, which in the better ones will emphasise the

underlying methodological questions of finding and using evidence, but whatever else they do, they will teach students, I suppose, rule number one which is to avoid bias in your evidence. So, for example, for surveys, you must use large samples of a known population size; you should make neutral statements in surveys; you should not have loaded kind of sentences that put words into people's mouths. Avoid value-laden terms; carefully report results without interpolation. And I think this is a particularly important point: don't impose unnecessary costs on respondents. Now, I would certainly accuse the IPO – not the individuals personally, of course – but I mean the office over the number of inquiries that there have been on this subject that have placed considerable burdens on the organisations and the stakeholders who are expected to respond. And on that subject, I'd like to say that of course in the 1990s, those organisations would have hired lawyers to help them with the copyright side of things, and now they're stuck with trying to produce economic evidence and I'm sure some of them don't know quite what to do about that. Obtaining and providing information is very costly, and the result is that the better off get heard more.

So, in terms of this meeting, you've all had the Intellectual Property Office's rules of good evidence (2011); it sets very high standards. Stakeholders may very well not care about the sort of things I've talked about, those are things that academics think about and of course it is the job of the stakeholders to protect their interests, or to promote their interests, and naturally they are biased, that's why they're there. I'd also like to mention that lobbyonomics, which is the term that Hargreaves coined in his report (Hargreaves, 2011), was thought of a long time ago in economics; it actually comes from a field of economics called Public Choice Theory, and there's a rather interesting rule that was made by a public choice economist called Gordon Tullock (1963) on rent seeking (rent being what you hope to get out of lobbying) which is that the limit to the expenditure on lobbying is the most that the lobbyist expects to gain in economic rent – quite an interesting thought.

So what we hope to get out of this meeting is more understanding about the validity of different approaches to these problems, and possibly some conclusions about how the processes of providing information on copyright policy might be improved.

Thank you all for coming, I'm going to now sit back and enjoy what I hope will be a very lively and informative discussion.

# EXAMPLE: THE PARODY PROJECT

*Dr. Kris Erickson (BU) and Prof. Martin  
Kretschmer (CREATe)*

**(MK)** Similarly, abusing the privilege, we thought we'd start with an example, an example everybody has an opinion about, and which also shows the difficult nature of evidence. So if you asked the question, whether making a parody should be permitted under copyright law, whether there should be defence or some other legal mechanism by which you can make parodies without seeking permission, what kind of evidence would bear on that point? Most of us will have an opinion here, and since we have Robin Jacob in the room, I thought I'd put one of his *bêtes noires* up.

This is a notorious case from the 1960s where an injunction was granted. Here is the film poster for Cleopatra: Liz Taylor, Burton, and so on, and this is the Carry On persiflage, and for the non-British, who have never seen a Carry On film, the cultural reference points are too complex! [laughter] I refer to Kris Erickson's inspired line at the top, it's a complex, longstanding cultural practice.

A similar case, you might say, is one from France, which has got a kind of defence in the Intellectual Property Act (Art L 122-5). In this example of *Tintin* parodies, current affairs topics are dressed up in the visual language and elements of the plot, which are part of the *Tintin* repertoire. In the Court of Appeal this was permitted. It looks, on the surface, to be quite similar to what we've seen on the Carry On poster.

Here we have a Louis Vuitton parody from the United States, which was permitted again, both under trademark law and as 'fair use' under copyright law. And this is a case from the Netherlands, the Chihuahua,

which is the favourite dog of Paris Hilton, with a Louis Vuitton bag. Again that was subject to litigation, and on appeal held to be lawful. So, there is a line to be drawn here: should it be or not, and there's a legal rule. Policy-makers in the UK are in that position at the moment, they're thinking about whether we should change the situation which we inherited, where essentially it is unlawful to make parodies (in the UK that is the current law). If you copy a substantial part, then you commit an infringement, and it's almost impossible to make a parody without copying a substantial part, because otherwise you can't recognise it as a parody; you can't easily comment on an object unless your taking is substantial.

**(Robin Jacob)** Actually, it's more complicated than that. For visual things, that's true. Written things, you can, you can parody somebody's style without copying anything; a very interesting fact.

**(MK)** You may not use any substantial part, and therefore you can get away with a textual parody, not with a visual one.

**(Robin Jacob)** Visual things you can't.

**(MK)** Okay, I'm sure we will speak much more. One of the reasons I put it up is because everybody has got an opinion! So, we have been commissioned by the IPO to produce a specific piece of evidence which looks at economic aspects of parodies, whether the presence of parodies causes harm to the original. A very specific question, but it is one question to which the answer would probably count as evidence in most of our minds. It's a piece of empirical work, which tells us something about the world, but what does it tell us about policy? Does it tell us anything about whether parodies should be permitted or not? So this is the paradox we put in the room. Kris will now show how we created our little empirical window, what we think the world is like.

**(KE)** Thanks, Martin. So we all realise that parody is something that takes place in all sorts of mediums, and Martin has just given a few examples. As a social scientist interested in internet communication, and faced with the question: does parody cause harm to right holders, my instinct was to look on the internet, and online, it seems to me, that YouTube is the place where a lot of this sort of parody increasingly takes place. But YouTube is an interesting case itself: it's a licensed

environment, and it's also a site where we have amateurs producing content, perhaps not even aware of the legal defences or the exceptions to copyright that they might be entitled to. And then we've got creators: record labels, commercial works, sitting in channels such as VEVO, which is a revenue share between large music labels and Google. So it's an interesting case, and we chose it as the field site, if you want, for this research, because YouTube is, I would argue, the place where there's quantitatively a lot of parody happening. And it's also, we use the term emblematic, of a kind of user-generated dynamic, which is a very interesting move forward.

This video is a still from a clip by Andy Samberg, and it was actually a parody music video that ran on Saturday Night Live, but it found its way on to YouTube and it was actually one of the early successful viral videos of YouTube. Now, NBC complained and had it taken down, after only 48 hours of being on YouTube. This was back in 2005/2006, but within those 48 hours it amassed 5 million views, and that was a lot of views in the early days for YouTube. So, arguably, parody has been involved right from the beginning in establishing YouTube's prominence.

I just want to show a quick example of the kind of thing we found when we first looked at what was out there. So this is a parody of a pop dance track called *I'm Sexy and I Know It*, and the person has parodied it by changing the lyrics, and maybe you'll see what he's done. [short clip played] *So I'm Average and I Know It*. And this fellow has been incredibly successful and this will be important later. Look at this: 23 million views he's got on his parody of a famous pop song from 2011. There are some more here, and if we distribute the slides you can check them out.

So, just to back up a little bit and add to what Martin was saying, that the context in which we were asked to provide this evidence is in the sort of post-Hargreaves Report world, and it's important to note that the Hargreaves Report discussed parody: it said that it's an important aspect in terms of freedom of expression, but that freedom of expression sat outside the terms of reference of that review. And, actually, Hargreaves makes the argument for a parody exception in the UK, based on more or less economic grounds. So, first of all, restricting

what such an exception would look like, by arguing that it should not damage the legitimate rights of copyright owners, and also suggesting that perhaps there might be some economic benefit, growth benefit for the UK, from introducing this and other related exceptions.

So, the methodology: we were somewhat feeling our way in the dark here, but what we did was we selected a primary sample of pop songs, by looking at the British Charts Company ([www.officialcharts.com/](http://www.officialcharts.com/)) data for 2011. We took the top 100 charting songs, so any song that charted anywhere in the top 100 in the UK for 2011, but we excluded covers, such as Glee, because typically those were already derivative and they were based on older music, so it would have been difficult to figure out in YouTube what was actually happening with old music. From that, that yielded 378 tracks, and that's because songs could chart for multiple months. We then further reduced the sample by checking to see if there was a commercial music video on YouTube. So remember, the song is separate from the music video. YouTube is a video platform, so there had to be an actual music video involving the sound recording as well as a new video recording provided by a skilled video maker. Then we employed some research assistants, one of whom, Conor O'Kane, is here – thanks, Conor, for all your hard work – and they diligently searched to find out how many parodies existed for each one of the 343 original songs existed as a parody on YouTube. They found a whopping 8299 cases, so already we were thrilled to discover that it's a very widespread and impactful behaviour. Because there were so many tracks, we have randomly sampled within the total number to reduce the amount to 1845, which we carefully scrutinised when we looked at things. We essentially carried out a content analysis on those 1845 videos, to see, for example, how much of the original was copied over, as well as some degree of how negative the parody was with respect to the original, because in order to find out whether or not reputational harm could be taking place, we needed to find out how negative the parodies were to the original.

So, this is one of our findings, and what we've done here is we've plotted out the 343 primary songs, so each of these dots represents a primary commercial music video from 2011. The x-axis is its retail success rank. We don't have exact sales figures from the British Charts



Company, because we're not part of the music industry and they jealously guard that data, but we do have the rank data, so we have some sense of how successful the song was at retail, out in the real world. The y-axis, we have the YouTube audience that it attracted on the VEVO ([www.vevo.com](http://www.vevo.com)) platform.

**(MK)** And VEVO is licensed, so these are the right holders' own versions of music videos; that's important. So the market we are looking at has the licensed version by the right-holders next to the non-licensed version by the consumer, or user generator.

**(KE)** And as expected, there's a loose relationship between those two factors. More successful songs out in the wild tend to attract higher audiences on YouTube for the licensed music video, but what we've overlaid on this are the incidences of parody. So these in blue, songs that sadly were not parodied at all. Green and yellow were moderately parodied, and the purple circles, we discovered more than ten incidents of parody in our searches. And we see that actually a high degree of parody appears to be correlated with higher viewership on VEVO. So we can very tentatively suggest that based on this, there doesn't appear to be any explicit damage to the YouTube performance of a music video caused by a large number of parodies being present.

**(MK)** So hold on for a second. It's just a correlation, it's not a causation; it could be that chart songs which are successful are more parodied, so the causality could be either way. But what is very interesting here is that the uplift from the presence of parodies is much greater for the lower ranking chart songs, you get a much higher uplift than you do if you're already successful, which suggests to us that the presence of parodies is not only not damaging but positively helpful. So basically, there are two findings we can state, and I think they are robust. (1) To claim that the presence of parody acts as a substitute, that is wrong. It's not; parodies are not a substitute for the original, very clear here. (2) The indications are that the presence of parodies is actually helpful to the original, on average.

**(KE)** Thanks, Martin. And we can discuss this, I'm happy to discuss this further. But moving along, the other interesting finding from our content analysis was that there was actually a real range of different

cultural practices observed within the parody sample. So here we're looking at the 1845 derivative parody works, and the doctrinal view in parody is that there are largely two types of parody: target parody, which focuses on the original piece of art or artist, and makes a critique of that, and weapon parody, which uses an existing bit of art or work, and actually parodies it to draw attention to some other phenomenon, some third party act or a phenomenon. So, for example, using a pop song to discuss politics would be an example of weapon parody. In our study we discovered a third category, or what we think is a third category, illustrated by the example that I showed you, which that in some cases, perhaps the parodist is actually critiquing themselves, so they're making fun of their own lack of ability in dancing or their own sort of physical appearance or what have you. And that does make sense given the sort of cultural and aesthetic dynamics in YouTube. We also found there were some cases where people were labelling their YouTube content with the word 'Parody', therefore causing it to show up in our search results, but upon viewing the video, we couldn't discern any actual parody there, so there could be some confusion in terms of how the public understands parody, and that complicates any potential policymaking, of course, and it's likely worthy of further study.

**(MK)** Or it may play on the rules of the platform, so they may want to escape an infringement claim by using the parody label, certainly in the US that would work.

**(KE)** The other important thing to draw from this is that within the target parody category, we essentially, in our content analysis try to determine the severity of critique. So this was a subjective judgement and we worked very hard as a research team to try to make sure that we were all on the same page in terms of whether a critique was negative, overtly negative or not. What we discovered was that a very small number of the weapon parodies, of the overall parodies, were explicitly negative, that is that they made some sort of a call to not commercially support an artist or an album, and actually, a larger proportion of the target parodies were really light-hearted in their approach to the target material. So, it simply gives us a snapshot of

what's happening in terms of the expressive side of what people are doing on YouTube.

A final point, which is important to make, I think, is that we looked at the quantity of views. Now that fellow who I showed you, he'd had 23 million views, and that puts him in a very elite category of parody maker. The vast majority, 69% of our videos, accounted for 22 million of all of the total views in the entire sample, and that fellow had 23 million views. So with one video, he's actually eclipsed 69% of our sample all added together. So that simply means that most parodists, they're not reaching a wide enough audience to have any sort of impact. When we're talking about Adele, or Lady Gaga, drawing down 600 million views on VEVO, a few million here and there in parody, it's hard to see how that could have any sort of a market substitution effect, and certainly it didn't bear out in the data. But it also potentially reinforces Hargreaves' finding that there is a market there for derivative creative output, for example, parody, if those skilled amateurs and professional quality parodists, like the fellow who we just met, were able to somehow monetise their work. And we can go into a more detailed conversation about how YouTube currently prevents that from happening by its content ID copyright, automated copyright filter, which I think, would be a very interesting case of technology as it relates to copyright, but simply to show that there is a somewhat potential market for this sort of derivative work.

**(MK)** Okay. So the session really is not about that project, but to reflect on what is the nature of the evidence we produced here. So we've got obviously a lot of interesting facts about what happens on YouTube, things we didn't know before. We didn't know before that the very critical ones are really a small percentage. We didn't know before some of the percentages of creative contribution, whether they just took the sound track and voiced over it, or whether they changed the music, or the extent of the creative input of the user, we've got some data here. But for policy, so what is this kind of empirical picture telling us where the line should be for a copyright exception? And my suggestion is that for copyright, this is particularly tricky, because copyright involves both norms of transaction and norms of communication, so it's not just one set, and therefore, wherever you look in detail, there comes much more

into play. There are very few questions which could be addressed purely in economic terms, where there would be societal acceptance that this is the only perspective that matters. There are very few questions in copyright law which you can isolate in that way. Anyway, I think the evidence is good evidence in that it disproves a widely held view about the presence of parodies, but what follows from it is unclear.

So, I think that's enough and we don't need to probe this as a piece of research, because that would get us in the wrong territory. We will now set up the next panel, which will be policymakers who deal with consultations and seeking evidence all the time, and how they view what comes their way.

# PANEL 1. POLICY-MAKERS' VIEW OF EVIDENCE FOR EVIDENCE-BASED POLICY

## Speakers

**Nick Munn** (Deputy Director Copyright, IPO) – hereinafter **(NM)**

**Pippa Hall** (Economic Adviser, IPO) – hereinafter **(Pippa Hall)**

**Linda Humphries** (International Adviser, IT Reform, Cabinet Office) – hereinafter **(LH)**

Chair: **Prof. Martin Kretschmer** – hereinafter **(MK)**

## Questions & Answers

**Richard Paterson** (Head of Research and Scholarship, British Film Institute) – hereinafter **(RP)**

**Robin Jacob** (Professor, UCL) – hereinafter **(RJ)**

**Will Page** (Director, Spotify) – hereinafter **(WP)**

**Ruth Towse** (Professor, Bournemouth University) – hereinafter **(RT)**

**(MK)** Let me introduce our panel of three: Nick Munn, Deputy Copyright Director from the IP Office, Pippa Hall and Linda Humphries. Pippa, Economic Adviser at the IPO, and Linda Humphries from the Cabinet Office who worked on the open standards policy, which was just announced last week. The order of play is, we go from Nick, to Pippa, then to Linda; and I would ask the speakers to introduce themselves in their role, what they do, because for us today it matters greatly – in the evidence context – how you understand yourself, how you understand your function, and from what perspective you produce your material.

**(NM)** Thank you very much Martin, and thank you to Bournemouth for the opportunity to come here and contribute to what I think is going to be a very stimulating and, perhaps, challenging discussion, but also a very important one. And I thought – as, I suppose, some of you might call a policy-maker, that is to say a civil servant who is a member of the

policy profession and has been for about fifteen years – I might say a little bit about the policy part of evidence for copyright policy. I think that might help us set the context for some of the discussion that is going to follow.

So, what do I mean when I say, ‘policy’? I’m going to fall back on what the policy profession itself thinks, so this is from a civil service website: ‘Policy work is about delivering change in the real world. Successful policy,’ it goes on to say elsewhere, ‘depends on the development and use of a sound evidence base.’ And on a couple of other things in fact, on understanding and managing the political context, and I’ll come back to that, because that’s actually quite important, and on planning on how the policy is delivered. It’s important to stress that Whitehall doesn’t have the monopoly on policy-making expertise, and Linda, in particular, will talk a bit about ways of policy-making which are more open than perhaps more traditional ones. But what does the use of evidence mean for the policy-maker? Well, again, I’m drawing on the professional skills framework for the policy profession: ‘The policy-maker understands the history of a policy area, seeks out rigorous evidence into new approaches, analyses the quality of available evidence and takes steps to mitigate gaps or weaknesses, uses a range of sources, including the front-line and customer insight, uses evidence to test and challenge assumptions and recommends a preferred option, based on thorough analysis of the evidence.’ That’s actually abstracted from a larger skills framework, not all of which is based on evidence and not all of which is solely about evidence or the other, but it just gives a flavour. All of which is well and good, but, what is evidence? And there are some competing ideas about what constitutes evidence. There’s what you might call a modernist or scientific view of evidence: that evidence is, if you like, a set of data against which a set of hypotheses might be tested. There are different ways of expressing that, but that’s the sort of core understanding of that. There are some legal ideas about admissibility of evidence, what counts as evidence and what doesn’t. And there’s also what you might call a post-modern idea of evidence, which is evidence is a competing view of the world, the claims of which both content and interpretation have to be assessed against one another. So how do we deal with that? Coming back to the aim of policy work, which is about delivering change in the real world; which,

of course, includes deciding what change might be delivered and what shouldn't and what priorities for change might be and so on; the aim's real solutions: so, policy-makers and civil servants working in the policy process are to test possible solutions and problems against reality. And for that, the scientific method naturally lends itself. We are looking for falsifiable hypotheses, so Ruth's question earlier, 'Does copyright act as an incentive?' actually is an attempt to create a falsifiable hypothesis. Whether there is sufficient evidence to answer that definitively, I think, is still rather an open question, and I don't personally think there is a yes/no answer to that question - and I might come back to that. So, policy-makers are typically much more interested in the data against which hypotheses might be tested, than they are in the conclusions that people have drawn from that data. In particular, where people's conclusions obscure the information on which that conclusion is based, that makes it very difficult to assess in the context of other views of the world. And here we are, back in the post-modern approach again: the strength of the evidence, the validity of it, how it compares with other things. And, again, we are back to a need for predictive power. One of the key questions for policy is, 'Will it work?' and, even if you know that something has worked in another context, there are questions around 'Will it work here?' So, it works there, but why does it work? So there are questions of both the existence of an effect, if you like, and whether that is something that can be created, appropriated, made to happen in a particular context. And there are, inevitably, going to be a range of views about that. There is a corollary about that, which is, if you are coming up with evidence which is not addressing some of these questions, that actually it may be less relevant to policy-making than you think it should be.

I want to say a little bit about the avoidance of bias, which is one of the goals of academic evidence creation. It is also one of the goals, of course, of policy-making in the public sector, but one of the challenges to that is, again thinking a bit more post-modernly, that there is simply no neutral perspective or dispassionate interpretation. Textual scholars, for instance, would just say that's not available. So, looking a little outside copyright, in the hope to avoid controversy for several seconds, I look to the theologian, a guy called Walter Brueggemann (1993), who is a textual scholar. And he writes, 'Every text makes its

claim, each such claim, however, requires attention that it be recognised, and understood, and weighted alongside other texts with other claims.’ And, actually, although from a completely different field, that is not at all dissimilar to the kind of thinking that goes into the policy process, the weighing alongside other claims. Now, there is a question here of interpretative framework. I mentioned before political context. One of the key things for civil servants in this country, in particular, is that, because one is working for the government, the government’s interpretative framework is the framework within which one is analysing – not uncritically – but there is something about if the government views a certain kind of thing in a certain kind of way, then it is necessary for civil servants to relate to it. So, to take a possibly relevant, but, hopefully, abstract example: if you have a government concerned with freedom, it will think about some questions, possibly including parody, differently from a government that is concerned more about the protection of people from bad things. Now, those are both perfectly valid things that you might want government to do, but those differences in emphasis might lead to differences in interpretation. Government does not, of itself, have a neutral framework and the framework that government has is largely a politically inherited one. Now, in copyright there are competing versions of interpretative framework ... There are, crudely, two paradigms that are fighting it out which could be characterised as ‘more copyright’ and ‘less copyright’. There is a distinct view that says that copyright is a good thing, because of its incentive effect, therefore more copyright is better, and a contrary view which says, ‘Actually, there are a lot of examples of copyright having a negative effect’ and, therefore, less copyright is better. And the government’s current paradigm is that neither of those is a sufficiently good explanation of what we see in the world of copyright. So, the government’s current paradigm is, what one might call, a balanced paradigm, or an evaluating paradigm which says, ‘Actually there are arguments being made that deserve investigation – both from the more copyright and less copyright camps’. And, just as copyright is not, of itself, regarded by economists as a first best solution, but as a second best solution, this seems to fit quite a lot of the general thinking about how copyright may or may not work.



So, what is evidence for copyright policy? Well, ideally, we'd like things with predictive power –so, data about copyright that can be used to form and test hypotheses about future behaviour, that appear likely to be predictive of actual behaviour and outcomes. And trying to get that is why the IPO published its guidelines about good evidence (IPO, 2011) – about which I think Pippa might say a little more in a bit. Failing that, evidence is, and will always be, also about the arguments made by particular interests for particular ends; and that's one of the reasons why we are very keen to know who is saying what, as well as what is being said. Again, there is no neutral interpretation. We are back to Brueggemann and post-modern textual theory. So, ultimately, evidence is that which can be relied upon in decisions about change in the real world. I just want to give one, brief, example of policy-making of evidence though – which isn't a government one – which I think is instructive about ways to deal with situations which are new and where evidence is hard to come by. It's an Australian example, from the Australian National University, which was founded about 1950. When they built it, they didn't build any paths between the buildings. They found out where the students walked and then put the paths there. And there is something about that natural experiment, finding out what people do, and then finding ways to make that normative and safe that is actually a very powerful thing, so the evidence from experience which is not always best obtained, as Ruth was hinting earlier, by econometric studies, is just as important in policy-making as the ability to create numbers. Ideally, we'd like both. Which I think is probably my cue to hand over to Pippa who is good at numbers.

**(Pippa Hall)** I'm Pippa. I'm the economic adviser at the IPO who's been leading the Hargreaves implementation programme, so my role, as Martin has asked me to describe, is probably somewhere to bridge the gap between the academic evidence and the stakeholder evidence and then to formulate it into the policy and discuss with the policy-makers how it all fits together.

As Martin's already set out, we published the Good Evidence Guide (IPO, 2011), back in autumn last year, I think, setting out the key guidance on what we, in the economics and research and evidence team at the IPO, consider to be robust evidence that can be used in the

development of policy. There's been a lot of work on what defines good evidence, and I'm sure, as today progresses, we will hear quite differing views as to what that is. So, we drew on a lot of this past work, and also our experience – seeing what has been submitted previously as evidence to consultations – and we came up with these standards of evidence that can help inform the development of policy.

I'm sure everyone here's skimmed the guide, so I won't use my allotted time to go into it in much detail, but what I will say, is that our objective is that all evidence that is used to inform public policy meets the three criteria. So, the first is that it is clear; it's in clear English so that everyone can understand it, all the assumptions are explicitly stated, it's clear who commissioned it and who paid for it, and it's clear what calculations were used and that all the raw data is provided so that everyone can see exactly how you got from A, to B, to C. Secondly, it is verifiable, so that the data is included. Now, that doesn't necessarily mean that the data needs to be made public, because I understand that in some circumstances, the data may be commercially sensitive, but it can be used in a controlled environment such as the Office for National Statistics (<http://www.ons.gov.uk/ons/index.html>) when we were doing the copyright investment figures (Goodridge, Haskel and Mitra-Kahn, 2012). And, finally, it's peer-reviewable. Now, again, this doesn't mean that it's been peer-reviewed. I appreciate that often the consultation deadlines are relatively short, so it's not always possible to do that, but it means that it can be peer reviewed in the future.

So, why are these three criteria important for us? When making policy decisions based on evidence, it's vital that we are able to make these decisions based on the most robust evidence available, and to be able to reflect accurately the limitations of the data and the evidence. This allows us to make informed policy that's going to have a real impact on society, so we really need to make sure that we have the best evidence out there and that the evidence can be challenged, built upon and acknowledged.

I think one of the important points to make is that evidence doesn't always mean economics. I'm an economist, I would prefer that, but also that it can be social, scientific, legal, anecdotal and case studies. Often the case studies give us the most insight – why do people do things,

what's the logic behind it. In an ideal world, case studies and the numbers would be perfect, but that's not always possible. All evidence is important for government when we are designing policy and it's for us, as the analysts in government, to weigh up the robustness and the reliability of the evidence that's submitted to us.

One of the objectives of the Good Evidence Guide was to give stakeholders an idea of the criteria that we use to weigh up this evidence and the criteria that need to be achieved if evidence is to have a real impact. But, it's important to highlight that each of the IP rights cannot be considered in isolation. We need to understand how each of the IP rights relate to each other, and that's both nationally and internationally, and I think all of this needs to be balanced with ensuring that the research that we do commission and carry out, whether stakeholders, government or academic, actually asks the right question, so what is the real issue we are looking at, and the research needs to be flexible enough to keep up with the fast-moving policy landscape. It's therefore really imperative that we all get together whether it's the stakeholders, the academics and the policy-makers to ensure that, early enough in the policy lifecycle, we are really identifying what the real issue is and making sure that the research we do answers that question. There's little point in producing technically brilliant research on the econometric basis, if it doesn't answer the question, because you're going to have no real impact on the policy then.

So, finally, for me, as a government economist, working in an area where the landscape is rapidly changing and where there is limited, and often conflicting, data, I welcome any attempt at coming up with new and verifiable data, as long as the limitations are clearly stated, all the shortcomings are acknowledged. I think that any new evidence can be built upon and we might as well start from a low base, and then we can build upon it. We certainly don't want to be in a place where little or no evidence is submitted because people are afraid that it may be rubbish, and the team really do welcome the opportunity to get involved in the early stages of scoping research, to make sure that academics, stakeholders, policy-makers get the most out of that research. We all want to meet the same objective, which is to produce

and deliver robust and independent research which has the ability to influence and impact on the development of national and international policy. So, we're all after the same thing.

**(LH)** Thanks, I'm Linda Humphries from the Cabinet Office, and as Martin mentioned, I've just run the Open Standards consultation (<http://consultation.cabinetoffice.gov.uk/openstandards/>) and delivered the final policy which was launched last week. What I'm not is an economist and I'm not a policy-maker, strangely enough. I have a role which is more related to technology, to technology strategy, particularly in gathering and sharing case studies, knowledge with other governments as well as our own, and my background really is communications, so, that just gives you flavour of the range of different people who work in policy-making in government as well, I think, because what I do have to do is rely on experts in the Cabinet Office, who are policy-makers and who are from an economics background or from a legal background and draw all of that together informing what is essentially a technology policy.

So, I just wanted to give you a little bit of an insight as to how I approached this particular problem, and I'll talk about it in a wider sense in terms of open policy-making, which is something that is quite close to my heart, and is something which our Cabinet Office is also leading on.

So, I started off with a problem that we had a stated commitment from government that we would have open standards in government IT. There are a lot of unknowns around that, about what it meant, about how it would be implemented, whether or how it could achieve the goals that we were hoping it would achieve, and we'd had quite a lot of experience of lobbying – people coming in to talk to us, arguing that we were doing the wrong thing, that what we were trying to do would essentially not meet the aims that we were setting out to achieve. We were very aware that what was happening was that it was the usual suspects, people who were used to talking to government, the people who were used to providing technology for the government - the large corporate organisations who were coming in to talk to us - and we

weren't really hearing the other side of the story. And that's why we set out to run a public consultation, and to do it in a really, really, open way, so that we could have open discussions, we could try and get some kind of self-moderation in those discussions in what is well-known to be a very fraught and emotive area - in technology circles at least. Most people don't know anything about it, and don't need to, but I think one of the essential things we were trying to do was just to bring some sunlight into it, and to make sure that people understood the issues and it wasn't all based on hype.

So in terms of open policy-making, if you're not aware of it, there's an open policy initiative with an associated website which is [www.openpolicy.demsoc.org](http://www.openpolicy.demsoc.org), which the Cabinet Office and the Democratic Society are using to gather information and share knowledge about all things that relate to policy-making including gathering evidence, what constitutes good evidence, but also in the approach that we use in talking to people, how we run these things, how we analyse what comes back and although these things are running in parallel, I was running my consultation at the same time as this debate was starting in public; we had a very similar ethos to start with, and that was that we need to make sure that we're reaching the right audience. We need to talk to people in ways that they understand, so the questions that we put in the consultation document weren't necessarily the questions we needed to ask in different environments. It was the same root of the question, but we needed to turn it around a little so that people understood what it was we were trying to draw out from them.

We ran it primarily online, and that, in itself, was quite an interesting experience. We wanted to make sure that the comments went up live, as people made them, so there was a little bit of moderation, but it was done very quickly, and it only stopped anything that was really the normal kind of moderation catch-all, in terms of profanity or if you were accusing a particular person of doing something, or advertising, it was that kind of flavour. And, essentially, what we wanted to do was get people to make those comments, for those comments to appear straight away and for their names to be against them, so that we could try and get some debate generated on line and a little bit of a flavour of

whether people agreed with those statements or not. That tended to happen, because in a public consultation we have to not limit how people talk to us, and we had other channels on which they could talk to us as well and that included e-mail, letters, public round tables and, in some instances, submission of academic or professional articles as well.

The interesting thing that really came out from running it online is that a lot of people who were on the open side of the debate rather than those who were opposed to what we were trying to do, or had real issues with how we might be affecting their organisations or their businesses or their way of life, the open people went on line and the people who had got real issues with us decided that e-mail was the best way. So, that debate didn't really happen in the way that we expected it to. Where that really did happen is when we had public round tables. And they were a fascinating experience in themselves, we recorded all of them, and they are all online so that people can hear how the debate went and what the points were that were raised, and essentially all this open policy-making activity is really supported by the new government principles on consultation that were published this summer, and also the civil service reform white paper, which essentially is encouraging policy-makers to be more open about the way in which we talk to people and the way that we listen. The term 'messy collaboration' is something that I've recently come across which I think is a Clay Shirky ([www.shirky.com](http://www.shirky.com)) term, I don't know if it's his or something that he's co-opted, but essentially what we found, particularly through the round table sessions, was that people were really influencing the way that we were running the consultation. The more we came across issues, the more we targeted areas where we thought we were missing views and we could then set up a new round table in a new part of the country, talk to different networks to try and find out who the people were that we needed to be talking to, because we just weren't reaching far enough. So, we ended up talking to open data communities in Manchester, to open source communities in Bristol. We had SMEs in London, we had one round table which was essentially entirely run over the telephone, because we needed to talk to voluntary and community organisations who just didn't have the resources to come and meet us, so we just wanted to plug every gap that we could, and evolve the way that we ran the evidence-gathering as we went. I think

from doing that, we raised the profile of the work we were doing. More people got to hear about it, and we ended up with a guerrilla evidence-gathering activity, whereby someone out in the open source community actually set up their own version of our consultation, promoted that around their peers, and that evidence came back to us as a 'job lot' – here you go; these are the answers we've collected! Because they used our questions to do that, we were able to take that on board, it was evidence that fed into the consultation, was actually a substantial part of our evidence base in the end. And it was generating that kind of interest in the community, getting people in the community excited about what we were doing, getting them to understand the issues which would help to do that, and enabled them to talk in their own community what their thoughts were and then we get everything fed back to us.

To make sure that we had some rigour in how we were interpreting and analysing the evidence, we actually came to Martin. So, we commissioned from Bournemouth two reports [<http://www.cabinetoffice.gov.uk/resource-library/open-standards-consultation-documents>], one was a review of the evidence that was existing, that was out there, that could inform our thinking on the economic aspects, the legal aspects of the policy that we were proposing, also to look at some of the material that was coming in as evidence through the consultation as well, to take that on board. But, we also commissioned Bournemouth to do the analysis of the consultation responses, and there were a couple of important things that came up through that, I think. One was that we thought it was essential to publish the methodology as well, so that people understood how we treated it, and that they understood how we allocated typologies to respondents, that kind of thing, so that they could have disagreed with us if they want to, they could see how we'd worked everything out, and that forms part of the analysis in our thinking when we're making the policy. The other thing that was really interesting that was actually brought up by the researcher who did the analysis is that because we hadn't started off with a closed set of multiple choice questions, we hadn't modelled our world view, I can't remember the technical term for it.

**(MK)** Grounded theory

**(LH)** She used grounded theory to flip that on its head, find out the flavour of the themes that were coming through in the responses and then allocated the responses to each one of those self-selected multiple choice answers, if you like. So, it meant that we didn't force people to choose something; they actually came to us with as many creative ideas as they possibly could, and it was kind of up to us to work out what the answer was from that. And I think it was quite a refreshing way to deal with this particular issue, because there could be one or two gems out there that would be missed, if we just gave a static view of the world. I'm not sure it would work in every instance, but for us I think it was really useful.

I just wanted to touch on a couple of the issues that came up whilst we were doing this. As any informed evidence-gathering policy-maker, I was challenged during the consultation process to think about how we were going to treat responses that came to us that were just a sentence that was a very emotional response to what we were doing. You've got to do this; it's the right thing to do. How do you deal with that, compared to a 40-page, peer reviewed academic paper? And what we thought we needed was to weight the responses in some way, but taking advice from Bournemouth, we knew that was absolutely the wrong thing to do because it is not a tool that's used in that way. So what we did instead was, we had the quantitative side where we counted out how many people were supporting what we were doing, but we also had the qualitative stuff that delved into what the points were that were being brought up and we considered each of those points, either as a summarised selection, or, if they didn't fit into our summary, we considered the ones that were outliers as well. So we looked at all the ideas that came up and responded to those, as well as having a flavour for what the mood was, if you like, in response to each of the questions that was posed.

Just one other point, I want to bring up is the burden of consultation. I think we were asking some really challenging questions, and I think it's really, really important to recognise not to set the bar too high when we're trying to gather evidence, because a lot of the people we needed to talk to would be frightened off – we had one person come along to the stakeholder round tables who ran a pet shop. Never in my wildest



dreams would I have thought she would be interested in this policy, she had some really, really interesting and valid points to make, and that goes back to the case study idea that, unless we understand what the barriers are for people trying to use this technology, we can't look at what the causes of those barriers are, and we need to understand how what is happening currently is affecting people so that we can come up with ways of avoiding it.

**(MK)** Thank you. I think that was an excellent mix of perspectives and quite typical of the different approaches to evidence. One, the economist, takes a look at the nature of evidence, what are the features which make good evidence; the other perspective looks at the process, good evidence arrives through an appropriate process. So, they are very different starting points for producing evidence, and I think it's great to have them on the panel in this form. Nick Munn, as any good civil servant, managed to say very little ... But I think that's the skill of a civil servant in a way.

So we have got time for a number of questions. Richard Paterson...

## ***Questions & Answers***

**(RP)** I'm from the British Film Institute.

**(MK)** In the same spirit as we have run the whole event, would you say what your function is, what do you do.

**(RP)** Oh, my title is Head of Research and Scholarship, and I am also quite heavily involved in IPO conversations at the minute. Obviously to Gowers (2006) and Hargreaves (2011) we submitted a lot of evidence, sorry views.

I think you were very unfair to Nick, because I do think if you are buried in the political process, the policy process, what he was saying is actually very valid and basically I would ask Nick a very simple question, 'how are power relationships involved in the terms of reference for reviewing policy?' I'd also be interested to hear what Pippa thinks about this. The Gowers review was started by Gordon Brown, that is by the Treasury, not by the IPO. The Hargreaves review

was started by David Cameron, the Prime Minister, not by the IPO. Now, why did it happen this way? It's an interesting question, I think, and relates back to what Nick was saying, there were a lot of underlying political factors involved. But who is expected to implement the Review conclusions? It's the IPO; and who, then, stands in the way? – the lobby groups with a range of interests. And the example, I would give is the Digital Economy Bill, where the orphan works and extended collective licensing clauses got dumped in the wash-up at the end of the last government. Various lobby interests came into play.

So, the question I'm going to ask is, 'How do you weigh the evidence?' I think Pippa touched on that: how do you weigh the evidence in the political process, because I get the sense that evidence from the Motion Picture Association, the US Studios, probably has greater weight than the evidence from a small SME. I would contradict that slightly by the example of Stop43 ([www.stop43.org.uk](http://www.stop43.org.uk)), which is the photographers' lobby group that was set up to oppose the orphan work provision in the Digital Economy Bill – and arguably were quite instrumental in stopping that clause being introduced into law. So given the complexity of factors how do you weigh the evidence?

**(MK)** Who wants to take this; any of you?

**(Pippa Hall)** Shall I? I think in terms of weighing up evidence I would really hope that as a government we don't just listen to the people who can pay for the best research and who have the loudest voice, so I wouldn't automatically say that that is the case. The point about trying to weigh up the evidence is trying to look at actually what the real economic or the real case study is actually saying behind the emotive spin that may be put on it. So I think, when we weigh it up, it's looking at what the actual story is telling us and what the evidence is showing rather than the emotive spin on it, and trying to weigh it in that sense. It is by looking at it and making sure the numbers stack up and that there isn't a spin on them and that it does apply across the board. I think as a government economist I do try hard to make sure that the evidence the SMEs give us isn't just disregarded because it hasn't got an academic name on the front and really try and look at it, and see how we can put it into the evidence.

**(NM)** There are two things I'd like to say. One is that Linda has described a particular process of trying to make sure all voices with an interest are heard, and we understand that consultation is burdensome for anyone who takes the time and trouble to get involved, but IPO and, indeed, the Gowers and Hargreaves reviews worked pretty hard to try and get a range of views, not just the most readily available to try and understand the whole landscape. The other thing I'd point back to, in context, is, when I talked about the factors in shaping policy, one of the ones that we acknowledge as the policy profession in government is the political context, and some of what you've described would be things I think that operate as I think you were saying in the political realm, not necessarily in the realm of evidence. That's not to say there's no evidence for those views, but some of that activity would fall outside the strict purview of evidence. It's not treatable logically; rationally, you can understand those views are there, but they don't necessarily relate terribly well to what the government's actually proposed in some cases.

**(RJ)** I have a question, what is the difference between evidence ...

**(MK)** Robin, would you introduce yourself?

**(RJ)** Robin Jacob, Professor at UCL. What is the difference between evidence and lobbying? I'm about to tell you. I don't think there is any difference. And is there a difference between good lobbying and bad lobbying?

**(Pippa Hall)** I think lobbying for me and the difference between lobbying and evidence is that lobbying is the spin put on the evidence. So, when I'm talking about evidence, I'm talking about actually looking at the data, or the example that you're going to use if we take the case study. And, actually, just putting the data out there and the evidence so that everyone can decide what the conclusion is, whereas lobbying is taking that evidence and putting your own spin on it to lobby the government. So, there have been a number of research projects recently where partners that you wouldn't necessarily expect to get together have done pieces of research, where they have just put the evidence out there, and they haven't tried to put the political spin on it, and I think that's the difference for me, as the economist.

**(NM)** I think there's some truth in that, that lobbying often features quite heavily inference from information, and it may also be aimed at the political sphere at least as much as at the evidence sphere. I am sure that this is one of those irregular nouns that I provide evidence, he or she lobbies, so and so is indulging in lobbynomics. It's one of those things that no one ever likes to think of themselves as lobbying when they are presenting a point of view that they sincerely and passionately hold, and that's true of many of the people that we come across in talking about copyright.

**(WP)** Will Page, Spotify. Just to come back on Robin's ...

**(MK)** Can you say what your role at Spotify is, that's the rules of the game today.

**(WP)** OK, Director at Spotify

**(MK)** With a brief for what, sorry, it's important to know.

**(WP)** To bring economic insight to Spotify's business. So, just with Robin's point, there is an assumption to your question, which is lobbying is simply bad, and evidence is therefore good, and that comes out in the answers from the panel, but you could reverse that logic by looking at, take DG Competition (European Commission's Directorate General for Competition) or any competition authority for example, that has to resolve the case, and that case happens to be narrowly defined. The competition authority says 'I want to resolve that case', for all the best evidence in the world, having a narrow definition of the case you are trying to solve narrows the overall objective of that firm or the complaint or the issue at hand. Lobbying may be required to broaden the lenses and realise that you can solve this narrow problem but you just send the problem elsewhere. So I just want to give an example where it's not necessarily the case that evidence is good – lobbying is bad, evidence in the best laid plans of mice and men may not solve the overall problem and lobbying could actually raise broader awareness, and that could be a multi-national firm, that could be a charity, lobbying to say the case doesn't capture the problem.

**(NM)** I'd go back to the paradigmatic thing I was talking about, that part of evidence is about providing the paradigm of interpretation; that

what you're putting forward is not neutral; you are actually putting forward context at the same time as you are putting forward what are likely to be the observables from the real world, if you like. I'm from the 'unsocial' sciences, so I like to think of observables as a good physical scientist. So, I don't think that the articulation of perception about a wrongness of focus is necessarily lobbying, but lobbying may well be used in order to make that point. And that's a valid part of the political system, what it isn't is strictly within the purview of evidence, although evidence may very well be involved, indeed one likes to think that it will be.

**(RJ)** I see what Martin's exercise was, was genuine attempt to collect evidence, measuring something. He will recognise has its limitations. It is limited to YouTube, pop music; limited in all sorts of ways; but it was a genuine exercise in asking does this matter or not? And seeing the results, and there was nobody who had any views on what the results were going to be, that, I understand is the kind of evidence which a scientist would call evidence. Most of the other things are not, and one of the problems that I see is that, unless somebody has a point of view they want to get across; they're not going to respond to any of this stuff at all.

**(RT)** Let me just say very quickly, the first evidence or the first data – I'll call it that – on the creative industries came from the United States, being measured by Stephen Siwek (Siwek, 2011) who's a very good economist, and financed by the Intellectual Property Alliance of America, and they continue to do the same thing, and of course, because people like my Society for Economic Research on Copyright Issues ([www.serci.org](http://www.serci.org)) have weighed in on questions such as where do you get these data, and what are the assumptions behind it, which are often very hard to find out because the national income accounts have been very poor on this area, but people regard this as very firm evidence. It's in every government policy document that I've seen. The creative industries are growing at 5% or 8%, and you have to do an awful lot work to show that that is not the case, or that it is doubtful. Casting doubt is an important part, and I think it would be very hard, for however well-resourced and excellent your work, it would be to reveal

all of that. And, I may say, I had a go at some of your own figures which I didn't think were also very easy to ...

**(RJ)** That £2.2 billion (Hargreaves, 2011) at the beginning of Hargreaves?

**(RT)** Yes

**(MK)** Well, I'm sure that the GDP debate will resurface again.

# PANEL 2. STAKE-HOLDERS' VIEW OF EVIDENCE FOR COPYRIGHT POLICY

## Speakers

**Peter Bradwell** (Open Rights Group) – hereinafter **(PB)**

**Frances Lowe** (Regulatory and Corporate Affairs Director, PRS for Music) – hereinafter **(FL)**

**Andrew Proddger** (CEO, BECS) – hereinafter **(AP)**

**Jeremy Silver** (Chairman of Musicmetric and Specialist Adviser on Creative Industries to Technology Strategy Board) – hereinafter **(JS)**

Chair: **Prof. Hasan Bakhshi** (NESTA, CREAG) – hereinafter **(HB)**

## Questions & Answers

**Lee Edwards** (Lecturer, University of Leeds) – hereinafter **(Lee Edwards)**

**Tony Clayton** (Chief economist, IPO) – hereinafter **(TC)**

**Will Page** (Director, Spotify) – hereinafter **(WP)**

**Tom Hoehn** (Visiting Professor, Imperial College) – hereinafter **(TH)**

**(HB)** The only rule that we're going to impose on the panel is that the evidence for copyright obviously is somewhat controversial but the focus here is not to debate that evidence, rather to discuss what constitutes valid evidence to copyright policy. What are the assumptions from a stakeholders' perspective that are made about the nature of evidence and that we need to be explicit about if we're going to answer that question? What are the assumptions that we make about copyright policy in answering that question and also, very much inspired by the comments that Linda made in the previous session, from the stakeholders' perspective what policy processes would support the gathering of valid evidence for copyright policy? Peter Bradwell, can you kick off please?

**(PB)** I am Pete Bradwell. I'm from Open Rights Group and I've been working, since I joined nearly two years ago, on copyright policy, which has taken in the Hargreaves Review and subsequent consultation as well. I've also been working on our copyright enforcement work.

When I was thinking about this I felt like there was an important distinction to keep in my head, which was policy we think that's been made well and policy that we agree with. I sometimes feel that when a policy process is run badly it makes it easier to confuse those two things and makes it easier for those two things to become muddled in the debate. I'm going to talk a little bit about why I think some of the problems with some policy-making, particularly in DCMS, make that situation arise. In doing so I'm going to talk not only about the good evidence that we might look for and what constitutes useful, constructive, helpful or transparent evidence but also how policy-makers listen to it, deal with it and process it, and the sort of process they run. I'm thinking there of the standards they expect, which we've talked about a little bit already, the analysis and effort they put into gathering evidence and listening to people, the inclusivity of that process and who they listen to, and the values and priorities they have that the policy-makers and politicians are bringing to this, and some of the priorities they are placing on different types of evidence. There are lots of examples of where the policy processes have failed to do that and as a consequence that's contributed to increasing the confrontational nature of the debate. It has contributed to a sort of mistrust in the area and contributed to that situation where we do mistake disagreement for bias or incompetence.

Regarding good evidence, it's easy to look at the IPO principles and say 'That's a really good start.' Transparency, I agree, is really important, not only in the data and methodology so that we can scrutinise where figures and opinions have come from, but also who's saying them, why they're saying them and the relationships involved in producing the report. It was alluded to in the previous session. I wouldn't necessarily go along with people are tainted by association and the fact that a particular report was produced by someone with a particular interest makes it useless because at the end of that path lies a situation where you distrust anything produced by anybody that you disagree with. It's just important so that you know where evidence is coming from and you can understand who's saying it and why, as much as ruling it out of contention.

As we look to appreciate more what good evidence looks like I would hope that we don't discard things that aren't hard quantitative analysis.



This was something that was talked about in context of the Open Standards Consultation. There is a role for case studies, stories, examples and opinion, which helps point policy-makers in the right direction. It helps them understand who is affected by a particular proposal and why, and where to look for more evidence of those perspectives and opinions. I hope we don't lose sight of the value of that qualitative work as well.

Evidence that doesn't meet the highest possible standards of transparency, clarity and verifiability isn't totally useless. It can be indicative. It can help us understand a little bit about what we're looking at but it will obviously not be something that you'd want to base a policy on or base your whole decision-making process on. Unfortunately there are lots of examples in copyright and largely copyright enforcement where those standards haven't really been lived up to. You can look at the Digital Economy Act impact assessments where, for example, the impact of copyright infringement on music was cited from a study as just *Jupiter 2007*, which might be the most amazing study in the whole world but if you can find it and get it publicly available I'll give you some money because it's difficult. The DCMS admitted to us that this is something they've basically taken on trust that they've just cited in the impact assessment with no real justification or analysis, which isn't an ideal situation.

A similar thing happened with the film policy review that came out of DCMS. I think it was in January this year. I apologise if this seems like I'm criticising DCMS in exclusion. They just seem to have more examples than other departments. They quoted a figure of around £500m for the impact of infringement on the film and television industries, and they cited an organisation that doesn't exist: Ipsos Media CAT. I think they meant Ipsos MediaCT. The figure was wrong I think and it came from a British Video Association study. I met them and talked them through it and it seemed like that figure was actually the impact of infringement on the whole of the copyright industries, rather than just film and television. DCMS managed to quote the wrong organisation, the wrong figure and cite a study that's not publicly available. It might be legitimate for the British Video Association not to publish publicly their research but it falls on DCMS to say that's the case and explain why they think that's a useful figure to use and also to probably use the right figure when they're doing it.

These problems speak to the role of policy-makers in gathering evidence and that's really one of the clearest things that I've learnt over the past 18 months. As much as we can talk about the need for good

evidence, policy-makers have an important role in setting those standards and making sure people understand the standards they have to live up to. This has been talked about already but in the political context the evidence lives in, there is a sort of economy of influence that evidence is published into. We have to recognise that as much as it would be nice if we thought 'Let's identify a problem and get all the best evidence. This tells us the right answer; we'll do that.' Actually, there's a whole other set of influences, political decision-making, status, perceptions of influence and so on that affect these things.

Policy-makers have an important role in setting what's valued in that economy of influence and helping people understand when they're going to be listened to, what sort of evidence and contribution is going to have value and how people should try and present their opinions and their evidence to policy-makers. That involves setting out the standards they expect, which is something the IPO have started to do with their principles, adhering to them themselves and being really clear about what they expect and when, being open and clear about who they want to hear from and making sure that they're inclusive in listening to a broad range of perspectives, being clear about what their values are and what they're prioritising and why, and spending time analysing the problem that they're trying to deal with properly and clearly. In a field like copyright where, as has been mentioned, there are multiple competing perspectives it's really important that policy-makers set that clear agenda through some strong political leadership so that people know that there's an inclusive process going on. The consequences of not doing that is just an increasingly heated, confrontational environment where it's as much about how loud you can shout at each other either directly, through the press or in round tables, as how robust an evidence base you have behind your position and how good an argument you make.

As someone mentioned that lobbying isn't bad in the sense that you can't expect people with either a particular industrial or political interest not to make their case really forcefully and that's absolutely right they do. It is policy-makers' role to make sure that's happening in a clear and robust way and that the way that happens involves analysing the best possible evidence. I place whatever blame can be attached to whatever bad copyright policies have happened in the past more on policy-makers than I do to whatever lobbyists have been involved. I include Open Rights Group in a lobbying sense that I don't externalise that activity to other people.

We might come onto some more detail in the discussion but I'll finish on some of the limits of evidence. There are going to be many competing perspectives and lots of different kinds of evidence. There's not going to be one dataset – the smoking gun that explains how things are – and you're not going to be able to derive an 'ought' from the 'is', as people say. You're not going to be able to be told what to do from the fact of any one organisation's case. It really falls on the policymakers to take that political leadership on and to set out an inclusive and open process so that the people involved can contribute the evidence they have and they know where it's going to end up and what kind of decisions are going to be taken on the basis of it.

**(FL)** Thank you very much. My name's Frances Lowe. I'm Regulatory Affairs Director at PRS for Music, which is a music rights collecting society representing 92,000 direct composer and music publisher members and many millions across the world which we license here in the UK. I was going to open with this personal perspective. I've found the policymakers' panel very useful. I am a competition lawyer and therefore I have worked for the last 20 years very closely with economists in analysing the problems and making the case and I make no exception. I now am in house. I represent an industry body and we are there to explain what policy means, what current practice is and what good policy might be in the field of copyright or copyright licensing. For that reason when we come to the question of 'What evidence?' I have always felt that it is a mixture of legal, economic, case history and also the voice of the individual members, and in our case, the individual members of the organisation who rely on us to ensure that their voice is heard well enough.

There have been many studies about collective management and lots of evidence. I would start where Ruth started. The MMC inquiry on Performing Rights was a huge, robust inquiry into collective management, all of its disciplines, governance, transparency and operations. It may not have been the best verdict for PRS but the set of recommendations were implemented and have transformed the model of collective management into what it is now. You've also got recent studies from PPL on two-sided markets in the economics of collective management (cf. Page 2007) and you have PWC (2011) who, for the Hargreaves process, did a really good piece of work for the publishing sector on secondary exploitation and collective management of secondary use of works. There was some really good evidence there.

What I wanted to do was start with a little bit of criticism of process of where we are and then turn to something a bit more constructive. It's easiest for me to talk about this in relation to the Directive on codes of conduct and now the parallel impact assessment on a Directive for management. I also would say in terms of the policy goals we support the policy goals of both those processes, which is to bring transparency and minimum standards to collective management and to ensure that it works, improves and is at its best. But how both sets of policymakers got to that goal has been a very different process and we have been involved in both.

Take the EU process: they have, for several years, issued questionnaires, had hearings, updated their questionnaires and the market research and gone out to consultation. What you have is a 197-page impact assessment, which goes into a lot of detail about how collective management might be impacted by policy change and different options analysis. The IPO process and codes of practice were published with its first consultation on impact assessment, which picked up on the Hargreaves criticism, which was that there was evidence of inefficiencies, a paper on actual reporting and behaviour of a collective society, which merited codes of practice. It would have been valuable to have unbundled what those criticisms were and given the subject of the policy the right of rebuttal and the right of response.

Where we are now we have a relatively thin impact assessment (Hargreaves, 2011; Supporting Document EE Economic Impact of Recommendations) which has now been updated and issued with the clauses on collective management orphan works and extended collective licensing for the Enterprise and Regulatory Reform Bill. That impact assessment cites evidence which has been gathered from academics or the consultants BOP on collective management, which collecting societies haven't yet seen. I say nothing. Until we see it, it's impossible to know whether the evidence and input are accurate at this particular stage. It's important we have trust in the process and that we have a process which is reviewable, particularly when you have been the subject of that review.

Today is about asking 'What are the right questions?' I would urge for more setting of the right questions together in debate in stakeholder dialogue. The IPO have a good working group with collecting societies and their licensees together. I would like to see that strengthened with the members of collecting societies who have a really important role to play in explaining why they choose the model they choose. We do want to look at best practice. The EU process has been good and the

Australian process of examining collective management has also been extremely good.

We have got an opportunity now, given there is self-regulation and regulation going in parallel, to set the metrics for whether that policy is working and whether it was set right. To do that we actually have to look at why it was put in place, the reasons it was put in place and good data underpinning that. I think that we have got an opportunity to be very constructive now to make sure that policy adopted now can be evaluated going forward and to ensure it's achieved its goals.

**(AP)** I'm Andy Prodger. I'm the chief executive of BECS, which is the British Collecting Society, which looks after audio-visual performers. We have just over 27,500 performers represented at BECS and their estates. We are somewhat of a strange creature as, within the United Kingdom, unlike France's representing music, audio-visual performers actually don't have any licensing rights within the UK and have very little in the way of copyright. It's interesting, I suppose, why I would be on this panel or have an interest.

In giving my background I'm not an academic and I'm not a lawyer. I was a trade union official for many years and was fortunate enough to represent actors from the late nineties until about five years ago when I was asked to become the chief executive of BECS. I suppose the basis on which I come from, and certainly BECS comes from, is the protection of performers and their rights.

It's interesting, recently looking at a piece of information from the Chartered Institute of Legal Executives (<http://www.cilex.org.uk/>). They describe employment law as the difference in relation to normal contract law because there is a requirement, because of the unequal nature of the relationship between an employer and an employee, that legislation is required therefore to protect the employee. I suppose to an extent that's where I start from in looking after performers because the most recent Skillset study (<http://www.creativeskillset.org/research/>) in relation to performers states that the average earning of a performer in the audio-visual industry is less than half the national average and that the average number of weeks a performer works in the industry is about 12 weeks a year.

This year BECS will have distributed just over £12m to audio-visual performers. The average payment per performer, and we paid out to about 17,000 members, was just over £500, with the top figure being £22,500 to an individual performer. Those monies predominantly came from the rights that exist for performers within Europe, private copy levies, communication to public levies, rental and lending levies, cable retransmission monies and some monies – about £2.5m – come through the collective bargaining that the union has managed to achieve within the UK. Just to finish that kind of picture, the picture that I have to deal with when looking at contracts of performers and whether or not I have a right to claim on their behalf, is that a standard clause in an audio-visual performer's contract throughout the world is that all rights that the performer holds now and in the future are invested in the producer in perpetuity in this universe and any universes subsequently discovered. That is a real and daily contract, which performers are asked to sign.

When we look at the question of copyright our view of copyright is perhaps a little wider than some inasmuch as, of course, performers don't have copyright. They have neighbouring rights and performance rights, which exist as part of the copyright regime, most of which in this country are exclusive rights, although there are remuneration rights that exist elsewhere.

In looking at what is evidence I thought Richard's (RP) comment in relation to how do you weigh evidence was quite an interesting question. In trying to provide evidence there is a difficulty in the UK, and almost a scepticism, in relation to how that evidence will be weighed and what the likelihood of the outcome of that evidence will be, particularly, as we mentioned earlier, that in relation to this particular field, we've been asked the same questions on numerous occasions over the last few years with Gowers and Hargreaves, the Digital Economy Act ad infinitum, and many of our answers remain the same. It's almost like being asked the same question in order for you to be able to get the right answer eventually or the answer that is liked. Again, as Richard says, these studies came out of different political departments, not necessarily the one that you would expect them to come out of. As we know, the most recent one followed a now infamous lunch between the Prime Minister and executives at Google, following which I attended a number of round tables in order to hopefully try and provide some evidence, most of which had Google sponsorship attached to them. You can imagine there was a certain amount of scepticism in relation to what might then come out of the sausage machine at the end. I think that's very unfortunate because the IPO's position is a very

positive position. I know the people who work on that evidence absolutely try and do a very pure job on it but you can understand that it is quite difficult sometimes to accept that evidence that you try and provide will be taken in that way. That also leads to why there is so much lobbying because people feel that perhaps other voices have a loudhailer directly into government on certain occasions and therefore there is a requirement to try and balance that.

In relation to what is good evidence our view is very much based on evidence should be factual, clear and transparent but we have difficulties as performers in trying to provide that evidence because much of our evidence is not economic evidence. It is not necessarily even past evidence but evidence as to what are the consequences potentially moving forward. Therefore, I would always ask the question in relation to evidence, how evidence is weighed against impact assessment. Are they the same thing? Are they two things that run hand-in-hand?

I will give you a story – I won't call it evidence – in relation to performers and performers' rights in the UK in the past. Up until 2002 people working in the cinema films in this country did not receive any ongoing secondary-use payments for the use of their work. In television they did. Yesterday an actor who I met on a number of occasions – a lovely man, Clive Dunn – died. He lived in Portugal, had a very nice villa and from the day he worked on *Dad's Army* as Corporal Jones continued to earn secondary-use payments on all of those performances – contractual payments from the UK and statutory payments from Europe – and had a very nice standard of living, whilst people continued to enjoy the work that he was in, and we still do. In fact, I listened on the radio this morning – Radio 2 – where the DJ was saying that when *X Factor* is on one side he's watching *Dad's Army* on the other side.

Take Clive who died at 92 and compare him with an actor, Joan Sims, who died a number of years ago now in poverty, destitute and suffering severe depression, who appeared in ten *Carry On* films. It was nice of Michael to put up the slide earlier. She did not receive another single penny for the use of that work, despite the fact that in exactly the way as *Dad's Army* it continues to be enjoyed, and hopefully for generations to come. So did the work that she and others performers did in relation to the fifties and sixties as far as *Carry On* films are concerned.

What is the social evidence that we can provide from that example in relation to the potential detriment when something doesn't exist? If we

look at the current set of copyright evidence, when statements are made that because, for example, there is no private copy levy in the UK as current, therefore introducing a copy regime without compensation would have no detriment. The fact that something doesn't necessarily exist in this country does not necessarily mean that both today and into the future there may not be a detriment as a result of not applying it. On that particular issue BECS does collect private copy levies for British performers whose performances are used abroad and part of the money that we sent out this year will form part of those levies. Is it possible that by introducing a situation without compensation under legislation, which defines that as being fair under the three-step test, that might have a consequence in the private copy regime across Europe and potentially on the monies that British performers can subsequently receive if, after all, our own legislation states that there is no detriment to the performers for the use of their work in private copy?

What is evidence in relation to social evidence is not always available to us looking backwards and sometimes it is difficult to try and identify what we believe is social evidence. For instance, social evidence of fear of what could be the case in circumstances moving forward.

Frances makes the point it is important to ask the right questions. That's vital and it's also vital that the people asking the questions understand what they're asking because I don't think that, both within the UK and within the EU, it has always been the case. Citing examples of that, I've spent a lot of time trying to debate extended collective licensing and the idea behind extended collective licensing in the UK and within Europe and also the question of orphan works and to try and give evidence as such. What I have found is that, in the main, the people who are trying to identify and debate the policy do not have a wide enough view of actually the impact of the rights regime that exists. For example, when orphan works was looked at in Europe specifically, the rights of authors were the rights that were solely identified and there was almost an unwritten assumption that the rights, as they affect authors, would therefore work for everybody else. The same is true in relation to extended collective licensing and I raised a point during one of these meetings where the debate with BIS (Department for Business, innovation and Skills) insofar as extended collective licences was concerned, was talking about a voluntary extended collective licence within the UK in order to open up archives, make available works to the public with fair compensation moving forward.



I asked the question that said if you have an author, that's fine. If you don't know who the author is, where that author is, that author potentially has the right to subsequently come back and withhold their right but there is an ability to move forward and make work available subject to fair compensation and that compensation being collected.

How do you deal with a situation where you've got 200 actors, for example, in a film? You might have, as with the *Carry On* film, the second spear carrier on the left as a performer who actually doesn't think that the £10 that they receive, which is about how much an actor will receive for their use on the BBC iPlayer, for example, is fair enough and I'm going to withhold my right. What are the chances of the individual production company, who is seeking to exploit and the archives being opened, painting out that individual from the relevant frames – it's not going to happen – or taking the frames out and changing the story? What might work for authors in those circumstances in relation to their rights cannot work in the same way for audio-visual performers per se – and it's not just that – where you will have 200 or 300.

There is actually a programme where that is absolutely true and I will give it as an example, and that is *Edward and Mrs Simpson*. For those of us who are old enough to remember the TV series *Edward and Mrs Simpson* it was a very good series with a very big cast. It was based on the life of the abdicating king and Mrs Simpson, which has never seen the light of day again, which is quite surprising given the historical nature of the programme. The reason it has never seen the light of day again is because one actor, amongst a cast of over 200, withheld their right, which they held at the time, to say 'I don't want that programme ever shown on what was identified as the secondary market. I only ever want it shown in relation to terrestrial television.' The cost of terrestrial repeats being so much more than secondary repeats on secondary markets means that programme has not been shown again. The country has missed out, in my view, on what is a fantastic drama giving an educational historical event. For argument's sake, let's say 200 actors – it's actually slightly more. One hundred and ninety-nine of them have missed on the potential payments that they would have received from the further exploitation of that film. The writer and music have missed out.

You cannot deal with rights in exactly the same way for the whole sector in relation to copyright, so when trying to identify the question there has to be recognition that the questions may be different. Just because we are the creative industries, what affects one part of the

creative industries and one set of rights in relation to creatives, may not be the same elsewhere. One size does not fit all. I will finish on that and going back to the likes of Joan Sims and Clive Dunn, people do need protection. People do need to earn but at the same time we need to be flexible in how we look at the questions of evidence, both in relation to past and what might be future.

**(JS)** Jeremy Silver. I'm chairman of a company called Musicmetric, which is a data analytics business. We gather data on recording artists, social media activities, web mentions about them and the degree to which their music or recordings are file shared on bit torrent. We analyse all that data and publish it in the form of various reports and we make some of it openly available and we sell other parts of it to people. We do that for currently 700,000 different recording artists on a global basis. That's the nature of the business. We don't do that for any other reason other than the fact that we're excited by it and we think we can make a living out of it. We don't have any other motivation. That's one of the things that I do. The other thing that I do is I advise the Technology Strategy Board on what their invest policy and programme activity should be for the creative industries.

You can understand from those two things that I tend to have a technological bias to some extent and also a forward-looking view of things and the way in which value might be created and the way in which business might develop. When I look at the copyright world and I have a fairly lengthy history in music and so I've been embroiled in this debate for a long time – too long – one of the things that I'm repeatedly struck by is the fundamental belief that I have, which is that one of the principles of copyright is actually broken. That copyright is based on essentially three things. It's based on integrity of the work, a right to attribution and remuneration and it does that based on the ability to actually prevent people from making a copy of something in order to be able to achieve those things. It's that last one that's broken.

It seems to me that we are in an impossible position. We are in a world of incredible change and in a world which is technologically dominated by systems that are not going to be controlled by individual governments. Those technologies have broken that fundamental piece of copyright. It seems to me that it is in need of fundamental reform but I am not naive enough to believe that fundamental reform is in sight. In fact, I would say there is zero appetite in any government anywhere in this world to try and address those fundamental problems that exist

within copyright legislation as it stands. The economic dependency that most of the major economies of the world have on the creative industries is perceived at least as being so significant as never to allow a government to think that it would ever be worthwhile messing with that at such a fundamental level.

Having said and having accepted that, despite what I may feel and believe about it, it is not going to be the case. What is it then that we end up talking about when we think about changing copyright legislation or making reform? The answer, of course, is that it ends up being all about exceptions. Most of the copyright reform that we actually encounter and most of the debate that goes on is not about whether or not copyright is a good thing or bad thing. That's not what's at debate. What's at debate is how do we deal with this incredibly messy situation where all kinds of individual constituencies with very specific and particular circumstances have very particular needs and they need to be addressed in the face of more change that we've seen in the last 50 years than we've seen in the previous 350 years?

What we're experiencing is an economy and a society which is charging down the road at a rate so fast that most of us find it dizzying to think about it, and at the same time we have a legislature whose ability to move is slightly faster than watching grass grow. That is a real challenge for our economies, it's a real challenge for our cultures and it produces incredible tension and division amongst us. And so what we do in response to that is we cast around for solid ground. When the whole world is rocking around you, what you ask for is some evidence, evidence. Now the problem is evidence for what? We are educating our children for jobs that don't exist yet. I chair a company that could not have existed five years ago and in five years' time there will be companies that exist that could not exist today because of the rate of technological change. We're making policy for businesses that don't exist yet. We're making policy for models that no one's yet dreamed up and there's a real problem when we think about that and we talk about evidence.

Because what is evidence? Evidence is something that tells you that something happened and this is the reason why, but we're dealing with stuff that hasn't happened yet, so the evidence may not be the thing that helps us. It may be useful in some respects and it's useful in one very important respect, and that is when we think about economics in this context.

What we're dealing with is what is commonly referred to – someone will tell me who coined this phrase as I don't know – as Tarzan economics (talk by Jim Griffin at Supanova conference 2010: <http://knowledge.wharton.upenn.edu/article.cfm?articleid=2452>). The notion of Tarzan economics is the one that says 'My business model is hanging from this tree and I'm hanging onto it like mad but I've got to get through this jungle. In order to get through this jungle I'm going to have to move to another economic model, which apparently is one of those lianas over there that's hanging from one of those trees. I don't know which one it is so I'm going to hang onto the one I'm hanging onto for as long as possible until I can make sure that the one over there is actually not going to come away in my hand. If I reach out for the one that's over there and it comes away in my hand I'm going to fall to the jungle floor and get devoured by insects. If I don't hold onto that one and hold onto this one I'm not going to make any progress because guess what? This one's really fraying quite badly too.

Tarzan economics is where incumbent rights owning businesses live on a day-to-day basis and it's ugly. It is a horrible, uncomfortable and scary place to be and I have immense sympathy. I have personal experience of working in that environment. It is not easy at all. It's extremely challenging and the challenges that they feel are also felt by all the individual creators, content originators and rights producers who make up the constituency that sit behind those rights bodies and rights companies.

We have a really complex position and picture. The thing that we do in that situation is try and hold onto this stuff that we think is for real. Here I am being the chairman of a company that produces data that may or may not be of any use to people but the one thing that I can say about it is that it is solid but it isn't a predictor of the future, or at least not yet. It may be that over the next three or four years we have actually managed to gather so much data, we understand the patterns in it and can predict things so well that we can actually use data to be predictive, such that we could use data of that kind to inform future policy-making.

The reality though is that we do impact analysis. Why do we do impact analysis? What is impact? Impact is what happens when something very fast moves something that isn't moving at all. That's what impact is and that's why we analyse it because that's what we've got. We've got something that's very static that's facing something that's coming at it at a great deal of speed and we want to know what's going to happen. If we make these changes what will happen if that thing hits? That's fair enough because there's an enormous body of people who are making a

living in companies that are based on those incumbent models and they make a living and they make an economic contribution to our society that we can measure, that we value and that we depend on. That liana over there that Tarzan may be trying to reach, nobody knows how much economic contribution it will make. Nobody's got any idea whether that particular economic model or that one over there is going to be the one that in ten, 15 or 20 years' time we all depend upon. In fact, actually, the one thing that we've learnt over the last 20 years is that there isn't a silver bullet. There isn't a single economic model that we can point to for any creative industry type company, any rights owning company, any copyright based company that you can point to and say 'It's that one.' Actually what we've found is that there's a whole load of them and some of them seem to work slightly better than others.

Spotify ([www.spotify.com](http://www.spotify.com)) is a company that gets talked about a lot in this context. We put out some data recently that demonstrated that if you look at the impact of file sharing on the sales performance of a piece of music in relation to Spotify, that Spotify is actually growing digital uptake and that file sharing actually isn't really doing anything to change that at all. In other words, Spotify is making a more positive contribution to the economy than the file sharing is detrimental. What file sharing takes away, Spotify does far more to add. We can go into more detail on that.

The point about it is we see some new models that come forward and attract us but we don't have any certainty. My biggest concern in all of this is when we talk about these things – and I'll try and wrap up – such as impact and data. We have to recognise that we are not really talking about anything that we can predict. Whatever little examples we show are not going to predict the future and we have to actually make a judgement about that. Mostly what we're talking about is damage limitation. How do we, as a legislative economy and society, manage change with the minimal damage to the economy that we can afford? It's these micro-negotiations that actually our experience is all about.

If, perhaps, as policy-makers we understand that micro-negotiation may actually have value and be important, that we should set ourselves up to do that, rather than thinking that we're setting ourselves up to make some massive cultural, social and economic reform that's going to change the lives of millions in any significant way as far as copyright's concerned. If we had that realisation and that recognition, which I think most of us probably do have when we sit down and negotiate these things, then that is probably a better outcome. The only question to ask

is if you do realise that and you do take that view, is the process we've got the right one or should we be re-examining the process? Thanks.

## ***Questions & Answers***

**(NM)** There is one thing I would like to say which is policy isn't necessarily undertaken by different bits of government as separately as some of the comments that we've heard make. In particular, the decisions that government makes, government makes collectively so however you get to the point of decision, however you're collecting the evidence, the view is taken by government collectively. I wouldn't personally like to say 'IPO does things this way, DCMS does things this way' to put a degree of ownership over government policy on the government departments whose officials may predominantly be the ones who are responsible for gathering evidence. It's not quite that stark.

**(HB)** I was struck with Andy's suggestion though – and maybe he can correct me if I've mischaracterised this – that if there's fragmentation it contributes to a lack of trust and that perversely increases the incentive to do more lobbying, which is obviously costly to industry. Comment. You needn't come back to me now. I'm sure this will come up in the afternoon. Were there any other comments either on Jeremy's points about technological uncertainty or anything for that matter?

**(Lee Edwards)** Lee Edwards from the University of Leeds. It's a very interesting panel. Thank you very much. There were a number of things that came up in it which I thought were fascinating. Morality is in there as well as this notion of uncertainty. One of the points that I'd like to make is that there is actually a lot of certainty around what technology is going to do in the sense that we know that users will be very creative about how they engage with it. So the uncertainty is actually not to do with the technological context, it's more to do with what effect what users do will have on us as industries, which brings up the issue of trust, not so much between lobbyists in the broadest sense and policymakers, but between the industry and its users.

If you look at another dimension of the communication that goes on between industries with an interest in copyright and users themselves, what industries are now doing through their communications campaigns is they're trying to co-opt users to get some kind of sense of moral obligation of the user to recognise their role in industry success,

which is presented as this ultimate good that everybody will benefit from.

There's a different conversation going on between industry and the users who engage with their comments. Between industries and policymakers, if you look at the submissions, industries focus their moral arguments on this broader notion of economic good and the fact that these figures that are bandied around about the value of the creative industries produce for the economy, this is where the moral high ground lies as well. It's not purely an economic argument. It's very much a moral argument and the assumption is made that the insects at the bottom of the jungle will, without doubt, destroy us. These things I've found quite moral. You're talking quite economically in legalistic terms, in many ways in technological terms but there is a huge moral dimension to this debate that would anybody have comments on?

**(HB)** Would anyone like to respond to that? Jeremy.

**(JS)** I totally agree with that. There's something very reductive if you end up simply talking about these sorts of debates as purely economic arguments. The difficulty is that if the response to uncertainty is increasing reliance on hard fact then things like moral factors, cultural benefit or cultural value become even less easy to pin down and therefore lower in the weighting. That's a challenge for policymakers as well, that somehow we need to be looking at this more at a broader level and have an understanding about what we mean when we talk about cultural well-being and the health of a society. These become almost irrelevant in the horse-trading of the reality of policymaking. I don't know how you bring them back in. What Linda was talking about in terms of the openness of consultation and the idea of having a distributed solution so you get a much bigger set of voices coming through is very powerful and I think has to be the sort of direction we go in. There's still an awful lot of detail to work out about how to make that work and how to really digest what then comes back.

**(HB)** Frances.

**(FL)** I wanted to pick up on that question because sometimes we just have to be careful that we ask some very practical questions. I agree with you. It's the users and how they're using existing creative works and reusing and repositioning, which came up through our first presentation on parody. The question is, actually have the questions been asked? Is that use of music being licensed and are the royalties going through the YouTube system back to those who wrote and

recorded the music? In many of those cases there is a change of lyrics but 95 per cent of the original work continues to be licensed through an existing commercial situation. Not every situation is new and we should be looking for practical solutions rather than complete policy head-scratching from fundamental principles all the time as well. That's why being given the opportunity to explain what the business of licensing copyright is helps us find some solutions to debate and think about. We have to be in the business of finding solutions to some of the copyright problems in a way that users and creators both win.

**(HB)** If no one else on the panel wants to pick up on that Tony's got maybe a last question unless someone's got a burning question.

**(TC)** I am Tony Clayton, chief economist at the IPO and (having arrived late) I speak without the benefit of having heard anything else that people in government have said. I thought the point you picked up on – trust – and how to assess impact in the context of uncertainty is really important. Those are the problems that we're actually trying to tackle and our approach to trust is to try and build common understanding of what evidence is and what data is useful, given that we don't have an awful lot of it and we have to make it up as we go along. And if we know that we're going to have to make it up as we go along then we need the help of everybody here to create the evidence base. We can't do it as government. It's not there.

I spent the last two days at OECD talking about evidence base for the knowledge economy and this is Tarzan economics in spades. It is not just the creative industries which are subject to Tarzan economics, everything affected by the internet and ICT. The economic tools that we have to run the economy do not capture half of this stuff. It is not just a creative industries problem, it is not just a copyright problem, it is much bigger than that but you are at the cutting edge and we are at the cutting edge of trying to solve the problems.

**(WP)** I just had two points: one on Jeremy's excellent point about impact assessments in an unknown future. It just made me think about one of the many things as a former government economist I struggled with at the Treasury, which was the discount rate. A discount rate in its simplest context; if a bridge cost £600 to build and generates £200 for the next three years that's negative because cash now is worth more than cash in the future. Now, how do you apply this concept, which the Treasury and government impact assessments have to apply to this unknown future? It's bonkers.



One, post credit crunch how do you justify it when inflation's above rate of interest? You put money in the bank, it loses you money. Pre-credit crunch yes you could argue that. Now it doesn't, but we still get told we have to discount at 6.5 per cent. How do you discount the value of intellectual property over time? Are you honestly telling me that putting your money in the bank as opposed to buying the Beatles catalogue in 1960 would be a wise move? The Beatles catalogue, by the way, will be worth more tomorrow than it is today at an increasing rate than the rate of interest. This is a very simple standard tool of economics that is totally flawed in the unknown future of intellectual property.

Two, on Peter's point about the use of essays, I remember once looking at the value of music exports to the UK economy. The DCMS website had it at about £165m for 2007 ([www.culture.gov.uk](http://www.culture.gov.uk)). I thought 'That's damn low because Frances' organisation [PRS for Music] brings that figure in alone, and this is just the nickels and dimes part of the industry brings in more than that.' PRS brings in way more than what the total value of music exports was in government accounts.

So can you change SIC (Standard Industry Classification) codes? Not in our lifetime. Can you do anything about that? Probably not, but to essays, how about this? A simple essay that just explains a three-piece band called Muse from Devon that sing in English, that for four times in the past eight years have been the highest earning members in SACEM in France. Their tours will employ 30 articulated lorries, lighting rig companies, sound engineers, production teams and hundreds of staff and all this activity is coming back to the UK economy. I would give up with the government stats and impact analyses. Just give me a nice essay that catches a point. Devon's got talent.

**(HB)** On the point of SIC codes incidentally, there is a ten-yearly process that Jeremy and I are getting our heads around at the moment. We're co-chairing a technical working group for the government and we're very much looking to the industry to feed in thoughts about how those industrial classifications can be changed. If people are interested in that, talk to Jeremy and me afterwards ([Hasan.Bakhshi@nesta.org.uk](mailto:Hasan.Bakhshi@nesta.org.uk)).

**(TH)** Tom Hoehn, Imperial College. My question follows from what Tony said about the availability of data, or lack of it and the need for data. Martin and Kris presented an interesting study. They could do that because they had access to YouTube data and it had data about how many people accessed that particular YouTube and there was also

publication of the charts so you had data. The question to the panel is should there be an obligation on industry bodies and collecting societies to make data available because they do have very good data?

**(HB)** Would anyone from the panel like to respond to that?

**(FL)** I'd happily respond. You probably got, from the gist of my presentations, that we welcome primary research and we would love to be approached more often about the research that has been conducted, than less. The opportunity to have collaborated on a parody research would have been useful because our input to government on the copyright consultation explained how monies flow through the system for parody. We've got the opportunity to connect and work together.

**(HB)** Was that the answer to the question that you asked?

**(TH)** In the past that has not been the case. It has been very difficult to get data. We can discuss in the afternoon session about the claim for confidentiality: 'This data is confidential. We can't release it.' I see that in other areas, not just in copyright.

**(JS)** You're right that there's still a good deal of hesitation about that. For example, there are some databases that contain information about who recorded or composed a particular musical work. Although there are some ways of interrogating an individual record at a time, that isn't actually publicly available, even though you might argue that the name of someone who composed a piece of music should be a matter of public record, but it isn't actually available. In our case, incidentally, we have an open API (application programme interface) and all of the data that we collect is available for non-commercial use on our API ([www.musicmetric.com](http://www.musicmetric.com)). They can do what they want with it and they do.

**(FL)** Just to supplement though, there's a cost of answering all the evidence and policy questions and there's a cost of doing research. That's the importance of asking the right questions, so that we spend money on the right research to get to the right answers.

**(HB)** Thank you. There are certainly a couple of big themes that I took from that. One, certainly from Peter, Frances and Andy's comments, was the issue of trust between policymakers and stakeholders in this area. Are policymakers being consistent in practising what they preach? I don't know if there's anyone from the DCMS in the room but certainly from IPO, if someone wants to respond to that it may be interesting to

hear a response to a couple of the examples that Peter and Frances gave.

The second big thing is the one that Jeremy identified, which is that copyright policy is being made in an environment of extreme technological uncertainty for businesses, perhaps even industries that don't yet exist. What contribution can evidence make in this context? Are impact assessments of the types that policymakers do completely redundant or do they need to be adapted? A personal interest of mine is what does this environment of uncertainty mean for the processes of policy, which goes back to the comments that Linda was making in the previous session.

# PANEL 3.

## SOCIAL SCIENTISTS' VIEW OF EVIDENCE FOR COPYRIGHT POLICY

### Speakers

**Dr. Christian Handke** (Erasmus University Rotterdam) – hereinafter **(CH)**

**Tom Hoehn** (Visiting Professor, Imperial College) – hereinafter **(TH)**

**Dr. Joost Poort** (IvIR Univ. Amsterdam) – hereinafter **(JP)**

**Dr. Nicola Searle** (Abertay) – hereinafter **(NS)**

**Dr. Davide Secchi** (BU) – hereinafter **(DS)**

Chair: **Prof. Philip Schlesinger** (Glasgow) – hereinafter **(PS)**

### Questions & Answers

**Paul Heald** (Illinois & BU) – hereinafter **(Paul Heald)**

**Ruth Towse** (Professor, Bournemouth University) – hereinafter **(RT)**

**Robin Jacob** (Professor, UCL) – hereinafter **(RJ)**

**Will Page** (Director, Spotify) – hereinafter **(WP)**

**Andrew Prodder** (CEO, BECS) – hereinafter **(AP)**

**Lee Edwards** (Lecturer, University of Leeds) – hereinafter **(Lee Edwards)**

**Martin Kretschmer** – hereinafter **(MK)**

**(PS)** We've got a bumper panel of talent here, I hope. I'm Philip Schlesinger; I'm Professor in Cultural Policy at the University of Glasgow, a Deputy Director of CREATe, the new copyright centre. On my left Christian Handke, Tom Hoehn, on my right, Joost Poort, Nicola Searle and Davide Secchi – so that's the line-up for this afternoon. I don't know what any of them is going to say, but they will speak for no more than seven minutes – I hope.

Just by way of perhaps an introductory comment, picking up on the evidence sessions that we had earlier, I do think the IPO's position, as

enunciated, is rather incoherent. What's on paper is really quite a positivistic and scientific conception of research. The only way I can interpret why it takes that form is that it's there to protect against lobbying and basically, interest groups. Because it really doesn't bear much relationship to how social scientists go about their work – at least not this one. I think also that it does privilege the quantitative over the qualitative. And I think we've heard some quite eloquent arguments about why cases and qualitative accounts may actually be taken rather seriously as evidence and give us important insights into the field that we're discussing.

Really just to say a couple of words about a study that Charlotte Waelde and I concluded last year which used I suppose what you might call qualitative sampling, which was a study of dancers and musicians of a precarious kind and their relationship to copyright (Waelde and Schlesinger, 2011; Schlesinger and Waelde 2011; Schlesinger and Waelde 2012). And one of the interesting things that came out in that part of the world, in those kinds of less privileged sectors, was that copyright did not figure as important. We had started off, perhaps, with the usual assumption that copyright would matter greatly. It's not that it *doesn't* matter; it's just that making copyright have a significant impact on your income is such a big push that it doesn't matter greatly.

And then that opened up a whole set of other questions which I think it's really quite important for us to put on the agenda, like non-economic values, values of cooperation – not necessarily altruism, but where people will engage in collaborative behaviour without any immediate, or even medium-term, or even ever, a pecuniary return, because that's the nature of what it is to be in a creative occupation.

So, I'll just leave you with that thought because I have a bevy of economists here. And I am a sociologist; so I'll put the counter position if they don't put it. So, with no further ado let me go onto Christian Handke who will hold forth for the next seven minutes and no longer.

**(CH)** Thank you, Philip. Now, I don't want to talk about methodology either necessarily. Let me start with three points regarding today's discussion so far. First of all, I happen to agree with the IPO guidelines for good evidence. As you would expect from an academic I find peer review perfectly normal – even though I don't always appreciate the process when it happens to me. Nevertheless, I do believe in that process, and I find nothing offensive about applying it where contributions in response to calls for evidence are concerned.

Second, the ultimate aim of transparency is usually to enable replication. And I understand how that wouldn't feature prominently in those guidelines for good evidence because replication would be very exceptional in practice. Yet I think that's a good measure of whether transparency really has been achieved. To ask a hypothetical question: would we be able to replicate this study? If not, we should be more sceptical about the value of the evidence provided.

Third, I also believe that anecdotal and qualitative evidence has a strong role to play in providing evidence for copyright policy. I would argue that quantitative studies and qualitative studies should be clearly distinguished, however. Maybe those submitting evidence should be encouraged to really decide when they're doing what. Qualitative evidence may inform us about specific problems and how they come about. For generalisation purposes across a large number of stakeholders, quantitative evidence is more important. The adequate use and interpretation of these types of evidence is crucial.

Let me move on to my main point. In my short statement I take inspiration from a very different aspect of the brief that the speakers received. One of the issues suggested was whether it matters what kinds of questions we ask – and I reckon that matters very much indeed.

First let me raise a rhetorical question: what is copyright supposed to achieve? We haven't really addressed that very much today. Maybe we're all in agreement; maybe not – we'll see. Now, I'm just an aspiring social scientist, but it would seem to me that one official aim of copyright is to promote innovation and creativity. Or to rephrase slightly, the question is: how does unauthorised use affect innovation and what can copyright do about it without excessive unintended consequences?

I suggest that we need to address this question. Maybe it's not the only one, but I think it should be rather central, and we should address it head on. Today that hasn't happened. Quite generally, it doesn't appear to happen much in the debate on copyright. Let me immediately put in a qualifier: innovation is a very tricky subject: it's a multifarious concept, it's complex, it tends to happen in fits and starts. As Bengt-Arke Lundvall (1992, p. 12) has stated, a strong element of randomness will always remain regarding innovation and technological change, and all related issues. It is really slippery and tricky topic. Today, I was impressed to hear Jeremy Silver using an avalanche of metaphors to describe some of the problems associated with assessing radical

innovation in particular that requires people to fundamentally change how they cope with a problem.

In any case, the question of innovation is not the main theme in copyright debates. It isn't in the economics of copyright that I have a reasonable overview of. Today innovation wasn't central either I believe that is a serious oversight.

Let me further suggest that it's worthwhile to look at two different types of innovation in this whole issue. One is the obvious issue of content creation, as I would call it, concerning the supply of new copyright works. The question is how unauthorised use – or its countermeasure copyright – affects the flow of new copyright works, and thus future welfare. The other type of innovation would be technological innovation concerning means to disseminate these works. Technological innovation could be managerial, organisational, technical and so on.

There have been a couple of studies at least on the content creation part, which is the more obvious candidate, admittedly, but I don't think it's the only one that matters. Regarding content creation a handful of quantitative studies have been put out, not a single one of which finds that stronger copyright protection – for example variations in the duration of copyright or the emergence and diffusion of digital copying technology like file sharing – would be associated with more varied or more valuable supply. In particular regarding the effect of file-sharing on the supply of new creative works, there is no evidence that we would be worse off than 13 years ago, just before when Napster started operating. That is not widely appreciated. Perhaps it is possible to provide that evidence. I don't think that has happened yet and there are few people who seem to be trying.

Again, a qualifier: it's important not to jump to conclusions. The existing studies on copyright and content creation are preliminary. There's the potential for protracted effects. It might very well be that any effect of file sharing on the supply of creative works transpires with a long delay. I'm not convinced that we don't have a problem or we will never ever have a problem there. And furthermore things could have been even better. Remember how I mentioned the problems with randomness and uncertainty associated with technological change; fair enough, things could have been even better. A lot of work remains to document the impact of unauthorised use on content creation. So far, there is no evidence to support the intuition that unauthorised use reduces content

creation. There's a potential that we will come across further counterintuitive results that won't go away if we look harder.

As a final point to round off the picture, there's the issue of technological innovation. I don't have time to discuss that extensively but I think that's also an important question: how does the copyright system as it is affect technological innovation in the copyright industries and in related sectors? This is particularly relevant where user innovation is more important relative to innovation conducted by current rights holders. And with that question I leave you.

**(TH)** I'm Tom Hoehn. I'm at Imperial College where I research on the area of IP, and I also teach a course called Business Models and IP. And I will rename it now Tarzan Economics – where the exam question last year was: explain the business model of Spotify. So, it's fascinating in that area. I also act as a panel member at the Competition Commission ([www.competition-commission.org.uk/](http://www.competition-commission.org.uk/)) where I'm a monopoly economist looking at how markets work or don't work. And I'm not speaking on behalf of the Competition Commission here when I make some comments about evidence gathering and the IPO rules.

There are three points; and I will choose to comment on two. One is clarity, clarity of evidence. I think we need to distinguish between clarity of presentation and the fact that when we look at data we often find data is messy, it's not very clear, it's difficult to interpret. Sometimes we have too much data and we have to test for various inferences; sometimes we have too little data and we still try to make some inferences. And it is hard work and is not always clear; but we'll try to make it as clear as possible.

There's another point about looking at data and getting some clarity: distinguishing between what is statistically significant and what is economically significant. And often people confuse the two. So, you may have a statistically significant effect – for example I did look at the effect of time extension for a copyright in sound recording, and I found that there was an effect; but it was a very small effect. And we need to be very careful what we then read into that, and we need to do a lot of thinking. So, thinking is very important.

Second point, verification or verifiability. I prefer the term replicability. And we use actually that term at the Competition Commission (CC) where there is some guidance on providing economic evidence in



competition proceedings. And transparency is there and then there is replicability. And that is very important. I make the distinction because what we want to do when we're presented with an argument or a piece of economic evidence is to see whether, given the data and the model, we can replicate the results. And that's a very important step. And that raised the question: how do you get access to the data? And there are various ways in doing that. Somebody on the first panel, it may have been Pippa, who said if you have data and it's an issue of confidentiality, you don't want to publish it, there are ways of dealing with it: you can give it to the ONS (Office for National Statistics), I think was one proposal. I've seen methods where there are data rooms that are created so that if people want to verify, check or replicate the analysis they can go there – they have to leave their Smartphone behind – and they can go on the terminal, take the data, run the analysis in order to see whether it can replicate it. So, there are interesting ways in which you can allow for verifiability, in IPO terms, or replicability; and I think I would encourage more of that.

And my other point about verification and replicability is this point made earlier in the day: we had a discussion about the duty to disclose data. I strongly believe that more data should be disclosed, particularly if you are a monopoly body or you have maybe a statutory body where you are collecting lots of information on behalf of an industry. And I think there should be a duty to disclose. There are reports that come out of government; again in my experience at the MMC (Monopolies and Mergers Commission, former name of the Competition Commission) or the Competition Commission these reports are very valuable research tools, but if they are heavily edited because of confidentiality that needs to be respected, and they become meaningless. And I think we should be very careful when we excise in these reports, when we do industry investigations, whether it is a body like the CC or a body like the IPO.

So, that's my point about verification. Then there is the point about, peer review I don't really want to talk about; I think we should be careful not to make it too academic. But there's the question of how do we get access to data and how do we share data. There is just something I would like to argue we should use more of, in policy-making or policy analysis, and that's experiments. We do like natural experiments, we like looking at history, we like looking at data that has been collected; but when it comes to designing policy instruments we need to be very careful and think what is the expected impact. And some of these instruments are either new, aren't tested, they can't be checked with respect to history; or the situation is a new one that we're faced with, new business models. So, I encourage use of experiments.

And you can use experiments to test willingness to share data; which is what we do at the moment in a project at Imperial College. So, what are the incentives that allow or get people to share data, that is medical data or personal data? And we can talk about what happens in Google when we go and answer off these search engines: we give away our own data and they re-use it. And then there's the question of give and take. And I think we should understand how that works and how context specific we react to different incentive schemes.

**(JP).** My name's Joost Poort. I work with the Institute for Information Law associated with the University of Amsterdam. And I work there as an economist. First of all thank you for the invitation to be present here.

Considering the IPO document, I have to start off noting that I endorse most of what's there. But also it is most of a Holy Grail what's presented there, saying: okay, peer review, data available, replicability – fantastic. But as was pointed out already, timelines or money often do not allow for peer review in the process, for research being published, peer reviewed in journals before the deadline of the consultation periods are over.

The question of course is what are the ways to get around that if you can't reach this Holy Grail? I think that's where the real interesting questions lie. And also data - publishing data appendices: particularly if work has not been published in peer reviewed journals yet, it will go against the interests of the academics involved if they still want to publish it in journals. So, they might even not want to disclose the data, not because they don't want people to look over their shoulder, but they need it for their future academic careers.

So, indeed peer reviewed is first best I think. But maybe a way to get around it would be to have an expert panel considering evidence that is brought into a political debate or policy-making debate: to scrutinise research that has been presented by several parties. And then of course the funder of certain research should not disqualify research, saying it's paid for by the industry so it's crap. But it could raise scrutiny saying: well, they do have an interest; it was not from independent sources of finance so we have to be really awake and alert to see if there is any spin put on this research.

I came across a very nice example quite recently: I did a survey on file sharing ([http://www.ivir.nl/publications/poort/Filesharing\\_2012.pdf](http://www.ivir.nl/publications/poort/Filesharing_2012.pdf)), amongst other things, and my finding was that file sharers are the

largest customers of the industries, buying more music, streaming more music from legal sources, going to concerts more often. And the same result was found by Joe Karaganis from The American Assembly (Columbia University) (<http://piracy.americanassembly.org/where-do-music-collections-come-from/>) recently. And the journalist I came into contact with said, 'Do you know this research?' And the IPFI reacted to the other research, saying, 'Research by The NPD Group during 2010 in the US found that just 35 per cent of P2P users also paid for music downloads.'

([http://www.ifpi.org/content/section\\_news/20121017.html](http://www.ifpi.org/content/section_news/20121017.html)). And he said, 'Are they lying? How was that in your research?' And I looked in my own data, and actually spot on 65% of people who had downloaded from illegal sources in the last year had not paid for downloading music in the last year; but from the people who had not downloaded from illegal sources in the last year, 92% had not paid for downloading music. So, they were presenting a fact, they were presenting evidence; but they were leaving out the important context to interpret this evidence.

It needs someone to be really into this debate and to really understand what's presented and what's left out to be able to interpret this evidence. It's a figure, it's a right figure; but still it's misleading to present it in an isolated way. So, I think that's a kind of neat example that you probably need to organise your peer review, even if it's not through the academic peer review process that normally takes two years.

Another point is just a question I'd like to raise: how to deal with foreign evidence in those debates, surveys from foreign countries; how do you accept them or not? Trends in society can be quite different in different countries. But what I see too little of is surveys that are set out across countries in exactly the same way, which could really point the way to how differences in policy affect people's behaviour and affect what is going on in businesses. Because what's done now mostly is surveys, set up in a different way with different questions with different framing, different timing, are more or less got together in one large stew. And I think evidence could profit a lot from international surveys done in the same way.

Then maybe to conclude, there were some statements about anecdotal evidence or case studies. I am very sceptical about anecdotal evidence because it's quite often off the mark. And that's because the debate on piracy and copyright issues is, it's a very polarised debate and a very fierce debate, and people will hang on to anecdotes that are in favour of

their way of seeing things. For instance, talking about a parody, there is this famous bunker scene from *Der Untergang* [*Downfall*], and there were many parodies on that scene with different subtitles or different text, when Hitler was screaming to his commanders (e.g. <http://www.youtube.com/watch?v=et76wPvRtgU>). It's a famous story that these parodies were taken off YouTube because the company making the film wouldn't allow it. And the producer or the director of the film, Hirschbiegel, actually said, 'Well, I kind of like them; I laughed about them'. That story I heard it dozens of times, and it's a story we cling onto saying, 'Okay, the authors really don't mind so much; it's the big companies making money that are the obnoxious types that get this stuff off YouTube'. But then we did a survey amongst 5,000 creators and asked them questions, amongst other things, about how they related to remixing; and it turned out that the majority of them were really opposed to remixing, and they actually felt it was a threat to their earning opportunities ([http://www.seo.nl/uploads/media/2011-17\\_Wat\\_er\\_speelt.pdf](http://www.seo.nl/uploads/media/2011-17_Wat_er_speelt.pdf) (in Dutch)). So, the story we like to believe that the authors are cool and the companies are the obnoxious types wasn't replicated in this research. So much for anecdotal evidence.

**(NS)** Nicola Searle. So, I'm going to be slightly self-indulgent and take a personal view of this. Because I'm the only economist in my family, it's a family of medical doctors and scientists, so when I think of evidence and I think of social scientists I think a lot of what's been happening in the medical sciences and the use of evidence based practice there. And also I want to comment that one of the things that I find interesting about the discussions we've had today is the fact that it's really difficult to have discussions about evidence without actually having discussions about evidence based policy. So, we've actually discussed more the policy in many ways than the evidence.

I'll start off with my dad and asked, 'What do you think about evidence based policy?' First of all he wanted to tell me all about economists, and his comment was that economists and doctors have many things in common, this includes the ability to walk on water. So, I think we should remember that we shouldn't develop god complexes in economics also. But evidence usage in medicine has long been the case; and looking at how treatments actually affect patient outcomes and how that should affect treatments and dosages is quite an important concern. It's also an important concern in terms of knowledge exchange and taking actual evidence from research and putting that into practice in the National Health Service (NHS). So, the NHS have been looking at a lot of these questions for a long time.

If I want to start my thoughts on evidence I can start with anecdotes, as I just mentioned. So, medical theory in some cases, tells us, for example, that betablockers would actually ease heart strain and result in less heart attacks; but in reality they actually increase mortality. But the flipside of that, hormone replacement therapy was meant to have a huge impact on breast cancer and things like that; but it ended up having these unexpected consequences that were not identified in the first evidence based analysis of this, because the evidence itself and the designs were flawed. And we talk about medicine we're talking about lives. And we're lucky that in social sciences we're typically not talking about lives; but it does mean that we have a lot of cases in medicine still where things like antibiotic courses and cough syrups and nail fungal treatments – I bet you didn't expect anyone to say nail fungal treatment today – are used, but actually there's no evidence to support that they actually work. So, the question is what type of snake oils are we using in copyright and in creative industries? What are these kinds of things that actually theory tells us work, everyone believes they work, but in reality they may not?

But I should say that the parallels with science and socioeconomic policy are limited because when we talk about evidence in science we're talking about very specific measurements. We're talking about salt content in blood, for example. Whereas in economics and socioeconomic analysis we're really talking about proxies on a regular basis: everything is essentially a proxy for something else. So, evaluations, utility, it's really not ever a direct measurement of what the question is. So, that step away from the sort of core question means that we're always talking about a slightly abstracted view of what the evidence potentially is measuring.

So, what is good evidence? And I'll show my bias as an economist and say it's quantitative. But at the same time, as we've mentioned multiple times today, evidence in IP is really difficult to collect. And I would argue that some evidence is better than no evidence. I've done some work on business models and trade secrets; both are notoriously difficult to measure: they're either secret, or how on earth do you measure business models. So, in cases like that and in a lot of cases we need qualitative evidence to either complement or perhaps illustrate areas where we are simply not able to do so. So, I think qualitative evidence has a very important role.

I thought this would be a bit cliché, and I expected someone else to say this today but they haven't, good old pithy quote that: data don't lie but people do. And that's a big problem. So, we have to remember that

when we're looking at data, the data shouldn't theoretically have any bias; but it's in our interpretation that we can find a lot of bias.

Also I'd like to say that I have very high hopes for the future of evidence in copyright, particularly in the digital media, because what we can do now with data mining and the amount of data that's coming through – if you look at computer games for example: entire games are now designed based on the data that they get from players. And that is really encouraging, or slightly disturbing – depending on your privacy position. There was a case in the States where Target [a large retail chain in the US] predicted a pregnancy in someone before the father even knew. This is the kind of data that we're actually getting. So, I have very high hopes that we'll get to a point in copyright where we'll actually be able to have very interesting things to say from data.

But the question I also want to think about was what constitutes appropriate evidence, was what we were asked. And the suggestion there is that there's also inappropriate evidence. And what is inappropriate evidence? And I think when we look at biased evidence and the interpretation of that evidence – and again it's not the data line; it's the people or the question or the measurement of that line – that we should be very careful when we talk about data, and not relying solely on these kinds of interpretations.

So, I want to say that overall we've got imperfect evidence, but we are moving towards having better evidence. And I think some evidence is better than none. I'll go back to my dad again. He said, 'In medicine it takes five years to adopt a good idea, and 20 years to get rid of a bad one'. And I'd say that in copyright it seems to take us about a lifetime plus 70 years to get rid of a bad idea.

**(DS)** I'm Davide Secchi and I work at Bournemouth University. I study decision making in organisations. I want to be upfront, I know very little about copyright. I'm here to talk about experiments and experimental research and how it could possibly be applied to copyright research or law in general.

My starting point discussing this is one of the papers that was shared by Martin, and it's a paper by Ruth discussing evidence (Towse, 2011). She makes a distinction between what we know and what we don't know as a starting point to discuss evidence. I personally would add another layer, which is: what we think we know – we may probably not. And

why is this important? Well, because of two elements that have already been cited. The first can be easily explained using the example of my discipline where we study what we call latent variables (e.g., Kline, 2005; DeVellis, 2012), i.e. something that is unobservable but is there, such as your level of attention as I speak. How could I possibly get to that? There are ways to get to that measurement; but it's not something that I can see. Well, there are clues. That's the first thing. For example, in the study of copyright I would be much more interested in answering the question: what's the perception of copyright law according to a consumer or policy-maker. This is a typical organisational scientist type of question: the perception of something.

The second point that is triggered by the question 'what we think we know', is replicability. One of the ways we all use as scientists to try and get a better understanding of reality – of evidence as a circuit of knowledge – is to be able to replicate whatever results as evidence. Now, experiments I think are one of the most powerful ways to replicate data, to gather evidence on a regular basis, if certain conditions are met. For example, if one wants to study whether price change of a particular good affects buying behaviour, it is unlikely that it could be done in a supermarket – although there are many people that do that. I would say, if you do try and conduct experiments in a supermarket, you never make sure that what really drives behaviour is price change; it is probably the colour, location in the aisle, other human beings buying the same thing – it's many things. So, if you want to conduct an experiment you've got to make sure that there is a significant *control*, and the only thing that varies is the one that you want to study. Otherwise you don't get to information that is clean enough to make judgements or to create data or evidence.

What is the advantage of testing hypotheses using experiments? Well, besides replicability, as I said, you can control settings. I used to say that applied psychologists are 'control freaks': they want to control everything in an experiment. And that is usually impossible in a social setting – you'll never control for everything. I remember in my former university they had an experiment room, which was basically a white cube with just a table and a chair. That was a perfect environment to conduct whatever experiment you want. They even had a window you could observe people from the outside without being seen. That's kind of scary; however, that's kind of the perfect layout for 'control freaks'. However, independently of how hard you try and even if you have the 'perfect' room, you can't of course have complete control. Even if you have that condition you'll never get perfectly clean data. Still, in experiments you can control for many different effects; much more

than if you check for prices and behaviour in a supermarket, for example. So, you can clearly isolate effects; sometimes you can generalise whatever you find – there are many ways to control for that. So experiments allow for high replicability. Sometimes you may also find that there are quite immediate practical implications such as what to do to trigger particular organisational behaviours. I would say you can probably get some implications for policy too.

An example of this can be taken from a very popular book by Thaler and Sunstein (2008) the title is 'Nudge'; they use behavioural science to show how that may affect policy-making. They also show some experiments and how you can use those to create policy recommendations. I think there's no way to think that copyright is an exception in that respect.

Here is one very short example of how experiments can be applied to copyright and law: me, Martin, Fabian Homberg, who's not here, and Dinusha (Secchi, Homberg, Mendis, Kretschmer, 2013), we conducted an experiment on orphan works to check for many different things. We were able to find that, for example, there is an effect of how much information is attached to an orphan work, a work where authorship is unknown. There's a difference between what people take or choose, whether they're exposed to music or photographs. So, information seems to be relevant in the case of pictures; but it's not relevant in the choice for music – people would partly trust their ears. Another point is that when we asked people to actually tested for the buying intention on the artefacts participants were exposed to, we found that the information wasn't really relevant in the understanding of how people decided to invest their money into a piece of music or another piece of art. So, information seemed not too private. But I would say experiments can be conducted in, for example, open source type of environments where you may want to test what really makes people contribute to an open source system.

Final thought I can put forward is what makes people violate, for example, copyright law. I think you can make some examples on that too.

Final sentence: I'm probably a big fan of experiments, but I understand that this is not the only way I would do for gathering evidence. I think there have been plenty of examples on this.



**(PS)** Thank you. The known knowns, the known unknowns and the unknown knowns and all the other combinations are on the agenda, as well as experimentation.

Really it's over to you now. You have to do some work. You've got a bit of space here to pose questions to the panel. The panel can pose questions to itself.

## ***Questions & Answers***

**(Paul Heald)** Paul Heald, University of Illinois and Bournemouth University. I was wondering if you might comment if there's any reason to make a distinction between micro and macro level investigations. I was thinking of Nicola; it seems to me two very distinct questions: how one orders the list or kidney transplant priority under the National Health Service rules, and whether a particular drug is efficacious in treating a particular kidney disease. One is a micro question; one is a macro question. I was just wondering if that distinction in levels of enquiry changes the way we should think about what constitutes evidence, the usefulness of it in policy-making.

**(PS)** A medical question for you, Nicola. You're eminently well qualified!

**(NS)** It's interesting because I'm a micro-economist, so that is something that I come across in my own work, is how applicable is this to policy wide initiatives: can you say that based on these smaller case studies and smaller level of analysis and evidence that it should become more of a macroeconomic policy.

I think one of the big issues is cost. With some of the types of questions we want to ask it would be simply prohibitively costly to do it at a macro level; although I can appreciate that for a lot of things a macro level would perhaps provide a better understanding of what a particular policy is, what the incentives and impact of a particular policy is. Trade secrets, for example, is just so difficult to do anything on a macro level; it's just impossible. So, micro economists are saying a preference should be for a macro – but I think bigger numbers are always better in term of stats. It's not something that I think is easily answered because the costs make it prohibitively so, and in some cases we won't ever be able to answer those questions.

**(PS)** Before I go to Ruth, can I just ask any other members of the panel whether they have any thoughts on the question, macro versus micro or macro and micro? It depends on the question.

**(TH)** If you're interested in the interaction between IP system and growth then you're in the area of macro when you're trying to prove some linkages between some very important systems as well as the economy. But if you're interested in looking at what is the value of copyright in a particular industry then you're looking in a sectoral dimension. That's probably mainly where you do your IP work is within the sectors. It depends on the question.

**(RT)** I think you're confusing generalisation and macro level. What Nicola was talking about was generalisation. The distinction to me between micro and macro economics is that micro economics is about behaviour, and that has to be looked at in quite an individual way; not just an individual sector perhaps, but at how people actually behave. Now, you might need a lot of evidence to show that across sectors, but it's still a micro study. But macroeconomics is looking at broad aggregate of things. Traditionally if you looked at say Keynesian macroeconomics (Keynes, 1936) – Keynes of course was the introducer of modern macroeconomics – he believed strongly that there could be no macroeconomics without a microeconomic foundation. But that's all got lost since we've had Bank of England models and Treasury models of the economy and so on – and it won't take you very much imagination to see have not been particularly successful in recent times. I think that is very important to understand the behaviour element.

**(NS)** But isn't policy inherently macro?

**(RT)** No. If you're looking at how people behave in relation to say file sharing, you're looking at the micro level of people's incentives to do that, or disincentives not to do it. You might want to value it or not value it for the whole economy; but the essential part of it is why people do it in the first place.

**(PS)** You might just say there, Ruth, might you not, that it's the collective behaviour or the aggregation of individual behaviour which actually creates the perception of the problem in the case of file sharing?

**(Lee Edwards)** University of Leeds again. I'm just very conscious of the fact that there is a nod to qualitative data and the importance of qualitative data; but the emphasis still seems to be inevitably drawn

back to quantitative approaches to define what good evidence is. I think there are a number of consequences to that that I think are important to bear in mind. First of all when you quantify something you treat it as part of a system; so there is an implicit assumption when we quantify evidence about copyright that copyright is part of a broader system that functions in some way and is predictable. And of course one of the big issues around copyright arguably is that it's not so predictable anymore – and we talked about that in lots of ways. That is one important consequence of that.

The other thing that happens is that when you emphasise quantitative data, and again we've alluded to this, it makes it very difficult for users to be heard in the quality making process because they cannot do so as a group; they don't do that. They're also quite difficult to identify as a group of people whom one can survey because you must fragment the broader population. And so implicitly when we say we like qualitative work and it's very interesting and it's very useful, perhaps it adds colour; but the quantitative data, the data is really important because it allows us to replicate etc – then by definition we do exclude the notion of copyright not as a system but as a lived experience which one users to decide to contravene copyright law or not. They are doing that as part of their daily lives; they're not doing it as part of a system. And we neglect that, I think, when we continue to emphasise the quantitative part.

**(CH)** I beg to differ. I think that qualitative and quantitative evidence should be complementary, quite clearly. I mean, this quantitative research, assume you ran a survey or we decide what secondary data to analyse we have to already anticipate; we will only find answers to the questions that we anticipate. And qualitative research, for example to pick up on new issues, unanticipated developments for example, I think anybody who thought about research methodology realises that qualitative research is extremely important, especially when addressing uncertain developments – it's just like radical innovation and so on.

So, I thoroughly agree with your notion that qualitative research is important. I don't think that favouring quantitative research or putting emphasis on that means that you disregard qualitative research. I think we are at a stage where we know some of the issues, some of the basic problems that exist. And now the question is: how do we develop one copyright policy or a limited number of variations of copyright to address a huge number of agents, firms, individuals operating under it. So, taking this step to a more generalisable result is, I think, inevitable; but it should ideally be based on an initial clear understanding of and

repeated attention to more micro, micro qualitative case study evidence – I completely agree with that. I don't think the two are mutually exclusive.

**(Lee Edwards)** I just want to clarify the point I was making. I don't dispute the fact that people on the panel and elsewhere today who have spoken don't recognise the importance of qualitative research; but what I'm hearing is that there is an emphasis on quantitative research as the most valid evidence. And that's where I find the problem.

**(PS)** There seem to be quite obvious reasons for that, don't there? One of which would be that it's something you can point to, if you like, which assumes the guise of ineluctable fact. And perhaps one of the implications of what you're saying is that it makes the design of policies rather difficult if you don't capture, as it were, what lies beneath the surface: the things that people don't, in a sense, want to know about because they're too difficult to grasp. I think that's possibly where you're going with that question.

Other points?

**(WP)** I just think what the lady before was saying was absolutely spot on. I want to give an example of BBC iPlayer: you think about linear TV and radio woefully served by measurement data, bar the fact that they don't include students and they don't include migrants. I think there's quite a lot of students and migrants in the economy and they all consume radio and TV. How good is that for measurement, for example? So, then you go to iPlayer and you think this is the land of milk and honey: we've got all this granular data and we can really understand the interaction. And this professor at London Business School, I'll never forget how he explained the study to me. He was asking at a micro focus group level, 'How much iPlayer do you consume as a household family of an evening?' Two to three hours. Great. He carried the survey out over time; came back and says, 'How much iPlayer, TV, interactive TV do you consume in one evening?' Two to three hours. So, he got a bit suspicious. So, he filmed the families in their households and then asked the question again, 'How much do you consume?' Two to three hours. And the filming showed at best a half-hour show once a week. So, then he turned this around again and said, 'All right, watch yourselves on TV what you did last night. I'm going to ask you the question again: how much iPlayer did you consume?' And they said two to three hours. So, it just helps to illustrate how much people exaggerate the amount of digital media they actually consume when they're reporting back to surveys.

And no macro study could have revealed that; you've got to get it right down to micro touchy-feely focus group level to uncover those flaws. So, it's a huge issue.

On the macro side as well just remember as well when you aggregate it all up the bigger numbers are the better, and in DCMS categories of accreted industries as an umbrella you've got competition within sectors. So, you have advertising and you have music; and the GVA (Gross Value Added) contribution of advertising will grow if the cost of music rights and licensing falls. So, there's displacement within those sectorised categories which often gets lost too. Which it's not; we're all in this together, we're all competing in this together as well. So, I think that's an important one too.

And the last one, just to build on Nicola's brilliant examples of why macroeconomics is bankrupt, and John Keene told me this last week: there's two economists in a field, and the field is surrounded by livestock, and a bull in the field turns around and starts chasing after these two economists. One economist opens up his laptop, and the other economist says, 'What the heck are you doing?' He says, 'Ah don't worry about it. I'm modelling the decisions that the bull has'. And he says, 'Well, the bull is coming to us really fast'. He says, 'Don't worry; the bull has got to model its decisions too'. It kind of captures the problem of macroeconomics.

**(RJ)** Similar question. You talk about doing experiments; how can you do experiments with copyright law? You can't. One of the big problems with law making is you can't do experiments?

**(TH)** I tell you that I can.

**(RJ)** Give me an example, the best example you can think of where you did a useful experiment in copyright.

**(PS)** Do you want to start this?

**(Paul Heald)** Sure. I just finished a study on audio books, refuting economists' claims that public domain audio books would be of low quality... the claim by the economists is that audio books made from public domain books would be of lower quality than those made from copyrighted books, and also that the low quality recording would diminish the value of the underlying work. So, you do an experiment: you have people listen to five-minute excerpts from public domain

books and copyrighted books; you have controls; and you actually come up with numbers proving that in fact that the quality of audio books made from public domain works is actually slightly higher than copyrighted books.

It's research that is relevant to particular policy questions, underlying copyright law. Certainly it can be done, it's helpful.

**(RJ)** You can do experiments in measuring, I see that; but you can't experiment with the law. You can't change the law and say, 'Let's see what happens with that'.

**(Paul Heald)** Yes, but the law changes on...

**(RJ)** I'll just change it in Yorkshire.

**(RT)** But what about hanging? I mean, we're not hanging people anymore; that's...

**(RJ)** Well, if that was a viable experiment...

**(Paul Heald)** That's why it's a natural experiment; they're not paying you.

**(TH)** But Robin there are different experiments: natural experiments where you go out and try to observe, did something happen in one country where the law was x, against country where it was y. And then you have the lab – which I think is where the other idea is operating – where you create a situation and you ask students typically to come in, give them ten quid and say, 'Now we want you to play this game. Here are the rules.' And then you observed what they do. And you start to change certain control variables. In the game that we're doing we're looking at giving lottery prizes for people who donate to charity. You take part in a lottery; does that improve the incentive of a level of contribution.

**(RJ)** I see that.

**(TH)** So, it's that: you're playing with mechanisms to see whether it has an effect or not.

**(JP)** The EU is actually quite a nice natural experiment: there were 27 member states and one copyright directive that can be implemented in many different ways. This does give room – my plea for international surveys; there are natural differences in the way this directive has been

implemented which could be used for actually gaining knowledge from this natural experiment.

**(WP)** But Robin's point relates also to something two panellists mentioned, which is Goodhart's Law ([http://en.wikipedia.org/wiki/Goodhart's\\_law](http://en.wikipedia.org/wiki/Goodhart's_law)) of macroeconomics; which is when you've got so many moving variables, you target just one, and therefore that target becomes redundant. So, the Bank of England just targets inflation targeting, which is all it's trying to do. Exchange rate auditing, money supply, all of the factors that the Bank of England could have controlled start getting way out of line. And illustrating Ruth Towse's point there are 850 economists at the Bank of England in 2007 and not one was looking at asset price problems; they were all looking at inflation targeting. And that's why the controlled experiments have a problem, which is just: what are you controlling.

**(MK)** Sometimes you've got natural experiments which come close to controlled experiments. Term extension is a good one; we could look at what happens from now till next November while sound recordings still fall in the public domain – from 1962, next November no longer. So, that's one particular change which...

**(RJ)** That's not an experiment.

**(MK)** No, it is. You probably can assume that the change you will then observe in the market for that particular kind of recording can be attributed to the change in the law. What controlled experiments try to do is just isolate out as many of those factors as possible. You can get very valuable insights on the likely behavioural effects of policy interventions.

**(Davide Secchi)** Two points. One is that – well, I don't want to talk more about experiments, but – the closest thing to a piece of legislation or a rule in an organisational setting is a code of practice or a contract that employees sign with the company. There are tons of experiments in my field that study how people react to a change of a policy or to a change of the regulation or how they perceive it, are they more motivated to do the job at best or not, are they satisfied or not, etc. So...

**(RJ)** But those are the ones that you can't do, because if you change the policy that means really changing the law. And that happens to everybody.

**(DS)** But you can do thought experiments or you can simulate some sort of fake situation where there are rules that are not exactly the same rules that are out there, but they mimic whatever is out there so that you can control how people react to a sudden change in that or not. So, there are ways to get close to that.

Now, as I said, I'm not a copyright expert; but there are things that are usually tested in my field that may be close to legislation.

The second point I was thinking of is your example of the family and the iPlayer. I would say there are probably a couple of issues that I can think of. The first is that you're not really testing time allocated to that; you're testing their perception of it. And that was my point at the beginning. If you do that there's no such a thing as one item that will bring you the information; you need a bunch of items – four, five, six, I don't know – that will tell you what is a reliable measure or a reliable way for these people to understand what it is exactly that they are doing. So, I would say maybe there are two issues: one is what it is exactly that you're measuring; and secondly, how you're measuring it.

**(CH)** May I just jump in with one sentence on that point? The iPlayer example put forward by Will Page earlier illustrates that it's better to observe behaviour directly than to rely on reports of behaviour, recollections of behaviour. That has little to do with the relative merits of qualitative or quantitative research. So, the example didn't quite work. I would agree with the previous speaker that the quality of empirical work is decisive. We may also have to develop flexible solutions and triangulate different types of evidence.

**(AP)** The point I wanted to make briefly was in relation to a marvellous comment on the extension of the term of protection. I think it was a very good example of bad data and information in relation to research on the grounds that it completely forgot to look at audio-visual performance. And for the first time since the Treaty of Rome when asked to endorse a term of extension for performers they said, 'Well, actually we forgot about them because we only looked at the impact assessment of audio productions and not audio-visual productions'. So, we now have a situation where audio productions will be protected for 70 years and audio-visual productions will now be, from a performance perspective, only protected for 50 years. So, it was an interesting exercise in relation to both quantitative and qualitative research; which had simply assumed – the point I made earlier – that one question and one size doesn't necessarily all fit all.



I just want to pick up the point very quickly as well about macro and micro study, in relation to some figures I gave earlier. I made a point that we distributed £12 million to performers, and the average was £500 and the top one was £22,000 – and those are macro figures. How do you study the tens, 20s, 50 letters that you receive at the end of that from the grandmothers who received £50 saying: you've just allowed me to spend money on Christmas? When you're looking at what is evidence and how far you can go down to study that evidence it is very difficult in the macro and in the qualitative to actually capture the social impact. And I think that was part of the question in relation to what is evidence, what is good evidence. Actually economics and numbers are one thing; people are another. Unfortunately in this issue people are the issue, both in relation to users, providers, rights holders – and not always will fit into boxes when trying to look at the micro sides of it.

**(RT)** I agree with you. There are a couple of things one could say immediately. One is that we do have data on income distribution in the country; so if you find, as you said, from the survey of your members that they're earning so much then we can compare it to the national average and that tells you something. It doesn't tell you how the grandmother reacts, perhaps; but it does tell you something.

But there's another much more fundamental question lying around here, which is that social science which deals with human beings, whether in the economic sphere or in other spheres, social sphere and so on, has to generalise or else it can pack up and go home. Of course those generalisations are likely to be generalisations; I mean they do not to fit every person.

Speaking of anecdotes, one of my favourites is that you do some work and you provide some evidence and you tell somebody, 'I've found evidence of this' and they say, 'Oh yes, yes, well I don't believe your evidence because my grandmother said so and so'. I mean, if somebody can't tell the difference between finding generalised statements which may not hold for the individual case, and the validity of the anecdotal thing, there's something wrong. Social science isn't perfect – it's not like experimental work in medicine. Although by the way, some of your examples I'm afraid to say have been rather destroyed by a recent report on what people do to fiddle their data to get their results. But we have to generalise; and if we don't generalise we won't be able to do anything. And law is general as well, Robin. So, generalisation is essential to what we're doing.

**(TH)** I just want to make an observation about the comparison made with competition policy and IP. In competition policy we've had now for 20, 30 years a lot of economic evidence flowing into the process, into the procedures. And companies are forced to justify what they do or to defend themselves – and they need economic evidence to do that. I'm not sure we are at that stage within the world of intellectual property or in copyright. I think there is a role for government to go and argue and put pressure on companies: if you don't justify, if you don't show, we will take measure x. And I think that would generate more insight, more data and probably more economic research.

**(MK)** But for competition law the rules are already set. So, the evidence you ask to produce is to certain rules, which are given. So, it may then be about market definition; it may be about dominance. And therefore it's quite clear that it's a question of a quantitative nature relative to rules which are given. In copyright law we are not there at all, because the rule to which we are supposed to produce evidence is not there. And a good example, term extensions is a very good one, audio-visual performance is a very good example. If you agree with the policy aimed to reward performers, collective licensing is only one means; there are hundreds of others. You could provide incentives through the tax system; there's something you could do through unemployment benefits for periods when you don't work; you could have grants for which you apply – there are lots of other means. In order to justify using the copyright system for that particular aim, we need evidence for that.

**(WP)** Just back to that iPlayer example, I think qualitative versus quantitative my point is, backing up from what the lady from Leeds was saying, that professor from the business school managed to smell a rat, which is that everybody was exaggerating how much of their content they were using. Drove and drove of qualitative and quantitative research, and there was an exaggeration in it. And the rat was: families don't sit around laptops; they sit around TV screens. And he was observing families; and he smelled the rat and exposed it. I just think you're better placed to smell a rat when you're dealing with humans than when you're dealing with numbers.

Another example is around this time last year OFCOM announcing some startling new research [<http://consumers.ofcom.org.uk/>] – I'm sure it's excellent qualitative, excellent quantitative, ticked all the boxes – that Facebook usage time was on the way down, therefore the social networking phenomenon that is Facebook is officially over. I smelled a rat. I raised my hand and said, 'Wait a second; the Facebook app is just being watched on the Smartphone, which means you can do more on

Facebook with less time'. I kind of found out what all my friends were doing in six minutes as opposed to 16, and getting more utility through less time. And you declared Facebook was over a stage in front of a public audience.

And I just think you can smell rats better when dealing with humans.

**(PS)** Well, that's a very profound thought. I don't know who your friends are!

So, I think we have a one-minute wrap-up for each member of this panel. So, starting with Nicola; if there are any thoughts you wish to offer to the audience here before we go for tea or whatever it is we're having.

**(NS)** I guess one of the things I've been hearing a lot about, which is slightly introducing a new topic, is the knowledge exchange – which is a bit of a buzzword – but getting all of this evidence into practitioners and into policy is the bigger challenge too. I don't know where we're going with some of this. And it's the same thing that they've had in medicine for a long time. Interesting.

**(PS)** It's the new religion in academia.

**(NS)** It is.

**(DS)** You shouldn't ask economists to go through the million dollar questions; ask them for partial questions – that's safer.

**(PS)** Would you get more for each part of the answer than you would for one answer?

**(DS)** No, you would probably get a more reliable answer. I would say, together with quantitative and qualitative, I would add something in the middle, which is simulation data. We can discuss if that's evidence, although I don't like the word evidence; I talk about data usually. So, we can discuss if that data is useful or not. But right now I think there are very powerful simulation tools that have been used a little bit in bandwagon and innovation diffusion processes (e.g., Abrahamson and Rosenkopf, 1997), like agent based modelling (Gilbert, 2008). I think that's yet one more way to kind of test one's theory and then get out and test it for real with quantitative and qualitative methods.

**(PS)** War games.

**(CH)** If I weren't afraid to exceed my role here, I would now hold a referendum and ask how many people in the room agree that copyright policy is about innovation rather than shifting money from users to rights holders. I'd love to see the outcome and hear your opinion on that. I guess we don't have the scope for that, however.

**(PS)** I'll phone the judge!

**(DS)** It depends on the voting system now! So, we don't have time for that; I appreciate it.

**(TH)** I think in copyright we are data poor, and unless we change that we can't make progress as economists.

**(PS)** Well, there we are. Thank you very much to the panel for a very wide array of thoughts; sometimes conflicting, occasionally converging, always stimulating. So, give them a hand. Thank you very much.

# OPEN DISCUSSION WITH AUDIENCE

Chair: **Prof. Charlotte Waelde** (Exeter and chair, Copyright Research Expert Advisory Group CREAG) – **hereinafter (CW)**

## Speakers:

**Martin Kretschmer** – hereinafter **(MK)**

**Tony Clayton** (Chief economist, IPO) – hereinafter **(TC)**

**Will Page** (Director, Spotify) – hereinafter **(WP)**

**Robin Jacob** (Professor, UCL) – hereinafter **(RJ)**

**Simon Stokes** (Practitioner, Blake Lapthorn and CIPPM) – hereinafter **(SS)**

**Ruth Towse** (Professor, Bournemouth University) – hereinafter **(RT)**

**(CW)** I'm Charlotte Waelde, I'm Professor of Intellectual Property Law at the University of Exeter, and I also chair the Copyright Research Expert Advisory Group at the Intellectual Property Office. And one of our tasks in this group is to scrutinise the research that's commissioned by the Intellectual Property Office to ensure that it's robust as a basis to be fed into the policy-making process. And a question that came up for us many months ago was what constitutes evidence, good evidence, for copyright policy-making. So this session is really incredibly important for feeding into the processes that go into the policy-making process that way as well.

Now, you'll see from the agenda that the first three sessions, the policy-maker session, the stakeholder session and the social scientist session, each of these were to give their view on evidence for evidence based policy, and this then feeds into the lawyer session, and the lawyers give their response to evidence for evidence based policy. So this is your chance as an audience to give your response to what you've heard so far from all three sessions, and that can in turn feed into the lawyer's thinking so we can get a holistic view about what everybody thinks.

I will say that the most remarkable thing for me so far is the degree of harmony in this room, it's not what I expected at all. I think certainly

from experience of research that's done from very different quarters there's always somebody that comes along and says, 'that's no good, the evidence there is nonsense, you can't get to the data underneath, what you're doing doesn't make sense,' and we have had almost none of that in the room today. So, we've either cracked it or people aren't actually saying what they think or sort of they don't want to make ripples if you like. So this is your chance to sort of put out there what you actually think.

The policy-makers I thought when they were talking, interestingly there was talk there about policy processes, I think more so perhaps than what actually constitutes evidence, but there was a great deal of agreement as to what should be looked at, and a little bit on the margins about anecdotal evidence and sort of how that should be taken into account, but a great deal of agreement. The stakeholders then, we had a little bit of an issue perhaps over the accessibility of data and we've had the lovely Tarzan economics which have been alluded to several times. We've had issues over uncertainty, but there was also an interesting, I think, point that came up there which was the need for the Intellectual Property Office to follow its own rules on stating what evidence it's basing its guidance or policy-making on, which I thought was a really very important point.

We had a lovely, spirited discussion with the social scientists, a very nice discussion I thought between the relative merits of quantitative and qualitative sort of evidence and the respective weights of these, I thought that was a really very interesting discussion, particularly given the move at the moment towards the quantitative data and policy-making being based on quantitative data. We also had discussion over peer review, replicability, what should be left out, and I loved the fact that we had an argument between economists over macro and micro economics and evidence, and I thought it's only lawyers that can argue over fundamental principles like that, but it's not, it's economists as well, so I thought that was very heartening.

I have got a good number of questions that strike me from the discussion so far which are based around both the process and the evidence itself and I'll throw it open to the floor in just a minute, but I want to ask a first question, I want to ask Martin, are we answering your question, what constitutes evidence for copyright policy? That's what this whole day is about. Are we answering it?

**(MK)** Well, Ruth is equally responsible for the question...

**(RT)** That's a good one... You know that somebody, I think an American president said, 'give me a one handed economist because economists always say, well on the one hand and on the other hand.' So Martin, you're passing the buck.

**(MK)** Yes. Do I come away from this room knowing more about what evidence might be, what's the nature of evidence, what would be useful for feeding the policy process? I think there are aspects here which I did not see before: there's a tension, on the one hand you've got a very idealistic conception of what good evidence is, a value-free approach, it's what we have in the IPO document and what is the ideal of academic knowledge creation, unbiased and if you do it well enough there's something which is robust and will stand the test of time. Then at some point everybody sees the light and agrees on the correct policy.

So that's the one end, and the other end is that it depends who has lunch with the minister and the policy over time tends to reflect power structures in society. That's the other position I see. And I think somehow that at the right moment the idealistic conception of evidence can matter, it can shift policy in one way but it's very rare that that will happen, most of the time it's really just a moderation game in a democratic society which enables power to be negotiated in a particular way, and evidence gathering has to be seen as part of that.

So I appear to hold these two conflicting positions simultaneously, on the one hand yes, as an academic, you have to believe that there's a rational approach to these questions, there's a rational way of producing good data and policy, on the other hand I also know now that probably policy-making doesn't work that way at all. But I believe at the right moment good evidence can matter. There is really quite a large amount of agreement what good evidence might look like. Still anybody who is a stakeholder will only support what we academics find if it supports their stakeholder interests. Others have made that observation many times before: investing in lobbying pays if the returns you can expect from the change (or non-change) in the law you achieve is greater than the cost of lobbying. But still, it's true. I don't know how coherent that was, but it's at least a statement.

**(CW)** Thank you. Any...? Yes.

**(SS)** Simon Stokes, I'm a practitioner and have a different position here. A couple of comments when you talk about evidence for copyright policy. Well almost by its nature if you involve economists you're going to be talking about innovation and you're going to be talking about the

economic aspects of copyright, but of course copyright historically exists for various reasons, including the context of property, and the nature of individual human rights. So one question I'd raise is when you look at evidence in terms of moral right aspects of copyright aren't you going to be looking much more towards non-quantitative type areas of evidence. If you focus just on the quantitative evidence you may be missing out on other reasons why copyright exists and why the copyright system exists. That's one question.

And the second question is as a lawyer in terms of evidence, it does seem to me that I think it's very good for Martin to raise evidence on the idealistic/rhetorical basis of arguments for copyright – if assertions are made, for example that copyright or certain aspects of copyright promote innovation you want to measure this. One should try and have evidence to challenge a lot of rhetoric that's used in copyright discourse, and of course a lawyer's job also is to be very critical of evidence, by its nature, because of what it is. At the end of the day you have to look at the assumptions behind how that evidence is collected and the questions that are used to gather the evidence. And so there is no objectivity, I'm a post-modernist in that respect, so that we're talking about contested views here. So I think a lawyer's job is often to try and get those contested views to the surface and then in the policy debate be honest about what it is we're arguing about. Those would be my two thoughts.

**(RT)** If I could just come back on the moral rights point. I've got a colleague, in fact she's a PhD student, in Iceland who has done a survey of Icelandic artists (Atladdottir, unpublished) of whom incidentally there are 800, which seems extraordinary in a country of 350,000, but they're rather a good group because they work all over the world, and so they can in a sense compare different author's rights and copyright systems, and she found that moral rights were considered more important than economic rights.

**(SS)** Academic papers and discourse talk about incentives and there is a school that would challenge incentive arguments, and emphasise the importance of being named, this is a 'creative commons' type argument. Jeanne Fromer (2012) talks about 'expressive incentives' here (the kudos of being creative and getting recognition – copyright creation as an expressive act) rather than just financial ones (cf. Stokes 2012, chapter 2). There are people, economists here, who could construct surveys to look at what motivates creation, whether it's reward or whether it's the reward of being named, of having Kudos.



**(CW)** Any other comments generally?

**(RT)** Well, I was going to give a very simple example of what might appear to be objective evidence that's actually been manipulated, which is that if you look at a time series say on economic growth or you're looking for a times series on economic growth, what matters is the end points that you use, because if you start (Tony Clayton is nodding because it's the most obvious thing in the world to people who have worked in macroeconomics) if you start from a year in which there's been a recession and then you go to a year in which there's been a tiny amount of growth you can show this growth, but if you work the other way round it wouldn't. And that's a very common trick when people are providing evidence for a theory about things that they're testing for – it's academics I'm talking about. And the only way that you can check up on that is if the data are either published data and you know exactly where they are so you can go and look at them, or if they're forced, as is the case now in a lot of academic journals in economics, to provide the data or at least to say where the data comes from and so on. It looks objective, you couldn't controvert it but it depends on the dates whether there's been growth or not. It seems like a very simple thing but of course it is not straightforward, it can be manipulated.

**(CW)** Yes?

**(RJ)** Yes, a touch of discord. When I was chairman of the Copyright Tribunal we used to have to set the royalty rates and so we had economists and naturally one left handed and one right handed. Later on I wrote a foreword to a book about a copyright tribunal and I suggested a practice direction that each side be deemed to have called in an economist and their evidence cancelled each other out. And the question which has bothered me for a long time is whether economists can add anything to what you can already sort of instinctively feel if you know the facts of how an industry works. And one of the things I feel sometimes the IPO doesn't always fully understand is actually what is real value? So those talks suddenly went from the abstract to how a real industry works, hearing suddenly about performers and the problems they face is actually real evidence of how you're going to make policy. And a real policy question came out there, can one guy hold up the exploitation of every other actor in that thing or should the law be changed so he can't? It's not a question of economic evidence, it's a question of factual evidence as to what's going on. So there you are, that's a bit of a gloom about 'evidence-based'.

**(CW)** Does anybody want to respond to that? Tony, do you want to respond to that?

**(TC)** Yes, it was't what I wanted to talk about but... Because I think as Robin thinks the answer is quite clear and the opposite of what he thinks. I mean economics is about fact, or it should be. Good evidence is about facts. As I said earlier on, I spent most of the last two days at the OECD (Organisation for Economic Cooperation and Development) trying to figure out how we build international evidence bases for innovation policy. And that's about capturing what happens in industries and businesses or what happens to people and what sort of skills they need to do the things that they want to do. And the analysis we can do on the basis of facts is usually arguable, but the facts themselves shouldn't be. And the problem we have with an awful lot of copyright stuff, and quite a lot of innovation policy, is that we have big holes in the factual interface. And the OECD principle is data first and it actually speaks to a point that I made this morning about the problem of getting the same surveys done in different countries and in the same way so you can compare regulatory systems and legal systems and do the sort of experiments that Robin thinks is impossible and which the OECD does every day. And my view, for what it's worth, is that micro matters most. In all of this stuff micro rules, which I think answers your point actually.

**(RJ)** Well, for example the Patent Office (IPO, 2010) has done two surveys on thickets. First of all they did their own study, which was top class, because it was somebody actually going out and saying pick an example. They chose the shaver industry and asked, is the whole world of shavers so bugged up with patents that nobody else can make shavers except the people who already do. Answer, no, because somebody went out and looked at the patent claims and they invented their way around, which is what the patent system is for. Then they've got another study coming up with is complete tripe because it's not based on relevant facts at all. It is built around 'triples' which are to do with how many times a patent is cited against a patent application. You can count the numbers of these – but they tell you nothing about (a) why examiners cite (many have favourite citations), (b) about the scope of the claims which matters vitally if you are negotiating your way round – one big patent can be more of a block than a hundred little ones, (c) about the validity of the patents, (d) the opportunities of designing or inventing around. In short the exercise tells you nothing you can usefully use or rely on.

**(TC)** But it's the behaviour of individuals that determines the response to policy. If you need to look at the facts of the effects of the rules that determines the response to policy because that's what adds up to the impact on the macro economy, but if you can't express it in that way then you don't really have a good story.

**(RT)** But I also think some of these facts are very difficult, if I could give the example of artists, the sort of work I've done on artists' earnings, I mean the sort of evidence that you can find comes from labour market surveys or surveys of firms, and when you find out what firms are, they're only firms of a certain size, or the data is based on people who are paying National Insurance contributions or something like that and they're just not getting at the right people. So what you end up with these things is that, in fact what Andrew mentioned earlier, what the average person earns, I mean what you actually want to know is what the median is, what the cut-off point is and so on, and you're just not getting the whole population that you want to study that way (Towse, 2010).

**(TC)** Well, that data is there if you want to go and find it.

**(RT)** Yes, but... Ah, well that's the point Sally was going to make, but said I ought to make, but she can make it herself now, which is the cost of getting all this.

**(RJ)** One other thing is that the Patent Office talk about, and with Tony there maybe it's getting even better, but the most amazing tripe that's come out of the Patent Office, I looked at the Hargreaves figures, actually was it £6.7 billion (Hargreaves, 2011: supporting document EE) it was going to add to the British economy if you implemented the Hargreaves? Something like that. That was a complete tripe that figure, like that of the Minister who introduced the Trade Marks Act. He gave a huge figure for the saving to industry which the new Act would bring about. Actually trade mark departments are much bigger now than they were pre-Act and the Act has been a cost, not a saving, to industry. And that's very worrying, because these figures count not because they are real or even realistic but because people believe them at the time. Likewise policy. I know that Tony doesn't entirely agree with what the government's up to, but without any policy whatever they're going to give permanent monopolies to dead furniture designers.

**(CW)** Yes, I will wrap it up. I want to hear from Will.

**(WP)** The other one was just with Spotify is very keen to engage with the academic and policy community. The classic experiment question we have to deal with at Spotify is, do we cannibalise record sales. Cannibalisation is tattooed across copyright holder's foreheads, so you cannot move, you cannot get up in the morning without asking the cannibalisation question. We panic about it, it's like you're paying ten quid a month, we're giving you access to all the world's repertoire, that's a lot of money but does that stop you buying CDs? And if it does are you actually spending more money than £10 a month as opposed to what you spend on CDs which is probably about 40 or 50 quid a year.

So your one example there, just to tee that one up is about Mumford and Sons (<http://www.billboard.biz/bbbiz/industry/digital-and-mobile/business-matters-mumford-sons-babel-smashes-1007965972.story>), their new album came out in America and number one on Spotify with a record breaking streams count of eight million streams in the first week and number one in the album charts, 600,000 album sales record breaking album sales. And you're just stepping back and thinking how do you solve this experimental question? Daniel Glass who manages Mumford and Sons said, 'we just wanted the fans to get to the content.' And the role of Spotify; let them get to it and work out whether they want to buy it or not. And I just throw it open because of that A versus B experiment is at the heart of our business right now.

**(CW)** Any final comments? One of my questions was going to be, what are the impediments to developing evidence for copyright policy, but I think I will put it there and leave it there because we need to go on to the next session. We've discussed a little bit I think the impediments, one here is cost and another one is accessibility of data, and I think those two have come up quite strongly, but I'm sure there are others, but I will just put that on the table for people to think about it at the moment as we're ready for the next session.

# PANEL 4. LAWYERS' RESPONSE TO EVIDENCE FOR EVIDENCE-BASED COPYRIGHT POLICY

## Speakers

**Prof. Estelle Derclaye** (Nottingham) – hereinafter **(ED)**

**Prof. Lilian Edwards** (Strathclyde) – hereinafter **(Lilian Edwards)**

**Prof. Paul Heald** (Illinois & BU) – hereinafter **(Paul Heald)**

Chair: **Sir Robin Jacob** (UCL) – hereinafter **(RJ)**

## Questions & Answers

**Martin Kretschmer** – hereinafter **(MK)**

**Ruth Towse** (Professor, Bournemouth University) – hereinafter **(RT)**

**Tony Clayton** (Chief economist, IPO) – hereinafter **(TC)**

**Philip Schlesinger** (Glasgow) – hereinafter **(PS)**

**Christian Handke** (Erasmus University Rotterdam) – hereinafter **(CH)**

**Nick Mann** (Deputy Director, Copyright Office) – hereinafter **(NM)**

**Will Page** (Director, Spotify) – hereinafter **(WP)**

**Pippa Hall** (Economic Adviser, IPO) – hereinafter **(Pippa Hall)**

**(RJ)** Lawyers' response to evidence for evidence-based copyright policy – that's the title of this section. Estelle is going to go first. I have been wondering over the days... most copyright is now being made by our masters in Brussels. A lot of it has continental notions which are along the lines of: it's nothing to do with economics at all, or indeed money, but all about an extension of the author's personality. Something similar goes on in trademarks. If that's right, then even... however good this conference was, it's a waste of space, because they won't pay any attention in Brussels.

I think that is a serious observation. I'm putting it slightly crudely, but policymaking is now shifting to continental Europe. Whether that's a good thing or a bad thing is difficult to say. Maybe it's a good thing. That would be an interesting question. Just look for evidence. You could, for example, say, who's got the best pop music industry in the

world? Is it France? Well they pay higher royalty rates for records, which is why we rejected that in the Copyright Tribunal; precisely because we thought the British model seemed to be working better. That was the evidence, if you like – not an experiment – but a comparative... actual evidence. German pop music is not doing too well either.

Estelle – she's got seven minutes. We've decided we're going to carry on with the existing time, because we stand between you and drinks. We also want to have a really big punch-up just before drinks if we can. Estelle.

**(ED)** Thank you, Robin. Hello, everybody. I'm Professor Derclaye. I'm Professor of Intellectual Property Law at the University of Nottingham. I want to take the question of the day again – what constitutes evidence for copyright policy? I won't talk about the UK IPO paper on good evidence for policy as such, because a lot has been said about it which I agree with; there's a lot to be praised about the paper; it is generally common sense. But my focus will be on something else.

If I can summarise my statement first, so you have an idea of what I'm going to talk about, something that I think a few people have already talked about is that evidence should not be only economic, because copyright is not only economic. Ruth and other people have made the point that there are also the moral rights that we have to take into account. So I think we should not forget that the goal of copyright... or one of the goals of copyright... I think Christian Handke was saying... asking the audience the question – is it innovation? Do we all agree with that? I say, yes, but there are other goals as well. One of them is not economic, at least if you look at the moral rights. This is, I think, too often forgotten by policymakers and even the literature.

I think the next idea is that there's an inevitable link, and that's the lawyer talking of course, between policy and evidence. If policy is about economic growth, then the evidence will be to try and find proof that copyright or intellectual property rights in general foster economic growth. But I think there is much more than economic growth, and, therefore, there's much more than economic evidence to copyright; and that we shouldn't look at economic growth as an end in itself; and economic growth is not always good. That's where I'm going... to try to link this idea with the issue of evidence.

It's about the nature of the evidence, so the type of evidence. The focus, as I was saying at the UK IPO and elsewhere in general in the decision-

making bodies around the world, seems to be always about economics and economic evidence. Now, I'm not saying we shouldn't have economic evidence, but we should have more than evidence that comes from economists, or, for that matter, quantitative evidence. A lot of people have already said we need not just quantitative data; we need qualitative data and we need other types of evidence - empirical research, experiments, etc, and I don't think we should discard this type of evidence. So that may be something that UK IPO can think about.

Even Hargreaves makes that point in his paper. He says, economic evidence is not of course the sole driver of IP policy (Hargreaves, 2011, p. 19). I finish the quote. To some extent the UK IPO paper on good evidence for policy alludes to this too but in less strong terms. So, we should remind ourselves of this.

The second point that I want to make is that, I quote, the Prime Minister here in 2010 (<http://www.number10.gov.uk/news/pm-speech-on-well-being>), in November actually, just two years ago, he made a speech about growth and GDP, and that growth and GDP are not the sole focus... not the only thing we should focus about, but we should also focus about happiness and wellbeing of the population; that they are actually equally important as economic growth.

The strange thing is that we need to look at this in general. The strange thing is that he gave the brief to Hargreaves and said, just look at the economic growth and how there's a link or no link between IP and economic growth. So there's a bit of an inconsistency between what... he didn't? Okay, we can have a discussion afterwards. I like people nodding in different directions.

So if he didn't, we'll talk about it, but from what I understand, the brief of Hargreaves was to look at IP and copyright, therefore, from an economic point of view; from the point of view of growth. If that is what the Prime Minister is talking about, maybe he thought there was no link between IP and wellbeing or IP, and copyright, and happiness.

But I think that copyright and intellectual property rights in general have a role in promoting wellbeing and do have already a role in promoting wellbeing and happiness, whatever you want to call it.

So I don't think we're tied... the UK IPO nor the other bodies in the world are tied with this brief that Hargreaves had, especially in the light of the Prime Minister's speech in 2010. Even Hargreaves said in his review, that policy should balance measurable economic objectives

against social goals and potential benefits for right-holders against impacts on consumers and other interests.

So I think that we should not forget that there is other evidence than economic evidence, to come back to my point, and that not only because copyright has other goals than economic growth, but also because even if we're looking at the economy's growth, it's not only economic evidence that is going to prove that IP or copyright leads to economic growth.

The other question is, I think, not well known, I suppose, or maybe it's known from economists or economists of happiness, or those who look into that... is that growth is not always good. After a certain point, if you reach a certain point of wealth, it doesn't make you happier. So if you are thinking about the utilitarian rationale for copyright law, then you have to think about at which point do we have too much IP and at which point IP does not make us happy anymore, if that's something you think about.

This is where I think there's an inevitable link between the evidence and the policy. You can't just look at them in isolation. Should an IP copyright lead to wellbeing and happiness as well? As I was saying, after all its current basis is the utilitarian, if you think of the current basis still now and you even forget about the labour theory. If so, we need the evidence that they do so. If the current framework does not, then the law should be changed.

I think the UK IPO should lead the way, like they did with the Green Channel in terms of the environmentally sound technologies a few years ago in 2009 in establishing the new system for fostering the environmentally sound technologies (see <http://www.ipo.gov.uk/p-pn-green.htm>).

I think that the UK IPO paper may clarify this type of evidence in addition to what it says about quantitative and economic evidence, if the paper is amendable.

I think also in terms of the link between policy and evidence, if there is too much focus on the evidence, you can lose the link between the two; between evidence and policy. Evidence should not be driving policy but only help it. If not, one cannot see the wood for the trees, I would say. Policy is what is desirable. The question is, should economic growth be the only desirable outcome or goal of IP rights. If not, then we need different types of evidence.



For example, evidence coming from only the economics of happiness suggests surveys on life satisfaction, or if you want to be more precise, day-to-day reconstruction surveys. This is, I think, the link that exists between the two. That doesn't mean that we should only look at the goal... the other goal should be only happiness or wellbeing, but there should be other goals as well that we might want to revisit, like sustainability and maybe other goals that should be taken into account when we talk about copyright and IP.

I'll finish with the two questions that Martin sent to panellists by email. The first one – are appeals to shared values evidence? I think we could say yes in some situations, because there is evidence that we all want to be happy with extremely few exceptions. So this could constitute evidence until the contrary is proved. Policy change could reflect this goal.

The second question you asked, Martin, is – is the past a guide to the future? I would say, yes and no. We don't want to repeat history when we got it wrong. That's what we learn from making mistakes. So if we learned that economic growth does not lead to happiness past a certain point, then we should revisit the goal of IP or change the law in that respect. But we can learn from our mistakes, as I was saying, through other new research on wellbeing. In fact, I've talked about these points in a paper that I published last year. [E. Derclaye, 'Eudemonic Intellectual Property: Patents and Related Rights as Engines of Happiness, Peace and Sustainability' (2012) 14(3) *Vanderbilt Journal of Entertainment and Technology Law* 495-543 - [www.jetlaw.org/?Page\\_id=11354](http://www.jetlaw.org/?Page_id=11354).]

That is what I wanted to say. If people have questions or disagree, I'm very happy to reply later on.

**(RJ)** I'm not sure I agree. I think copyright is all about money; money for all the people who have their greasy paws in it. Of course, the people in... the middle men are always the ones who take the most money – the Stationers of old, the publishers of now. But others feed off it too.

**(ED)** I'm not saying that copyright is not about money; I'm saying it can be about other things too.

**(RJ)** I follow that. It is also about other things. The very first example you had this morning was about free speech.

**(ED)** I wasn't there, sorry.

**(RJ)** But it's primarily about the money. What do you say, Lillian? Do you think it's all about cash?

**(Lilian Edwards)** No, you're not going to like me either at all, I'm afraid. I'm on the advisory board of the Open Rights Group ([www.openrightsgroup.org/](http://www.openrightsgroup.org/)). I'm not a copyright lawyer. I'm not an economist. I'm not an empirical researcher. You may well ask, why on earth am I here? We can just go over to you. I'm an IT lawyer and I'm the deputy director of a copyright centre. Life is bizarre sometimes.

My introduction to the world of copyright evidence was really through my involvement in the Digital Economy Act – God bless it. I gave a series of talks around the country which all had a title more or less like – there are two things you never want to see being made: law and sausages; attributed to Bismarck. I thought maybe at the end of today that I would feel that way about policy as well, but actually I don't really; actually it's been quite an encouraging day.

**(RJ)** It's not finished yet.

**(Lilian Edwards)** I know. Just wait for more. You won't like it. To throw in my two pence on the quantitative and qualitative evidence debate, which I was very interested in... I think particularly I was most sympathetic to Christian's version of it. I am intrigued also with what Charlotte said when she introduced this session, when she said something like, this is about lawyers' response to evidence; whereas everyone else it was their views of evidence. The implication seemed to be that lawyers don't supply evidence. I wondered if that was deliberate or not. Okay, so we're all lawyers and we can spot textual shifts.

**(MK)** The blame is here.

**(Lilian Edwards)** Okay, because I think lawyers do supply evidence, but maybe I'm wrong. I then went and asked David Humphries this, who should know. He didn't completely smack me with a wet fish. My evidence in relation to the Digital Economy Act, which seemed to have quite a wide public uptake even though I never sent it to the IPO, did not relate to econometrics; it related to things like rights of privacy, freedom of expression, digital inclusion, social exclusion, the impact on public Wi-fi wired cities and possibly general respect for the law, because as we know, it does the law no good when you pass

unenforceable laws that most people under about 30 know how to evade. So these are all not about money, but I think they do impact in the balance on the discussion of copyright policy.

To contextualise that a bit, I've got here context of quantitative evidence. This really is following on from conversations with Christian and with Joost Poort, in that there is room for both, I think. I've been looking recently at the French HADOPI report (<http://arstechnica.com/tech-policy/2012/09/french-anti-piracy-agency-hadopi-only-sued-14-people-in-20-months/>). This is the report that has come out after two years on the success of... the HADOPI system. It has been widely reported in my kind of places as showing that HADOPI is a failure, because after two years and ten million emails and so forth and so on, they've only managed to fine one person.

This is obviously a partial response, so I went looking for other responses and I found quite an interesting piece that said, but hang on, the point of three strikes graduated response is supposed to be to educate. If you actually look at the percentage of people who received one warning (1.15 million), about 90% of them didn't get a second warning. If you look at the people who got a second warning (102,854), only 340 (0.33%) did get a third warning.

Then it stops. At this point what I desperately wanted to know was why. I wanted the qualitative follow-up. I wanted the focus group interviews. I wanted someone to tell me, did they stop because they were terrified? Did they never listen to music again? Did they get a subscription to Spotify? Did they get a VPN? Did they get Proxy? Did they join a Darknet? What happened next?

So there is clearly a need here, it seems to me, for a synthetic world of quantitative and qualitative research. On a practical level that actually led me... I've been talking also to the guy who did the YouTube research – Kris – it led me to a really practical question, which is, what is the status of open data in this? Because I immediately thought of a project I'd like to do using Kris' data. Maybe I can pay Kris to do it, which is good, but maybe I can't; maybe I have to do it myself. So then it gets into open data, academic funding, credit, confidentiality, transfer of personal data. These are all issues that we're really familiar with in the privacy community, which I actually come from. I think that needs a bit of discussion. At CREATe we have committed ourselves to open data, subject to confidentiality – this is void where excluded by law. What else have I got here? Have I got another couple of minutes?

**(RJ)** Yeah. Two.

**(Lilian Edwards)** More practical suggestions – my background in empirical research such as it is was actually from family law. I used to teach child law. I hung around with people who did longitudinal cohort studies, which I'm sure a lot of people here will know what that is. So, for example, a very successful one at Edinburgh University – they took a very large sample, statistically significant, of all the primary schools in Edinburgh (<http://www.law.ed.ac.uk/cls/esytc/>). They followed those kids through – for successively about ten years to study their involvement with authorities, juvenile delinquency, children seeing police, social workers, etc. Why aren't we doing that with file-sharing?

There's the Amsterdam File-sharing IViR 2012 survey (Poort & Leenheer, 2012), which as I say is wonderful, which I need to read in English, the whole thing. If we did that every year and we followed it up with qualitative work and focus groups, we'd have an idea of what these people did. So, for example, within the IViR survey it says that they had 25% - correct me if I've got this wrong – they had 25% of the sample who admitted to having done infringing downloading rather than illegal downloading in the previous year. Then 75% of them said they had not been affected by Netherlands' blocking of the Pirate Bay.

Again you think, why? What happened? The obvious answer for me was, they found a way round it; they got a VPN, they got a proxy. But maybe they didn't. Maybe they gave up. Maybe they lost interest in music, because there's also evidence that people download more music when they're younger than when they're older.

So that's just a practical suggestion. It will take money. It will take money. Who is going to pay for it, because as Robin Jacob correctly said, people pay for this to get the answer they want, and this is not something that the rights-holders would pay for.

Finally, the last practical point I want to make, very much from my involvement with the Open Rights Group but also as an academic, is about consultation theatre and consultation ennui. There's a wonderful phrase that Bruce Schneier ([www.schneier.com/](http://www.schneier.com/)) coined in the world of security and privacy, which is, security theatre; which means you're not actually making anything safer, but you do things because you have to be seen to do it.

I would suggest, and this is where you wanted the fight before drinks, that we're going through a period of consultation theatre. Is there any

real reason why the EC has consulted three times in my lifetime on net neutrality and as far as I can tell asked the same question every time? I'm not really sure.

So we have to be very careful that consultations come out that have not got a prejudged outcome; which is not the same as saying they shouldn't have a research question or agenda, because I've been at the other end of that where it was very clear that a tender was being put out for some kind of research about something, because no one knew very much. That's really again not very helpful for either the tenderer or the tenderee. But I do think we have to think about that and about consultation *ennui*. Unfortunately this is going to interact with these very high standards for evidence that have been proposed.

**(RJ)** Thank you. What are you going to say in seven minutes?

**(Paul Heald)** First of all, I'd like to say it's a tremendous honour to be invited here. I really do mean that. I come from a land where empirical evidence doesn't play much of a role in copyright policy at all, so it's wonderful to be in a room full of people so ahead of the curve. I must say, it's a sign of a good conference that I've had to change my remarks. I looked at them and realised that because of what I've heard today, I've actually had to change what I want to say. What has occurred to me, before I make my points, is that there seem to be two different contexts for evidence to play a role in copyright policymaking.

First, you have the situations where powerful rights-holders are fighting each other over what the right policy should be. So, you have a collective rights organisation on one side and the television stations and radio stations on the other side. You have two powerful interest groups. In that situation I'm quite optimistic about the role evidence should play. It's a natural way to make the decision. There's less direct political corruption because both parties are funding the fray. Evidence there, I think, is a way for the policymaker to be neutral and tell a convincing story to the loser as to what the law should probably be.

My remarks, however, were drafted thinking about a different model, and that is where copyright owners and performers and collecting rights organisations are all on the same side, and the only possible loser is the consumer (where there's a diffuse loss to be suffered by consumers). This is a situation where academics naturally come to the side of consumers, and I think where the IPO and the Government have a very special role to play, maybe a different role to play in evaluating evidence than in the context of battling industries.

What I'd like to do is take my role as a lawyer very seriously. It's been a while since I wrote a brief, but nonetheless I wanted to explore how the litigation model might help us think about some of these evidentiary issues. I've got a first point which draws a positive lesson from the law and a subsequent two points which are more cautionary tales.

Point one is simple. I think the party petitioning the Government either for a judgement in a civil or criminal case or a party requesting a law from a legislature has to bear the burden of proof. But unlike in litigation, a petitioner for legislation bears the burden of providing empirical evidence that its proposal is in the public interest. I think we can argue as long as we want about what constitutes evidence, but without a presumption as to who bears the burden of proof, we really only get so far in the ultimate policy question.

Hopefully post-Hargreaves this means providing credible empirical proof of a net public benefit. So, when Disney comes to the UK asking for a term extension, it must come armed with evidence that the monopoly cost of its continued property rights are outweighed by a tangible and measurable public benefit.

**(RJ)** That's not the way it happened, though.

**(Paul Heald)** Moreover, just as in litigation, I think that burden increases when convincing contrary evidence is produced. I, Martin, and others have shown very measurable costs of term extension in terms of higher prices and diminished availability of creative works. I think this sort of evidence raises the petitioner's burden of proof higher still. Anecdotes at this point simply will not do. Also, as in litigation, a 50/50 split of evidence on both sides means no legislation, means no judgement in favour of the petitioner.

Relatedly, as a political and rhetorical matter, I think those seeking a reduction in copyright protection, a lowering of the current standards, should also bear the burden of proof. I don't make this argument as a fairness argument. I advocate equal treatment for expansionists and contractionists, but not on fairness grounds. I think at least in the US after decades of expansion of copyright law in favour of owners who submitted little evidence to justify the expansion, it really doesn't seem fair to require empirical evidence to dismantle the edifice. Nonetheless I think this is an inevitable price that has to be paid for the acceptance of this innovation in evidence-based rulemaking.

The second point is a cautionary tale from the law of evidence. Our question today discretely is, what constitutes evidence for copyright policy? Here, a lawyerly litigation model I think is really pernicious. Quite frankly, in legal practice anything that is relevant and persuasive is potentially admissible evidence. Here's a lawyer's view that I don't think we should adopt. I think the model of adversarial litigation of the courtroom is a poor one when it comes to legislation and policymaking, which I really think should be about finding the best evidence upon which to base policy.

In the courtroom, the question is admissibility or not. If it's admissible it goes to the jury. Here we need a filter. I think everything should be admissible and submittable to the relevant regulatory agency, but some sort of policy group should choose what the best evidence is upon which to actually base the policy. We hopefully are engaged in a scientific search for truth and not the sort of adversarial courtroom tactics which frequently allow for obfuscation of the truth both in the acceptance of second-best evidence and the barring of good evidence.

Third point, final point – second cautionary tale from the law that invokes what I thought was going to be the 800lb gorilla in the room but it was let out by Professor Hoehn here when he started talking about forcing the production of evidence from those who have it. Remember that in litigation we have rules that sometimes allow defendants to avoid testifying. Here truly are evidentiary rules that stand in the way of finding the truth. There are good reasons – protection of personal liberty – that might justify some of those evidence-blocking rules, but none of them apply here, I don't think.

If we want to truly endorse evidence-based rulemaking I think we must be relentless in requiring all reasonably available evidence to be adduced; this means forcing copyright owners to produce their confidential data or back down from their petitions for added protection.

Just a couple of examples, if I have time. One of the major arguments made for a copyright term extension around the world is that bad things happen when works fall into the public domain; in other words, books will be less available, music less available. The best evidence of this would be sales data of books before and after the work falls into the public domain, or maybe evidence of whether they're more or less on bookshelves – bookstore shelves – before and after they fall into the public domain. You cannot get, at least in the US, any of this evidence from the right-holders. I was stuck with looking at second-best

evidence; whether the book is in print or not; how many editions; how many publishers – which is helpful; it's good evidence, but it's not the best evidence.

In the context of music what you'd like to see is before and after a work falls into the public domain the amount of airtime they have; maybe sales data also. Again, I'm stuck in my own research with third-best data. That's tracking songs and whether they appear in more or less movies after they fall into the public domain.

Just to digress to patent law for a second, when Monsanto comes asking for patent protection for GMO plants, claiming that protection is necessary to stimulate innovation, one cannot even begin to evaluate that claim without access to data that only Monsanto has about its R&D budget and will be utterly unwilling to share with you as it asks for legal protection.

Finally – I'm probably running out of time here – I don't think it's enough in this context for creative industries to claim the protection of trade secret law, confidentiality law when we as academics and the Government agencies can credibly promise not to misuse or reveal discrete data, especially when we – and I really like the Hargreaves rules – promise to make all of our data accessible for whoever wants to test and replicate our experiments.

So for me the question of what constitutes evidence is ineluctably tied to the question of whether we should allow policy to be made where the best evidence is deliberately secreted and hidden. I don't think there's any reason for policymakers to be hampered by law's set of evidentiary rules which frequently keep the best evidence from the decision-maker when we're in the different context of deciding the wisdom of legislation.

**(RJ)** That's interesting, but quite a bit of that I'm afraid was framed against the American litigation system with a jury trial, because on the whole in our litigation system we let all evidence in and weigh it. That would happen, for example... we talk about the big boys about having a fight – their fight was likely to end up in the Copyright Tribunal if they can't sort it out. That's exactly what the Copyright Tribunal is for and actually works rather well.

I think it's a hugely good model for many, many things. Of course you have evidence; you have opinion polls; you have the kind of stuff the patent office best practice document has. If it isn't up to scratch you



didn't need the patent office document to tell you that, because this was being operated by the Copyright Tribunal for years.

Let me take a particular example. I'm sort of speaking as the next speaker. The patent office's document contains a lot of basic common sense, as you put it, Estelle. It does and it's well worth it. Those of us using opinion polls, I think you should have said a good deal more about them, actually. It's very difficult to frame one which is not biased. Those of us who have ever been concerned with opinion polls and trade mark cases... well.

One of the big problems is also identified by you, which is that Joe Public never speaks. All the people you're getting new evidence from are people who've got some kind of axe to grind – all the way through. That's been true of all IP creation ever since the beginning of time. You get movements every now and then – oh, I'm against patents, in the middle of 19<sup>th</sup> century; perhaps starting again now. But they're all people who have got a view. I don't know how you deal with that – getting Joe Public to give evidence on a subject he's not interested in, which is what it really boils down to.

Now let's throw it open. Who wants to have a swing at somebody? Yes, Tony.

**(TC)** Can I respond? I think it's been a really good set of comments. I have to say, to be accused of common sense as a Government department is a real compliment.

**(RJ)** If I may say so, it's a bit of a model of what it's trying to say a thing should be a model of, it is written very clearly.

**(TC)** To answer the early point, it is not final. We want to develop it. We are aware that it doesn't say enough about case examples and behavioural stuff, because unless you understand that, you don't understand the impact of policy. That we completely accept.

To come back to the point where I was shaking my head vigorously at the beginning, the remit for the Hargreaves review was to look at the role of intellectual property... of intellectual property policy and the scope for improving it to promote social and economic innovation and growth. Those were the terms. They're written in the front of the report.

**(ED)** I missed the social point.

**(TC)** Yeah, it's there. When you look at the attempts to value the recommendations at the end, half of the recommendations have got 'no economic value shown', but say 'this is for social innovation'.

**(RJ)** I thought the real objective of Hargreaves was to do what Gowers had done all over again.

**(ED)** He does say that in the recommendation, but he doesn't push it further.

**(TC)** But quicker and shorter.

**(ED)** I admit that. I did quote one of them where he does say this, but he doesn't push it further. We don't know what comes later.

**(TC)** Partly because it's much harder to do.

**(ED)** A lot of research has been done already on this.

**(TC)** I'm sure there is, but Hargreaves had six months to get the thing done.

**(ED)** He didn't spend that much time.

**(TC)** He took the rather sensible decision that he wanted to make just enough recommendations to get them implemented but not too many that they get forgotten.

Just coming on evidence of policy, I think the point that was made about the difference between business-to-business contests is a really important one. That is quite often where you end up with litigation or you end up with lobbyists effectively lobbying against each other to persuade ministers to do X or Y. The point about having some principles for what evidence should be adhered to is just to avoid us getting out time wasted, because it's incredibly easy – I've seen it happen – that we put out a policy recommendation and we instantly get deluged with evidence of unknown quality, which the minister is expected to ask that we read and respond to. That is standard lobbying practice. It's much easier if you've actually got a thing which says, I'm terribly sorry but you haven't read our standards; we're going to put this straight in the bin.

I've tried to promote this at the OECD... and the reaction was that it was a bloody good idea – so we are actually moving things on. The point about the term extension thing you referred to, I don't know whether

you've actually read the impact assessment to copyright term extension, but it says...

**(Paul Heald)** ... is it different from Gowers? I read Gowers.

**(TC)** No, probably not, but it basically says, the costs outweigh the benefits by about 30 million...

**(Paul Heald)** I know. It's wonderful.

**(TC)** If you wanted to write the case for term reduction, it's very easy to do, because we've done it. We sent it to the minister and he signed the Copyright Term Extension bill nonetheless. And that's how it works.

**(RJ)** Can I just ask...? I had a theory... did anybody in that exercise say that they should be permanent copyrights? It's a much better right all round!

**(TC)** It's illegal. You can't do it.

**(RJ)** Never mind.

**(Paul Heald)** The obvious... is renewable. My question about...

**(RJ)** Because if you did, then you won't have out of copyright works competing with works where you want to pay authors and orchestras and whatnot who are living.

**(TC)** Can I just finish my... I'll be brief. Who speaks on behalf of consumers – that's your point; Joe Public – and the small firms who can't afford court; and the unborn firms; firms that have not yet been created? That's what we commissioned research to do. That is the public interest; that's why we commission research; that's what it's for. I don't see anybody else doing it.

**(RJ)** It's quite sensible that, isn't it? If the Government says, we're not... we'll look at lobbyist research providing it satisfies rational criteria of the kind we're setting out. We have to do our own research for the other guys. We know they're never going to say anything anyway.

**(Lilian Edwards)** Except the lobbyists put a lot more money into their research.

**(RJ)** It doesn't matter how much money... well, that's true. They may still...

**(TC)** If they do it well, I don't care how much money they spend.

**(RT)** But the public may not speak, but it acts. That's what we've seen with downloading. That's where we come in with observation, isn't it?

**(Lilian Edwards)** Yeah, and I'd just like to contest the view that Joe Public isn't interested. I'm aghast at that. I can barely go out of the house without someone talking to me about copyright. As I say, it's ruining my social life.

**(RJ)** That's because you're a target for it.

**(Lilian Edwards)** No, that's my friends; that's not academics or students.

**(ED)** Can I briefly respond to your point, Tony? I must have missed the term social. It is true that it appears from time to time.

**(RJ)** She missed it because Hargreaves never mentioned it.

**(ED)** No, no, he does mention it. I think I quoted from him and he does say that. I'm not saying that the Hargreaves report does not address it. What I'm saying is that you're Chief Economist at the IPO but there's no chief sociologist or there's no other 'chief something'...

**(TC)** We've only just got the economist.

**(ED)** That's true. My point is, economics is very important, but I think we should also look at all the other evidence. That's I think what I wanted to say. Let's forget about the Hargreaves review; maybe I didn't read it properly and it's true that the remit was broader – but in terms of evidence, when you hear at other levels where bodies are in charge of policy, it's always about economic growth.

So I'm not targeting the IPO. Sorry, I withdraw my comment just for the IPO, but I think it's a general comment that we should not forget the other fields. That's not only sociology – it's also psychology, philosophy, etc, that should be taken into account. That's where the evidence should come from too.

**(PS)** May I just add a word? I think the way you describe... the way you've constituted the rules for evidence is very interesting, and is clearly to stop a load of dross flooding in. One of the things I'd like to reiterate is that the kind of model that is embedded in the propositions is quite a limited model of how research is conducted. If you could

extend that somewhat I think that would be really a very beneficial outcome actually.

**(Pippa Hall)** I think just to be clear... the evidence does set out that it's only involved with that one particular type of evidence. It does acknowledge that there are lots of other types of evidence; it's just on that one. The idea would be that we...

**(ED)** Yes, it's open. The paper is open; I agree with that.

**(TC)** If you would like to send us your suggestions as to what...

**(RJ)** I think one thing you ought to add... anecdotal evidence is important of a problem. We had such a wonderful paradigm example today. The third spearman holding up the whole release of a damn film, which is ridiculous; or the re-release. That is a very serious problem, because what he's going to do – he's going to start negotiating with the other ones and there's going to be a hell of a row and the whole thing will go to pot, all because the law says – otherwise there will be an injunction.

But it's not the kind of economics involved in measuring anything. It's getting the story, as a real story saying, this is a real problem. That is evidence too. So I think your kind of evidence should include evidence of real problems.

**(CH)** Can I chip in here? I think that's not quite right. What you described just now is a holdup problem in the economics jargon, and they would ideally be avoided. The next question is how much it costs us to do something about it. Very rarely do we have costless measures to solve any kind of problem. So we have to get a sense of proportion, and ask: can we do something about this holdup problem without excessive unintended consequences? It doesn't have to come in exact terms of dollars or a pounds sterling, and I'm not talking precise numbers necessarily. But we have to get a sense of proportion, and thus there's the challenge of measurement in devising policy, because policy measures are costly. Tony Clayton of the Intellectual Property Office has a wage, for example, and so does his staff.

**(RJ)** I'm not convinced it has a significant... but it might do. Supposing you were going to modify the law. It may be the law already that an injunction should only be granted when it's proportioned. So this guy says, you're not getting an injunction; you can have a few bob like all the other spearman, and that's it, unless you've got a good reason why

you particularly don't want it done which is justified. I can't see that's a very expensive operation, to change the law along those lines.

**(CH)** In this example, it might be easy to find that sense of proportion. I think the most interesting questions are usually those where the countermeasures are quite costly, not only in terms of paying people's wages who deal with the administration of rights. Costs may also be unintended consequences, such as lower incentives of people to participate in creative projects if they feel that they won't have any rights to negotiate later on – if they have no moral rights, for example, to avoid that individual contributors can hold up projects involving many collaborators.

I take your point and there might be a few cases like that. The more important and longstanding questions tend to be the ones where policy is costly, and then we have to have a sense of proportion.

**(RJ)** I think that must be true generally, mustn't it?

**(Lilian Edwards)** Can I add a bit on that? I have an example like that, which maybe is a counterexample: The Professionals TV series (ITV 1977-1983) was similarly not allowed to go I think to DVD or video for years because one of the main actors thought it was rubbish. I think that's an example you're giving. I don't know how to balance those. I quite like The Professionals myself, but you can see his moral rights and you can see his issues about whether it would ruin his future career as a theatrical actor, which I understand was his worry.

I was also going to say about anecdotal – I'm afraid I have a terrible knee-jerk response about this, because one of my main fields is privacy in social networks. I have seen, I'm afraid, people in high-ranking Government departments in which policy has been made round a table by saying, my children found this on the internet the other day, or everyone is on Facebook and there's no privacy anymore.

There is very good research out there on this; extremely good research; a great deal of it, because people are very interested, and it is displaced by anecdotal. So that is the other end of the scale.

**(RJ)** I'm not saying it isn't... what I'm saying is that if you get... that's a real story; it's a story upon which somebody now ought to work out what the policy is going to be. But part of the evidence, which is what Tony is calling for, is that story in the first place.

**(Lilian Edwards)** But I think I'm saying that sometimes these stories are not accurate.

**(RJ)** That's another matter.

**(Lilian Edwards)** That's what evidence is about, isn't it?

**(RJ)** If it consists of what a minister's... what can I say?

**(RT)** I think that one role of these anecdotes is that people choose to do research on them. We haven't actually talked about that. We've talked as if everybody does research... like QCs or something – when your turn comes up, you have to do it. It's not like that. I do research on cultural markets because I'm interested in singers and performances and so on, and that's how I got into it. Everybody I think follows their nose in that respect. So the anecdote might start the thing off.

But what I really wanted to say was to take up with Tony, which is not his fault at all... but one of the things that we haven't discussed is, why is there so much haste over Government research? Which I'm sure is not your choice, but possibly you might be able to do something about it, because certainly the length of time over which research is done is bound to reflect the quality of evidence that you get from it. That's a topic that we haven't actually touched on.

It occurred to me that maybe that resonates a little with law professors here, because presumably court cases take as long as they need to take rather than saying, we ought to get through this in half an hour.

**(RJ)** Not quite.

**(RT)** Although I should think if Robin is there, they'd probably get through it in ten minutes.

**(RJ)** Some things are done on a rocket docket.

**(RT)** Anyway, you know what I mean. It's a general issue.

**(NM)** For me a lot of this comes back to political mandate. There is often a tension between political imperatives, which generally require something to be done yesterday, and the amount of time which people would really want to explore it properly, which can be probably 20 to 30 years if the data becomes available.

There are compromises to be made. To give a sense of quantum, the maximum parliamentary term in the UK is five years, therefore, that five years represents more than the amount of time that any given Government tends to be willing to spend doing anything, unless they are very, very sure of their ground. So I don't want to pretend that that's the only factor in decision-making.

To take another point that came up from Estelle, a point at which extra growth... economic growth and copyright would cease to make people happy – if you are the Chancellor of the Exchequer with the economy in its current state, I don't think there is a number too big for him right now. In all seriousness, the Government has essentially as its top priority growth, at which point it's not to say that other things mightn't be valuable, but the emphasis on growth in Hargreaves work, which is there although the mandate is wider, reflects the Government's priority. That is a priority that is, if you like, *a priori*.

**(TC)** I want to come back to Ruth's point about timing. There are two basic types of research that we commission. One I'd call strategic research, which is the stuff that we need to build the evidence base on which we can build and other people can build serious thinking. There's quite a lot of that in the research programme, in the stuff that we've just talked about here, for example, on public domain. It's a piece of work that has not been done but needs to be done so that we can understand copyright policy in something other than just what is copyright worth.

The other stuff is stuff where somebody comes into my office and says, I need this done by three months' time. That's usually a political imperative because something has to go to a minister and there is a slot in the parliamentary timetable for something to be done. Those two things... there's a bit of a spectrum between them, but that's the world we live in.

**(Pippa Hall)** I think that's why my plea this morning about sitting down at the early stage in the policy lifecycle with the stakeholders, with the policymakers and with the researchers, so that we're all thinking about the question early on. So it's not a surprise to you when we put a tender out and say, we've got this question; we'd like this piece of research; that actually we've all done the thinking together so that we know that the topic coming up for research interests are in that area. So the earlier we sit down together the less likely there is to be that haste.



**(RT)** I do wonder if there isn't more stuff out there than people are aware of. There's a lot of academic material how good I wonder are the databases or whatever you like to call them; the SSRN kind of things? Again, that takes a lot of time. Collating what is out there might be an important aspect of this.

**(TC)** We do quite a lot of literature reviews. We've commissioned that already.

**(MK)** It's still true that our disciplinary bias often doesn't allow us to see evidence which is provided in a different discipline which might matter. You may get a book historian who can tell you something about a key question of... I don't know, adaptation or... You could look at how interventions in the past worked. There may be evidence out there which we just haven't seen because we never thought about talking to book historians about it.

I think there are a few other areas. It could be psychology. It could be computation theory. It could be any number of other disciplines.

If you search for copyright as a keyword you find too much or too little. So what you need to do is, you need to get the sense for patterns of behaviour that might matter to the questions we are asking. That's a very difficult thing. So literature review of other disciplines which are relevant to our questions which don't have the same keywords are almost impossible to do. Some people have tried, but it's not easy.

**(RT)** What you do get when you search for copyright is everything because everything has got a copyright.

**(ED)** I just wanted to reply very briefly to Nick. Yes, I agree with your point. Economic growth is the most important thing now because we're in a recession. I know that the Government can't think ahead for five years; more than five years. I take that point perfectly well.

But it is a fact that you have different types of growth. Part of the happiness research suggests that indeed people have to be employed in order to feel happy. There is a link between the two. But there are plenty of different types of growth that do not relate to wealth in terms of pounds or dollars, whatever you want to call them. That's what I think the Prime Minister was saying in his speech, which is not reflected in the other policies that maybe are dealt with at the moment. My point is just to remind ourselves of that specific aspect; not to lose sight of it. That's really what I wanted to say.

**(NM)** I'm not arguing that we should say that at all.

**(ED)** No, I'm sure you don't. I'm not replying just to your point. But just making a point for everybody.

**(RJ)** Will.

**(WP)** I have three points. The first one is a good news story. I've solved an orphan works problem. The term Tarzan economics is attributable to Jim Griffin from 2007. I promised him I'd give him recognition even if we – as a public performance – can't give him royalties. So it was Jim Griffin, orphan work no more!

Secondly, back to Robin's point about that it's all about the money, the money, the money. This is a timely reminder in copyright of the Montana gold rush. Who made the money in the Montana gold rush? It wasn't the prospectors; it was the folk who made the shovels; the middlemen.

I was just thinking about the value of copyright. You need a shovel – you want to look for gold. Whether you're going to find it or not is up to yourself. If you think about music and the value of copyright, the publishers who are selling EMI publishing to Sony/ATV generates a huge asset value, but that's not the value of copyright; that's the value of the transaction of an asset. That value will accrue to Citibank who purchased the catalogue from Guy Hands. So that sale generates GVA for financial services and has zero to do with copyright. It's an interesting example to think about. Where is the value of copyright? If you're a middleman, it's not the value of the copyright per se; it's the value of the tradable asset.

The third point was to Paul's excellent seven minutes. You talked about disclosure of data and litigation. I know nothing about litigation, but I just had a thought about this. You talked about discretionary disclosure of data in a battle in court, and compulsory or forced disclosure. Discretionary disclosure has got some pros and it's got some cons. It's not perfect. On forced exposure will have some pros and will have some cons.

When Margaret Bloom

(<http://www.whoswholegal.com/profiles/36223/0/bloom/margaret-bloom/>) taught me competition law, the most important lesson she taught me was... the most common complaint in competition law is when people abuse competition law, not they abuse competition. The

logic goes like this: 'So I'm crap at innovation; Apple is really cool; I want to put them in court; I use competition law to hinder their ability to innovate. I'm using the law to bend the law'.

I'm wondering if I could throw that curve ball at yourself. Could that possibly be used in enforced disclosure of data as well in a litigation setting? So I'm going to take you to court because I know I can get data out of you when I'm in court.

**(Paul Heald)** I think it happens all the time. It's a fairly detailed set of rules to protect the data from being abused. It's usually discoverable *in camera*.

**(RJ)** There are all sorts of restrictions on both sides of the Atlantic. On the continent of Europe they wouldn't do it at all because they don't have the idea of getting documents out of the other side at all. But the common law system does, and both sides of the Atlantic have protective regimes. So sometimes its lawyers only; sometimes its lawyers and an expert; named individuals have to give undertakings to the court; if they let this go, they're going to prison, and stuff like that. That's quite well controlled actually. It's a huge subject in litigation. It depends actually on having an honest bunch of lawyers about. That's not so easy...

**(ED)** There was something else I wanted to say in my talk but I only had seven minutes. It was about forced disclosure as well. If we do have forced disclosure, I think if only the UK does so, we're going to have forced disclosure for transparency reasons, that's a danger, because obviously then you have companies leaving the UK because they won't have this forced disclosure.

So I think before we think about that, we should think twice and try to influence Europe to have this at European level at least, if not international level, because that's important, I think. I concur with all the other speakers that we need more data and that data is sometimes in the hand of companies, and that data is not confidential, but they won't give it out. We need it for evidential reasons. So there is a good case to be made of releasing that data somehow.

**(RJ)** You get examples of people claiming confidential... they've just doubled the price of Boris bikes. People are saying... (Barclays Cycle Hire, Transport for London  
<http://www.tfl.gov.uk/roadusers/cycling/14808.aspx>)

**(ED)** Have they?

**(RJ)** Yeah, they have. £90 a year and £2 a day. People are saying, how much are Barclays chipping in? Oh, we can't tell you that; it's commercial confidence. Absolute rubbish.

**(ED)** It's because Barclays may have to pay out some fines.

**(RJ)** The Government... this is Boris – completely weak-kneed. Say, I'm going to disclose it; now sue us.

**(LE)** But they are just excuses.

**(RJ)** Where's your damage? The damage is, it's revealed you're a cheapskate. But that's not damage. People aren't tough enough.

**(RT)** Can I chip in here? I said in my original statement, where we started getting evidence on copyright was from the Monopolies and Mergers Commission. We haven't had anything like that for a long time. In fact Richard Arnold came here and talked to us once and said that he thought all this discussion of evidence and doing it ourselves and all the rest of it was all wrong; there should be a thing like the Whitford Report (1977) that takes proper evidence from people and forces people to disclose evidence in court circumstances.

**(RJ)** It wasn't a court circumstance. Whitford... it is an interesting question. The policymaking... he was a high court judge, but he was invited to write a report on copyright. He took a year or a couple of years to do it. He had a skilled team as part of his team, a bit like, you might say, the Competition Appeal Tribunal ([www.catribunal.org.uk/](http://www.catribunal.org.uk/)), which has a high court judge and a bunch of wingers – different skills. They took evidence from anybody who had anything to say about copyright. Then the Government paid no attention, which is... but we've stopped making law that way.

**(Lilian Edwards)** Leveson Inquiry?

**(RJ)** Leveson is not quite like that.

**(Lilian Edwards)** How much is it costing?

**(RJ)** It's not a law-making... it's the nearest thing to it. It's sort of, but it's not exactly the same.

**(Lilian Edwards)** And it's costing quite a lot.

**(RT)** Hargreaves and Gowers – I wasn't around in the country when Gowers took place particularly, but also the recent Hooper thing - are really more based on who wants to bother to respond to them, which is a very different situation from somebody saying, as in the Monopolies and Mergers Commission...

**(MK)** ...we need your evidence.

**(RT)** ...we need your evidence to know what you're up to.

**(RJ)** I said to the Minister, who is no longer the minister now the Baroness Wilcox: look, copyright is in a real mess. You need somebody to do something about it over the whole thing. Why don't you get a high court judge – I happen to know one; you've just mentioned him – who could do this job? Absolutely zilch has happened. Somebody said it would take too long, but he'd have been half way through by now.

**(Paul Heald)** Is it okay to switch direction? I want to say one more thing in response to Robin just to change the subject. I don't think we need to throw up our hands when we encounter moral rights. Robin mentioned the overlords in Brussels maybe making this whole discussion irrelevant. I really don't think that's true, because I think it's possible, especially by using experimental techniques, to show the cost of a strong moral rights system.

You can imagine moral rights so strong that current artists can't do anything. You can get a consensus among current artists that in fact there should be limitations on moral rights in order for them to have space to create themselves (or to collect the royalties, in the case of the third spearman). I think all the other spearman are probably in agreement that the property rule that prevents them from getting their royalties is probably a bad one.

This is a situation where in the experimental context I think you can actually elicit from artists themselves – I have a friend doing experimental research on the artists at the Chicago Art Institute – you can adduce evidence from artists themselves, which will suggest, I think, much more limited contours for moral rights than maybe Brussels itself is pushing. I think it's experimental economics that is the best way to, and the most disciplined way to think, about a moral rights system. So I think it's just more work for us.

**(RJ)** It's actually more complicated. Take the colourisation of a movie. A movie came out in black and white and they wanted to put it in... Who was it? It was...

**(Paul Heald)** John Huston.

**(RJ)** John Huston. The French court said, you can't do that, because it's an infringement of the moral right of this dead character. Over here you might think it's damned silly, but that is considered a serious, big deal in France. You ask yourself, is this a question of just making up your mind what the policy is? Or do you want some more evidence about it? What kind of evidence would you have? Supposing you wanted to investigate the question of whether colour... not only the author but even the author's successors in title have a right to stop colourisation; is this a good idea or a bad idea? How would you set about doing research? I don't know.

**(ED)** It depends what test you use. The test in France may be more geared towards the author. So it's the author who feels aggrieved; whereas in the UK it's objective. Do right-thinking members of the public think badly of the author? Then there is an infringement only if the relevant people think that it is reflecting badly on the reputation or honour of the author.

Then you can ask; you can have a survey. That's what you would do, but generally it's the judge who decides. The judge decides these things. Well, I'm the right-thinking member of the public and I don't think that breaches the moral right.

That evidence in France, if you take the subjective test, would only need to come from the author and that would be it. But I don't think that it's true to say that French people are totally focused on moral rights and that it's an absolute right. There are plenty of examples, for example, for functional works, like architecture or software, etc, where moral rights are on almost the same level as the UK. The rights are not enforceable in many situations. So I think you can't really have such a clear-cut view of moral rights in France and say French people are totally unreasonable as...

**(RJ)** That's a pretty unreasonable... some chaps weren't allowed to...

**(ED)** It's not unreasonable... then I agree with that.

**(RJ)** Some chaps weren't allowed to modify the building they'd bought because the architect objected. It's ridiculous.

**(ED)** A disclaimer – I'm not French. So I'm not advocating for the French.

**(Lilian Edwards)** There still have to be policy choices, because what else can you do but compare apples and oranges? You could do this opinion poll thing, but it seems to me what you're driving at, I don't know, is that you could look at the money that the colourised film made in various markets, or the number of people that went to it and you're trying to develop some kind of model of social good from that. But I don't think it compares. This really is a national policy choice. We can say it's ridiculous or we can say it's not. It doesn't seem that ridiculous to me, and I'm not French.

**(Paul Heald)** We want evidence upon which to base our policy; of course it's a policy choice. That doesn't mean we can't look for evidence.

**(RJ)** What about painting a moustache on the Mona Lisa? It was out of copyright.

**(Lilian Edwards)** Good or bad?

**(RJ)** Well, it's a very famous art work.

**(Paul Heald)** What sort of moustache?

**(Lilian Edwards)** For Movember ([uk.movember.com/](http://uk.movember.com/)). Would we make any money out of it? What's the aim here?

**(RJ)** It's a very famous artist, Duchamp, who did it. It's a very famous work of art. But if Mona Lisa had been in copyright, it would never have happened. Very strange world, isn't it? I don't know how much of this you can do with economic policy...

**(MK)** Robin, you are very certain in your intuitions. That comes from life as a senior judge, because a lot of what you've done has turned into rules we all have to comply with. So you're very confident that you know how the rules should look.

**(RJ)** No, I'm not. I'm confident that you don't have to have evidence for all the rules you make.

**(MK)** You don't call it evidence.

**(Lilian Edwards)** Then you'd agree with most our ministers.

**(MK)** What you say is 'the line should be here', but you still use a frame in which you make your judgements. You have to acknowledge that there's a judgement that you make. I think it's misguided to say that it's not open to evidence. It's probably a different type of evidence.

**(TC)** How do you make arbitrary judgements without evidence?

**(RJ)** Part of it is just life's rich pattern, isn't it?

**(Lilian Edwards)** All texts tell their story.

**(Paul Heald)** That's evidence.

**(RJ)** Somebody comes and tells you something is damned silly.

**(Lilian Edwards)** That's what they said about votes for women, I believe.



# BIBLIOGRAPHY

## *Books and articles*

Abrahamson, E. and Rosenkopf, L. (1997) Social network effects on the extent of innovation diffusion: a computer simulation, *Organization Science*, 8(3): 289–309

Bently, L. et al (2012) Copyright law ‘must be clarified’, Letter discussing Clause 56 of the Enterprise and Regulatory Reform Bill, *The Times*, 25 July 2012

Brueggemann, W. (1993) *Texts under negotiation: the Bible and postmodern imagination*, Minneapolis: Fortress

CIPIL (2006) Review of the economic evidence relating to an extension of the term of copyright in sound recordings, Centre for Intellectual Property and Information Law (CIPIL), University of Cambridge for UK Treasury Gowers Review of Intellectual Property  
[http://webarchive.nationalarchives.gov.uk/+http://www.hm-treasury.gov.uk/gowers\\_review.htm](http://webarchive.nationalarchives.gov.uk/+http://www.hm-treasury.gov.uk/gowers_review.htm)

Davies, P. (2004) Is evidence-based government possible?  
<http://www.nationalschool.gov.uk/policyhub/downloads/JerryLeeLecture1202041.pdf>

Derclaye, E. (2012) Eudemonic intellectual property: patents and related rights as engines of happiness, peace and sustainability, *Vanderbilt Journal of Entertainment and Technology Law*, 14(3): 495-543

DeVellis, R. F. (2012) *Scale development: theory and applications*, Thousand Oaks, CA: Sage

Erickson, K., Kretschmer, M. and Mendis, D. (2013) ‘Copyright and the economic effects of parody: an empirical study of music videos on the YouTube platform, and an assessment of regulatory options’, Report for UK Intellectual Property Office (forthcoming)

Favale, M. with Kretschmer, M. (2012) An analysis of the public consultation on Open standards: Open opportunities, Analysis commissioned by the UK Cabinet Office

<http://www.cabinetoffice.gov.uk/resource-library/open-standards-consultation-documents>

Fromer, J. C. (2012) Expressive incentives in Intellectual Property, 98 Virginia Law Review 1745

Gilbert, N. (2008) Agent-based models, Thousand Oaks, CA: Sage

Goodridge, P., Haskel, J. and Mitra-Kahn, B. (2012) Updating the value of UK copyright investment, Newport: Intellectual Property Office  
[www.ipo.gov.uk/ipresearch-ukinvestment-201206.pdf](http://www.ipo.gov.uk/ipresearch-ukinvestment-201206.pdf)

Gowers, A. (2006) Gowers review of intellectual property, HM Treasury, Norwich, HMSO  
[http://webarchive.nationalarchives.gov.uk/+http://www.hm-treasury.gov.uk/gowers\\_review.htm](http://webarchive.nationalarchives.gov.uk/+http://www.hm-treasury.gov.uk/gowers_review.htm)

Griffin, J. (2010) 'Tarzan Economics': If music is free, how do artists get paid?  
<http://knowledge.wharton.upenn.edu/article.cfm?articleid=2452>

HADOPI report (2012)  
[http://www.hadopi.fr/sites/default/files/page/pdf/Chiffres\\_cles\\_Decembre.pdf](http://www.hadopi.fr/sites/default/files/page/pdf/Chiffres_cles_Decembre.pdf); <http://arstechnica.com/tech-policy/2012/09/french-anti-piracy-agency-hadopi-only-sued-14-people-in-20-months>

Hargreaves, I. (2011) Digital opportunity: a review of intellectual property and growth, Newport, IPO

Homberg, F., Favale, M., Kretschmer, M., Secchi, D. (2013) Licensing the use of orphan works: a rights clearance simulation', Report for UK Intellectual Property Office (forthcoming)

Hooper, R. (2012a) Rights and wrongs: copyright licensing fit for purpose for the digital age? The first report of the Digital Copyright Exchange feasibility study, Newport, Intellectual Property Office  
<http://www.ipo.gov.uk/dce-report-phase1.pdf>

Hooper, R. (2012b) Copyright works: streamlining copyright licensing for the digital age, Newport, Intellectual Property Office  
<http://www.ipo.gov.uk/dce-report-phase2.pdf>

Jacob, R. (2013) Parody and IP claims: a defence? – a right to parody?, in IP at The Edge, Cambridge University Press (forthcoming).

- Karaganis, J. & Renkema, L. (2013) Where do music collections come from? copy culture in the USA and Germany  
<http://piracy.americanassembly.org/where-do-music-collections-come-from/>
- Keynes, J. M. (1936) General theory of employment, interest and money, London: Macmillan.
- Kline, R. B. (2005) Principles and practice of structural equation modelling (2nd ed), New York: Guilford Press
- Kretschmer, M. (2011) Private copying and fair compensation, ESRC Report for UK Intellectual Property Office, Newport, IPO
- Kretschmer, M., Bently, L., Singh, S. and Cooper, E. (2011) Copyright contracts and earnings of visual creators: a survey of 5,800 British designers, fine artists, illustrators, and photographers, London/Bournemouth, DACS/CIPPM/CIPIL
- Kretschmer, M., Derclaye, E., Favale, M. and Watt, R. (2010) The relationship between copyright and contract law: a review commissioned by the UK Strategic Advisory Board for Intellectual Property Policy (SABIP), Newport, IPO
- Kretschmer, M. and Hardwick, P. (2007) Authors' earnings from copyright and non-copyright sources: a survey of 25,000 British and German writers, London/Bournemouth, ALCS/CIPPM
- Lundvall, Bengt-Ake (1992) Introduction. In ditto (ed.), National Systems of Innovation, London: Pinter; 1-19
- Mendis, D. and Kretschmer, M. (2013) The treatment of parodies under copyright law in seven jurisdictions: a comparative review of the underlying principles', Report for UK Intellectual Property Office (forthcoming)
- Page, W. (2007) 'Competition with reciprocity in a Two Sided Market – a primer', Economic Insight, Issue 7, p. 1, London: PRS for Music
- Poort, J. (2011) Wat er speelt  
[http://www.seo.nl/uploads/media/2011-17\\_Wat\\_er\\_speelt.pdf](http://www.seo.nl/uploads/media/2011-17_Wat_er_speelt.pdf)
- Poort, J. & Leenheer, J. (eds.) (2012) File sharing 2©12, downloading from illegal sources in the Netherlands, Amsterdam: Institute for Information Law (IViR) & CentERdata  
[http://www.ivir.nl/publications/poort/Filesharing\\_2012.pdf](http://www.ivir.nl/publications/poort/Filesharing_2012.pdf)

PriceWaterhouseCoopers (PwC) (2011) An economic analysis of copyright, secondary copyright and collective licensing', Commissioned by the Copyright Licensing Agency, Ltd

[http://www.cla.co.uk/data/corporate\\_material/submissions/2011\\_pwc\\_final\\_report.pdf](http://www.cla.co.uk/data/corporate_material/submissions/2011_pwc_final_report.pdf)

Siwek, S. (2011) Copyright industries in the U.S. economy: the 2011 report, Prepared for the International Intellectual Property Alliance (IIPA). Washington DC: Economists Incorporated

Schlesinger, P. and Waelde, C. (2011) Performers on the edge, Audiovisual thinking, 3 (September), <http://www.audiovisualthinking.org>

Schlesinger, P. and Waelde, C. (2012) Copyright and cultural work: an exploration, Innovation – The European Journal of Social Science Research, 2(1): 11-28

Secchi, D., Homberg, F., Mendis, D., Kretschmer, M. (2013) User behaviour towards orphan works: two experiments with blues and visual art, working paper commissioned by UK Intellectual Property Office (forthcoming 2013)

Stokes, S. (2012) Art and copyright (2<sup>nd</sup> edition), Oxford: Hart

Taylor, M. and Towse, R. (1998) The value of performers' rights: an economic analysis, Media, Culture and Society, 20(4): 631-652

Thaler, R. and Sunstein, C. (2008) Nudge: improving decisions about health, wealth and happiness, Caravan books

Towse, R. (2010) A textbook of cultural economics, Cambridge: Cambridge University Press

Towse, R. (2011) What we know, what we don't know and what policy-makers would like us to know about the economics of copyright', Review of Economic Research on Copyright Issues, 8(2): 101-120

Tullock, G. (1967) The welfare costs of tariffs, monopolies and theft, Western Economic Journal, 5: 224-32

Wells, H. G. (1905). A modern Utopia  
<http://books.google.co.uk/books?id=kmZHlvjWtTUC>

Weston, S. and Kretschmer, M. (2012) Open standards in government IT: a review of the evidence', An Independent Report commissioned by the Cabinet Office (51pp)

<http://www.cabinetoffice.gov.uk/resource-library/open-standards-consultation-documents>

Whitford (1977) Whitford committee report on copyright and designs law, London, Cmnd 6732 HMOS

World Intellectual Property Organisation (WIPO) (2003). 'Guide on surveying the economic contribution of the copyright-based industries', Geneva, World Intellectual Property Organisation

Waelde, C. and Schlesinger, P. (2011) Music and dance, beyond copyright text?, SCRIPT-ed, 8(3): 257-291

## ***Legislation and official documents***

Cabinet Office Open Standards Consultation 2012  
<http://consultation.cabinetoffice.gov.uk/openstandards/>

Digital Economy Act 2010  
[www.legislation.gov.uk/ukpga/2010/24/contents](http://www.legislation.gov.uk/ukpga/2010/24/contents)

Digital Economy Bill Impact Assessments (2009)  
<http://www.ialibrary.bis.gov.uk/uploaded/DEB-Impact-Assessments.pdf>

Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights  
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:265:0001:0005:EN:PDF>

Enterprise and Regulatory Reform Bill  
<http://services.parliament.uk/bills/2012-13/enterpriseandregulatoryreform.html>

Code de la propriété intellectuelle (France) (Art L 122-5)  
<http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006069414>

IPO (2011) Patent thickets  
[www.ipa.gov.uk/informatic-thickets.pdf](http://www.ipa.gov.uk/informatic-thickets.pdf)

IPO (2011) Good evidence for policy  
[www.ipa.gov.uk/consult-2011-copyright-evidence.pdf](http://www.ipa.gov.uk/consult-2011-copyright-evidence.pdf)

IPO Copyright Consultation 2011

<http://www.ipo.gov.uk/consult-2011-copyright>

Monopolies and Mergers Commission (1988) Collective licensing. Cm. 530.  
HMSO, London

Monopolies and Mergers Commission (1994) The supply of recorded music.  
Cm.2599, HMSO, London

Monopolies and Mergers Commission (1996) Performing rights, Cm. 3147.  
HMSO, London

Trade Marks Act 1994

[www.legislation.gov.uk/ukpga/1994/26/contents](http://www.legislation.gov.uk/ukpga/1994/26/contents)

Treaty of Rome

[http://ec.europa.eu/economy\\_finance/emu\\_history/documents/treaties/rometreaty2.pdf](http://ec.europa.eu/economy_finance/emu_history/documents/treaties/rometreaty2.pdf)

## ***Links***

Barclays Cycle Hire, Transport for London

<http://www.tfl.gov.uk/roadusers/cycling/14808.aspx>

Chartered Institute of Legal Executives <http://www.cilex.org.uk/>

Competition Commission [www.competition-commission.org.uk/](http://www.competition-commission.org.uk/)

Competition Appeal Tribunal [www.catribunal.org.uk/](http://www.catribunal.org.uk/)

Copyright Tribunal [www.ipo.gov.uk/ctribunal.htm](http://www.ipo.gov.uk/ctribunal.htm)

Creative Skillset <http://www.creativeskillset.org/>

DG Competition [ec.europa.eu/dgs/competition/index\\_en.htm](http://ec.europa.eu/dgs/competition/index_en.htm)

Department for Business, Innovation and Skills

<https://www.gov.uk/.../department-for-business-innovation-skills>

Department of Culture, Media and Sport [www.culture.gov.uk](http://www.culture.gov.uk)

British Charts Company [www.officialcharts.com/](http://www.officialcharts.com/)

Goodhart's law [http://en.wikipedia.org/wiki/Goodhart's\\_law](http://en.wikipedia.org/wiki/Goodhart's_law)

Haute Autorité pour la diffusion des œuvres et la protection des droits sur internet (France)

<http://www.hadopi.fr/>

Intellectual Property Office [www.ipo.gov.uk](http://www.ipo.gov.uk)

IFPI P2P file-sharing

[http://www.ifpi.org/content/section\\_news/20121017.html](http://www.ifpi.org/content/section_news/20121017.html)

OECD (Organisation for Economic Co-operation and Development)

[www.oecd.org](http://www.oecd.org)

OFCOM <http://consumers.ofcom.org.uk/>

Office for National Statistics [www.ons.gov.uk/](http://www.ons.gov.uk/)

Movember [www.uk.movember.com/](http://www.uk.movember.com/)

Musicmetric [www.musicmetric.com](http://www.musicmetric.com)

Mumford and sons <http://www.billboard.biz/bbbiz/industry/digital-and-mobile/business-matters-mumford-sons-babel-smashes-1007965972.story>

Open Policy-making (Democratic Society space on open policymaking and better consultation) <http://openpolicy.demsoc.org/>

Open Rights Group [www.openrightsgroup.org/](http://www.openrightsgroup.org/)

Professionals, The (ITV 1977-1983)

[http://en.wikipedia.org/wiki/The\\_Professionals\\_\(TV\\_series\)](http://en.wikipedia.org/wiki/The_Professionals_(TV_series))

Bruce Schneier [www.schneier.com](http://www.schneier.com)

Shirky [www.shirky.com](http://www.shirky.com)

Spotify [www.spotify.com](http://www.spotify.com)

Stop43 [www.stop43.org.uk](http://www.stop43.org.uk)

Storify Twitter #CIPPM2012 <http://storify.com/cippm/my-title>

Two-sided markets [http://www.en.wikipedia.org/wiki/Two-sided\\_market](http://www.en.wikipedia.org/wiki/Two-sided_market)

Untergang ('Downfall') parody

<http://www.youtube.com/watch?v=et76wPvRtgU>

VEVO [www.vevo.com](http://www.vevo.com)



RCUK Centre for Copyright and  
New Business Models in the  
Creative Economy

College of Social Sciences / School of Law  
University of Glasgow  
10 The Square  
Glasgow G12 8QQ  
Web: [www.create.ac.uk](http://www.create.ac.uk)

