

**Submission by British Equity Collecting Society  
to the Gowers Review of Intellectual Property**

1. British Equity Collecting Society (BECS) is the UK's only collective management organisation for audiovisual performers. It represents the interests of its members – approximately 20,000 actors and other performers - in the negotiation and administration of performers' remuneration throughout the European Union territories. Rights administered via agreements with 11 European collecting societies include the rental, private copying, cable retransmission and communication to the public rights. Since its incorporation in 1998 BECS has generated in excess of £7 million in extra income for performances in British film and television productions. BECS is a member of AEPO-ARTIS, an association representing virtually every audio and audiovisual collective management organisation in Europe.
2. BECS has a direct interest in issues related to IP given that the income we generate for British performers is dependent upon the existence and exploitation of performers' intellectual property rights.
3. Our intention is to comment mainly on the specific questions raised on page 7 of the call for evidence paper. We will focus on issues regarding the term of performers' rights, private copying, digital rights management technologies, and we will also add some comments on how IP is licensed.
4. The creative industries are a significant and growing part of the UK economy with copyright industries contributing over 8% to the UK's GDP. At their base these industries are supported by frontline creators like performers, authors and directors of audio-visual works who are in effect micro-economic enterprises. We are concerned that the questions within the Review appear to discount the interests of this section of the creative economy focusing instead on the perceived needs of users and business groups.
5. We urge the Review to recognise that rights and their administration are not homogeneous. There are profound differences between patents and copyright, copyright and neighbouring rights and the administration of those rights in different sectors such as the audio and audiovisual sectors.
6. Consequently, we wish to underline the need to distinguish between content users and artists. In practice, the rights of performers are often subsumed by producers and

studios. We therefore urge the Review to remain aware of this distinction in its deliberations. The desire to drive innovation and creativity is in the interests of all those associated with the creative industries. However, a balanced regulatory framework is required to minimise the potential for exploitation of those on the frontline.

7. We believe the Review should recognise that the term of protection for performers' rights also affects the audio-visual sector. The UK is the second largest exporter of audio-visual material in the world, and the extension of term will have a direct economic impact on thousands of performers in UK film and TV productions.

### **Specific Issues**

#### **Current term of protection on sound recordings and performers' rights**

##### **(a) What are your views on this issue?**

8. BECS supports an extension of the term of protection of performers' rights to 95 years. Extension for performers' rights is required to address the inconsistencies that exist both territorially and between different contributors to the creative economy. Copyright duration for authors and film producers is currently life plus 70 years compared with the 50 years afforded to performers. Extension of the term would therefore ensure that performers' rights for the same film production do not lapse significantly before those for the film's screenwriter and director.
9. Extension is also crucial to ensure that revenue flowing to older British film and television works from statutory performers' rights in other European countries is not prematurely curtailed. Classic British films and radio drama and, increasingly, cult TV series from the 1960s continue to be exploited throughout the world. A small selection of film titles that have already fallen out of the term of protection for performers' rights, or are on the brink of expiration include:
  - Brief Encounter (1945)
  - Brighton Rock (1948)
  - Kind Hearts and Coronets (1949)
  - The Third Man (1949)
  - The Lavender Hill Mob (1951)
  - The Ladykillers (1955)
  - The Bridge on the River Kwai (1957)

In spite of their international success, the only secondary revenue that performers in these productions have ever received has been collected by BECS due to the existence

of statutory rights in other European countries (see Annex 1 for a breakdown of income received from these rights by one performer). Such payments, arising from the communication to the public and other statutory rights, would continue to contribute towards the UK's creative economy if the duration of performers' rights in the European Union was revised upwards.

10. Within the context of the European Commission's current review on the term of copyright, BECS urges the Review to recommend harmonisation to 95 years across the European Union. This is a necessary condition for international harmonisation given the 95 year benchmark figure set in the USA.

11. An extension would reflect the fact that the commercial value of audio and audio-visual works now easily exceeds 50 years. While this is partly due to digitisation making possible better quality copies of older works, it is also testament to the enduring popularity of and public demand for classic sound recordings and film and television works.

**(b) Is there evidence to show the impact that a change in term would have on investment, creativity, and consumer interests?**

12. There is no evidence to show that an extended term of performers' rights will adversely affect investment, creativity or consumer interests. On the contrary, as we have stated above, it would ensure that revenue continues to flow from other European states into the British creative economy. We also believe that the ease and cheapness of digital distribution systems will prevent any so-called locking-up of protected material.

**(d) Are there alternative arrangements that could accompany an extension of term?**

13. We believe that the extension of term should be coupled with a statutory recognition of a performers' right to receive ongoing revenue from their works in the UK. Otherwise, as has been detailed above, the extension of term will not have a direct economic benefit for many of the elderly and needy performers who helped create this country's cultural heritage.

**(e) If term were to be extended, should it be extended retrospectively (for existing works) or solely for new creations?**

14. The term should be extended retrospectively with similar provisions to those that applied when the copyright term was extended.

15. As a final word on this issue we would like to highlight the personal impact of an extension. Contrary to public opinion, British performers only very recently negotiated a contractual agreement to receive revenue for the exploitation of feature films. This means that British actors who appeared in classic films like the 'The Great Escape' and 'The Ladykillers', which are still shown around the world and sold in video and dvd formats, have had no share in the economic success of these productions. We appeal to the Review to bear this in mind when deliberating on the copyright extension. Failure to revise this limitation would deprive many performers of the modest benefits that they have only recently started to receive from their European statutory rights.

### **Copyright exceptions**

#### **(a) What are your views on the current exceptions in copyright law?**

16. BECS believes there are serious implications from technological change on private copying. Specifically the rise in the use of personal video recorders (such as Sky+ and TiVo), which are transforming the way in which television viewers record material for their private use, has several major consequences which we outline below.

#### **(d) Are the current exceptions adequate or in need of updating to reflect technological change?**

17. Personal video recorders (PVRs) risk devaluing the secondary television market, which provides an important source of income to many performers. The ability to record and store a vast volume of programmes will inevitably reduce the demand for repeats and so drive down the value of the secondary market. Performers and other creators, including independent producers<sup>1</sup>, therefore risk financial loss as a result of new technology that enables the unfettered private copying of audio-visual material.

18. There is also evidence that PVRs are growing in popularity to the detriment of other ancillary markets. Recent research shows that 19% of those who own a PVR do not feel that they require on-demand services<sup>2</sup>. Therefore, in addition to adversely affecting the secondary television market, PVRs also threaten to hinder the development of other legitimate services.

19. BECS believes that PVR technology throws current legislative arrangements on private copying in the UK into question. The ability to store high-quality recorded material

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<sup>1</sup> See report by Oliver & Ohlbaum Associates for PACT which recommends a royalty scheme paid for by platform owners per PVR home for loss of income due to extensive re-use of programming on free-to-air channels

<sup>2</sup> Results from studies by Leichtman Research Group and Carmel Group

indefinitely and for unlimited re-use seriously challenges the current exemption on private copying for the purposes of 'time-shifting'.

20. It is arguable that the creation of permanent, private audiovisual libraries, made possible by PVR technology, is a breach of current copyright legislation. Private recording in this manner far exceeds the intended remit of the prevailing legal arrangements, which only permit copying for 'time-shifting' purposes i.e. recording material to view at a more convenient time. BECS therefore believes that British copyright legislation requires revision in light of previously unforeseen technological advances.
21. BECS urges the Review to examine arrangements for legal private copying in other European countries. The UK is one of only three EU member states that do not have a levy on blank recording devices and/or equipment<sup>3</sup>. This has created the anomalous situation whereby BECS is able to collect private copying revenue for British performers from most European countries *but not at home*. The lack of harmonisation also denies reciprocity with foreign collecting societies: other European performers are not entitled to compensation for the private copying of their work when it is copied in this country.
22. In spite of manufacturers' dislike of private copying levies, the experience of most EU countries is that modest levy systems applied to recordable media (blank tapes, CDs, DVDs, memory cards) and equipment (VCRs, PVRs, computer hardware, download devices like i-Pods and games consoles) provide a manageable, efficient and fair solution for dealing with the reality of private copying. Admittedly the variation in private copying tariffs across EU member states is problematic, although objections to levies could be much allayed with tariff harmonisation. At this moment in time, however, no other solution is capable of satisfying both consumer demand for legitimate private copying, and the creators' right to fair compensation for the ancillary use of their material.
23. British law on private copying is vague and frequently contravened with impunity. The vast majority of consumers are unaware that it is theoretically illegal to 'format shift' e.g. transfer their CDs onto other formats like i-Pods and MP3 players. However, new technology actively encourages format shifting, which is consequently a commonly accepted and widespread practice. Moreover, the concept of 'time shifting' was conceived at a time when the long-term retention of high quality recorded material was unenvisageable. Yet material downloaded from PVRs or the Internet onto DVDs effectively represents perfect copies of copyright material for life. What constitutes legitimate private copying is therefore less than clear-cut, public understanding is

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<sup>3</sup> All of the original 15 EU Member States, apart from the UK, Ireland and Luxembourg, opted for a private copying exemption to the reproduction right under Article 5(2)(b) of the EC Copyright Directive. This exemption ensures 'fair compensation' to rights-holders for private copying.

confused, and the legal definition of private copying is no longer valid in light of technological developments.

24. BECS therefore advocates a broader exemption to the reproduction right in the Copyright, Designs and Patents Act, coupled with a private copying compensation system for rights-holders. This is necessary to bring the UK into line with most other EU states as well as other territories including Japan, Canada and to a limited extent the USA, and strike an acceptable balance between the rights of consumers and those of British and European creators in the digital and online environment.
25. In connection with this last point, BECS urges the Review to examine the government's interpretation of the Information Society Directive as it relates to compensation for exemptions to private copying.

### **Copyright - Digital Rights Management**

26. As a collective management organisation BECS recognises the potential benefits to be derived from the development of DRM technologies. We particularly welcome systems that incorporate Rights Management Information (RMI) mechanisms such as watermarking and fingerprinting, which will facilitate online rights management. A major difficulty for rights-holders is determining where and when their work has been used and RMI has the potential to overcome this problem.
27. However, effective RMIs are reliant upon the accurate compilation of meta-data. Whilst the audiovisual industry is moving towards a standardised numbering system, such as ISAN, we would welcome government pressure on the industry to encourage the proper cataloguing and indexing of all available works in an open and interoperable manner.

#### **(a) Do you have a view on how the use of digital rights management technologies should be regulated?**

28. Contrary to industry claims we do not agree with the argument that DRM technology negates the need for traditional private copying levies. Firstly, DRM systems are not technically foolproof and can be cracked relatively easily by professional pirates. Secondly, they are incapable of distinguishing between fair dealing and unauthorised copying, which has led to legal actions in other European countries. Thirdly, they do not guarantee any financial return to performers.
29. We urge the Review to question the manufacturers and users of DRM systems to explain how they intend to work with the organisations that represent performers to ensure fair compensation for talent for the extensive exploitation of their work.

## **Copyright – orphan works**

### **(b) Do you have any suggestions on how difficulties identifying the owners of copyright content could be overcome?**

30. This issue is being addressed by collecting societies and much work has been done to improve databases including rights owner details so that living and deceased rights holders can be more easily identified and clearance granted. As stated above in relation to standardised numbering systems, government pressure on the need for accurate information gathering and industry-wide efforts on the development of comprehensive databases would in the long-term help alleviate any problems associated with orphan works.

## **General Questions**

### **How is IP licensed and exchanged?**

#### **(e) Are there barriers to licensing IP on grounds of cost?**

31. As a licensing organisation BECS has encountered reluctance on the part of certain exploiters of performers' rights to enter into or even discuss appropriate licensing arrangements. The cost of taking action against these organisations frequently outweighs the cost of the final licence. We believe there should be greater responsibility on behalf of users to respect performers' rights and to seek out appropriate licences where necessary.

#### **(h) Are there specific barriers to licensing IP rights for small businesses or individuals?**

32. The manner in which the rental right was introduced for performers has made effective licensing virtually impossible. Therefore, performers amongst other rights-holders have been denied any income from the rental of their material in the UK. This is a direct result of the way in which the British government implemented the provisions of EC Directive 92/100 in 1996. BECS would therefore suggest that these provisions are reviewed to enable proper licensing. The case of the rental right underlines the government's obligation to properly consider the rights of individual creators and the way these rights are managed or transferred when introducing legislation.

## Summary

BECS urges the Review to consider the following in the course of its deliberations:

- Recognise that the term of protection for performers' rights also affects the audiovisual sector and distinguish between the interests of content users and artists.
- Endorse an extension of the term of protection of performers' rights to 95 years and harmonised across the EU to ensure the continued stream of revenue from European territories for performers' rights into the UK creative economy.
- Advocate a broader exemption to the reproduction right in the Copyright, Designs and Patents Act coupled with a private copying compensation system for rights-holders.
- Examine the government's interpretation of the Information Society Directive as it relates to compensation for exemptions to private copying.
- Question the manufacturers and users of DRM systems on how they intend to work with the organisations that represent performers to ensure fair compensation for talent for the extensive exploitation of their work.
- Encourage the audiovisual industry to engage in accurate information gathering and foster industry-wide efforts on the development of comprehensive databases to alleviate the problems associated with orphan works.
- Demand that users respect performers' rights and seek out appropriate licences where necessary, and call for a review of the provisions relating to the implantation of EC Directive 92/100 on rental right which has produced no revenue for British performers.

## Annex 1 Example of performers' income from European statutory rights

The following exhibits income collected by BECS for a deceased performer who appeared in a number of classic British feature films.

The income shown is the only income, apart from the initial engagement fee, that has been received for these works. No revenue has been received for the re-use of these films in the UK.

<b>Film</b>	<b>Amount</b>	<b>Country</b>
<b>Battle of Britain</b>	£9.39	Switzerland
	£66.40	France
	£115.37	Italy
	£38.17	Netherlands
	£12.02	Spain
<b>Operation Cross Bow</b>	£8.30	Switzerland
	£28.13	Spain
<b>Where Eagles Dare</b>	£25.31	Switzerland
	£743.58	France
	£421.82	Italy
	£59.89	Spain
<b>Repulsion</b>	£1.19	Switzerland
	£85.25	France
	£28.27	Spain
<b>Cromwell</b>	£1.13	Switzerland
	£41.59	Italy
<b>The Psychopath</b>	£161.88	Italy
<b>Total</b>	<b>£1,847.69</b>	