

GOWERS REVIEW OF INTELLECTUAL PROPERTY

SUBMISSION OF CHANNEL 5 BROADCASTING LIMITED

General Questions covered:	
How IP is awarded	x
How IP is used	x
How IP is licensed and exchanged	x
How IP is challenged and enforced	x

1. Very broadly the current copyright system works adequately well for our business in terms of remedies, enforcement, and encouragement of innovation. However it is becoming increasingly apparent that the current state of the law lags significantly behind technological and other developments – particularly in relation to digital media, but also in relation to so-called “format rights” and “character rights”. We envisage that the pace of technical developments will soon over-stretch the current categories and framework of copyright law and could lead to significant confusion and disputes between rights-claimants that could have a negative impact on our business.
2. Audiovisual exploitation of programmes via the internet potentially poses a great threat to our core business. Accordingly issues in relation to the internet [such as what constitutes “publication”?; what is a “copy”?; what is “distribution”?; where does an act take place?; how protection can be given where the relevant server is outside the jurisdiction?](as well as issues such as ownership and extent of the “acts restricted by copyright”) should all be clearly and urgently addressed by UK legislation.
3. At the same time it is our view that digitalisation raises several fundamental issues in relation to the applicability of copyright principles, such as whether the rights to “manipulate” or “re-format” (for example so that the subject matter can be made available to the end user by way of a different device) digital information should be the exclusive right of the originator or subject to some form of compulsory licensing or obligation to “make available”; and indeed whether the traditional division of rights according to the type of work or manner of exploitation (ie literary work, dramatic work, sound recording, broadcast) is any longer relevant to a “package” of digital information. In addition to the traditional “analogue” copyright categories it seems that it may be appropriate to have a separate type or package of rights, eg a “Content Right” in relation to works created or held in digitalised form.
4. In relation to “**format rights**” there is a need for clarification of the law. Custom and practice has developed piecemeal and in various territories around the world but there is still a lack of certainty in the law. We support the idea of recognising “format rights” and codifying in a precise and delimiting way exactly what constitutes a format. Currently there is a tendency for production companies to claim a “format” in every programme – even those of the most basic

documentary or news style. In our view there is a lot of unnecessary and pointless debate about ownership of “format” rights in such cases. At the same time we believe that there is good reason for allowing truly developed and original formats the benefit of copyright protection. Format rights can generate considerable sums of money for their creators through being licensed to third parties and we believe that the law should protect format creators against the unauthorised exploitation of their endeavours by others.

5. **1(g) Barriers to obtaining IP rights:** The lack of clarity over digital rights is adding a degree of complexity to the negotiation of rights, which legislation, by introducing a degree of certainty over definitions and rights, could greatly help to reduce. Another barrier is the ability of copyright owners (and in some cases, performers) to refuse consent for use of clips in our programmes. Whilst recognising the inherent importance of this aspect of copyright (or performers’ rights) we would suggest that **in cases where copies of a work have been released for sale** (but not otherwise) consent to a limited and reasonable use of clips (not necessarily within the scope of the existing “fair use” exemptions) in (other) programmes should be deemed to have been given (by virtue of the act of releasing for sale) subject to the terms of a copyright licensing scheme (ie payment of fees and/or a fixed percentage of costs or revenues)(which scheme would be subject to the jurisdiction of the Copyright Tribunal). The implications of such a suggestion would be far-ranging and would require a sophisticated Digital Rights Management system or collection society, but with the ever-increasing availability of (and ease of making) perfect digital copies, if such a system were not developed then one could foresee ever-increasing (and un-authorised) “hi-jacking” of digital packages of information (of whatever type of copyright work) in order to “copy” extracts or aspects thereof (such as structure as opposed to “expression”) and it would be far preferable, in our view, to have some sort of regulated “use of digital content” approach to IP – albeit one with a significant aspect of ‘compulsory licensing’ - as opposed to a difficult-to-enforce system based on copyright absolutism.
6. **2(b) Overlapping forms of IP protection:** Five would rarely seek Trade Mark protection in addition to protection under copyright. In the few cases where we do rely on trade mark protection we find the system, though somewhat time-consuming to set up, effective and enforceable.
7. **2(e) Influence of term of IP rights on investment decisions:** Virtually nil.
8. **2(f) Innovation:** Could be encouraged with codification of format rights and of character rights.
9. **4(a) Problems with enforcement:** Generally none.
10. **4(h) Problems with enforcement overseas:** Lack of consistency between jurisdictions.

Specific Issues covered:	
Current term of protection on sound recordings and performers' rights	x
Copyright exceptions – fair use and fair dealing	x
Copyright – digital rights management	x
Copyright – orphan works	x

1. **Current term of protection:** we are strongly in favour of consistency across different categories of copyright work. Five sees no particular benefit of introducing a 95 year time period as this does not exist elsewhere in UK copyright law. Rather we would consider that the full term of copyright protection (70 years pma) should apply to sound recordings just as it applies to audio-visual works and indeed to most categories of copyright work. We would not object to retrospective application of any extension and consider that the overall impact to our business, though slightly adverse to us in cost terms, would not be material.

2. **The fair use/fair dealing exceptions to copyright** are extremely important to our business as a public service broadcaster. We believe that Digital Rights Management systems should allow the introduction of a “fair use” payment tracking and clearance system that would be of a huge benefit to programme making. If such a system were developed then there should be no need to introduce a private “fair use” exemption into UK law. And even before such a system were developed we consider there should be little need for such an exemption as it would often be in the commercial interest of content suppliers to authorise a reasonable and realistic degree of duplication (eg for multiple devices in the same home) and that natural competition in the market place will work out a natural and reasonable level for this.

3. Five is a member of the Educational Recording Agency Limited (“ERA”) and strongly supports the suggestion (made in ERA’s Submission to the Gowers Review) that the scope of Section 35(1) of the Copyright, Designs and Patents Act 1988 should be extended to encompass the making of ERA recordings accessible via a server to authorised students when they are not physically on the campus of the educational establishment concerned and furthermore supports the detailed suggestions set out in the ERA’s Submission as to how this could be enacted.

4. **Regulation of Digital Rights Management technologies:** we would envisage an on-line clearance, tracking and payment system. We would be opposed to a formal “registry” but would some sort of “easy tracking” system along the lines of a bar code which could help log and trace copyright ownership. If it were made compulsory to have such a bar code system on programmes with legal obligations as to the accuracy of information, then we would support this as an alternative to having a more formal “claim” based register system.

5. **Orphan works:** we believe there should be limitations on the exclusive rights of copyright owners where there has been bona fide use made of an apparently “orphan work”. Five has experienced problems where the owner of a feature film, for example, could not be traced easily. Copyright ownership of feature films is often held by a “single purpose” company and

ownership and assignment of rights as between financiers and successive owners of “film libraries” are not matters of public record and accordingly it can be very difficult to establish the current copyright owner despite diligent enquiries. Perhaps an obligation could be placed on those who commercially exploit rights to pass up to date “bar code” information to a Digital Rights Management system (as discussed under the previous point) allied with an obligation re the accuracy of the information backed up by criminal sanctions.

Submitted by Adam Sutcliffe, Business Affairs Executive, on behalf of Channel 5 Broadcasting Ltd

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