

Channel Four Television Corporation

**Channel 4 response to the Gowers Review of
Intellectual Property**

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1. Introduction

Channel 4 is a publicly-owned not-for-profit broadcaster operating in the UK. It was established in 1982 as a publisher-broadcaster required to commission originated content from the independent production sector. Its main public service channel, Channel 4, is a free-to-air service funded entirely by advertising and sponsorship. It also operates a number of other services, including the digital television channels E4, FilmFour and More4; a pay-TV service FilmFour (which will be relaunched as a free-to-air channel this summer); and an expanding range of online services (at channel4.com), including the broadband documentary service FourDocs. It sources all original content across its portfolio of digital channels from independent producers.

The use of intellectual property (IP) is central to all of Channel 4's activities, and we therefore welcome the opportunity to respond to the Gowers review. This review is certainly timely, as the range of issues raised in the Call for Evidence make clear. The areas of **fair use** and **fair dealing** are of particular concern to us, and we deal with the specific questions raised in the next section. We then go on to answer the other questions of concern to us in the following two sections.

We should point out that Channel 4's activities are not impacted by many of the current controversies and debates on the development of IP law, as:

- (i) we are not involved in technology development but license fully-developed technologies
- (ii) we adopt rights clearance policies that are necessarily conservative, and
- (iii) programme development is rarely dependent on the need to use orphaned copyrighted works.

For this reason, we have only commented on those issues of direct relevance to Channel 4 in this response.

2. Copyright exceptions – fair use/fair dealing

Channel 4's most significant concern across the range of issues covered in the Gowers Review relates to fair use and fair dealing. We respond to the specific questions raised in the Call for Evidence in this section.

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

There are a number of exceptions to copyright that allow limited use of copyright works without the permission of the copyright holder. Generally, it is considered that these exceptions work well to maintain a fair balance between freedom of expression and the commercial rights contained within intellectual property.

Channel 4 would vigorously defend the fundamental importance of the "fair dealing" provisions under s.30 Copyright, Designs and Patents Act 1988 as essential to its ability to produce and broadcast its programmes and its freedom of expression under Article 10, Human Rights Act 1998. This is in respect of s.30 (1) "Fair dealing with a work for the purpose of criticism or review" and s.30(2) "Fair dealing for the purpose of reporting current events...". We would add that the exigencies of the latter can present practical difficulties in establishing the relevant "author" for the purposes of making the "sufficient acknowledgment" required under the legislation.

Under Article 10, Channel 4 has the right of freedom of expression as a national broadcaster with a statutory public interest remit. Likewise, the independent production companies which produce Channel 4's programmes and the individuals who appear in those programmes also have freedom of expression rights. Allied with the right of freedom of expression under Article 10 is the right to receive information and ideas, which is enjoyed by our viewing audience.

Channel 4 has an established record of legitimate and appropriate use of the "fair dealing" provisions in its programmes, and has successfully defended formal challenges to such use – most notably in the acknowledged landmark Court of Appeal case of Time Warner – v – Channel 4 (1993). In that case, Channel 4 successfully resisted an application by Time Warner to prevent the use of extracts from the feature film "A Clockwork Orange" in a Channel 4 programme which provided an important critique of that film.

Channel 4 advises its commissioning editors and its independent producers on the appropriate use of the "fair dealing" provisions in its programmes and issues them with written guidelines on such use. The guidelines are regularly revised and updated to take into account developments in the law and represent best practice for the application of this law in the production of television programmes. The guidelines are highly regarded and have been adopted as an industry model by other national television broadcasters. We believe the guidelines and our practice strike the appropriate balance between freedom of expression rights and intellectual property rights.

Recent cases such as Fraser-Woodward – v – BBC (2005) have reaffirmed the fundamental principles in respect of fair dealing copyright works within television programmes.

(b) Could more be done to clarify the various exceptions?

We would note that “incidental inclusion” under s.31 Copyright, Designs and Patents Act 1988 is not clearly defined, and that the reference to “musical works” under s31 (3) would on the face of it exclude the incidental use of all music in pre-recorded programmes. However, the word “incidental” has been observed by Mummery LJ (*Football Assoc Prem League – v – Panini, 2004*) as:-

“incidental is an ordinary descriptive word. The range of circumstances in which the word “incidental” is commonly used to describe a state of affairs is sufficiently clear to enable the courts to apply it to the ascertainable objective context of the particular infringing act in question.”

(c) Are there other areas where copyright exceptions should apply?

We would argue that publication on the internet should have the same defences available to traditional forms of publication. Unless “geo-blocking” or other territorial containment systems are applied, material published on the internet that is primarily intended for reception or consumption in the United Kingdom, will nevertheless be available for reception or consumption outside the United Kingdom. In such circumstances, under the current law, liability for infringement is determined by the jurisdiction in which the relevant material is or can be downloaded, and accordingly there would be liability for copyright infringement irrespective of UK legislation.

The existence of a specific “public interest” defence to copyright infringement has been argued in case law (see in particular, *Lion Laboratories – v – Evans [1985]*; it was also considered in *Hyde Park Residence – v – Yelland [2001]*). Channel 4 would argue that in the public interest and for the purposes of Article 10 there is a clear argument for such an express, statutory defence to copyright infringement.

(d) Are the current exceptions adequate or in need of updating to reflect technological change? For example copyright law in the UK does not currently have a private “fair use” exception. Such an exception might allow individuals to copy music CDs onto their PC and MP3 player for their personal use. Should UK law include a statutory exception for “fair use”?

The public misconception that such practices are in fact legal, together with technological developments making it easier to copy and distribute copyright material, potentially pose an increased threat to copyright owners generally. Industry custom and practice, consumer behaviour and digital rights protection technologies are evolving rapidly and, as a consequence, Channel 4 is still considering its position on this issue.

(e) How would you see content owners being compensated for such use?

See above.

(f) To what extent has technological change presented difficulties in use of copyrighted material in the field of education?

Channel 4’s Education programmes are subject to special clearance arrangements with the relevant collection societies such as Equity (including the MU and Writers Guild), MCPS, PRS, PPL and VPL.

Channel 4 is a member of the licensing scheme certified by the Secretary of State under the provisions of s. 35(2) Copyright, Designs and Patents Act 1988. Under this scheme, educational establishments are permitted to record Channel 4 programmes for educational purposes. There is no indication that technological changes have presented difficulties under this arrangement.

(g) Are there issues concerning the archiving of material covered by copyright?

There are no current issues concerning the archiving of material by Channel 4 which would not be covered by the existing copyright exemptions or the applicable license arrangements pertaining to that material.

3. General Questions

3.1 How IP is awarded (Question 1)

As a general observation with regard to registration of Community trademarks, Channel 4 considers the procedure for registration to be slow and expensive.

3.2 How IP is used (Question 2)

Question 2a: What types of IP does your organisation use and why?

As a broadcaster, Channel 4 principally deals in copyrighted works, either as copyright owner or licensee of certain exploitation rights. Channel 4 also owns a number of trademarks, and registers these for protection throughout Europe, the United States, Canada, Australia and New Zealand.

Question 2f: How well does the UK IP system promote innovation?

Innovation is central to Channel 4's activities, given that it explicitly forms a core element of our remit, as set out in the Communications Act 2003. Moreover, our audience research shows that Channel 4 is consistently perceived by viewers to be the most innovative television channel in the UK.

The UK IP system, insofar as it applies to Channel 4's business, does not unduly restrict Channel 4's ability to commission innovative television programming and develop other innovative products and services. In particular, our view is that the current status of so-called "format rights" as a licensable commodity, rather than a statutory class of work that attracts copyright protection, strikes the right balance between rewarding owners and developers of format rights, whilst allowing others to develop innovative programming.

Question 2g: To what extent does your organisation make use of other methods used by Government to encourage innovation, such as public funding?

As noted above, Channel 4's remit requires us to encourage innovation across all our programming. However, while Channel 4 is publicly-owned, a key element of our institutional independence is that we receive no direct public funding for our core activities, whether from the licence fee or from general taxation.

We do, however, regularly work with other public sector organisations to co-fund a wide range of specific training, talent development and programme innovation schemes. Current examples include:

- **IDEASFACTORY**, an online platform and networking space to promote careers in the creative industries, funded with a range of partners including regional screen agencies, local authorities and Skillset
- **Warp X**, a low budget film studio funded jointly by Channel 4, UK Film Council, and two regional film investment funds: EM Media and Screen Yorkshire
- **The Big Art Project**, a major initiative to inspire and create six different pieces of new public art across the UK, established in partnership with Creative Partnerships (part of the Arts Council), which will utilise funding from Creative

Partnerships and a number of regional and local authority funds (depending on the location of the projects concerned).

3.3 How IP is challenged and enforced (Question 4)

Question 4a: Are there specific problems with enforcing the main different forms of IP: patents, copyright, trade marks, and designs?

Question 4b: Are there barriers to challenging infringement and enforcing your IP rights on grounds of cost? What drives these costs?

Question 4h: What are the principal barriers to efficient and successful challenge and enforcement internationally?

The principal threats to Channel 4's IP rights arise from the unlicensed availability of Channel 4 programming on the internet and other networks. Due to the multiplicity of potential infringers, the use of file-sharing technologies and the ease with which the programming may be disseminated, the barriers to efficient and successful challenge and enforcement will remain significant, regardless of changes to IP law. We would encourage the following measures, which will be of assistance in protecting and enforcing copyright infringement:

- greater harmonisation of international definitions of infringement of copyright over the internet, in particular by websites or service providers that permit infringement without actively encouraging the same
- incentives (which may take the form of less restrictive tests for liability, or increased sanctions for infringement) for website or service providers:
 - i. to remove infringing copies from the website/service once these have been identified
 - ii. to implement available technologies that allow for infringing copies to be removed from such website or service on an ongoing basis, once identified (so that the copyright owner is not obliged to identify each and every occasion on which infringing copies are available)
 - iii. to display prominent warnings against illegal copying and dissemination of works, together with links to services and websites where authorised copies of works may be available.

Question 4d: To what extent do you use IP litigation insurance? How effective is it?

Channel 4 has an annually renewable broadcaster's Errors & Omissions policy covering insured risks arising from its television programming output, including standard claims for copyright infringement (for example where we are seeking to rely on the defence of fair dealing) and claims for passing-off. However, no insurance is available for a failure to clear rights.

Separate Errors & Omissions policies are also purchased on a programme-by-programme basis for Channel 4's film commissions and certain co-productions. We consider that such policies are effective and do not consider the lack of insurance for failure to clear rights to be problematic, as our strict policy is to contractually require producers to clear such rights in any event.

4. Specific issues

4.1 Current term of protection on sound recordings and performers' rights

The Review will fulfil the Government's commitment to examine whether the current 50 year term of protection on sound recordings and performers' rights in sound recordings is appropriate, in the light of its extension to 95 years in a number of other jurisdictions.

- (a) What are your views on this issue?*
- (b) Is there evidence to show the impact that a change in term would have on investment, creativity, and consumer interests?*
- (c) Are you aware of the impact that different lengths of term have had on investment, creativity, and consumer interests in other countries?*
- (d) Are there alternative arrangements that could accompany an extension of term (e.g. licence of right for any extended term)?*
- (e) If term were to be extended, should it be extended retrospectively (for existing works) or solely for new creations?*

Currently, record companies assert new copyright ownership and publication dates on each occasion that a recording is remixed, remastered, digitised to CD quality or formatted to a new channel configuration (e.g. formatted from stereo to 5.1 surround-sound configuration). In this regard, it is desirable that the law as to which of the foregoing activities leads to the creation of a new copyrighted recording be clarified.

We believe that the current term of protection on sound recordings and performer's rights should not be extended. In fact, we consider it desirable that a holder of copyright in sound recordings should only be entitled to the full existing term of protection if it is required after a certain point to assert its entitlement to protection on a pro-active basis. We do not believe that an extension of the term would materially promote increased levels of investment or creativity. Rather, it would increase the cost of clearing music for television programming.

In any event, should the term of protection be extended, we believe that it should be done so on a prospective and not a retrospective basis. Any retrospective extension would create confusion and a significant administrative burden for users of public domain recordings.

4.2 Copyright – digital rights management

Increasingly digital media content is distributed with digital rights management (DRM) technologies that can enable rights-holders to track usage and prevent unlicensed copying by technological means. However concerns have been raised about interoperability and that such technologies may impair the content consumer's legal rights. For example they may be unable to take into account exceptions to copyright, the ultimate expiry of copyright term, or the future evolution of technology. They may therefore undermine legitimate rights to access digital content, now and in the future.

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

We would make three points:

- First, any regulation of digital rights management technologies should be applied consistently in the United Kingdom and internationally and should be independent of (i.e. not discriminate between or depend on) the specific technologies used.
- Second, an easily identifiable and internationally consistent notice and labelling system should be applied to products that are protected by or incorporate digital rights management technologies.
- And third, there may be scope for the introduction of separate offences and sanctions for the manufacturing, sale or distribution of any product, the primary purpose of which is to circumvent digital rights management systems.

4.3 Copyright – orphan works

(a) Have you experienced any difficulties in identifying the owners of copyright content when seeking permission to use that content?

(b) Do you have any suggestions on how this problem could be overcome?

Channel 4 has, on occasion, experienced difficulties in identifying the owners of copyright content when seeking permission to use that content. In many cases, the problems have not been caused by the difficulty in identifying the copyright owners, but rather by the difficulty in identifying the licensees of distribution rights to such works. We do not, however, consider these problems to be significant in the context of Channel 4's business, as the editorial content of our programming is set at our discretion and is not usually dependent on the availability of any particular copyrighted work.

The problems could be alleviated somewhat by the establishment of a registry or by the introduction of licence of right system, but we consider that such solutions would create other problems and would not be satisfactory. In particular, the establishment of a copyright registry would create a huge administrative burden for copyright owners but could not serve as an authoritative source of information as the ownership of copyright or distribution rights, whilst the public policy arguments for a licence of right for copyright works outside the existing fair use / fair dealing exceptions are weak (certainly weaker than the arguments for licences of right for patents).

4.4 Legal sanctions on IP infringement

(a) Are you aware of any inconsistencies or inadequacies in the way the law applies legal sanctions to infringement of different forms of IP or to different circumstances?

(b) For example, should criminal sanctions on online infringement be the same as those relating to physical infringement?

As a general observation, Channel 4's view is that the high levels of piracy affecting the film and television industries would indicate that:

- with respect to organised or "professional" pirates/counterfeiters, the current sanctions for copyright infringement and dealings in infringing copies are inadequate
- with respect to casual unauthorised copying or dissemination of works by members of the public, both the sanctions for copyright infringement and the level of public education as to what constitutes copyright infringement are inadequate.

With regard to public education, Channel 4 is actively involved in a wide range of media literacy initiatives, many of which aim to educate (actual and potential) content creators and policymakers alike about (traditional) IP law. For example, a DVD on IPR called CREATE was produced under the aegis of the Channel 4 scheme **IDEASFACTORY**. This DVD (commissioned by DTI) was presented at the EU Presidency Creative Economy conference in London in October 2005 and subsequently distributed by the Creative Industries IP Forum. Channel 4 also works closely with Ownit (www.own-it.org), a service which offers free intellectual property advice for London's creative people.

Channel 4 is also at the forefront of Creative Commons licensing (we were the first UK broadcaster to use it), through which we have succeeded in encouraging content creators who have traditionally worked outside the copyright zone (e.g. by using samples of works that have not been cleared) to work within a legal framework. For example, the **IDEASFACTORY** PIXnMIX initiative has encouraged the VJ community to operate within legal parameters.

Turning to online infringement, we would argue that, provided that the potential infringer is given sufficient notice as to the acts that would constitute online infringement, criminal sanctions for online infringement should be no different to those for physical infringement.