



EQUITY SUBMISSION TO THE GOWERS REVIEW OF INTELLECTUAL PROPERTY

INTRODUCTION

1. Equity is a trade union representing 40,000 performers and creative personnel who work across the whole spectrum of entertainment. This includes a range of media and creative industries covered by the scope of the Gowers Review, such as visual broadcasts, sound recordings and film.
2. The intellectual property framework is an essential element that supports these creative industries and ensures investment in the individual creators, both now and in the future. The majority of this submission refers to our experience representing these creators within film, television and radio, and proposes a number of measures to encourage investment and innovation in creative works.

IP RIGHTS FOR PERFORMERS

3. The rights that exist for audiovisual performers in the UK are limited, and have mainly been achieved through the inclusion of rights under contract, negotiated on their behalf by Equity. These collective agreements are negotiated with the main employers including BBC, ITV and PACT, and provide minimum terms and conditional for creators, as well as a range of ongoing ancillary payments, usually through the payment of a residual or royalty and in some cases a collective license.
4. These mechanisms are designed to ensure that a creator benefits from the success and continued exploitation of their performance. They also enable broadcasters and producers to ensure the efficient administration of the intellectual property rights agreed under the contract. However, it is important to note that not all audiovisual material is necessarily produced using an Equity contract. Therefore this mechanism to ensure that a performer secures rights in their work does not always function in every case.
5. Moreover, in the case of most feature films made over the years, even where these were made under an Equity contract, no ancillary or ongoing payments were guaranteed for performers. Since 2002 the Equity Cinema Films Agreement does include additional ongoing payments from sales to television broadcasters and from sales of videos and DVDs, although there is a similar problem in that some producers may not choose to make their film using this agreement.

6. An additional method, whereby performers are able to gain from the rights in their work is through the payments made in accordance with statutory arrangements for exploitation of audiovisual material overseas. These sums are often micro-payments made in line with rights provided in other countries – for example, to compensate for the extent of private copying; cable retransmission; rental of videos and DVDs; and communication to the public. In the UK this income is collected by British Equity Collecting Society (BECS). Similarly the Performing Artists' Media Rights Associations (PAMRA) collect monies due to performers, either for the licensing of sound recordings within the UK or due to British performers from on the basis of statute in other European countries.
7. However, a strange anomaly exists, in that audiovisual performers in the UK do not have these basic statutory rights in their work. Creators need a supportive framework to ensure that there is appropriate reward for the investment in their creativity and innovation. For audiovisual work this means recognition of the rights that are intrinsic in the work of performers. There has been slow progress at the World Intellectual Property Organisation (WIPO) towards an audiovisual protocol that would address these concerns, despite the broad consensus about introducing rights for performers in this area.
8. While the UK Government has now introduced moral rights for sound recordings, these rights are expected to have a limited impact due to the inclusion of an assertion provision and the possibility of waivers. Equity believes that the Government should address this issue head-on by removing these restrictions and introducing similar rights for audio-visual performances, prior to any protocol being agreed. Legislation to implement moral rights to cover both audio and audiovisual performances would also bring the UK to a level more comparable with other EU states.
9. Moral rights are vitally important to performers as they are a recognition of the creative act. However, the Government should be aware that this forms part of an overall package of rights and that there is a practical connection between this and the other rights for performers, including the application and administration of economic rights. This is especially true in relation to public performance rights for performers in sound recordings, an economic right which is potentially worth in excess of £40 million per annum for performers. Moral rights would also assist UK performers in tracking and enforcing rights under contract and collecting revenue from statutory rights in other EU member states, thereby garnering further revenue for the UK creative economy.
10. Ultimately, creators want to ensure quick, easy and efficient licensing of their work to ensure the greatest opportunity for its use and re-use. In this sense the interests of creators and consumers are not as far apart as is sometimes portrayed. Equity believes that a recognition of rights that subsist in audiovisual performances and a more consistent and logical

moral rights regime, could form important building blocks to provide greater investment in creators and ensure the availability and exploitation of our members' work.

TERM OF PROTECTION ON SOUND RECORDINGS

11. Equity notes that the copyright of performers on recordings made in the UK and the European Union is limited to 50 years, whereas sound recording copyright can continue for 95 years in the USA and for an average of 75 years in most non-EU countries. As a result of this, UK and EU recording artists can be denied income from the playing of their recordings during their lifetime. Equity has therefore supported calls for the Government to recognise this as denial of income due to artists and to alter UK and EU copyright laws accordingly.
12. Failure to extend the term – and apply this retrospectively to existing works – will have a detrimental impact on performers who have invested their creative energy into developing a body of work capable of providing ongoing benefits for them and their families.
13. While the most high-profile examples of work that would be affected by an extension of the term are in the music industry, there would also be a direct and positive impact upon the rights of actors and those involved in dramatic works. The most obvious example is that of sound recordings which were first broadcast 50 years ago or more, mainly on BBC radio. A programme such as *Hancock's Half Hour*, which was first broadcast between 1954 and 1959, has recently reached this threshold and has raised issues regarding continued payment, as it is currently under licence to BBC7 and provides revenue accordingly.
14. In addition to these sound recordings, an extension in the period of protection would have a direct impact on payment for the work of performers in classic film and television programmes. While the actors in these productions often received nothing more than their engagement fee under contract, the existence of a right that subsists in the performance has enabled them to benefit from a range of statutory sources of revenue, particularly from EU member states.
15. Films from the *Doctor...* series, including *Doctor in the House* (1954) and *Doctor at Sea* (1955) are already being affected by the expiration of the term, with *Doctor at Large* (1957) and *Doctor in Distress* (1963) due to fall out of protection in the next few years. While television programmes can age quickly, the economic impact of the term expiring could soon be felt on classic series such as *The Avengers* (1961).
16. Equity believes that it is in the interest of creators from past and present to see an extension to the term of protection, to ensure that there is an appropriate and ongoing reward to performers, which is consistent with other areas of copyright, as well as an incentive for the next generation.

However, it will be vitally important to achieve a framework that ensures that performers actually benefit from the extension and receive a fair proportion of the royalties and payments generated by the continued exploitation of their work.

17. It is also in the interests of consumers to ensure that the producers continue to retain an interest in exploiting a performance or recording to enable clear and efficient availability. Equity is not aware of any evidence that a shorter term of protection would benefit consumers by providing a cheaper or more accessible product for consumers. In instances where the producers continue to hold the copyright but the performance falls into the public domain, the producers simply make a larger profit and the performers miss out completely. This type of scenario can occur in film (which applies the copyright applicable to the publication of literary works), when rights continue to subsist for 70 years after the death of the last surviving principal, such as the producer or director.
18. Therefore Equity believes that copyright on sound recordings and performers' rights should be extended in line with that of the publication of literary or musical works – to 70 years after the death of the last surviving producer or featured performer on the recording.

COPYRIGHT EXCEPTIONS

19. It is widely acknowledged that (so far) the music industry has been most directly affected by the increase in high quality unauthorised reproduction and dissemination of creative content using new technology. Research for the British Phonographic Industry estimated a loss in sales of £1.1bn over three years to 2005. This reflects alternative ways that consumers have been downloading music, both through illegal file sharing activity and an expansion of legal downloads, which have increased dramatically but been unable to replace lost revenue.
20. It would appear from the developments in the music industry that the unauthorised reproduction of creative content is, and will continue to be, driven by the consumer demand. The availability of high quality digital reproductions and the technological means to access this material on a much bigger scale through high speed internet access has created an irresistible proposition of the latest, high quality recording for a lower price.
21. While it is necessary to protect the rights of creators (sometimes through legal action) it is preferable to acknowledge this demand and work to develop legal means of managing the demand for the work of creators, through appropriate business models. The music industry is now well developed in this area with the dominant model being that of iTunes, which has illustrated the desire of the vast majority of consumers for a legal alternative to the illegal file sharing or reproduction.

22. Increasingly, performers of audiovisual work have seen their content become available illegally on the internet and through online peer-to-peer (P2P) networks. This is not just a problem for film, as a number of British television programmes have also appeared on the internet including *EastEnders*, *Hollyoaks* and a number of classic comedy programmes. Probably the most high profile example of this in the UK occurred last year, when the BBC also found that its new series of *Doctor Who* was available on-line before it had even been broadcast.
23. It is against this background of growing demand – as well as greater affordability and availability of technology able to produce high quality copying – that Equity has supported the concept of a levy applied to recordable media (such as blank tapes and CDs) and equipment (including computer hardware and portable download devices such as i-Pods and games consoles). This would acknowledge the reality that private copying occurs and will continue to do so. It would also prevent the criminalisation of consumers for ordinary and widespread behaviour such as format-shifting for personal use (e.g. CDs to PCs to MP3 players), which is not subject to prosecution activity, so seemingly acceptable.
24. Good laws are those that are respected by the citizens and the fact remains that the present law is not respected, or obviously enforced. Equity would therefore favour a broader exemption to the reproduction right to allow for legitimate private copying, coupled with a levy system to enable right-holders to receive revenue for the use of their material in this manner. The majority of EU member states already have a levy on blank recording equipment or devices and some are considering how this can be extended to hardware and new media in the manner outlined above. The UK is one of only three EU member states without such a levy system. Nevertheless, revenue is collected by British Equity Collecting Society (BECS) on behalf of British performers from private copying levies in these countries.

DIGITAL RIGHTS MANAGEMENT

25. There is an argument that the type of levy arrangement outlined above will be unnecessary as advances in digital rights management systems (DRMs) enable limits on private copying, however Equity does not believe that this is a long term solution. DRMs are often seen as a protectionist measure, which can lock certain users out completely and can create a good deal of public hostility. It has also been the case that the professional “pirates” of such material are able to crack such systems relatively quickly.
26. Therefore while DRMs may provide a helpful enhancement in the flexibility of the propositions that can be offered to consumers in the short term, a levy system is a more sensible and pragmatic approach to adopt for the future. This would enable consumers and legislators to more easily discern between piracy and legitimate private copying by consumers,

creating a renewed legitimacy in a copyright system that is sometimes viewed as anti-citizen.

27. There have also been recent signs of increased pressure to enable greater inter-operability of DRMs, with legislation brought forward in France and under consideration in Denmark. This would prevent the current lock on content from providers such as Apple's iTunes, which restricts downloads exclusively to Apple products such as iPods. Equity believes that improved inter-operability is an admirable goal, but should not necessarily be the subject of legislation in this way. The extent of adjustments to the use of DRMs will ultimately be decided by the market. Nevertheless, if this trend continues a levy system would ultimately support this more open exchange of content, while protecting revenues for performers and producers.

ORPHAN WORKS

28. There is not usually a significant problem in identifying the rights holders in audiovisual content. Nevertheless, there are occasions when it is not possible to do so. In these circumstances a process of due diligence is pursued, in order to ensure all necessary enquires have been exhausted and reasonable efforts made to identify the rights holder. Once this process has been completed payments are then made to the appropriate collecting society for the benefit of performers.
29. It may be helpful to introduce a statutory scheme, or at least detailed guidance, which would support industry practice in this area. This would necessarily focus on the payment of a fair royalty as the preferred option, but outline reasonable steps and an alternative process of best practice.

LICENSING OF PUBLIC PERFORMANCES

30. Equity represents a number of singers, who currently enjoy significant benefits from the system of licensing and paying royalties to collecting societies for public performance of music and/ or sound recordings. As a result, it would not appear necessary to propose fundamental changes to the workings of the current system.

COMPETITION POLICY

31. There have been a number of instances within the audiovisual sector where vocal sections of the industry have argued that unfair competition exists. For example, PACT made a very successful case to the Government and Ofcom that independent television producers were not receiving an appropriate share of programme commissioning and were also restricted in the exploitation of these programmes. The subsequent code of practice, which led to a new terms of trade, has enabled independent producers to build up an asset base of audiovisual material due to the rights they now hold in these productions.

32. This process has (and continues to be) promoted as a way of intervening to improve competition and resist the tendency to vertical integration from the large broadcasters. However, it is also important to note that this benefit has not been passed on to other parties in the supply chain, including performers and those featured in the productions. As a result, such actions can be seen by performers, not as a method of tackling unfair competition, but a rights-grab by the producers. In a similar manner, rights within feature films are assigned to the producers with no countervailing mechanism or rights for performers.

33. Equity believes that some of these tendencies could be addressed through the introduction of performers' rights in audiovisual work. This would help to prevent instances where IP rights are automatically assigned to the producer and fail to flow down to others involved in the creative process.

SUMMARY – KEY POINTS

34. Equity welcomes the Gowers Review and hopes that it will recommend that the Government takes the follow measures:

- Support the implementation of an international audiovisual treaty on performers' rights through WIPO.
- Extend the current term of copyright protection on sound recordings and performers rights to life plus 70 years, in line with that for authors and composers.
- Undertake detailed consideration and assessment of the impact of a levy on recordable media and associated devices.
- Implement the manifesto commitment to work with industry to address the growing threat of piracy, but support investment in legal business models (with a limited use of DRMs where necessary) so that creative work is available on new and emerging platforms.
- Clarify procedures of due diligence in identifying rights holders, prior to alternative payment arrangements being agreed in respect of orphan works.

Matthew Payton
Research and Parliamentary Officer
Equity
Guild House
Upper St Martin's Lane
London WC2H 9EG

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