



Response to Gowers Review of Intellectual Property

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Pact is the trade association representing the commercial interests of film, television, animation, distribution and interactive content companies across the UK. We have over 800 member companies.

Executive summary

- 1) Independent production companies have played an instrumental part in making the audiovisual creative industries one of the fastest growing sectors of the UK economy. The independent television production sector is demonstrating sustained year-on-year growth, increasing total turnover from £1 billion in 2003 to more than £1.74 billion last year.¹ The huge potential for further growth is evidenced not just in television, but also in the new forms of interactive content and delivery that are emerging in the digital era.
- 2) Creating, licensing and exploiting intellectual property, both for television and completely distinct new media formats, is fundamental to independent production businesses. This was recognised in the 2003 *Communications Act*, which enshrined Codes of Practice for negotiations between producers and broadcasters. This framework allowed production companies to benefit from the revenues generated by their copyright, and is helping drive the current growth.
- 3) Pact therefore welcomes the *Gowers Review*'s recognition that intellectual property is crucial for the success of knowledge-based industries, such as the independent production sector. Our response to this review will focus on two areas: the way in which copyright and trademark law applies to the work of Pact's members; and the need for a market in exploiting intellectual property rights that is as open and competitive as possible.
- 4) Copyright and trademark law must continue to work, as it does now, with relative ease and clarity. This system has played a part in allowing creativity to flourish and UK programming to build up a world-renowned reputation for quality and originality, generating exports that are second only to the far larger US industry.
- 5) At the heart of the copyright regime is a flexibility that is crucial in the fast-evolving digital age. Creators are able to choose how their intellectual property is licensed. This allows companies to secure financial returns on their intellectual property, and encourages them to make content commercially available as soon and as conveniently as possible. The public increasingly expects more choice in how it accesses content and, as evidence increasingly indicates, is prepared to pay a reasonable price for that choice.

¹ Broadcast annual survey, 17 March 2006.

- 6) To undermine creators' ability to choose how they licence their content would therefore not only be contrary to the *Communications Act's* intention to allow producers a fairer share of the revenues from their content; it would also upset the delicate balance of interests between creators and users that has evolved over time.
- 7) Pact members are well placed to appreciate the nuances that affect both creators and users in the copyright debate. Production companies are both, creating copyright work and licensing the work of third parties as part of the creation of their own content. We urge this review to carefully consider the impact of any changes to the copyright regime across different sectors and on different stakeholders, using a rigorous, evidence-based approach.
- 8) We also ask that the review team consider the market conditions affecting intellectual property. The terms of trade discussions that Pact and the broadcasters are currently holding must create a more open market for exploiting rights to intellectual property. In the analogue era, a limited number of incumbent UK broadcasters have been able to dominate the market for intellectual property rights and stop new entrants having reasonable access to UK content.
- 9) In the digital age, failing to allow new entrants reasonable access to UK content alongside existing broadcasters would represent a huge opportunity missed. In addition to providing the public with increased choice in how it engages with content, companies outside the traditional broadcasting world offer an opportunity for UK content to compete globally. *Coronation Street* registers more than 10 million viewers on UK television, but Yahoo! has a worldwide customer base of 400 million people, 200 million of whom are registered.
- 10) Fundamentally, market conditions and the legal framework must engender choice: choice for businesses in how they license and exploit intellectual property; and choice for audiences in what content they watch, and when and where they watch it.

GENERAL QUESTIONS

1. How IP is awarded

(a) Are there barriers to obtaining IP rights due to system complexity? What could be done to improve this situation?

- 1) UK television audiences enjoy one of the highest levels of new programming in the world, and the UK content creation sector is world-renowned for its creativity and innovation. In made-for-television programme sales, for example, the UK's market share of 10% is second only to the far larger US industry, and substantially ahead of its closest rival Canada, which is on just 3.9%.²
- 2) Myriad factors are responsible for this success, but copyright and trademark law has played its part by providing a framework that generally works with ease, clarity and, crucially in the fast-evolving digital era, flexibility.
- 3) In particular, the way in which copyright is recognised, without the need for formal registration, helps support this innovation and creativity. This generally compliments the other forms of intellectual property for which registration is a requirement.
- 4) Additionally, the way the current regime allows creators to choose how they licence the content they create is fundamental in incentivising business while providing choice for consumers. As we will detail in response to questions 1.(g), it is in creators' interests to make content available on commercial terms as soon as possible after initial transmission. And the public, evidence increasingly suggests, is prepared to pay a reasonable price for that content, provided it is high quality and delivered in ways that offer them increased choice in when and where they access it.

(b) How easy is it to find out about obtaining IP rights? What could be done to improve awareness for businesses and innovators? Is there sufficient awareness of the need to protect IP internationally?

- 1) Since the field of media copyright is specialised, we consider it a key part of our role as a trade association to offer specialised and tailored advice

² Rights of Passage: British Television In The Global Market, Television Research Partnership, page 3.

to our members on copyright, rather than more generic information and training. Overall we consider a self-help approach to targeted training is more beneficial than general guidance.

- 2) Pact provides training courses such as Copyright for Beginners and The Value of Rights, which are subsidised by the Independent Producers Training Fund, and large-scale events such as Rights Lab, which is aimed at introducing producers to key buyers and helping them build their digital rights strategies.
- 3) Additionally, our business affairs consultancy advises on commissioning agreements and contracts relating to exploiting secondary rights. We also offer advice through our subsidiary the Producers Rights Agency whenever needed on copyright and run a copyright registration scheme to prove time of origination.
- 4) Business links and projects such as Passport to Export are useful for new businesses and SME's. However, Pact would support further consideration of how UK audiovisual sectors as a whole might provide more coordinated advice and information together with government agencies and departments.

(c-e) Are there specific barriers to obtaining UK IP rights on grounds of costs?

- 1) Please refer to our response to question 1.(h) regarding costs specific to small businesses.

(f) Is lack of trust in the system a barrier? To what extent do you rely on other tools to bring innovation to the marketplace, such as being first to market, maintaining trade secrets, or using an open innovation model to generate value through reputation or network effects?

- 1) Pact members generally trust the current copyright regime to protect the content they create. As we have outlined above in response to 1.(a), the copyright and trademark system has provided a framework that works with ease, clarity and the flexibility that is needed in the digital era.

(g) Are there specific barriers to obtaining IP rights in your sector?

Market barriers

- 1) The copyright regime presents no significant barriers to obtaining intellectual property rights that affect Pact members. The market, however, does. Indeed, the barriers to commercially acquiring the right to exploit intellectual property in the market impact not just on Pact members, but on the choice of content available to audiences.
- 2) The production cost of television programmes has generally been met by producers selling exploitation rights to a broadcaster, with the producer paid a fee and the licence paid by the broadcaster funding the making of the programme. The UK content sector has for many years been characterised by a handful of buyers, ie analogue broadcasters, and a host of sellers, ie producers.
- 3) Along with their spin-off channels, the main networks account for 79% of all viewing and 95% of money invested in non-news programmes in the UK.³ In contrast, there are more than 800 independent production companies competing for commissions with each other, broadcasters' in-house production departments and overseas imports.
- 4) There is a long history of the incumbent broadcasters using their dominant position to stifle other, so-called secondary markets by 'warehousing' - ie not exploiting secondary rights in an effort to deny new entrants to the market access to content.
- 5) The *Communications Act* sought to address the imbalance between buyers and suppliers, creating Codes of Practice for negotiations of rights between producers and broadcasters. These codes were aimed at "unbundling" rights, ensuring that they were clearly defined and disaggregated.
- 6) However, while the codes have greatly helped producers start to build sustainable businesses, broadcasters will continue to dominate the market into the foreseeable future, according to research commissioned by Pact from media analyst Oliver & Ohlbaum Associates. The primary commission from the main broadcasters currently provides over 85% of the lifetime income for an average new programme, excluding children's. The Oliver & Ohlbaum study suggests that in the next 10 years, despite

³ UK TV Content in the Digital Age - Opportunities and Challenges, Oliver & Ohlbaum Associates, page 3.

growth in secondary and ancillary markets such as video-on-demand (VoD) and mobile, this is likely to remain above 75%.⁴

- 7) This continuing dominance will allow broadcasters to potentially seek to “re-bundle” an array of additional rights into the price they pay for the primary licence for no additional cost. This is a particular issue for new media rights.
- 8) Such a “re-bundling” of rights would clearly represent a transfer of value back to the terrestrial broadcaster, eroding the benefit of the Codes of Practice, and damaging the business model of Pact members.
- 9) Just as importantly, if successful in “re-bundling” rights, the main networks would potentially be able to stifle secondary markets by warehousing certain rights. This creates a danger that new entrants will be excluded from developing new platforms and services using UK content, undermining competition, investment and innovation and resulting in a significant loss to both the viewer and the UK content creation sector.

Repeating analogue’s failures

- 10) This has previously occurred in the context of the cable services, which were prevented from acquiring UK programmes by the main networks and forced to fill their schedules with imported programming. Unless there is a more open market for rights to content, the UK risks repeating exactly the same scenario in the digital age.
- 11) Broadcasters have argued that their dominant position could be undermined due to pressures on advertising revenues in the multi-channel era. However, these concerns may have been overstated. Overall advertising revenues have been growing year-on-year, with any decline in revenues from traditional channels offset by growing revenues from additional ones.
- 12) Those additional channels will often belong to the same parent broadcaster as the terrestrial service, as evidenced in ITV's annual results for last year. Overall, advertising revenues at the UK's biggest commercial television broadcaster were up 2.7%.
- 13) Advertising revenues across the whole broadcasting sector for the first three quarters last year have outperformed the corresponding period in

⁴ Ibid.

2004, according to Ofcom's figures.⁵ In 2004, overall advertising revenues across the sector were also up 7%.⁶

- 14) Growth is predicted well into the future. In its conservative scenario, PricewaterhouseCoopers' model of the television market, commissioned by Ofcom, estimates that advertising revenues will record an overall annual growth rate of 2.1% in real terms for the period until 2014.⁷
- 15) Indeed, Channel 4's recent switch of its E4 and, this year, FilmFour channels from subscription to a free-to-air, advertising-driven model would seem to contradict broadcasters' protestations that the advertising market is collapsing. E4 has shown robust growth in advertising revenues since 2004, its last year as a pay service. Last year, E4's advertising revenues hit £60 million, compared to £38 million in 2004. We understand that E4 is forecasting between £90 million and £100 million this year.

Opening up the market

- 16) The way forward is to develop the market by allowing the prompt exploitation of rights via diverse services in a way that rewards, and therefore incentivises, producers and broadcasters.
- 17) Consumers are increasingly used to subscription and pay-per-play models and the flexible use of licensed rights which these models afford. Just replicating older forms of delivery on new platforms will, Pact believes, fail to stimulate the innovation and investment which have been crucial to the success of the UK broadcasting and independent production sectors.
- 18) Far from harming broadcasters' revenues, there are many signs that new media applications will increase their overall revenues, even with a reduced holdback. Subscription revenues earned by platform operators are growing and are now the largest single source of revenues in the television sector, at almost £3.6 billion in 2004. In the interactive market, Pact understands that ITV is predicting that its new participation channel, ITV Play, will make £20 million in profit in its first 12 months.
- 19) Additionally, broadcasters are diversifying online - ITV's recent acquisitions of Friends Reunited being a notable example - and potential revenues from online advertising have rocketed.

⁵ The Communications Market, interim report, February 2006, Ofcom.

⁶ The Communications Market 2005, Ofcom, Page 192.

⁷ Economic Analysis of the TV Advertising Market, PricewaterhouseCoopers for Ofcom, 2004.

- 20) Developing commercial on-demand services that get UK content to the market quickly after the first transmission should also help to address television piracy. If the public is prevented from accessing content in the ways that are created by new hardware and digital technology, there is every reason to suggest many people will do so by illegal means. This was clear from the explosion of unauthorised file sharing enabled by new peer-to-peer technology, which had a significantly damaging effect on the music industry.
- 21) By eventually responding to consumer demand, and making music available in a variety of new online subscription, streaming and commercial downloading services, the music industry has now created an increasingly significant revenue stream. Global digital revenues were worth \$1.1 billion in 2005. They are growing rapidly and are now worth 6% of total music industry revenues. Just two years ago, they were worth 0%.
- 22) The UK public is already showing a similar propensity to use peer-to-peer technology in regard to unauthorised audiovisual files. Research has already shown that the level of such unauthorised use of audiovisual files in the UK is one of the highest in the world. UK content is amongst the most popular in the world, and therefore the threat from unauthorised use for producers is proportionately greater.
- 23) However, just as the music industry has developed new revenue streams in online and commercial downloading services, evidence suggests that people will pay for the right kind of content, if it is available by legitimate means where and when they find it most convenient. Average household spend on television 10 years ago was around £20 a month, on the television licence and the average BT bill. Now, over half of UK households are paying five times that for services such as BSkyB, multi-channel, broadband and mobile telephones.
- 24) Pact therefore supports any broadcaster developing services for delivery over new platforms. The current terms of trade do not prevent any of the incumbent broadcasters from making a commercial offer to acquire further rights from any producer beyond the primary license. Indeed, we would welcome the prospect of new investment into original content, as long as that investment is on properly negotiated commercial terms, recognising the value of the rights licensed and the advantages secured through multi platform delivery.
- 25) However, in practice, as we have outlined, the main broadcasters are seeking to re-bundle additional rights into the primary licence for no

additional cost, with the resulting risk of suppressing competition in secondary markets, particularly in new media.

- 26) Without increased opportunities for licensing of programme rights, the continuing dominance of the main broadcasters therefore risks stifling at birth the benefits of increased choice and competition in the digital era. It is crucial that new entrants to the distribution market are allowed to compete alongside existing broadcasters for original UK content at a reasonable cost and with relative ease.

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

- 1) In so far as copyright is awarded, the current regime generally works successfully for Pact members and we would urge any changes to be made only after rigorous, evidence-based analysis.
- 2) One area where Pact does have concerns is the cost of going to the Copyright Tribunal. We welcome the Patent Office's current review of how the tribunal works and hope costs are addressed. This is an area of law that attracts the most expensive legal counsel as it is dominated by large media businesses pursuing high value or large-scale copyright cases. The high costs incurred over a lengthy time period are prohibitive for smaller businesses, which comprise the vast majority of Pact members.
- 3) In terms of the market, there are other specific barriers for SME's. As such, independent production companies are often at a disadvantage when they need to negotiate the use of pre-existing copyright material with large rights-holder organisations such as collecting societies or talent unions. This has proved problematic in the past when big organisations try to enforce unfair terms upon producers.
- 4) For example, in 2003 the Screen Actors Guild (SAG), the trade union for US actors, stipulated that all SAG members were only to be engaged on SAG contracts. As these contracts provided for excessive payments it threatened to deter UK producers from using US actors, if this was their preferred choice, and also took away the freedom to negotiate terms with actors individually.
- 5) Similarly, when producers wish to use a piece of music in a production, they have traditionally been reliant upon obtaining relevant licences from a local collecting society, such as the Mechanical Copyright Protection Society in the UK. When such societies have fixed standard

licence terms, it is usually impractical on grounds of cost for a production company to challenge such standard terms. This can create an unfair barrier to trade despite rights for companies to refer licensing schemes to the Copyright Tribunal.

(i) How well does the national system for awarding IP, administered by the Patent Office perform? How well do the international and European systems work?

- 1) This is not relevant for the purposes of copyright. However, for trademarks and patents, it is important for the Patent Office's role to extend beyond purely policing the award of intellectual property, and include promoting education and awareness about the whole range of rights which comprise intellectual property.

2. How IP is used

(a) What types of IP does your organisation use and why?

- 1) Whilst production companies increasingly rely upon the use of patents to support their work, they primarily use copyright. Production companies create new work, use the work of others, and exploit work. Their wide range of activities – which means they are well placed to understand different aspects of intellectual property rights - involves:
 - a. Creating new copyright works and trademarks;
 - b. Commissioning third parties to create copyright works for use in content made by production companies;
 - c. Compiling new combinations of copyright works within content made by the production company;
 - d. Licensing rights in the collected works; and
 - e. Exploiting intellectual property rights.

(b) To what extent do you seek multiple overlapping forms of IP protection?

- 1) For the independent production sector, enforcement issues make it important for producers to have the benefit of both trademark and copyright protection.
- 2) Trading Standards currently only has a duty to take action in cases of trademark infringement, but not copyright infringement or infringement of performers rights. This is because sections 107(A) and 198(A) of the *Copyright, Designs and Patents Act 1988* have not yet been implemented.
- 3) The Alliance Against IP Theft has made the case for effective early implementation of these provisions, and Pact hopes that action will be taken to pursue this imminently.

(c) To what extent are these decisions influenced by sector-specific considerations?

- 1) Branding is becoming increasingly important for companies in the digital world. The links between copyright and trademarks are particularly important for the television and film productions sectors. In this sense the overlap is sector specific. However similar issues will apply in other creative industry sectors.

(d) How does your company value its IP? Are there problems with raising finance against intangible assets based on IP? What improvements could be made in this area?

- 1) The biggest single improvement that could currently be made to help independents raise finance against rights would be the negotiation of terms of trade that allow production companies a fair share of revenues generated by new media applications. These applications will in many cases be increasingly significant sources of revenue in the future. Unless production companies are able to benefit from the exploitation of rights to the content they create on the services of the future, the transfer of value to producers intended by the *Communications Act* will be undermined.
- 2) New media also create a need to assess how rights to intellectual property are defined. ITV has for example acquired the online service Friends Reunited. An audiovisual spin-off from this service might classify as part database, part programme.
- 3) Pact would also encourage any steps to improve investor understanding of the nature of creative businesses and intellectual property. Independent production companies have recently made significant progress in this respect, as evidenced by a series of successful IPOs. However, companies that have floated have sometimes been confronted by a lack of awareness of very basic aspects of how intellectual property is exploited.
- 4) Producers report that analysts and investors readily appreciate the value of merchandise associated with a programme, but are unaware that intellectual property created by a UK company can generate revenues by being sold to different markets around the world.

(e) To what extent does the term of IP rights at the margin affect investment decisions?

- 1) The term of intellectual property rights when they are awarded has, at most, a minimal impact on investment decisions. Television and new media content has a relatively short lifespan in the market and there is no reason to use projections that exceed the current term as the basis for investments.
- 2) In contrast, the length of the time during which a rights holder is permitted to exploit rights to content is a crucial matter for the health of a creative business. Under the *Communications Act*, producers own the rights to the content they create. Pact is sympathetic to broadcasters having limited control over some of those rights, but rights must be available for commercial exploitation promptly after the initial transmission.
- 3) Otherwise, consumers will seek to illegally download content that is not available commercially, even though they willing to pay for greater choice in how, when and where they watch content by legitimate means.
- 4) The time period for the exploitation of rights is therefore one of the most significant factors in the current negotiations over terms of trade between Pact and broadcasters. However, an equally important issue is the medium used to deliver content within that timeframe. With the growth of new media, rights will often be exploited through different forms of delivery during the same period, each of which may impact on the others.
- 5) This interrelationship is illustrated by a YouGov consumer survey commissioned for Pact. The research, which has been analysed by Oliver & Ohlbaum Associates, indicates that a free catch-up window (ie the broadcast of the same programmes at a later date for audiences who missed the programme initially) will impact on the value of the pay VoD market. The survey found that 58% of all respondents would be less likely to be interested in pay VoD, or would no longer be interested at all, if there were a free seven-day catch-up available.⁸
- 6) In addition, the YouGov research suggests that pay VoD will impact on DVD sales, especially if pay VoD allows consumers to keep the programme indefinitely. If downloads were available to keep, 36% of respondents said they would be less likely to buy or rent DVDs.⁹

⁸ The Prospects for On-demand TV in the UK: Analysis of the YouGov Consumer Survey, Oliver & Ohlbaum Associates, page 11.

⁹ The Prospects for On-demand TV in the UK: Analysis of the YouGov Consumer Survey, Oliver & Ohlbaum Associates, page 9.

- 7) Furthermore, pay VoD will undermine pay TV channel take up, and therefore any likely secondary programme income from these channels. The YouGov research found that 27% of those interested in VoD would reduce their viewing of thematic channels, and 57% might reduce their linear pay TV packages if VoD were available directly.¹⁰
- 8) This means that independent production companies face a potential decline in revenues from DVD, VoD and pay TV, in addition to the previously detailed pressures on the price paid for the primary licence. Independents must therefore have control over pay VoD rights as well as DVD and pay TV rights in order to maximise the value of these markets by coordinating their exploitation.

(f) How well does the UK IP system promote innovation?

- 1) The copyright and trademark regime generally works with ease, clarity and flexibility, but one area that is worth considering is the status of format, or remakes.
- 2) UK production companies have proved themselves to be world leaders in the creation and exploitation of formats. Independently-made programmes such as *Who Wants To Be A Millionaire?*, *Wife Swap*, *Supernanny* and *Pop Idol* have led the way, opening up the US market to UK programming and being successfully formatted around the world. UK exporters have a dominant 45% share of the international television format market by hours, and 49% by number of titles. The UK's closest competitor, the far larger US industry, has a 20% share by hours.¹¹
- 3) This position in some quarters has been seen as "vulnerable"¹² due to a lack of clarity over when a format qualifies as a copyright work in its own right, and the lack of a common framework for protecting relevant intellectual property rights in the EU and other worldwide markets. The law of copyright, which is so fundamental to encouraging innovation and investment, is unclear over the status of identifiable formats.
- 4) However, while there is a need to protect the interests of the creators of formats, the equally important goal of allowing and encouraging creativity must also be considered. Copyright law, and the way that written programme formats might already be recognised as literary works, is

¹⁰ Ibid, page 8.

¹¹ Rights of Passage: British Television in the Global Market, Television Research Partnership, page 3.

¹² Ibid.

important to providing this balance between protection and encouraging creativity.

- 5) The world beating success of the UK in developing and exploiting formats suggests that the current system is not without merit. However the lack of clarity previously referred to is an issue which should be considered in the context of the current review.
- 6) Some case law has resisted recognising certain programme formats as works protected by copyright law.¹³ In practice, the process for recognising the moral and commercial value of original formats has become well established within the UK production sector. This allows commercial licences to be negotiated, taking into account the distinct features of a format alongside the benefits, which the creator may have under the law of confidence, through trademark protection and design rights. At the same time, the informal nature of this process has allowed creativity, ie the development of new formats, to flourish.
- 7) Any change to copyright law to clarify the statuses of formats should therefore be mindful of the potential negative impact on what is a highly successful area of the UK production sector.

(i) Do you have any evidence as to the static or dynamic costs that IP rights (as statutory monopolies) impose on the economy?

- 1) Copyright protection does not provide a monopoly in the sense that the protection can apply distinctly for two similar works which are produced wholly independently of one another. It is important to bear this in mind when hearing those who argue against copyright protection on the grounds of its monopoly status. Copyright is, and should remain, the way in which creators are able to receive recognition and secure a return for their work.
- 2) We also refer the review to our response to question 1.(h) regarding barriers to obtaining rights for SMEs. As we have outlined, independent production companies incur additional costs when negotiating the use of pre-existing copyright material with large rights-holder organisations such as collecting societies or talent unions. We have given the examples of the Screen Actors Guild and the Mechanical Copyright Protection Society.

¹³ Green v New Zealand Broadcasting Corporation 1989 – Privy Council decision that the unifying features of the talent show *Opportunity Knocks* did not constitute a work protected by copyright law.

- 3) Please also note our comments in response to question 4. regarding the costs associated with the Copyright Tribunal.

(j) Have you encountered patents or other IP rights being used defensively, ie obtained not to develop products, but only to prevent others from doing so? Under what circumstances do you consider this acceptable?

- 1) As we have explained in response to question 1.(g), there is a long history of the incumbent broadcasters using their dominant position to stifle secondary markets by warehousing rights to intellectual property in an effort to deny new entrants to the market access to content.
- 2) This has previously occurred in the context of the cable services, which were prevented from acquiring UK programmes by the main networks and forced to fill their schedules with imported programming. Unless there is a more open market for rights to content, the UK risks repeating exactly the same scenario in the digital age.
- 3) There are no circumstances under which we regard such an unreasonable use of rights as acceptable. It runs counter to the interests of consumers, depriving them of choice, and undermines overall market growth. We refer you to our answer to question 1.(g) for further comments on this important issue.

3. How IP is licensed and exchanged

- 1) It is imperative to provide the increased choice that the public is demanding, but this must not be at the expense of destroying incentives for investment in the sector. The current regime, by allowing a creator to choose whether they licence the use of their content and on what cost basis, achieves this balance.
- 2) Forcing production business to give away their work for free would not only undermine their very business models, it is unnecessary as a step to achieving what must be the overriding goal of delivering increased choice to the consumer. It is after all in the interests of production businesses to make content available on a commercial basis as soon after initial transmission as possible. This also serves the interests of the consumer: as we have outlined in answer to question 1.(g), there is mounting evidence that consumers are prepared to pay a reasonable price providing they are receiving increased choice in return.
- 3) In many cases, consumers are now increasingly creators, as advances in technology have opened up means of communication traditionally the preserve of those involved in professional copyright work. Many members of the public are not interested in licensing the use of their work. Recoupment is not a driver for them. Instead they may choose to make their works freely available for use by others.
- 4) However, this does not mean that production businesses should be denied the ability to be flexible in how they offer their content. Some of those businesses may choose to provide content for free, in order to raise its profile for further sales, for example. In general, however, failing to allow the creator to choose how their content is licensed will undermine the very businesses that are supposed to provide audiences with an increased range of content in the first place.

4. How IP is challenged and enforced

- 1) Existing copyright law has developed a fair balance between the rights of copyright owners and consumers' access to content, and there is a valuable flexibility at the heart of the legislative framework. We therefore reiterate our concerns that any review should carefully consider the impact of any changes to the copyright regime so as not to upset the way this system delicately balances a number of different interests.
- 2) However, Pact would support further consideration of the anomalies highlighted by the Alliance Against IP Theft. These include:
 - a. Addressing deficiencies in the system for damages, which does not reflect the true loss to rights holders and the economy as a whole as a result of counterfeiting and piracy;
 - b. Trading Standards not having the duty, power or resources necessary to enforce copyright law; and
 - c. Difficulties in information sharing between private and public enforcement organisations to help tackle crime.
- 3) As referred to in our response to 2(b), Trading Standards currently only has a duty to take action in cases of trademark infringement, but not copyright infringement or infringement of performers rights. This is because sections 107(A) and 198(A) of the *Copyright, Designs and Patents Act 1988* have not yet been implemented.
- 4) Whilst rights owners do all they can to protect their rights, Trading Standards does not have any enforcement powers for criminal offences. This means that although they may have clear evidence of infringing activity, they cannot enter premises and they cannot inspect and seize goods and documents relating to that infringing activity. Confirming Trading Standards duty in this respect will serve the interests of the consumer, rights owners, retailers and others who work in the supply chain for legitimate products.
- 5) Furthermore, due to inadequacies in the current legislation, legal action against software providers behind peer-to-peer services and internet service providers has proved difficult. This is because the secondary infringement provisions of section 26 of the *Copyright, Designs and Patents Act 1988* do not clearly apply their authorisation provisions

when the peer-to-peer software provider or linked provider is merely facilitating unauthorised activity, rather than authorising it.

- 6) This has resulted in the people or companies behind the services making money from the use of services linked to unauthorised use of copyright. The industry has had to focus its attention on members of the public to seek redress from those who upload copyright works for unauthorised communication to the public across networks.
- 7) Pact would therefore support considering the role of providers of software or network services which are used to infringe copyright, as opposed to those who permit the use of premises for an infringement under section 26. The latter is currently an act of secondary infringement which attracts both civil and criminal liability. Pact recommends confirming a new act of secondary infringement to cover the first instance. This would encompass the provision of software or access to network services for the communication of infringing copies.
- 8) Furthermore, Pact views encouraging improved media literacy and a greater understanding of the economic importance of intellectual property across the whole of society as an important part of combating piracy. The Creative Industries Forum on Intellectual Property noted that initiatives aimed at raising public awareness have been dominated by a narrow, negative, piracy focus. Although it has a role, this approach fails to explain the importance of intellectual property to the success of creative industries and the careers of those who work in them.
- 9) The forum's education working group also concluded that the many agencies and organisations communicating issues surrounding intellectual property often lacked consistency and coordination.
- 10) The Patent Office could play an important role in encouraging this coordination within Government and in connecting with industry. It will need the support and involvement of key departments if its work is to have the best effect.
- 11) Industry too has a role. It should be clearer and more transparent in explaining to consumers the terms and conditions attached to the licensed or authorised use of copyright materials.
- 12) Such terms are already becoming established in online music services. These services allow consumers to choose from a number of ways in which to access recordings. Price and other conditions then dictate the

levels of use to which the consumers are entitled, dependent upon the service to which they choose to sign up.

- 13) Such a model will also help empower rights owners to choose the extent to which they authorise private, non-commercial copying.

SPECIFIC ISSUES

Current term of protection on sound recordings and performers' rights

- 1) To extend the term for sound recording would run counter to international thinking and the philosophy that underlies copyright law. Copyright is fundamentally about protecting and rewarding creativity. The *Copyright, Designs and Patents Act* recognises that sound recording has a lower origination requirement than, for example composing, and therefore has a lesser, 50-year term.
- 2) This is also recognised at international level. The *Berne Convention for the Protection of Literary and Artistic Works*, which established copyright legislation, concluded that sound recording was not sufficiently creative and not appropriate for the treaty. Instead, sound recording was recognised under the Rome Convention of 1961.¹⁴ This “lesser” status is also recognised in France and Germany, where sound recording is not protected by copyright, but by rights that are referred to as neighbouring or related.
- 3) Pact members are both licensees and licensors in this area. Our members are licensees of sound recordings from third parties, as audiovisual content often involves the reproduction and use of pre-existing sound recordings within the soundtrack of the programme. And they are creators of original sound recordings, including soundtracks of films and commercial sound recordings exploited independently of a film.
- 4) Pact members therefore stand to both benefit and lose from an extension to the term of protection. However, it is the potential loss that concerns Pact most as this impact would be immediate.
- 5) UK audiences enjoy one of the highest levels of new, or “original”, programming in the world. In surveys of public expectations of public service broadcasting, original programming regularly ranks as one of the highest desirables.¹⁵
- 6) However unintentionally, an extension would increase the production costs associated with making the high levels of quality new programming that UK audiences expect. This would come at a time

¹⁴ International Convention for the protection of Performers, Producers of Phonograms and Broadcasting Organizations, Rome, 1961.

¹⁵ See Ofcom's Review of Public Service Broadcasting, Summary of Phase 1 Responses, page 24.

when production budgets are already under pressure. In Pact's view, broadcasters are seeking to reduce the price they pay when commissioning new work following the *Communications Act*. In a recent sector survey, 68% of production companies said they had been victims of what is termed "netting off" through reduced budgets and tariff freezes.¹⁶

- 7) Extending the term is expected to have a particularly significant impact on works using sound recordings where the copyright term had previously only just expired, such as productions set during the period in question.
- 8) Pact therefore urges any review of the term of protection to consider this impact carefully. The music industry has argued that an extension is necessary to safeguard investment levels, but the review team should be aware that an extension could have a negative impact on other sectors. It will be important to weigh the benefit to creators against the cost to licensees, and to do so with concrete financial data.

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

- 1) It is imperative that any extended term should only apply to sound recordings made after the date upon which the relevant legislation is passed. Pact is concerned that failing to do this would create additional payments for which production companies have not budgeted, and make users vulnerable to unreasonable payments due to their weakened bargaining position. Licensees should be able to have confidence in current regulations as they stand without risking being made liable for additional payments of work already licensed.

¹⁶ Broadcast Indie Survey 2006.

Copyright exceptions - fair use/fair dealing

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

- 1) As originators of copyrighted work and licensees of third-party work, production companies are well placed to appreciate the interests of creators in exploiting content and those of users in the dissemination of material. In Pact's view the current exceptions in copyright law achieve the required balance.

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

- 1) No. Unlike US law, the UK's statutory provisions on fair dealing as framed are narrowly defined. These exceptions have been supplemented by a body of case law which has aided interpretation.

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

- 1) In our comments below, we refer to the clearance of orphan works and discussions taking place in the US.

(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"?

- 1) Introducing a blanket exception for private use is not necessarily appropriate. The economic threats from certain forms of private copying have become much greater for rights owners following the development of digital copying and transmission technologies.
- 2) As a matter of principle, any act of private copying that takes place in the UK without the consent of the rights owner is illegal, in the absence of applicable exceptions, limitations or a statutory licensing system. This applies whether copying is made directly or indirectly through agents or intermediaries such as collecting societies.
- 3) However, the law to date has enabled rights owners to choose to take a pragmatic view over enforcing rights, or where enforcement costs would

be disproportionate to the damage caused. This does not mean that the rights have been ineffective. Far from it: they have acted as an important safeguard for the interests of rights owners.

- 4) Introducing a blanket private use exception would upset, and potentially destroy, the balance created by existing copyright exceptions and limitations. In Pact's view, the scope of permitted copyright exceptions and limitations in article 5 of the EC *Copyright Directive* is flexible enough to adapt to the digital age.
- 5) Furthermore, a wholesale exception would undermine the ability of rights owners to develop new licensing models which would otherwise provide more choice for consumers.
- 6) Pact therefore endorses the approach of the High Level Working Group established by the EC to address the issue of digital rights management. In its final report in April 2004 the group recognised:
 - 7) *"The way forward is a system based on existing exclusive rights backed by technologies that ensure a secure environment where such rights can be licensed and enforced."*
- 8) The group also concluded:

"Assessment of the situation needs to be done on a case-by-case basis in the context of specific devices and services, based on objective, transparent and non-discriminatory criteria. The situation as regards application of DRMs and the amount of private copying effectively taking place in the context of such devices and services needs to be taken into account."
- 9) In addition, a review of the future application of the current time shift exception recognised within the UK should be considered. The range of platforms for transmitting digital broadcasts has grown far beyond what was envisaged when the current provisions under the *Copyright, Designs and Patents Act* were agreed. The variety of devices with which material can be captured, copied and stored for on-demand access has similarly increased.
- 10) As a result, section 70 of the *Act* fails to address the market significance of new forms of communication to the public, including making a work available by electronic transmission in such a way that members of the

public may access it from a place and at a time individually chose by them.¹⁷

- 11) Pact therefore proposes that section 70(1) of the *Copyright, Designs and Patents Act* be amended to allow for digital licensing solutions to operate alongside a private, domestic, non-commercial time shift provision. This provision would be permitted by rights owners as a result of the terms and conditions which are agreed applicable for the reception of a particular service. In order to accommodate this, the application of section 70(1) might be qualified as follows:

“To the extent permitted by the licence or other conditions applicable to reception of the same (whether linked to payment of fees or controlled by technical protection measures or otherwise), the making in domestic premises for private and domestic use of a recording of a broadcast solely for the purposes of enabling it to be viewed or listened to at a more convenient time does not infringe any copyright in the broadcast or any work included in it.”

- 12) Sections 70(2) and (3) would then continue to apply, making it clear that no dealing with time shift recordings permitted under the above provision would be allowed or implied.
- 13) A transitional provision might be considered for those who make private, non-commercial time shift recordings of analogue broadcasts using analogue recording equipment. This would reflect the original intention of section 70 and the current transition towards digital switch-off in the UK.
- 14) Such a transitional provision might reflect the provisions of article 5.3(o) of the EC *Copyright Directive*.¹⁸ This proposal would:
- a. Maintain the original intention of the time shift provision for those with analogue television receivers and analogue recording equipment during the run up to digital switchover; and
 - b. Recognise the market significance for rights owners to authorise on-demand communication to the public of their works, over and

¹⁷ See section 20(2) *Copyright, Designs and Patents Act* 1988.

¹⁸ Article 5.3(o) – member states may provide for exceptions and limitations to the rights provided for in Articles 2 and 3 (reproduction and communication to the public) in the following cases:

(o) use in certain other cases of minor importance where exceptions or limitations already exist under national law, provided that they only concern analogue uses and do not affect the free circulation of goods and services within the Community, without prejudice to other exceptions and limitations contained in this Article.

above authorising the broadcasting of their works within scheduled programme services.

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

- 1) Pact advocates a licensing approach to private copying as the best way to engender choice. Advances in protection measures will allow a licensing system to develop that both consumers and rights owners can accept. If technical protection measures are applied by rights owners in a way that consumers do not like, they are likely to choose products where the use of protection measures better suits their needs.

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

- 1) Generally, the correct balance has been established under law applicable in the UK. The *Copyright, Designs and Patents Act 1988*¹⁹ achieved this balance in recognising that certain acts could be carried out by, or on behalf of, an educational establishment without infringing copyright, unless there is a scheme that provides for the grant of licences.
- 2) This system has worked well for both educational establishments and rights owners. In practice, rights owners have been given the incentive to act collectively. At the same time, they have been able to preserve their entitlement to secure fair compensation for the uses licensed.
- 3) Furthermore, the effectiveness of the “three step test” for copyright exceptions and limitations is nowhere better illustrated than in the field of education.

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

- 1) The cost burden of archiving works in digital form could certainly be a concern for Pact members. In the future, production companies may need to change the medium on which they hold their films from tape to a digital format.

¹⁹ Section 35 and paragraph 6 of schedule 2. Option afforded rights holders of either waiving rights or participating in a certified licensing scheme covering the off-air recording of broadcast works for educational use.

- 2) Currently, this would be regarded as a restricted copyright act as the work would need to be reproduced and therefore would require clearances from the many contributors in a film or programme.
- 3) These consents may not be granted or, as a company would be in a weak bargaining position, may only be granted subject to an excessive fee. As this conversion would be purely for the purpose of access, it would be wrong for production companies to be prevented from undertaking necessary and purely technical intermediate copying purely to maintain access to material originally fixed in analogue formats.

Copyright – digital rights management

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

- 1) Pact has addressed this issue in its recent submission to the All Party Parliamentary Internet Group, attached as an appendix.

Copyright – orphan works

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

- 1) The issue of orphan works warrants further review. Despite the advantages of copyright existing without the need for registration, one of the difficulties when dealing with the clearance or licensing of orphan works is the lack of any comprehensive database from which information about current owners can be sought.

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

- 1) This issue is being addressed by collecting societies, and much work has been done to improve databases. These efforts should be encouraged and supported by the Patent Office and Government.

Coherence between competition policy and IP policy

(a) Has your organisation experienced any activity linked to IP rights that you regarded as unfair competition?

- 1) The UK content sector has for many years been characterised by a handful of buyers, ie analogue broadcasters, and a host of sellers, ie producers. As we have detailed in answer to question 1.(g), there is a long history of the incumbent broadcasters using their dominant position to stifle secondary markets by warehousing. This is now a danger in terms of new media rights.

Parallel Imports/International Exhaustion

- 1) It is important to distinguish between copyright and trademarks in this context. International exhaustion has never been part of UK copyright law, and we do not believe that this status quo has ever seriously been questioned.
- 2) In contrast, it is only in relation to trademarks that European Community law has impacted on the UK so as to preclude international exhaustion. The main controversy in this area in recent years has thus been in relation to trademarks.
- 3) Pact is opposed to any attempt to introduce international exhaustion for copyright. In any event, given the growth in the delivery of copyright works by online means, the issues associated with the distribution of physical copies of copyright works, such as exhaustion of rights, are becoming less important to the exploitation and use of such works.

APPENDIX: Pact response to All Party Parliamentary Internet Group inquiry into Digital Rights Management (Dec 21 2005)

Executive summary

- 1) The Producers' Alliance for Cinema and Television (Pact) is the UK trade association representing the commercial interests of UK film, television, animation, distribution and interactive content companies. We have a membership of more than 800 companies.
- 2) Pact welcomes the opportunity to respond to the All Party Parliamentary Internet Group (APIG)'s inquiry into Digital Rights Management (DRM). In particular, we agree with APIG that DRM "permits the creation of new business models" and that portraying the issues around DRM as merely a consumer versus publisher debate is misleading.²⁰
- 3) In facilitating new business models, DRM is a potentially significant tool for sustaining growth in the UK's creative industries. These industries contributed over £53 billion to the UK in 2002 and grew at an average of 6% between 1997 and 2002 - double the rate of the economy as a whole. They accounted for 8% of GDP and supporting 1.8 million jobs.
- 4) In stimulating new business models in the creative industries, DRM will also create opportunities to offer more choice to the consumer/citizen. As APIG states: "DRM permits the creation of new business models where you buy the right to read a book just once, or pay a fraction of a penny every time you play a song. This allows publishers greater flexibility in the services they offer and leads to increased consumer choice."²¹
- 5) Providing this choice is key to combating copyright theft. Pact supports the development of effective deterrents such as anti-piracy laws, as well as educating the public about the value of intellectual property and the impact of copyright theft. However, in addition, providing the customer/consumer with a legitimate, commercial alternative to illegal downloading is widely recognised as part of the solution to the theft of intellectual property, as evidenced in the music industry. DRM is a tool for creating this legitimate alternative.
- 6) We would also urge APIG to consider the important distinctions which exist between technical protection measures and electronic rights management information. Although both these groups relate to the

²⁰ APIG announcement of public inquiry on DRM.

²¹ *ibid.*

management of rights in the digital environment, and as such may be referred to as DRM, they have different functions for rights owners.

- 7) Essentially, technological protection measures refer to methods which practically limit the way in which a consumer can use a product or service. This is focused on theft prevention, such as stopping people making copies or taking off encoding.
- 8) The second type, management systems, encompasses identification and licensing. They are effectively stock management tools, and tools through which the interests of rights owners can be identified, their uses recorded and, through this, remuneration arranged. Rather than preventing copying, they could, for example, facilitate tracking material during authorised copying. We have addressed the legislative context of these issues in our response to Section 8.

Key issues and questions

1) Effects of DRM on traditional tradeoffs in copyright law

- 1) Risk taking and creativity must be encouraged in new online markets if the UK's creative industries are to continue as one of the economy's fastest growing sectors. To achieve this, content creators must be able to secure a return on the successful intellectual property they generate.
- 2) An effective rights protection mechanism is central to this, and the *2003 Copyright and Related Rights Regulations* are therefore providing increasingly significant safeguards for the independent content creation industries across the UK. In its risk assessment for implementing the *2001 Copyright Directive*,²² which led to putting into effect the 2003 regulations, the Government recognised:

“Digital technology permits perfect copies of works to be made and transmitted almost instantaneously across national boundaries, and it is widely accepted that strengthening and harmonisation of basic rights is necessary in order to ensure that copyright laws can be in a position to cope effectively with the demands of the information society. In particular, the ease of unauthorised use of digital copyright material on the internet requires the introduction of common rules specific to online transmission and electronic copying, coupled with stronger sanctions and remedies to

²² Directive of the European Parliament and the Council of the European Union of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society - 2001/29/EC.

deal with wilful illegal activity when on a damaging scale. Effective legal protection is also required for technological measures which right owners are now applying to their works in digital formats and environments in order to protect these works against all infringements and assist in the management of rights.”

- 3) These key issues addressed in the 2003 regulations have created safeguards that benefit both consumers and creators, and have no doubt encouraged the development of new online services. This is exemplified in the emergence of effective, legitimate online music services.

- 4) This year, IFPI reported:²³

In 2004 the available catalogue on the biggest legitimate online music services had doubled from around 500,000 tracks to around one million tracks;

The number of online services where consumers can buy music has increased fourfold to more than 230 worldwide, with over 150 of these services being in Europe.

- 5) Copyright exceptions and limitations have evolved over time, but the underlying principle established in international treaties, and more recently within Article 5.5 of the *Copyright Directive*, should be supported. This provides that:

“Exceptions and limitations... shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject matter and do not unreasonably prejudice the legitimate interests of the rights holder.”

2) The legislative environment for new types of content sharing licence (such as Creative Commons or Copyleft)

- 1) Since the existing regime has enabled rights owners to choose whether they wish to license the use of their works by means of sharing licences such as Creative Commons, it is unnecessary to make legislative changes to permit them.
- 2) However, in the interests of creating a commercial environment that encourages investment in the creative industries, such types of content

²³ IFPI online music report 2004.

sharing licence must provide an appropriate financial return for rights owners.

3) How should copyright deposit libraries deal with DRM issues?

- 1) The *Legal Deposit Libraries Act 2003* provides important flexibility for the Secretary of State to make regulations concerning the legal deposit of works published in media other than print.
- 2) Discussions are taking place between representatives of publishers and libraries to ensure that deposited works can be read and accessed subject to the agreed limitations of the deposit rules, and bearing in mind the three step test which must apply to any copyright exceptions or limitations.
- 3) No specific right for libraries to circumvent technological protection measures is thought to be necessary in the context of these discussions.

4) How consumers should be protected when DRM systems are discontinued

- 1) The developers of technical protection measures are not usually the same companies or individuals as the owners of the copyright works to which they are applied. Recognising this, it must be for the developers of technical protection measures to decide upon the commercial value of their own products.
- 2) The fact that the owner of copyright material chooses to publish or distribute their work in conjunction with a technological protection system developed by a third party should not mean that the owner of the copyright material takes on responsibility for the obsolescence of the third party product.

5) To what extent should DRM systems be forced to make exceptions for the partially sighted and people with other disabilities?

- 1) The concern behind this question was much debated during the process leading to adoption of the *Copyright Directive*. The purpose of technical protection measures could very easily be undermined if specified groups of people were able to circumvent the measures on the grounds of relying upon recognised copyright exceptions.

- 2) However, rights owners generally wish their works to be appreciated by as wide an audience as possible, within the recognised copyright regime. In view of this, rights owners have been willing to make arrangements for accessible copies of works to be made available to visually impaired people.
- 3) The provisions now included in sections 31A and 31B of the *Copyright, Designs and Patents Act 1988* (as amended) illustrate how access can be accommodated without overriding the entitlement of rights owners to publish works in copy-protected electronic form.

6) What legal protection systems should DRM systems have from those who wish to circumvent them?

- 1) The provisions already included within Section 296Z of the *1988 Copyright, Designs and Patents Act* (as amended) should continue to be recognised.

7) Can DRM systems have unintended consequences on computer functionality?

- 1) Developers of technical protection measures will seek to ensure that new products are tested to avoid unintended consequences of use in line with general consumer law.
- 2) However, where unintended consequences do arise, existing consumer protection rules should provide the route to recourse. Just because one product amounting to a technical protection measure delivers unintended consequences, the general development and marketing of technical protection measures should not be limited by changes to the law.
- 3) We would support appropriate standardization processes. We would refer APIG to the 2004 report of the European Commission's High Level Group on Digital Rights Management. This highlights the importance of interoperability across different platforms.

8) The role of the UK Parliament in influencing the global agenda for this type of technical issue

- 1) UK legislation such as the 2003 *Communications Act*, which ushered in the new terms of trade between independent producers and broadcasters, has played a significant role in developing sustainable,

globally successful independent production companies. The Act and the terms of trade allow independent companies to retain rights to the intellectual property they create, thereby allowing them to share in the value chain and generate the revenues which will attract further investment.

- 2) One example of the considerable impact this has had is the worldwide success in selling remake – or ‘format’ - rights to independent programmes such as Pop Idol, Big Brother and Who Wants To Be A Millionaire? Ofcom states:

*“The terms of trade have helped open up international format markets to producers. This has proved particularly lucrative for UK independents, with the US and Germany representing particularly important markets.”*²⁴

- 3) To sustain such growth, Pact would submit that the UK Parliament and Government must ensure that those rights are adequately protected. Parliamentary recognition of and support for the value of copyright and other intellectual property is increasingly important within the digital knowledge economy. Otherwise, opportunities for the creative industries within the UK to continue to develop will be eroded.
- 4) An important way for Parliament and Government to promote the value of intellectual property is through education. The Government has for example committed to working with business leaders in order to embed the so-called CREATE principles within their own corporate and social responsibility commitments. These principles were developed through the Creative Industries Forum on Intellectual Property and were designed to express the key aspects of the value of intellectual property in the modern economic and social setting.
- 5) As these principles outline, improving understanding, respect and trust is not helped by the use of convenient terminology for a range of new products and services, with a variety of purposes, under the generic heading of DRM. Greater understanding will help ensure that, if there is unfavourable publicity over one product, the public does not tar all products under the same generic description with the same brush.
- 6) We would also illustrate the important role Parliament and the UK Government have to play in highlighting and implementing the distinction between technical protection measures and electronic rights management information.

²⁴ The Communications Market 2005, Ofcom, page 203.

- 7) This distinction is important in the debate over possible new regulations and should be addressed in any education campaigns. It is important to ensure that consumers are not misled over what a product or service does or does not offer, and that regulations do not apply to more DRM elements of production than is necessary.
- 8) The difference between protection and management was properly recognised within Articles 6 and 7 of the *2001 Copyright Directive*, and recognised within the UK when implementing the directive through adoption of the *2003 Copyright and Related Rights Regulations*.
- 9) Sections 296ZA to F of the *Copyright, Designs and Patents Act 1988* (as amended) now refer to “technological measures” as “any technology, device or component which is designed, in the normal course of operation, to protect a copyright work other than a computer program.”
- 10) Section 296ZG applies to electronic rights management information. Subsection 7(b) describes this as “any information provided by the copyright owner or the holder of any right under copyright which identified the work, the author, the copyright owner or the holder of any intellectual property rights, or information about the terms and conditions of use of the work, and any numbers or codes that represent such information.”