

Gowers Review of Intellectual Property – Call for Evidence

Views of Scottish Screen

Scottish Screen welcomes the Gowers Review of the UK’s intellectual property framework and has the following comments on the questions raised in the Call for Evidence for the Review:

GENERAL QUESTIONS

2. How IP is used

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

Technological convergence in the screen industries has resulted in audiovisual content which was previously regarded as specific to one delivery platform, for example terrestrial television, having a potential and actual value across several such platforms, for example cable and satellite television, film, the internet, mobile telephony and computer games. The current protracted negotiations between independent television producers, represented by Pact, and the terrestrial broadcasters on the treatment of new media rights¹ illustrates the importance of these changes in the prevalent business model, as well as the difficulty of deriving appropriate valuations in such an unpredictable and fast changing environment.

These changes also illustrate the need for IP protection to address rapid technological change in the methods of delivery of the IP content which is to be protected.

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

One of the distinctive features of the screen industries, in particular of film and television, is that they play a key role in national cultural life in addition to their economic importance. Reflecting this dual role, the screen industries are characterised by significant levels of public sector intervention, including such measures as the recently announced new UK film tax measures and the raft of regulatory measures to support public service broadcasting which are policed by Ofcom to support the interests of the UK “citizen-consumer.” These interventions impose a range of public obligations as well as providing benefits for the film production companies and television broadcasters involved. The screen industries’ mix of rapid technological change and a very substantial public interest dimension are highly distinctive and give rise to a number of sector-specific IP considerations, for example the need to strike an appropriate balance between

¹ Other important IP rights issues which Ofcom are currently reviewing include: (1) Duration of pricing window and holdback period; (2) Treatment of repeats; (3) Treatment of Video on Demand; (4) Treatment of repurposed content; and (5) Treatment of returning series.

ensuring the creative endeavours of independent producers are adequately rewarded and at the same time recognising the public's entitlement to benefit from public service broadcasting.

(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?

The problems associated with raising finance against intangible assets based on IP lie at the heart of the severe structural problems facing the screen industries in Scotland.

The creators of IP in the screen industries tend to share a number of characteristics, such as a greater interest in and focus on the creative than on the commercial aspects of the business and a preference for working independently rather than being part of a larger organisation. These characteristics do not assist the financial robustness of the sector, particularly against a background of:

- structural factors which strengthen parts of the supply and value chains which are further downstream (for example the presence of long established and powerful distributors and an imbalance in power between buyers and sellers);
- escalating R & D costs²; and
- the historical difficulty in raising finance which faces the IP creator, at least in comparison with creators of more tangible assets.

The position in Scotland is further exacerbated by the relatively small current scale of its screen industries.

The eventual outcome could be a scenario in which the creative end of the business ends up as an under-capitalised cottage industry or a collection of one-man bands, with the real value controlled and held by a number of large downstream organisations. Worse, these organisations (and most of the wealth generated) are likely to reside outside Scotland, particularly where there are scale and/or scope economies to be generated from an international rather than a domestic marketing strategy.

However, Scotland's screen industries do have a real opportunity to make a step change in their scale of operation and to generate longer term competitive advantage. In television – and via knock-on effects in the other screen industries - the key to this will be effective exploitation of the brief window of opportunity provided by the increased out of London television network production requirements and plans from public service broadcasters and the anticipated improvement in the effectiveness of policing of Nations and Regions targets by Ofcom.

² Such costs are often not recorded or recognised as such by practitioners. In the computer games industry, for example, TIGA have launched a major campaign to encourage much increased take-up of the very significant R & D tax credits which are available to games developers.

The role of indies will be crucial to exploiting this expansion opportunity. It is therefore essential for indies to exploit programme rights effectively, which in turn depends on ensuring there is sufficient capacity to generate the rights in the first place, and that the indies are of sufficient scale to achieve this. Better exploitation of existing IP rights and better understanding of how to exploit IP also need to be on the agenda.

4. How IP is challenged and enforced

(f) Are there specific barriers to challenging and enforcement of IP rights for small businesses or individuals?

In any market which is characterised by a disproportionately large number of actual and potential suppliers in relation to buyers, by low entry barriers and substantial vertical integration, there is clearly potential for buyers to abuse their strong competitive position and for suppliers to fear sanctions should they challenge abuse. These dangers are even greater when the products traded are largely intangible, even more so when both buyers and sellers provide input to the creative process.

These features are also clearly characteristic of the UK screen industries, with the added dimension of an overwhelming geographical concentration of television buying power in London.

The comments of independent producers noted by Ofcom in its record of roundtable discussions which followed the introduction of new terms of trade for indies are relevant.³

“A6.39 On pricing, producers at some of the roundtables told us they believe they have seen budgets fall following the introduction of the new Codes of Practice. It was suggested that broadcasters are squeezing prices to the lower ends of the tariff ranges.

A6.40 Producers were also concerned that new media rights were being “bundled” into primary rights, and therefore retained by the broadcasters. It was suggested that clear definitions are needed in order to clarify the position with regards to new media, both in terms of distribution of the primary broadcast on new platforms, and relating to the exploitation of intellectual property on new media platforms.

A6.41 The holdback policies of some of the broadcasters was seen as reducing producers’ ability to exploit secondary rights to their full potential. The problem of broadcasters “warehousing” programmes was raised by producers keen to exploit what they see as dormant rights.”

A further PACT/Ofcom survey on the subject⁴ also noted a number of key themes among indies, including:

³ From *Ofcom’s review of the television production sector*, January 2006, on the Ofcom website at <http://www.ofcom.org.uk/consult/condocs/tpsr/>.

“• Retention of rights was central to profitability as primary production often generated little or no profit and overall margins were low. Rights arrangements should not change in a way which might undermine the independent sector.

• The main terrestrial broadcasters remain the most significant buyers from the external production sector and this defined and affected the relationship between producers and broadcasters.”

SPECIFIC ISSUES

Coherence between competition policy and IP policy

(d) Should competition law have a greater role to play in regulating IP?

The major sector-specific concerns of the screen industries noted in 2(c) above and the barriers to challenging and enforcement of IP rights noted in 4(f) above suggest that ex ante rather than ex post intervention is required. This clearly places limitations on the extent to which competition policy may be relied upon at the present time.

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⁴ From *Ofcom's review of the television production sector*, A6.44, January 2006, on the Ofcom website at <http://www.ofcom.org.uk/consult/condocs/tpsr/>.