

The Gowers Review of Intellectual Property

A Submission from the UK Film Council

April 2006

1. Executive Summary

- 1.1 The UK Film Council welcomes the opportunity to contribute to the Gowers Review of Intellectual Property.
- 1.2 The UK Film Council is the strategic agency sponsored by the Department for Culture, Media and Sport to develop, co-ordinate and help deliver a coherent and comprehensive public strategy for film in the UK.
- 1.3 The key themes of this submission are:
 - To emphasise the crucial role in the UK IP economy of individuals and SMEs and micro-businesses in generating valuable IP - rather than large corporations
 - To emphasise that long term success for the UK IP economy will come from a policy focus on creating stable and growing content creation businesses over the coming years not on distribution networks.
 - To ensure that the Government adequately positions British SMEs in the new (global as well as domestic) on-line market place so they can properly market their IP to the public. This in turn would allow SMEs to exploit their IP and to build value in new British IP led businesses - which is good for the UK economy.
 - The need to ensure that the public has easy access to public assets (e.g., film archives)
 - The need for copyright terms to fuel IP business growth - but balanced and enabled by;
 - Better "fair dealing" provisions for legitimate purposes - especially proper "educational use" activities

- The need to protect IP led businesses from piracy through better messaging/education, tougher enforcement and systematic removal of existing barriers to growth of on-line sales
- 1.4 We strongly endorse the recent observation by Lord Sainsbury, Parliamentary Under-Secretary of State for Science and Innovation that;

“Government must ensure that there is a proper balance between the benefits and incentives for the consumer and the creator. It needs to recognise that different sectors have distinctive business models. So IP must be flexible enough to be applied in different ways.”¹

2. Background

- 2.1 The UK Film Council’s overall role is encapsulated in its aim, “to stimulate a competitive, successful, vibrant British film industry and culture, and to promote the widest possible enjoyment and understanding of cinema throughout the nations and the regions of the UK”.
- 2.2 Given the breadth of issues flagged by the Gowers Review (“the Review”) the UK Film Council (as a public agency) wishes to focus on issues flowing from the role of public policy highlighted by the Review. Further, it wishes to focus principally on matters pertaining to copyright as issues relating to trademarks and patents have only very limited relevance in respect of film.
- 2.3 The UK Film Council notes that the covering letter which accompanies the Call for Evidence specifies that respondents may confine themselves to a number of issues on which they wish to comment. Therefore, this response confines itself to addressing some of the specific issues identified in the Call for Evidence (p.7 ff.) rather than seeking to address all the general questions set out at pp.5-6.
- 2.4 The UK Film Council further notes that examples from the music industry are cited in the Call for Evidence, examples from film are absent. Given the complexity of the value chain for film (particularly given the different windows of

¹ Speech to Social Market Foundation event at the Royal Institute of Surveyors, February 28, 2006.

release) and wide -ranging public policy objectives which the Government has set for film (by contrast with commercial music) the UK Film Council would urge the Review team to ensure that film is given proper consideration during its deliberations.

- 2.5 Our response is complementary to that of the British Film Institute (bfi), which is funded by the UK Film Council to deliver cultural and educational objectives around film and the moving image.

3. The Context for UK Film

- 3.1 The landscape of film, both globally and in the UK, is undergoing very rapid change as a consequence of the impact of new media platforms. These new platforms have been made possible as a result of the development of digital technology.
- 3.2 To some extent, this reflects the complexity of the interdependent, globalised world of the early 21st century, but it's also a reflection of the fact that digital technology is having a genuinely transformative effect on the creative industries and on all elements of the film sector and the film value chain.
- 3.3 But the technology itself is only a means to an end; what is being changed is both the economics and culture of film, and the way in which audiences of all kinds relate to film. This has important consequences for the use of IP in respect of film.
- 3.4 On one side some existing and powerful incumbents have adopted, at least until recently, a largely defensive approach to the emergence of the new media, apparently in the belief that the status quo would prevail largely untouched and that existing business models would remain fit for purpose.
- 3.5 On the other, some who claim to be speaking in the name of the citizen and/or consumer have claimed that the impact of the new media will sweep away all our present assumptions about the way in which the creative industries, and film in particular, operate and that in a brave new world of digital plenitude "market failure" will eventually cease to exist, and IP will be available to all at virtually no cost.

- 3.6 These positions are mirrored, for example, in elements of the debate around copyright theft and online copyright infringement. Some powerful interests have behaved at times as if the only way to fight piracy is through protection of the existing business model and more extreme forms of enforcement. Some “libertarians”, by contrast, have behaved as if access to any form of intellectual property at any time for free is a human “right”.
- 3.7 The UK Film Council believes that the polarisation of debate around IP is profoundly unhelpful and even destructive. It has helped to prevent the emergence of a more balanced, rational debate which properly examines the consequences of technological change for public policy.

4. Governing Principles

- 4.1 The UK Film Council believes that the foundation of the UK's IP regime in the digital age should essentially be founded upon an appropriate balance between the need to incentivise creation and innovation on the one hand, and the need to maximize the social and cultural benefits of such creativity and innovation on the other. The economic gains which accrue from the exploitation of IP are crucial to the development of the UK's film sector and its creative industries more generally, most especially to SMEs. But these economic gains should not be made at the expense of restricting the ability to legitimately enhance access to creative material which is made possible by digital technology.
- 4.2 On both sides, there are a set of complex trade-offs between rights and responsibilities. These trade-offs go to the heart of the relationship between the private and public spheres in a contemporary democratic nation which is committed to building a knowledge economy founded largely upon the exploitation of, and access to, intellectual property.
- 4.3 For example, in respect, of the former the UK Film Council is clear that film theft and online copyright infringement are a serious threat to the development of the UK's Creative Economy.² The UK Film Council supports all the recommendations of the Creative Industries Forum on Intellectual Property set up by the Government and welcomes the fact that many of these recommendations are now being moved forward by Government.³ It welcomes the determination to ensure more effective protection for, and

² See the UK Film Council report, Film Theft in the UK, available at: <http://www.ukfilmcouncil.org.uk/usr/downloads/Piracy>

³ At http://www.culture.gov.uk/global/publications/archive_2005/gr_cif_ip.htm

enforcement of, IP rights for the Creative Industries. Equally, it welcomes the recognition that much more needs to be done to make citizens, especially young people, aware of the role and importance of IP rights, and that the regulatory barriers to growth for new business models should be removed wherever possible.

- 4.4 Within this context the UK Film Council recognises the crucial importance of Digital Rights Management (DRM systems) as a means by which some rights holders may wish to protect their revenue base to underpin the development of new delivery systems.
- 4.5 But equally, in respect of rights of the citizen and the consumer, the UK Film Council believes that DRM systems which infringe the rights of citizens to use legitimately-purchased material in accordance with UK law are unacceptable.
- 4.6 The UK Film Council would emphasise the crucial role in the UK IP economy of individuals and SMEs and micro-businesses in generating valuable IP. It would also emphasise that long term success for the UK IP economy will come from a policy focus on creating stable and growing content creation businesses over the coming years rather than on distribution networks such as telecommunications providers. The principles governing the development of IP policy should ensure that British SMEs are positioned in the new (global as well as domestic) on-line market place so they can properly market their IP to the public. This in turn would allow SMEs to exploit new business models and to build value in new British IP led businesses, which not only create IP, but crucially have the means to retain it.

Issues Identified by the Review

5. Current term of protection on sound recordings and performers' rights

- 5.1 It is not for the UK Film Council to comment on the appropriate duration of term for sound recordings and performers rights in respect of music.
- 5.2 However, the UK Film Council notes that under the current term of protection for sound recordings and performers rights that soundtracks to films have a shorter duration of copyright protection than the films themselves. This is because copyright in a film expires 70 years after the end of the year in which the death occurs of the last to survive of the principal director, the authors of the screenplay and dialogue, and the composer of any music specially created for the film. By contrast, copyright in a sound recording expires 50 years from the end of the year in which it was made or, if published in this time, 50 years from the end of the year of publication.
- 5.3 This disparity in term of protection seems anomalous, and can give rise to practical difficulties in the administration of copyrights. The UK Film Council believes that consideration should therefore be given to making the protection of soundtracks to films equivalent to that provided for film more generally.

5.4 The UK Film Council also notes the complexities engendered by the current definition of copyright term for film, not by the length of term, but by the reference to the deaths of different parties. There may be scope for simplification of the regime so that its term is defined in relation, for example, to theatrical release rather than the death of one of several defined individuals. This issue would require detailed examination before concrete recommendations could be made. The UK Film Council would wish to be party to any such examination.

6. Copyright Exceptions – fair use/fair dealing

6.1 The Government has consistently stated its desire to promote media literacy. Reflecting their own commitment to media literacy, the UK Film Council and the bfi are both members of the Media Literacy Taskforce.⁴ However, the effective development of media literacy is dependent, in part, on the ability of citizens to access copyrighted material for the purposes of education, both formal and informal, where no commercial gain is sought by the citizen.

6.2 For The UK Film Council shares the *bfi*'s concern that in the transposing of the 2001 Copyright Directive into UK law, a number of important exceptions in section 5 were not included so that the UK public sector is disadvantaged in relation to other Member States. We believe this lack of uniformity in European copyright law disadvantages British companies and organisations seeking to develop innovative educational services available to the public.⁵

⁴ The other organisations which are members of the Media Literacy Taskforce are the BBC, Channel 4 and Skillset. Ofcom has observer status on the Taskforce.

⁵ For more detail see *bfi* submission to the Review.

- 6.3 Furthermore, we endorse the *bfi*'s view that new ways should be developed to define 'education use' and in particular to move outside the current definition of education which allows usage of some materials only in a physical establishment as defined by Parliament.⁶
- 6.4 We also share the *bfi*'s concerns that it is currently disadvantaged in terms of its legal permissions for making copies of material in the National Film and Television Archive in comparison with the libraries and museums.⁷
- 6.5 A well-educated, skilled and media-literate workforce is one of the keys to a successful creative economy.

7. Copyright – digital rights management

- 7.1 Many digital media content publishers say that DRM technologies are necessary to prevent revenue loss due to illegal duplication of their copyrighted work. However, others, including representatives of citizens and consumers argue that transferring control of the use of media from individuals to a consolidated media industry will lead to loss of existing user rights and stifle innovation in software and cultural productions.
- 7.2 The UK Film Council believes that rights holders and others have a legitimate expectation of reward from the use of content. Equally, the UK Film Council recognises that consumers and citizens have legitimate expectations about the way in which they can access content which they have legitimately purchased.
- 7.3 The UK Film Council believes that where the development of public policy for film touches on the issue of DRM, then

⁶ For more detail, see *bfi* submission to the Review.

⁷ For more detail, see *bfi* submission to the Review.

policy makers have a role to play in helping to ensure that the correct balance is struck between these two competing sets of expectations. Without such a balance it will be far harder for an organisation such as the UK Film Council to fulfil its aims and objectives in respect of both the Creative Economy and citizens and consumers.

- 7.4 The UK Film Council also acknowledges that a “one size fits all” approach to the issue of DRM may not be appropriate – it may be that the public policy approach to DRM issues will be different depending on the type of content concerned or depending on the strategic and business objectives of the rights holder.
- 7.5 For example, the appropriate approach in respect of archive material whose commercial value is very largely exhausted, may be rather different to that in respect of contemporary film which has significant commercial value.
- 7.6 Both the UK Parliament and the European Commission potentially have a central role to play in this space. Indeed, the UK Film Council has been involved in the discussions which the Commission has already had on this issue[p1].

7.7 The UK Film Council notes with interest recent developments with respect to the development of Open Standard DRMs.⁸ We believe that potentially such developments could both provide the protection that rights holders seek, while also ensuring that the justifiable expectations of consumers and creators in respect of access to product which they have legitimately purchased.

8. Copyrighted Orphan Works

8.1 The process of clearing orphan works for film needs to be streamlined. In general, we support the bfi's idea of the allowing for the possibility of exploiting orphan material within a system where an escrow account is created which holds a proportion of any income generated and thus can provide for compensation to any rights holder subsequently identified. This would be analogous to the principle of the "Black Box" which has been adopted elsewhere in relation to copyright matters. Under such a system, where the original rights holder could not be identified within a fair and equitable time frame with best efforts, some of the monies from the exploitation of the work would be put into a Black Box for subsequent disbursement to the rights holder were they to come forward or to be identified at a later point.

8.2 Such a system could be particularly useful for unlocking access to material stored in the UK's National and Regional Film and Moving Image Archives.

9. Legal Sanctions on IP infringement

9.1 The UK Film Council has consistently argued that film theft and online copyright infringement represent the major threat to all elements of the UK film industry and to film culture.

⁸ See for example: <http://www.internetadsales.com/modules/news/article.php?storyid=7072>

- 9.2 Some 5% of UK adults have downloaded a film and/or a TV show and the quantity of titles illegally downloaded has risen to an average of between 7-15 per year.⁹
- 9.3 The very rapid take-up of broadband in the UK could accentuate copyright infringement by means of file-sharing. The UK Film Council was active in all the different components of the Government's Creative Industries Forum on Intellectual Property. It believes that the recommendations of the Forum, taken together, constitute a very effective strategy for discouraging and stemming piracy while encouraging the creation of legitimate services which take advantage of the new media to make content available in new ways.
- 9.4 We fully endorse the proposals which emerged from the Forum on Intellectual Property and, in particular, from the sub-group on IP Crime and On-Line Infringements.
- 9.5 We believe the following proposals from that sub-group are key in respect of Legal Sanctions on IP Infringement:

9.5.1 Occasional sales regulation

Introduce national legislation to curb illegal trade in counterfeit/pirated goods at occasional sales and markets (expanding on provisions in the 2001 Kent Act) and ensure enforcement, to make non-retail markets a clean place to do business.

9.5.2 Exemplary/ Statutory Damages

Reform damages so that they become the 'effective deterrent' required by Enforcement Directive by

⁹ Source: British Videogram Association

extending the legal concept of exemplary and statutory damages to cases of copyright infringements.

9.5.3 Empowering Trading Standards

Give Trading Standards the power to enforce copyright law (implement s107A CDPA), to provide an additional weapon for TSOs once they are included in the incentivisation scheme under the Proceeds of Crime Act from April 2006.

9.5.4 Legal sanctions for online IP infringements

Migrate the hard goods criminal sanctions to prosecute those individuals who are the first in the chain to post film files online.

- 9.6 Furthermore, we believe that the UK Government must ensure that the on-line legislative framework for IP enforcement in the UK is robust to foster new on-line services and content. In particular, it should resist proposals to create new liability exemptions under the E-Commerce Directive for search engines, hyperlinks and content aggregators that would fundamentally undermine right owners' ability to tackle on-line infringements.

- 9.7 We would also like to see piracy included on the National Criminal Intelligence Service (NCIS) threat assessment to reflect the seriousness of IP crime. This would mean that IP crime would automatically become a priority for the Police. As it is Trading Standards have lead responsibility but have no powers of arrest, are unable to cross local authority boundaries and do not have adequate resources.

10. Coherence between competition policy and IP policy

- 10.1 The UK Film Council is clear that competition policy and IP policy need to operate hand in glove if the both the Creative Economy and citizens are to reap the digital dividends of the digital age. In particular, there is a need to ensure that innovation is not chilled by incumbent interests using their market power to the disbenefit of others, whether they be SMEs or individuals.

Other film-specific IP issues.

11. Windows and Rights

- 11.1 There are also major issues around IP arising from the complex sequence by which films reach audiences and thereby generate revenues and affect hearts and minds. At present, the availability of film in a given medium (cinema, DVD, pay-TV, terrestrial TV etc) is determined by a series of "windows" which in turn is built on a system of rights, defined according to generally accepted industry principles. The windows themselves are agreed in different ways on a territory by territory basis – in the UK, for example, the windows have historically been agreed between different sectors of the industry on a voluntary basis.
- 11.2 The windows between different formats, for example, between theatrical and DVD have been shortening in recent

times. Nonetheless, the distinctions between the different windows have not yet been called into question.

- 11.3 In a digital world, new forms of rights arise. In an environment which is partly digital, at least four different rights can be identified in the space between DVD release and the screening of a film on terrestrial television.

11.4 These rights are:

- Video On Demand (VOD) whereby the consumer purchases films on a title -by-title basis;
- Pay-Per-View, currently equivalent to Near Video On Demand;
- Subscription VOD (SVOD) in which the consumer pays a monthly fee and is able to access an unlimited or large number of titles against that payment;
- Other pay-TV windows

11.5 At present, there is no generally agreed definition of VOD and SVOD rights. There is a need to develop a clear, rational policy for the film sector in respect of these rights.

11.6 This is because in the absence of clear, agreed definitions about how certain specified rights are defined in a digital environment, it is likely that those who license rights to digital platforms may see those rights absorbed by the acquiring platform as an extension of existing rights.

11.7 This would provide very significant advantages to incumbent platforms who may use their existing market power to encourage a form of "rights creep" by which, in effect, they are able to exclude new entrants from the platform market. This would be to the severe detriment of both consumers and citizens.

11.8 Such "rights creep" would also make it far harder, and perhaps impossible, for rights owners to extract additional revenue against the licensing of those rights.

11.9 Once electronic delivery of films also starts to replace distribution through packaged media such as DVD, such inability to extract revenue from the licensing of those rights would have a seriously detrimental impact on the

model by which independently-produced films are financed.

11.10 This is because these films are financed in part by the pre-sale (in effect, licensing) of the rights to distributors who in turn generate revenue from the exploitation of those rights to a variety of third parties (exhibition chains, DVD retailers, DVD rental services, pay-TV operators, terrestrial broadcasters etc). The absence of clear, agreed definitions around rights would inhibit the ability of distributors to maximise revenues, most especially in relation to the licensing of rights to content distributors deploying new platforms; e.g. those based on VOD or SVOD.

11.11 Thus, if market forces are allowed to prevail unchecked, there are strong arguments that both consumer access and the financing model for independent films may suffer despite the advent of digital services.

11.12 The UK Film Council does not yet have a position on the best way to avoid the situation whereby the apparent benefits of choice and diversity which potentially accrue from a digital world are stymied. The matter requires further investigation and discussion between all interested parties – the Government, Ofcom, rights holders and platform owners.¹⁰

¹⁰ The UK Film Council is a participant in the European Commission's Leadership Summit on Film Online which seeks to identify, "the opportunities and challenges involved in making film online take off in Europe."