

## **GOWERS REVIEW OF INTELLECTUAL PROPERTY**

### **EXECUTIVE SUMMARY OF THE RESPONSE TO THE CALL FOR EVIDENCE FROM THE BRITISH SCREEN ADVISORY COUNCIL**

The British Screen Advisory Council (BSAC) represents a wide cross-section of stakeholders in the audiovisual sector. The evidence submitted to the Gowers Review is necessarily limited due to the time constraints, and mainly relates to copyright. However, copyright is the key right for the audiovisual sector in the digital age.

#### **General Questions**

##### ***How IP is awarded***

In general we believe that the copyright framework in the UK is in very good shape and is not in need of a major overhaul. The automatic worldwide protection is particularly important and should not be replaced by official registration, although we accept that more voluntary, industry-led registration could ease some of the problems of tracing right holders. The copyright framework is necessarily complicated given the overlapping rights that must exist in an audiovisual production, but more could be done to increase awareness and education about all IP, including copyright, building on the many initiatives already being undertaken.

##### ***How is IP used***

Other IP rights are important to many of BSAC's members, but these cannot replace copyright protection or vice versa. Raising finance against intangible assets such as copyright can be a problem, particularly for small businesses and individuals. It would be beneficial to deliver greater consistency in accounting standards. We believe that the changes made to the copyright framework in 2003 has made it fit for the digital age and generally appropriate for encouraging and rewarding innovation in the audiovisual sector. Public funding and other fiscal measures are, though, important too. The DCMS mapping of the creative industries should be kept up-to-date and its reliability improved.

##### ***How is IP licensed and exchanged***

Licensing deals in the audiovisual sector give rise to significant costs, but BSAC is not in general in favour of any regulatory change. Costs are simply part of what would be expected in an industry where an audiovisual production usually includes a large number of other pieces of protected material. However, our members are exploring alternative licensing arrangements for some situations, such as the Creative Archive Licence, and more voluntary registration of rights might also be helpful to find licensing partners. In addition, BSAC would like to see further study of the problem of, and possible solutions to, the clearance of rights at the margins, such as reuse of older material where there may be problems clearing just one of the many rights in an audiovisual product.

### ***How is IP challenged and enforced***

Piracy is a serious issue for BSAC members, many of which spend considerable resources on enforcement activity, either alone or in collaboration. However, enforcement activity needs to be supported by an appropriate regulatory framework and BSAC believes that some improvements are needed, such as to bring section 107A of the Copyright, Designs and Patents Act 1988 into force, make camcording in cinemas a criminal offence and remove some difficulties in proof of the copyright offences. We do accept, though, that providing attractive new business models to consumers at a fair price is part of the solution to piracy, as is better education and awareness about IP. For non-wilful copyright infringement cases we believe that the best approach is to explore how to encourage more cases to be settled by ADR. We would like to see all member States have in place bodies equivalent to the Copyright Tribunal for adjudication on royalties offered by collecting societies.

### **Specific issues**

#### ***Current term of protection for sound recordings and performers' rights***

We believe that the decision on this should take account of the impact on all stakeholders.

#### ***Copyright exceptions – fair use/fair dealing***

BSAC accepts that limited exceptions to copyright provide an essential balance in the copyright framework and we are pleased to engage in a constructive debate, including with consumers, about the right balance. However, we do not think that it is right at this time to amend exceptions to permit more private copying of audiovisual content as this would undermine investment in new and variably-priced business models that would ultimately be to the detriment of consumers. We are not in favour of levies to compensate for private copying and believe their existence in most EU member States is causing problems for the development of new business models there. We are in favour of some modification to educational exceptions to accommodate distance learning. We would also like to see additional provision on exceptions relating to archives so that the UK's audiovisual heritage can be properly preserved.

#### ***Copyright – digital rights management***

DRMs are the tool for delivering new business models to consumers at a range of prices and the audiovisual sector is proactively investigating and delivering an increasing range of new business models enabled by DRMs, such as video on demand and digital downloads. BSAC is not in favour of any regulatory intervention on standards and interoperability of DRMs; we believe solutions here should be market driven. Private copying levies tend to institutionalise piracy and deter business investment in DRM-enabled new business models that can be disseminated throughout Europe. We would like to see this issue addressed in

Europe, and also further discussions in the context of the review of the copyright Directive of the interplay between DRMs and exceptions more generally.

***Copyright – orphan works***

Difficulties in tracing copyright owners are an increasing problem for the audiovisual sector and this is also preventing public access to some of our audiovisual heritage. BSAC would therefore like the issue of use of orphan works to be addressed. We believe that the solution should be part regulatory, but that the establishment of more voluntary databases of rights should help ameliorate this problem in the future. We are unable at this point to offer a preferred regulatory solution, but believe that it should permit immunity from liability if all reasonable efforts to trace right holders have been made and provide for a royalty to be paid to any right holder who turns up after an orphan work has been used, and that the Copyright Tribunal is an appropriate body for deciding on the royalty level.

***Legal sanctions on IP infringement***

We agree that sanctions for online infringement should be the same as those for physical infringement.

***Coherence between competition policy and IP policy***

We believe that the current framework is appropriate for dealing with anti-competitive behaviour.

***Parallel imports/international exhaustion***

As business models change in the audiovisual sector, the significance of regulation on parallel imports of physical products is diminishing.

## **GOWERS REVIEW OF INTELLECTUAL PROPERTY**

### **RESPONSE TO THE CALL FOR EVIDENCE FROM THE BRITISH SCREEN ADVISORY COUNCIL – STRICTLY CONFIDENTIAL**

**28 April 2006**

#### **Introduction**

The British Screen Advisory Council (BSAC) is an independent, industry-funded advisory body on audiovisual policy issues. It brings together many of the most influential players in the audiovisual sector<sup>1</sup>.

The creation and exploitation of intellectual property rights are at the core of the audiovisual sector and underpin their economic viability, so we welcome the opportunity to provide evidence to the Gowers Review of Intellectual Property. The Gowers Review has set a very ambitious agenda, looking in general across the whole range of IP rights as well as at some very specific and detailed issues relevant to only some IP areas. It is, of course, right to have regard to the value of all IP rights, and their complementary and sometimes overlapping role, as each type of protection serves an important purpose. We are delighted to see HM Treasury taking the lead in setting up a review to explore this breadth of issues in the IP area, and the recognition this gives to the role of IP rights in the delivery of the UK's present and future success in the global knowledge economy.

#### ***Limitations to evidence submitted***

The very breadth of the Gowers Review does, though make it extremely difficult to provide comprehensive evidence in the short time available since the Call for Evidence was published on 23 February 2006. BSAC has therefore concentrated on identifying the issues that are most important to the majority of its members in the audiovisual sector and this evidence is based on that principle. It does not replace the evidence that individual BSAC members have separately provided, but we hope that it is nevertheless helpful to have attempted to identify and draw initial conclusions on some of the most critical issues for the sector we represent.

Where BSAC has not commented, or commented but not been able to draw any definite conclusions, this should not be taken to indicate that we have no interest in these issues, and that we could not provide a more considered and detailed view given more time. In addition, given the time constraints, this response is limited to evidence relating to the general questions and some of the specific

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<sup>1</sup> See <http://www.bsac.uk.com/members.html> for a list of BSAC members.

issues set out in the Gowers Call for Evidence, but this should not be taken to indicate that BSAC has no interest in any other IP issues.

### ***Background***

For more background about the industry area we represent, and more discussion about some of the views we have set out in this response, we would like to refer the Gowers Review to several existing documents as additional evidence. For a better understanding of the audiovisual sector, and its proactive and enthusiastic consideration of the opportunities, as well as the challenges, in the digital environment, we refer the Gowers Review to:

- New Business Models for Audiovisual Content - Report by the British Screen Advisory Council for the UK Presidency Creative Economy Conference, September 2005 (<http://www.bsac.uk.com/reports/bsacbusinessmodels.pdf>).

BSAC has also recently contributed to the debate about public access, most notably in a paper prepared for the Creative Economy Conference which sets out many of the issues that need to be considered in such a debate. We refer the Gowers Review to:

- Public Access Discussion Paper - Report by the British Screen Advisory Council for the UK Presidency Creative Economy Conference, September 2005 (<http://www.bsac.uk.com/reports/bsacpublicaccesspaper.pdf>).

And finally, BSAC's commitment to keeping stakeholders engaged with the opportunities and challenges in the digital world, so that these issues remain at the top of the agenda in the audiovisual sector, is demonstrated by the discussions that took place at our recent Film Conference:

- BSAC Film Conference – A Brave New World: Emerging Platforms and Formats, March 2006 (<http://www.bsac.uk.com/reports/filmconferencereport006.pdf>).

This final document does not, though, necessarily represent a consensus view of BSAC members on the issues discussed as it is a record of the discussion rather than a paper agreed by the Council.

### ***BSAC's unique position***

BSAC is in a unique position to explore the way forward in the light of technological changes affecting the audiovisual industry as its membership encompasses the widest possible range of UK industry interests, including those creating, investing in and exploiting creative content, as well as the technology providers and those with educational and archiving roles. BSAC's consideration of the issues arising from technological change and convergence, including those relevant to the IP questions posed by the Gowers Review, has now reached a level of maturity and inclusiveness that should be particularly helpful to Government as it explores these areas. We hope that Government acknowledges the important role that BSAC can therefore play in representing the views of the audiovisual sector, not only as the Gowers Review progresses,

but also in any future initiatives taken forward after Gowers has reported to Government in the autumn.

### **Consumers**

BSAC is, of course, well aware that one constituency not represented by its membership is the consumer. But this is not to say that the significance of, and needs of, the consumer are neglected by BSAC. The public service broadcasters represented by BSAC have a long tradition of delivering creative content free at the point of reception for consumers to enjoy and other BSAC members dependent on consumers being willing to purchase their products in various ways have for a long time realised that their profitability depends on satisfying consumer demand in terms of both price and content. As new business models are developed, the primary aim of BSAC members is therefore to give consumers what they want in the form they want it and at a fair price, and in order to do this, BSAC members continue to strive to understand consumers' wishes and expectations better than ever before.

But there are increasingly policy issues in the IP area where it is right that content creators and technology providers such as those represented by BSAC should be prepared to engage in a constructive debate with consumers. That is why BSAC was delighted to lead the organisation of last October's very successful Creative Economy Conference<sup>2</sup>, which was held during the UK Presidency of the EU and which was sponsored by a number of BSAC members as well as other stakeholders. This conference is believed by many to have provided a forum for the first time where stakeholders across the whole IP community as well as across the whole of Europe have acknowledged that IP must provide a balance between the interests of right holders and others in the IP value chain, including consumers. BSAC acknowledges, for example, the fairness of the recommendation from that Conference that "In the compact between consumer and corporation, if corporations want consumers to respect copyright, they must live by equally fair values ...".<sup>3</sup> This public recognition of the principle of balance and fairness provides an excellent foundation for a productive debate about issues such as public access, so BSAC welcomes the opportunity that is provided by the Gowers Review to consider in more detail whether any changes to the IP framework are now needed to adjust the balance.

### **Focus on copyright**

As a result of our decision to focus on what is most important, this response concentrates on evidence relating to copyright. Other IP rights are, of course, important to at least some BSAC members, but copyright is the key right for the audiovisual sector. Copyright underpins the audiovisual sector and is crucial to the challenges and opportunities that we face in the digital world.

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<sup>2</sup> See <http://www.creativeeconomyconference.org> for conference papers, including the recommendations from the conference working groups

<sup>3</sup> See <http://www.creativeeconomyconference.org/outcomes.aspx> for recommendations from the conference working group Value for All and More of It

## General Questions

### **1. How is IP awarded**

The questions under this general heading seem to be mostly aimed at the registered IP rights as there is no process for “awarding” copyright and the related automatic rights. Copyright will exist automatically in material that falls within the scope of one of the types of protected works so long as the nationality or other qualification requirements are met. It is therefore possible for copyright to exist without the person who owns it realising this is the case. Lack of awareness of copyright can therefore be a problem, but our comments below in response to the questions under this heading are not, however, directed at the process of acquisition of copyright itself as we support the principle of automatic protection which is underpinned by the Berne Convention requirement in Article 5(2) that the enjoyment and exercise of copyright shall not be subject to any formality.

The automatic protection of UK-created copyright works, both in the UK and practically the whole of the rest of the world, is one of the great merits of copyright protection and is of enormous benefit to the audiovisual sector. Compulsory registration systems would therefore never provide an acceptable solution to some of the problems that might occur downstream, such as easing identification of who owns the rights, as they would be a bureaucratic nightmare for right holders. Even voluntary official registration systems (which do not, of course, exist in the UK) have their difficulties as those who have not registered may be disadvantaged when trying to enforce rights.

However, we do recognise the benefits of better mechanisms for tracing right holders of particular works (which might reduce the incidence of orphan works for example). Digital watermarks and other rights management information incorporated in digital media will increasingly provide some solutions. In addition, however, the various sectors within the creative industries could perhaps do more to establish voluntary, industry-led databases of rights and ownership/licensees. We would be pleased to explore the merits of voluntary registration further.

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

Copyright and related rights are automatic, so, as we have explained above, there is strictly speaking no cost in “obtaining” the rights. But costs can arise in maintaining suitable business awareness of the complexities of copyright law so that appropriate decisions can be made about investment in the creation of copyright-protected content. Much of the complication in copyright law is, however, inherent in a system that must protect a wide range of different types of

material. BSAC therefore believes that the copyright framework in the UK generally delivers the right protection very well and with the flexibility necessary to take account of developments in creativity and technology. However, where new rights are introduced, such as the new on demand right required to meet the terms of the 2001 EU Directive on copyright and related rights in the information society (the copyright Directive), it is imperative for Government to ensure that suitable guidance is made available to business. Since this right arose out of a Directive, the onus for this perhaps should have been as much on the EU Commission as the UK Government, but, without guidance, there has been a considerable amount of confusion and debate in some constituencies regarding whether this right overlaps with or is completely different from rental rights.

Regarding other countries, although core audiovisual material is generally protected with the same basic rights in most of the developed world at least, there can however, at the margins, be differences between the UK and other countries regarding the existence and scope of protection, which can add further costs to a creator's understanding of his rights. Further international harmonisation of what is protected and by what rights could therefore be helpful, but this would need to be pursued with great care as it should not be at the expense of diminishing levels of protection currently existing in the UK, or compromising the essential balance that is provided by the copyright framework in the UK.

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

*(c) Are there barriers to obtaining UK IP rights on grounds of cost? What drives these costs?*

As already explained, the real issue in the audiovisual sector is understanding what rights in the copyright and related area have arisen automatically both in this country and abroad, or what rights might accrue automatically, as a result of the creation and development of different types of content. The big players in the industry have legal departments, or access to lawyers, well able to explain rights and ensure that sensible steps, such as keeping appropriate records, are taken to manage rights acquired automatically. However, even in such organisations, individual content developers may not understand rights that might come into existence and this could lead to problems. BSAC therefore supports the need for better education about IP, particularly copyright, in the education system. This might be especially appropriate if it is linked to courses of study followed by those likely in the future to work in the audiovisual industry. Such educational initiatives are also important in the fight against piracy (see below), but, even if reducing piracy is the aim, highlighting the positive aspects of copyright and other types of IP, ie how it encourages and rewards creators, is the right approach.

We welcome the work that has already been undertaken in the area of IP education and are pleased to see the impetus to be given to IP education as part of the school curriculum by the Government's promise to work through the Department for Education and Skills on how to embed IP into the school curriculum<sup>4</sup>. Public education is an area where a number of our members have, and continue to be, actively engaged in pursuing the objective of greater awareness about IP. For example, the DVD elaborating the CREATE principles developed by the Creative Industries Forum on Intellectual Property was produced under the aegis of the Channel 4 scheme IDEASFACTORY. This DVD was presented to delegates at the Creative Economy Conference where public understanding of IP was debated. In addition, the charity Film Education, supported by the Film Distributors Association, individual film distributors, exhibitors and theatres, the UK Film Council and the British Film Institute, works to encourage use of film and media in UK schools and colleges and is currently working on a secondary school educational resource about copyright and piracy. And, of course, the BBC is getting a new role in the area of media literacy.

BSAC fully supports the recommendation from the Creative Economy Conference that "national governments, in collaboration with public agencies and the private sector, should take responsibility for educating young people about the value of IP"<sup>5</sup>. We would welcome a continuing dialogue with the Government about how current and future initiatives will help to take this forward.

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

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

It is possible that costs due to lack of awareness about IP by businesses are worse in the audiovisual sector than in other copyright-dependent sectors, because an audiovisual product generally contains a large number of other types of protected copyright material and it is necessary to understand exactly what is protected and how. As is likely to be the case in any sector, lack of awareness is more of a problem for small businesses and individuals than the big players and once again could be worse in the audiovisual sector than other sectors due to the need to understand the complexity of the protection for the overall product and its constituent elements. For small businesses and individuals, there is a need for access to more comprehensive information than people will have acquired from educational initiatives, and, indeed, in addition these parties would benefit from readily available, and affordable, help and advice when necessary. We therefore welcome initiatives such as Ownit<sup>6</sup>, which offers free intellectual property advice

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<sup>4</sup> See [http://www.culture.gov.uk/NR/rdonlyres/12017917-F8D5-4CEB-B898-D839BFC90DA7/0/GovernmentResponse\\_CIF.pdf](http://www.culture.gov.uk/NR/rdonlyres/12017917-F8D5-4CEB-B898-D839BFC90DA7/0/GovernmentResponse_CIF.pdf) for Government response to the recommendations of the Creative Industries Forum on Intellectual Property

<sup>5</sup> See <http://www.creativeeconomyconference.org/outcomes.aspx> for recommendations from the conference working group 'From Creativity to Commerce'

<sup>6</sup> See <http://www.own-it.org>, Creative London Intellectual Property Advice Service

for London's creative people, and would like to see similar initiatives available throughout the country.

*(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 effect?*

Amongst the players in the audiovisual sector in the UK, there is in general no lack of trust in the copyright system as being the right framework in order to protect and reward creativity and investment in this sector. This does not mean that there is no desire to see minor adjustments to the system as discussed further below, but copyright is accepted as being a crucial piece of regulation, underpinning the success of the area that BSAC represents, and the framework is generally in very good shape in the UK.

It is difficult to envisage how copyright could be replaced by tools such as being the first to market or trade secrets. The products of the audiovisual sector are, increasingly, only digital files that are broadcast, issued on DVDs, made available online and so on. Once any one of these has happened for the first time, in the absence of copyright protection, it would be impossible to prevent others from readily copying those files and disseminating the product so that the original producer and his licensees are no longer able get a return on further dissemination, and so a return on their original investment.

It is important to note that an audiovisual product generally requires a very significant investment to produce it, and much lower costs to duplicate and disseminate it. However, in order to get a return on the investment in the original production, the later duplication and dissemination must lead to payments greater than the marginal costs of undertaking these activities. The low marginal costs in making more copies is why this is an attractive area for pirates to enter as they can make very significant profits.

Even for films that get their first public exposure by theatrical release in a cinema, copyright protection ensures that any illegal copying, by, for example, camcording and dissemination to the public of copies made this way, can be pursued and dealt with to prevent the producers' investment in creating the product from being undermined. Trade secrets can have little relevance to audiovisual products once released to the public, as from that point there can no longer be any secret about what is the protected material.

It is possible to conceive of a model of a low budget audiovisual production made for broadcasting which could lead to a return on investment even if there were no copyright protection, but this would only be possible if it can command a considerable audience for its first transmission and so significant advertising revenues, sufficient to cover all the costs up to that point. However, the

increasing number of broadcast channels offered to consumers, and consumers' increasing desire to be able to view transmissions at alternative times and not just the time of first transmission, the latter of which are being met by imaginative new business models offered by the broadcasters, mean that such programmes are likely to become much rarer if they ever existed at all. Also, as pressures on broadcasters grow to produce themselves, or commission from independent producers, more high quality programming at the same time as revenues from the licence fee or advertising income are unlikely to keep pace with the costs of such productions, then it is more important than ever that copyright provides the framework for being able to get a return on later dissemination of the broadcast too.

Generating value through reputation is important across the audiovisual sector, but once again establishing a reputation alone cannot replace copyright given the ease of copying once the product has been released to consumers. Many audiovisual products are the result of much collaboration, and there may be a place for open innovation models, such as Creative Commons licensing, in some circumstances. However, whether to collaborate, and if so who with, and the licensing arrangements for any collaboration, must be decisions for those who own, or will own, the copyright arising from that creativity. These are not, therefore, alternatives to copyright. Rights under copyright law need to continue to be available and to be enforceable in order to gain a fair return on investment.

## **2. How is IP used**

Given that BSAC is concentrating in its evidence on issues relating to copyright, we are not currently able to offer evidence for several of the questions under this heading. However, we would like to point out that other forms of IP are important to some, or a number of, BSAC members. The most notable of these is trade marks which many of our members rely upon to give branding to their products and services. Registered designs may also be used to protect logos or the image of a character for example. Patent rights are, of course, very important to our technology company members for the protection of their technological inventions. Increasingly, technological developments are emerging also from audiovisual companies, such as the broadcasters and the leisure software developers, who traditionally would have had interests predominantly in the content and copyright sphere, so they too have an interest in patent rights. These other forms of IP protection complement copyright protection, protecting innovation and creativity in different ways, and serving different purposes. They in no way make copyright protection redundant or vice versa, and the protection arising does not overlap with that provided by copyright for the actual audiovisual content that is at the core of our sector.

However, the copyright area itself gives rise to overlapping protection. For example, a broadcast is protected as such but it invariably includes a number of

other copyright works such as films, sound recordings, music, literary material and so on. Some of these protected works do in turn incorporate other protected material or are derivatives of such material. But these overlapping layers of protection simply reflect the way that copyright works, underpinning the creativity and investment in a wide range of material. Copyright protection for each element is important to encourage and reward endeavour at each stage of the value chain that results in the production of an audiovisual product.

Some of the other unregistered rights related to copyright also play a part in this complex picture of overlapping rights. For BSAC members the most notable of these are rights in performances granted to performers. Once again, however, these rights are not a problem but, rather, are essential to ensure that all contributors to an audiovisual production gain recognition and reward for their creative input. There may, therefore, be many creators, performers and right holders who have a stake in a single film or broadcast and any changes to the regulatory regime need to be based on a full understanding of the complexities that will necessarily arise.

*(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?*

Raising finance against intangible assets such as copyright is often a problem for all sectors within the creative industries, and the audiovisual sector is no exception in this respect. The problem, not surprisingly, is likely to be most severe for small businesses and individuals. Government support for programmes to raise awareness of the value of IP amongst business communities in general and financial institutions in particular would therefore be one way to improve the situation.

A more general problem is lack of consistency in accounting standards for copyright-protected material such as films and in particular the way in which the value of intellectual property is written off over time. For leisure software there are also serious problems about appropriate recognition of value as the platforms for the games get more and more complicated and the middleware or tools needed to interface between the games and the platforms becomes more sophisticated. Some BSAC members have found this lack of consistency a problem when accounts are being discussed with the Financial Reporting Review Panel. BSAC therefore believes that it would be beneficial to deliver greater consistency in accounting standards, and that this would also permit a more accurate picture of the value of the sectors mentioned above to be obtained.

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

Innovation is vital in the audiovisual sector if the consumer's appetite for new and exciting programming, films and computer games is to be met. BSAC believes

that the current UK copyright framework generally provides a very sound basis for protecting that innovation and so promoting investment in further innovation. The changes made to the law in 2003 to fully implement the copyright Directive have made the law fit for the digital age and major changes to the law are not needed to enable it to continue to reward innovation. Copyright protection is not, of course, a monopoly right. It only protects against unauthorised copying and not independent creation. Moreover, the underlying ideas in a copyright work are not protected, so others are free to innovate based on those ideas so long as their elaborated expression of those ideas is different.

One area that has been considered in the past for possible specific protection under copyright is television programme format rights. Some people have argued that such formats have not been sufficiently protected and so have not enabled a reward to be obtained by those who have created them. But others say that format rights are already frequently traded globally suggesting a healthy respect for rights in fully developed formats. There are also concerns that any changes to the law could damage innovative programming being developed based on the underlying ideas of a format. This is an area that is of great interest to BSAC members, but we have not in the time available had sufficient discussion amongst our members in order to offer a view. We would, however, like an opportunity to consider this further should Gowers wish to take this issue forward.

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

The audiovisual sector covers a wide range of businesses that rely on a number of different funding methods and so there is no single answer to this question other than to urge continued recognition of the need for public funding and other fiscal measures when appropriate in order to encourage innovation. BSAC was particularly pleased to see the new tax relief rates for indigenous and inward investment films introduced recently. The various types of funding for film production and training available via the UK Film Council are also important to encourage continued innovation in the UK audiovisual industry. As new delivery methods for film are rolled out, it will be especially helpful for Government to ensure that there is public support for specialist and niche films via digital cinema and video on demand (VOD) as otherwise it might be difficult to maximise the benefit of these opportunities for this type of film in competition with the marketing and promotional activities of the major studios. In this respect the UK Film Council's digital screen network is an attractive model.

*(h) Are data on the use of patents and other forms of IP useful as a means of measuring innovation?*

The work commissioned by DCMS in past years on mapping of the creative industries provided a welcome measure of the worth of these industries relative

to each other and the economy as a whole. It is important that this mapping data is kept up to date regularly and its reliability is improved where possible as these figures show not only the considerable success of the creative industries including the audiovisual sector, but they can also alert policy makers to any changes to this success story and so provide some early warning of problems that might need to be addressed. Our comments above on consistent accounting standards are therefore relevant here.

### **3. How is IP licensed and exchanged**

- (a) How easy is it to negotiate licences to use others' IP for commercial or non-profit purposes?*
- (b) What mechanisms do you use for finding potential licensing partners?*
- (d) Are there specific barriers to licensing in the main forms of IP currently used: patents, copyright, trade marks and designs?*
- (e) Are there barriers to licensing IP on grounds of cost? What drives these costs?*
- (f) Are there specific barriers to licensing IP in your sector?*
- (g) Does your organisation use methods to facilitate exchange of IP – such as cross-licensing or pooling IP rights with other firms or organisations?*
- (h) Are there specific barriers to licensing IP rights for small businesses or individuals – for example barriers to entry to patent pools?*
- (i) Are there barriers to trade and exchange of IP internationally?*

The audiovisual sector depends on licensing of copyright belonging to others probably more than any other sector. The return on investment in an audiovisual production is rarely, if ever, the result of a single creative individual or enterprise creating copyright content, which includes no other content, and where the enterprise or individual then goes on to exploit that content themselves with no partners, deals with distributors and so on. Effective licensing, and sometimes exchange of copyright, both within the different constituencies of the audiovisual sector, and between this sector and others, is therefore crucial. In general, appropriate licences are agreed by negotiation within the current copyright framework so BSAC does not believe that in general there is a need for any intervention. Licensing costs are market driven and this is the right approach. The cost of clearing rights is simply part of the package that leads to a deal where rights are licensed or exchanged in order to use other people's material. It is, of course, even more costly when there is an international dimension to licensing, but BSAC still does not believe that this would justify any regulatory change.

Although most of the licensing arrangements in the audiovisual sector involve commercial deals, BSAC would also like to highlight the alternative and imaginative forms of licensing being developed by some of its members. In particular, the Creative Archive Licence is a specific BBC initiative, working with

others. Under this scheme, an increasing pool of moving image material will be offered to the public with rights cleared to use to stimulate media literacy, individual creativity and education.

There are some limited areas of licensing where BSAC members do, though, agree that there needs to be further study and possible regulatory change or other solutions to enable or facilitate use of copyright material. Use of orphan works gives rise to particular problems which we have addressed in response to the questions on this specific issue. However, there can also be problems where the copyright owner can be traced but is not able to license the use in question because the relevant rights have already been licensed to others and there is then a problem tracing those people, for example those who have been granted distribution or other rights by the copyright owner. Moreover, where original licensing contracts have been negotiated without anticipating technological change, or where new uses are in their infancy at the time the original contract was agreed and are not covered in the contract, it can be difficult securing licensing for all these rights in the future. Uncleared rights can then hold up the pace of change and the roll out of audiovisual material on new platforms and this in turn can have an adverse impact on competitiveness. Given the often very large number of rights in a single audiovisual production, it can be that there is a failure to reach agreement to clear just one of the rights, which means that no-one can use the product even if all the other rights have been cleared.

As we have already indicated, we do not believe that official registration of copyright should be considered for solving problems such as these, although industry-led registers of rights could be beneficial in finding partners for collaborative activities as well as clearing rights. But registers of rights are unlikely to provide a complete solution. BSAC has not yet formed a final view on whether compulsory licensing or licences of right should ever provide part of the solution to these problems, but we do believe that copyright licensing issues at the margins should be investigated further with a view to deciding whether any equitable and balanced solutions might be possible.

#### **4. How is IP challenged and enforced**

- (a) Are there specific problems with enforcing the main different forms of IP: patents, copyright, trade marks and designs?*
- (b) Are there barriers to challenging infringement and enforcing your IP rights on grounds of cost? What drives these costs?*
- (f) Are there specific barriers to challenging and enforcement of IP rights for small businesses or individuals?*
- (g) To what extent is the risk of litigation a factor in your organisation's investment in innovation?*
- (h) What are the principal barriers to efficient and successful challenge and enforcement internationally?*

## ***Piracy***

The most important issue for BSAC members that comes under this heading is the problem of copyright piracy and trade mark counterfeiting. As audiovisual product is now provided on digital media as the norm where perfect copies can readily be made, the industry is exposed to significant risks, and suffers substantial damage, as a result of illegal copying of its product. Criminals are attracted to IP crime because it is a low risk activity but can result in a very high profit for the criminal.

The film industry body established to fight audiovisual piracy, that is the Federation Against Copyright Theft (FACT), has estimated that, in 2005, 77 million counterfeit DVDs were traded in the UK. This puts the UK second only to the US in terms of the volume of counterfeit DVDs. To give an idea of what this means in terms of costs to the industry, FACT has estimated that in 2005 the value of the black market due to counterfeiting and piracy in the UK was £0.6B for the cinema and home entertainment sector. Counterfeiting and piracy is also an enormous problem for the leisure software sector and the industry body that has an Anti-Piracy Unit to fight this illegal activity, the Entertainment and Leisure Software Publishers Association (ELSPA), has estimated that the value of the black market due to counterfeiting and piracy in the UK in the leisure software area was £0.54B in 2005. As well as illegal manufacture, distribution and sales of physical products, DVDs and videos, increasingly, of course, the threat comes from online trading, including via auction sites, and P2P file sharing networks. TV piracy is a relatively new phenomenon where there is increasing evidence of TV programmes being made available for illegal downloads from the internet. Addressing TV piracy raises a difficult challenge to public perceptions because illegal dissemination of material that is made available to consumers free at the point of viewing may not be readily seen as causing any damage to the broadcaster.

However, BSAC members have not been complacent in the face of the threats from piracy. They have been active in a number of ways to enforce their rights, involving both self-help activity and engagement in collaborative initiatives with other industries affected by IP crime, with enforcement agencies and with Government. These are too numerous to elaborate in detail here, and we believe that the Gowers Review should already be well aware of all of this activity, not least because of direct Government involvement in much of this collaboration through the Patent Office led IP Crime Group and activity under the national IP Crime Strategy, but BSAC can provide further evidence if needed.

A very recent initiative in the audiovisual sector is worth mentioning, though, as it could create a centre of excellence to help police forces understand the piracy problem, something that is in our view essential for tackling piracy where it has been shown to have links with serious organised crime. In February this year the Metropolitan Police's Economic and Specialist Crime Command, acting in

partnership with FACT, launched a new police unit. This unit will be dedicated to combating film piracy and is particularly geared up to identify and eliminate the organized criminal networks engaged in the manufacture and distribution of counterfeit films.

The enforcement activity against counterfeiting and piracy that is undertaken by BSAC members does give rise to significant costs and costs will always be greater where there is an international dimension to any enforcement action taken. However, BSAC members accept that they must devote some of their resources to this activity, but in order to achieve the maximum impact against piracy for the costs devoted to enforcement by industry, there does need to be a regulatory framework in place that fully supports industry's efforts. In this respect, much work has been undertaken by the umbrella group, the Alliance Against IP Theft<sup>7</sup> identifying what needs to be done for all industries facing the threat of IP Crime. Moreover, the UK Film Council produced a report, Film Theft in the UK, at the end of 2004 identifying priorities for the audiovisual sector<sup>8</sup>. In addition, the IP Crime and Online Infringements Working Group of the Government's Creative Industries Forum produced a set of recommendations in March 2005 relating to legislative and other issues that should be pursued<sup>9</sup>.

We are not going to discuss all of these in detail in this evidence, but we refer the Gowers Review to all of these sources for further information. BSAC would, though, like to highlight three issues in particular that we would like to see addressed urgently. The first relates to the Government's failure to bring into force section 107A of the Copyright, Designs and Patents Act 1988 after its enactment over 10 years ago. This provision, which would put a duty on local authority trading standards officers to enforce the copyright offences, is essential if all the relevant enforcement agencies that are active in the UK are to have the tools needed to take appropriate enforcement action. Linked to this issue are the inadequate resources made available to trading standards departments to undertake enforcement action against IP crime, including to cover the costs of prosecutions. Although some additional funds may be available in the future where there have been successful confiscation orders under proceeds of crime legislation, BSAC believes that the problems of inadequate funding for trading standards departments which are often at the forefront of the fight against piracy should also be addressed as a priority.

The second issue we would like to highlight is illegal camcording in cinemas. An increasing number of the biggest films are released simultaneously around the world. This in part is the industry's response to the threat of piracy as it reduces the incentive to illegally copy films being shown in one part of the world for dissemination to people in other countries where the film is not yet available. However, there can still be a market for illegal copies of DVDs made from a copy

<sup>7</sup> See <http://www.allianceagainstiptheft.co.uk/index.html>

<sup>8</sup> See <http://www.ukfilmcouncil.org.uk/downloads/?subject=24>

<sup>9</sup> See [http://www.culture.gov.uk/creative\\_industries/ip\\_forum.htm](http://www.culture.gov.uk/creative_industries/ip_forum.htm)

camcordered in a cinema and UK cinemas are increasingly vulnerable to this activity given the increasing number of films that have a worldwide opening day in the UK. In addition, a direct recording made illegally in a cinema often passes onto P2P file sharing networks and so fuels the increase in internet piracy which in turn can be the source of a digital download duplicated for the illegal hard goods market. There have in the past been calls to criminalise the act of illegal camcording in a cinema. Given the increasing threat from this activity in the UK BSAC urges that urgent action should be taken on this issue.

Finally, we would like to see the Gowers Review address problems that have been encountered in pursuing piracy cases to successful conclusions, due to the onerous burden of proof for the criminal offences in copyright law. These problems should be tackled by extending the presumptions about copyright ownership that apply to civil cases to the criminal offences, or some other way. We believe that some reversal of the burden of proof is not incompatible with human rights legislation.

#### ***Other enforcement issues***

Under this heading we are providing evidence relating to copyright infringement cases where there is likely to be a genuine difference of opinion about the existence of infringement. Indeed, disputes of this type might easily arise between BSAC members. As there is, therefore, unlikely to have been wilful infringement of copyright, recourse only to the civil law to solve such disputes is appropriate. Moreover, draconian sanctions are unlikely to be justified so the existing regulatory framework is generally appropriate to enable cases to be resolved fairly.

Copyright disputes are probably the least expensive type of IP dispute to resolve when compared to more complex disputes surrounding patents or indeed trade marks. Legal costs in a relatively straightforward copyright dispute can be around £100,000 - £150,000. This level of costs could still deter some people from pursuing alleged infringement cases, particularly SMEs, but a reduction in costs could encourage more people with weak cases to go to court which might not be a better outcome. BSAC believes that a better way forward is to do more than has been done to date to encourage the settlement of disputes by ADR as this should reduce costs, produce speedier settlements and lead to less friction between parties. Indeed, one BSAC member, Channel 4, has actual experience of the usefulness of mediation to settle disputes. And two other BSAC members, Equity and PACT, have built ADR into their contracts as the first step in any dispute resolution.

BSAC is therefore in favour of exploring whether stakeholders within the audiovisual sector more generally might be able to reach agreement to always try and resolve certain types of dispute by mediation or another form of ADR in the first instance. We would like to see the Government encourage initiatives such as this in other sectors too.

*(c) To what extent does your organisation make use of other methods than litigation to resolve IP infringement cases, for example the Patent Office opinion service, mediation services, Alternative Dispute Resolution, or the Copyright Tribunal?*

*(e) Are there barriers to using such methods to settle IP disputes without recourse to litigation? How might they be removed?*

### **Piracy**

Regarding piracy, the audiovisual sector has for some time recognised that there need to be several ways to tackle the problem and actual enforcement action supported by the right legislative framework is only one part of the equation. Another essential part of the enforcement equation is the way industry designs business models to discourage piracy and provide consumers with high quality legal products at a fair price. The industry's exploration of exciting ways of using consumer-friendly DRMs to offer the public a range of options at different prices, and at the same time prevent unpaid for copying, is one aspect of this preventative work (see section below for further discussion about DRMs.) The increasing move to close, or even remove entirely, windows, both those delivering sequential release in different regions of the world and those between theatrical release, DVD sales, VOD and broadcasting for example, is another aspect of this approach. BSAC firmly believes that the audiovisual industry must continue to react as fairly as possible to consumers' expectations in the way it is developing its new business models and that this is one of the best ways to reduce the incidence of piracy.

Another preventative approach which we have mentioned above is better education about IP in the school curriculum in as positive a way as possible. Efforts also need to continue to raise public awareness about IP and the impact of IP crime. The audiovisual sector continues to devote considerable resources to this type of activity and in 2004 the major DVD distributors joined forces with retail and rental outlets in the UK to establish the Industry Trust for IP Awareness<sup>10</sup>. This organisation, amongst other things, engages in consumer awareness campaigns.

### **Other enforcement issues**

The Copyright Tribunal is not currently able to resolve copyright infringement cases as its jurisdiction is limited to resolving various issues to do with copyright licensing after it has been agreed by both sides that a licence is needed. In particular, its main role is to adjudicate on terms and conditions in licences offered by collecting societies. BSAC would like to see it continue to have this role, and for similar bodies to exist throughout Europe where currently there is seldom an effective way of resolving disputes over collective licensing royalties. But we do not think that the Copyright Tribunal would necessarily be the right body to resolve copyright infringement cases as it currently has no particular

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<sup>10</sup> See <http://www.piracyisacrime.com>

expertise in this respect. As indicated above, we are in favour of further encouragement of ADR to settle some types of infringement cases.

## **Specific issues**

### **Current term of protection on sound recordings and performers' rights**

We wish to comment on this issue to say that any decision on this should only be made after taking into account the arguments of, and impact on, all stakeholders. The onus should be on those wishing to see an extension in the term of protection to make out the economic case for such a change with a full cost and benefit analysis.

### **Copyright exceptions – fair use/fair dealing**

- (a) What are your views on the current exceptions in copyright law?*
- (b) Could more be done to clarify the various exceptions?*

Limited exceptions to copyright have existed for a long time. BSAC members both enjoy the benefit of some exceptions to copyright when creating audiovisual material and are right holders whose creative content is in other situations subject to limited use by others under exceptions. We acknowledge that exceptions have a very important role to play in providing an essential balance in copyright law between the interests of all stakeholders, including consumers. We are, moreover, pleased to take part in any constructive debate about possible modifications to the exception regime in the light of technological changes or otherwise, and in such a debate we must be prepared to listen to the views of consumers.

We therefore welcome the fact that this area has been specifically identified in the Gowers Review. However, it is a complex area which cannot be looked at simply as some have in the past by just counting the number of exceptions. There is not necessarily a problem with a large number of specific and narrowly defined exceptions as tends to exist in the UK; it would not necessarily be better to have fewer and/or broader exceptions as may exist in some other EU member States. When considering any changes to the exception regime, the type and scope of exceptions therefore needs much careful consideration, and in some cases it may be too soon to know what, if any, changes to exceptions might be justified as technology is changing so rapidly and new markets are being developed. BSAC nevertheless is offering some views on the exception regime under the specific questions below and would particularly like to be further involved in this debate as consideration of this issue is taken forward by Gowers and Government.

As we understand that the issue of exceptions is likely to be debated within the EU in the near future, mainly in the context of the EU Commission's review of the copyright Directive, an additional issue that we would like to see considered

further is difficulties that may arise for UK content creators who rely on UK exceptions, such as that permitting fair dealing for the purposes of reporting current events. Although an exception of this type is common in other member States, the precise scope of the exceptions vary. When an audiovisual product is created, it is necessary to ensure that use of other copyright material that has taken place in the UK during that content creation, which is within the scope of the UK exception, is also within the scope of equivalent but not identical exceptions in other member States where the audiovisual product is to be disseminated. It can be very time-consuming and costly to ensure that all material is used legally in all the relevant member States.

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

We have provided comments on education and archive exceptions under the specific questions below. In addition, our support for exception-type or similar provision in the case of orphan works is covered under that specific issue below and we have also highlighted the need for further study of possible solutions to the difficulty sometimes encountered where some of the rights in old material cannot be cleared in our response above to the general question on how IP is licensed and exchanged. Other than that, there is no consensus within BSAC at the moment for any change to the UK exception regime, but some of our members have pointed out that the UK did not introduce exceptions in all the permitted areas when implementing the copyright Directive into UK law. For example there is no exception in the UK specifically permitting use of copyright material for the purposes of parody. Some BSAC members have also pointed out that in general exceptions need to keep pace with technology.

*(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"?*

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

There are several exceptions in UK law that already provide limited private copying in certain circumstances. In the audiovisual area, the most important exception is that permitting time-shifting of broadcasts for private and domestic use. We do not believe that the time is right to consider any extension to copyright exceptions for private copying of audiovisual material. The audiovisual industry fully recognises the consumer's desire for a range of different products and different delivery methods for audiovisual content and the absence of a generous private copying exception in the UK permits the industry to invest in these with the knowledge that this investment will not be undermined.

The new products being developed allow the industry to offer a range of prices to the consumer so that the consumer can decide to pay a low price for very limited

access and a higher price for more generous access. We believe that consumers will welcome the ability to pay for exactly what they want and no more; many consumers will be able to access and enjoy films for less than they pay at the moment, especially where they only want to watch a film once. For example, a film might be offered on a VOD basis for a single viewing at a very low price, for as many viewings as the consumer wants over a fortnight at a higher price and as a digital download so that the consumer can burn a copy onto a DVD to keep and view whenever they want for an even higher price. If a private copying exception permitted copies to be made where only a single viewing has been paid for, then the economics of these models would change and the industry would inevitably end up charging nearer to its highest price whatever the delivery mechanism and/or it would decide simply not to invest in developing new business models designed to permit only viewing and not copying. Thus, a broad private copying exception applying to audiovisual product would ultimately undermine consumer choice which we do not believe would be welcomed by consumers.

The more generous exceptions applying to audiovisual content that exist in many other member States are coupled with levies on blank recording media and/or recording equipment. BSAC is not in favour of such levies coupled with a wider private copying exception for audiovisual material. The existence of levies is impeding the ability of the audiovisual industry in some other member States to respond to consumer demand with attractive new business models which can be differentially priced. For example, there is no incentive to charge consumers a low price for a single viewing of a film if levies have then legalised copying and repeated viewing of that film.

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

BSAC recognises that educational activity is no longer confined to things that happen within the premises of educational establishments such as schools, colleges and universities. Distance learning where students study for at least part of the time at home, and so need to access educational material online, is increasing.

Some of our members belong to the Educational Recording Agency which licenses off-air recording of broadcasts by educational establishments for their educational purposes under a licensing scheme certified for this purpose by a statutory instrument. This certification is necessary in order for the licensing to take effect as otherwise this activity would be possible under a copyright exception. We agree that the terms of this exception, and so the certified licensing scheme, may be unduly restrictive given the importance of properly supporting distance learning. We therefore support further consideration by Gowers of possible changes to the exception regime in order to permit some type

of controlled educational use of copyright material by licensing, underpinned by an exception, outside the confines of an educational establishment.

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

BSAC believes that there is a public interest in preserving copyright content for posterity and that the existing provision of exceptions in copyright law that can be used for this purpose are not comprehensive enough to ensure the preservation of our audiovisual heritage. Preservation is particularly important where content has been recorded on formats that are deteriorating or will become obsolete with technological advances. Without investment in establishing and maintaining comprehensive archives of all audiovisual productions this legacy, which can inspire and stimulate creativity in the future, could disappear.

We would therefore be in favour of some expansion of the exception regime applying to archival activity as we do recognise that copyright constraints can give rise to difficulties in both setting up archives in the first place and ensuring that archived material is properly preserved so that it is accessible in the future. We would be pleased to take part in further debate on what the detail of any new or modified exceptions might be, for example, whether or not any provision should be limited to activity by designated bodies or otherwise. However, in accepting the need for some change here, we believe provision should be limited to any copying necessary to put the material in an archive and preserve it appropriately as technology changes. It should not cover subsequent exploitation of archive material. Exploitation should continue to be negotiated with the relevant right holders so long as copyright subsists, or be within the scope of permitted exceptions such as might apply to orphan works more generally.

## **Copyright – digital rights management**

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

As we have already discussed above, the technology is being developed and used in the audiovisual industry in ways that will provide products delivering more consumer choice with different pricing mechanisms. BSAC believes that it is very important to be able to preserve the value chain in the audiovisual sector so that there is a sufficient economic incentive to industry to provide flexible use and deliver these choices to the consumer. DRMs provide the means to control the different business models being developed; they are crucial to the development of sustainable business investment that can create new products for consumers.

Concerns raised by some groups about the use of DRMs with digitally recorded copyright content are in part, we believe, based on a misunderstanding of what

DRMs do. Early use of DRM technology has admittedly been primarily used in order to protect DVDs against unauthorised copying. However, DRMs have much more potential than this and are better viewed as the enablers of dissemination of copyright material in innovative business models. DRMs can also carry rights management information enabling authorisation and payments for copyright use to flow through the value chain.

There are several issues relating to DRMs that BSAC wishes to comment on. The first relates to standards and interoperability. There has been a considerable amount of discussion already in various fora about what, if anything, needs to be done here. BSAC, like many others, has concluded that there should not be any government regulation in this area. In this respect, we therefore support the recommendations of the Creative Economy Conference that the development of DRMs should be market driven, only subject to the existing EU regulatory framework. We would also welcome further work to be facilitated by either the EU Commission or the UK Government to encourage a greater consensus on standards. We wonder whether Ofcom might be an appropriate independent body to lead such discussions in the UK.

The second issue that BSAC wishes to comment on concerns the interplay between DRMs and private copying levies. We have already indicated our opposition to private copying levies in the UK regarding copying of audiovisual material. And we welcome the lead that the UK has already given within the EU by demonstrating to other member States, including the newer member States, that levies are incompatible with the way DRMs can be used to develop new and exciting business models to offer to consumers. The audiovisual industry must be free to develop its use of DRMs flexibly and imaginatively to provide a range of products at different prices and at the same time protect against unauthorised, unpaid for use and copyright piracy.

Levies on the other hand tend to institutionalise piracy and deter stakeholders from exploring and delivering new business models that might deal with this problem by giving the consumer what they want at a price they think is fair. Levies also penalise the many legitimate users of blank recording media. BSAC therefore hopes that the UK will continue to encourage other member States to review and remove their levies as they apply to audiovisual content and support any efforts by the EU Commission to resolve the problems caused by the lack of a level playing field across Europe on this issue. The audiovisual industry needs to be able to develop and use DRMs on products that can be disseminated and traded across Europe and this is currently difficult where other member States have levies coupled with private copying exceptions that can undermine the viability of the variety of business models being developed.

The final issue that BSAC would like to address under this heading concerns the interplay between DRMs and exceptions more generally. The copyright Directive requires member States to provide a remedy where certain types of exceptions

cannot be enjoyed because DRMs have been applied to copyright material in order to ensure continued enjoyment of those exceptions. In the UK the remedy, making a complaint to the Secretary of State who will investigate and then issue directions to the copyright owner if appropriate, is, as far as we are aware, as yet untested. Moreover, each member State has been free to choose its own remedy and the range of different remedies could be a cause for concern. There is also an absence or no remedy at all for dealing with the interplay between DRMs and copyright exceptions that the audiovisual sector might want to enjoy, because the Directive does not permit such a remedy. BSAC is not at the moment able to reach a consensus on what, if anything, should be done regarding this issue, but it does agree that it is an area that Gowers and the Government should explore more. As this issue relates as much to the Directive as UK law, we would like to see the Government ensuring that it is studied properly in the context of the review of that Directive.

### **Copyright – orphan works**

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

Although films produced by the major studios are unlikely to ever fall into the category of orphan works, we do accept that other parts of the audiovisual sector may not be, or have not been, so well organised and there is a real likelihood that it may sometimes be difficult or impossible to trace the holders of rights in older material in order to seek permission to use it. One of BSAC's members, the British Film Institute (BFI), holds the largest collection in the world of moving image material in the National Film and Television Archive and so it is well placed to understand the difficulties of tracing right holders in what has often been a rather disorganised and fragmented British film industry. These difficulties can mean that the BFI is unable to use the uncleared material in its own activities, as well as being unable to release material for use by others developing new products in the audiovisual sector. Our members do, of course, often use other's copyright content in their commercial productions and so within BSAC we have considerable experience of the difficulties in identifying copyright owners of some older material.

Our members are divided on what they would do where it has not been possible to clear rights due to untraceable right holders. Some of our members would simply not use the material, whilst others would still use it if exhaustive searches have not led to finding the copyright owner. However, we do not believe that either approach is satisfactory. Choosing not to use older material where rights cannot be cleared means that the public is denied access to new innovative products derived from this old material, and in some cases older material may simply disappear due to deterioration if it is not possible to clear rights to use it in a new production. Other members who have used material with uncleared rights

have sometimes faced big claims against them when a right holder has eventually emerged, and risk having to pay substantial damages in addition to the licence fee that might have been agreed if the right holder had been found earlier. This potential liability is, of course, an important reason behind decisions not to use the material in the first place and increasingly it is difficult to get insurance cover where it is not possible to demonstrate that all rights have been cleared.

We are pleased to say that there is, therefore, a consensus within BSAC for the issue of orphan works to be addressed. This would not only help the audiovisual industry as they develop new productions and products inspired by earlier creativity, but it would also be in the public interest to remove barriers preventing uses that give public access to orphan works.

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

BSAC believes that at least part of the solution should be a legislative one. We are aware of a legislative solution that exists in Canada and one that has recently been proposed in the US. Both would give a user of an orphan work who cannot find a copyright owner after reasonable enquiries protection from some of the remedies that could be used by a copyright owner who later turns up and sues for infringement. However, whereas we understand, but would need to confirm that, the Canadian model requires the user of an orphan work to pay a reasonable royalty into a fund from which the copyright owner is then paid if he turns up, the US proposal appears to be that a royalty would only be paid if and when the copyright owner turns up.

We have had an initial debate about these two approaches and have not so far been able to reach any consensus, other than that any approach should deliver protection from litigation to the user of an orphan work, provided that all reasonable efforts have been made to trace the rights owner, and should provide for the payment of a reasonable royalty for that use should the copyright owner emerge after use has begun. Some members prefer to pay nothing unless and until a copyright owner turns up whilst others find the idea of always paying into a central fund attractive, and possibly eventually using unclaimed royalties in that fund to support the industry in some way, assist with archival activity or something else. We do, however, generally believe that the Copyright Tribunal can have the role of deciding on a reasonable royalty whatever solution is used.

An alternative or additional legislative solution might be stipulate that the limitation period for being sued for infringement is only 6 years measured from the date of first broadcast or other dissemination of the production including the orphan work. This would permit those who have used an orphan work without clearance to at least have protection from litigation after 6 years. But this is merely another suggestion which we are not at this stage saying we would necessarily support. We would therefore be pleased to engage in further debate

of what might be the most appropriate legislative solution or solutions to deal with the problem of orphan works.

Another part of the solution could be to try and reduce the problem of the time wasted trying to trace unidentified right holders in the future. We have already indicated above in response to the general question on how is IP awarded that we would like to explore voluntary stakeholder registration of rights further. It is unlikely that this could provide any solution to the problem of tracing rights owners of orphan works now, as realistically any new system would only be rolled out initially for new works. As with the Land Registry model which only required registration when land changed hands, it might, though, be possible to add works to any database when they are traded. This could build on work that some of our members are already undertaking, for example PACT is already working with the International Standards Group (ISAN) on a possible code for independent producers. We would be interested to debate further the usefulness of practical initiatives such as this with Gowers and the Government.

### **Legal sanctions on IP infringement**

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

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

We agree that the criminal offences for wilful online copyright infringement should attract the same maximum penalty levels as for hard copy piracy. As we have already indicated above, increasingly one type of illegal activity can feed the other so there is no justification for wilful infringement online that is happening on a commercial scale being considered less serious than wilful and illegal duplication of DVDs.

### **Coherence between competition policy and IP policy**

BSAC accepts that there can be certain situations where competition law needs to be invoked to deal with anti-competitive behaviour by those who own IP rights. However, we believe that both the UK and EU regulatory frameworks in this respect already provide the tools needed to deal with any problems.

### **Parallel imports/International exhaustion**

*(a) Has your company been affected by parallel trade?*

*(b) What would be the impact on your organisation of a change in the current rules?*

*(c) What evidence is there of the costs and benefits, both for consumers and firms of the current rules?*

The rules permitting the audiovisual industry to set sequential release windows in different regions of the world have been important to maintaining the economic viability of the industry. However, the issue of parallel imports is only relevant to movement of physical product. As business models change in the digital world, physical products are increasingly going to be replaced by online delivery such as VOD and digital downloads and in the online marketplace the rules that permit control of parallel imports no longer apply. And global release windows are already much shorter or, in increasing numbers of cases, not present at all.

## **Conclusion**

BSAC and its individual members would like to be fully involved in any further debate as the Gowers Review progresses to its conclusions. We would also like to be given an opportunity to give more thought to any issues that are taken forward by Government after the Gowers Review has reported, and to be able to submit more detailed evidence before any final decisions on legislative change or otherwise are made. As we have already indicated, the very short time allowed for compiling evidence has not permitted us to discuss and reach a fully elaborated consensus on a number of issues that are nevertheless extremely important to the audiovisual sector.

Whilst the very existence of the Gowers Review reinforces the Government's commitment to raising the profile of the importance of intellectual property issues to creative and innovative industries such as the audiovisual sector, we would, however, urge the Government not to lose sight of a number of other equally, or even more, important issues. In the audiovisual sector, another crucial issue concerns finance, including access to finance, public funding and taxation. BSAC has already welcomed the new film tax reliefs that have recently come into effect, but we need to make sure that these do work as intended so that the UK continues to attract inward investment, while also enabling the indigenous film sector to thrive. This will be particularly important to monitor as new business models evolve and traditional financial structures in the UK film industry may change.