

Gowers Review of Intellectual Property

Evidence from the British Film Institute

Introduction

- 1.1 The British Film Institute welcomes this opportunity to provide evidence to the Gowers Review.
- 1.2 As the Royal Charter body charged with the role of preserving and making accessible our film and television heritage and with the development of a greater understanding and appreciation of these media, our operations are inextricably dependent on the laws of copyright. It is noteworthy that we have found the existing IP framework to be sufficiently flexible for most areas of activity in which we operate, but we very much welcome Government attention to its fitness for purpose in the digital age.
- 1.3 The BFI's evidence only covers those questions in the Review document which pertain to our operation, and in particular only to copyright law, and is complementary to the UK Film Council's broader submission.

General Questions

2. How IP is used

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

The operations of the British Film Institute are largely dependent on the use of copyright materials across its various services and activities. These include:

i) BFI Collections

At the heart of the BFI is the National Film and Television Archive (soon to be renamed BFI National Archive) whose collections maintain a record of the unique achievements of the creative workers in the United Kingdom in producing films and television. Today, the National Film and Television Archive contains 750,000 titles from the earliest days of film making in 1895 to the present. In addition, the BFI collects related materials ranging from personal and company papers to design and publicity materials and houses one of the world's biggest libraries devoted to subjects related to film and television.

Film

There is no legal deposit provision for film in the UK. Films have been collected from diverse sources since the inception of the BFI in 1933, and in many instances the BFI has received material from organisations or individuals who held no copyright in it. The 'rights' in this material are highly variable and it is often the case that, while the BFI arguably has certain physical rights in the donated/loaned material, it does not own the IPR, and therefore no exploitation rights, in those same films. The BFI had, before the development of its web service screenonline.org.uk, not sought use rights beyond research access in the material deposited and had effectively acted as an archive of last resort for much of the material. In addition, the BFI owns outright a number of national collections including silent newsreels and films from the nationalized industries.

Television

The BFI's television collections have been more systematically collected because of the establishment in the 1990 Broadcasting Act (and amended in the 2003 Communications Act) of a quasi-legal deposit arrangement for terrestrial commercial television whereby OFCOM (and previously the ITC) has designated the BFI as the National Television Archive.

Personal and Company Papers

The Special Collections unit of the BFI holds many important papers of both organizations and individuals. These donated materials are held under donor agreements with different levels of restrictions on reuse.

Audio

The BFI holds a number of audio collections in some of which it holds certain rights. These include the NFT interviews – for which, currently, rights have to be requested from both interviewer and interviewee – and the BECTU Oral History collection, for which the BFI acts as guardian with reuse rights negotiated.

Research Viewing

The BFI provides access to its Collections to bona fide researchers on its premises in line with agreements provided by donors.

screenonline

Screenonline (www.screenonline.org.uk) launched in 2003 and makes material from the BFI collections available to UK educational establishments and public libraries. The BFI has negotiated more than 80 agreements with owners of rights in British films, including most of the US majors as well as Granada, Canal Plus and many smaller companies, to use digitized extracts (of varying lengths) without payment for streaming to registered schools, libraries and colleges in the UK.

Screenonline has a Joint Editorial Initiative with the television companies, underpinned by an agreement with the Performers' Alliance (Equity, Musicians' Union and Writers' Guild of Great Britain), to include digitized extracts and some full length programmes, subject to an annual licence fee..

ii) BFI South Bank

The BFI operates the National Film Theatre, a cinematheque celebrating artistic achievement in film and television across the globe, which will be relaunched later this year as BFI South Bank to include a mediatheque facility offering access to browsable digital surrogates of material from our collections.

The BFI exhibits films at the NFT under licence from the distributor or rights holder on a favourable royalty basis including all materials held in the Archive. The BFI also runs the London Film Festival and the London Lesbian and Gay Film Festival both of which mainly operate within privileged rights parameters.

As most television programmes are made under agreements which do not include theatrical performance the BFI has, since the early 1980s, had an agreement with the

Performers' Alliance which, with the cooperation of the television companies which hold the rights in the programmes, enables the BFI to programme television seasons.

Mediatheque

The first BFI Mediatheque, providing venue-based access to digitized material, opens at BFI South Bank later this year. Further Mediatheques, in partnership ventures across the UK, will be opened in the next three years. Clearances for Mediatheque use of film and television follow a similar pattern to screenonline but permission is sought to make digitized full length films and programmes available within a secure local network.

iii) Film Distribution

The BFI licenses films for distribution to venues both theatrically and non-theatrically and has more than 3000 films in this category

DVD and Video publishing

The BFI, along with the entire film distribution sector and owners of IPR in content, has embraced the commercial potential of video and DVD. The BFI licenses the majority of material it releases on DVD, including enhancements, except where the rights are owned by the BFI or in the public domain and for material which is or was commissioned by the BFI itself

iv) BFI-owned databases

The BFI owns a set of databases which are being integrated to create BID (the BFI Integrated Database). The first elements of this are available on the BFI's web site (www.bfi.org.uk/database). Parts of the filmographic database are licensed to Proquest which makes it available online as Film Index International.

- d) ***To what extent do you seek overlapping forms of IP protection?***
- e) ***To what extent are these decisions influenced by sector-specific considerations?***

As noted above, nearly all IP-related issues which involve the BFI are sector specific i.e dealing with the complexities of IP in the exhibition, distribution or research use of film and television productions. While much of this is standard industry practice, the BFI has had to negotiate separately on a number of services where its unique position requires a novel approach.

The major area of BFI activity, which is not film/tv sector specific is in relation to making the BFI's database available online, which is covered by the EU Database Directive.

- f) ***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?***

As the IP in the bulk of the BFI's collections is not owned by the BFI its value is cultural rather than commercial. The BFI has never separately valued the IP in the material it owns or which it has commissioned or created.

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

The BFI endorses the longstanding trade off in our society between the rights of the author and the rights of citizens. However, we are concerned that the equitable balance – recognising that most 'new' inventions are based on many older ones and that to restrict knowledge would inhibit progress – is now being contested in attempts to extend the term of copyright to a wholly unreasonable term beyond the death of the author or any principal.

As an organisation with a set of educational as well as heritage objectives which have been reinforced in recent years by Government support for a media literacy agenda, we have developed a range of innovative activities and services, most of which are IP dependent. Although there have been occasional instances when the BFI has been unable to licence key material for education us, in general, we have found considerable support across the industry to allow us to fulfil our objectives and have worked within the existing IP framework.

For example, as members of the Creative Archive Licence Group (with the BBC, Channel 4, Open University, Teachers' TV, the Community Channel and the MLA), we have offered material from our Archive for download and non-commercial reuse using the 'Creative Archive licence', which operates wholly within the existing rights regime. Our involvement is predicated on a desire to support innovation and creativity among the wider public as the new technologies provide opportunities for users to experiment and create their own works.

However, there are inhibitions to innovation in the existing IP system where a lack of balance is emerging between the rights of the citizen and those of companies. For example, the BFI remains perplexed 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

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

The BFI is itself publicly funded but has used these public funds to pioneer the delivery of online access to its Archives. The innovative model of screenonline has been singled out as 'commendable practice' by the European Commission and has gained attention around the globe, and an Australian version of screenonline is now in development.

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

No

3. How IP is licensed and exchanged

a) ***How easy is it to negotiate others' IP for commercial or non-profit purposes?***

Solutions are needed to overcome the rights issues which prevent the riches held by public organizations being easily and fairly made available. We believe Government should ensure that the safeguarding of commercial rights does not lock down other possible uses, indeed that Government should seek to further liberate the wealth of our nations currently held in the archives for all the world to benefit. To quote from the recently published Adelphi Charter 'it is a human right to ensure everyone can create, access, use and share information and knowledge'. The creative imagination requires access to the ideas, learning and culture of others, past and present. As public bodies we wish to go with the grain of the enabling facilities provided by technology – and rights cannot be a barrier. The new licensing models – from creative commons to creative archive - offer a hint as to the immense opportunities that can be grasped with some innovative thinking and generosity by organisations with rights to give. We believe these issues should be a central concern of the inquiry.

One area where we wish to canvass change is in the general area of educational use. With the development of screenonline – which makes archival material available to educational establishments and libraries in the UK using a digital certification process to ensure copyright security – we have come up against the difficult issue of defining an educational establishment (in order to maintain the terms of our contracts with the rightsholders). So, we have not been able to issue digital certificates to students who are being home-educated and have had to place restrictions on student use outside the school or college, so that, for example Open University students are disadvantaged because they study from home and not on a campus. With the spread of broadband, and the encouragement by Government of lifelong learning, we would like to encourage new ways of defining '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.

However, we would like to register the possibility of working within the existing framework by working closely with partner organisations to provide culturally valuable services to the public. The BFI occupies a unique position of trust with rightsholders for both film and television material and has been able over a long period to establish a framework for use of the collections it holds for the nation to secure the rights to use this material for non-profit purposes but for which the IP is usually vested in another organisation or organisations. Good examples of such agreements are the BFI arrangement with Performers' Alliance which, subject to an annual licence fee, allows the screening of television material at the National Film Theatre and the series of contracts with a range of companies and individuals to enable the streaming of digitised content on screenonline to UK educational establishments. Through negotiation we have in part achieved what might be termed a BFI right and we would welcome discussion as to whether this could be formalised.

b) ***How easy is it to use others' IP for research purposes? Have you experienced difficulty around research exemptions?***

Third parties own the rights in most BFI's collections. The BFI has for many years provided research access to this material to bona fide researchers through its Research Viewing Service and has secured exemptions from donors to allow this use. However, many donors are not the rights holders and a general exemption to be

able to make any material we hold available for research access to bona fide researchers and the general public would be invaluable.

c) ***Are there specific barriers to licensing in the main forms of IP currently used: patents, copyright, trade marks, and designs?***

The greatest barrier to licensing of film material is knowledge of the current or past rightsholder. Due to the fragmented structure of Britain's film industry, with many companies being established but producing few films and with a high mortality rate, there are works in our collections where the production company has ceased to exist and no successor company owns distribution rights.

d) ***Are there barriers to licensing IP on grounds of cost? What drives these costs?***

Yes, but these costs are generally responsive to market conditions. However, there are clearly other considerations which a public body faces in negotiating rights where we wish to offer a not-for-profit service and cannot pay a market price. We have sometimes experienced an unwillingness to trade from larger companies for whom the administration cost of the transaction exceeds the price we are able to pay.

e) ***Are there specific barriers to licensing IP in your sector?***

Yes, as per sections [a] and [d]

4. How IP is challenged and enforced

g) ***To what extent is the risk of litigation a factor in your organisation's investment in innovation?***

For a number of years the BFI has considered utilising the fair dealing clauses in the 1988 Copyright Designs and Patents Act to facilitate the development of educational materials for classroom use in the development of the media education curriculum. The possibility of legal action has militated against any such developments.

SPECIFIC ISSUES

Current term of protection on sound recordings and performers' rights

The BFI holds to the basic principle that there should be an equitable trade off between the rights of authors and greater social and citizen benefits.

It has to be acknowledged that there is an anomaly in terms of protection for sound recordings, and we would canvas the need for uniformity in this age of convergence. However we are not convinced that there is a proven case for term extension, and believe the Review team should review the costs and benefits of change of the term and assess this against the status quo before making any recommendations.

We are particularly mindful of the situation in the US which provides for author incentive differently from the EU so that the producer owns the copyright in any work and those who make a creative contribution work for hire.

This system also removes the variability of term protection afforded through the focus on the three principals in a film: the writer, the director and the writer of any original

music. We would support proposals to align duration of copyright term from release date.

Copyright exceptions – fair use / fair dealing

In recent years, with the boom in the DVD market, Archives have become a primary source for rightsholders to materials which they did not conserve on first release because at that time this medium's output was often seen as ephemeral

It is our contention that there is a need to recognize the work of, and public money spent over many years on, film archives both in the past and in the future and that this role needs to be better validated through a vesting of a range of non-commercial use rights, including educational use rights, in the collections of those Archives. We have been heartened by recognition at the European Commission of the industrial as well as cultural role of Archives, and the recognition of the value of the cinematographic heritage through the passage of the and European Council and European Parliament Recommendation (2005/865/CE) on 'film heritage and the competitiveness of related industrial activities'.

In more specific terms, the lack of uniformity in the transposition of Section 5 of the EU Copyright Directive into national law across the European Union is, in our view an unsatisfactory state of affairs. One of the exceptions, which the UK did not have in the CDP and decided not to include when the Directive's provisions were drafted into our national legislation, was the right for Archives to make digital copies. The exception in question is para 5(c): "in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives which are not for direct or indirect economic or commercial advantage". This has left us in the unfortunate position of being unable in the UK to implement a subsequent provision of the European Parliament and European Council Recommendation (2005/865/CE) which suggests that Member States should make deposited cinematographic works accessible for educational, cultural, research or other non-commercial uses of a similar nature by 'adopting the necessary legislative or administrative measures to allow designated bodies to make deposited cinematographic works accessible for educational, cultural, research or other non-commercial uses of a similar nature, in all cases in compliance with copyright and related rights'. We would welcome a clear statement from the Review team on this matter.

In a related issue, one of the problems faced by the BFI is 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. The 'Amending Statutory Instrument 1989 no. 1212 [The Copyright (Librarians and Archivists) (Copying of Copyright Material) Regulations 1989]' gives a legal right to copy to libraries and museums for a published work and certain unpublished works. We are keen that this Statutory Instrument be amended to include the copying of film and television material and would request a clear statement from the Review team that Parliament should remedy this situation

Copyright – digital rights management

We subscribe to the general principle that there is a public interest in achieving interoperability between DRM systems. In our view, it is an issue for competition policy as there is a consumer interest in protection against the market power of any dominant player in the market protecting a business model through either chilling innovation or abusing that position to inhibit market entry.

Copyright – orphan works

As an archive one of our main concerns is to ensure that we do not transgress the laws of copyright. Legal title to many films in the Archive can often be difficult to establish. We would like to ask the Review team to consider a public interest option to Archives allowing at a minimum non-commercial use of this material on any platform, and at a maximum the possibility of exploiting material commercially but through an escrow account of a proportion of any income providing for compensation to any rights holder subsequently identified.

We are particularly concerned at the legal costs currently associated with copyright tribunals or establishing *bona vacantia* in titles

Legal sanctions on IP infringement

Our main concern is to ensure the continued growth of Britain's creative wealth of nation and believe this can be achieved working within the existing IP framework with small adjustments to take account of the potential offered by technological advance. We would be concerned at any legal sanctions of IP infringement which might be seen to chill software, platform or content innovation.

Coherence between competition policy and IP policy

As noted above, we believe there is a link between IP policy and competition policy which could have problematic industrial and social consequences. Mindful of the need to sustain innovation and develop our knowledge economy, and the importance of diversity and value in our culture to enhance the skills of the workforce needed for Britain to compete successfully in the 21st century, we would hope the Review team take especial account in its recommendations of any lobbying for measures which would be anti-competitive and inhibit innovation.

RP
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