

# Gowers Review of Intellectual Property - Call for Evidence

## Summary of Main Concerns

### 1. Registered Rights:

#### More precisely and clearly defined

- **Patents:** a more robust examination procedure to avoid broad and vague claims is we believe essential particularly in the broadcasting and computing fields. Further in such fast developing areas, we query whether a 20 year monopoly is appropriate.
- **CTMs:** we would like to see stricter testing of the intent to use criteria to eliminate the granting of unjustifiably wide specifications and a more robust approach to descriptive marks.
- **UK trade marks:** we support the continuation of examinations on relative grounds as this gives greater certainty as to the validity of the mark.

#### Encouragement and better use of new technology

- **UK trade marks:** offering a discount on fees for filing online would encourage use of this service which in our experience saves time and costs. More information on the website comparable to that which is available from OHIM would also be welcome.

#### Domain Names

- The continual introduction of more TLDs is causing trade mark owners like ourselves considerable time and expense but we doubt if they are of any economic or other benefit to commerce generally or society as a whole. We think that there should be no more new TLDs.

### 2. Licensing of Copyright

- **Releasing archive material on new platforms:** we would like mechanisms put in place so that we can re use material in our archives in situations where we cannot trace the contributors or where one of the contributors is unreasonably refusing permission. We have suggested various solutions to these situations in our response – refusal of permission (pages 6 and 7) and orphan works (page 12).
- **One stop shops for collective licensing:** are of enormous benefit enabling us to enter into one agreement to cover all platforms on which our programmes and services are distributed and all jurisdictions in which they are accessible. This would be aided by the recognition that the applicable law in relation to simulcasting is the country of origin and that the Commission's recommendation on collective cross border management of copyright and related rights does not apply to broadcasters.
- **Inappropriate licensing by publicly funded institutions:** is, in our experience, often of dubious legality, uneconomic and a hindrance to creativity.

### 3. Enforcing/Challenging Rights

- **Trading Standards:** we would welcome greater powers and resources for Trading Standards to carry out enforcements.
- **Costs awards in the UK Patent and Trade Mark Registries and OHIM:** although we agree that costs awards should be capped we do believe that the cap should be more realistic to encourage greater use of their powers but also to discourage vexatious claims.
- **CFAs:** are having a chilling effect on the willingness of broadcasters to rely on copyright exceptions such as fair dealing and reform is needed.

- **Procedural and evidential differences in other jurisdictions:** consistency with other jurisdictions, particularly within the EU, would make international enforcement much easier.

#### 4. Exceptions

- **Consistency:** we do believe that exceptions should be consistent so that the same exceptions apply not only to copyright but also to the database right. Greater consistency in particular as regards fair dealing across the EU would also assist the broadcast and sale of programming in those territories.
- **Updating:** certain copyright exceptions have not kept pace with technological developments. We believe that the references to premises in s.35 and s.70 CDPA 1988 is out dated in the context of new technology and that a limited private use exception should be considered to cover the ability to transfer legitimately obtained copyright material from one format to another (which only reflects what many people do and believe they are entitled to do in any event).
- **Conflict with technological measures:** we are concerned that there is no remedy if technological measures start to impede our ability to report the news or to criticise and review material freely, whereas there is such a remedy in relation to other exceptions. We believe this is an anomaly which needs to be addressed.

## **The BBC's response**

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

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

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

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

**(d) How do these costs compare internationally in your organisation's experience?**

**(e) Do you have any comments on the UK Patent Office fees structure for obtaining and renewing IP protection?**

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

**(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?**

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

### **1. Trade Marks**

(a) The process of registering a trade mark is relatively straightforward though it can become slow and expensive where there are objections from the Registrar on the specifications, or on absolute grounds, or as a result of citations raised on relative grounds, ie that there are potentially conflicting marks already on the Register.

(b) The UK Patent Office site is a very useful and informative resource. It enables basic searches for other UK marks and CTMs against mark, registration number, and proprietor (UK marks only). The OHIM website does have additional benefits which we would welcome being adopted by the UK Patent Office, for example an advanced search function which enables searches by agent names. Where a mark is opposed, it also provides information on the opposition, including the name of the opponent and the status of the opposition, including in some cases a link to the decision (though the site is not always up to date in this respect).

(c) In the UK, costs are driven up by the extensive examination process conducted by the Registrar. That said, there are considerable benefits to the more extensive examination procedure conducted by the UK Registry, as compared to OHIM (see below), and we generally regard UK marks as being more 'robust' than CTMs.

(d) and (e) Official fees (eg for filing new applications and renewing registrations) in the UK seem reasonable (in particular in relation to the additional payments for additional classes). They are roughly comparable with the US but lower than in many Middle Eastern and South American countries. They are also lower than under the CTM system, though this is understandable as a CTM covers 25 countries.

In the US and under the CTM system, there is however a discount for filing online. Filing online is of real benefit since not only does it reduce filing costs but also it reduces the possibility of error in the specifications in the process of transferring these into the Registry's records. Errors can lead to delays (since this sometimes requires marks to be readvertised) and to additional costs. It is possible to file a UK application electronically. No discount is offered for this but it would be welcomed.

(i) In comparison to OHIM and many foreign national Registries – India, China, Malaysia are examples of territories where there are very significant delays – the UK Patent Office is very efficient. On an application with no objections a registered mark can be obtained in under 6 months (advertisement for opposition purposes accounts for 3 months of this). The detailed examination conducted by the Registrar does mean that the process may be much slower than this, but an advantage is that there is a reasonable assumption that a UK registered mark is probably valid, subject to any non-use argument after 5 years.

We do though have concerns about the CTM regime. OHIM appears to give very little scrutiny to applications for CTMs and permits marks to proceed to grant which may be unlikely to achieve registration in the UK because they are too descriptive, or which claim broad monopolies in many classes and/or the specifications for which cover the entire class. In many cases it is clear that the proprietor has no intention to use such marks in relation to many of the classes for which it has applied or for the goods or services within those classes, because of the nature of the business they are in.

This has a number of repercussions. First, it potentially limits the pool of available marks for others to use. It is obviously necessary to take such marks into account when clearing similar marks because use of such a mark could constitute infringement and attract a claim even if there is no real commercial likelihood of confusion.

Secondly, it makes applications for similar later marks more vulnerable to opposition proceedings even where there is clearly no real commercial likelihood of confusion. Opposition proceedings can take a number of years to resolve (which delays registration of the mark), can be costly and even if successful, the costs then awarded bear no relation to the costs actually incurred.

Under the CTM regime, it is relatively straightforward to apply to cancel marks for non-use. This is because, provided a mark has been on the register for 5 years, the first step in cancellation proceedings after a cancellation notice is served is for the owner of the mark to prove the mark has been used. If they cannot do this, the mark will be cancelled. This practice, which has recently been adopted in the UK, is a quick, cheap and efficient way for third parties to remove marks from the register for non-use.

Nevertheless, this still means that the owners of such marks have a 5 year grace period during which their mark will act as a very effective deterrent to anyone considering using a similar mark. The fact that marks become vulnerable to cancellation in due course is of little benefit in a fast moving industry such as the media, where the defects in the CTM system still result in many potential marks being unavailable for use when required.

We would welcome a tightening up of the CTM examination process with stricter testing of the intent to use criteria and not the rubber-stamping of applications covering all goods and services in the class.

## 2. Patents

We comment on the broad scope of many patents under 2 (f) below.

### 2. How IP is used

- (a) What types of IP does your organisation use and why?**
- (b) To what extent do you seek multiple overlapping forms of IP protection?**
- (c) To what extent are these decisions influenced by sector-specific considerations?**
- (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?**
- (e) To what extent does the term of IP rights at the margin affect investment decisions?**
- (f) How well does the UK IP system promote innovation?**
- (g) To what extent does your organisation make use of other methods used by Government to encourage innovation, such as public funding?**
- (h) Are data on the use of patents and other forms of IP useful as a means of measuring innovation?**
- (i) Do you have any evidence as to the static or dynamic costs that IP rights (as statutory monopolies) impose on the economy?**
- (j) Have you encountered patents or other IP rights being used defensively, i.e. obtained not to develop products, but only to prevent others from doing so? Under what circumstances do you consider this acceptable?**

(b) and (c) Overlapping forms of IP protection.

The BBC will in certain cases seek both trade mark and design protection for a logo or the image of a character from a programme. Registered designs are quick and cheap to obtain so that it is possible to obtain the early protection of a registered right but design registrations will never be a complete alternative to trade marks for a number of reasons. First, Trading Standards have no power to enforce registered designs whilst they do have powers in relation to trade mark offences and this is a powerful weapon against counterfeiters. BBC Worldwide relies to a great extent on Trading Standards to enforce its rights against counterfeiters. It would be very costly both in terms of time and expense for BBC Worldwide to pursue counterfeiters through the civil courts. Secondly, it is not particularly easy for third parties to search for registered designs so they do not have the same deterrent effect as a trade mark and nor do they last indefinitely.

(f) Promotion of Innovation

In the recently published White Paper – A Public Service for All: the BBC in the digital age – six new public purposes were confirmed for the BBC, one of which was “Building Digital Britain”. As part of that purpose, the BBC is urged to continue to play a leading role in technological development. In the Green Paper’s description of Building Digital Britain, this specifically included developing new interactive and web-based services, as demand grows for new media, such as broadband.

The BBC does however have serious concerns that in certain cases the IP system can create an insurmountable obstacle to the development of new technologies and have the effect of stifling innovation rather than promoting it. There are two sets of circumstances where this is seen to be happening.

## 1. The unduly broad scope of protection of patents and patent applications in the computing and broadcasting fields.

During this time of very rapidly developing technology, patents that are granted which are very broad in scope can cause significant and costly obstacles to product and services development. Whilst wishing to invest in new ways of delivering content to the public for the benefit of licence fee payers, the BBC must also ensure to the best of its ability that it is not risking licence fee payers' money by infringing third party rights. It has been considered advisable to carry out risk assessments prior to making any key business decisions but the high volume and broad scope of many of the patents and applications in the computing and broadcasting fields means that this can be very difficult. Risk assessments tend to be very costly and can often be inconclusive. The BBC was recently quoted £0.5m from a firm of patent attorneys for a risk assessment with only an indication of the level of risk being offered as the result. This figure does not of course take into account the additional internal costs that are incurred with BBC staff who are experts in their field taking time out from their development work to assist with such assessments.

The risks associated with developments in this area have been highlighted by the Blackberry case in which the company Research in Motion was sued for patent infringement and had to pay just under £350 million in settlement to the patent owner.

The BBC clearly cannot expose itself to high levels of risk and must take a cautious approach when assessing new propositions. For example, the BBC developed a product a couple of years ago that had the potential of 7 different levels of complexity. However, because of doubts about the patent situation and the cost of further assessment of the risk, it was never developed for use beyond level 4.

The BBC has also had to take patent opposition proceedings in the EPO in the case of a patent that was very broadly drawn and granted in the EPO despite observations filed by us as to its invalidity. The patent had been asserted against us and if allowed to stand could have had wide repercussions across a range of our new media applications. The opposition was successful but time consuming and costly.

Also of concern is the ability of patent owners to 'sit' on their patents before enforcing and claiming damages backdated to cover up to 6 years use. The BBC has been advised that since ignorance of a patent is only a defence in very limited circumstances, it could be possible that despite conducting a risk assessment, the BBC could still be incurring a liability even though the particular patent in question had not come to light.

Three possible solutions to these problems could be envisaged. First, we would welcome a more robust examination process with examiners being assisted if necessary by experts in the particular field resulting in narrower, more specific patents. Secondly, we would question whether in such an area of fast developing technology, a 20 year monopoly is in fact appropriate. Thirdly, in order to reduce the uncertainty, we would suggest that the general period for which a claimant could back date a claim for damages could be reduced from 6 years to 3 years.

## 2. The high cost of patent fees being sought by Patent Pools.

As is acknowledged in the introduction to this call for evidence, companies are increasingly collaborating and using patent pools to licence the resulting technology. This is particularly prevalent in the development of open standards for new technologies of which the BBC is very supportive. However, despite the requirement that such patent pools licence on fair, reasonable and non discriminatory terms the high costs being charged by the licensing administrators of the patent pools on behalf of the patent holders can also act as a bar to innovation.

A recent example of this is the dispute over licensing fees for MHP (Multimedia Home Platform), an open solution standard adopted by DVB, and promoted by the EU for the interface for interactive television. This standard is already being used in Italy and (to a lesser extent) Germany and was scheduled for introduction in France and Spain. However, the level of fees recently announced by the licensing administrator are considered too onerous and are now having a serious effect on the take up

of the technology. Indeed the level of licence fees that is being touted for MHP is sufficiently high that countries, such as France, who were considering using it are now seriously looking at alternatives. There are now genuine concerns that the standard will not survive.

This is not the only case in which this has happened. There are also concerns about the level of fees being charged by licensing administrators for MPEG-4 AVC and there were concerns about the level of fees for DAB in the days leading up to its launch.

Even where the level of fees can be negotiated down to something more reasonable, it still adds unnecessary delay into what is inevitably a faster-moving field.

If this is allowed to continue, it will significantly undermine the attractiveness of open standards in favour of proprietary solutions where you only have to negotiate with and pay one inventor.

### **3. How IP is 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?**

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

**(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?**

**(j) Does your organisation consider renewing patents using "licence of right" provisions in patent law (which entitle any person to a licence under your patent and reduce your renewal fees by half)?**

**(k) What could be done to improve "licence of right" provisions and business awareness of them?**

**(l) Do you have any experience of the compulsory licence provisions within current patent law? Are they effective? How could they be improved?**

Combined response to:

(a) How easy is it to negotiate licences to use others' IP for commercial or non -profit purposes? And

(f) Are there specific barriers to licensing IP in your sector?

The BBC is a volume user of third party intellectual property. We spend over £230M p.a on the acquisition of IP rights from programme contributors in BBC-produced programmes alone.

This expenditure is based on two major forms of contractual activity. First, programme contributors (e.g actors, writers, musicians and presenters) are engaged on individual contracts to contribute to a specific programme or programmes. The terms of such contracts may have been the subject of collective agreements with the relevant trade unions eg Equity or the Musicians' Union and will deal with the basic engagement terms including pay and specify any further payment that may arise if certain rights are exercised in making further use of the programme.

Secondly, the BBC acquires rights on a non-exclusive basis from collecting societies who have been given the ability to grant such licences by the original creators of the works. This is the case in relation to music rights, represented by the music collecting societies such as the MCPS-PRS Alliance and Phonographic Performance Limited.

The BBC has some 70 different licences and agreements covering the above and related activity. To illustrate the scale of this activity further, for example, approximately £60M is paid annually in engagement fees to several thousand performers and about the same amount is spent each year on collective licensing fees, covering for example the use of some 180,000 music items per week by the BBC.

Inevitably, in an operation on this scale, there is a degree of complexity. From the BBC's point of view both the effective collective administration of rights and the effective collective representation of particular groups of contributors are important factors in dealing as efficiently as possible with the necessity of acquiring and licensing a complex range of rights on a high volume basis.

Generally, within the present system, the BBC has been able to acquire and license the IP it needs in respect of programme contributions. However, the sheer technological potential of the digital environment has increased the degree of strain on the BBC in the present system. This is explained further below. In addition a modification to the present arrangements is proposed which the BBC believes would create a better balance between the interests of rights-owners, users and BBC licence fee payers.

Digital technology has created opportunities for the BBC which have significant implications for the negotiation and licensing of the IP residing in programmes e.g:

- (i) The opportunity to launch and operate new BBC services (e.g BBC Three, BBC Four, CBBC, CBeebies, the new BBC digital Radio services – 1Xtra, 6Music, BBC7)
- (ii) The opportunity to make its programmes and services widely available on multiple distribution platforms, including as a part of making available services, so that licence payers have an enhanced degree of choice about how and when they use and consume BBC programmes and services.
- (iii) The opportunity to increase access to the BBC archive of TV and Radio programmes, through initiatives such as the Creative Archive licence (more fully described on page 15 below).

The BBC is able to anticipate these developments and negotiate the changes that are needed to our licences and agreements to ensure we have the rights to include future programmes on new services and to be distribute them in a multiplicity of ways.

However, there are contributions integrated into archive programmes in relation to which the BBC requires additional rights to take advantage of these opportunities and where at present an underlying rights-owner does retain the ultimate ability to refuse permission.

This will arise where the contributors to an archive programme were contracted on terms which did not include the modern right of communication to the public and who can refuse the BBC permission to include the programme in a making available service - either following a broadcast transmission (a "catch up" service) or as part of a stand-alone archive service. Typically, the types of uses technology now makes possible would not have been contemplated at the time the contract was entered into – these now range from temporary, on-demand viewing of archive content, download to own, or use under a Creative Archive-type licence which allows non-commercial personal copying, adaptation and sharing.

The BBC view is that in relation to the rights attached to contributions which are integrated into archive programmes the ability of certain individual rights-owner to effectively veto the use of a programme within the digital environment represents a lack of balance within the present arrangements. It affords the potential (at least) for unreasonableness on the part of an individual rights-owner to override the wider legitimate interests of (a) the BBC, to make its programmes and services as widely available as approved, (b) the licence payer, to enjoy greater choice and increased access to and use of the BBC archive of programmes and (c) other programme contributors and rights-owners who would permit wider availability of the relevant programmes.

The BBC believes that the present arrangements should be amended to provide for a simple legal mechanism allowing broadcasters to more readily make use of their own archive productions, subject of course to the payment of equitable remuneration and respect for authors' moral rights. Without being prescriptive, examples of a possible legal mechanism include a "collecting societies solution", providing for specific defined rights in archive productions to be administered only by collecting societies or similar representative rights negotiation bodies, or a provision for the mandatory retrospective application of existing, equitable collective agreements relevant to the class of rights concerned.

In our view a simple provision of this kind would create more balance in the present regime and benefit the majority of stakeholders in archive programmes and more particularly BBC licence payers, by facilitating easier access to the rights required for the re-use of archive programmes.

(i) Are there barriers to trade and exchange of IP internationally?

At the European level there are two specific issues which have a particular impact on the ability of the BBC to distribute programmes and services outside the UK:

(i) For broadcasters, online simulcasting is analogous to distribution by satellite and we believe that the applicable law in the country of origin, not the parallel application of the laws in the countries of reception, is the appropriate model. We would welcome legislative confirmation of this in accordance with the principles of the European Cable and Satellite Directive. The benefit of this confirmation to the BBC would be that we could obtain "one stop shop" licences for the relevant rights in respect of online simulcasts which were originated by the BBC in the U.K and have certainty that any extra U.K access to the services was licensed.

(ii) The Commission's specific recommendation on licensing for online music services\* might be appropriate in relation to the licensing of music download services. However, it will have the undesirable consequence of making the licensing system more complex for broadcasters seeking to acquire rights in the world-wide repertoire of musical works to distribute the programmes and services incorporating those works across a multiplicity of platforms. Again, the Recommendation militates against the operation of efficient one stop shops where the BBC is able to enter into one agreement covering the multiplicity of platforms on which BBC programmes and services are now routinely distributed. The Commission have advised us that the Recommendation was never intended to apply to broadcasters and we would welcome official confirmation that it does not.

\* Commission recommendation on collective cross-border management of copyright and related rights for legitimate online music services, 18 May 2005.

#### **4. How IP is 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?**

**(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?

**(d) To what extent do you use IP litigation insurance? How effective is it?**

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

**(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?**

(a) There are some specific problems with the enforcement of IP rights:-

- Copyright legislation can be ill suited for dealing with the most pressing problem faced by those investing in or creating original content in the audio/visual media; that being online copying. With a copying system like BitTorrent, each computer in a peer2peer system only holds/provides to the requester a small /insubstantial amount of the whole to be copied. Perhaps this could be addressed by a provision in the legislation making it an infringement to act in concert to enable copying/to conspire to enable copying.
- Tracing cybersquatters/infringers: Where individuals are posting content/cybersquatting/posting software which circumnavigates copy protection or are posting the instructions how to do so on discussion boards/websites it is possible to get the content/software/discussion removed (if it is a reputable ISP) but it is not possible to obtain the identity of the party actually posting the content/software/information, who is also likely to be posting this content/information/software elsewhere. The only way to do so is to apply for a disclosure order against the ISP for details of the infringer and this requires the rights owner to swear it is for the purposes of bringing proceedings. However the copyright owner may only wish to send a cease and desist letter rather than commit at that stage to taking legal action.
- The effect of the Enterprise Act has been to prevent rights holders from using information about infringers supplied by enforcement authorities for civil action. There was extensive consultation on this at the end of 2005 and it is anticipated that amendments to the legislation will be made.
- The need to avoid the threats provisions in the UK Trade Marks Act (also in the Patents Act and the unregistered design right provisions of the CDPA) makes it difficult to state clearly in a letter before action the rights on which one is relying and the action which will be taken if infringement continues. We would query whether the benefits of the threats provisions outweigh the disadvantages.

(b) Costs

Litigation and Conditional Fee Arrangements.

Civil litigation in the UK is expensive and costs can therefore act as a deterrent. The introduction of Conditional Fee Arrangements (CFAs) has also had a chilling effect. CFAs allow solicitors to charge an uplift of up to 100%, depending on the risk involved, on the fees they actually incur should they win the case. These costs are then payable by the losing party. The BBC has made submissions on the need for reform of CFAs to the Select Committee for the Dept of Constitutional Affairs and the issue has also been referred to the Civil Justice Rules Committee. These submissions related to publication cases in the context of defamation and privacy, but the problems are equally acute where copyright exceptions such as fair dealing are relied on. In a recent case against the BBC (Fraser-

Woodward v BBC, judgement 23 March 2005) copyright infringement was claimed when photographs were commented on and shown, without permission, in a programme about the tabloid press and celebrity photographers. The damages claimed were £15,000, but the claimant's lawyers' costs were estimated at the early allocation stage as over £152,000. Had the BBC lost the case, we could have faced a bill of over £300,000 if an uplift of 100% had been applied. The BBC fought the case (and won) on the point of principle that the ability to rely on fair dealing (whether for the purposes of criticism or review, or reporting current events) is a vital editorial freedom without which copyright works could only be used on the owners' terms.

Patent Office and OHIM costs awards.

In the trade marks registries (UK and CTM), the costs that are recoverable by a successful party in oppositions and other actions are capped at a very low level. This means that a successful party is unlikely to recover anything near its actual costs of conducting such an action. It also means that fear of a high costs order does not operate as a deterrent to vexatious litigants. While we appreciate the benefits of capping costs, the levels at which such costs are currently capped both in the UK and at OHIM should be reviewed.

#### (h) International Enforcement

The principal barriers to international enforcement are costs and procedural and legislative differences. Different evidential burdens are also imposed in different territories. For example, BBC Worldwide has experienced problems with enforcement issues in Spain. BBC Worldwide's Spanish lawyer had to travel from Madrid to the Canary Islands because there had been a large seizure of allegedly counterfeit Teletubbies products. The Spanish Customs would not provide a digital photograph, samples, or any information in advance. When the lawyer got there, she discovered that the products were not fake Teletubbies at all, but fakes of some other brand not owned by the BBC. BBC Worldwide cannot afford to waste money in this way, so the refusal by Customs to provide sufficient information is a disincentive to taking action on counterfeits. In the UK, Customs will provide details of the importer, which may only be used by the brand owner for the purposes of confirming whether the goods are counterfeit but can on occasion dispense with the matter altogether (for example where the importer is the authorised licensee of the brand owner). Customs are also prepared to send a sample from the shipment to the brand owner, in order for them to examine the article and confirm its counterfeit status. Both of these actions avoid unnecessary trips to the port and ensure that the person examining and confirming the status of the goods is the one best placed to make this assessment.

Further, in Spain, in order to award damages from an infringer the judges will often look to there being genuine product of the same type. If the counterfeit product using our brands is not one that we would have licensed, or we do not have a current licensee in the territory at the time of the infringement, there have been occasions where the court has taken the view that no damages should be awarded. The system of evidence in Spain is also very "document based" – original contracts have to be provided, translated and notarized. Frequently these documents are quite long and complicated and much of the content is irrelevant to the actual infringement but the physical document is viewed as necessary evidence whilst an extract of the relevant parts or a witness statement explaining how business is conducted in the territory is not acceptable.

The more that different jurisdictions (particularly within the EU) can be consistent as to their procedural and evidential requirements, the easier enforcement will be.

## SPECIFIC ISSUES

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

**Background:** The Review will fulfil the Government's commitment to examine whether the current 50 year term of protection on sound recordings and performers' rights in sound recordings is appropriate, in the light of its extension to 95 years in a number of other jurisdictions.

**(a) What are your views on this issue?**

**(b) Is there evidence to show the impact that a change in term would have on investment, creativity, and consumer interests?**

**(c) Are you aware of the impact that different lengths of term have had on investment, creativity, and consumer interests in other countries?**

**(d) Are there alternative arrangements that could accompany an extension of term (e.g. licence of right for any extended term)?**

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

Reference has been made to the longer term of protection for sound recordings in the United States (although we are not aware that any other significant jurisdictions have followed suit). However, the form of protection in the U.S differs from that in the United Kingdom in that there is no exclusive right for sound recordings and therefore record producers have no equivalent PPL income in the US, so a comparison of term is not a like for like comparison.

We would also comment that the 50 years term is at present consistent across all the member states of the European Union. Any increased term of protection would therefore need to be adopted across the EU, or detract from the objective of increased copyright harmonisation in Europe.

A further comment is that in the UK (and in other European territories) there is a 50 year term of protection for other types of rights including performances and broadcasts (the so-called "neighbouring rights"). It would not be reasonable in our view to extend the term of protection for any one of this "class" of rights in isolation, without giving equally careful consideration to the position on the others.

Having said that there are certainly arguments in favour of extending the term of protection for these rights. This would bring the period of protection more into line with the underlying rights that may exist in recordings, performances and broadcasts such as those of writers and composers.

- **Copyright exceptions - fair use / fair dealing**

**Background:** There are a number of exceptions to copyright that allow limited use of copyright works without the permission of the copyright holder.

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

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

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

**(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?**

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

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

(a) – (c) – The BBC is both a rightsholder and a user of rights and, subject to the few specific points below, we consider that the current regime of copyright exceptions provides an adequate balance between rightsholders and users. We would welcome the further harmonisation of exceptions across EU member states (for example there is no exception to cover parody in the UK). This would facilitate the broadcast and sale of programmes containing material included under, for example, fair dealing.

(c). For broadcasters fair dealing is an important exception which enables the editorial freedom to comment on and criticise copyright works without the owner’s permission. As we have already pointed out in our submission to the EC Commission dated 10 March 2006 as part of their evaluation of the Database Directive (copy attached), we believe that the database right should be subject to the same exceptions as copyright and currently there are no exceptions for reporting current events or criticism and review.

(d) In relation to the issue of a private “fair use” exception, we would like to make some observations based on recent experience. The BBC’s Integrated Media Player (or iMP) is an application in development offering UK viewers the chance to catch up on TV and radio programmes they may have missed for up to seven days after they have been broadcast, using the internet to legally download programmes to their home computers. iMP uses peer to peer distribution technology (P2P) to legally distribute these programmes and DRM software to ensure that seven days after the programme transmission date the programme file expires and users will no longer be able to watch it. The DRM also prevents users emailing the files to other computer users or sharing it via disc.

Initial user feedback part way through the trial suggests that users feel that the use of DRM is inappropriate and unnecessarily restrictive. This is because they believe that there is already a private use exception in UK law, and do not appreciate the limitation of the time shift exception in Section 70 CDPA 1988 and that it only applies to broadcasts as opposed to any communication to the public. If this is to remain as it is, this underlines the need for education in this area.

Secondly, although not specifically addressed by the iMP trial, we also believe that in relation to the example given most people would think that they were entitled to copy music CDs which they have purchased onto their PC or MP3 player in any event. It would seem logical to have a private “fair use” exception that, at least, reflects that reality so that where a users have legitimately obtained a copyright work for their own private use they can transfer it on to another device to listen to or view it. Although this activity is currently tolerated by the record industry, without such an exception copyright owners may be tempted to prevent such use by DRM or other copy-protection.

Thirdly, we do consider that the use of the word “premises” as in “domestic premises” in section 70 (and again in section 35A in relation to the premises of educational establishments which we mention below) is out dated in the context of new technology.

(f) The BBC is a member of the Educational Recording Agency (ERA), the licensing agency which administers the licensing scheme in accordance with section 35 CDPA 1988. Whilst ERA welcomed the amendments to section 35 introduced when the Copyright Directive was implemented in the UK as acknowledging the new ways in which educational establishments wished to use the programmes that they were recording, it did not take fully into account the reality that many educational establishments have courses that involve distance learning with students spending much of their time off site. The limitation that the programmes can only be communicated within the educational establishment’s premises is not realistic. We therefore fully support ERA’s request that this issue be looked at and we refer to ERA’s letter to the Patent Office of 16 January 2006, as well as ERA’s response to the Gowers review.

· **Copyright – digital rights management**

**Background: Increasingly digital media content is distributed with digital rights management (DRM) technologies that can enable rights-holders to track usage and prevent unlicensed copying by technological means. However concerns have been raised about interoperability and that such technologies may impair the content consumer's legal rights. For example they may be unable to take into account exceptions to copyright, the ultimate expiry of copyright term, or the future evolution of technology. They may therefore undermine legitimate rights to access digital content, now and in the future. (NB: We are aware of all formal submissions that have been made to the All Party Parliamentary Internet Group on this issue.)**

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

We are not aware that the BBC has been prevented from carrying out any permitted act in relation to copyright protected material (for example fair dealing for the purposes of reporting current events and for criticism and review) as result of DRM or other copy protection systems. However, with the likely increase in the use of DRM by rights holders as a means to control the release of digital content, the ability of users of content, such as the BBC, to rely on the fair dealing exceptions in order to make news programmes and programmes of criticism and review, may well be compromised. There is in this respect an anomaly in the Copyright, Designs and Patents Act (CDPA) as amended by the Copyright and Related Rights Regulations 2003. Section 296ZE provides a remedy where effective technological measures prevent permitted acts. This section does not however cover all permitted acts but only those listed in Part 1 of Schedule 5A. That list does not include the fair dealing provisions contained in section 30. This means that if we did in the future find that copy protection systems were hampering our ability to report the news or to criticise or review material freely, we would have no recourse. We raised this issue with the Government at the time the EU Copyright Directive was going through the EU process and later when we were consulted about the UK Regulations. It was accepted that it was an anomaly but it has remained.

• **Copyright – orphan works**

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

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

The BBC can experience significant difficulties when trying to identify and/or trace owners of copyright in its archive content and there is currently no mechanism which would allow the BBC to use that material even if after having made reasonable enquiries, the owner cannot be identified or found. This can limit considerably the material that the BBC is able to release from its archives, either in programming or in projects such as the Creative Archive.

There are a number of possible solutions. One approach might be for legislation to provide that where it has not been possible to identify the rights owner by reasonable enquiry the limitation period runs from the prospective licensee's first use on a once and for all basis (which would also cover uses authorised by the prospective licensee). This would at least give us some certainty as to any possible liability in respect of the use after a fixed and certain period of 6 years. Another approach, but which would have to be financed, would be for a public database to be set up where prospective users could post details of works in respect of which they had been unable to trace a rights owner after reasonable enquiry. If after a certain period a rights owner has not been able to prove ownership the work would be treated as being out of copyright or subject to a compulsory licence at a reasonable royalty payable to the appropriate collecting society.

Another possibility could be to amend CDPA s57 e.g. by extending it to cover all copyright works and/or reducing the period from the author's assumed death from 70 to, say, 20 years. The ambit of the section would also have to be widened to include works where the identity of the author is known but the rights owner cannot be traced.

- **Trade Marks – international issues**

**(a) To what extent does your organisation register its trade marks at the European rather than national level?**

**(b) Could the UK trade mark system be improved to work better alongside the European system?**

(a) We register at both the national and European level. Generally, subject to Registry objections and oppositions, a UK mark will be registered more quickly than a CTM. Further, there is more chance of a CTM being opposed because of the potential for conflicting rights in one of the Member States. However, in some circumstances, where the likelihood is that the UK Registrar will take a more restrictive view than OHIM and is unlikely to allow registration, we may apply for just a CTM.

(b) The system does work quite well alongside OHIM but as we have mentioned above we do have concerns about OHIM and would prefer it to take a stricter approach to applications than it currently does, particularly in relation to the intent to use criteria. We understand that the UK Patent Office is currently conducting a consultation as to whether it should stop taking relative grounds into consideration and leave such matters to be raised by third parties claiming prior rights at opposition, as OHIM does. We would not welcome this and we will be responding to the consultation separately.

- **Designs – registered designs and unregistered design rights**

**(a) To what extent does your organisation rely on registered designs? And on unregistered design rights?**

**(b) To what extent does your organisation register its design at the European rather than national level?**

**(c) To what extent does your organisation rely on the European unregistered design right rather than the national UK unregistered design right?**

**(d) Could the UK registered design be improved to work better alongside the European system?**

**(e) Could the UK unregistered design right be simplified to work better alongside the European unregistered design right?**

**(f) Do you see a useful role for the UK unregistered design right alongside the European design right?**

(a) We rely on both registered and unregistered designs. For programmes perceived to be commercially valuable we have started to register designs of key logos and the images of key characters likely to be exploited by merchandising.

(b) This would depend on the plans for the property.

(c) Where we did not have a registration we would rely on whichever rights were available to us – ie, both European and UK unregistered design right if applicable.

(d) to (f) It is complicated to have both unregistered rights, which apply different criteria and have different terms, and it would be greatly preferable to only have to deal with one system.

- **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 on online infringement be the same as those relating to physical infringement?**

(a) Criminal trade mark infringement enforcement by Trading Standards is centrally funded, whereas criminal copyright infringement is not. This leads to copyright being taken less seriously by habitual infringers.

Performance rights: In general this legislation is poorly drafted and confusing. As a specific example, the s183 defence (that the Defendant is unaware of the lack of consent) applies where the performer was filmed without his consent, but not where the use of his/her performance is without his/her consent (ie where he/she agreed to the filming but not to the method of exploitation). Similarly good faith protects the user from liability on damages where he was not aware of the existence of the performance rights (s191J), but apparently not where the user was unaware that use of the rights was outside the terms of the consent.

(b) Criminal sanctions should be the same for online infringement as off line. There is no logical justification for treating this differently.

- **Parallel Imports / International Exhaustion**

**Background: European law does not allow firms to use trade mark or copyright law to prevent their goods sold in one EEA Member State from being imported and resold in another Member State – i.e. they are not able to segment the EU market. However European law does allow the use of trade mark and copyright law to restrict the imports to EU Member States of goods sold outside the EEA. It also specifically inhibits EU Member States from legislating to remove such import restrictions at the national level – so called “international exhaustion” of trade marks or copyright. There has been a good deal of debate, both here in the UK and at EU level, about the costs and benefits of removing restrictions on parallel imports. There is a further issue of firms taking advantage of variations in prices on pharmaceutical products across the EU and repackaging drugs bought cheaply elsewhere within the EEA to resell within the UK.**

**(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?**

On occasion we do come across goods intended for one territory being sold in another. Within Europe we have encountered goods sold in the EU which were licensed for sale only in the US. This can cause difficulties with local licensees, whose market is eroded by the (generally cheaper) imports. In Korea we have encountered a similar problem with legitimate licensed goods from China being imported into Korea. Under Korean law it is not possible to take action in relation to such parallel imports. Despite this, licensees tend to expect us to do something to safeguard their market and are unhappy to be told that we cannot do so. In extreme cases, large scale parallel imports have destroyed the local market and we are unable to find licensees in the territory. A solution to this, of course, would be to appoint licensees for a whole region rather than limited to one territory, but this can cause difficulties with branding (where the programme has a local name in each country) and the need to carry all notices on the product in numerous languages

International exhaustion would be a particular concern where, in order to raise sufficient funding for a TV programme we may seek investment from a non-UK co-producer. In exchange for this investment, there will often be a division of territories for the purposes of exploitation. For example with a US or Canadian co-producer we might agree that they will have the exploitation rights in North America, possibly also South America, and that we will have the rest of the World. They will therefore carry out

their own exploitation in their market and may have slightly different quality or style criteria as appropriate for their region, and will produce products that meet the legislative requirements of the particular territory. The parallel imports may therefore be the products authorized by our co-producer over which we have had no control and which may be slightly different in style or quality to the products familiar in the local market. Any disappointment caused by this to the purchaser will have a damaging effect on our reputation.

## **Other Issues**

### **1. The Creative Archive**

The Creative Archive licence is relevant to three areas of interest to this review: encouraging creativity and innovation, effective licensing, and clearance requirements.

#### **Creativity and Innovation**

The introduction to the call for evidence notes that 'It has been suggested that copyright exceptions lack clarity and are ill equipped to deal with ...technological challenges. Furthermore public awareness of the boundaries of lawful use is low, and legal sanctions on infringement appear to lack clarity and consistency across different forms of IP'. The call for evidence also recognises that "consumers themselves increasingly play a part in developing innovative goods and services".

However, consumers are likely to be inhibited if they do not have access to suitable audio-visual content, or if they are uncertain of their rights. There is currently a lack of engaging, accessible and affordable content which consumers can be confident that they are permitted to use and/or to share for creating their own works for personal, non-commercial purposes.

Launched in April 2005, the Creative Archive Licence is a specific initiative by the BBC, working with others, to address these issues within the framework of existing copyright law. The BBC, the British Film Institute, Channel 4, Teachers' TV and the Open University are all making content available under the Creative Archive Licence.

Our joint aim is to deliver a substantial pool of legally cleared still, moving image and audio content to the UK public to stimulate media literacy, individual creativity and education. We also believe that where the commercial rights can be cleared by a reasonably simple and straightforward mechanism, some individual users of Creative Archive Licence content will identify opportunities for entrepreneurial innovation, stimulating new markets for content generally as a result.

#### **Licensing**

The Creative Archive Licence sets out a framework of user rights for pre-cleared archive film, television and radio content. It allows the downloading and personal use (including manipulation) and sharing of archive content for non-commercial purposes, including learning and personal interest.

The BBC is currently piloting its use of the Creative Archive Licence through the phased release of nearly 1,000 extracts of factual archive content on [bbc.co.uk](http://bbc.co.uk). When the pilot ends in September, it is anticipated that there will have been about 500,000 downloads of programmes and extracts. When the project undergoes a Public Value Test the effectiveness of the Licence may well be a key factor in determining the future of the scheme.

Current data suggests that users understand and accept the terms of the licence. It is written in clear and simple terms, which help users to understand the principles of copyright law and to respect the restrictions around the permitted uses.

#### **Clearances**

Schemes such as those run under the Creative Archive licence are dependent on the willingness of contributors to make archive content available for the uses contemplated by the licence.

While the BBC's experience is that many contributors are more than happy to offer appropriate content for use under the Creative Archive licence, taking the view that it will give them a higher profile and stimulate creativity (both generally and potentially to stimulate new markets for their content), some minority contributors to the same content are currently able to veto such use, thus keeping it locked in the BBC's archive. We refer to the comments under 3(f) above (page 6). In the context of the BBC, we would consider "appropriate" content to be content which has already been broadcast in the UK, which has come to the end of its apparent commercial life and which is made available to end users in a sub-broadcast resolution.

The potential cost and complexity of clearances for schemes such as the Creative Archive are also a concern, both for the personal uses contemplated by the Licence and for more innovative and/or entrepreneurial uses for which a complicated clearance process could be significant deterrent.

The following 3 factors favour a simple legal mechanism for broadcasters to more readily make use of their own archive productions (subject of course to equitable remuneration being paid): (1) the end-use will be for personal, non-commercial purposes only and either be free of charge (where public service) or provided at minimal cost to consumers; (2) the time costs involved in clearing the volume of otherwise suitable archive content from the BBC archives alone; (3) the benefit to the creative health of the nation in as diverse a repertoire as possible being made available.

## **2. Domain Names**

A new top level domain (TLD).eu., has recently been introduced to sit alongside the existing TLDs (.com, .org, .info, .biz etc). It has raised for the BBC the question of whether any new TLDs are actually necessary and who benefits from their introduction.

As the owner of a large number of brands (from channel titles to genre, project and programme titles), the introduction of the .eu TLD has proved to be a very expensive and time consuming exercise for the BBC. The BBC took the view that it was important to apply for .eu domain names in relation to at least its key brands (especially childrens' brands) for brand protection reasons (ie to stop others securing those names) rather than because the use of .eu forms any part of its current or future internet strategy. This is against a backdrop in which the BBC is faced with numerous examples of unauthorized use of its brands in domain names and on websites, for example the use of the name teletubbies.com to create a fake Teletubbies website, and wwwbbcnews.com for a campaigning anti-abortion website.

The application process for .eu, which was conducted in 3 phases, was complex and confusing.

In the first phase, only trade mark owners could apply could apply for domains which exactly matched their registered marks. However, where a number of owners owned the same mark (eg in different classes), names were allocated on a first to file basis. Different accredited registrars offered a confusing array of options, often at exorbitant costs, for increasing brand owners' chances of being the first to file. The BBC, for example, was offered the option of being on a 'private list' (said to be give the best chance of being the first to file) in order to obtain bbc.eu, at a cost of £60,000. (Happily, the BBC did eventually secure this name, at a fraction of this price).

In the second phase, applicants have to establish another 'right' in order to obtain a domain name, eg passing off, copyright etc. This phase has involved considerable work and expense since, for each domain name, it is necessary to prepare an affidavit setting out one's entitlement to register.

The third phase is the 'landrush', ie first come first served. We have ended up putting most of our names into this phase and hoping for the best, to avoid the time and expense of phases 1 and 2.

We understand that there are shortly to be further new TLDs introduced, including .asia, .mobi and (possibly) .xxx. While the latter two are unlikely to be of real concern, .asia is likely to be of concern to the BBC because of its activities in Asia and the amount of infringement of its IP it experiences there.

We see no reason for further TLDs to be introduced and doubt if they are of economic or any other benefit to commerce or society generally.

### 3. Format rights

We understand format rights were raised at the seminar on 2 March. We believe the current law gives adequate protection. There is a thriving business in format rights and as well as acquiring format rights under licence the BBC creates and licenses its own. Format sales by BBC Worldwide currently amount to £35 million a year.

Although it not always clear which elements of a format have copyright protection, we believe that a more prescriptive approach would only create more difficulties. There was a consultation on this 10 years ago and we see no reason to look into it again.

### 4. Inappropriate exploitation of IP rights by publicly funded institutions

The BBC has experience of institutions such as the Metropolitan Police and the MoD seeking to charge for use of 'intellectual property' such as logos or even references in dramas to 'the Met'. The Metropolitan Police set up an 'Income Generation' unit to deal with this. The BBC has so far successfully argued that use of logos etc on sets or uniforms in dramas comes under the copyright exception of 'incidental inclusion' and does not have to pay the MoD for use of any IP in its public service broadcasting. Museums and galleries also charge copyright fees for supplying images of works of art from their collections in which copyright has long since expired. The legal basis for claiming copyright in those images is doubtful (since they are exact copies of other works – see the *Bridgeman Art Library\** case), and while the level of fees can be prohibitive to students and academic publishers, we understand that the rights departments of such museums usually operate at a loss. The whole process of publicly funded institutions seeking to charge (often other publicly funded institutions) in this way is a distraction from their core purpose, of dubious legality, uneconomic, and an unwelcome and pointless hindrance to creativity.

\*Bridgeman Art Library Ltd v Corel Corporation, Feb 1999, US District Court, J.97 Cir.6232 (LAK) – a US case which applied UK law on the issue of whether copyright subsisted.

### **The BBC's comments on the Commission's evaluation of Directive 96/9/EC on the legal protection of databases.**

We are not aware of any effect of the database right in stimulating the production of European databases. We are aware that the uncertain scope of the protection has led to extended litigation in the case of the British Horse Racing Board v. William Hill and the ECJ ruling in this and the Fixtures Marketing case has made it clear that the protection is narrower than first thought. Our concerns as to the legal scope of the protection are:

1. Copyright protection for databases is now more limited (and less clear).

Databases will now only qualify for copyright protection as literary works if they constitute 'the author's own intellectual creation'. The meaning of 'intellectual creation' (derived from the Berne Convention) is unclear and we understand has not been consistently interpreted by the contracting states. [See Ricketson, para 16.15, *The Berne Convention for the Protection of Literary and Artistic Works 1886-1986* (Centre for Commercial Law Studies 1987), cited in *The Modern Law of Copyright*, Laddie Prescott & Vitoria, para 30.25.] If the databases do qualify as intellectual creations, they may be protected by both copyright and the database right.

2. The database right has also been limited by the ECJ ruling.

The necessary 'substantial investment' which gives rise to the protection only covers work in collecting, verifying and presenting pre-existing material for the database, rather than the

creation of the material making up the content of the database. So it is conceivable that a database which would have been protected by copyright as a compilation or table under the old law, could now lack any protection either under copyright (for not being an intellectual creation) or the database right (for not being a collection of pre-existing material).

3. The scope is also confusing for would-be users (as well as owners) of material forming part of a database. As well as being perpetually renewable in duration, the database right has none of the long established exceptions to copyright law which allow freedom of expression and access to information, for example under fair dealing. The BBC would wish to be able to quote from a database (for example a directory or website) as part of its normal news reporting or programme making, without having to obtain permission to do so. Recent examples include a programme about the siting of mobile telephone masts, where the relevant information was contained in a table. Had the database right in that table been enforced, this could have effectively blocked the use of that information.

4. If the right is maintained, the exceptions should be aligned. The Commission's Staff Working Paper on the review of the EC legal framework in the field of copyright and related rights (SEC 2004 995) pointed out that the Database Directive does not contain an exception for the benefit of the disabled, and commented that the alignment of exceptions would be further examined in the report on the database right. However both this paper and the evaluation (para 4.3) seem to argue that a two-tier scheme of protection is likely to have different exceptions. The problem is that the protection given by copyright and the database right is not clearly two-tier, but can both overlap (as mentioned in para 1 above) or possibly not apply at all (para 2). We can only comment that the ECJ ruling has not allayed our fears that the database right is capable of 'locking up' information to which the BBC would previously had access under long-established copyright exceptions designed to safeguard freedom of expression and the public interest.

#### 5. Policy Options

We are not convinced that the database right has resulted in any economic or other benefits, and we consider that maintaining the status quo (option 4) simply continues the legal uncertainties and the risk of the right being used to prevent access to information and legitimate comment. If the right is to be maintained we consider it essential to provide similar fair dealing exceptions (to allow news reporting or criticism or review) that exist under the Copyright Act; however amendment under option 3 could result in even more uncertainty and litigation. We would prefer Option 1 to Option 2 as we see no real need to distinguish between databases and other forms of tables or compilations.

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