



## **THE FALL AND RISE OF RIGHTS IN A WEB WORLD: REFLECTIONS ON COPYRIGHT**

### **BRITISH SCREEN ADVISORY COUNCIL**

#### **Report by the Blue Skies Copyright Working Group**

#### **Overview**

1. The creative economy requires IP rights that balance revenue generation for creators and investors with the freedom to take inspiration from earlier creativity. We are moving into an era where it is harder and harder to maintain copyright. It gets ever easier to copy and any morality against unauthorised copying is disappearing. A new IP rights framework must:

- Promote equitable and flexible licensing of rights
- Recognise public entitlement to access publicly funded content
- Facilitate mash-ups

A future rights framework must be developed under a new communitarian system of governance at UK, EU and international levels. IP rights must drive innovation, enhance competition and deliver access for consumers. Policy-making for rights must equate with measurable innovation outcomes.

#### **Introduction**

2. The future of commercial creativity rests on business models which lead to a return on investment. In the audiovisual area these currently rest on copyright. The rights issue is the most important policy issue after the development of the network to carry content. The BSAC Blue Skies Copyright Group has grappled with identifying new ideas for copyright in the 21st century, through exploring either a new framework or how the old one needs to evolve.

3. The system of IP rights we have now is currently working but it may have a finite life. It is possible that successful new economic models may simply emerge so there may not be a copyright framework problem. But the ability to enforce copyright on the internet is diminishing rapidly. Encryption will always be hacked. So what models and what rights will support creativity in the future? We can be somewhat disparaging about new types of content but if this is what people prefer is there no future for commercial

content? We have attempted to answer questions such as these. Most importantly, we have concluded that for the foreseeable future we should not look at an either/or world; traditional audiovisual content will exist alongside user-generated content (UGC). And flexibility in IP rights models, or at least licensing, is a key issue for both innovative and traditional audiovisual content.

### **Consumer demands**

4. Last year the BSAC Blue Skies Group mapped the trends (Report by the BSAC Blue Skies Group, 2 October 2008) that are changing how people make, sell and use audiovisual material. Crucially, that Group identified a change from a supply-led to demand-led relationship and so the importance of recognising, and responding to, consumers' four basic demands:

- What I want
- When I want it
- How I want it
- Paid for in a way I want

In this new world, business models must succeed where there are no bandwidth constraints, everything can be made available and UGC, both good and bad, is pervasive. Expensively produced audiovisual content which dominated the 20th century may be endangered. It may just fade away as bandwidth increases and new forms of content are created. Attempts to preserve it might be seen as another act of industrial preservation in the face of change, but for the moment there is still a market for expensive content. Licensing this content to people against a backdrop of so much 'free' material is the key.

### **Must all content be 'free'?**

5. A generation of people are more and more reluctant to pay for audiovisual content even if that will result in its disappearance. And people create their own free content. The market is moving away from creators; consumers are questioning the value of traditional content, but that content needs to be paid for somehow if it is to exist.

6. The appetite for expensively-produced content is, however, very healthy. An event may not have happened if it isn't posted on Facebook, but plenty of the events passionately debated on that social networking site are the latest episodes of a TV drama or soap. And clips on YouTube (whether or not authorised by the rights owner) can drive up TV ratings. The way forward could be one or more of the following:

- Get the current generation of young people to understand that traditional content might disappear if it cannot be supported by revenue streams.
- Wait for it to be lost and missed so that new economic models where traditional content is paid for become more attractive.

- Develop new models before then because content that costs a lot to produce can still be offered ‘free’.

Fear of piracy and the UGC-generation, but also uncertainty about mechanisms for generating revenue in the new environment, has interfered with the industry’s willingness to explore flexibility of licensing models that may deliver traditional content in new and imaginative ways. The most valuable content is the content that is most linked to, and then most quoted. We need licensing of rights that support ways that this value can be realised to secure a return on investment in creation and enable access.

## **Philosophy of rights**

*It is the fate of every original work to be part of the creative commonwealth.*

7. The copyright model first introduced in the UK 300 years ago recognised this principle by sanctioning a time-limited monopoly for a right holder. Reward for effort in creativity and/or investment in that creativity is currently obtained through exercise of a basket of exclusive rights. Rights in any future framework must continue to permit a reward, but it would be better to think in terms of a right to grant a licence rather than copyright. After an initial decision over whether or not to make creative content available to the public, the key thereafter is to be able to obtain royalties for licensing further use rather than the current emphasis on authorising or prohibiting further exploitation. But licensing must benefit the licensor as well as the licensee, so flexible and equitable licensing appropriately regulated should be at the centre of a revamped philosophy of rights.

*Licensing of rights must promote innovation, incentivise the wide dissemination of works, enhance competition and ultimately secure the flow of knowledge.*

## **IP rights literacy**

8. Copyright is complex and few people have an in depth knowledge of this rights framework. Consumers in particular, and most importantly young people who live in the mash-up culture, see copyright as a negative thing, something that may make them criminals for sharing and remixing content. But a rights framework, whether it is copyright or something else, is the “spelling” of “literacy” in the 21st century. Spelling of words is a key component of ordinary literacy; in a similar way “IP rights”, particularly the licensing of rights, should be at the core of 21st century “literacy”. The Digital Britain interim report quite rightly recognises the importance of media literacy, but it will be crucial to successful delivery of this to place an understanding of the role licensing of rights play at the centre of what is taught.

*The UK curriculum for schools fails to include the literacy needed for the age we live in.*

9. Education about licensing of rights is hard and needs imaginative solutions. Industry has a role to play too in promoting IP rights literacy. Some educational material for schools funded by industry has been successful. Film Education has raised awareness about IP rights and how these support content creation, also highlighting how people are deprived of their livelihood when content is stolen. Lots of kids want to be in the creative industries so educational messages need to play on these ambitions. The simple truth is that no-one in the past understood copyright because they didn't need to. Copying was hard work, but now copying, online dissemination, making mash-ups and mashing-up the mash-ups is all effortless. Indeed, remixing content is something that schools should be licensed to do as this can bring benefits to the teaching of any subject. But the role of IP rights to support content creation and license transformations, as much as an understanding of how to keep personal data safe when engaging in social networking sites, needs to be a key part of the curriculum in every school in the UK and ultimately worldwide.

*The Department for Children, Schools and Families, together with DG Education, Training, Culture and Youth at the European level, must ensure that schools deliver citizens with the competency needed for the 21st century – an understanding of IP rights.*

### **Licensing issues/solutions**

10. An audiovisual production is inherently a collaborative enterprise. Some content may be specially commissioned for inclusion but other content will already exist. Building on earlier creative acts is therefore the norm in this area. Indeed, there may be no such thing as a creative act which does not quote an earlier creative act. More flexible licensing throughout the value chain is needed to support content creation, and delivery and reuse of that content. Creator to business and business to business licensing is critical to the creation of both traditional and innovative audiovisual content. Licensing will also be critical to new business models, both to clear rights so that services can be developed and to define relationships with consumers of those services.

11. The current cost of the necessary licensing can be crippling, particularly for those developing innovative products with uncertain markets. But even the use of traditional types of content in new business models can be derailed by licensing problems. Licensors, often represented by collecting societies, can impose an inappropriate existing licensing model, eg broadcasting, on a new online use. A single licensing solution is not the answer. And territoriality is no longer the right concept. Global licences for online distribution must, though, be valued so as to accommodate content that is viewed or downloaded widely and more specialist productions destined for small audiences. Licensing might also have to accommodate changes in the value of content with time, attractiveness of different formats and so on. For example, a book that is no longer being bought may be perceived to have little or no value, but a format shift of the content into a film may result in renewed worth.

*A rights framework must deliver licensing of underlying material promptly and equitably.*

12. Major shifts are also needed to deliver much more flexible licensing regimes for consumers. Whether there are individual transactions will, of course, depend on the business model. When consumers purchase software they generally understand that the payment is for a licence. And a software licence typically gives the consumer a right to a new copy if the old one is damaged. Purchases of audiovisual material have not been so flexible. So should a film licence be bought with a DVD, which not only permits a free download, but also comes with an entitlement to upgrade to Blu-ray for a small top-up payment?

*Licensing systems must facilitate access to, and continuous availability of, content.*

13. Publicly funded content such as some BBC content should perhaps be available for re-use under a Creative Commons licence. A set of easy to understand principles such as apply to Creative Commons licences could certainly be developed and used more widely. But the BBC does not own all the rights in what is broadcast and is not generally free to offer licences to remix without appropriate licensing deals with those other right holders. Licensing issues also arise when providing public access to view publicly funded content. Creators recognise that there is a tension between free access as unmonetised value and free access having a promotional value. But consumers feel they have already paid for content and want to watch it when they want. Licensing should deliver this public entitlement.

*If public money is spent on creating content, it should always be available to the public.*

### **Piracy: threat or opportunity**

14. As soon as (or even before) a programme is broadcast or a film shown in a cinema, the content is lost to illegal P2P networks. But, as noted above, YouTube clips can drive up TV ratings. At least some piracy is not substitutional; it can lead to more opportunities for legal business models and legitimate purchases. At the moment the pirate experience can be better for consumers than legitimate offers; the range of audiovisual products available is greater. But legal services can offer a superior experience. Better “extras”, peripheral content, superior presentation and ease of use, and more convenience in legal business models can lead to success if they can also match the range. This does question the current licensing model for audiovisual content with windows. And content producers and creators have understandably been nervous about change because of piracy. But thinking about radical changes to business models and licensing deals is the way forward.

*We need to move more rapidly to a world where honest people stay honest because they can readily get what they want legitimately online.*

## **Funding content production**

15. This may seem more relevant to business models than a debate about IP rights. But how content might be funded is inextricably linked to how rights can be used, or even whether rights are needed at all, to get a return on investment. We might ask “Why is the audiovisual industry entitled to payment for content it has produced?”, but, as already noted, consumers seem to still want traditional content. It will not exist without funding by some mechanism. The 20th century saw democratisation of funding for audiovisual content based on the exercise of the different rights. Shifts in traditional patterns already seem to be taking place for funding of music production. Bands are moving back to more payments for live performances and less dependence on recordings. Is there a stage version for audiovisual material where fans can engage with the content beyond just viewing a recording? Rights might be less important to this type of exploitation, but it should not be the only option.

16. A new era of patronage supporting production is already emerging for music. Fans are funding creation, recording and release of recordings through Sellaband and Slicethepie. The Facebook generation is, though, unlikely to relinquish sufficient finance for high quality traditional audiovisual content to be produced this way. However, commercial patronage from things like product placement and association with advertising must be options some of the time. These options do not, though, exist outside of an IP rights regime even if there is no direct payment from consumers.

*As rights based remuneration directly from consumers weakens, regulatory authorities must permit all alternative funding streams to be explored.*

17. Audiovisual content does of course include games where turnstile business models certainly work at the moment. World of Warcraft, for example, is a tremendous success. Gateways stop some people taking content for nothing now, but DRM protection may never be unhackable. Disseminating content flexibly and comprehensively can be done with more confidence using gateways that permit the value of the content to be monetised. But gateways should not be used to prevent things from being available.

18. Charging consumers for ‘free’ public service broadcast content may be challenging. Paying later for something initially free is the converse of a normal model where things get cheaper with time. But BBC Worldwide and others have done well selling ‘free’ content against this background. A ‘free’ episode of Life on Mars given away with a newspaper led to more people buying the boxed set of all the episodes. However, in the online world where the competition is piracy, the best commercial models may be ones free at the point of use. Looking at music, the Radiohead free download offer probably led to more people buying the album. But there must be a mechanism to support high risk investment in the initial ‘free’ content in the first place. New ideas are constantly needed to get maximum revenue from audiovisual content as with the online environment ever changing any business model successes may only be transient. And fear of piracy must no longer prevent all the opportunities being explored.

*IP rights may vary in their importance to different business models, but without rights the options would be much more limited.*

### **Term of protection**

19. The balance between IP rights which give a temporary monopoly, and making all information available for enjoyment by all, is a universal principle, recognised by the Universal Declaration of Human Rights. Rights must last long enough to reward talent or enable investors to get a return on capital. Should we be searching for a new, correct term of protection in a broadband age? It may be that with effective licensing and fair systems for extracting micro payments for use term of protection is less of an issue. On the other hand, terms have traditionally been longer than necessary to influence decisions to innovate or invest. Indeed, one idea is terms that could be renewed where there is still some value in the protected content. Or rights that revert to the creator after a certain time. But unexpected new opportunities to exploit content may make those changes not always equitable.

20. Reaching agreement on answers to the many questions, such as “Should copyright term be so much longer than patent term?” and “Why can’t cultural investment (as protected by copyright) be passed on from generation to generation indefinitely in the same way as physical property from financial investment?”, is difficult. But evidence must support any change to term of protection. The current proposals on term in the EU are contrary to existing evidence.

*Extending term on the basis of the current evidence does not make sense.*

### **Equitable use**

21. Fair use or a fair right to a licence needs to be articulated clearly in regulation and practice. This is a crucial issue but hard to gain a consensus on. Also, any debate is against a backdrop of what happens now in this country and others such as the US. For this reason it may be better not to use the term “fair use” which has a history in the US and is never a remunerated use. “Equitable use” could cover both some uses that might be “free” and others that might be remunerated under an automatic licence.

22. Right holders do not benefit from a lock-down system. Promotion of content is always needed. In Japan fans and publishers have a tacit agreement where fans can take and develop the characters of a successful book in their own stories without paying for copyright up to a certain limit. This fan creativity expands knowledge of, and enhances, the character. This is an example of the ‘quotable culture’; an implicit mash-up licence that seems to benefit everyone. Developing a system of equitable use may, though, need to have regard to moral concerns where remixing and associations denigrate the creator and his work. In practice, though, preventing such use is likely to be very difficult if not impossible.

23. There are differences between commercial use and non-commercial use that should be explored. Most cases of commercial use may demand payment whereas for non-commercial use the presumption might be that equitable uses are free. Differences may also be dictated by the type of use with amateur quoting such as happens on YouTube perhaps being unremunerated equitable use, but any use of an entire piece of content attracting a royalty.

*Equitable use must extend beyond current exceptions to rights, but may be coupled with remuneration, particularly for commercial users.*

24. A number of avenues might be explored to develop this area further. Two that might lead to early agreement are:

- Use of orphan works where non-remunerated use unless and until a right holder turns up might be equitable for commercial and non-commercial users.
- Licensing of rights by heirs where the unreasonable behaviour of some creators' estates suggests a presumption in favour of use on fair terms should be the norm if rights are to continue to pass to heirs.

### **Key principles for a new IP rights framework**

25. "Copyright" sounds like a protectionist framework. A new framework, "a right to grant licences", would encourage and support participation much more widely. Some key principles for such a rights framework are:

- People should be able to claim rewards for risk and effort and a "right to grant licences" is how this should be delivered.
- Creative content inevitably becomes part of the shared wealth of "information" so a right to grant licences must be limited in time.
- Licensing, which should be inherently permissive, must be flexible and equitable to benefit licensees and licensors.
- Licensing Management Regimes, which facilitate use, rather than Digital Rights Management, which excludes access, are the way forward.
- An "equitable" regime for free, or unreservedly licensed, use is necessary, but "payment" must arise at some point if professional rather than just amateur creativity is to exist in the future.

### **Governance of copyright**

26. Debate about the future needs to be based on an understanding of the perspectives of all stakeholders. Traditional forms of consultation may elucidate the views of old media interests, and there is a danger that the newer sectors which are most innovative and most successful are least likely to engage. And those who shout loudest may be less

ground-breaking in their business development. It may not, therefore, be possible to find the right answer simply by consulting enough. A measured and careful approach to redevelopment of the copyright framework underpinned by good quality research is needed. Copyright in the past may have worked well for a few privileged sectors producing high value content. But the governance of copyright must change to reflect the widening out of participation. Those providing the infrastructure that permits easy and rapid dissemination of content and consumers must be fully engaged in the process

*A new communitarian system of governance at UK, EU and international level is needed.*

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