

Has Gowers Helped or Hindered Enforcement of IP Rights?

New Inquiry by the All Party Intellectual Property Group

Submission from the British Screen Advisory Council (BSAC)

Executive Summary

- 1) The audiovisual industry is in a state of transition from old to new business models. We believe that the Gowers Review did not fully recognise this, nor how business models may vary between creative sectors. For much audiovisual material, consumers often prefer business models that permit a single viewing for a lower price than that charged for a copy to keep. In this respect there are important differences compared to music content. Two years after the Gowers Review it is even more important to understand the differences between consumption of digital content in the online world properly, as well as the similarities. The private copying recommendation made by Gowers has had the unfortunate effect of diverting debate too much onto what should happen to physical copies, such as music CDs that might be copied onto MP3 players. We believe that in the online world differently priced business models that permit less to be paid for less consumption as well as more for more are likely to be attractive to consumers.
- 2) The increased ability of trading standards officers to enforce copyright offences, facilitated through Gowers, is very much welcomed. There is as yet little else by which to judge the effect of recommendations made by the Gowers Review. We are, however, pleased that a private copying exception applying to audiovisual material is not in place as we do not believe such a change is appropriate. We are, though committed to a balanced copyright framework and would like to see some other exception provisions put in place. In particular, we would like to see the use of orphan work permitted.
- 3) Enforcement of rights is crucial to enable industry to obtain sufficient returns on investment to pay for the transition to new business models. Development of these must be based on the consumption preferences that illegal activity might be demonstrating. A better understanding of the likely nature of the future landscape in the audiovisual sector is therefore important. This is something we are currently exploring in our Blue Skies Working Group.
- 4) Some legislative changes, which would have been helpful, were not taken up by Gowers, such as the need to criminalise camcording in a cinema. We are also disappointed that Gowers failed to recommend that IP should be embedded in the school curriculum as better understanding about IP is also crucial to enforcement. Better coordination of

current educational activity by industry and Government is important to avoid the risk of mixed messages being delivered.

- 5) We do not believe that Gowers is the key to delivering improved choice for consumers. The development of new business models has to date delivered improved choice and this is likely to continue. Therefore it is important that legislative changes to deliver the Gowers Review do not undermine the flexibilities that industry has to offer the best business models to consumers.

Detailed Submission

- 6) The British Screen Advisory Council (BSAC) is an independent, industry-funded umbrella group bringing together many of the most influential people in the audiovisual industry. Audiovisual material encompasses broadcasts, films and video games. Stakeholders across the value chain for audiovisual material are represented by BSAC.
- 7) Our evidence to the Gowers Review concentrated on copyright issues as this is the main area of common interest about intellectual property amongst BSAC Members. This submission therefore also concentrates on copyright issues.

The relevance of the original review and report two years on

- 8) The audiovisual industry is in a state of transition. Old business models exist side-by-side with an ever increasing number of new business models. The evolution from existing business models, where feature films are predominately delivered via cinema exhibition followed by sale or rental of physical copies on DVDs and broadcasting, to a world where online delivery plays a major role is not one that was fully understood by the Gowers Review. Those creating other audiovisual material such as games and content made for broadcasting are also facing the challenges of the move to online delivery which were not really analysed by Gowers. Indeed, the Gowers Review had an extremely wide and ambitious agenda so it is perhaps not surprising that it failed to fully explore and analyse to what extent different industries are affected in both diverse and similar ways by digital technology, and so whether or not it is always appropriate to respond in a uniform way to the issues that were raised.
- 9) Two years on it is even more important to look at how the different creative sectors are developing and changing so that similarities and differences can be fully understood. Although much creative content may be carried on the same type of digital media or be delivered digitally online by similar services, other factors may vary. For example, it is important to recognise that audiovisual content is not necessarily consumed in the same way as music. The old business models where consumers pay to enjoy a single viewing of a feature film in the cinema or on pay-TV or by renting a DVD are likely to have their counterparts in the online world and not be matched by new business models for music where consumers usually want to listen to the content repeatedly. Market research suggests that consumers appreciate the opportunity to pay for only what they want to

consume so new business models that deliver a single viewing for a lower price may be particularly important for audiovisual material.

- 10) The rate of development of new business models is determined by a number of factors. The limited availability of broadband spectrum sufficient to deliver high quality and full-length audiovisual material at a reasonable speed is obviously important. For some years at least old business models are therefore likely to continue to be necessary to meet consumer demand, but the industry is making use of the opportunities to develop and test new business models at the same time. We do not believe that the Gowers Review recognised that the relevance of factors like bandwidth will vary for different types of content and so how the market develops for audiovisual content is not wholly in the industry's control.
- 11) Moreover, some of the Gowers Review, particularly relating to the recommendation to introduce a limited private copying exception, and the subsequent work on this undertaken by Government, has had the unfortunate effect of focusing attention on the physical world at a time when the online world for creative content is growing rapidly. Format shifting of CDs onto MP3 players, which was the main emphasis in Gowers, is only relevant so long as physical copies of music on CDs are bought. Where music, or any other content, is delivered online, the contractual agreements with consumers will determine the extent to which copies in any format can be made, with more likely to be charged where more copying is permitted and less for less. Differently priced business models where consumers pay for what they want, rather than where all consumers pay the same (higher) price because they are permitted to format shift even if they don't want to, are likely to be particularly attractive to consumers of audiovisual content delivered online.

Whether the changes made to the IP regime have been the right ones, and were these successful?

- 12) To date very few changes in the copyright area have actually been delivered as a result of the Gowers Review. We naturally welcome the long overdue implementation of section 107A of the Copyright, Designs and Patents Act 1988 putting a duty on trading standards officers to enforce the copyright offences. This was brought into force speedily following publication of the Gowers Review, but other legislative changes are as yet only subject to consultations if that. Judging the success or otherwise of changes to the copyright regime is therefore largely premature. It is, of course, very disappointing that some of the useful recommendations applying to enforcement of rights and otherwise are taking so long to be taken forward.
- 13) One of the recommendations in the Gowers Review where we do, however, welcome the fact that no legislative changes have yet been delivered is that relating to a new private copying exception to copyright to permit format shifting that we have already mentioned (Recommendation 8). This is an issue where the Gowers Review considered business models and consumer behaviour with respect to music content only but went on to write a

recommendation in general terms. We do not feel that this was helpful or fair. In response to the consultation by the UK IPO held earlier this year on how this (and some other recommendations relating to exceptions) might be delivered, we have explained the problems at length were this exception to apply to audiovisual material. We would be pleased to provide the All Party Intellectual Property Group with a copy of that evidence should that be helpful.

- 14) BSAC therefore remains opposed to a format shifting exception applying to audiovisual material at this time of transition from old to new business models where importantly, the industry depends on the income from old models to pay for investment in that transition. In general, however, we do support the principle of appropriate exceptions to rights to provide a necessary balance in the copyright framework. A fairly balanced framework is a pre-requisite for rights that people will respect and accept should be enforced. We have therefore supported some other changes to exceptions in areas identified by the Gowers Review.
- 15) We were, though, particularly concerned that the Government seemed not to be pursuing legislative changes to permit use of orphan works, preferring to wait for discussions within the EU under the European Digital Libraries Initiative to be completed first. However, we welcome the UK IPO's more recent engagement on this issue and have been pleased to take part in consultative meetings that have been held. Our interest in finding a satisfactory solution to permit use of orphan works is, of course, obvious from the detailed paper that we were happy to provide to the Gowers Review. More recently we have been pleased to participate in the audiovisual working group under the European Digital Libraries Initiative to develop high level sector specific guidelines on searching for right holders of suspected orphan works. We continue to believe this is an important issue to pursue which is why we have very recently provided a further paper to the UK IPO on orphan works providing some additional information on possible solutions to this problem. We can provide copies of the relevant papers to the All Party Intellectual Property Group should that be helpful.
- 16) Turning back to the Gowers recommendations relating to enforcement of rights, we are currently preparing a short response to the UK IPO consultation on penalties for copyright infringement (Gowers recommendation 36) and would be pleased to provide the All Party Intellectual Property Group with a copy in due course. We note, however, that the consultation is limited to possible changes to the level of fine that could be awarded in Magistrates' Courts and as such does not actually deliver the harmonisation of maximum terms of imprisonment for physical and online copyright crime as recommended by Gowers.
- 17) Enforcement of rights is, of course, crucial at a time where industry must have the resources to invest in the transition to new business models. Industry itself must continue to play a leading role in enforcing rights. An important response to enforcement is to respond to the needs and wishes of consumers as illegal activity will thrive where

consumers are not able to consume audiovisual content when they want and in a way they want. Illegal file sharing may currently be less of a problem for the audiovisual sector compared to music but the messages about consumption preferences that such activity illustrates cannot be ignored. We are aware that particular interest groups think that trying to deliver enforcement of rights in the online world is actually a case of trying to shut the stable door after the horse has bolted. We are, though, keen to ensure that the audiovisual industry does discuss and explore what the future might look like, including what business models might be most successful, in order to be better placed to deliver legal content to consumers and so deter illegal activity.

- 18) We are therefore particularly excited about our current discussions in our Blue Skies Working Group where the likely nature of the future landscape in the audiovisual sector is being considered. We hope that this will inspire wider discussions, including on the appropriate regulatory framework in years to come. The Blue Skies Working Group should be delivering a report to the BSAC Council in early October and we would be very happy to share these emerging thoughts with the All Party IP Group in due course.

Whether there were any issues not covered by Gowers that should have been/or where change was needed but not recommended?

- 19) BSAC did identify some issues in its evidence to Gowers which were not taken forward. For example, better public understanding of IP is important in addition to the development of attractive new business models to deter illegal activity. This was to some extent recognised by Gowers, but the need to embed IP in the school curriculum, as was promised by the Government in its response to the recommendations of the Creative Industries Forum on Intellectual Property, was not part of a recommendation by Gowers. There is, of course, much useful work being undertaken by the UK IPO and industry to deliver attractive resources with educational messages about IP to schools. However, we do feel that the Government should take a more proactive role in coordinating all the activity to avoid the risk of mixed messages being delivered, as well as to ensure that appropriate teaching takes place in every school.
- 20) On the legislative side, BSAC and others did highlight some enforcement issues that should be pursued but which were not part of any of the Gowers recommendations, such as the need to make illegal camcording in cinemas a criminal offence. In addition, we identified some other issues that we wanted to see explored, such as whether there could be any solution to the problem where just one of many rights in older material to permit its use cannot be cleared even though the right holder can be traced. This is an issue that extends beyond that being considered under the orphan works agenda, where use of works with unknown or untraceable right holders is the issue. We do not have firm views on what, if anything, should be done regarding this inability sometimes to secure agreements on licensing at the margins, but we would welcome further exploration of the issue by the Government. Unfortunately, the desire to concentrate on pursuing only those

things recommended by Gowers seems to have had the effect of closing down any chance of pursuing other issues in the short term.

Whether the government's delay in implementing certain recommendations is causing problems, and why?

21) We have already indicated our concern about the delay in pursuing the issue of orphan works. Whilst this might be partly explained by its interrelationship with EU legislation and activity, of greater concern is whether the UK IPO has had sufficient capacity to take forward the ambitious Gowers agenda. We do wonder whether it might have been more sensible for the Government not to have agreed to take forward all of the Gowers recommendations before stakeholders had had a chance to comment on the desirability of this. For example, the Government's apparent determination to pursue a format shifting exception applying to audiovisual material despite repeated lobbying from BSAC and others about the problems with this. Also the complete lack of evidence in Gowers to support this, has no doubt taken up much time within Government as it has, indeed, in organisations like BSAC working to identify the evidence that does not support such a legislative change.

Whether the digital developments of the past two years have resulted in changed focus and priorities?

22) We have already indicated how some of the Gowers recommendations, particularly that relating to the private copying exception to permit format shifting, has more relevance to the physical world and in time would become irrelevant in the online world. We hope that the report from our Blue Skies Working Group will show more generally how digital developments in future years are likely to require a changed focus and priorities.

Whether Gowers' recommendations have improved choice and protection for consumers?

23) Consumers want to choose what they consume and when they consume it, and pay a fair price for that choice. The development of new business models, and not Gowers, has to date delivered improved choice for consumers as we have indicated above. This is likely to continue. In taking any recommendations forward it is, however, crucial that this does not undermine the flexibilities that industry has to offer the best business models to consumers. In this respect, in our response to the UK IPO consultation on taking forward the Gowers recommendations on copyright exceptions earlier this year we explained the issues that need to be considered very carefully.