COPYRIGHT THE FUTURE: DEVELOPING A COPYRIGHT AGENDA FOR THE 21ST CENTURY

BSAC RESPONSE TO THE UK IPO CONSULTATION

Background

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.

Copyright is the main area of intellectual property in which BSAC members have a common interest. It underpins the success of the audiovisual sector. It is the mechanism by which value can be extracted from investment in creative content in this area.

We therefore welcome a debate about whether or not the current copyright framework remains fit for purpose in the 21st century. This mirrors our own blue skies thinking, a debate that we started in BSAC over a year ago. Last year our Blue Skies Working Group explored business trends in the audiovisual sector to build a better picture of what the future might look like. We are providing a copy of the report from that Working Group herewith. It is particularly important to note the emerging change from supply-led to demand-led relationships in this sector and the recognition of consumers' four basic demands, namely:

- What I want
- When I want
- How I want
- Paid for in the way I want

The Blue Skies Working Group made no specific recommendations on regulation, but did identify some regulatory issues that should be explored. These mainly centred on the issue of fair competition. On rights, the Working Group specifically asked the UK IPO to assist right holders to flourish while meeting consumer demands.

Following that high level discussion of blue skies issues, we have recently established some specific working groups to take forward thinking on some of the issues that were identified. One of the new working groups will focus on blue skies thinking in the area of copyright. We certainly recognise that the right copyright framework is crucial to

enable rewards for creativity and investment at the same time as meeting consumers' four basic demands.

Our Blue Skies Copyright Group has not yet developed any answers that can be shared more widely. Indeed, we are still grappling with the questions that are right to ask. The blue skies work is in any case only the start of a wider debate in BSAC in the future. Moreover, although changes are almost certainly needed in the future, it is very important to remember that old business models supported by the current copyright framework still provide much of the return on investment in the audiovisual sector. Without that return on investment, the industry will not be able to invest in the all important transition to new business models. Although new business models are being developed quickly, in the UK at least bandwidth constraints will affect the attractiveness of some business models for many people for sometime to come, and so old business models cannot disappear overnight.

The following comments therefore in no way commit BSAC or any of its members to support for these ideas in the future. However, we thought it might nevertheless be useful to set out some of the issues that we may want to consider in making recommendations about a future copyright framework fit for purpose in the digital world.

We certainly intend our Blue Skies Copyright Group to deliver radical thinking about the copyright framework in the light of technological changes and consumer behaviour. Our earlier work has identified the emerging business-to-consumer relationships that rights need to support. We hope to be able to identify the nature and scope of rights that can be justified as fair and necessary to underpin the full range of both business-to-business and business-to-consumer relationships that are emerging. How to provide access that meets consumers' four basic demands, and at the same time how to incentivise investment in creativity, is, as we have already said, a key requirement of a copyright framework.

Our recommendations will not necessarily be about pasting a few new ideas onto the current copyright framework, an approach that has essentially been the way forward at international level ever since the Berne Convention was first agreed in 1886. It may be more appropriate to work from first principles to determine the nature of a copyright framework fit for the 21st century. Perhaps the UK is well placed to offer such ground breaking insights in the year that is the 300th anniversary of the Statute of Anne, the first copyright law as such in the world.

Before identifying what type of material should be protected by rights, for how long and how, the Blue Skies Copyright Group will, though, need to explore what is fair and unfair competition in an arena where the marginal cost of making content available has rapidly decreased. The technical knowledge needed to copy and disseminate material is widespread, and follow-on creativity by consumers is extensive. But the cost of initial creation can still be substantial.

Turning to a new copyright framework, it may be right to consider whether registration should be a prerequisite for protection. Another possible consideration might be whether

moral and economic rights should be decoupled. When it should remain possible for uses of copyright content to require clearance of exclusive rights before use commences will need to be examined alongside the possibility that a remuneration right should be the only entitlement for some uses of creative content. ‘Free’ uses also need to be considered, but mechanisms that can provide rewards for original creators at least some of the time are crucial if consumers continue to want expensively produced audiovisual content in the future. The blue shies work would be unlikely to be complete without also considering the long term future, if any, of DRMs and/or contracts with consumers for controlling access to content, and the relationship between these and copyright.

BSAC is excited about the ambitious work programme in the Blue Skies Copyright Group. We hope that Group will be in a position to report to the full BSAC Council in the summer, and that the continuing debate will lead to a consensus within the audiovisual sector at least on the best way forward. On the timescales provided by the UK IPO we are therefore unable to commit to particular viewpoints on the vital issues this debate raises at the moment. There is, of course, a danger that, with limited time, stakeholders will maintain current strongly held views that might be entirely appropriate in the short term. We are resisting this temptation.

Our understanding of the debate that David Lammy has initiated is that the aim is to look beyond immediate concerns. A fundamental debate such as this should not be hurried. The goal is to build a long term vision for copyright, a vision that will need to be developed on the international stage. Such a vision requires not only great ideas but also the building of alliances between diverse stakeholders. That in our view takes time, but in the audiovisual sector is something that we are already committed to doing. Even within BSAC there will be many differences of opinion, which we will be exploring as we take our own blue skies work forward. And we hope in due course to be able to bring forward ideas about the future of copyright that can be widely supported by BSAC members and then shared more widely too.

Our views in this response are therefore at this stage only very preliminary. We would, though, very much like to continue to take part in the debate as it is developed by the Government. We are therefore delighted that the UK IPO has already indicated a strong interest in engaging with our blue skies agenda.

Recognising creative input

Q. Does the current system provide the right balance between commercial certainty and the rights of creators and creative artists? Are creative artists sufficiently rewarded/protected through existing rights?

The nature of rights for creators and artists is something that we expect to explore in our blue skies work explained above. However, this set of questions could in addition open up issues such as the contractual arrangements on transfer of rights to those who invest in creativity. Statutory regulation of this relationship in addition to general rules preventing anti-competitive practices and unfair contracts is not necessarily helpful.

There have probably always been and always will be sensitive and sometimes difficult relationships between investors and those who create the material that results from that investment. BSAC membership exemplifies these different stakeholders. It can be very hard for regulation to fit all the circumstances that might arise in practice. There is, therefore, a danger that regulation aimed at addressing a particular 'problem' merely leads to creation of a different concern. Moreover, we are not convinced that this issue is relevant to driving the economy and so a core concern for the future prosperity of Digital Britain. Furthermore, creators already can and do successfully use common law remedies both for restraint of trade and where a person has signed a contract when in a vulnerable position. It would be unfortunate if a debate about the contractual arrangements reached between creators and investors were to detract from the very much more important issues raised in the second and third sets of questions in this consultation paper.

The nature of the contractual relationship between creators and artists on the one hand and investors in an audiovisual product on the other hand has a long history in the UK. For example, agreements between Equity and broadcasters provide minimum levels of pay and engagement fees for performers which are tailored to various types of audiovisual product and different types of participation by the performer. These arrangements can include ongoing contractual payments during the entire term of protection for performances. Similar agreements exist between Equity and PACT which represents independent producers of film and television programmes. The origin of industry agreements for these collaborative products often predates the current framework of rights in the UK.

We are, of course, aware of concern amongst some performers about the industry agreements, particularly in the area of film where new ways of exploiting older films do not necessarily give rise to additional payments to performers. But we are not convinced that a statutory solution would necessarily be better than resolving this by collective agreements between Equity and producers or distributors. Agreements can be more readily adjusted to the circumstances and factors that need to be taken into account, as well as being better able to provide differently for different situations. In contrast, a statutory system could require continuing payments for exploitation to performers and creators from the producer regardless of whether or not a film has led to a return on investment in its creation.

Of course, there have been attempts at the international level to harmonise rights for audiovisual performers to match provision in the 1996 WIPO Performances and Phonograms Treaty for performers of sound recordings. In many respects the proposed WIPO audiovisual performances treaty would have done no more than confirm rights that already exist in the UK. We have been supportive of this initiative. However, there was a failure to reach international agreement on that treaty at a diplomatic conference in December 2000 because of differing views on the issue of transfer of rights. Various discussions and meetings in subsequent years have not enabled any resolution of this sensitive matter. (A considerable amount of background material has, though, been published by WIPO that illustrates the complicated arrangements under statute and

contractual arrangements on rights and transfer of rights in a number of countries including the UK[1].) It would be a shame were matters of a contractual nature such as this once again to be raised in such a way as to jeopardise the much more useful debate identified by the second and third sets of questions in this consultation paper.

We are, moreover, concerned that this first set of questions reflects a belief that authors and performers are more worthy of protection for creative endeavour than those who invest in creativity. In the audiovisual sector the copyright and related rights framework already provides complicated and overlapping rights that can be exercised to deliver rewards to creators and artists on the one hand and those who invest in that creativity on the other hand. However, these categories are not clearly distinct in terms of who delivers the most value. An audiovisual product is necessarily a product resulting from the collaboration of many different types of people. Producers and broadcasters, who might be thought of more as only investors, may also deliver creative input to a finished audiovisual product. It is not always possible or appropriate to attribute a greater creative input to, say, the writers of the screenplay and performers appearing in an audiovisual product than those who provide the investment to enable its creation. An actor or actress playing a leading role obviously makes a significant difference to the success or otherwise of the finished product, but the same is not true of the actors who play a very minor part in the audiovisual recording. An idea for an audiovisual production originating with the producer or broadcaster could, though, be critical to its subsequent success.

Finally, the IPO consultation paper seems to pose these questions on the basis of possible concern that creators might have about how their work is used. It is important to remember that an audiovisual product is very likely to comprise material in which many individuals may have originally held individual rights. Downstream use would be very difficult to authorise if any individual creator or performer were to retain exclusive rights in the specific element that is theirs. By refusing to clear rights in that element exploitation of the entire product could be impossible. This would also apply to any system that provided a reversionary interest after a certain time to a creator or performer in respect of use of their protected material in the audiovisual product. It may be that the IPO consultation is more directed at the situation where a single creator in, say, a literary work, has assigned his or her rights to a publisher to publish that work as a single and discrete item in some way. We cannot easily comment on that situation as that sort of scenario is simply unlikely to arise in the audiovisual sector. Any decisions that might be made regarding that sort of scenario do, though, for the reasons we have indicated, need to avoid any impact on the highly collaborative material produced by the audiovisual sector.

Access to works; Incentivising investment and creativity

[1] See the studies and information documents published by WIPO at http://www.wipo.int/copyright/en/activities/audio_visual.html

Q. Is our current system too complex, in particular in relation to the licensing of rights, rights clearance and copyright exceptions? Does the legal enforcement framework work in the digital age?

Q. Does the current copyright system provide the right incentives to sustain investment and support creativity? Is this true for both creative artists and commercial right holders? Is this true for physical and online exploitation? Are those who gain value from content paying for it (on fair and reasonable terms)?

The issues raised by these questions are not ones that can be readily answered individually. For example, it is not possible to conclude that the system is too complex without understanding and taking into account what sort of system is needed to sustain investment. Exceptions to rights cannot be amended merely to deliver simplicity if that simplicity in turn undermines the ability to derive value from creative content. It is also important to remember that simple, sweeping concepts (like "fair use" in the US), do not necessarily reduce complexity. They may mean that a clear set of statutory principles are replaced by a set of court decisions which can be inconsistent and overlapping. That can be harder for the average non-lawyer to navigate than a clear statutory framework.

These two sets of questions, and some of the matters raised by the other sets of questions too, are, therefore, ones that need to be considered holistically. But the aim must not be simplicity in statute for its own sake if this actually delivers complexity in practice. These questions do, moreover, explore the scope and nature of the current copyright framework in a very fundamental way. They are, therefore, crucial questions to try and answer.

A debate on the future of copyright of this sort is one that BSAC welcomes. It is exactly the sort of debate that we have commenced within BSAC as we have explained above. Our Blue Skies Copyright Group will be looking at issues that are at the heart of how questions such as those raised here might best be answered in a new copyright framework for the 21st century.

BSAC would, therefore, very much like to continue to participate in the Government's debate about the future of copyright. However, identifying the best way forward in a consensual way will, in our view take time, but this is the best way to work if a truly better framework that addresses everyone's legitimate needs and concerns is to be identified. There is a danger that a rush for answers will fail to examine the big issues and cream off merely a few easy "wins". This was, in our view, one of the problems with the Gowers Review, which had a tight timescale for its round of evidence as well as an ambitious agenda.

We therefore urge the IPO to take time to develop this debate rather than be tied to the current demanding timescales of the wider Digital Britain debate. Given that a number of issues are likely to lead to questions over the wider EU and international copyright frameworks, changes cannot be rapidly delivered in the UK alone. It would therefore in

our view be much better to get the questions right, as well as develop sensible solutions, in a measured and inclusive way.

Authenticating and protecting works

Q. What action, if any, is needed to address issues related to authentication? In considering the rights of creative artists and other right holders is there a case for differentiation? If so, how might we avoid introducing a further complication in an already complicated world?

The first question seems to be quite specific, but the discussion preceding the questions and the other questions suggest that much wider and potentially radical issues are being considered. Limiting rights to material that passes a certain threshold of creativity, registration, and differences between creative artists and other right holders are issues that we have already mentioned above in the context of our blue skies debate. However, use of and protection for rights management information also seems to be relevant to the first question. The changes made to UK copyright law in 2003, to meet the terms of the 2001 copyright Directive, did, of course, provide some protection for use of rights management information (RMI). RMI can be useful to track, and possibly lead to payments for, use of creative content and so will be crucial to some business models. This is true regardless of the nature of, and type of owner of, rights. However, what business models will exist in the future, and so whether or not RMI might be used in this way, is much more difficult to predict. Authentication of material and identification of authors, performers and other right holders is, however, likely to be important at least some of the time so continuing protection for RMI is likely to be important too.

Conclusion

The timescale we have identified above for our own blue skies examination of the copyright framework will not match the ambitious target of concluding the work in spring 2009 indicated in the UK IPO consultation. We hope, nevertheless, that our determination to find a consensus on a way forward, which we would be happy to share more widely in due course, will be attractive to Government, and that it can be persuaded not to rush to a conclusion on this very difficult topic.

As the consultation paper indicates, the UK copyright system does not exist in a vacuum. Businesses operate globally, territorial licences often no longer make sense and so national boundaries for laws should not constrain thinking. We would therefore urge the Government to not seek to solve only immediate problems as tended to be the case with the Gowers Review. Rather, the Government should seek long-term solutions backed by as many stakeholders as possible. These solutions in our view are likely to ultimately command more support at the all important international level.