



COPYRIGHT POLICY AND EUROPE

BRITISH SCREEN ADVISORY COUNCIL COMMENTS ON IPO CONSULTATION

11 October 2013

Introduction

1. We welcome the opportunity to provide views on copyright policy and Europe. The British Screen Advisory Council (BSAC) is a UK umbrella group in the audiovisual sector. BSAC Members include, not only all of the segments in the UK audiovisual value chain (including development, production, sales, acquisition and licensing of content), but also leading technology firms and ISPs whose growth relies in part on strategic alliances with the content production sector in the UK and across the EU.
2. An excellent understanding of the copyright-dependent industries must be at the centre of the UK's development of policy on copyright in Europe. The UK's audiovisual content and services industry is the largest in the EU and a leading sector of the UK's creative industries. BSAC certainly agrees with the Government's recognition of the creative industries as one of the areas of the national economy with the greatest potential for growth. We hope that the following statistics about the audiovisual sector will help the IPO appreciate how successful the sector currently is, and so how important it is not to undermine this, as it develops ideas about copyright policy:
 - made-for-TV content is seeing robust growth. The UK sector is now the fourth largest in the world in terms of the level of broadcasters' investment in original content, second only to the US in its export performance and world leader in the export of programme format sales
 - overall revenues from the international sales of British programmes were £1.47 bn in 2011, a 9% increase on the previous year¹
 - the UK TV industry collectively generated revenue of £11.8 bn in 2010, a 6.6% increase on 2009²

¹ See UK Trade and Investment/PACT research on UK Television Exports 2011 at <http://www.pact.co.uk/support/document-library/tv-exports-survey-2011>

² See Ofcom research in the Communications Market Report at <http://stakeholders.ofcom.org.uk/market-data-research/market-data/communications-market-reports/cm11/uk/>

- by last year, over 16 million households were able to access television-based VoD, and film production activity totalled £929m last year on 249 films wholly or part-produced in the UK
 - British films also attracted a 32% market share at the box office
 - online film revenues increased by 123% in 2012, reaching an estimated £123m³
 - the UK video games market is amongst the top three worldwide, with sales figures just short of £1.6 bn in 2012.
3. The Commission's activity in the copyright area must have regard to potential for growth in the whole of the EU; however, the UK's engagement in the various debates should reflect the rather unique position in the UK. Given the current copyright policy agenda in Europe, the IPO's consultation on copyright policy and Europe is particularly timely. The clear recognition that the UK is a net exporter of copyright content, and of the importance of the right European framework for the success of industries that depend on copyright to continue to thrive, is particularly pleasing.
 4. In some recent debates about copyright, many in the creative industry sector have been concerned that the UK Government has failed to sufficiently recognise the significant role that strong property rights and enforcement of those rights play in delivering this success. As a result, some possible changes to copyright law in the UK have not, in our view, been explored with a proper regard to their full impact. In any case, we would highlight that the Government has been able to take forward UK copyright reforms under the current EU framework. Changes to copyright law in the EU, which might undermine the proven and certain success for the UK economy of those investing in the creation of audiovisual material, should be pursued with extreme caution. BSAC is fully behind the idea of growth for the economy as a whole, and the broad range of stakeholders represented by BSAC means that our views reflect interests beyond those at the core of the creative industries. We support an environment where platforms and network providers can also innovate to deliver benefits to consumers and growth to the UK economy. However, growth more widely should not be at the expense of damage to those investing in content creation by changes to copyright law which, for example, shift the balance between exclusive rights and exceptions to rights unfairly.
 5. Another concern is the failure to properly consider factors, other than copyright, that may influence sustainability and growth in the creative sector. This is something BSAC has raised, for example, in the context of our response to the consultation on the European Commission's Green Paper on the online distribution of audiovisual works in the EU.⁴ We have very recently produced a contribution to the EU Commission's *Licences for Europe* work stream on issues relevant to satisfying consumer demand for audiovisual content in Europe. We are providing that paper herewith as additional evidence. The paper explores a range of relevant issues that affect where, when and how audiovisual content is made available to consumers. We hope that the IPO ensures

³ See BFI Statistical Yearbook 2013 at <http://www.bfi.org.uk/education-research/film-industry-statistics-research/statistical-yearbook>

⁴ See BSAC comments published in November 2011 at <http://www.bsac.uk.com/2011.html>

that it does not therefore consider copyright policy and Europe in a vacuum. Factors that determine where, when and how audiovisual content is made available to consumers include how the production was financed, cultural preferences and language versioning. There is not in any case a digital single market for all audiovisual content that would be ready and waiting, if only the content were made available to all consumers across the EU. The case for a single digital market is much more layered and nuanced. Devising culturally appropriate marketing and promotion is an important part of how to get content noticed in a crowded marketplace. As we demonstrate, again, in this contribution to the *Licences for Europe* work stream, the tendency to focus only on possible changes to the copyright framework as the way of delivering solutions to any perceived problems is not helpful, and the perceived problems may not, in fact, be problems in the first place.

6. Gaining a proper understanding of the impact on all stakeholders of changes to regulation in the copyright, and any other, area is therefore very difficult given the many relevant issues. Rushing into changes to the law may often not be appropriate in any case, especially at a time when technology is still evolving so much and the successes (and failures) of the various new business models are so uncertain. Other interventions by policy makers can, however, often be very helpful. For example, BSAC welcomes the Commission's *Licences for Europe* initiative. We believe that the workshops with stakeholders provide a useful forum to share views, as well as help the Commission form a clearer sense of what consumer-driven solutions Europe's audiovisual industries are already deploying in order to adapt to new expectations and patterns of consumption.

Comments on European Commission's Intellectual Property Strategy

7. As the IPO has acknowledged, a number of the copyright proposals set out in the Commission's communication about an intellectual property strategy are already underway. Such initiatives include the *Licences for Europe* stakeholder dialogue. A number of copyright issues relevant to the audiovisual sector were explored further in the Commission's Green Paper on the online distribution of audiovisual works, and the comments from BSAC on this document are still relevant.⁵ We have, therefore, referred to that contribution to the debate, where relevant, in our comments on issues below.

Collective management of copyright

8. Harmonising some of the rules that apply to collective management of rights across Europe makes sense and so BSAC welcomes the intentions behind the legislative proposals in the draft Directive. Audiovisual material is not in general licensed collectively, and right holders in this, and other sectors, must in most situations remain free to decide whether or not to opt for a collective licensing approach to licensing particular uses of their content. But those in the audiovisual sector do benefit from being able to take out collective licences to clear rights for certain uses of underlying content in an audiovisual work. We therefore value collective licensing as a useful solution to licensing in some specific situations. We also fully recognise the need to ensure that the inherent monopoly of a collective rights management organisation

⁵ See document referenced at footnote 4

should be subject to certain rules for the benefit of both right holder members and licensees. The voluntary development of codes of practice for collective rights management organisations in the UK, with statutory underpinning, is therefore a helpful addition to the role of the Copyright Tribunal to adjudicate on licensing terms and conditions. The similar developments at EU level also make sense to ensure that regulation of collective licensing is more harmonised than is currently the case.

European copyright code, including exceptions and limitations to copyright

9. BSAC's views on a European copyright code are as set out in the answer to Question 13 in the Commission's Green Paper on the online distribution of audiovisual works.⁶ Such a project would be exceptionally ambitious with a most uncertain chance of delivering an outcome that would contribute to growth in cross border services. The UK would need to be very aware of the pressure from Member States that are net importers of audiovisual and other copyright content to seek a very different code from the one that would be in the UK's interest. For example, one of the key provisions in the 2001 Information Society Directive means that EU-wide exhaustion does not currently apply to intangible online goods. Maintaining this principle is essential for the audiovisual sector so that it can continue to develop new business models in the online sphere and deliver content to EU consumers by a wide range of services that can provide a return on the considerable investment in creation of the content.
10. As we have said in the past, at the very most there should therefore only be discussions about harmonisation on certain very specific issues, although we are not particularly recommending the need for any such discussions and would be very concerned indeed about some issues being opened up. However, if discussions were to take place, we would expect the IPO to take account of the UK's unusual status within the EU as a net exporter of copyright content, and so the need for strong and enforceable rights. Legislation needs to go with the grain of changing consumer behaviour and the need to develop innovative services, without undermining the legitimate expectations of rights holders with regard to the protection of their works.
11. Regarding limitations and exceptions to copyright, changes to exceptions to copyright are currently being pursued in the UK. We welcome some of the proposals, such as to ensure that all audiovisual material in the country's national archives can be properly preserved, and so that educational establishments can deliver recordings of broadcast content to their students even when they are not on the campus. Others are more problematic, such as the proposed drafting of the new private copying exception, which does not seem to have been developed in the light of the new ways in which audiovisual content is being offered to consumers. Market-led solutions to provide consumers with the copyright content that they want in the ways that they want it will often be a faster way of satisfying consumer demand than legislative changes. This approach is, moreover, more flexible than a legislative change, which may make provisions that make sense now but in the future may not be well understood by consumers. In any event, as we have already noted, the UK has been able to pursue changes under the existing EU framework. An exhaustive list of specific exceptions at EU-level is important for legal certainty. We would want the UK to consider very

⁶ See page 16 of our comments as referenced at footnote 4

carefully whether market-led solutions are the better approach at EU level regarding any concerns about exceptions and limitations to copyright.

Unitary copyright title

12. Once again, BSAC's views on a possible optional unitary copyright code are as set out in the answer to Question 14 in the Commission's Green Paper on the online distribution of audiovisual works.⁷ We remain puzzled as to how an EU title would help with rights clearance, rather than confuse and complicate matters, given that it would be optional and co-exist with national titles. Moreover, in the audiovisual sector, rights clearance is not usually a problem that needs a solution in order to make content available across Europe. The non-copyright issues that are relevant to satisfying consumer demand for audiovisual content in Europe are, as already mentioned, explained in particular in our recent contribution to the *Licences for Europe* initiative.⁸

Licences for Europe dialogue

(a) Cross border access and portability of services

13. BSAC's recent contribution to the *Licences for Europe* initiative is the main piece of evidence we would like to bring to the attention of the IPO regarding cross border access and portability of audiovisual services.⁹ That paper explores the rapidly increasing choices that European consumers have about how they access audiovisual content, including by an increasing number of cross-border business models. It goes on to stress that the issue of cultural diversity should not be forgotten in the debates about the Single Market, pointing out that it would ultimately be the consumer who would lose out from the loss of a culturally diverse range of material in any desire to promote standardised EU-wide distribution of content. The complexities of the financing of European content are explained, including how important exclusive territorial rights can be to try and secure the financing needed to produce the expensive content that consumers enjoy. The dangers to the continued production of EU films with any attempts to regulate licensing models are pointed out. Similar issues apply to TV, notably high-end drama. The paper concludes that nothing in the current framework of EU and member States' copyright laws prevents producers and distributors from licensing audiovisual content on a pan-European, multi-territory basis, whilst suggesting some practical incentives that the Commission should consider for SMEs in particular.

(b) User generated content

14. BSAC welcomes the discussions in the *Licences for Europe* initiative about how it might be possible to better license use of content in some situations. We have previously indicated that solutions could be found for some types of uses of copyright content, as happens on social networking sites, so long as the issue of how to deliver fair compensation to right holders is addressed. This should not, however, extend to uses that would compete with right holders' own business models, and so undermine

⁷ See page 16 of our comments as referenced at footnote 4

⁸ See paragraph 5 above

⁹ See paragraph 5 above

how they develop various ways of delivering content to consumers to gain a return on their considerable investment in content creation.

(c) *Audiovisual sector and cultural heritage*

15. BSAC also welcomes the discussions on the audiovisual sector and cultural heritage. The British Film Institute and the BBC are represented at BSAC and so we understand the issues here. All BSAC Members have always recognised the importance of properly preserving audiovisual content in national archives. We have supported an exception to copyright to permit this at both UK and EU level. We have also commented on the possibility of other limited exceptions to copyright in our answer to Questions 21 and 22 in the Commission's Green Paper on the online distribution of audiovisual works.¹⁰ Licensing solutions may, of course, be possible for further uses of content in archives, and so we look forward to the final report from this work stream.

(d) *Text and data mining*

16. This is an issue that has been explored in the UK and we had not thought that it was directly relevant to the interests of BSAC Members. It seemed to us that proposals were targeted at academic journals, and text and data mining for the purposes of scientific research. However, the recent drafting of the proposed UK exception would permit things well beyond this as it was not limited to uses for scientific research purposes only, nor was it limited to only mining what is in databases of online journals. Use of terms like, 'research,' makes the scope of what is permitted very vague. Indeed, the UK proposal, as currently drafted, would apparently permit the copying of any database of any type of material in order to mine it for any sort of information, as well as copying any content to establish a database in the first place to mine it for data of any sort. So, for example, a person would be able to copy every piece of audiovisual content on YouTube in order to mine it for any type of information for any (non-commercial) purpose.
17. The impact on stakeholders of such a wide provision does not, so far, seem to have been assessed in the UK. It would therefore be of great concern if the UK were also to support similar action in the EU without very carefully looking at whether or not this would be a balanced solution or have a detrimental impact on the UK creative industries. We do not know whether or not the discussions on this issue in the context of the *Licences for Europe* initiative would give rise to the same concerns, but the focus there, on licensing solutions rather than regulatory change, is probably the better approach.

Private copying levies

18. BSAC has never been in favour of private copying levies. The current research and discussions in Europe on this issue do tend to show that levies as a means of compensating right holders for legalised private copying make even less sense than in the past. Business models giving consumers choices about what they pay for seem to us to be the better approach, and business models are certainly being developed in response to some consumers' desire to be able to make copies. For example,

¹⁰ See pages 18 and 19 of our comments as referenced at footnote 4

UltraViolet, a technology platform developed jointly by consumer electronics device manufacturers, content owners and several of the larger international film distributors, provides consumers with the ability to register UltraViolet-enabled films and TV content they have purchased in their personal cloud 'locker'. The content in a consumer's UltraViolet library can be downloaded to a device before travelling or streamed to a connected device whilst on the move. Services are also appearing that allow consumers to register their existing DVD/Blu-Ray collection in their UltraViolet library. Mandating any levy will disincentivise the future development of such consumer friendly products. Our lack of support for a levy does not mean that new limited private copying exceptions with no mechanism for compensation should be encouraged. For example, in the UK we do not believe that the proposed drafting of a new private copying exception has had proper regard to the impact on right holders of what would be permitted. The better approach in the online environment, and one that avoids any problems, including of double payment because a levy has been paid as well as a payment for a particular service, is to not have a broad private copying exception and not have private copying levies, but rather to let the market deliver different business models to consumers.

Enforcement of rights

19. A key issue for right holders is effective enforcement of rights. EU regulation on this issue is, of course, about all types of intellectual property rights, but many discussions about copyright policy are likely to need to have regard to both regulatory and non-regulatory approaches to better enforcement of rights as well. We do not, however, believe that a reopening of the Copyright Directive or Enforcement Directive will improve existing enforcement activities. It would probably, therefore, be helpful for the IPO to conduct a similar consultation to the current one about IP enforcement and Europe so that the UK is well prepared to defend UK interests when enforcement issues are debated. We welcome the administrative co-operation on IP enforcement through the EU Observatory on the Infringement of Intellectual Property Rights, but are concerned that current regulation in this area has probably not delivered all the benefits that were hoped for.

International issues

20. We are generally pleased with the outcome of the two recent diplomatic conferences about the new WIPO treaties on audiovisual performances and facilitating access to published works for print-disabled people. Although opposing views seemed irreconcilable at times, the eventual consensus on provision that is fairly balanced is welcome. The EU's engagement in the negotiations seemed generally helpful, but we are well aware of the pressure from some quarters within the forum of WIPO for a weakening of copyright. It is therefore essential that the IPO continues to ensure that the EU's contribution to debates in WIPO supports a copyright framework of strong and enforceable rights, so that the UK can continue to be a world leader in the creative industry sectors that depend on copyright protection.

Completing the Single Market

21. The IPO consultation on copyright policy and Europe refers to the various work streams already taking place and we have provided comments on these where we feel this is appropriate. The IPO paper also asks whether there are further steps needed to complete the Single Market in this area. In our comments we have already indicated that one of the most important areas for action is enforcement of intellectual property rights. Moreover, we have in a number of places pointed out that copyright, and more specifically copyright licensing, is not a problem that needs to be solved by regulatory solutions in order for cross-border business models for audiovisual content to continue to be developed. The current Directives harmonising copyright mean that right holders retain the contractual freedom and flexibility necessary to approve exploitation of their works in ways that can maximise opportunities for monetisation in their home countries and throughout the EU.
22. Practical measures that might facilitate cross-border licensing of content may be appropriate for the Commission to explore. In the UK, the industry-led work on a Copyright Hub and related issues may certainly deliver better solutions for some types of copyright licensing. We are not yet wholly convinced that the UK initiative will deliver massive benefits for the audiovisual sector, however BSAC, and the sector more generally, have been playing a full part in taking the work forward in the UK and is continuing to do so. It may be that it would be helpful for the Commission to facilitate wider discussion and collaboration on practical solutions for some types of copyright licensing across Europe, perhaps by taking forward any emerging ideas from the *Licences for Europe* initiative.
23. There may be some other practical issues that it could be helpful for the Commission to engage in. In our recent contribution to the *Licences for Europe* initiative we have suggested that the EU Commission should explore practical incentives, for SMEs in particular, in their efforts to develop new business models that meet EU consumers' growing interest in flexible access to content, including cross-border portability and access. We have suggested that funds from Creative Europe could usefully be re-prioritised to support business ventures with pan-European components by offering to share in a number of technical costs, including regarding:
 - encoding costs
 - language versioning
 - market research
 - content identification and registration.

The work in the UK linked to development of the Copyright Hub has already identified some of these issues, such as content identification and registration, as important building blocks to facilitate easier copyright licensing. Other issues, such as language versioning, are not relevant unless content is licensed outside its country of origin, but for audiovisual content it is a very important issue if content is to be found attractive across Europe. Producing different language versions incurs a significant cost and so is a considerable barrier for SMEs.

24. We appreciate that the IPO may not feel that it should lead on some of these issues. However, the wider picture needs to be taken into account when the IPO considers whether or not it should support changes to the copyright framework in Europe. The IPO must therefore fully understand all of the issues that are relevant to whether or not, and how, content is made available across borders in Europe before it too readily accepts that there are copyright issues that need to be solved to complete the Single Market for digital content. Moreover, as we have already said, market-led solutions are likely to deliver something faster and more flexibly, even if a problem has been identified.