



## **INDEPENDENT REVIEW OF INTELLECTUAL PROPERTY AND GROWTH: CALL FOR EVIDENCE (DECEMBER 2010)**

### **SUBMISSION FROM THE BRITISH SCREEN ADVISORY COUNCIL (BSAC)**

**4 March 2011**

#### **Introduction**

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<sup>1</sup>.

We welcome the opportunity to provide evidence to the Hargreaves Review. BSAC has, and will continue, to engage in constructive debates relevant to the audiovisual sector and this Review explores some key issues for the sector. 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. Our response to the call for evidence is therefore largely about copyright. The recommendations to emerge from this Review about the copyright framework will be very important.

BSAC regularly engages with government on current copyright issues. For example, we provided evidence to the Gowers Review of intellectual property in 2006 and responded to the government consultations about taking the copyright recommendations of that review forward<sup>2</sup>. We also provided a response to the UK IPO consultation on the future of copyright<sup>3</sup>. But we have also taken the initiative to explore more long-term issues when government is not actively seeking views. For example, in 2009 we published a report<sup>4</sup> produced by the Blue Skies

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<sup>1</sup> See the BSAC membership list at <http://www.bsac.uk.com/membership-list.html>

<sup>2</sup> See the responses to the consultations in 2008 and 2010 for BSAC views on these issues – published at <http://www.bsac.uk.com/published-reports.html>

<sup>3</sup> See the BSAC response in 2009 to the consultation – published at <http://www.bsac.uk.com/published-reports.html>

<sup>4</sup> See the Blue Skies Copyright Report 2009 published at <http://www.bsac.uk.com/published-reports.html#briefing> – The Fall and Rise of Rights in a Web World: Reflections on Copyright

Copyright Working Group, which had been set up by BSAC in recognition of the need to look at the future of copyright. That report identified a number of key features that must be delivered by a new IP rights framework, including the promotion of equitable and flexible licensing of rights, the recognition of public entitlement to access publicly funded content and the need to facilitate mash-ups. The Working Group's consideration of the issue of "equitable use" is perhaps particularly relevant to the current Review. Although it identified certain principles, the Working Group was very conscious that developing the details would take longer and was beyond its remit at that time. Underpinning the report from the Blue Skies Copyright Working Group, however, was a belief that IP rights must drive innovation, enhance competition and deliver access for consumers, issues that remain relevant and at the core of what the current Review must consider.

After our Blue Skies Copyright Working Group had reported, we started work on an audiovisual policy paper that was published in December 2009<sup>5</sup>. This paper identifies four key policy areas for priority regulatory intervention and/or direct support by the government. Not surprisingly one of the policy areas is copyright, but this paper illustrates an important point for the Hargreaves Review beyond what it says about copyright. Industry success is rarely the result of just one type of policy intervention and so a review that focuses on just one policy area may not reach the right conclusions. For example, under the heading for enterprise, the paper identifies the need to focus resources where the chances of generating a small number of nodes of economic success are greater. The failure to do this in the UK compared to what has happened in the US for example may be more relevant, or at least as relevant, to where innovation thrives as the issues about copyright explored by the current Review. A more holistic approach to policy-making than that suggested by the Review questions is recommended. In this respect we note that the government's current review of growth in general does appear to be adopting a more holistic approach to identifying the barriers to growth<sup>6</sup>. The digital and creative industries have been identified as one of the six sectors to be considered first. Ensuring that there is joined up policy-making in the light of the growth review and the Hargreaves Review will be essential.

The copyright issues identified by the BSAC policy paper published in 2009 include the importance of copyright enforcement, including by cooperation between all stakeholders, the need for a review of copyright licensing to allow for requisite flexibility and global demand but without undermining right holders' interests, and ensuring fair access to copyright material, particularly a right to quote, as part of a social compact between creator and society. This paper

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<sup>5</sup> See the Creativity, Competitiveness and Enterprise Report December 2009 at <http://www.bsac.uk.com/published-reports.html#briefing> – Creativity, Competitiveness and Enterprise in UK Audiovisual: New Vision, New Policies

<sup>6</sup> See the path to strong, sustainable and balanced growth published by HM Treasury and BIS - <http://www.bis.gov.uk/policies/growth>

therefore very broadly endorses the more detailed conclusions about the future of copyright identified by the Blue Skies Copyright Working Group. The issues identified are, of course, also at the core of what is now being considered by the Hargreaves Review.

Despite the policy issues that we have identified for intervention or support, it should be remembered that the audiovisual industry in the UK is a success and so anything taken forward must be designed to enhance rather than undermine this. In June 2010 the UK Film Council published an updated report from Oxford Economics on the economic impact of the UK film industry<sup>7</sup>. This report, the third in a series, examined not only the direct impact but also indirect contributions, such as those to supplier industries, tourism, culture, merchandising, trade and the promotion of the UK internationally. The study focused in particular on the ‘core UK film industry’, defined as film production in the UK plus the distribution and exhibition of UK films. The analysis showed that the core UK film industry contributed £1.6 billion directly to UK GDP in 2009, with a direct contribution to the Exchequer of £445 million. This GDP contribution rose to £4.6 billion when all indirect effects were taken into account. In video games, the UK was in third place in global video games sales rankings by country of origin in 2008. That position has, however, now slipped so that the UK is behind Canada, but the reasons for this, which we refer to further below, are not due to the copyright framework. And in television, the UK industry generated £11.1 billion in revenues in 2009<sup>8</sup>, which has underpinned investment in original content. For example, the five main PSB channels invested £2.41 billion in first-run UK-originated programming in 2009, supporting independent production companies across all parts of the UK.

It is also important to remember that the different parts of the creative industries in many ways continue to have their own distinct characteristics. For example, the way a consumer enjoys many films, ie watching a film once only, or only watching it again many months or years later, is very different from the way a consumer generally enjoys music, where the same track is listened to repeatedly. Legacy business models in the audiovisual sector reflect these differences, for example where rental of a film has been popular. Music has not generally been offered to consumers this way. Online business models are still in a state of flux so that it is not yet clear which ones will be the most successful, and the business models that work may superficially not look so different for different sectors. But the details of the actual consumption of different types of content are still likely to be different. It is therefore very important in our

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<sup>7</sup> Published by the UK Film Council at <http://www.ukfilmcouncil.org.uk/article/16830/Major-new-report-shows-that-UK-film-contributes-over-45-billion-to-UK-GDP-supports-100000-jobs-and-is-weathering-recession-well> - The Economic Impact of the UK Film Industry: June 2010

<sup>8</sup> As reported in the Communications Market Report, Ofcom , August 2010 -

[http://stakeholders.ofcom.org.uk/binaries/research/cmr/753567/CMR\\_2010\\_FINAL.pdf](http://stakeholders.ofcom.org.uk/binaries/research/cmr/753567/CMR_2010_FINAL.pdf)

view that any recommendations made by this Review on the basis of looking at one sector are not applied to all sectors without very carefully examining the implications of doing this.

Our work on copyright to date makes it clear that we would not argue that there should never be any change to the copyright framework, but we recognise that identifying the detail of any change tends to be extremely difficult. For example, this has definitely proved to be true in the case of orphan works, which we mention further below. Evidence is certainly needed in order to identify the right changes, but we do wonder whether that is easy to obtain from a consultative process alone. The BSAC Blue Skies Copyright Working Group report said that it may not be possible to find the right answer simply by consulting enough. Policy-making may therefore need to be developed in the light of good quality research that the government has commissioned as well as wide-ranging consultative exercises. It may be unrealistic to expect to easily identify quick fixes as these may do more harm than good. We hope that the recommendations emerging from the current Review, which in the time available cannot have dug down into the detail of all the issues, are, nonetheless, a helpful step forward in the process to finding a copyright framework for the 21<sup>st</sup> century.

### **Call for Evidence: Copyright**

*1. Is there evidence from other national frameworks to suggest how the UK (and EU) copyright systems could better support innovation?*

Those investing in innovative creativity need a copyright framework everywhere in the world that gives them an opportunity to seek a return on their investment. The rights granted by copyright laws in many countries to those who invest in the creation of original content are currently very similar, not least because these are laid down in international treaties and conventions to which many countries in the world belong. This is not a problem but a benefit as it provides more certainty in how a return on investment can be secured. The benefit of finding similarity in the protection available in all countries rather than big differences is in our view more important than ever to the creative industries in a world where making material available on the internet is crucial and where markets are global.

The creative industries are, of course, more successful in some countries than others, but this is likely to be largely due to factors other than the copyright framework. For example, the Canadian video games sector has benefitted from the financial incentives. Proposals for arrangements in the UK have so far been rejected by the government, despite the analysis which demonstrates the relative decline in the sector in the UK compared to jurisdictions with more

favourable tax and other support regimes<sup>9</sup>. Moreover, the recently published independent review<sup>10</sup> identifying skills needed for the high-tech video games and visual effects industry sectors shows how addressing these needs is also crucial if the UK is to remain one of the world leaders in these highly innovative areas. As that report states, at over £2 billion in global sales, the UK's video games sector is bigger than either its film or music industries, and visual effects, the fastest growing component of the UK's film industry, grew at an explosive 16.8 per cent between 2006 and 2008. Worldwide, the video games market, which is a major generator of intellectual property, is projected to grow at an annual rate of 10.6 per cent between 2010 and 2014 compared to an average of 6.6 per cent for all media and entertainment markets. But, as the independent review identifies, the UK's video games industry has dipped from third to sixth place in the global development rankings, so there is an urgent need to address issues like skills and tax credits. These issues are likely to have a much greater impact on the future success of these innovative sectors than any concerns about the copyright framework.

There is much innovation too in other parts of the audiovisual sector. Digital TV take up is high as shown by the increase in the number of homes that can access it. Ofcom's most recent Communications Market Report<sup>11</sup> shows that around 5.1 million UK homes had access to HDTV channels across satellite, cable and digital terrestrial television at Q2 2010, up from around 1.9 million at the end of Q1 2009. 3D cinema is proving to be popular with a total of 28 3D films released in 2010 grossing £237.4m - a 24% market share, up from 16% in 2009<sup>12</sup>. 3D televisions are now on the market and the first 3D broadcast of a live football match last year has been followed by more films, sports, and entertainment programming being made available in 3D. Increasingly, the VoD window is being brought forward in line with the DVD release date so that the new online business models are more attractive. But there are two key factors delaying more growth in the VoD market. The first is lack of connectivity between the TV screen and the internet as a standard, something that is a barrier to uptake of VoD by many consumers. The second is problems with download speeds for full length audiovisual content. Innovation and investment in the technology and infrastructure needed to deliver new business models, as well as the new business models, is therefore crucial, but this is not something that requires a change to the copyright framework. The government's commitment to bring superfast broadband to all parts of the UK is welcome, but, until that is delivered, the audiovisual sector must still rely heavily on legacy business models to obtain a return on investment. These must not, therefore, be undermined by changes to the copyright framework considered only against new business

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<sup>9</sup> See the report published by TIGA at <http://www.tiga.org/News/Investing-in-the-Future.aspx> - Investing in the Future: a Tax Relief for the UK Video Games Development Sector (January 2011)

<sup>10</sup> Published by NESTA at [http://www.nesta.org.uk/home1/assets/features/next\\_gen](http://www.nesta.org.uk/home1/assets/features/next_gen) - Next Gen. Transforming the UK into the world's leading talent hub for the video games and visual effects industries

<sup>11</sup> See footnote 8

<sup>12</sup> See UK box office data published by the UK Film Council at <http://www.ukfilmcouncil.org.uk/theatrical>

models that do not at the moment contribute significantly enough to the income from exploitation of films.

The audiovisual sector in the UK is therefore already innovative and it is also successful on a global scale. Creative audiovisual content originating in the UK is valued highly in many countries. That does not mean that there are no problems for the sector; indeed we have identified some above. Moreover, we accept that some parts of the copyright framework do need to be examined, as indicated below. But copyright may not be the most important issue to address. A recent BSAC working group, which included entrepreneurs, financiers, exhibitors and studios, looked at the issue of enterprise. It explored a number of problems, but no member of the group identified copyright as an important concern, ie changes to the copyright framework were simply not raised as important in the context of facilitating enterprise.

### *“Fair use”*

We assume that the main focus of this question in the Review is about innovation in sectors that depend on use of others’ creative content for their success. Building on earlier creativity is often the norm, and the major producers of high value, original audiovisual content include other material in their products. There are also sectors wishing to use others’ creative content which have not been contributors of major investment in original creation of content. Whilst we support the ability of sectors such as these to innovate, this should not undermine the ability of those who have invested in content creation to obtain a return on their investment.

We are aware of the comments made by some about the lack of innovation in the UK in this area being the result of the absence of a US-style fair use exception to copyright. However, we think this is an over-simplification of what has happened in the past where this copyright exception has not necessarily been the key to determining the success of search engine providers, social networking sites and so on having their origin in the US. The US fair use exception is certainly more flexible than the more specific exceptions in the UK, but those wishing to stretch the boundaries of what might have been previously permitted seem only to be able to do so with confidence if they have the means to defend their position in court. Indeed, the information about fair use published by the US Copyright Office says the distinction between fair use and infringement may be unclear and not easily defined<sup>13</sup>. The US Copyright Office notes that the safest course is always to get permission from the copyright owner before using copyrighted material. The cases on the interpretation of the fair use exception in the US also show that this exception, which is not coupled with any form of remuneration, is in general quite limited in scope.

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<sup>13</sup> See the information published at <http://www.copyright.gov/fls/fl102.html>

While the current evidence does not suggest there is a need for US-style fair use exception, we would welcome a further debate about whether or not the copyright framework is appropriately balanced. This needs to look at options beyond what it is in any copyright framework in other countries. As we said in the section on copyright in the BSAC paper published in December 2009<sup>14</sup>, a print literate society has a right to quote, so an audiovisual literate society should also be able to quote. Some of the issues that need to be explored further to deliver this need very careful thought, which we have not been able to undertake in the time available for submitting evidence to this Review. Some of the things that perhaps should be permitted under an “exception” ought to give rise to remuneration for right holders, whereas other things perhaps ought to be free as is the case with the current UK fair dealing exceptions and US fair use exception. An occasional use of a small part of something by a single person for their own purposes only is very different from regular use of many different works in a way where they are made available to the public in general. But use where something is made available to the public can also vary between use of a small part of something in a much larger new work with much original material, and use of small or large parts of many things with little original material. Also, although we accept that this is a very difficult dividing line to draw, there may be differences where the use in public leads to no commercial advantage for anyone and uses where there is such an advantage.

The uses that are permitted under the current UK fair dealing exceptions, which lead to no remuneration for right holders, are very important to many of our Members and we do not think there is any reason to limit these, such as by coupling them with a remuneration right. Indeed, there may be a case for extending their scope to clearly cover use for other purposes. The Gowers Review of Intellectual Property recommended a new exception to permit use for the purposes of parody. It would be reasonable for there to be an exception permitting fair dealing with a work for this purpose.

More generally, the debate started in our Blue Skies Copyright Working Group about the idea of “equitable use” may also be one that should be taken forward in various ways. The Working Group suggested that two particular avenues might be explored to develop more understanding of how to develop permitted use beyond existing exceptions, including to consider when there should be remuneration for right holders. The first was use of orphan works, where, as indicated below, BSAC continues to play a lead role in how this might be developed, and the second was licensing of rights by heirs<sup>15</sup>.

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<sup>14</sup> See point (f) in the table below paragraph 29 of Creativity, Competitiveness and Enterprise in UK Audiovisual as referenced in footnote 5.

<sup>15</sup> See paragraph 24 of the Report by the Blue Skies Copyright Working Group referenced in footnote 2.

## *Orphan works/rights*

BSAC has been committed to the need to find a solution to permit use of orphan works for sometime. This started with a report<sup>16</sup> that was requested from us by the Gowers Review of Intellectual Property and which was acknowledged by the recommendation for action in the report of that Review. We subsequently developed our ideas further in the light of concerns that had been raised about the acceptability of a copyright exception as a solution to this problem and the need to take account of possible collective licensing solutions. We submitted an additional report<sup>17</sup> to the UK IPO in 2008 exploring these concerns and suggesting solutions. We were therefore generally pleased to see the enabling provisions in the Digital Economy Bill in early 2010 to permit legislative change by regulations allowing use of orphan works. We were disappointed when that part of the Bill failed to reach the statute book.

The lack of a consensus on this issue seems to have been the cause of this failure. With this in mind, last autumn BSAC set up a Working Group of some of the most interested BSAC Members, but also with participants from areas beyond those represented by BSAC. Our Working Group includes not only right holders, but also platforms, and library and archive representatives, namely a wide cross section of those who are interested in finding a solution. We have so far produced several interesting papers, some still only in draft, assessing the pros and cons of the various possible solutions, providing examples of orphan works, exploring exactly how collective licensing might be part of any solution and examining how the law on ownership of rights has changed in the last 100 years. We have been considering this issue only in the context of how audiovisual material where one or more rights are orphan might be used, but audiovisual material typically contains many other types of copyright work. We are currently trying to put together some case studies so that we have a better idea about what types of content the most likely orphan audiovisual material actually contains. We would be very happy to share any of the papers with the Review team, but are not yet at the point where we can identify consensus solutions to the problems.

The discussions have been most constructive and so we are very hopeful that a consensus will emerge. Although, as indicated, this is currently limited to what might work for use of audiovisual material, we hope that the rigorous and collaborative approach to taking this forward means that the Working Group's conclusions might lead to an even wider consensus about orphan works in due course. This issue is, of course, one where we expect a legislative proposal

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<sup>16</sup> See the briefing paper published at <http://www.bsac.uk.com/published-reports.html#briefing> – Copyright and Orphan Works: A paper prepared for the Gowers Review 2006.

<sup>17</sup> See the consultation response published at <http://www.bsac.uk.com/published-reports.html#briefing> – Implementing the Gowers Review: Orphan works



to emerge from the EU Commission very soon, but we understand that the details of any solution are likely to be left to Member States. It is therefore important for the government to engage with all stakeholders on this issue again and play its part in finding a consensus way forward. We hope that the government will find the work we are doing useful and with this in mind we invited the UK IPO to participate in our Working Group. We are aware that others may also be exploring this issue, but we do not believe that there are any groups doing so with such a wide representation as our Working Group, and so we hope the government will give appropriate weight to the recommendations that will emerge from our work.

*2. Are markets involving copyright more competitive in any other countries, while still providing satisfactory incentives to creators and investors?*

Many of the points we have made in answer to question 1 are relevant to this question too.

*3. Is there evidence of how the UK copyright framework supports growth and innovation?*

We have already identified growth and innovation in the audiovisual sector in our answer to question 1, but many factors and not just copyright will be relevant.

*4. Is there evidence of areas where the UK copyright framework does not deliver the optimal outcomes?*

Two key areas where we would like the current copyright framework to be explored are as identified in the two reports published by BSAC which we have mentioned in the introduction above. Both the Blue Skies Copyright Working Group report and the paper on Creativity, Competitiveness and Enterprise in UK Audiovisual identified the exception regime and the rights' clearance regime as ones that may need to adapt. The first of these is discussed further in our answer to question 1 above, and the second is explored further in answer to question 6 below.

*5. Is there evidence to suggest that the current framework impacts the production and delivery of goods and services which consumers want?*

Although consumer expectations are obviously changing and user-generated content continues to grow, many consumers still value traditional audiovisual content and consume it via legacy business models. As broadcasters contended with the impact of the economic downturn, television revenues fell slightly according to Ofcom's most recent Communications Market

Report<sup>18</sup>, particularly due to reductions in the revenue from advertising, but UK television broadcasters still generated revenue of £11.1bn in 2009. Pay-TV revenues actually increased with revenues up by £319m (7.5%) in 2009 to £4.6bn. Also, the average number of hours of television watched by individuals in the UK increased slightly from 2004 to 2009, up by 3% from 3.7 hours a day in 2004 to 3.8 hours a day in 2009. The amount of TV watched by catch-up services continues to grow rapidly, with Ofcom research in Q1 2010 finding that 31% of adults with the internet had watched catch-up TV, up from 23% in Q1 2009, but this still constitutes a small amount of overall viewing. The Ofcom research has also shown that the average person spends 252 minutes per week watching non-linear audiovisual content<sup>19</sup> across a variety of platforms and devices, this being 17% of the average consumer's 1,461 total minutes of weekly audiovisual viewing.

Data produced by the UK Film Council<sup>20</sup> shows that, despite broadband penetration of 65% of all UK households (and 90% of UK households connected to the internet), the online VoD market did, however, remain small in 2009, with estimated revenues of around £15.9 million (plus approximately £300,000 from subscription services). This has, though, grown from £6.2 million in 2008 and £700,000 in 2007 due largely to the introduction of films on iTunes mid-way through 2008 and also on Xbox Live Marketplace. Screen Digest<sup>21</sup> has estimated that the combined value of the television-based VoD and nVoD and internet-based film market was worth £124 million in 2009, but this is only roughly 3% of the total UK filmed entertainment market. For the year ending December 2010, the digital delivery platform accounted for 11% of the total UK video entertainment market in value, but DVDs and Blu-Ray disc sales (and to a lesser extent rentals) are still a major part of the post-cinema exhibition window for films<sup>22</sup>.

Revenue to provide a return on the investment in creating original audiovisual material therefore still has to come from traditional business models as this is the main way the content is consumed. We agree that the sector also needs to continue to experiment with pricing models that work for both the consumer and the industry, and the size of the VoD catalogue, but this experimentation must continue to take place against the need to secure revenues for films now. The current copyright framework remains largely fit for purpose to meet the consumer demand for this original content delivered in traditional ways, and any changes that are considered should

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<sup>18</sup> Communications Market Report, Ofcom, August 2010 -

[http://stakeholders.ofcom.org.uk/binaries/research/cmr/753567/CMR\\_2010\\_FINAL.pdf](http://stakeholders.ofcom.org.uk/binaries/research/cmr/753567/CMR_2010_FINAL.pdf)

<sup>19</sup> Non-linear TV includes content consumed on DVRs, rented/purchased DVDs/VHS, recorded TV on DVDs/VHS/games consoles/on demand TV through a TV set or PC, and content downloaded from the internet.

<sup>20</sup> UK Film Council Statistical Yearbook 2010 - <http://sy10.ukfilmcouncil.ry.com/Default.asp>

<sup>21</sup> For a comprehensive assessment of the VOD market see a report produced for BSAC by Screen Digest at <http://www.bsac.uk.com/published-reports.html#briefing> - Internet Video on Demand Market Update 2010

<sup>22</sup> See British Video Association press release of 5 January 2011 at <http://www.bva.org.uk/news-press-releases/video-entertainment-remains-popular-ever> - Video entertainment remains as popular as ever

fully take into account the need not to jeopardise the way the market currently enables a return on investment to be secured as this could be detrimental to consumers, as well as the industry.

6. *What evidence is there that the necessity/complexity/cost of obtaining permissions from existing rights holders constrains economic growth?*

The difficulties with the current copyright licensing regime were raised by both the Blue Skies Copyright Working Group<sup>23</sup> and in our Creativity, Competitiveness and Enterprise Report<sup>24</sup>. The latter of these said that the multiplication of access points permitted by broadband internet, combined with the sharp decline in the marginal costs of distribution, is putting pressure on a licensing regime designed largely for the bygone age of the physical print or disc. Licensing problems are of concern to content creators as well as consumers. Large broadcasters and independent producers do create much original content, but they also usually want to include other content too. They may have the size and negotiating power to obtain fair licences for what they need, but they can certainly face problems with licensing to permit innovative uses. Use on the internet of archive material that includes third party content can be particularly problematical. For example, the BBC has calculated that rights' clearance for the BBC's Archive would currently cost approximately £72m for staff alone and take three years.

Particular problems with copyright licensing are also faced by small and innovative new content creation businesses, where their original creations also include some third party material. The difficulties of obtaining licences to permit this have been set out in an article by Jon Pettigrew, the Founder of Maxus Ltd<sup>25</sup>. As well as enormous delays in, or no, replies to licence requests, there can be difficulties in agreeing a realistic licence fee for a new product that might be launched globally online, but for which the market is very uncertain. In such circumstances, agreeing a fair licence fee in advance is enormously difficult.

As we identified in the Creativity, Competitiveness and Enterprise Report, the rights clearance regime needs to address both the need for a more streamlined and expedient process and the development in recent years of "licensing-light" formulas to give creators and users an especially flexible framework, which is conducive to creative exchange, quotation and other derivative uses. One possible effective tool in reducing the complexity of rights clearance is extended collective licensing, which is widely used in the Nordic countries. The UK government should establish enabling legislation similar to that which was removed at the last minute from the Digital Economy Bill 2010 for extended collective licensing for works under copyright for the

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<sup>23</sup> See footnote 4

<sup>24</sup> See footnote 5

<sup>25</sup> See the article "Copyright is a Friction" published by Counterpoint, the think-tank of the British Council, at <http://www.counterpoint-online.org/copyright-is-a-friction/>

purpose of broadcasts, including online use. More generally, industry must lead on the review of licensing regimes, but government should provide appropriate support.

7. *What non-legislative changes could improve practices around copyright to improve overall outcomes?*

As we have identified in the briefing paper published in December 2009<sup>26</sup>, new educational initiatives must be designed to present copyright as a positive tool which can benefit everyone, from the “amateur” video maker seeking to monetise her work, to the new media entrepreneur hoping to build an IP-dependent asset base. Consumers in general do, in particular, have a problem understanding what copyright means. In the past this has generally not been a problem, but, now that consumers are able to copy and distribute digital content widely themselves, they need to understand when this raises copyright issues.

Consumers in the future will probably often just be “buying” a licence (whether this involves an actual monetary transaction or whether content is “free” but paid for by advertising and so on) when they access content online. This concept is one that consumers are familiar with for software, which is often sold under a licence, but much less so for audiovisual content. But a licence should give rise to clear rights for a consumer depending on what has been paid for and government might help facilitate discussions between stakeholders to improve the way consumer licensing is developed and explained. A consumer who has only paid for access to content for a short time must understand that this is what they have, ie they have no right to copy the content to keep it for ever. But a consumer who has paid more for permanent access might then reasonably expect to be able to have that access with any necessary format shifting in the future so that something is playable on the latest technology.

Some business models will continue to use encryption and DRMs as tools to enable and promote legitimate online content services. These tools are not always understood by consumers, although there is evidence to suggest that, when they do understand how the tools are used, they do value the choices of business models at different prices that might be made available to them<sup>27</sup>. Government could certainly play a larger role in facilitating a greater understanding of how this technology can be beneficial to everyone.

The solution to problems with the rights clearances’ regime may in large part be something that can be solved by non-legislative means. Industry will undoubtedly develop changes to copyright

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<sup>26</sup> See footnote 5

<sup>27</sup> See for example the Indicare Survey on Digital Video Usage and DRM of February 2006 at [http://www.indicare.org/tiki-read\\_article.php?articleId=178](http://www.indicare.org/tiki-read_article.php?articleId=178), which showed that two thirds of those asked agreed that technical measures such as DRM should be employed to allow consumers to pay only for what they really want.

licensing in time, and, indeed, changes are already taking place in response to the development of new business models. Changes should, therefore, be industry-led, but the government should consider how they can best facilitate and support the discussions that need to take place between different stakeholders.

*8. Is there evidence of difficulties in obtaining financing relating to copyright?*

Film finance deals are usually complex, but the expectation of the rights provided by copyright has underpinned the ability to negotiate a deal with, say, distributors in order to raise the finance to make the film in the first place. Identifying the winners and losers in advance is not an easy task and so finding a backer for a film can be a challenge. The difficulties with access to finance are not, we believe, to do with problems with the copyright framework, but we would, nevertheless, welcome further research by the government on this important issue. Differences in the financial relationship between film production and theatrical distribution in the UK compared to that in the US is, for example, one of the issues we have pointed out in our recent paper exploring difficulties with theatrical distribution and exhibition for independent British films<sup>28</sup>, but identifying the best solutions requires further study.

Given that access to finance depends on the rights that will be granted under the copyright framework, it is also extremely important that any possible changes to that framework are fully tested for their impact on that access to finance. We have identified above how popular traditional audiovisual content continues to be, but this type of content is not cheap to produce. So long as consumers wish to view high quality content, including that having its origin in the UK, policy on any issue that will have an impact on the sector must be decided without jeopardising the complex ways in which finance to make the production might be secured.

*9. To what extent are the international rules around copyright more or less important than those in the UK? How should the UK approach this matter?*

The international copyright framework provides many advantages, such as the consistency of rights in different jurisdictions which we have mentioned in answer to question 1. But there may be some aspects that impose inappropriate constraints on what the UK can do, such as the list of permitted exceptions to copyright in Article 5 of the EU copyright Directive of 2001, which causes problems with an exception approach to permit use of orphan works for example. The difficulty in the international arena in recent years has been lobbying from groups that are not particularly committed to a copyright regime at all so that sensible discussions on adjustments to

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<sup>28</sup> See BSAC briefing paper at <http://www.bsac.uk.com/published-reports.html#briefing> – Distribution and Exhibition in UK Film, December 2010

the international framework have been difficult. It would be wrong, though, to simply abandon the international framework. Innovative industries will be trading globally and across borders and so need some consistency in rights. As the UK is, though, largely represented by the EU in the international arena, the UK should in the first instance seek to encourage greater debate and agreement in the EU about more flexibility in the copyright framework.

### **Call for Evidence: Enforcement of Rights**

BSAC has identified the need for enforcement of copyright and related rights to remain the utmost priority for government and industry as content theft is the largest threat to the competitiveness of the UK audiovisual sector in the long term<sup>29</sup>. A recent report<sup>30</sup> by Tera Consultants estimates losses linked to illegal downloads and streaming of film, TV, music and software in the EU to have been €10bn in 2008 alone. Co-operation between all stakeholders, including ISPs, must therefore enable legitimate peer-to-peer file exchanges as well as appropriate enforcement.

An OECD report<sup>31</sup> provides useful evidence of the damage to the growth of the creative economy caused by digital piracy on a global scale. That report highlights how piracy can damage international markets. It notes that the pervasiveness and easy access to unauthorised content operate as significant limiting factors in efforts to fully develop a robust, legitimate marketplace. We have explained above how the audiovisual sector is being innovative in the ways it is trying to respond to consumer demand in the UK, but piracy continues to make this a considerable challenge. Enforcement in the UK therefore needs to be coordinated, effective and consistent.

BSAC does not engage in any enforcement activity itself and so does not, however, have sufficient insights to answer all the detailed questions in the Review's call for evidence.

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<sup>29</sup> See point (a) in the table following paragraph 29 of Creativity, Competitiveness and Enterprise in UK Audiovisual as referenced in footnote 5.

<sup>30</sup> See publication at <http://www.teraconsultants.fr/en/Publications/Publications-2008-2009.html> - Study on the impact of digital piracy on the EU's creative industries: March 2010

<sup>31</sup> Piracy of Digital Content is a report from Phase 2 of the OECD project on counterfeiting and piracy, published in July 2009 - [http://www.oecd.org/document/35/0,3746,en\\_2649\\_34173\\_43394531\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/35/0,3746,en_2649_34173_43394531_1_1_1_1,00.html)