

3 February 2009

**© The Future
Copyright and IP Enforcement Directive
Intellectual Property Office
Concept House
Cardiff Road
Newport
NP10 8QQ**

Response from British Equity Collecting Society

Intellectual Property Office

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Introduction

What is BECS?

British Equity Collecting Society is the only United Kingdom based collective management organisation for audiovisual performers. It represents the interests of its members – over 22,000 actors and other performers - in the negotiation and administration of performers' remuneration. Rights administered via agreements with other European collecting societies include rental, private copying, cable retransmission and communication to the public rights. Since its incorporation in 1998 BECS has distributed in excess of £10 million to performers in British film and television productions. BECS is a member of AEPO-ARTIS, an association representing audio and audiovisual collective management organisations in Europe.

BECS works to secure and distribute revenues to performers that recognise the value of performances within the increasingly diverse services now being developed through advances in technology in the digital age.

BECS and the copyright debate.

BECS has been engaged in the copyright debate since the company was established. The work of the company is evidence that performers are able to develop systems to support creativity and promote investment in jobs, reflecting the objective of the Paper.

BECS works closely with Equity and the British Copyright Council and has responded to the steady stream of consultations that have followed both the Gowers Review of Intellectual Property and the ongoing reviews by the European Commission linked to implementation of the EC Copyright Directive.

BECS urges the IPO to take into account the responses previously made when giving further consideration to the points particularly raised in the latest Paper.

A Glossary of previous relevant submissions is attached as Appendix 1.

The Issues

Recognising creative input

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

The balance that is provided by the current system must not be ignored.

There is a danger that consideration of the question will seek to remove foundations for this balance, rather than addressing points of detail where the system may not deliver fair recognition and/or reward.

In this context, BECS members have a number of specific concerns which we hope the IPO will seek to address in more detail as a result of the Paper.

BECS would like to highlight three areas where UK audio-visual performers need particular assistance to ensure that recognised rights are sufficiently rewarded :-

- (a) measures to ensure that equitable remuneration is paid for exercise of rental rights that have been transferred to a producer;
- (b) measures to provide for payments for the lending of audio-books and other audio-visual works within a review of the public lending right;
- (c) measures to ensure that fair compensation is paid to audio-visual performers from the private copying of their work.

1. The right of performers to receive equitable remuneration from exercise of rental rights when they have been transferred to a producer.

S 191 G Copyright, Designs and Patents Act provides:-

- (1) Where a performer has transferred his rental right concerning a sound recording or film to the producer of the sound recording or film, he retains the right to equitable remuneration for the rental.
- (2) The right to equitable remuneration under this section may not be assigned by the performer except to a collecting society for the purposes of enabling it to enforce the right on his behalf".

BECS members mandate BECS to act as the collecting society representing their rights for the purposes of these provisions.

2. BECS also represents its members for the purposes of collecting revenue from the lending of films including the performances of BECS members.

S 182 C Copyright, Designs and Patents Act provides:-

"A performer's rights are infringed by a person who, without his consent, rents or lends to the public copies of a recording of the whole or any substantial part of a qualifying performance".

BECS has been particularly concerned that the growth in the lending of audio-books by libraries has, in practice, failed to result in agreement being reached with lending libraries for the payment of equitable remuneration to the performers whose performances enable audio-books to be enjoyed.

BECS has previously approached the IPO about the practical difficulties in asserting these rights within the United Kingdom.

BECS would urge the IPO to consider linking the exercise of rental and lending rights linked to the use of films in future debates concerning future application of public lending rights.

3. The right to provide for a system of levies or other payments to provide fair compensation for rights owners in respect of the private copying and format shifting of copies should continue to be carefully considered as a practical option for compensating rights owners.

A Rights Agency funded by a levy paid by service providers and owners of compilations of copyright works is now suggested as a possible solution to addressing the issue of illicit peer to peer file sharing.

BECS would urge further consideration be given to the way in which the reciprocal agreements that BECS has in place with collecting societies representing the interests of audio-visual performers in other EU Member States provides for payments to BECS members from private copying levies applied in these other Member States.

In responding to the Gowers Review of Intellectual Property on the issue of “format shifting” BECS previously argued for:-

- (i) a realistic impact assessment of the possible change to the law taking into account the way that Article 5(2) (b) of the EC Copyright Directive requires that any copyright exception or limitation in respect of reproductions for private non commercial use is conditional upon rights holders receiving fair compensation for such use;
- (ii) comments and justification for the heavy reliance placed by the Gowers review upon the scope of recital 35 of EC Copyright Directive, and the limited way in which this recognises “in cases where rights holders have **already** received payment in some other form, for instance as part of a licence fee, no specific payment may be due”;
- (ii) careful consideration of what is meant by the term “format”. Whilst the Gowers team clearly concentrated upon issues related to individuals making copies of sound recordings from CD’s onto other media for strictly personal use, the narrow limits implied in the text were not translated into the Recommendation made. This is important when considering how format shifting may apply to film, or perhaps the transfer of visual images (including photographs) from CD or web based viewing, onto paper;
- (iii) clarification of how any appropriately narrow definition of the permitted copying of a specified “type of copy” onto another media can in any event be reconciled with

the required Berne Three Step test, as internationally recognised in Article 13 of the TRIPS Agreement.

This recognises that any exceptions or limitations to exclusive rights may only apply

in certain special cases;
which do not conflict with a normal exploitation of the work; and
which do not unreasonably prejudice the legitimate interests of the rights holder;

- (iv) ensuring that the scope of any exception or limitation is distinguished from reproductions integrally linked to acts of communication to the public, internet downloading, the creation of copies from Digital Audio Broadcasts and similar services where terms and conditions for access are set out for consumers.

BECS believes that all these points are as important now as they were when made in the context of the Gowers Review.

Beyond this, it is vital that the scope of any exception does not overlap or contradict with separately recognised copyright exceptions or limitations which have been developed to more appropriately address private use of copyright works other than commercial sound recordings. The way in which the section 70 time shift exception already applies to “private domestic” recordings of broadcasts of films is a good example of this.

BECS believes that it is questionable whether Recital 35 of the EC Copyright Directive can legitimately be used to argue that required “fair compensation” can be regarded as having been automatically included in the normal sale price.

Those who argue against the introduction of levies to cover appropriate “fair compensation”, have suggested that levies are a “blunt instrument where the amount is fixed and does not reflect the number of times a device is used”. However, what is the difference to consumers between including the cost of “fair compensation” within the sale price, and a “levy” on the manufacturers or importers which they pass on in the sale price of a recordable device or carrier?

Gowers suggested that in providing for the important strict limits on the scope of any private copying exception, that a new UK exception (or limitation?) might only allow “one copy” per format. This was stated recognising the importance of the exception providing that for any subsequent dealing with a copy made within the scope of the exception, it would become an infringing copy. BECS believes that such an approach would maintain the practical problem for rights holders to police the use of their works, in the absence of digital rights management?

A levy system that recognises this difficulty of policing may therefore remain the best alternative way to ensure that “fair compensation” is paid to rights holders.

Q. Is our current system too complex, in particular in relation to the licensing of rights, rights clearance and copyright exceptions?

BECS does not believe that the existing international framework for copyright protection is unnecessarily, or “too”, complex.

To the contrary, it is the success of the application of 6 basic restricted acts recognised in a new copyright work which have created so many millions of successful compilations of copyright interests, that have come together to generate income for the creative industries (accounting for some 8% of UK GDP).

A degree of complexity flows from this. Users and rights owners should be enabled to work with the complexity, and secure the consents and licences that they need, rather than

claiming that “because” the system overall provides for a multitude of licensing opportunities, the system itself is somehow at fault.

In April 2008, BECS responded in detail to the UK IPO Consultation: Taking Forward Gowers Review of Intellectual Property. This Consultation and the responses to it specifically considered ways in which UK copyright exceptions might be developed to reflect digital developments.

A copy of BECS earlier submission is attached as Appendix 2. In addressing possible increasing complexity for the application of traditional copyright exceptions in the digital environment, it is important that Government enables distinctions to be made between the subsections of the public who might claim the benefits of a particular exception or limitation on the one hand, and “the public” who are the potential consumers or licensed users of copyright works, on the other.

Q. Does the legal enforcement framework work in the digital age?

The development of digital technologies and increased speeds for electronic communication, have created new challenges for the policing and enforcement of copyright.

However such developments should not mean that “challenges” translate to “impossibilities”.

The value of copyright to the UK economy is far too great in creative, cultural and economic terms for anyone to logically allow this to happen.

The practical concerns over enforcement recognised by Gowers were helpful. Action already taken to implement Gowers Recommendations 35 to 45 on IP enforcement issues have, in general, been welcomed by industry.

However, further consideration is needed to bring penalties for online and physical infringement into line.

In addition the debate to pursue appropriate action on the back of the Government’s recently published response to last year’s BERR consultation on issues related to illicit peer-to-peer file sharing will be important.

In this context, BECS would hope to be consulted concerning plans to take forward actions 12 and 13 of the recently published interim Digital Britain Report (funding a new approach to civil enforcement and legislation requiring ISPs to notify alleged infringers of rights that their conduct is unlawful).

Q. Does the current copyright system provide the right incentives to sustain investment and support creativity?

The current EC proposal to amend the Copyright Term Directive by extending the term of protection for the rights of performers and producers of sound recordings has engendered much debate.

It is clear that generally performers are living longer. It is also true that new online distribution systems are enabling the development of rights management systems that make it much easier for secondary payments to rights owners from online use to become more automated.

BECS and Equity have expressed their concerns about the way in which the proposal eloquently made a case for performers who happen to be musicians, to receive payments beyond the current 50 year period, to reflect longer lifetimes, whilst failing to recognise that the same arguments apply to actors and other audio-visual performers.

The principal concerns are set out in the briefing paper prepared by BECS and Equity entitled “After the Picture Show – The case for protecting all performers”.

A copy of this briefing paper forms Appendix 3 to this submission.

We urge the Government to ensure that steps are taken to identify the way in which royalty, residual and statutory payments are increasingly being paid to audio-visual performers throughout the extended commercial lifetime for films opened up by on demand and online delivery systems.

It is iniquitous if the system is to be changed to recognise the principle of performers being entitled to payments throughout a longer lifetime, whilst discriminating against audio-visual performers in this respect.

Is this true for both creative artists and commercial rights holders? Is this true for physical and online exploitation? Are those who gain value from content paying for it (on fair and reasonable terms)?

This question needs to be considered in the light of the concerns raised by BECS and others over possible introduction of a “private copying” format shift exception into UK law without appropriate back up provisions to ensure that fair compensation is paid to rights owners.

The Gowers Review appeared to have accepted the widespread belief amongst consumers that private copying of works between devices that they own is permissible, of itself justifies the introduction of a new exception to copyright to make the law match the perception.

“We do not believe that the present statutory exemptions from infringement of copyright are providing clarity or confidence for users or for the creative industries, particularly in relation to home copying”.

However the suggested remedy ran in danger of making what is legitimately a complex issue even less satisfactory for both rights owners and consumers.

From the rights owners’ perspective, any format shift exception must take into account the effect of both :-

- (a) the provisions of the Three Step Test; and
- (b) Article 5(2) (b) of the EC Copyright Directive which provides that any “private copying” exceptions may apply ONLY
 - “in respect of reproductions on any medium made by a natural person
 - (i) for private use; and
 - (ii) for ends that are neither directly nor indirectly commercial

on the condition that the rights holders receive fair compensation which takes into account the application or non-application of technological measures ... to the work or subject matter concerned.

In trying to accommodate these conditions, the UK IPO have suggested that, by relying on (debatable) interpretation of recitals in the EC Copyright Directive, a “narrow” exception might mean that prejudice to rights owners is minimal; therefore no obligation for payment (comprising fair compensation) may arise.

BECS does not accept this view.

The conditions mooted for the application of a “narrow” exception covered:-

- (a) format shifting for copies that people have legitimately purchased
- (b) when they keep the original; and
- (c) when they only use the copies for their own private use.

Crucially it was recognised that any exception would not permit any “private copy” to be given away or shared more widely (for example in a file sharing system or on the internet).

But coupling this with a further condition that private copies could not be retained if an individual was no longer in possession of original, is hardly conducive to encouraging legal transparency or an improved ability for rights owners to police use of their work.

There is a real concern that a “gut feeling” about wanting to allow individuals to copy CDs onto their own MP3 Players without infringing copyright, has been used to open up debate on copyright licensing structures that are in reality working well or evolving well for other parts of the creative industries.

This is particularly true for the film and online services which are increasingly using controlled access to works in an on line/streaming/download environment to support vital new business models.

Even where economic research has been undertaken linked to consumer use of commercial sound recordings, BECS does not believe that the ways in which consumers use different types of commercial sound recordings have been taken into account.

Many BECS members have performances recorded in audio books and recorded plays.

The market for the use of audio books reflects different consumer use patterns to those which apply for consumers listening to favourite music tracks.

When someone purchases an audio recording of a play, they are likely to want to listen to it on a single device. Even when someone starts listening to a play on an MP3 Player when “on the move” and then wishes to listen to a further Chapter or part of the play when at home, it is relatively easy for consumers to plug their MP3 player into a radio or other device so that the recording can be listened to through the additional device, without the need for a further copy of the recording to be made.

BECS already collects private copying levies falling due to audio-visual performers from private copying taking place in other EU Member States. BECS would argue that it is able to

collect and thereafter distribute payments that are similarly levied for private copying in the UK.

BECS would urge UK IPO to consider the existing structures and collecting societies who are well placed to assist in the administration of private copying payments.

Q. What action, if any, is needed to address issues related to authentication?

Care must be taken to distinguish steps being taken within industry to promote easy **identification** of copyright works and performances, from debates over **authentication**.

BECS operates a database to enable cast lists of television programmes and films to be logged and used as the basis for distributing secondary payments to performers (including its 22,000 + members).

BECS has encouraged the adoption of identifiers for films and television programmes such as ISAN.

BECS believes that the market must be allowed to develop new rights identifiers that help to support both use and distribution of copyright works and performances in the digital world.

However, what is not required is any form of hurdle or registration barrier before copyright is recognised.

Article 5(2) of the Berne Convention makes it clear that the enjoyment and the exercise of authors rights is not to be the subject of any formality (such as registration),

In addition, there must be a real danger that introducing registration requirements for recognition of rights per se would discriminate against the new creators and innovators that are often put forward as the reason to review current copyright rules.

In considering the rights of creative artists and other rights holders is there a case for differentiation? If so, how might we avoid introducing a further complication in an already complicated world?

Copyright protection should not be subject to registration for any type of rights owner.

As the law stands, copyright protection does not restrict inspiration. Instead it provides a framework to support innovation and investment in it.

British Equity Collecting Society
Hudson House
8 Tavistock Street
London
WC2E 7PP