

UK Film Council

Response to

**Copyright in a Digital World –What Role for a Digital Rights
Agency?**

30 March 2009

Executive Summary

The UK Film Council is the Government-backed lead agency for film in the UK. Our goal is to help make the UK a global hub for film in the digital age, with the world's most imaginative, diverse and vibrant film culture, underpinned by a flourishing, competitive film industry.

The UK Film Council welcomes the opportunity to comment on the discussion paper on the Digital Rights Agency. Our response reflects many of the issues raised in our response to the Digital Britain Interim Report.

We believe that compelling, attractive and diverse content is the key to getting citizens to engage with Digital Britain and to building economic and cultural value in the future.

The development of fast broadband offers the opportunity to deliver films and moving images to citizens in new ways, and with a wider choice of content than ever before, since the capacity constraints characteristic of the broadband age – spectrum scarcity, limited shelf space etc – start to fall away. However, unless the problem of illegal file-sharing is tackled effectively, rights holders will not make this content available and citizens and consumers will miss out.

We think that a Digital Rights Agency could help both to ensure more effective legitimate access to intellectual property and that it has a role to play in helping to significantly reduce illegal file-sharing. In particular, it could help to make orphan works more available and help public bodies to enable more effective access to works that they hold.

However, we believe that self-regulation alone will not work and that appropriate, and proportionate statutory powers, underpinned by legislation, will be required if such significant reductions in activities which infringe copyright are to be achieved.

Such statutory powers should facilitate the exercise of a graduated response by Internet Service Providers resulting in “browser suspension” for the most egregious

infringers. Given the scale of the problem, civil actions by rights holders are unlikely to be of sufficient practical value in deterring heavy repeat offending.

This will entail any such Agency having very clear terms of reference, which are crystal clear about the set of outcomes which it is designed to achieve and the timescale within which they are to be met.

The British Film Institute, which delivers cultural and educational objectives for the UK Film Council, has made its own submission to this consultation. The two submissions share common principles and are intended to be complementary.

1. Consumer education and information

Key questions

How could a body representing interests across the digital content value chain help to change mainstream attitudes to copyright? Is there a need for a body to have a coordinating role, for example bringing together rights holders and others in the supply chain to work together on consumer education campaigns?

What role is there for additional or linked awareness campaigns? – bearing in mind that it is a costly activity and may have impact on existing campaigns run by rights holders nuanced for their particular target audiences.

If work is done in this area, how should this link with the educational and awareness work of other government bodies or educational authorities? If work is already taking place in these other contexts what added value can a rights agency deliver?

On the issue of educational and awareness campaigns, it has historically been difficult for the copyright industries to achieve consensus on messaging campaigns.

A digital rights agency could easily lose much of its valuable time and resource by pursuing this aim as a main focus.

For example, a key debating point for copyright stakeholders on messaging strategy has whether been to take a more enforcement-led approach (focus on the links to associated crime) or aim to convince consumers of the damage that copyright theft does to the industry (encourage respect for creativity). In the case of the UK film sector, both messaging strands are now employed, as well as a third which uses social stigma as a mechanism to shift attitude and behaviour (The *Knock-Off Nigel* campaign).¹

2. Encouragement of commercial offerings

Key questions

What is the potential for providing a market place for developing collective licensing agreements or marriage brokering between organisations who want to develop consumer propositions and those who have the content?

How might this function be set up to comply with competition law?

Could the agency play a standardisation role in areas such as rights clearance, and DRM labelling, whilst ensuring that standardisation agreements and participation in the setting of standards are in line with competition law?

Regarding the encouragement of commercial offerings, a digital rights agency could share best practice, and could help those organisations which have a public service remit to find ways to negotiate collective solutions to rights blockages with relevant rights holders. This applies most particularly in the case of new technologies making

¹ <http://www.knockoffornot.com/>

content available in new ways. This would deliver benefits to audiences by widening the range of films and moving images on offer.

However, the idea of becoming a “neutral” space for solutions to rights issues involving companies whose objective is to deliver shareholder value seems to us fanciful given the historic difficulties associated with such negotiations and the strength of the vested interests involved.

We are not qualified to comment on how such arrangements could be made compliant with competition law.

With respect to DRM labelling we note that Recommendation 16 of the Gowers Review was that:

“DTI should investigate the possibility of providing consumer guidance on DRM systems through a labelling convention without imposing unnecessary regulatory burdens.”²

We think that a Rights Agency could usefully take forward discussions with stakeholders on this issue.

3. Voluntary rights registration and rights fund

Key questions

Would such a voluntary registry be useful as a tool for clearing rights?

How should it operate in such a way that it does not become mandatory by default?

Could it be relatively light touch?

If set up, would the rights agency be the best place for it?

The idea of a voluntary rights register and also a Rights Fund to help solve the Orphan Works problem are interesting and both are worthy of further exploration.

² <http://www.ipso.gov.uk/policy-issues-gowers-flexibility.htm>

They could help to significantly broaden the range of work on offer in a digital world to the benefit of citizens and consumers. This, in turn, would deliver a broad range of economic, cultural and educational benefits.

The rights register would help future generations to avoid the problem of orphan works – however it would not help resolve the present situation with regard to orphan works. As the discussion paper notes, care would need to be taken to ensure any such register “does not become de facto mandatory for rights holders.” Rigorous mechanisms would need to be put in place to avoid false claims.

The UK Film Council thinks that a Rights Agency should play an powerful enabling role in helping to identify and push forward ways in which barriers to access could be overcome. It should help to explore, for example, ways in which legislative and other potential solutions could be implemented to enable the exploitation of orphan works. According to a 2007 survey carried out by Association des Cinémathèques Européennes (ACE), approximately 50,000 of the surveyed works in archives across Europe were considered as orphan although this is likely to significantly understate the real scale of the problem as many archives simply do not know how many works are in their collections are orphan in nature.³

The legal barriers to the exploitation of orphan works were identified by the Gowers Review and have been the subject of detailed discussion under the aegis of the European Commission.⁴ However, no solution has yet been implemented which enables them to be made legally available. This is a particular problem both for the UK’s archives – for example the BFI National Archive and the archives which are

³ http://ec.europa.eu/information_society/activities/digital_libraries/doc/seminar_14_september_2007/ace_perspective.ppt

⁴ See: http://www.hm-treasury.gov.uk/d/pbr06_gowers_report_755.pdf p.69 and also the paper by the British Screen Advisory Council (BSAC) developed at the request of Gowers: <http://www.bsac.uk.com/reports/orphanworkspaper.pdf>
For the European Commission’s work in this area see: http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/reports/copyright/copyright_subgroup_final_report_26508-clean171.pdf

members of the Film Archive Forum.⁵ It prevents works being made available which may have both significant cultural, educational and commercial value.

Many thousands of films are locked into a 'copyright purgatory', comprised of failed distribution and sales companies, production companies that no longer exist, bankruptcies, rights reversions, or unresolved creative rights that have resulted in a lack of audience access to these films.

There are also often challenging issues relating to rights in relation to works where rights holders can be identified yet the original licensing terms did not anticipate in any way the advent of digital media. For example, the UK Film Council itself, is the owner of rights to a number of British films from earlier decades which cannot be exploited for this reason.

The recently launched initiative Find Any Film (FAF), which is supported and funded by the UK Film Council, has highlighted some of the challenges.⁶ It is intended that it will become UK's most comprehensive search engine for film, and is a tool enabling to help users who are seeking to watch, buy, download or films via legal means.

The site has for the very first time generated statistics on audience demand and film availability in the UK across different formats. Approximately 30% of the 30,000 films in the database aren't available on any format– even on DVD, the cheapest, easiest and most ubiquitous of all digital supply technologies.

These unavailable films are not limited to the more obscure titles. Many independent films have rights issues that have, over time, led to their disappearance from the market.

By playing an enabling role in helping to resolve, on a collective basis, some of these rights issues, a Rights Agency should help ensure all consumption of films takes

⁵ <http://www.buofc.ac.uk/faf/members.htm>

⁶ <http://www.findanyfilm.com/search>

place within a legal environment in which both access and value are maximised, to the ultimate benefit of both audiences and rights-holders.

4. Guarantor of quality – a kite mark for digital content

Key questions

How much value would there be in such a kite mark?

How it would it set standards, and who would audit them?

In a global environment what is to stop fraudulent use of such a mark?

Given the vast amount of different types of video content available online, an amount that is increasing at an exponential rate - on YouTube alone 15 hours of new video content are uploaded every minute - we think it unlikely that such a kitemark could be attached to a sufficient volume of content to make any meaningful difference to citizens and consumers.⁷

5. Self-regulatory enforcement role

Key questions

How could an independent industry body achieve sufficient authority to agree such a code and undertake the functions suggested?

How should such an industry body work with Ofcom as the regulator?

How likely is it that an industry body could achieve the agreement and consensus required to draft a code of this sort?

The UK Film Council does not believe that it is realistic to expect that the Agency could create what the discussion paper calls a “strong self-regulatory model” to reduce copyright infringement and theft, without some form of statutory intervention. The respective positions of rights holders and internet service providers are simply too far apart at present to make it likely that they could come together under the umbrella of the rights agency and agree voluntary codes of practice that could deliver a “significant reduction” in infringing activity.

Although it is our outstanding that the discussions convened under the aegis of Ofcom on the basis of the Memorandum of Understanding were making some progress, and that the trial letter-writing helped to produce an interesting evidence base, nonetheless they failed to produce a shared commitment to Codes of Practice. This demonstrates the very significant limitations of a voluntarist approach when the positions of the relevant parties are a long way apart.

In practice, the Digital Rights Agency in the Straw Man seems to be modelled on the regulatory structure for premium rate telephone lines which is made possible by Sections 120-123 of the Communications Act. As we understand it, this currently involves service providers and network operators adhering to Codes of Practice which are overseen by PhonepayPlus. The costs of PhonepayPlus are financed by a levy on the revenues of service providers, although the levy is collected by the network operators.

We note that, as described in Annex B, under Section 122 of the Communications Act, if Ofcom cannot approve a Code of Practice which has been voluntarily agreed, it has “a duty” to impose such a code, and that it also has the powers to establish an independent body to operate and enforce the code under these circumstances, and to raise charges to cover the costs of both Ofcom and the independent body.

In practice, we suspect that it is entirely possible that Ofcom would have to exercise such powers in respect of, at the least, a Code of Practice. So long as Ofcom has these backstop powers we believe that there is a merit in exploring the idea of such an independent agency and codes of practice modelled on Section 121 of the Communications Act.

Ofcom would be able to build upon and learn from the substantial experience it has in the sphere of overseeing such regulatory arrangements; as regards both the strengths and weaknesses which it has observed in relation to particular arrangements.

⁷ <http://www.techcrunch.com/2009/01/30/youtubes-chad-hurley-we-have-the-largest-library-of-hd-video-on-the-internet/>

Our belief that statutory intervention is required reflects Ofcom's own analysis of the limits of self and co-regulation as set out in its statement of December 2008 *Identifying appropriate regulatory solutions: principles for analysing self- and co-regulation*.

We note in particular the following paragraph:

"In summary, we have found that self-regulation is most likely to work where the following conditions are present: industry collectively has an interest in solving the issue; industry is able to establish clear objectives for a potential scheme; and the likely industry solution matches the legitimate needs of citizens and consumers. It is unlikely to be appropriate where the following conditions are found: there are incentives for individual companies not to participate; or there are incentives for participating companies not to comply with agreed codes. Where we determine that self-regulation is unlikely to succeed, co-regulation may be used to ensure that incentives are effectively aligned. Where neither self- or co-regulation are appropriate but regulation is necessary, a statutory solution will be required."⁸

In particular we believe that some internet service providers may have incentives not to participate in a self-regulatory or co-regulatory scheme to tackle file-sharing and we therefore believe that the exercise of the backstop statutory powers similar to those conferred upon Ofcom by Section 122 of the Communications Act is likely to be required if the Government is going to achieve its stated objective of a "significant reduction in the number of people file-sharing over participating ISPs' services over the next two to three years, i.e. a cut of up to 80%".⁹

Ofcom itself has defined self-regulation as:

"when industry administers and enforces its own solution to address a particular issue without formal oversight or participation of the regulator or government. In particular, there is no *ex ante*, legal backstop in a self-regulatory scheme to act as the ultimate guarantor of enforcement."¹⁰

⁸ <http://www.ofcom.org.uk/consult/condocs/coregulation/statement/>

⁹ <http://www.berr.gov.uk/files/file47139.pdf> Annex D. p.47

¹⁰ <http://www.ofcom.org.uk/consult/condocs/coregulation/condoc.pdf> paragraph 2.17

We believe that in these terms, it is somewhat misleading to, as the discussion paper on the Agency does, to describe an arrangement which could be modelled on Sections 121 and 122 as a self-regulatory arrangement.

In fact, as Section 122 of the Communications Act makes clear Ofcom has *ex ante* legal backstop powers to intervene by imposing a code, creating a regulatory body to oversee it and making companies pay for the costs of regulating of that code. Therefore, while it may be preferable that stakeholders voluntarily undertake to agree to Codes of Practice, it is apparent that statutory powers underpin such an agreement. And we believe that those statutory powers would almost certainly need to be invoked to make Codes of Practice work in an effective fashion.

As set out in our response to the Digital Britain interim report, we are also very firmly of the belief that the draft proposals set out in that Interim Report and repeated in this discussion paper would not act as a sufficient deterrent on their own; the combination of educational initiatives and legal remedies instigated by rightsholders is necessary but not sufficient. Sending notices to casual infringers without a real deterrent soon be perceived as an empty threat. The second obligation on ISPs to make it easier for rights holders to target the worst offenders places all the enforcement onus on content owners. It would be extremely difficult for rights owners in all practical terms pursue very large numbers of repeat infringers with civil action.

We support instead a graduated response in which a series of letters are sent to infringers. This graduated response would be comprised of three stages:

1. Infringers are sent an information message by their ISP, using automated technology, explaining to them that they are in breach of copyright law.
2. Those who continue to infringe are informed by their ISPs that they will be subject to network management controls such as “bandwidth throttling” which will significantly reduce the speed of their internet connections, and therefore make it much harder to download content of any kind.
3. Those who continue to infringe despite the imposition of network management controls are subject to the sanction of a temporary “browser suspension”. This

would make it extremely difficult for those infringers to engage in illicit file-sharing, but would allow them to continue to use certain forms of email and voice communication, to receive security updates for their computers and therefore stops short of denying access to broadband services in their entirety.

Such a graduated response is based upon the application of technological measures as the primary form of deterrence. The UK Film Council would like to see the Government legislate for such a graduated response at the earliest possible opportunity.

Rights holders should be empowered to be able to identify and to take legal action against particularly egregious infringers, in the appropriate circumstances.

The framework proposed above will require that the Agency has very clear terms of reference and that it is tasked with achieving specific outcomes within a stated timescale.

France is in the midst of passing its graduated response scheme legislation and this includes the creation of an independent administrative authority called HADOPI (Haute autorité pour la diffusion des œuvres et la protection des droits sur Internet) which would be entitled to collect infringers' data from their ISPs following a request from right holders. It could also instruct ISPs to cut an infringing user's Internet access the user being able to open another account. We believe that the Government could usefully look at the model of HADOPI to see whether there are elements of that model which might be transferable.

6. Tackling persistent civil infringement – a test-bed for technical measures

Formation of an industry self-regulatory body

Acting as an information hub.

Key questions

Is there a role in technical standard setting, identifying, road testing and promoting technical solutions to address abuse?

Is there a role for the agency in agreeing binding (on agency members)

codes of practice on taking technical measures to deal with repeat infringement?

We believe such an agency could usefully resurrect the work undertaken by the MoU technical working group which was making good progress on technical standard setting and the powers which might be needed to implement such measures.

7. Dispute resolution

Key questions

How much value would there be in such a process for consumers, rights holders and others?

It is important that this does not duplicate the work of the Copyright Tribunal – in the light of that what extra could this process do – and what should it avoid?

How would such a body be constituted, and how binding should its decisions be?

Any form of dispute resolution function is useful to content owners, especially small rights owners and those companies wishing to innovate in the digital space. However, if the Agency is to have powers in this area, it is vital that they do not duplicate the work of the Copyright Tribunal.

8. Representation

Key questions

How can we ensure that a rights agency is properly representative – should membership be open to whoever is prepared to pay the fee, or should it be structured so that was (say) one place at the table for games, one for music etc?

Should membership be open to trade bodies, individual companies – or both?

How will decisions be arrived at – does there need to be equal weighting for ISPs and other intermediaries? What happens if there is deadlock? How binding are decisions – what about late entrants and their requirements? The agency will need credibility with consumers – it must not be seen as

an industry conspiracy to do things to, and against the interests of, consumers. How should they be represented – and should they have a vote?

The formula for representation of the various sectors inside the rights agency will have to be equitable for both large and small industries, but it is too early to comment on this in detail.

The UK Film Council, as the Government's strategic agency for film, would wish to be represented as a significant stakeholder in film since it can provide expert and informed advice on all matters relating to film – indeed this is what Government funds it to do more generally.

It is important also that the interests of the independent film sector in the UK are represented in decision-making.

9. What might an agency look like?

Key questions

What level of funding would be proportionate to the problem?

What is the minimum size of an agency that would be able to act effectively in this sphere?

We believe that it would be premature to comment on the size and level of funding required for such an organisation in advance of having greater clarity about its structural role. However, we believe that for such an agency to be effective, the legislative underpinning would need to bear more resemblance to a body like PhonepayPlus than to the “light-touch” underpinning of the Advertising Standards Authority.

10. How could it be funded?

Key questions

How should contributions be divided between the participants?

Are there any other funding options that you would advocate? How

would such an option compare with the ones explored above?

We agree that it would be “neither feasible nor fair to load all the costs onto one set of participants.” Options to explore would include using Ofcom’s budget to support the work of such an Agency. However, further work is needed on to agree the broad aims and objectives of such an Agency prior to detailed discussions about funding.