

Response from BRITISH EQUITY COLLECTING SOCIETY

**Ofcom Discussion Paper**

**'A new approach to public service content in the digital media age'**

**22 March 2007**

**Introduction**

British Equity Collecting Society (BECS) is the UK's only collective management organisation for audiovisual performers. It represents the interests of its members – approximately 20,000 actors and other performers - in the negotiation and administration of performers' remuneration throughout the European Union territories. Rights administered via agreements with 12 European collecting societies include the rental, private copying, cable retransmission and communication to the public rights. Since its incorporation in 1998 BECS has generated in excess of £10 million in extra income for performances 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, therefore, works to secure and distribute revenues to performers that recognise the value in the use of performances within the increasingly diverse services now being developed through advances in technology in the digital age.

For this reason, BECS welcomes the opportunity to comment on the Ofcom discussion paper. In doing so we note the continuing wish to promote plurality and diversity in the wider digital market<sup>1</sup>. In particular we note Ofcom's wish to secure a public service system for the future which continues to deliver the best elements of the previous model: one which addresses viewers' interests through the provision of substantial amounts of high quality, UK originated content; and which is characterised by a number of suppliers competing to provide that content.

BECS welcomes these aims for its members, but believes that it is vital that the "new rights approach" outlined in the discussion paper for content to be included on any new PSP service is properly linked to the existing structures recognised to support copyright and related rights in performances.

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<sup>1</sup> As previously highlighted in Digital PSB published by Ofcom in 2006.

## The rights approach

The discussion paper suggests:

*“Just as the PSP will need to configure commissioning to the needs of digital media, so it will need to ensure that procedures for the most effective exploitation of that content are in place.”*

The Gowers Review of Intellectual Property (IP) recognised that:

“IP serves three principal functions:

- ▶ to incentivise knowledge (and hence wealth) creation;
- ▶ to accumulate knowledge in a culture; and
- ▶ to protect a distinct identity”.

These three elements must continue to be recognised when consideration is given to how any PSP can innovate, not only in terms of content but also in the use of content.

The paper states that<sup>2</sup>: “In the traditional media world copyright licences which required all rights to be reserved were appropriate to the task of managing dealings between a limited number of professional organisations – the fact that they needed to ask each other permission did not create unmanageable friction in the system”.

However, the paper fails to recognise the practical ways in which rights owners have enabled their rights to be licensed through collective licensing when individual management is impractical. It also fails to recognise the existence of statutory licensing schemes and levy provisions reflecting international recognition of the need for rights owners to continue to receive recognition for the use of their works, even when copyright exceptions or limitations might otherwise apply.

In short, the existing internationally evolved system for the recognition of copyright and rights of performers provides for flexible application that will continue to avoid “unmanageable friction”, if the services offered by any new PSP can be shown to support all three of the principal functions of IP described above.

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<sup>2</sup> Paragraph 5.18 page 41

## **A “rights reserved” approach to innovation**

Digital technology has enabled a wide range of new services to be offered to the public which rely upon selective presentation of imaginative and innovative content. Licensing of content to legitimate new services has proved possible because rights owners generally wish their creative work to be seen, heard and appreciated by others.

But one of the three principles underpinning recognition of intellectual property is the right to protect distinct identity. It is for this reason that the making of an adaptation of a literary, dramatic or musical work is one of the restricted acts recognised by copyright. Similarly, the principle underpins the moral rights recognised for performers. In particular, performers’ rights to object to distortion, mutilation or other modifications of the broadcast or recording of a performance remain important to distinguish distinct identities, and in turn help to promote genuine innovation in others.

The “rights reserved” approach supported by intellectual property law has not prevented innovation to date. It has provided for rights owners to secure a fair return for use of their works by others. When non-commercial use is proposed, rights owners have been willing to agree special licence terms for educational or charitable purposes. In addition, copyright exceptions and limitations that comply with the Berne Three Step test<sup>3</sup> allow for a range of uses in special cases which do not conflict with the normal exploitation of a work and which do not unreasonably prejudice the legitimate interests of the author.

It is these principles that have allowed for the development of Creative Commons licences and other similar licensing models.

It is for this reason that BECS believes any new PSP must justify to rights owners and performers, who contribute to productions for use by the PSP, the extent of the rights that they can make use of within the existing IP framework. It would be contrary to the principles of competition law if one service provider were able to unilaterally argue for special “rights exemptions”. If the PSP wishes to develop content for specific types of use, then contributors should be able to decide whether they are happy to grant the relevant rights to service the promotion, adaptation or modification of their works when this is within the spirit of the PSP service.

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<sup>3</sup> Article 9(2) Berne Convention for the Protection of Literary and Artistic Works – It shall be a matter for legislation in countries of the Union to permit reproduction of such works  
-in certain special cases  
-provide such reproduction does not conflict with normal exploitation of the work; and  
- does not unreasonably prejudice the legitimate interests of the author.

In other words, the rights regime for the PSP should be developed because the PSP is able to work with creators in ways that they are happy to grant the rights that the PSP wishes to acquire on the basis of free negotiation, not on the basis of “dictat”.

The way in which different rights in programming have been negotiated between Pact and existing UK broadcasters clearly proves how such negotiation works in practice. Likewise the development of new on-line services, where content is offered to subscribers under Creative Commons licences or programming is shown on television services such as Teachers TV on a wide “educational rights cleared basis”, are all examples of why it would be wrong for the PSP proposals to attempt to justify changes to intellectual property law *per se*.

### **Summary**

1. In configuring its content to the needs of digital media, any PSP must work within the existing copyright and related rights regime.
2. The existing intellectual property regime already allows for rights owners to license adaptations and modifications of their works when this is not going to be detrimental to their legitimate creative interests. Evidence shows that rights owners do grant such licences in many instances, promoting innovation whilst retaining integrity for the original authors or creators of works and performances.
3. Adaptation may be a valuable opportunity for some content (and performances included in it), but not for all. The ability for a PSP to secure licences to allow third parties to adapt programming and other content shown by the PSP must be on the same level playing field as other service providers.
4. Moral rights in performances exist for a reason. They can be waived in certain circumstances, or they can be asserted. In practice it must be recognised that flexible specially negotiated licences are often developed to grant rights suited to new types of service. However, any PSP must show that it will respect the rights of its content contributors and the extent of licences which are granted in the light of remuneration or other forms of compensation to rights owners for the use of programming, or other material, within a PSP service.
5. Special terms have traditionally been negotiated for the use of material on a genuinely non-commercial educational basis. However, where educational use is likely to be the only source of remuneration or compensation for a creator, the fees or remuneration payable has to take this into account.

6. Collective licensing and the development of rights management information systems that take advantage of digital technology will continue to help ensure that “unmanageable friction” in the rights clearance world cannot be used as an excuse for arguing that any new PSP (as one new service provider in the digital age) should automatically be entitled to demand rights from contributors, which will give it an immediate unfair economic advantage over others.

A PSP must earn its right to show innovative and new content within the marketplace for intellectual property rights as a whole.

BECS would be happy to provide further background on the issues raised in this response if required.

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