**BFI**

**Response to**

# IPO Call for views: Modernising the European copyright framework

**December 2016**

1. **About the BFI**

The BFI is the lead organisation for film in the UK with the ambition to create a flourishing film environment in which innovation, opportunity and creativity can thrive by:

* Connecting audiences to the widest choice of British and world cinema
* Preserving and restoring the most significant film collection in the world for today and future generations
* Championing emerging and world class film makers in the UK - investing in creative, distinctive and entertaining work
* Promoting British film and talent to the world
* Growing the next generation of film makers and audiences

The BFI is a Government arm’s-length body and distributor of Lottery funds for film. It serves a public role which covers the cultural, creative and economic aspects of film in the UK. It delivers this role:

* As the UK-wide organisation for film, a charity core funded by Government
* By providing Lottery and Government funds for film across the UK
* By working with partners to advance the position of film in the UK

To these ends, the BFI helps ensure that public policy supports film and, in particular, British film.

Founded in 1933, the BFI is a registered charity governed by Royal Charter.

The BFI Board of Governors is chaired by Josh Berger.

1. **Executive Summary**
   1. The BFI welcomes the European Commission’s broad ambitions to widen access to EU audiovisual content to the benefit of people across Europe.
   2. In particular, we welcome proposed revisions to the regime of copyright exceptions which will make it easier for learners to access material across borders and also help ensure that Europe’s audiovisual heritage is preserved.
   3. The BFI also welcomes measures to improve the circulation of Out of Commerce Works. This will help audiences to enjoy a wider and more diverse range of material than at present. The BFI has already held initial meetings with stakeholders to consider the feasibility of embracing the EU proposals in this area.
   4. We welcome the use of non-legislative measures to improve the circulation of films but we have concerns that some of the proposed mechanisms are not sufficiently thought through – for instance, we do not think that planned interventions around licensing hubs would deliver the desired outcomes.
   5. We have serious concerns however about parts of the Draft Regulation which is designed to facilitate the clearance of certain online rights (in particular catch-up TV and simulcast). The application of a country of origin principle to the clearance of such rights – especially in combination with the apparent direction of travel in the competition sphere – risks severely undermining the ability to license rights on a territorial basis. This would seriously harm the capacity to finance works and hence, for instance, make it far harder to deliver a wide range of independent films to audiences.
2. **Proposal for a Regulation laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions**
   1. The European Commission pledged in its Digital Single Market (DSM) Strategy that it will “ensure cross-border access to legally purchased online services while respecting the value of rights in the audiovisual sector.”[[1]](#footnote-1) This is clearly not the case with the proposed Regulation and we are very concerned by the extension of the Country of Origin principle to broadcasters’ ancillary online services which could undermine territorial exclusivity. Our concerns are exacerbated by the link this proposal has with the Commission’s DG Competition investigations, such as the one into cross-border access to pay-TV content (Case AT. 40023).
   2. For UK independent film companies, territorial exclusivity is a precondition for the financing, distribution, and marketing of UK works. Any erosion or elimination of this principle would have serious negative consequences for the creation and circulation of culturally diverse works across the EU and therefore for audiences. For example, it would profoundly affect the ability to finance British films and TV series and will negatively affect European co-productions in particular, which the European Commission seeks to facilitate in the framework of the Creative Europe MEDIA sub-programme.
   3. The extension of the Country of Origin principle would erode the principle of territoriality. Catch-up services are increasingly used by consumers to access content. These rights, which are negotiated at the same time as linear services, are sometimes not monetised and the online rights are often sold at no extra cost. It is doubtful that this will change under a proposal which will undermine the bargaining power of producers, sales agents and distributors.
   4. This will not lead to higher remuneration for producers or other right holders. In a situation where broadcasters would be able to get the rights to all 28 EU Member States by default, the right holders will be in a significantly weaker negotiating position.
   5. Furthermore, the Commission’s proposal needs to be evaluated in the light of the signals emerging from DG Competition. The BFI is deeply concerned by the Commission’s sectoral inquiry into the e-commerce section and, above all, the competition inquiry into Cross-Border Access to pay-TV content (Case AT. 40023).  This could set a dangerous precedent and have a consequence on contractual practices by forbidding the use of contractual clauses that allow the introduction of geo-filtering.
   6. The impact of this case will not be restricted to the relationship between Sky UK and the studios but will also directly affect the licensing practices of Europe’s independent (overwhelmingly SME) audiovisual companies and have a contagious effect across all platforms and media, regardless of the specific modes of distribution concerned. Therefore, the combination of an extension of the Country of Origin principle and prohibition of contractual clauses could lead to the elimination of territorial exclusive licensing, even if this is limited to broadcasters’ ancillary online services.
   7. The reasons for, and benefits of, extending the Country of Origin principle to broadcasters’ ancillary online services such as catch-up TV is unclear. Current copyright law does not prevent right holders from selling multi-territorial licenses. Broadcasters can already buy rights for multiple territories and a large amount of TV programmes (including news and actual and fictional TV shows) produced and owned by broadcasters are already accessible across borders without any difficulties under the current regime (news, entertainment programmes and even sometimes features films or series).
   8. In its Impact Assessment (IA) the European Commission identifies an issue of “high transaction costs for the acquisition of rights for their online services when they are offered across borders.”[[2]](#footnote-2) At the same time the Commission states that they do not have the data to support this assumption. In reality, these transaction costs in the case of an audiovisual work are low as the exclusive exploitation rights are usually held by the producer or licensee (sales agent or distributor).[[3]](#footnote-3) The Commission only highlights that transactions costs exist for clearing rights locally. The BFI therefore does not understand the problem the European Commission is trying to address.
   9. The Commission’s IA states that the extension of the Country of Origin principle takes into account the implications for cultural diversity.[[4]](#footnote-4) However, it is clear that undermining territorial exclusivity would mean fewer important cultural works and less access to those works across borders. Cultural diversity would be severely weakened by this Regulation which contradicts Article 167 of the Treaty on the Functioning of the European Union[[5]](#footnote-5) and the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions.[[6]](#footnote-6)
3. **Copyright Exceptions**
   1. The BFI welcomes the EU’s policy objectives of updating and/or making mandatory the existing copyright exceptions relating to education and the preservation of cultural heritage.
   2. The BFI fully supports the objectives in Article 4 to facilitate the use of works and other subject-matter in digital and cross-border teaching activities
   3. In the UK, the BFI remains at the forefront of the development of media education in the education sphere to facilitate access to moving image materials for teaching and learning in the age of convergence.
   4. The existing UK exception and licensing override has helped to promote an educational market place as the exception has acted as an incentive for distributors to provide licensing solutions. In the UK, the ERA (the Educational Recording Agency) scheme has operated successfully for more than thirty years and has provided a facility for schools and universities which meets their needs while also providing compensation to rights holders.
   5. While the primary purpose of the exception has been to facilitate the use of television programmes recorded off-air in teaching across all disciplines it has also helped to develop young people’s engagement with moving image texts more broadly, and in particular to develop critical thinking in this important cultural medium.
   6. Changes are envisaged to the operation of the exception to validate the provision of material over electronic networks across borders to help distance learners who are not in the same Member State as the educational institution to which they are attached. This goes with the grain of changing educational practice and is supported by the BFI.
   7. Article 5 - Preservation of cultural heritage

The BFI has benefited significantly from the existing exception to copyright in UK law that permits the preservation of cultural heritage helping to ensure that works remain in an accessible state to the benefit of users (e.g. learners) and audiences. Making this exception mandatory in all Member States, thereby helping to preserve our rich European heritage of audiovisual works would help ensure that similar benefits are delivered for people across the EU.

1. **Article 7 - Use of out-of-commerce works by cultural heritage institutions**
   1. The BFI is supportive of measures to improve the circulation of Out of Commerce Works. We have already engaged in initial meetings with stakeholders to consider the feasibility of embracing the EU proposals in the draft Copyright Directive for a new provision which would enable archives to secure licences for ‘out of commerce’ works through a CMO (Collective Management Organisation)[[7]](#footnote-7).
   2. The BFI’s lottery funded Unlocking Film Heritage digitisation programme for archive material has provided practical experience of the many difficulties associated with copyright clearance of archival films where the work is still in copyright but is not orphaned. Significant resources have been deployed to trace rightsholders who have then been given the option either of a standard contract, where the film is offered on a commercial basis through the BFI-Player and they receive 50% of any revenue, or waive the commercial option and allow the work to be made available freely (in the UK).
   3. In some instance, particularly in the case of television works which have remained unavailable since their initial transmission, and where the further exploitation rights are circumscribed by the terms of the original commissioning contract and the need to ensure the rights of underlying rightsholders are met, there have been additional difficulties. The BFI believes the out of commerce provision, if incorporated into UK law, would offer a solution.
   4. We would also be interested in exploring whether and how these provisions might apply to film works although we believe this may be more complicated due to the more extensive range of contractual provisions which might have applied there.
   5. We believe the Extended Collective Licensing provisions, enacted through the ERR Act in 2014, could arguably entail an overlap with any new agreement that might be reached although there is no CMO which is currently seeking to utilise these provisions for the audiovisual sector.
   6. The MoU between various stakeholders in the book publishing industry provides a useful starting point for deliberations. Its aim was to encourage voluntary collective licences. It focuses on the role of libraries which hold titles that are part of the cultural heritage which may have fallen into oblivion, but which can now be digitised by the libraries and made available
   7. In book publishing ‘out of commerce’ is coincident with ‘out of print’. If an e-book exists then the book is considered to be in commerce.
   8. For the audiovisual sector an agreed definition of ‘out of commerce’ works will be needed. As noted above, from our experience it will almost certainly be important to distinguish between material produced under different agreements. For television, for example, we assume that programmes produced pre-2004 will need to be treated differently to some extent from those produced after 2004 given the changes of enacted to the terms of trade between broadcasters and producers that year.
   9. The BFI has had an agreement with the Performers’ Alliance (Musicians’ Union, Equity and Writers’ Guild) for more than thirty years which has allowed it to screen television programmes (in venue and online) when there was no legal basis for showing them in terms of the underlying rights in the performances beyond the initial contracted transmissions. This agreement with the Performers’ Alliance only provides access in defined educational and/or cultural contexts. The advantage of an out of commerce framework might be that it would allow interested parties to build on this longstanding and beneficial relationship to secure a licensing regime which both provides wide public access and suitable financial provision, where necessary, to remunerate underlying rightsholders.
   10. ERA (the Educational Recording Agency) provides an example of a well-functioning system whereby educational establishments are licenced on a per capita basis to record and use television material in their teaching. ERA has sufficient breadth of membership to act in the audiovisual sphere to apply for the role as the CMO to establish an extended collective licence for audiovisual works and therefore to establish an out of commerce framework if they so decided. We believe ERA would be well suited to this role as it is the only existing umbrella body for audiovisual licensing.
2. **Other Issues mentioned in the Communication**
   1. **The development of licensing hubs (online tools that allow the digital distribution of European works in countries where there is no distributor).**

* The BFI believes that access to European films by legal means should be maximised across the UK. This helps to ensure the maximum number of people have access to a diverse, culturally rich range of films and also helps to reduce copyright theft and infringement (piracy).
* We have not yet seen any evidence which demonstrates whether licensing hubs are an effective way of achieving this goal or not. Some of the explanations put forward by the Commission as to the role of licensing hubs appear to the BFI to be quite opaque.
* More time is therefore needed to assess whether licensing hubs are an effective tool.
  1. **Further work on standard identifiers including working towards interoperability of the two identifiers**
  + We share the goal of interoperability. The BFI has already adopted the use of EIDR as the standard unique identifiers for films in the UK filmography, registering all of the UK filmography of theatrically released British feature film (9,500 works). BFI will continue to register all UK theatrical releases, both British and non-British under EIDR.
  + EIDR better responds to the needs of BFI. The hierarchy better matches that used in the UK filmography, as a charity the cost of using EIDR is free and it opens the possibility for BFI to linking to and tracking audio-visual works in other databases (ISAN, BASE, IMDb, Google, Netflix etc.).
  + The UK, BFI, applies an EIDR number to lottery funded films when they receive a copy for the UK filmography/archive, but BFI will look at the feasibility of requiring beneficiaries to secure identification for all BFI funded works, work that the BFI itself distributes and works that apply for tax relief (this would include working with funding for audio-visual works in the UK screen agencies across the four nations).
  + The latest meetings and conversations with the European Commission have highlighted that unique identifiers could track value of consumer spend and film deals more easily for both film agencies and film producers, distributors and exhibitors.
  1. **Exploring ways to incentivise rights holders to make available works receiving support for distribution through the Creative Europe MEDIA programme in territories where no distribution agreement has been signed.**
  + We would like to see rights holders incentivised to exploit their works in territories not covered by distribution deals supported by MEDIA whether the films are supported by MEDIA or not. We support experimentation with distribution models. Access must be underpinned by a robust business model that guarantees fair remuneration to the rights holder even in the absence of a distributor in a given territory. The BFI supports such measures as long as they respect the rules of territorialisation. We certainly would not endorse any obligation to make works available if the films are supported.
  + Creative Europe MEDIA Sub-Programme has championed innovation in the audiovisual sector. Currently the programme has a specific funding opportunity for online distribution which includes grants for experimentation with distribution models including semi-simultaneous releases (day-and-date) and/or multi-territory releases (where possible). The UK's digital distributors have benefited from this support by leading or taking part in international projects such as EDAD, Tide Experiment or Scope 50. While the impacts of these project on non-national circulation ‎of works remain limited, they improve with time as lessons from each distribution campaign are learnt. The value of these project is primarily in the aspect of research and development, with public funding enabling greater  risk-taking and experimentation.
  1. **Aim to increase efficiency in public funding and use of subtitling and dubbing.**
  + The BFI of course supports the principle of increased efficiency of public funding around subtitling and dubbing. We are aware that there is an EC call for proposals.
  + However, it is the view of both the BFI that interventions around subtitling and dubbing are not necessarily a priority – rather the priority should be to boost availability of titles and discoverability (see next point).

1. **Further work on promoting the discoverability of European films including the development of joint promotion strategies for European co-productions.**
   1. The BFI believes that the discoverability of film European – i.e. the ability to find films once they are available or to discover new ones that a person was not necessarily aware of, is crucial. Joint promotion strategies are important for all films, including European co-productions.
   2. Collective actions have also been initiated, such as dedicated workshops and a dialogue with the MEDIA Unit to identify initiatives that will support the new developments while going with the grain of the sector. For a more long term reflection, a Think Tank was set up by the European Film Directors Agencies (EFADs) association to explore what the film sector will look like in 2025 and how to support policies which would assist that evolution.
2. **Work to explore alternative methods of financing in the Animation sector and producing a joint action plan for the sector by mid-2017.**
   1. Animation is an important sector to the UK creative economy – one reason why the Government introduced a tax relief specifically for the animation sector. We support the Commission’s broad ambitions in this area – as they note, animation works do tend to cross border more easily than works from some other sectors – but we must await substantive proposals from the Commission before we can comment on the detail.

1. European Commission. 6th May 2015. “A Digital Single Market Strategy for Europe.” COM(2015) 192 final p. 8 [↑](#footnote-ref-1)
2. Impact Assessment, page. 24 [↑](#footnote-ref-2)
3. Charles River Associates. March 2014. Economic Analysis of the Territoriality of the Making Available Right in the EU. [↑](#footnote-ref-3)
4. Impact Assessment, page. 12 [↑](#footnote-ref-4)
5. European Union. **13 December 2007**. “Treaty on the Functioning of the European Union” Official Journal C 326 , 26/10/2012 P. 0001 - 0390 [↑](#footnote-ref-5)
6. <http://en.unesco.org/creativity/sites/creativity/files/convention2005_basictext_en.pdf> [↑](#footnote-ref-6)
7. Proposal for a *Directive of the European Parliament and of the Council on copyright in the Digital Single Market,* 14 September 2016 para 25 [↑](#footnote-ref-7)