

BRITISH FILM INSTITUTE

Response to:

**GREEN PAPER ON THE ONLINE DISTRIBUTION OF AUDIOVISUAL WORKS IN
THE EUROPEAN UNION: OPPORTUNITIES AND CHALLENGES TOWARDS A
SINGLE MARKET**

Final Draft

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Introduction

The British Film Institute (BFI) is the Government's lead body for film in the UK. It has become the Lottery Distributor for film in the UK, and assumed certain other key functions following the closure of the UK Film Council earlier in 2011.

The BFI welcomes the opportunity to respond to this Commission Green Paper. We set out our answers to each question below.

Executive Summary

The BFI wants to see a flourishing European film sector in which the audience has access to the widest possible diversity of material and the indigenous industry flourishes and increases its market share in all media, including online.

We believe that audiences are already benefitting from the significantly increased choice of film and moving images which are now legally available via online services.

Public policy should encourage the creators and distributors of content to maximise the availability of choice to the benefit of audiences, while maximising the benefit to European rights holders.

At the present time a legislative solution which imposed multi-territory licensing would be counter-productive because it would cause major disruption to the marketplace. It would be better to allow the online market to mature further and to determine what, if any, legislative interventions may be required.

We support KEA's recommendations that the Commission should give support to European rights holders to establish voluntary collective licensing initiatives and that it should promote 'one stop shop' solutions developed by the market. Both of these recommendations could help to reduce transaction costs.

The BFI also supports the proposal by KEA that an impact assessment should be undertaken on the issue of extending the "country of origin" principle to online services.

Further, widespread adoption of a single numbering system for all audiovisual works, such as the International Standard Audiovisual Number (ISAN) mechanism, would also be a very important mechanism to help online clearances of rights.

As the custodian of the BFI National Archive we very strongly support the introduction of a format-shifting exception for archives, which would enable them to copy material which they own for preservation purposes. We believe that such a measure would help the BFI to fulfil its public interest mission.

We would like to see a study undertaken to identify ways in which equality of access for the disabled to film and moving images online can best be achieved.

Response to Questions

1. *What are the main legal and other obstacles – copyright or otherwise - that impede the development of the digital single market for the cross-border distribution of audiovisual works? Which framework conditions should be adapted or be put in place to stimulate a dynamic digital single market for audiovisual content and to facilitate multi-territorial licensing? What should be the key priorities?*

The BFI does not believe it is feasible or desirable to use legislative interventions to move to a digital single market based on online multi-territory licensing in the near future. The existing model for making independent film of all kinds available to audiences is dependent on territorial licensing. Rights are sold on a territorial basis in exchange for money which helps to finance the film. This model may well evolve over time as new digital business models make cross-border licensing more feasible. In particular, there is a need to develop mechanisms which streamline the process of licensing across all 27 member states to the benefit of audiences and the independent sector (including the distributors of classic and archive films). Public policy makers should maintain a watching brief with a view to identifying any persistent market failures which may arise.

Any attempt however to impose a legislative solution in the immediate future would be likely to lead to confusion in the marketplace to the detriment of citizens, consumers, creators and businesses.

It would be preferable to allow market participants to determine if, how and when they move to a model of multi-territory licensing to the benefit of audiences. In a fully digital world, in the long-term, a single market might ultimately allow audience greater freedom of choice in accessing audiovisual works through online media. The legal online market however will only be able to thrive if there are also effective means of enforcement against those persistently making available and accessing infringing content.

We recognise that the recent European Court of Justice judgement in the matter of the Premier League and others vs Karen Murphy raises complex issues about the operation of audiovisual rights in the European market.¹ We

¹ <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-403/08>

would welcome clarification from the Commission on what it sees as the relevant issues for the current consultation which are raised by that judgement.

However, we do support a number of the recommendations made by KEA in its study of Multi-Territory Licensing of Audiovisual Works in the European Union undertaken for the Commission.²

In particular, we support the KEA recommendations for decreasing transaction costs:

“Two sets of measures are considered to contribute to the establishment of a licensing infrastructure in Europe that would be more conducive to cross-border trading of audiovisual works and better access for European audiovisual works to digital platforms:

> The EC should give support to European rights holders to establish voluntary collective licensing initiatives and mechanisms to access VOD platforms on fair terms and offer easier and cheaper licensing solutions to operators.

> The EC should also promote ‘one stop shop’ solutions developed by the market, inter-operability between existing services and tools, as well as stronger co-operation between rights holders, users and technology stakeholders. This would eventually contribute to the establishment of more seamless and internationally-connected licensing infrastructures.”³

We also agree with KEA that “Public policy should encourage EU rights holders to experiment with new forms of digital distribution and test new business models in order to understand the new market place and its requirements.”⁴ This should be pursued both by Member States and by the Commission through the MEDIA Programme and other appropriate instruments of policy.

2. *What practical problems arise for audiovisual media services providers in the context of clearing rights in audiovisual works (a) in a single territory; and (b) across multiple territories? What rights are affected? For which uses?*

At present significant problems in clearing rights fall into three categories:

- i. Works where the rights owner cannot be identified, known as orphan works. The UK Government has accepted the conclusions of the Hargreaves Review of Intellectual Property and Growth which proposed that legislation be brought forward in the UK this Autumn to allow the legal exploitation of orphan works.⁵ The BFI strongly supports the principle of this legislation. We believe in unlocking the value of orphan works to provide as much public access as possible, and that this will be beneficial to the public, the film and audiovisual industries, archives across the UK (including the BFI National Archive), researchers, academics, and innovators. We also strongly support the Commission’s proposals on

² <http://www.keanet.eu/docs/mtl%20-%20full%20report%20en.pdf>

³ *Ibid.*, p.9.

⁴ *Ibid.*, p.11.

⁵ <http://www.ipo.gov.uk/ipresponse-full.pdf>, p.6

mutual recognition of orphan works but believe this needs to be complemented by legislation at the level of Member States.⁶

- ii. Works where the owner of particular rights cannot be identified. The UK Government, again has accepted the conclusions of the Hargreaves Review which proposed that legislation be brought forward in the UK to allow the legal exploitation of such works using a system of collective licensing. The BFI strongly supports the principle of this legislation.⁷ Again, there will be benefits to the public, the film and audiovisual industries, archives, researchers, academics and innovators.
- iii. Works where there are significant difficulties in clearing the online rights because the concept of online exploitation did not exist when the work was created, and/or where the costs of clearing those rights for online exploitation are too high because of the complexity of adjusting existing legal and business practice to the online world. The Hargreaves Review proposed a Digital Copyright Exchange, operated by the industry, to help facilitate copyright licensing. The UK Government accepted this recommendation.⁸

As the Government observes, to be successful, such an Exchange will need to create value for both purchasers and sellers of rights. We note that the Government is encouraging public bodies to make material they own available via the Exchange as soon as it is set-up and the BFI is looking forward to discussing with the UK Government about how we can contribute material which we own to the Exchange and others ways in which we can assist in contributing to this valuable initiative. We are especially interested in ways in which the Exchange could help to ensure that independent companies which own rights to British films are able to make their films more easily available to the benefit of the public.

3. *Can copyright clearance problems be solved by improving the licensing framework? Is a copyright system based on territoriality in the EU appropriate in the online environment?*

In addition to the measures outlined in response to Question 2. above, the BFI believes that a system of copyright exceptions which are appropriate, transparent and based on clear evidence of need will provide the optimal public benefit in a digital age.

A watching brief needs to be maintained, both at national and European level with regard to the potential need for new exceptions to take account of developments in the audiovisual sector which could benefit citizens, consumers and businesses across Europe. The BFI believes it might be valuable for the European Commission to create a framework which enables it to undertake a formal audit of exceptions and their impact no less than once every 5 years.

⁶ http://ec.europa.eu/internal_market/copyright/docs/orphan-works/proposal_en.pdf

⁷ Ibid., p.7.

⁸ Ibid., p.6.

4. *What technological means, for example individual access codes, could be envisaged to enable consumers to access "their" broadcast or other services and "their" content, irrespective of their location? What impact might such approaches have on licensing models?*

This is for market participants, for example rights holders and mobile companies, to determine. But it will become an increasingly important issue in a digital age, in which, for example, "catch-up" services – allowing viewers to access broadcast programmes that they missed – are available increasingly widely.

5. *What would be the feasibility, and what would be the advantages and disadvantages of, extending the "country of origin" principle, as applied to satellite broadcasting, to online audiovisual media services? What would be the most appropriate way to determine the "country of origin" in respect to online transmissions?*

We would support the proposal by KEA that an impact assessment should be undertaken on this topic.⁹ The "country of origin" principle has worked well in the context of the Satellite and Cable Directive, as has the Directive itself. The advantages of applying it to online audiovisual media services might be to bring clarity and transparency to the market in respect of the regulation of such services but an evidence-based study is required.

The most appropriate way to determine the "country of origin" would be by the Internet Protocol (IP) address of the server transmitting the service.

6. *What would be the costs and benefits of extending the copyright clearance system for cross-border retransmission of audiovisual media services by cable on a technology-neutral basis? Should such an extension be limited to "closed environments" such as IPTV or should it cover all forms of open retransmissions (Simulcasting) over the internet?*

In the absence of available evidence as to the impact of extending the copyright clearance system in this way, the BFI is not able to comment. However, we would recommend that the Commission request a report on this subject to provide the appropriate evidence base for a judgement to be made about its desirability.

7. *Are specific measures needed in light of the fast development of social networking and social media sites which rely on the creation and upload of online content by end-users (blogs, podcasts, posts, wikis, mash-ups, file and video sharing)?*

We believe that the Hargreaves Review in the UK has put forward appropriate recommendations in the light of such developments, for example by supporting the introduction in the UK of a parody exception, and we are not aware of

⁹ Op.cit., p.10

evidence which would point to the need for further interventions at this time although flexibility is needed going forward.¹⁰

We strongly support the UK Government's position in its response to Hargreaves that the Government will aim to secure further flexibilities at EU level that enable greater adaptability to new technologies including use of data for research. We support a review of relevant EU legislation to this end.

8. *How will further technological developments (e.g. cloud computing) impact upon the distribution of audiovisual content, including the delivery of content to multiple devices and customers' ability to access content regardless of their location?*

The BFI believes that the distribution of content is moving toward an "everything everywhere" type model. But we believe that policy interventions should be based on clear evidence of need and that it is not fruitful therefore to merely speculate how the market might develop and what interventions might be needed.

9. *How could technology facilitate the clearing of rights? Would the development of identification systems for audiovisual works and rights ownership databases facilitate the clearance of rights for online distribution of audiovisual works? What role, if any, is there for the European Union?*

Please see answer iii. at Question 2 above regarding the Digital Copyright Exchange. We believe that the successful implementation of such an Exchange would facilitate the clearance of rights for online distribution. A single numbering system for all audiovisual works would also be a very important mechanism in facilitating such clearances. The International Standard Audiovisual Number (ISAN) is a system that provides a unique, internationally recognised and permanent reference number for each audiovisual work registered in the ISAN system. Stakeholders across Europe should be encouraged to use this system. .

10. *Are the current models of film financing and distribution, based on staggered platform and territorial release options, still relevant in the context of online audiovisual services? What is the best means to facilitate older films which are no longer under an exclusivity agreement being released for online distribution across the EU?*

See answer to Question 1.

Again, the Digital Copyright Exchange would help facilitate the release of older films being released for online distribution. But judgements about what to release and how should be left to the market – unless copyright exceptions permit their use in specified contexts.

¹⁰ <http://www.ipo.gov.uk/ipresponse-full.pdf>, p.8.

11. *Should Member States be prohibited from maintaining or introducing legally binding release windows in the context of state funding for film production?*

In the UK the issue of the length of release windows for the cinema and other media has always been dealt with on a case-by-case matter using contractual law. Competition law continues to act as a back-stop to prevent unfair practice which is to the detriment of consumers. In the UK, the length of windows should continue to be determined by the interplay of market forces between audiences, distributors and exhibitors.

The BFI respects the principle of subsidiarity, so each Member State should be allowed to address the implementation of legally-binding release windows in the context of their own state funding system.

12. *What measures should be taken to ensure the share and/or prominence of European works in the catalogue of programmes offered by on-demand audiovisual media service providers?*

The BFI believes that these issues are best dealt with through specific funding interventions, which are compliant with State Aid rules, in individual countries, and via the support offered by the MEDIA Programme – for example, via the latter’s VOD/DCD strand.¹¹ We believe that the latter intervention should be focussed on VOD services which serve multiple territories.

13. *What are your views on the possible advantages and disadvantages of harmonizing copyright in the EU via a comprehensive Copyright Code.*

We do not see the evidence of a need for an EU Copyright Code. We believe that, as the recent Hargreaves Review in the UK suggests, that Member States are best placed to drive forward the necessary changes to the copyright system in the digital age.

14. *What are your views on the introduction of an optional unitary EU Copyright Title? What should be the characteristics of a unitary Title, including in relation to national rights?*

As with the answer to Question 13, we see no evidence of need and believe that any relevant issues are best dealt with by Member States.

15. *Is the harmonisation of the notion of authorship and/or the transfer of rights in audiovisual productions required in order to facilitate the cross border licensing of audiovisual works in the EU?*

We are not aware of evidence that would suggest such harmonisation is desirable. Any changes to the current system would need to be evidence-based.

¹¹ http://www.mediadeskuk.eu/funding/_3,18,156/

16. *Is an unwaivable right to remuneration required at European level for audiovisual authors to guarantee proportional remuneration for online uses of their works after they transferred their making available right? If so, should such a remuneration right be compulsorily administered by collecting societies?*
17. *What would be the costs and benefits of introducing such a right for all stakeholders in the value chain, including consumers? In particular, what would be the effect on the crossborder licensing of audiovisual works?*
18. *Is an unwaivable right to remuneration required at European level for audiovisual performers to guarantee proportional remuneration for online uses of their performances after they transferred their making available right? If so, should such a remuneration right be compulsorily be administered by collecting societies?*
19. *What would be the costs and benefits of introducing such a right for all stakeholders in the value chain, including consumers? In particular, what would be the effect on the crossborder licensing of audiovisual works?*
20. *Are there other means to ensure the adequate remuneration of authors and performers and if so which ones?*

The BFI does not have a detailed view on questions 16-20. Authors and performers must be paid equitably for their contributions to works. Collecting societies must operate in the most transparent way possible. We are not aware of evidence to support the introduction of unwaivable rights of the kind proposed above.

21. *Are legislative changes required in order to help film heritage institutions fulfil their public interest mission? Should exceptions of Article 5(2)(c) (reproduction for preservation in libraries) and of Article 5(3)(n) (in situ consultation for researchers) of Directive 2001/29/EC be adapted in order to provide legal security to the daily practice of European film heritage institutions?*

The BFI very strongly supports the introduction of exceptions which enable film heritage institutions to better serve the public who pay for them. We support the introduction of a format-shifting exception for archives, which enables them to copy material which they own for preservation purposes. The UK Government has said in its response to Hargreaves that it intends to introduce such an exception.¹²

We would also like to see the widening of an exception for non-commercial research which the UK Government has said it will seek.¹³ European Commission support for the UK Government's policy of introducing these exceptions in the UK (which are already enshrined in the European legislation) would be valuable.

¹² Op.cit. p.7.

¹³ Ibid.,

In addition, we would like to see the introduction of an educational exception for distance-learning. This was originally proposed by the Gowers Review of Intellectual Property in the UK and the UK Intellectual Property Office subsequently issued two consultations on this subject under the previous Government but no legislation has been brought forward in the UK.¹⁴ Again, the support of the Commission for introducing these exceptions would be valuable.

We are aware that Peaceful Fish are conducting a study for the Commission on Challenges of the Digital Era for Film Heritage Institutions and the findings of this study should be used to help inform the direction of policy in this area.¹⁵

22. *What other measures could be considered?*

The BFI has set out its core requests in response to question 21 above.

23. *Which practical problems arise for persons with disabilities to have access on an equal basis with others to audiovisual media services in Europe?*

The BFI wishes to ensure that all citizens of Europe have the capacity to access audiovisual media services in Europe without any barriers created because of disabilities. As technologies constantly evolve it will be important to maintain a watching brief to ensure that the copyright system is fit for purpose in this regard.

24. *Does the copyright framework need to be adapted to improve accessibility to audiovisual works for persons with disabilities?*

As far back as 1982, the Governing bodies of WIPO and UNESCO issued a report examining the issue of access to copyright works for people with disabilities.¹⁶ We are aware that WIPO took up this issue in relation to printed works in 2008 but no substantive progress has yet been made.¹⁷ We are also aware that the EU submitted a draft of a proposed treaty on the same subject to WIPO.¹⁸

In an age where people increasingly access audiovisual material, as well as printed material, via electronic devices such as tablet computers, we believe that the Commission should undertake a study of ways in which a copyright exception might, or might not, help to ensure greater access for disabled people to audiovisual material across the European Union.

¹⁴ <http://www.ipo.gov.uk/consult-copyrightexceptions.pdf>, p.8 and <http://www.ipo.gov.uk/consult-gowers2.pdf>, p.11

¹⁵ http://www.dae-filmheritage.eu/mediapool/100/1000452/data/DAEFH_Consultation_Paper_FINAL.pdf

¹⁶ http://www.keionline.org/misc-docs/tvi/1982_report.pdf

¹⁷ E.g. see paragraphs 57-61 from report of WIPO Standing Committee on Copyright and Related Rights, Geneva, June 15-24 2011. at: http://www.wipo.int/edocs/mdocs/copyright/en/sccr_22/sccr_22_18.pdf

¹⁸ http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=134412

25. *What would be the practical benefits of harmonising accessibility requirements to online audiovisual media services in Europe?*

It would help to ensure equality of access to copyright material for disabled people.

26. *What other actions should be explored to increase the availability of accessible content across Europe?*

In the first instance, a study as proposed at question 24.

Ends.