BRITISH COPYRIGHT COUNCIL

Response to the European Commission's Green Paper
On the online distribution of audiovisual works in the European Union: opportunities and challenges towards a digital single market

The British Copyright Council represents those who create, hold interests or manage rights in literary, dramatic, musical and artistic works, performances, films, sound recordings, broadcasts and other material in which there are rights of copyright and related rights.

Our members include professional associations, industry bodies and trade unions which together represent hundreds of thousands of authors, creators, performers, publishers and producers. These right holders include many individual freelancers, sole traders and SMEs as well as larger corporations within the CCIs. Our members also include collecting societies which represent right holders and which enable access to works of creativity.

BCC Member organisations:

Artists' Collecting Society . Association of Authors' Agents . Association of Illustrators . Association of Learned & Professional Society Publishers . Association of Photographers . Authors' Licensing & Collecting Society . BPI . British Academy of Songwriters, Composers and Authors . British Association of Picture Libraries & Agencies . British Computer Society . British Institute of Professional Photography Broadcast Entertainment Cinematograph & Theatre Union . Chartered Institute of Journalists . Copyright Licensing Agency . Design & Artists Copyright Society . Directors UK . Educational Recording Agency . Equity . Incoporated Society of Musicians - Music Managers' Forum . Music Publishers Association . Musicians' Union . National Union of Journalists . Periodical Publishers Association . PPL . PRS for Music . Publishers Association . Publishers Licensing Society . Royal Photographic Society . Society of Authors . Writers' Guild of Great Britain .

We welcome the European Commission's Green Paper on the online distribution of audiovisual works in the European Union which is of direct significance for most sectors of our membership, whether as directors, authors and performers of such works, or contributors to such works as graphic artists and designers, composers and musicians, or as other right holders in such works.

Whilst recognising that the fundamental issue in relation to this Green Paper is the further development of, and economic growth within the Single Market, we believe that proper recognition should be given to the practical choices already offered to consumers through both more traditional forms of exhibition of audiovisual works (such as terrestrial broadcast) and new forms of presentation within catch up television and other video on demand services available on line. The film and television markets are established and successful ones in which consumer demand and business and licensing models are

undergoing rapid transition. However, it is important to recognise that most audiovisual productions are produced recognising national and linguistic traditions.

The Communications Chambers Report by Robin Foster and Tom Broughton, "Creative UK – The Audiovisual Sector & Economic Success"[1] found that within the United Kingdom alone around £13bn flows directly into the UK audiovisual sector each year funding investment in content production of around £4bn a year, which delights audiences here and around the world involving over 7,000 firms, including world-leading production companies and small garage-based start-ups. In addition, international sales of UK television programme and associated activities grew to £1,337 million in 2009 (being a 127% increase on 2006).

We note that the Green Paper highlights diversification in the delivery of television services while film is largely dealt with in relation to online delivery through VoD type services (Section 2) and in relation to Film Heritage Institutions (Section 5). Nevertheless, the Paper is particularly valuable in opening interesting debates on potential new markets for older films as well as television productions and new "secondary" online uses for such materials.

We have also noted Commission initiatives on copyright and related rights which are already under development through its IP Strategy, from cross-border licensing to orphan works, and we will be contributing to these separately, though we make reference to them in this response. Through these initiatives, potential solutions have already been identified or are being sought at those points where copyright and related rights do impact on the digital single market. We are unclear what this consultation will add to this part of the debate which does not duplicate or cross with the Strategy and the work programme arising from it. The British Copyright Council's view is that the findings of this consultation should, in the main, focus on gaps in the availability of online services for consumers in the marketplace which the Commission quite rightly identifies in Section 3 and seek to establish real evidence (against a background of cultural and linguistic differences) about whether such gaps really result from a lack of demand or need when the services that are being made available and developed to meet demands of the market place are taken into account.

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[1] Creative UK – The Audiovisual Sector & Economic Success – Communications Chambers – A Report by Robin Foster and Tom Broughton – Commissioned by Channel 4, ITV. Pact and Sky – available at www.commcham.com

Executive Summary

- There are other factors which prevent the successful development of a digital single market in online distribution of audiovisual works. Cultural and linguistic differences cannot be ignored. Copyright and copyright licensing must be considered as an enabler, not an inhibitor, of current and future markets for distribution and use of audiovisual works.

- Copyright provides a flexible framework which can evolve to reflect technological developments which enable and support access to audiovisual works online. Advances in technology must not erode the principle of Member States providing adequate legal protection against the circumvention of effective technological measures.

- In the interests of right holders, it is essential to preserve the balance between primary licensing opportunities and recognition of the ability of rights holders to exercise exclusive rights directly or through application of collective bargaining agreements on the one hand and secondary licensing (e.g. cable retransmissions, collection of equitable remuneration, and administration of the collection of statutory revenues/levies) which can only practically taken place through or with the assistance of, collective management organisations, on the other.

- An unwaivable right to remuneration should not reduce the exclusive rights of authors or audiovisual performers to consent to the making available of their performances online.

- The Commission should enable collecting societies to play an effective role in the allocation and distribution of monies due to audiovisual performers from the making available of their works online when (a) contractual arrangements do not secure effective and equitable remuneration to be paid and/or (b) the identity or whereabouts of an individual performer is not certain at the time when a user wishes to exercise making available on demand rights in a sound recording or film under a contract whereby the owner of the sound recording or film has authorised such use.

3.1 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?

We welcome the Commission's recognition that copyright and related rights play a vital role in facilitating access to audiovisual works but it does not follow that the role which copyright and related rights play are an impediment to that market, nor to a digital single market in such works.

In addressing other obstacles facing production and distribution of new and existing works, it is important that the Commission does not remove flexibility for the sector to use new technology and the rights recognised by copyright to secure revenue from all forms of exploitation that are met by demand from consumers.

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?

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?

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?

The reality is that clearances are regularly planned to match the expected distribution for a particular production. Expected distribution can include worldwide clearances in many cases. Where buy-outs are not possible because underlying rights can only be cleared at local or national level, the relevant local clearances are then available collectively by application of local collecting society mandates. By way of example, the right to authorise the broadcast of certain music included in a television programme may be cleared by a local broadcaster having a blanket agreement covering broadcasting of music (using local mandates and mandates applied under bilateral agreements in place to facilitate the clearance of repertoire administered primarily through other national societies).

The commercial, linguistic and cultural realities of the marketplace have by far the greatest impact on the single market and in the free movement of audiovisual works, whether distributed online or through more traditional means and whether as goods or incorporated into services. The market in and between each Member State is much more dependent on these realities: for example on taxation rules,

on consumer protection law, on differences between culture and most importantly, on language, than it is on copyright.

The following are examples of these market realities which we believe support our view.

Developments in online radio, closely related to and, in fact, forming part of the audiovisual market, demonstrate that while copyright and related rights underpin certain aspects of the commercial dealings in that market, they have not prevented its development as an online global market.

One issue for the Single Market in the television broadcast field, though on a much smaller scale and one mainly of consumer (and media) interest, is that individuals may be unable to watch their national television while living, working or on vacation elsewhere in the European Union. Again copyright is not at the heart of this issue. Such territorial limitations on access are in fact due to the relative commercial value of such programming to national broadcasters and distributors, whether within the European Union or internationally. The terms of the EC Cable and Satellite Directive already provide options for cable operators to pick up and relay broadcasts of one national broadcaster within the territory of another. In reality, linguistic and commercial considerations have meant that it is not economically viable for local cable operators to carry all channels because the demand in their own area of reception is simply not high enough.

Finally, taking public sector broadcasting as an example, whereas German public sector television is available in the UK, British public sector broadcast services are not retransmitted by cable in Germany. This reflects the way that UK public sector broadcasters find the real markets for viewers of programmes owned by them through targeted international sales (including production of dubbed and subtitled versions of programmes when appropriate). Broadcasters successfully sell individual programmes, rather than their service, for distribution into a territory. The market works to provide real choices for consumers if it is allowed to function in this way.

The European Court of Justice has recently been called upon to address whether a sports match can of itself amount to a "work" protected by copyright[2]. Whilst the ramifications of this have yet to be addressed by the English Courts, it must be hoped that distinctions will be clearly made between "works" that are protected by copyright on the one hand and the goods or services which may include them. Such distinctions will be vital to enabling the value of copyright to continue to promote diversity of goods and services which will meet market and consumer demands in the future.

[2] ECJ Case C-403/08 and C-429/08 Football Association Premier League and Others v QC Leisure and Others – Karen Murphy v Media Protection Services Ltd. Other issues raised by this case are under consideration by the BCC.

As representatives of right holders we support the collective management of rights where individual rights clearances are not possible or practical. Through reciprocal agreements collecting societies are well placed to provide cross-border licensing within the European Union and internationally as well as at national level.

Right holders accept that there is scope for improvement in rights clearance services. It is in their interest to make improvements as much as it is in the interests of service providers, broadcasters and consumers. In this regard the British Copyright Council has developed a proposal for a UK based solution for the licensing of orphan works. In addition it has supported the development of Principles of Good Practice to assist in the promotion of transparency and mandates for the operation of collective management organisations.[3]

As right holders we also recognise that rights clearance issues also include the provision of improved access to archival material, both film and broadcast material, which is of historical and educational value in a non-commercial context. We equally recognise the potential added value from making films available online, where the market for such films in physical form e.g. through DVDs or through exhibition in cinemas, has long since fallen below the threshold at which it is viable.

Recognition must be given to the way that online use of one copyright work may be of more primary commercial use and significance that the same use may have for another work embedded within an audiovisual work. These distinctions must not become blurred if authors, performers and other rights holders are to benefit alongside services providers, broadcasters and users, from these additional forms of exploitation. This is particularly important for "local" markets – that is, national markets where licensing and/or statutory arrangements for equitable remuneration of authors and performers should continue to support secondary use under national laws.

The importance of distinguishing copyright uses relevant beyond the point of reception of an online service from the copyright restricted acts of "reproduction" and "communication to the public" involved in the electronic operation of online services is vital to ensuring that right owners remain able to secure payment for all types of use.

Private copying or public performances that occur following reception of an online service must remain relevant to copyright rules.

[3] BCC response to The Independent Review of IP and Growth by Professor Hargreaves and UK Government Response – http://www.ipo.gov.ujk/types/hargreaves.htm,

The further development of databases of works and right holders are a priority. In music, one example of a right holder initiative is the Global Repertoire Database but it may take time for other sectors to catch up and European Union support such as that provided for the ARROW project is essential or, perhaps more relevant for audiovisual works and their authors, is work on and support for the further development of ISANs and the IDA.

The concept of the one-stop shop, or the development of a single set of standard terms for all forms of rights clearance, may appear to provide a simple and superficially attractive solution but as the Commission is aware, films and television productions are complex works, each involving a "basket" of right holders (as well as non-right holders with contractual or employment rights), each tied by contract in different ways to that film or production. Generally producers of films and other audiovisual works have been able to secure clearances that support a "one-stop shop" approach when distributing and selling works for use in the areas of exploitation envisaged at the time of production. When new forms of exploitation become possible at a later date or within a "long tail" of availability within new online services, collective licensing and new payment arrangements recognised under collective bargaining agreements already play an important role to support new clearances being obtained. However, it must be remembered that such new uses may be of more "primary" relevance to one rights owner (say the author of a screenplay) than another (say the owner of a clip from a commercial sound recording embedded as background within a film).

Within the industry, structures are already in place for the negotiation of such deals and for the collection and remuneration of many underlying right owners whether on an individual basis, through an agent, or through unions, or collective management organisations.

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?

The question about the feasibility of extending the country of origin approach, currently applicable to satellite broadcasting, to the online distribution of audiovisual works and underlying works embedded within them raises difficult and controversial issues.

The commissioning of an impact assessment on the application of a "country of origin " principle to the online distribution of audiovisual material has been suggested in the Report prepared for the

Commission on multi-territory licensing of audiovisual works within the European Union. This would seem to be the most important next step if the concept is to be explored further.

One element that we believe will be important to address within any impact assessment is the effect that application of a country of origin principle to licensing online services may have on the ability for right owners to enforce rights. This is particularly relevant because the placing of a server from which an online service may operate is something that can easily be changed by unscrupulous operators. There is also much less of a link to the national regulatory frameworks that are relevant for companies who wish to become licensed to operate broadcast television services within EU Member States. In addition there are risks if a server is located outside the EU. This would create a new challenge in combating piracy because of the difficulty of identifying where the server is.

The country of origin principle is hard enough to apply to satellite broadcasting, where there is fixed physical technology provided by a third party provider to the distributor. The case law in cases such as *Laguardère Active Broadcast v SPRE* show that there are difficulties in applying the EC Cable and Satellite Directive on satellite broadcasting – let alone the less regulated area of internet transmissions.

The place where an internet transmission originates is inherently fluid and easily moved. It therefore risks creating significant legal uncertainty, and potentially increasing the transaction costs of maintaining a fully licensed market.

In addition, any impact assessment must be clear about the restricted copyright acts relevant to the services that are to be considered against any "country of origin" approach to licensing. In particular, a consistent approach is needed over the extent to which "simulcasting" of broadcasts using the internet amounts to a "broadcast" of copyright works, rather than some form of "communication to the public" which is not regarded as a broadcast.

It seems clear that making available a copyright work in an online service for viewing "on demand" requires reproduction of an audiovisual work (and works and performances included in it). This recognises that copies of the audiovisual work are stored on the server from which any communication to the public is triggered when consumers access a service online. The right of communication to the public is also relevant and cover the electronic transmission to the consumer.

In this context, the right of communication to the public under Art. 8 WIPO Copyright Treaty 1996, which the Information Society Directive 2001/29/EC implements, provides for a right that takes place both at the place of transmission and the place of reception. This has been upheld in European case

law[4]and by legal authorities.[5] Limiting the right to place of transmission would alter this principle of the WIPO Copyright Treaty

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?

To assess costs and benefits, the nature of the copyright restricted acts relevant to a service must be consistently interpreted across the EU.

Reference to "open retransmissions" and "closed environments", must be related back to the different ways in which rights apply to subsets of the "communication to the public" right. These subsets include both "broadcasting" and "making available to the public works in such a way that members of the public may access them from a place and at a time individually chosen by them. It is not possible to answer this question, in the absence of this clarification.

As a separate issue, the regulatory framework applicable to national broadcasters cannot be ignored.

While the British Copyright Council does not and cannot speak for the BBC, nor do we wish to single out any particular broadcaster, the licenses granted to the UK's public service broadcaster by right holders have developed as a result of the way in which that broadcaster is itself licensed and regulated.

In summary, the BBC is licensed to broadcast in the UK. The successful online services it now provides in the UK include simulcasting on its I-Player. It also provides an additional download service to which territorial controls are applied, making such downloads available to BBC licence holders on demand. Some BBC broadcast services are picked up and re-transmitted by cable within certain other territories (in line with the EC Cable and Satellite Directive) but there is also demand for the sale of individual programmes to other broadcasters or distributors outside the UK.

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[4] See for example the "thumbnail" case in the Landgericht, Hamburg, 05.09.2003 - 308 O 449/03; Republic of Chile v Florence G. & Clara (Cour d'Appel de Paris, 9th September 2009); Cassina SpA v La Fondation Le Corbusier (District Court of Amsterdam, 14th July 2010); *International jurisdiction in the event of unauthorised public access to a work protected on the internet* (Munich Regional Court, 30th July 2009, 7 O 13895/08); 800-Flowers Trade Mark [2000] FSR 697 at 705 (in the context of trade marks);

[5] *The WIPO Treaties 1996*, Reinbothe & von Lewinski, (2002), *The Law of Copyright and the Internet – The 1996 WIPO Treaties, their Interpretation and Implementation*, Ficsor (2002), *International Copyright and Neighbouring Rights – The Berne Convention and beyond* Ricketson & Ginsburg, 2nd Edition (2006) and *World Copyright Law,* Sterling 3rd Edn. (2008) at pp.469-472.

To support the BBC's activities and, of course, to benefit alongside the BBC from those activities, right holders provide it with a multi-layered contractually-based licensing structure, in some cases starting with a licence to produce the programming, followed by a licence to broadcast television productions in the UK, on top of which there is a negotiated deal for its on-line services. Where the BBC licenses its service into other territories there is a further payment for additional territories which is based on audience numbers. Where another broadcaster or distributor purchases individual programmes or acquires the right to make those programmes available online a further royalty is paid to right holders.

The system works for broadcaster and contributors alike. Such a system should be and already is being applied to online distribution. With a market still in transition, there are clearly tiers which remain open for negotiation but others are already in place.

The British Copyright Council supports the principle enshrined within this system, that is that re-use should trigger payment and that the chain of contracts and rights ensures payments and royalties are delivered to right holders and, indeed, to other contributors. It is vitally important and must be protected. While some payments are large, some secondary payments may be small but all provide a steady flow of revenue back to right holders and contributors. In turn, the broadcaster benefits by paying only for those rights at the point at which they sell their service or programming for onward distribution whether as physical product or online service

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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)?

This question raises direct concerns over the future application and interpretation of Article 5 of the EC Copyright Directive[6] on copyright exceptions and limitations; particularly those exceptions that might apply to the reproduction of works and performances on any medium made by a natural person for private, non-commercial use on condition that the right holders receive fair compensation which takes into account the application or non-application of technological measures to the work or the subject-matter concerned.

Many of our members have no objection to a limited private copying exception for protected works in the UK, but believe that any such exception should provide for fair compensation to rights owners and the scope of such an exception requires careful framing to ensure it does not harm new markets.

[6] Directive 2001/29/EC

Such fair compensation would also be required if any exception is introduced under mandatory European rules (Article 5 (2b) Copyright Directive 2001/29).

We recognise the value of national interpretation of application of the optional exceptions recognised under the EU Information Society Directive in cases where this supports valuable cultural diversity within the EU. Nevertheless, differences which result in the loss of fair remuneration for rights owners linked to the application of exceptions and limitations, should be addressed.

Greater harmonisation of the ways in which fair compensation is secured for rights owners when exceptions under Article 5 (2) (b) EC Copyright Directive apply, must continue to be addressed particularly in the light of the technologies referred to in this question.

As a separate issue, clarity in setting terms and conditions and improving consumer understanding of the terms and conditions applicable for accessing online services and contributing content to them must be addressed.

The practical reality of users failing to read or understand the terms and conditions legitimately attached to online services, is a challenge for all online service providers. Those who create and contribute content to blogs, podcasts and social network services need to understand that the original work that they create is a copyright work in its own right. Contributors need to understand the rights that they licence or grant to the service operators who first publish their work.

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?

It will be important that increased storage of copies of audiovisual works in lockers accessed through cloud computing does not remove the opportunities that should exist for right owners to participate in the value chain when new users or consumers access copies in ways that replace more traditional sales or delivery opportunities for audiovisual works.

Application of Article 6 EC Copyright Directive (obligations as to technological measures) will be increasingly important in this context.

Social networking and social media sites already rely on the creation and upload of online content, incorporating protected works and performances, by end users. Increasingly, social networking and media sites are licensed by right holders and user-created content is licensed using Creative Commons type licences where the user-creator wishes to share their work freely for certain types of use.

Therefore we do not accept that specific measures are needed and we believe that current rules applicable to recognition of copyright should be maintained.

We believe, however, that it will be important for the operators of such sites to explain in plain language what licences in "user created content" they demand of user-creators when material is uploaded on published on such sites. Such terms should also be clear on what the licences *mean* to those user-creators; and why a licence is necessary to the provision of their service.

Copyright and related rights must continue to apply, firstly to ensure that where end user products such as mash-ups, blogs, etc. cross over into commercial exploitation the right holder is still in a position to negotiate for that commercial use and to their benefit. Secondly, where the moral rights of the right holder are affected, they should be in a position to enforce their right to have the material taken down. There is no suggestion that laws with moral implications such as libel laws, or those relating to offensive material should not apply because of the nature of the end use or user, so there is no reason why a new generation of authors and performers should be prevented from protecting their work against derogatory treatment or false attribution.

Specific regulatory measures are not an appropriate way of dealing with such content but we do feel that service providers should be further encouraged to work with right holders and others to educate end users on the thresholds of acceptable use through the terms and conditions of access to the social networking or media site.

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?

Technology, including identification systems and rights ownership databases, already exists to facilitate the rights clearance process. New systems are also under development. Such systems and databases (many within, or shared across, collective management organisations) have existed and functioned for a number of years and demand from right holders and users alike has provided the commercial impetus for their further development to provide solutions for online distribution. Certain categories of right already have highly sophisticated systems and databases in place for the collective management of such rights and continue to develop, for example, the Global Repertoire Database. For other types of rights ARROW, ICE, etc. (also see our response to Question 2). Use of rights databases and the importance of their being kept up to date will significant in enabling the diligent search processes linked to searching for ownership of orphan works to become more efficient.

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?

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

Staggered platform and territorial releases arose, like other elements in the audiovisual sector, from commercial imperatives. While such practices reflect copyright legislation, they are largely determined through contractual negotiations. In our view, this question is no longer particularly relevant. Market developments resulting from consumer demand and threats from piracy and unauthorised online use have largely superseded the need for such "windows". Where the need remains it should be left to the market to determine. There is no need for Member States funding such productions to become involved or for the European Union to act.

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?

In the context of on-demand services, the major point of regulatory leverage would be analogous to regulation of programme guides on cable television. It is difficult to see what a "quota" would mean in this context. Since the goal of such regulation would largely be to ensure prominence to productions native to a particular language, this should be left to Member States to deal with as a subsidiarity issue.

The question also ignores the fundamental nature of the rights which are licensed to enable films and programmes to be included within on-demand audio-visual media services. The reality is that works are included in such services and made available to the public in a way that members of the public may access them **at a time and a place and at a time individually chosen by them**.

In view of this, the benefits to a consumer of insisting that an online service offers a quota of programmes from a particular source would not seem helpful for economic growth (in the way that quotas were relevant to provision of broadcasting services).

In the case of on-demand services the consumer/public chooses what they wish to view. If a particular type of programme is not available from one service provider, the market should enable another service to offer films and programmes for which a demand has been identified.

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

While in the long term a European Copyright Code might seem desirable to the European Commission, we do not see what a single European Copyright law would contribute to the potential for creating a digital single market in the online distribution of audiovisual work. In any case, the audiovisual market, reliant as it is on contracts supported by licensing, the harmonisation of which is dependent on a great many other factors and variables does not seem the most suitable place in which to initiate this debate.

Furthermore, we think that the nature of the current academic thinking on the subject, as represented by the Wittem code, despite going further than the current European copyright framework, demonstrates only too well by its incomplete nature the extreme difficulty of formulating an exhaustive European Copyright Code. See for example Cook & Derclaye - An EU Copyright Code : What and How, if Ever? [2011] IPQ pp 259-269 at pp 267-8.

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?

Our response to Question 13 applies no less to the concept of a unitary EU copyright title, as to the desirability or otherwise of which we also note that the academic authors of the Wittem code expressly take no position. Moreover, as explained at pp 261-3 of the Cook and Derclaye paper there referenced, a unitary copyright title can have no effect on the consequences of territoriality unless accompanied by radical amendments to, or even repeal of, national copyright laws, which even if politically feasible as to the future could have only a limited effect on already acquired rights under such laws. In addition to difficulties that adoption of any such title would have in terms of application to rights and clearances relevant to copyright works existing at the time of adoption would raise unnecessary complications.

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?

The difficulties of harmonisation have been exemplified by the lengthy discussions within WIPO to reach consensus over the wording for Article 12[7] within a possible Treaty for the Protection of Audiovisual Performances. The Article proposes to address the issue of transfer of rights.

The wording that (after over 10 years of discussion) is now hopefully to be considered in a WIPO Diplomatic Conference to address the Treaty recognises the importance of a flexible approach.[8]

7
Possible Article 12
Transfer of rights

Important recognition is given to the fact that, independent of acknowledged transfers of rights to a producer, national laws or individual or other collective agreements may provide a performer with the right to receive royalties or equitable remuneration for use of performances linked to rights of "making available of fixed performances" and "broadcasting and communication to the public" or performances.

16.&18. Is an unwaivable right to remuneration required at European level for audiovisual authors/performers to guarantee proportional remuneration for online uses of their works after they transferred their making available right? Is so, should such a remuneration right be compulsorily administered by collecting societies?

It should not be the only option for services that involve use of the making available rights of authors.

For audiovisual performers, please see our comments in response to question 15 above. We acknowledge that different and flexible approaches to paying performers for the use of their performances are already provided for across different EU Member States. There are concerns that, in some cases, legal recognition has not always resulted in newly recognised rights leading to new payments for performers.

However, models for payments being made include contractual payments based upon licensing of exclusive rights, statutory provisions providing for rights to receive "equitable remuneration" and other forms of collective licensing.

These different approaches suggest that there should be no "one size fits all" approach for securing payments to audiovisual performers and that the flexibility acknowledged in proposed Article 12 of the WIPO Treaty is helpful.

It will remain vital for authors and performers, or their representatives to retain an option to manage their exclusive rights and exercise them through collective agreements. This has been the basis for much of the licensing of use of audiovisual works within the United Kingdom. Until now, this system has worked to the advantage of consumers, broadcasters and performers, promoting the making available on demand of audiovisual programmes in a range of new online on demand services.

A Contracting Party may provide in its national law that once a performer has consented to fixation of his or her performance in an audiovisual fixation, the exclusive rights of authorisation provided for in Articles 7 to 11 of this Treaty shall be owned or exercised by or transferred to the producer of such audiovisual fixation subject to any contract to the contrary between the performer and the producer of the audiovisual fixation as determined by the national law.
A Contracting Party may require with respect to audiovisual fixations produced under its national law that such consent or contract be in writing and signed by both parties to the contract or by their duly authoried representatives.
Independent of the transfer of exclusive rights described above, national laws or individual, collective or other agreements may provide the performer with the right to receive royalties or equitable remuneration for any use of the performance, as provided for under this Treaty including as regards Articles 10 and 11.

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 cross-border licensing of audiovisual works?

Please see response to questions 8 and 15.

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 cross-border licensing of audiovisual works?

We think that question 19. runs the risk of confusing right holders with consumers.

Please see comments in response to question 8 concerning possible "consumer" interests as right holders of the future.

Education about the options open to copyright owners about how and when they might wish to assert rights in their work will be important.

For right owners, a system that will deliver secondary payments linked to actual "secondary or long tail) online use of audiovisual works may have the following cost benefits:-

(a) the ability of rights owners to receive secondary payments for the use of their work that reflects economic use and consumer interest;

(b) the ability for producers to participate in such secondary revenues rather than having to include all rights buyouts for contributors at the time that a film or new television programme is made;

(c) consumers being given wider choice of programmes within available online services, due to release becoming more economic for the producers; and

(d) the collecting society and secondary licensing markets taking on the responsibility for collection and distribution of payments to underlying rights owners (including audiovisual performers) so that fair compensation is secured without unnecessary bureaucracy.

20. Are there other means to ensure the adequate remuneration of authors and performers and if so which ones?

Yes, there are other means, most notably through strong collective bargaining.

In addition continued development and application of databases including details of right owners and licences which may be available through collective licensing, will be important.

Technology, including identification systems and rights ownership databases is already in place to facilitate the rights clearance process, or is under development. Such systems and databases (many within, or shared across, collective management organisations) have existed and functioned for a number of years and demand from right holders and users alike has provided the commercial impetus for their further development to provide solutions for online distribution. Certain categories of right already have highly sophisticated systems and databases in place for the collective management of such rights and continue to develop, for example, the Global Repertoire Database. They will continue to help ensure that adequate remuneration can be secured from new online forms of exploitation of audiovisual works in the future.

The British Copyright Council supports strong remuneration rights for authors and performers.

21. Are legislative changes required in order to help film heritage institutions fulfill their public interest mission? Should exceptions of Article 5(2)(c) (reproduction for presentation 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?

Whilst a public interest mission to preserve the work of others is likely to be complementary to the interests of tight owners, the use of preserved materials may well conflict with the normal exploitation of a preserved work and (as a result) prejudice the legitimate interests of right owners.

This vitally important point must continue to be addressed should the impact assessment promised by the European Commission address this question further.

22. What other measures could be considered?

The British Copyright Council has already indicated at national level and in previous submissions to the European Commission that it welcomes changes linked to the preservation of materials if they are within the parameters of the existing Copyright Directive.

In this context, there is a real need for clarity on definitions of “commercial” and “non-commercial use” in relation to the activities, rather than the purpose of film and other cultural heritage institutions. With reductions in public funding across Europe, such establishments are under increasing pressure to develop commercial activities.

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

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

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

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

First and foremost a common position should be agreed on this at international level within WIPO, as it is being for print material. For the European Union it is currently more important to concentrate on supporting development of systems for providing access to such material and not on the rules for obtaining the works themselves. Good work is already being undertaken in this field on a voluntary basis, e.g. the development of audio descriptors, sub titling and signing, some of which is supported by the European Union and by right holders. This should be supported.

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