

UK Film Council Response to

**Creative Content
in a European Digital Single Market:
Challenges for the Future
A Reflection Document
of DG INFSO and DG MARKT**

5 January 2010

1. Executive Summary

- 1.1 The UK Film Council welcomes the opportunity to respond to this Reflection Document. In general terms we endorse the Document's objective of creating "a modern, competitive, and consumer-friendly legal framework for a genuine Single Market for Creative Content Online."
- 1.2 It is crucial however that any proposed revisions of the legislative framework governing copyright in Europe take into account the needs of citizens and non-commercial entities as well as consumers and businesses. A copyright framework that is equitable and effective is key to the functioning of an informed democracy – most especially in a digital age which has intellectual property of all kinds at its heart.
- 1.3 The UK Film Council believes that the framework governing copyright at a European level will need adaptation if it is to serve the needs of all stakeholders in a digital age.
- 1.4 With regard to the Possible Actions set out in the Reflection Paper, further European Union initiatives which help to make possible EU-wide legal access to orphan works would be a very welcome complement to proposals put forward at a national level by the UK Government.
- 1.5 Copyright exceptions deliver significant cultural and educational value and moves to harmonise them, to the greatest extent practicable, are welcome.
- 1.6 However, we do not believe that attempts to create additional layers of top-down regulation, for example in relation to such issues as multi-territory licensing, are either desirable or practicable. For similar reasons we do not support the introduction of a "European Copyright Law." Nonetheless, as progress continues toward a fully digital world, a watching brief should be maintained in relation to the desirability of any light touch interventions which might be made by the European Union to the benefit of citizens, consumers and rightsholders.

2. Introduction

- 2.1 The UK Film Council is the Government-backed lead agency for film in the UK ensuring that the economic, cultural and educational aspects of film are effectively represented at home and abroad. The Board of Directors, appointed by the Secretary of State for Culture, Media and Sport, oversees

the work of the UK Film Council and provides advice to the Government on film.

- 2.2 In our submission, we have focussed only on the aspects of the paper which relate to film and in particular we have, as requested in the paper, focussed on the Possible EU Actions outlined in Section 5.

3. Detailed comments

3.1 Generic Issues

3.1.1 We strongly agree with the statement that "A wide and competitive Digital Content Market consisting of legal services, attractive offers and fair conditions would raise consumer confidence in online businesses and foster access to culture and knowledge across the EU."¹ However, we would also stress that the benefits are to citizens across the European Union and not just to consumers or businesses engaged in economic transactions. The paper as a whole pays insufficient attention to the needs and desires of citizens, as distinct from consumers. In a digital age, as David Lammy, the UK's Minister of State for Intellectual Property has argued, "the citizen will need to have the means to become much more aware of Intellectual Property and what it means if as a society we are to reap the potential benefits of the digital age".²

3.1.2 As the paper recognises, the film sector, like other parts of the creative industries is currently in transition. As a consequence of the development of digital technologies, many traditional business models for film are no longer optimal and they are very unlikely to be sustainable as the only source of revenue generation for rights owners in the future. The decline of DVD revenues and the fragmentation of the television advertising market means that far fewer entities are willing to advance finance – and are willing to advance less – to production ahead of those revenues, except that is (in Europe) for public film funds. New business models are being tested, but it is very unclear which models for the distribution of film online will maximise both access for audiences and income for rights-holders. As rightly stated in the paper; "Online platforms do not generally contribute to financing the production of films and other audiovisual works in the same way as "traditional" distributors, in particular upstream investment, e.g. pre-purchase of rights; online platforms do not yet

¹ http://ec.europa.eu/avpolicy/docs/other_actions/col_2009/reflection_paper.pdf 5.1. p.14

² © The way ahead: A Copyright Strategy at <http://www.ipso.gov.uk/c-strategy-digitalage.pdf>

play the important role that cinema exhibitors do in the promotion of films.”³

3.1.3 But throughout this period of upheaval, copyright remains a crucial mechanism for enabling the distribution of works in the European single market in a manner which benefits citizens, consumers and rights-holders. It provides absolutely vital economic support which helps to secure a financial return for rights-holders and thus provides the means by which investment can be made in future content for the enjoyment of audiences.

3.1.4 However, even as the transition to a fully digital world is still underway it is already apparent that aspects of existing law governing copyright at a European level are in need of adaptation, in particular to meet new demands from citizens and consumers.

3.2 Orphan Works, Exceptions and Related Issues

3.2.1 This is clear, for example, in relation to orphan works and other kinds of “non-managed works.” In particular, the UK Film Council supports the idea put forward in the paper that extended collective licensing could bring real benefits both as regards access to works and value for rights holders. While it is clear that checks and balances – such as careful definition of what actually amounts to an orphan and a rigorous definition of “diligent search” - will need to be in place to safeguard the position of rights-holders, the benefits of being able to make works available under such a scheme could be considerable. The work already undertaken by the High Level Expert Group – Copyright Subgroup in relation to orphan works under the auspices of the i2010 Digital Libraries initiative is valuable in this regard.⁴

3.2.2 The paper rightly identifies that such measures would help to make orphan works available. But extended collective licensing could also help make available works in which the copyright holder is known but some of the underlying rights holders cannot be traced. The recognition of the opportunities and challenges presented by orphan works is very welcome, although this is not only a rights issue but also a challenge on other fronts - e.g. the costs of digitisation, issues relating to “findability” and so on.

³Reflection Paper, op. cit., p.8. An interesting exception to this rule is in the case of Orange in France which has set up a unit to buy online rights and to pre-finance production.

⁴http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/reports/copyright/copyri ght_subgroup_final_report_26508-clean171.pdf

- 3.2.3 The Digital Economy Bill which is making its way through the UK's Parliament contains broad proposals to provide for the licensing of orphan works and for the use of extended collective licensing which are similar to those put forward in the Reflection Paper. As a consequence a dialogue with the British Government with a view to sharing ideas could be fruitful.
- 3.2.4 The UK Film Council agrees that "[F]urther harmonisation of copyright laws in the EU, in particular relating to the different and optional limitations and exceptions, would create more certainty for consumers about what they can and cannot do with the content they legally acquire."⁵ Some of these exceptions are extremely important for advancing access to education and culture. However, care needs to be taken that "harmonisation" does not remove "flexibility" provided by international rules when flexible interpretation actually assists in promoting the cause of cultural diversity and access to works.
- 3.2.5 We would draw the attention of the Commission to the UK Intellectual Property Office's (UK-IPO) recent consultation on exceptions: *Taking Forward the Gowers Review on Intellectual Property: Second Stage Consultation on Copyright Exceptions*.⁶ The complete harmonisation of exceptions would give rise to the extension of some exceptions, such as the "private copying exception" where they are not currently operative. The UK Film Council does not, at this point in time, see the need for a private copying exception for film in the UK – e.g. such as a format-shifting exception - either one based on compensation for rights holders, or one that is tightly constrained so that there is no apparent harm to rights holders, and thus with compensation set at a very low level or zero. We are mindful however of the proposals set out in paragraphs 159-172 of the UK-IPO consultation referenced above, which in turn draw on elements contained in *© The Way Ahead: A Strategy for Copyright in the Digital Age*, and will be responding to these proposals in the early part of 2010.⁷ We will be considering in that response whether we wish to revise our view on private copying exceptions.
- 3.2.6 For this reason, the UK Film Council agrees with the statement that "[I]n general, a rather more nuanced approach to exceptions and limitations might be in order in the medium term. There are 'public interest' exceptions for research and teaching or for access to works in favour of persons with a disability, on the one hand, and there are the

⁵ Reflection Paper, op.cit., p.15.

⁶ <http://www.ipso.gov.uk/consult-gowers2.pdf>

⁷ op.cit.

consumer' exceptions, such as private copying, on the other hand."⁸ In particular, the specificity of national laws and judicial processes needs to be taken into account in any consideration of moves toward harmonisation around exceptions and limitations. Such recognition of existing national laws needs to include consideration of the way in which such rules support local access and local accessibility to works for diverse sections of the community (e.g. rules governing access to language subtitles for the hearing impaired). Such localised exceptions may actually help to preserve and promote cultural diversity within the EU without putting up any barriers to the free movement of goods.

3.2.7 In such an uncertain environment, it would be imprudent to undertake wholesale reform of copyright in the European Union. At present, the introduction of a "European Copyright Law" as apparently suggested by some stakeholders (p.18), would be likely to exacerbate the already very considerable challenges faced by rights-holders in making the transition to a fully digital world. In any case, significant aspects of copyright law remain a matter of national competence. As such a new "European Copyright law" would introduce a new layer of law with which both rights-holder and consumers would need to comply, potentially increasing complexity and reducing transparency at a time when greater transparency is needed as a consequence of the transition to a digital world. It is therefore neither desirable nor practical to seek to introduce such a comprehensive, harmonised European system of copyright.

3.3 Licensing

3.3.1 More generally, simplification of the licensing system for the use of rights, would benefit both audiences and rights-holders in a digital age. For the reasons set out in the paper, the UK Film Council would support "an extension of the scope of the Satellite and Cable Directive of 1993 to online delivery of audiovisual content." Since an increasing proportion of the services covered by this Directive are delivered online, such an extension seems logical and desirable.

3.3.2 As the paper notes, "[T]ransposing the rationale of this Directive to the Internet could imply that once an online service is licensed in one EU territory, for example the territory with which the service provider is most closely linked, then this license would cover all Community territories paralleling the scope of the new Audiovisual Media Services Directive."

⁸ Reflection Paper, op.cit., p.15.

- 3.3.3 However, we do not support the notion that alongside this extension it would be necessary to review the “single state clearance” mechanism because of its alleged contribution to the persistence of territorial service limitations. The decision as to whether to offer a service on a national basis, and therefore contractually to segment national markets by, for example, encrypting a signal, should be left to market participants to determine. Any attempt to impose a “must offer” obligation on operators forcing them to make services available in any territory in which they can be received would undermine the principle of territoriality in a way that could have unintended consequences.
- 3.3.4 For example, rights to independent films are sold on a territory-by-territory basis and the resulting films are released through a series of windows. Release dates and the length of windows for independent films can differ very significantly territory by territory and any attempt to impose multi-territory licensing through regulation would have to take account of a very large number of factors were it to be successful. In any case, for the moment it would seem highly desirable to leave rights-holders and platform operators to decide together how they wish to release their films in a market that is going through a difficult transition to digital with an as yet uncertain outcome, rather than attempting to impose regulatory solutions. On the specific issue of windows the UK Film Council is consulting on the idea that it could, as a public body with stakeholders which include both audiences and industry, serve as a platform for debate on the flexibility of film windows in the UK.⁹ It is also planning to undertake research on the issue.
- 3.3.5 The UK Film Council recognises that as we progress further toward a fully digital world, it may be desirable to review the potential benefits to citizens, consumers and rights holders that would result from greater harmonisation of the licensing process for services that can be received across the single market. The transition does pose significant challenges to existing business models which may not fully exploit the capacity of digital technologies to optimise access across borders. But while in the online world barriers to making material available across multiple countries are greatly reduced – the ability to segment distribution territory by territory is not erased; for example, a rights-holder can still restrict the availability of material based on the identification of an Internet Protocol address or the mailing address to which a credit card, used for a particular transaction, is assigned. A

⁹ See proposal at http://www.ukfilmcouncil.org.uk/media/pdf/g/r/UK_Film_-_Digital_innovation_and_creative_excellence.pdf, p.17

wide variety of such factors would need to be taken into account in any review of licensing across the single market. These would include a proper assessment of the economic value of “retransmissions” in additional services when the retransmissions create additional economic value.

- 3.3.6 The Commission should keep a watching brief on licensing issues in the round, and be mindful of the need to encourage innovation to the benefit of all stakeholders. However, a sweeping, wholesale reform of copyright law at this point in time, for example through a “European Copyright Law”, in the form of a “Community copyright title” is highly unlikely to produce the desired outcomes, given the uncertainties which plague much of the existing market for film and other digital media.¹⁰
- 3.3.7 We are very strongly opposed to the idea of imposing alternative remuneration systems for example through a unilaterally imposed mechanism under which “ISPs would owe rightholders a form of compensation for mass reproductions and dissemination of copyright - protected works undertaken by their customers. This compensation, applicable only to unauthorised file sharing and reproductions, would exist alongside the copyright licences given to operators of legal services”¹¹
- 3.3.8 The UK Film Council cannot support any measure which would encourage citizens and consumers to believe that online infringement of copyrights is acceptable. Such a measure would also directly cut across legislation which has either been developed or implemented in many nation states with the intention of significantly reducing online copyright infringement, and which has yet to produce an evidence base as to its effectiveness. The analogy given – namely, “all you can eat” music subscription services – is of a different order altogether since it based on a contractual agreement between consenting parties and not on the imposition of a system of compulsory licensing which, as the paper notes, may not be consistent with international copyright conventions. Similarly, the valuable cable retransmission payments that are collected via societies such as AGICOA welcome and we see no problem with variations on such agreed and existing models in a digital world.
- 3.3.9 The practical ability to enforce copyright for the benefit of citizens, consumers and rights-holders is critical if we are to ensure the

¹⁰ Ibid., p.18

¹¹ Ibid., p.19

availability of sufficient investment to make creative content in the future. This is especially true for a medium such as film where the costs of production are often high relative to other creative sectors. The Commission has a role to play to helping to ensure that effective enforcement mechanisms to stem online copyright infringement are put in place throughout the European Union and internationally. But it should not impose its own solutions which over-ride carefully worked through proposals in member states which have been designed to be consistent with European law.

3.3.10 The UK Film Council strongly endorses the statement that “easier access to creative content will have to be combined with adequate protection of rightholders in order to furnish a growing and more diverse content market.”¹² We also welcome the reference to the MEDIA Programme’s support for VOD services and agree that it shows “the importance of financial incentives for triggering changes in industry practices.”¹³ That said, the MEDIA Programme could do much more to disseminate more broadly the learning points arising from its interventions therefore maximising its impact on overly conservative industry practice.

Ends.

¹² Ibid., p.20.

¹³ Ibid.