



ACE Response to the “Green Paper on the online distribution of audiovisual works in the European Union: opportunities and challenges towards a digital single market”

The Association des Cinémathèques Européennes (ACE) is an affiliation of 41 film heritage institutions from all over Europe, all of them not-for-profit organisations with a public interest mission. ACE’s joint role is to protect and promote the European film heritage, and to ensure that audiovisual records survive to be enjoyed and studied by future generations.

In line with their public interest missions such as preservation, restoration and the provision of cultural and educational access to films and film related material in their collections, film heritage institutions (FHIs) have a strong interest in digitising their collections, making them available online, and keeping them alive in digital format on screen.

Therefore, ACE initiated among other projects EFG - The European Film Gateway www.europeanfilmgateway.eu, a web portal which provides access to the digital collections of Europe’s film heritage institutions and which is linked to Europeana. As a founding member of Europeana, ACE shares the vision that “cultural heritage is not only the legacy of the past, but is a body of knowledge, imagination and creativity which is constantly evolving and growing every day. Today’s wealth of cultural expressions and knowledge will be our common cultural heritage tomorrow.”¹

The content held in FHIs and made available via EFG and Europeana is of extremely high cultural, historical and educational value. Its online accessibility will result in re-use, innovation and creation of new works with a huge social, educational and economic impact.

Although the Europeana user statistics show that audiovisual material is the most wanted content, only 5% of EFG’s approx. 550,000 and 2% of Europeana’s 20 million digital items are moving images.

In its response to the Green Paper “Copyright in the Knowledge Economy”, ACE already identified the legal obstacles preventing FHIs from making more AV material accessible online.

The current copyright legislation decisively affects the rate of digital preservation and accessibility of audiovisual content (***please see answer Q21***).

¹ The New Renaissance. REPORT OF THE ‘COMITÉ DES SAGES’ REFLECTION GROUP ON BRINGING EUROPE’S CULTURAL HERITAGE ONLINE, p.9

Due to the young age of this art form, only very few works are in public domain and thus can be published; the majority, however, is out-of-commerce and the amount of works with unclear copyright status is striking. According to the results of an ACE survey conducted in 2010, 21% of the film deposited in the ACE member archives are considered to be orphan works. The figures are confirmed by the results of the rights clearing process carried out by the EYE Film Institute Netherlands in the framework of the Images for the Future Project.

Film clearing is a very complex task and the majority of the ACE members don't have the financial resources nor the legal expertise to clear rights. Therefore, ACE strongly supports the Proposal for a ***Directive of the European Parliament and of the Council on Certain Permitted Uses of Orphan Works***. It will be an important instrument for FHI to make an identified orphan work available to the public, as it provides a legal framework to indemnify FHI against claims of copyright infringement. If the Directive will be adopted without substantial changes, it would be an appropriate instrument to considerably increase access to culture and knowledge. It will also have major benefits for education and research as well as for the creative industries. ACE proposed some improvements to the European Parliament and the Council in order to make the Directive more useful for FHIs.²

ACE welcomes the ***Commissions' Recommendation of 28 October 2011 on Digitisation and Digital Preservation***, inviting the Member States to step up their efforts, pool their resources and involve private actors in digitising cultural material and making it available through Europeana in order to get more in-copyright material online by creating the legal framework conditions enabling large-scale digitisation and **cross-border accessibility of out-of-commerce works**, to reinforce their strategies and adapt their legislation to ensure long-term preservation of digital material. FHI are more deeply affected by the digital challenge than other cultural institutions: The investment which digitization of audiovisual material entails is huge. Large scale digitisation programmes and long term preservation strategies are still lacking in many Member States. According to the findings of the **DAEFH study "Challenges of the digital era for film heritage institutions"**³ which has been supported by ACE (two members of the ACE Executive Committee are part of the DAEFH advisory board), there is an urgent need for action to make sure that the cinematographic heritage is saved by the means of digitisation and digital preservation. As FHI and the industry are not yet equipped for the preservation of born digital material a significant number of works will be lost. The same applies to the visibility of analogue films as only digitised content will be accessible.

ACE welcomes the ***Green Paper on the online distribution of audiovisual works***, the purpose of which is to reflect on the impact of new technologies for the online distribution of audiovisual and cinematographic works, identify the obstacles for creating a single market and promote cross-border licenses. However, from ACE's point of view, the paper does not consider sufficiently:

² http://www.ace-film.eu/wp-content/uploads/2011/11/ACE_Comments_-_Directive-Orphan-Works_Final_111021.pdf

³ DAEFH CONSULTATION PAPER "Challenges of the Digital Era for Film Heritage Institutions"

- The specific nature of the material deposited in FHIs and other cultural heritage institutions which is of high cultural but low market value and thus will never be commercially exploited. The Green Paper only considers the commercial value of film and audiovisual content;
- The benefits of making such content available: access to and democratisation of culture and knowledge, benefits for education and research, but also economic benefits which are related to the development of new technologies and services;
- To support FHIs in exploring new ways of access and in encouraging the use of their content;
- The users' expectations to access content easily online and to re-use it in their educational, creative, and leisure projects.

It should also be pointed out that the need for digitisation and preservation should not be ignored as it is the precondition for online distribution and access. Today's film production will be tomorrow's film heritage.

5. 2. Questions

Q 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?

In general, mandatory exceptions of Article 5(2)(c) and of Article 5(3)(n) of Directive 2001/29/EC should be mandatory for all cultural heritage institutions in the Member States in order to fulfil their public interest mission. Copyright legislation has to be harmonised and mandatory exceptions have to be clearly defined with a strong obligation to implement them into the Member States' legislation in order to prevent that existing exceptions are interpreted in different ways.

However, mandatory exceptions for in situ consultation and digitisation for preservation purposes are too narrow in scope and not adapted to a digital environment. They neither meet the expectations of the user nor the public interest mission of film heritage institutions in the 21st century. The question is how to improve online accessibility and distribution of film heritage on local websites and portals like EFG and Europeana.

These exceptions are far behind what has been achieved on the basis of a framework agreement on voluntary deposit between ACE and FIAPF, the International Organisation of Film Producers Associations. Parties to the agreement are allowed to digitise for

preservation purposes, to allow in situ research and password protected online access, to screen on the premises without paying royalties and to loan the films to the ACE members which have signed the agreement.

Besides digitisation for preservation purposes and access on the premises, mandatory exceptions are needed for:

Publishing

FHIs are allowed to publish in analogue format non-film material like photos and posters, when connected to a film work for illustration purposes. This right should be extended to online publishing and other digital formats.

Quotation / reference copies:

In the cultural, historical, educational framework of the FHI access to and online publication of cinematographic excerpts up to (2) two minutes should be free, without consent of the right holder.

Online access to low resolution material

In general, exceptions for the non-commercial use of works for archival purposes, study, research, education and exhibition purposes should be made mandatory. An exception allowing FHIs to make in-copyright material available for streaming purposes and in low resolution is highly desirable. Exceptions and limitations should be formulated in a technology-neutral way in order to allow cultural heritage institutions to fulfill their public interest mission in a digital environment.

Mandatory exceptions are needed to give public interest institutions legal certainty in fulfilling their public mission. They are needed for encouraging expensive preservation through digitisation, facilitating the accessibility of material, assuring users and the public in general.

There is an enormous amount of film works which is created mainly with taxpayers' money and is preserved and studied by publicly funded institutions, the purpose of which is to disseminate culture, information and data on behalf of the wider public.

Legal uncertainty leads to the fact that cultural heritage materials are no longer accessible and run the risk of fading from the collective memory. This situation contradicts not only the public demand for promoting and protecting cultural diversity, but also the expectations of the user to access and re-use cultural content.

Q 22 What other measures could be considered?

Works out-of-commerce

The adoption of the Orphan Works Directive by the EP and the Council – provided no substantial changes will be made – would be an important step for improving cross-border

access to film and AV material. Considering the fact that about 85% of Europe's film heritage is not commercially exploited, ACE welcomes the Commission's initiative to support a stakeholders' dialogue for the digitisation and online availability of works out-of-commerce. These works are of high cultural, but less commercial benefit, and for this reason the right owners and catalogue holders do not invest in their digitisation and re-distribution. Member States and the European Commission should promote solutions for the digitisation of and cross-border access to these works.

ACE supports the recommendations of the Comité des Sages **that for cultural institutions collective licensing solutions should be backed by legislation** in order to digitise and bring out-of-commerce works online, if rights holders and commercial providers do not do so. Rights holders should be the first to exploit out-of-commerce works.⁴

Different scenarios are thinkable:

1) For the commercial exploitation of out-of-commerce works, investments in digitisation should be made primarily by the rights holders. There should be no direct public funding for digitisation in view of commercial exploitation.

2) The public sector invests in the digitisation of works-out-of-commerce:

- If the right holders do not digitise the out-of-commerce works, digitisation should be paid for with public money. The content should be made freely available in streaming format and in low resolution and for non-commercial purposes only. For commercial exploitation a modus operandi must be found to ensure that the revenues are shared among the FHIs and the right holders.
- FHIs should be authorized to digitise and make available films out-of-commerce in streaming format and in low resolution and for non-commercial purposes only. If the right holders want to exploit these films commercially, they should buy-off the costs and the work will be taken offline.

3) Voluntary ECL agreements: XIMON

XIMON is a VoD platform launched in April 2011, giving access to material digitised in the "Images for the Future" project. The platform was built up in a Public-Private Partnership between EYE Film Institute Netherlands, Netherlands Institute for Sound & Vision, and the Dutch Society of Feature Film Producers. The aim is to make available the entire Dutch film production. The initiative is open to any business model: streaming and downloading; pay-per-view; subscription-based; advertising and banners. Public domain films are available for free, users who are interested in more recent films pay a fee and the right holders receive a certain percentage for each view. From all income generated online, 10% off top goes to the

⁴ The New Renaissance. REPORT OF THE 'COMITÉ DES SAGES' REFLECTION GROUP ON BRINGING EUROPE'S CULTURAL HERITAGE ONLINE, p.19

collecting societies to be distributed amongst the creative contributors to the making of the work: directors, writers, actors, composers and producers as individuals. This is exerted on brand new titles where the VoD rights are often held by a distributor; it is also applied to orphan works where the 10% off top is reserved, in case heirs of the creative contributors show up after all. The collecting societies grant permission to show the works of their members online, while indemnifying Ximon for the works of non-members.

Considering the different scenarios, the stakeholder dialogue moderated by the Commission could help to explore agreeable models for bringing out-of-commerce films back to life. It could foster understanding between right holders and film heritage institutions about what out-of-commerce means for audiovisual content, whether and how cut-off dates can be applied, how public non-profit institutions can provide access to works that are not otherwise available and whose commercial life is likely to be over, etc.

Extended collective licensing

The Commission should support the establishment of **Extended Collective Licensing Initiatives**. Considering the growing importance of collective rights management, extended collective licenses (with cross-border effect) negotiated between stakeholders require legislative backing to ensure mutual recognition and a harmonized and transparent operational framework for collecting societies.

In order to facilitate Extended Collective Licenses, a one-shop-stop for the audiovisual sector should be set up to prevent that negotiations must be held with each CMO separately, which would be an extremely time-consuming (and costly) process.

Rights information databases

ACE strongly recommends the implementation of rights databases on European level in order to support diligent search and downsize the transaction costs for rights clearing. EU funded pilot projects like ARROW are needed for the AV sector.

Remuneration

An unwaivable right to remuneration, as suggested in question 16 in section 4.3, would further increase costs and complexity for cultural institutions, attempting to give wider non-profit access to the works they care for and preserve and shouldn't be imposed as a blanket provision.

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