



Internal Market and Services DG
Unit D1 Copyright

and
CC DG CONNECT
Converging Media & Content Unit

and
to whom it may concern

Brussels, 7 March 2014

Re: Follow-up to Public Consultation on the review of the EU copyright rules

The Association of European Film Archives (ACE) regroups 44 Film Heritage Institutions (FHI) in 28 European countries; all of our members are non-for-profit, public mission institutions; although they obviously differ in size and funding levels, all together they represent the vastest majority of film holdings in Europe: the collection of the smallest of our members is larger than the largest privately owned film collection in Europe. Our members are effectively conserving, restoring and making available (or trying to) 120 years of the cinematographic memory and culture of Europe.

We as Association, and our members as individual institution, have duly responded to the Consultation, and we did our best to provide an input as constructive and detailed as possible.

Having said that, we regret that the Survey was not designed to be more clear and effective in gathering data about the effects that a fragmented, often confused and always confusing legal environment has on the complexity, and hence the costs, of copyright clearance in Europe.

As we could not find a clear area where such considerations could be highlighted in the Survey, I considered it useful to raise some key points in this separate document, which can be considered as an addendum to our submitted response.

Although our point of view is clearly that of non-for-profit, public mission institutions, our remarks on the high transactional costs of clearing copyright largely apply to all other users and uses. It is in fact important to highlight that most of our members have a direct experience of the film sector's marketplace as they are involved in distribution (theatrical and/or home video and sometimes VoD).

Before getting into the issue of transactional costs, I think it is important to shortly refer to the overall framework in order to contextualize the context in which FHI operate.

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European film production and exploitation is heavily subsidized, from pre-production (script-writing) to production and exhibition, film production are currently fully funded, either directly (subsidies) or indirectly (tax shelter) or via the funding of the pre-purchase of public broadcasters. It is not far from reality to say that European film works are mostly subsidized at 100% of production costs, or very close to that.

A similar situation applies to archival (catalogue) titles.

Thanks to active collecting, legal or contractual deposit, most if not all European film production is stored and conserved by non-for profit, public-mission institutions. In other words, the burden and the responsibility for conservation is carried by the taxpayer. Obviously the alternative, i.e. the US system, is not necessarily better: the lack of public investment leads to the fact that in the US only the works produced by the studios are correctly stored, conserved and restored (at the expenses of the studios themselves). Independent, "art-et essai" films are not preserved properly.

But in Europe, all major initiatives dedicated to the digitization and the restoration of the European heritage are funded by public monies. This is always true, with very few exceptions. The two most relevant projects, "Beelden voor de toekomst" in the Netherlands (Images for the future, multi-million project concluded a couple of years ago) and the current program of the Centre National du Cinéma et de l'image animée in France (open-ended budget, budget per title around 50-75K€) show how the European industry is not up to the task to take care of its own collections without public support.

On a smaller scale, this applies to almost all European countries, where FHI intervene heavily on the restoration and the digitization of catalogue films (i.e. films that are not in the normal distribution circuit anymore: today this means a film that is some 4 or 5 years old).

Against this landscape, the reality for FHI, the educational sector (schools, Universities, etc.) and of all other non-profit organizations is that they are requested to pay significant fees in order to make films available to their audiences, in any way, and for any purpose. Today, the fee for one single screening of a restored film (normally restored with public funding, and conserved for decades on public budgets, and often produced with heavy public funding) is around 300€ for one screening, non-commercial use. Commercial screenings (e.g. in festival) can reach the double or more. Fees to use film clips in exhibitions (or any historical context, and normally for educational/cultural purposes), in the production of educational multimedia supports, or in archive-based programs easily reach the 2000€ per minute. In most cases, the rights-owners requesting these fees are not even in possession of a copy of the work – the copy comes from another FHI, who is not entitled to receive any compensation, as it does not hold the rights.

This situation, coupled with the continuous reduction to budget for culture and education in EU countries, leads inevitably to the fact that film works are progressively less used in educational and cultural contexts, or that illegal or semi-legal, lower quality copies (like DVDs in a classroom) are used. It is not realistic to expect

that a school invests in 300€ to pay for a screening of a film (not to mention the other costs involved).

Needless to say, the impact is also economical: fewer opportunities for extra screenings for theatres and exhibitors, limited possibilities for the development of a market of innovative (and/or traditional) services in the field of culture and education. We can imagine what a potential market for the re-use of historical images could represent for multimedia, or online applications.

Not to mention of course the fact that these obstacles do not apply only to feature, fiction films, but also to all documentary images. We are living in a world in which without YouTube we cannot teach our kids that the Holocaust took place. It is in fact not surprising that so many of them either don't know about it, or are ready to accept the word of negationists!

But beyond these costs that are in the open, we cannot underestimate the complexity of identifying and locating rights-holders, which translates in very high transactional costs.

Calculating transactional costs involved in clearing rights for European productions is extremely complex, and unfortunately no study was ever carried out in order to define the level of transactional costs in the different segments of the media environment, or how they affect different sectors in the for-profit and in the non-for-profit area.

Still, we can quote some general principles, hoping that they are useful to your assessment of the situation.

The data resulting from the EFG1914 project (designed to digitize and make available some 660 hours of moving images from the War World One) indicate that some 10-12 hours are needed on average per running hour of material in order to properly identify the rights situation and obtain the necessary clearances. Within EFG1914, the cost of digitizing one hour of material was calculated at 750€/hour (as an average across the different countries, internal and external digitization, etc): with the same principle, 10 hours of work to clear one hour of work amounts to some 250€ / 400€, in other words, 25% to 40% of the digitization costs.

Obviously such figures can decrease dramatically when large digitization projects are put in place, allowing the clearance of larger catalogues once and for all. On the other hand, larger digitization projects also reduce the costs of digitization per hour, and this means that the 75-25 relation between transactional costs and technical costs is probably to remain valid across the spectrum.

On the opposite end of the spectrum are higher-value restoration projects, where the costs per title can go up as much as 50K€ or 100K€ per title, or more. Obviously, in such projects the ratio between overall budget and transactional costs are reduced, simply because of the higher technical costs.

Having said that, such complex and high cost projects often require more elaborate and complex negotiations. This is the case whenever in exchange of the restoration, some rights (e.g. the making

available) are transferred, or requested. In this case, the 10-12 hours required to negotiate the conditions might stay the same, but the fees to be calculated are those of a legal advisor, which easily can multiply the cost by a factor of 10 or 20.

Furthermore, it is worth mentioning that the figures calculated in the context of the EFG1914 project refer to films produced during World War One, or some 100 years old. In this case the possibility of rights to be split across EU countries is reduced to almost zero (there were very few co-production between France and Germany in 1915!!!). This is not the case for post-World War Two European productions, which are largely funded by co-pro-productions and whose rights are managed differently in different countries. In this case, the untangling of the rights situation can take way longer than some 10 hours of work per title.

This usually translate in the fact that institutions dealing with projects involving such rights clearances are 'forced' to set up some sort of 'legal or rights-clearance and negotiation' environment, with internal staff dedicated to that, or external legal advisor on retainer. In case of an internal department, this translates in an 'entry fee' corresponding to a full time or 50% employee with some legal experience. In that case, the number of contracts signed / titles cleared per year depends on the complexity of the projects.

A look across our membership shows that it is not unreasonable to consider that each institution on average has *at least* a FTE position (most of the time made up by a number of part time positions) to deal with rights clearances.

Finally, the timeframe of rights assessment and rights clearance process should not be underestimated. It is not simply that the research takes dozens or hundreds of hours. It is that these hours are distributed over months or years. Many of our members report of projects in which negotiations went on literally for years. In some cases, legal advice had to be hired in a foreign country, raising the costs even more (for example, my institution had to hire a private investigator to locate a rights holder in the US).

It is also necessary to dispel the notion that this process (rights assessment, identification of rights owners, negotiations, rights clearance) is a one-time only.

This is not at all true. The reality on the field is that only large digitization projects aiming at making available entire collections have to face one-time-only transactional costs, as the process takes place at the beginning of the project, once and for all, and it only needs to be re-discussed only at the expiration of the original contract / agreement (usually some 5-10 years).

In all other cases, requests for authorization of use must be addressed (and renegotiated) for each use (screening, clips, exhibition, etc.). Obviously, subsequent requests are usually simpler as the rights-owners have been already identified on the first occasion (in other words transactional costs are lower after the first research) But still: 1. transactional costs can be lower, but they are *always* there, and 2. the rights situation



can change (rights are transferred, distribution rights expire, rights-owners die, heirs are not easily found...), over the years several searches might be necessary, and they tend to be cross-border...

So, in other words, these costs, low as they might be (and it is not often the case), they are recurrent: every school that requires to watch that specific film on the Holocaust or World War One will reinitiate the chain of search/request/authorization. Again, these transactional costs must be balanced against other costs that can also be low (in the case of a projection for a school, the only cost can be the 300€ for the rights-owner, against which even some 50-60€ of extra transactional costs are significant!).

This model applies to all screenings, all uses of moving images: even the smallest sum must be multiplied not by the number of the works, but by the number of the *events* (screenings, uses online or offline, etc.). Last but not least, transactional costs must also take into consideration the whole management and administrative work behind the fulfillment of the contractual clauses that usually include some form of reporting on which a revenue-sharing mechanism of one sort or another is based. This can be significant: the more important the higher the number of titles or transactions. It is also important to keep in mind that the value of each transaction can be quite low, hence the percentage of the transactional costs will increase.

As an example and a conclusion, I can quote the case of the institution that I direct, which can be easily taken as an example of similar situations across our colleagues.

We manage a catalogue of some 400 titles for which we have regular distribution contracts. The titles are 99% archival titles, "classics", so to say.

First consideration: the fragmentation of the market means that acquiring the right for one European title implies the same amount of work that is required to negotiate and acquire a large number of US productions: US model means one interlocutor, clear chain of rights, one contract for many titles vs. the European situation that implies *many* contracts for *one* title. The result is that in our catalogues EU productions are under-represented, not for lack of interest, but due to too high complexity and transactional costs.

Secondly, many of the titles circulate very little if at all. Still, reports must be produced for all of them, and invoices of few *dozens* of euro produced, processed, paid, etc. on a regular basis. The management costs of the whole system can easily surpass the actual revenue at the end of the year, this means that 1 or 1,5 FTE are necessary to manage the whole system.

In the case of the institution I direct, to this we can add: 1 FTE whose only job is to manage rights-clearance and authorizations to access our collections from third parties; 1,5 FTE equivalent to manage DVD distribution (45 titles); 2 FTE equivalent for managing rights clearances for public screenings, exhibitions, et alia; 1 legal advisor on retainer. Summing this up, this adds up to some 6 FTE (or 12% of our staff, without counting the costs of the legal advisor, and the work of accounting/administration).

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All considered, this represents more than 50% of the *gross* revenues generated by the same departments and activities, these are realistic transactional costs. And let's not forget that from gross revenues one should still deduct production costs: e.g. for DVD publication, acquisition of projection elements for screenings, subtitling, transport, digitization, restoration etc.

As I wrote earlier, this is not to be considered an exception, but a rule across other FHI in Europe.

If looking at these figures is not convincing enough, then it will be enough to look at the present offer of archival materials for theatrical screenings or of older (10 years or more) European titles on VoD platforms.

If transactional and production costs were really so low, why so few titles are available?

I remain at your full disposal for any further information,

Best regards

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President

Association des Cinémathèques Européennes

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