

**Public Hearing on Audiovisual Production in the EU:
Opportunities and Challenges
December 13, 2010
Outline Intervention
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Introduction of the IVF

The members of the International Video Federation comprise companies, which are active in all areas of the audiovisual industry (development, production, distribution, etc.) as well as entities that are dedicated to, and specialized in, publishing audiovisual content on digital media and online.

Our members have every interest in ensuring lawful access to their works on appropriate terms. Our goal is to reach the widest possible audience, provided that our intellectual property rights are respected and provided we can secure a return on our creative and financial investments.

Introduction of the Topic

In order to bring some clarity to the discussion, we need to draw a clear distinction between:

- Broadcasters' archives (largely self-produced or commissioned content) and
- Film archives (works deposited by producers and/or distributors in archives dedicated to preserving the national film heritage).

The issues which may arise in connection with the first type of archive, i.e. broadcasters', seem to be of an "employer-employee" nature. Basically, we are talking about productions made or commissioned by the broadcaster itself in respect of which rights for new uses may not have been acquired. So problems may arise related to national limitations on contractual freedom in certain countries. The relevant details about the various right holders involved in a TV programme should be held in the broadcaster's own legal archives (which are of course vast in the case of some public broadcasters). This would also be the case for film producers when looking at film productions. Much work is involved in the investigation of rights in the case of new types of distribution, but these are surmountable – it has been done before in connection with other, at the time, new types of distribution, e.g. distribution on physical carriers. Indeed, the issue seems to be more about rights clearance as such which is considered by some to be a nuisance – and this at the expense of right holders.

Second, it is worthwhile noting that the extended collective licensing systems which have been applied to the clearance of certain rights in broadcasters' own productions and those commissioned by them in the Scandinavian countries rely to a large extent on very homogenous markets with a high degree of representation in few collecting societies. And of course individual right holders can opt out but rarely do. In addition, as is the case for example in Denmark, these collecting societies representing different groups of right holders have agreed to be represented by one single collecting society in the case of the use of the Danish public broadcaster's archived productions. Not a simple feat . . .

One might also argue that to some extent extended collective licensing may mean that the problem of identifying and locating the right holder is simply "exported" to the collecting society and that remuneration will be collected but difficult to distribute . . .

Turning now to the specific topic of film archives, as a point of departure, we do not think that any further statutory instruments or legislative steps are necessary at this stage to deal with the issue of orphan works and the availability of content in the cinematographic sector.

It would appear, and this has been publicly confirmed by representatives of ACE in various fora, that the issue of orphan works is focussed on certain types of audiovisual works, e.g. news and documentaries, as opposed to feature films and TV series. In this regard, it is therefore very important to be precise when we talk about the "problem" of orphan works and to avoid proposing overly broad solutions.

The Way Forward?

We fully support the overall public policy objective of preserving Europe's cultural heritage and facilitating the appreciation thereof by European citizens. As producers and distributors of audiovisual and cinematographic works, we understand the value to the industry and society at large of preserving and providing access to this highly valuable component of Europe's cultural heritage. We continue to contribute to this important process by participation in both mandatory and voluntary deposit schemes at national level, which, coupled with individual agreements with libraries and film archives, provide the necessary framework for the subsequent preservation of the deposited materials and establish the terms and conditions under which the deposited materials may be made accessible to the public for research and cultural purposes. This could for example include not only non-commercial screenings at the premises of the archive but also making copyright works available online in secure environments for private study, research and other non-commercial purposes.

We believe that voluntary agreements and public-private partnerships are the way forward. Should a public sector archive/library wish to provide access to copyrighted content online, it should do so through licensing arrangements with right holders in the same way as is common

practice for content on physical carriers and always in a manner not interfering with the normal exploitation of the work by the right holders, as foreseen by European and international law.

We wish to stress the importance of the Commission properly quantifying the problem for individual types of works in an impact assessment so that possible proposed solutions can be tailored to the size of the problem and the particular type of content and/or work concerned.

As regards establishing common standards on the level of due diligence required, much effort has already been deployed in the context of the 2008 MOU which was signed by 27 signatories including libraries, archives, and many different types of right holders. The MOU recognizes that different types of content have different search requirements. We want to work together with film archives to review the application of the MOU and the diligent search guidelines in practice so that we can continue to amend and adapt them to offer archives the best possible support from right holders and their professional organizations in the pursuit of identifying and locating right holders with a view to clearance of the relevant rights.

We expect any proposed EU initiative dealing with the clearance of rights to works contained in audiovisual archives:

- To be proportionate to the size of the problem identified as regards specific types of content;
- To take into consideration that this may well be a temporary problem as the sectors concerned implement more and more content identification mechanisms;
- To recall that “one size does not fit all”. For example, the film sector did not have any input into the model licenses for “out-of-print” or “commercially-unavailable” works developed by the High-Level Expert Group on Copyright. We have consistently made it clear that these model licenses cannot immediately be applied in the cinematographic sector due, among other, to the specific distribution practices applied by the cinematographic industry – an issue which was raised as early as in September 2007 by FERA (European Film Directors);
- To develop a clear understanding of the coverage and potential impact world-wide of the proposed remedy – if indeed a problem is empirically proven. Audiovisual and cinematographic works of non-European origin are widespread in European film archives’ collections due to deposits made on a voluntary basis or in response to national mandatory requirements; and
- And – yes, of course – we would expect any proposal to respect current EU and international law, including the 3-step test.