

Submission to the Commons Culture, Media and Sport Committee call for evidence on the protection of intellectual property rights online.

23 March 2011

1. This submission is by The Federation of Commercial Audiovisual Libraries International Limited¹ ("FOCAL International"). In this submission, "archive" refers to "audio-visual footage archive."

Summary

2. FOCAL International is the representative organisation of the commercial archive sector in the UK and worldwide.
3. Commercial archives are a significant source of content for traditional and developing audiovisual markets.
4. Digitisation (of content and function) is basic to commercial archives' contribution to the digital economy and development of online business models.
5. Copyright law provides the legal basis on which commercial archives' business models are founded, therefore the balance between exclusive rights and freedom to use content which are inherent in copyright law is fundamental to the industry, in particular at this point enabling the industry to invest significantly in digitisation and participate effectively in the online environment.
6. FOCAL International makes the following recommendations concerning obtaining permission from existing right holders (known and unknown) and fair use - including in relation to issues which were raised in the preparation of the Digital Economy Bill but did not find their way into the Digital Economy Act, although they are still under consideration. FOCAL International:
 - makes proposals to permit use of orphan works whilst respecting owners' exclusive rights;
 - opposes introduction of so-called "extended collective licensing" (including for "out-of-commerce works") because the economy of commercial archives, notably including extensive digital operations and investment, is built on the archives' ability to exploit their rights exclusively;
 - proposes an exception to copyright to allow an archive to carry out digital film preservation (as is found in many other European countries);
 - opposes introduction of a general fair use exception (modelled on the US copyright statute).

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FOCAL International

7. FOCAL International is a not-for-profit professional trade association which represents commercial audio-visual footage libraries² throughout the world.
8. FOCAL International's members include broadcasters,³ news organisations,⁴ institutes,⁵ commercial, cultural, educational and similar archives⁶ on six continents.⁷
9. FOCAL International
 - acts as an industry representative
 - provides education and training⁸
 - provides online services⁹
 - attends international trade fairs¹⁰

² Commercial archives such as most of the UK's archive sector compete with publicly funded entities such as Ina and the BBC, which are seeking to commercialise their archives in the digital environment. e.g. The Federal Film Archives, Berlin, have digitised the Deutsche Wocheschau newsreel collection of German newsreels from 1949 and made them freely available over the Internet.

³ including ABC (Australia), BBC (UK), CBC (Canada), DRTV (Denmark), NBC (USA), NHK (Japan), NHNZ (New Zealand), NRK (Norway), RAI (Italy), RTE (Ireland), SVT (Sweden), TSR (Switzerland), YLE (Finland), ZDF (Germany).

⁴ including AP, CNN, ITN, Press Association, Reuters, Sky News.

⁵ including Audiovisual Library of the European Commission, BFI (British Film Institute), National Archive of Australia, National Archive of Singapore, National Film Board of Canada, National Scottish and Welsh Screen Archives, Nederlands Instituut voor Beeld en Geluid (Netherlands National Archive).

⁶ including BP, The Bridgman Art Library, British Pathé, Canal+, Centre de Cultura Contemporània de Barcelona, Channel 4, Discovery, Fremantle, Gaumont Pathé, Getty Images, HBO, The Imperial War Museum, Ina (France's National Audio-visual Institute), ITV, The National Gallery (London), National geographic, The Open University, The Olympic and Paralympic Television Bureaux, Wellcome Library.

⁷ FOCAL International's members also include footage researchers who research and deliver audio-visual footage to end users (such as documentary film producers and advertising agencies), footage consultants who advise on content management solutions and preservation and use of audio-visual assets and facility houses which provide technical equipment and expertise to store, restore and/or deliver audio-visual content in any format.

⁸ for entrants into the industry:

- where the skills needed in the industry can be learned, and

at higher levels on an international basis:

- for example international seminars and workshops on industry-related topics including
 - US and European copyright laws
 - instruction and establishing metadata standards
 - digital migration and restoration and
 - an annual Footage Training Week attended by archivists from many countries

⁹ *Footage Finder*, *Researcher Finder* and *Facility Finder* online services, available through FOCAL International's website.

- hosts an annual FOCAL International Awards.¹¹

The archive industry

10. Headline industry information:¹²

- Global trade in archive content generated €430m in revenue in 2009, with total revenue growing at a CAGR of nearly 8% over the past 5 years.
- A total of 42.7m hours of content are held in the world's archives.
- News content, celebrity footage and topical material sells at a premium. Sales of premium content produce the most revenue for an archive, through volume of sales and because it can command a high price.¹³
- On average, 61% of archive footage has been made available on-line.

11. The sector's primary B2B market for audio-visual content is expanding.¹⁴ More archive content is being used in productions: production budgets globally are squeezed, and this is increasing the sales of archive content as a substitute for original footage.¹⁵

12. A B2C market is developing as a result of desktop editing software, opportunities for user generated content including mash-ups, and growth of internet use generally.

Digitisation in the audio-visual archive industry

13. In the archive industry "digitisation" refers to conversion of analogue to digital media, and to moving tape- or reel-based media onto file-based formats.¹⁶

¹⁰ including MIPTV and MIPCOM in Cannes, Sunnyside of the Doc at La Rochelle, RealScreen in Washington DC and the Broadcast Live Show in London.

¹¹ which promote the use of archive images in the creative media. Prizes are awarded for the best use of archive footage in factual productions, arts music or drama productions, best use of wildlife and natural history stock footage, of sports footage, of footage in an advertisement or trailer, in educational and corporate productions, in a cinema release, in non-television platforms, and for preservation or restoration projects. 233 submissions from 20 countries have been received for the 2011 Awards.

¹² The following "snapshot" is based on an international survey of the industry which was compiled with the help of FOCAL International and the Fédération Internationale des Archives de Télévision/International Federation of Television Archives: this organisation corresponds to FOCAL International in respect of public service and non-commercial audio-visual archives.

¹³ The Imperial War Museum in London estimated in 2006 that 80 per cent of all its archive sales are to broadcast production and 50 per cent of these sales are driven by topical subjects.

¹⁴ Commercial archives such as most of the UK's archive sector compete with publicly funded entities such as Ina and the BBC, which are seeking to commercialise their archives in the digital environment. e.g. The Federal Film Archives, Berlin, have digitised the Deutsche Wocheschau newsreel collection of German newsreels from 1949 and made them freely available over the Internet.

¹⁵ In the UK, the BBC appointed its own Head of Archive in 2008 launching shows such as The Making of Modern Britain in 2009, which was almost entirely constructed from archive footage. It was broadcast on the BBC to over two million viewers of each episode. Online advertising is also a growth area.

¹⁶ The key elements of a digital infrastructure include:

- Catalogue AV content: Understand where the value lies
- Triage: Understand the condition of the media and work needed to digitise it
- Media preparation: Baking, cleaning, repair
- Ingest documentation: Scanning, keying, matching

14. Digitisation:

- increases an archive's revenues including through opening wider and more efficient sales channels,
- increases awareness of an archive's assets by allowing large amounts of content to be viewed online from anywhere,
- preserves content which would otherwise be inaccessible or lost through degrading or obsolete carriers and formats,¹⁷ and
- reduces the cost of duplication and delivery of content.

15. Almost all commercial archives are already digital businesses.

16. Digitisation and the infrastructure required to store, manage and make the digital content accessible are expensive and capital-intensive.¹⁸

17. Public and private sector news broadcasters rely on their commercial archive divisions to help fund their newsgathering and news broadcasting activities.¹⁹

Metadata and rights management

18. Metadata²⁰ are indispensable, being required to provide access to digital archives, enabling footage to be found efficiently and cost effectively by identifying shots, format, encoding information, transfers, rights and other information required to carry out sales digitally.

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- Format transfer Enhance metadata: Cataloguing, UGM
 - Digital enhancement: Sound improvement, picture improvement
 - Ingest media: Robots or manually select media for digitisation, develop workflows for digitisation, store
 - Media management: Barcode media assets, ingest barcodes into MAMS, process management.

¹⁷ A European project ("Presto") which is a cooperation between Ina (France), Beeld en Geluid (Holland), ORF (Austria) the BBC (UK) and RAI (Italy) identified 20 million individual items of film, video and audio. 70% of this material was identified as decaying, fragile or on obsolete formats (or all three), amounting to 17 million items: 6 million films, 6 million videotape and 5 million audio recordings. At the 2004 rates of preservation work, (and with audio and video material beginning to degrade after 20 years at 5 per cent a year), 40 per cent of existing material will disappear by 2045.

¹⁸ NHK recently undertook a project working with Vietnam's national archive to restore and digitise footage from 1953 recording the Indo-China war. The 31 minutes of footage cost \$8,000 and 100 hours to restore and digitise. Few commercial archives (without the benefit of public funding) can afford to develop their own online systems, and many create joint ventures or revenue sharing partnerships with technology partners or buying managed services. Examples are Screen Ocean (a joint venture company owned by the UK's Channel 4 and Cambridge Imaging Systems, established to exploit Channel 4's archive) and Thought Equity Motion (partnerships with the BBC, NHK, New York Times). Chinese national broadcaster CCTV's audio-visual archive over the past 5 years, with technology partner Dayang, has digitised its entire tape- and film-based archive into the world's largest digital archive storing 420,000 hours of digitised programmes with over seven million pieces of catalogued data. It has an annual processing capacity of 100,000 hours.

¹⁹ Many commercial archives are divisions of news companies and other news organisations, that often have a public service remit (for example BBC News, ITV News, Channel 4 News) while others like AP Archive (through its parent the Associated Press) have not-for-profit status. News broadcasting is rarely profitable in itself, with some news broadcasters like Sky News making substantial losses each year.

²⁰ Meta = after; data = information: metadata are "data beyond [the traditional] data."

19. Ascertaining and incorporating metadata of sufficient granularity²¹ to enable effective digital rights management requires significant investment and expertise.²²

New routes to market through digitisation

20. Nearly all large and some smaller commercial archives currently do business by e-commerce, i.e. making B2C sales *via* the internet.
21. Virtually all commercial archives use the internet to showcase their content with a view to attracting commercial licensing.
22. Commercial archives are increasingly providing digital fulfillment of sales.²³
23. Many commercial archives operate online video platforms through syndication, for publicity (such as dedicated YouTube channels) or sales via third parties.

Current issues surrounding digitisation

24. The archive industry is not representative of the economic proposition that the early years of a copyright's life are the most productive. The long tail accounts for a high proportion of the sector's value.²⁴ Digitisation, addition of metadata, and often digital preservation are needed to realise this value through digital rights management. This must be paid for by the commercial archives' own investment, which often takes many years to recoup.
25. Digital preservation is a priority and, unlike subsidised public archives, commercial archives fund preservation through their sales.
26. Digitisation of content, to take advantage of the digital market, is also funded through sales. Many commercial archives have invested in digitisation in anticipation of future demand from digital markets.
27. Archives must therefore maximise sales revenue in order to continue providing more digitised content which the market requires.
28. As more digital content has become available, the price of digital footage has dropped.²⁵
29. The digital challenge to the archive industry is thus to monetise more of their content,

²¹ Detail.

²² FOCAL and FIAT/IFTA are both active in promoting industry standards of metadata and rights management. For example, most recently, FOCAL International and FIAT/IFTA held an international conference in Dublin hosted by RTÉ: http://www.focalint.org/DublinSeminar_jul2010.htm, http://www.conferencepartners.ie/flat_ifta/; FOCAL International and FIAT/IFTA have jointly authored and published a Dictionary of Commercial Terminology aimed at standardising archive industry standards and terms.

²³ In response to the rollout of digital workflows in the traditional broadcast sector and to serve the emerging online sectors better.

²⁴ The extra 20 years added to many copyright terms has produced an incremental increase to the value of the applicable copyrights far greater than the generally held average increase of between 0.4% and 1.3% of the copyright's net previous value.

²⁵ In 2005 archives realised on average €12 per hour of archive footage, in 2009 they realised €10 (Screen Digest *op. cit.* p. 9).

both providing more digital access and making more investment needed to continue the process - at the same time protecting their investment (including by guarding against piracy, which in itself requires investment).

SUBSTANTIVE RECOMMENDATIONS

Copyright law and commercial archives

30. FOCAL International makes the following recommendations:

Extended Collective Licensing

31. An audio-visual work contains creative contributions of many participants many of which are potentially protected by copyright²⁶ and related rights.²⁷ Potential right owners and the rights which they own are not the same in various EU Member States²⁸ and other countries.

32. Users of audio-visual archive content - especially those who are inexperienced in the genre, in new digital environments - hope for a magic bullet which can solve the complex rights problems with one shot. The Nordic model of extended collective licensing ("ECL") has been put forward as this solution.

33. We have the following observations on ECL:

ECL and orphan rights

Rights within an audio-visual work

34. ECL may be useful in relation to classes and uses of orphan rights found within audio-visual works, where such rights and their uses are already extensively licensed collectively.

35. Such arrangements, handled by collecting societies

- which already license equivalent rights and uses
- at nationally agreed standard rates
- for the majority of right holders
- who grant their rights on a voluntary basis

may enable audio-visual works to be exploited which currently cannot be because one or a small number of holders of such rights within the work cannot be identified or found (subject to the commonly agreed *caveats* including provisions that the user is indemnified, and that the right holder who comes to light may easily withdraw her right from any ECL arrangement).

²⁶ Including the director, the writers of the screenplay, composers of music.

²⁷ Including performers.

²⁸ For example, the producer is a copyright owner in the UK but owns a related right in France; a broadcaster is protected by copyright in the UK but by a related right in Germany; contributors such as cameramen may be part-owners of authors' rights in France and Germany but not of copyright in the UK.

36. However, such arrangements are likely to have a very small take-up, because an ECL can only be granted on a national basis, whereas most digital audio-visual uses are multi-national or worldwide.²⁹

The audio-visual footage itself

37. Orphan audio-visual footage, meaning that the owner of the copyright in the film is not identifiable, is an insignificant part of most commercial audio-visual archives' holdings.

38. Under appropriate legislation the archives themselves (or, subject to their agreement, FOCAL International as their representative body) would be the appropriate bodies to issue licences to use such material.³⁰

39. Careful search criteria would be required to establish orphan status in the audio-visual archive industry sector.³¹ Material which could easily be sourced to the right holder by experts is increasingly being credited "YouTube" by careless or underfunded producers.

40. Premium sales are a significant and essential part of the industry's economy, and a significant contributor to continued digitisation. ECLs can only function where industry-standard fees are agreed. ECLs issued by organisations which do not make the digital investment in the material will have the effect of lowering the fees for archive orphan footage and (if on a large enough scale) for archive footage in general, thus diminishing archives' ability to invest in increasing the supply of digital footage for the market.³²

41. ECL could only extend to the UK. This is likely to result in a very small (if any) take-up, which is confirmed by the Canadian experience.³³

²⁹ For example, productions commissioned for domestic broadcasting are rarely economically viable without subsequent secondary worldwide exploitation - or even secondary broadcasting by multi-territory satellite; developing digital exploitations such as virals, social media and user generated content are not territorially restricted.

³⁰ This will require careful consideration in relation to statutory provisions governing any indemnity which a licensor is required to offer end users and fees which it is required to pay right holders for past uses.

³¹ For historic and technical reasons, including because of the way in which satellite feeds are received by broadcasters, archives may hold substantial amounts of material which belongs to other archives, and in practice may therefore not have full details of right holders: but these are not orphan works.

³² AP Archive provides an instructive case study: in the past 2 years it spent close to £2million restoring, cataloguing and digitising its UPITN newsfilm collection. This represented 3,000 hours of international news footage (1963-85) which had lain in deep storage in its original 16mm film format for many years without a text database, which had rendered it wholly inaccessible. On creating the new metadata and on digitising the collection, a treasure trove of culturally important footage was resurrected. Critically, AP Archive's decision to make this investment was based entirely on its expectation to generate a commercial return, which depends on its ability to exercise exclusive rights. Due to the cyclical demand of historical footage (footage of historical events and people often lies commercially dormant for long periods only being in commercial demand on anniversaries or for obituaries) AP Archive believes that it will take at least 5 years to break even on this investment.

³³ Of the 249 licences to use orphan works ("unlocatable copyright owners") issued by the Copyright Board of Canada since it assumed this function some 10 years ago and the 8 refused applications, only one application was for use of a film clip, although Canada has a prolific film production industry - especially documentaries, which tend to use large amounts of archive footage. We are not aware of any formal research as to why no more such licences have been applied for. Anecdotal evidence from FOCAL International's Canadian members and Canadian producers suggests that the main reason is the Canadian Copyright Board's inability to issue worldwide licences for use of orphan material, and without the possibility of at least secondary worldwide exploitation few audio-visual productions are financially viable in the current climate.

ECL and pan-European use of orphan works

42. As noted, there is unlikely to be significant take-up of nationally restricted licences to exploit orphan archive audiovisual footage. A worldwide solution for use of orphan audiovisual works appears remote. However, the UK should ensure that any legislation will not be incompatible with European Commission or other EEA Member States' proposals, so as not to preclude mutual recognition of national solutions in the future.
43. DG Markt stated that the Green Paper containing a proposal for a Directive due to be released in 2011 will deal only with orphan works in print media,³⁴ and the European Commission's legislation on collective rights administration proposed for 2011 is expected to deal with music.
44. In some respects - the wide variety of pricing and premium content - archive sales are analogous to print sales. In the universality of the moving image and music, archive sales more resemble music sales.
45. The music copyright collective industry in the digital market has not been an encouraging example for the digital archive sphere.³⁵
46. However, it is possible that with its two representative bodies, FOCAL International representing the commercial archives and FIAT/IFTA representing the public archives on a pan-European (and worldwide) basis, a genuinely workable outcome of collective solutions for orphan archive works based on mutually recognised national statutes and an internationally recognised industry practice could be achieved.
47. Features of any solution must include:
 - a. market awareness so that licensing is appropriate in view of the corresponding non-orphan works,
 - b. accountability to the archives which hold the orphan footage as they must invest in its digitisation, and
 - c. transparency for right holders who appear after material has been licensed as well as for those of comparable works whose value may be affected by such licensing.

Diligent search

48. Most proposed orphan solutions require a diligent search. As explained, search is a particularly important aspect of any orphan rights licensing solution for the archive industry.
49. No ECL arrangements currently in place in the Nordic countries involve any search. They are all predicated on the premise that all right holders, whether signatories or

³⁴ The paper is based on Tilman Lüder's paper published in a German Law Journal ("The „orphan works” challenge", GRUR Int. 2010 <http://beck-online.beck.de/default.aspx?typ=reference&y=300&z=GRURINT&b=2010&s=677&n=1>)

³⁵ Extensive efforts of more than one European Commission DG, and the CISAC case, have shifted the collective tectonic plates around a bit, but in reality have brought the digital industry's nirvana of obtaining a pan-European music copyright licence from a single source no closer than it was ten years ago.

members of the relevant licensing body or not, are bound by the ECL,³⁶ therefore no search is ever necessary.

50. FOCAL International believes that a diligent search is indispensable in any orphan works solution for audio-visual works.³⁷

Register of orphan rights

51. In view of the online footage services which FOCAL International already provides its members, it can host and administer a voluntary register of orphan audio-visual archive material licensed pursuant to a scheme.

Exceptions to copyright - digital preservation

52. Digital preservation is an area in which the UK's copyright exceptions should be amended to correspond with those of most other EU Member States, permitting an archive to digitise material for preservation without obtaining copyright consent.

53. In the case of preservation, it is not always practicable to obtain right holders' consent, including

- where orphan rights are present
- where mass digitisation make individual rights clearance impracticable for reasons of economy

but exceptions should not extend any further, to exploitation of any kind commercial or otherwise.

54. Digitisation for preservation should not fall within any ECL arrangement which applies to orphan works, as the need to identify individual orphan rights within digitisation projects and apply for licences in respect of them would generally make such projects economically unviable.

"Out-of-commerce works" - ECL or Extended Licensing Schemes

55. Section 116B of the Digital Economy Bill proposed that the Secretary of State be empowered to make regulations permitting a licensing body to grant licences "in respect of works in which copyright is not owned by the body or a person on whose behalf the body acts."³⁸

³⁶ The exception is right holders who have chosen to withdraw from an ECL scheme, cf. the UK's CLA's lists of excluded publishers and works, see http://www.cla.co.uk/excluded_works/excluded_categories_works/. However, under such a scheme there can be no such right holders in relation to orphan works until after the licence has been granted and the work used, and the right holder thus alerted has appeared and elected to withdraw.

³⁷ Although ECL without a search may have some application in other situations where the overwhelming proportion of rights are collectively licensed routinely at standard rates.

³⁸ **116B Extended licensing schemes**

(1) The Secretary of State may by regulations provide for authorising a licensing body to grant copyright licences (within the meaning of section 116) in respect of works in which copyright is not owned by the body or a person on whose behalf the body acts.

56. Although headed "Extended Licensing Schemes" this provision did not contain limitations and safeguards which apply to ECL in the Nordic countries.
57. FOCAL International cannot accept that ECL be imposed in respect of content in which its members own and/or administer exclusive rights.
58. As stated, premium sales are essential to investment, without which the supply of digital audio-visual material will dry up. ECL cannot manage premium sales, as the licensor may apply criteria other than the owner's, and not having to make the owner's investment may undercut the owner.³⁹
59. The vast majority of archive content - particularly of digital archive content - is licensed for international or world exploitation, and not for national exploitation. Therefore there would be almost no take-up of any ECL for digital archive exploitation. 60% of archive content is purchased from an archive in the country where the customer is based. If even a proportion of that 60% of domestic purchasers obtained archive footage under ECL and went on to use it digitally - which means largely internationally - the loss in investment to the archive industry would be significant.

Opt-out from ECL

60. Nordic countries have small populations - the population of Sweden is smaller than London's - and their languages have restricted currency. Therefore, "opt-outs" for right holders who do not wish their rights to be licensed collectively may be a realistic defence against the Berne Convention's almost total ban on compulsory licensing. The moving image has a universal currency, and archives typically contain material which has originated in many parts of the world. The accepted balance inherent in copyright between right owner and user must be fundamentally changed, if an American or Chinese right holder is to be expected to withdraw from a UK-based ECL which she may not even have heard of: this would be tantamount to compulsory licensing.
61. The Berne Convention and European legislation permit abrogation of copyright owners' exclusive rights in relation to rebroadcasting⁴⁰ in limited situations. However, the secondary market⁴¹ is an important market for archives,⁴² and secondary licences are not automatically granted or granted on standard terms. ECL is therefore not appropriate for the audiovisual archive industry.

Fair use

62. The US copyright statute's fair use doctrine⁴³ offers a general exception applicable to a wide range of situations in which copyrighted material is used without authorisation in ways that might otherwise violate the owner's exclusive rights. The doctrine dates back to US case law of the 1850s. Since then the doctrine has been interpreted by the US federal courts, including the Supreme Court and Circuit Courts of Appeals. It is clear

³⁹ The wide variety of fees charged within the industry demonstrates that this is no argument in favour of a cartel: but if licensors are consistently able to enjoy the fruits of others' investment at cut price it is clear that the investment will cease.

⁴⁰ Berne Convention, Article 11(*bis*)(2); Article Council Directive 93/83/EEC, Article 9(2).

⁴¹ The relicensing of material in television programmes after the expiry of the initial licence.

⁴² The Imperial War Museum's secondary market can amount to anything up to 25% of its total income.

⁴³ Codified in 1976 as Sec. 107 of Title 17, United States Code. This codification was part of the general revision of the Copyright Act that took effect on January 1, 1978.

from the number of cases which are heard by these higher courts today, that 150 years after its origin the fair use doctrine remains far from certain. The European Commission and Parliament have, on the other hand, notably in their 5th and 6th copyright Directives, made substantial progress towards harmonisation and certainty in the exceptions to copyright within the European Union.⁴⁴ Introduction of fair use without the accompanying 150+ years of jurisprudence would increase uncertainty within the internal market. Litigation as far as the Court of Justice of the European Communities, to obtain unanimity throughout the internal market on the many issues which have been and are still reviewed by the US Supreme Court, will be available only to the richest digital players, and a severe discouragement to new entrants. This would undo the trend towards certainty within the EU for many years.

63. FOCAL International is well positioned to compare the experiences of its members on either side of the Atlantic. Increasing use of fair use has depressed the value of archive footage in the USA, where there is a widespread concern amongst commercial archives that the fair use doctrine is being increasingly abused in order to avoid the payment of *bona fide* licence fees.⁴⁵
64. Substitution of the fair use doctrine for the UK's well-defined statutory exceptions⁴⁶ (which does not appear possible under current European law) would result in a major repositioning of the archive footage market, with a dramatic reduction in income, the consequent investment in digitisation⁴⁷ and resulting availability of digital content, and in digital (including internet) business models.

Archive solutions

65. As stated above, the UK's archives are implementing digital strategies

- digital preservation
- digitisation with a view to exploitation (including metadata, digital systems and rights management)
- online showcasing of content
- providing online transactions
- providing digital fulfilment

⁴⁴ Directive 96/9/EC transposed into UK law by SI 1997/3032 and Directive 2001/29/EC of 22 May 2001 transposed into UK law by SI 2003/2498.

⁴⁵ At *Realscreen Summit* in Washington D.C. in January 2011 Los Angeles attorney, Michael Donaldson stated that he had helped one US network reduce its clearance costs by two thirds, and another to reduced its clearance costs on one project from \$250,000 to \$16,000 by reliance on fair use; and that no fair use had been made by any of the films he worked with for *Sundance 2005*, but as a result of his input, the 8 films he worked with for *Sundance 2011* had used over 900 video clips under fair use as well as many still photographs, pieces of music and other copyrighted works; and one of the single productions on his spreadsheet had employed fair use around 700 times.

⁴⁶ Sections 28 to 76 and sections 1 to 21 of Schedule 2 of the Copyright, Designs and Patents Act 1988 as amended, sections 20 and 20A of SI 1997/3032 (Database Rights).

⁴⁷ The US experience backs this up: the Library of Congress has documented that fewer than 20 per cent of U.S. feature films from the 1920s survive in complete form in American archives and of the American features produced before 1950, only half still exist.

to serve their traditional markets and emerging digital markets better.

66. These strategies include wider public interest access to commercial archives' content, including by joint ventures with public bodies.⁴⁸

67. This "opening up" of commercial archives depends on the archives' exclusive rights in the content which they own or administer, because of the investment required to bring it about. If the archives' legal control over their content and certainty of the legal environment are lessened

- archives will not continue with any significant digitisation of content, and
- are likely to remove content which they have already digitised from public view, keeping it viewable only by trusted commercial clients in a strictly controlled environment.

⁴⁸ For example:

- ITN's Archive ran a joint venture with JISC: JISC provided funding for digitisation to ITN, for which the *quid pro quo* was that JISC was allowed to use the content within the UK's schools, colleges and universities.
- While archives create B2B sites to showcase their digital footage to their primary market, it is possible for any member of the public to log in and view the content for their own private research and study.
- Also commercial archives often invest in search engine optimisation in order to better expose their content online – while they do so in order to attract commercial licensees, this kind of activity also has the effect of making the content more visible to non-customers who use the Internet, and who may become B2B or B2C customers.