



## **The Government's Consultation with a view to implementing the Hargreaves Review**

### **BRIEFING NOTE FROM FOCAL International Ltd**

This note is presented by FOCAL International (the Federation of Commercial Audiovisual Archives Limited).

#### ***The industry***

FOCAL is the industry body representing commercial audiovisual footage archives. FOCAL members in the UK include AP, BBC, Bridgeman Art, British Pathé, Canal+ Image UK, Corbis, Framepool, Getty Images, Huntley Archive, ITN, ITV, The Imperial War Museum, The Olympic Television Archive Bureau, PA, Sky News, Wellcome Library. Members in other countries include the Audiovisual Library of the European Commission, CBC, CNN, Discovery, HBO, Institut national de l'audiovisuel (ina), National Film Board of Canada, NBC, RAI, ZDF. Further information is at <http://www.focalint.org>.

Archive footage is an important, sometimes the most important, ingredient in many digital audiovisual productions – from TV news through documentaries and feature films to eBooks, iPad apps, games – and many educational products, online, in DVDs and apps.

The UK's commercial audiovisual archive sector is a world industry leader. UK archives contain upwards of 17 million hours of footage. In 2011 UK archive footage sales totalled in excess of £112 million. This £112 million represents a small but crucial element of productions and their subsequent sales which run to hundreds of millions of pounds or more. Sales revenues of several larger archives each exceeded £10 million. Archives invest large amounts in digitisation. Several invest between £1 and £2 million each year. The sector supports UK digital preservation, digitisation and media asset management businesses.

#### ***Some of the proposals are welcome***

FOCAL welcomes some of the consultation's proposals:

1. *Digital Copyright Exchange* can promote digital market growth – FOCAL absolutely supports easier access to digital content: its members are investing large sums to achieve this. FOCAL and many of its members already have the technology in place to join in a cross-media portal from day one

2. an exception to copyright, making *preserving and digitising* historically and culturally valuable collections easier
3. a workable solution for a exploiting *orphan works* would be welcome – however, only an internationally workable solution would have significant economic impact for growth, in this industry.

***Other proposals will be destructive and will produce contraction rather than growth***

FOCAL strongly opposes other proposals:

1. any loss of exclusive rights over archives' footage ("*Extended Collective Licensing*")
2. *widening of exceptions to copyright* (uses of footage where the owner is not paid) – such as introducing a general "quotation" exception

These would adversely affect archives

- archive sales are mostly small amounts of footage (10, 20, 30 seconds) - so allowing even marginally more free use would affect footage archives disproportionately, in comparison with many other media.

Archives' income would be seriously diminished

- resulting in less investment in digitising archive footage for the digital market
- removing incentive to make digital content available
- some archive and supporting businesses would be destroyed.

The UK has recently been strengthening IP protection

- by statute (e.g. the Digital Economy Act), in the Courts (e.g. blocking The Pirate Bay) and by enforcement agencies (e.g. SOCA – the Serious Organised Crime Agency – closing down illicit online sales)
- this makes investment in creating digital IP worthwhile.

Weakening copyright protection – by weakening exclusive rights and widening exceptions – is a move in the opposite direction

- less protection is the strongest possible disincentive to invest in producing digital content.

**Some of the consultation's proposals will mean that some archives can no longer invest in digitisation. Others will disappear, leaving the country or ceasing to trade. This will lead to a significant loss to the UK of commercially and culturally valuable audiovisual material.**

**A large, diverse, economically and culturally important sector of British creative media industry – the footage archives as well as their supporting businesses – will significantly diminish or vanish.**

*Further details about the effects of the proposals are given in the following pages.*

## IN DETAIL

### ***About the archive industry sector***

Footage archives are the source of archive footage, which plays a significant role in the media industry.

Archive footage is a resource for

- the news media, such as
  - TV news (e.g. archive footage providing background contextualisation to news events such as regime change in Libya; examples of Marie Colvin reporting following her death in Homs; references back to the 1976 drought in the face of threatened drought in 2012)
  - Broadcast, online and mobile news subscription services (e.g. news feeds from around the world: fighting in Syria; the Japanese Tsunami)
- media productions, such as
  - documentary films (e.g. The George Harrison story; Melvyn Bragg's Class and Culture; The Prince and the Composer, HRH the Prince of Wales's film about Parry)
  - feature films (e.g. The King's Speech; Senna; The Iron Lady; the Artist)
  - digital media productions (e.g. Farewell Comrades! Interactive web production <http://www.farewellcomrades.com/en/>, Great Battles of World War II DVD)
  - eBooks with audiovisual content (e.g. The Beatles: 50 Fabulous Years , JFK's biography, Nicholas Roeg's autobiography)
  - Games (e.g. World War II game)
  - Apps (e.g. Hammer Horror Films app)
- educational productions, such as
  - educational broadcasts for schools and colleges (e.g. access to the British Pathé News collection for historical footage to illustrate social and historical events; Espresso TV using ITN news content)
  - multimedia educational products (e.g. Penguin's Total English)
  - new media educational productions (e.g. Science Photo Library's footage is a vital ingredient of <http://twig-it.com/s> online educational subscription service to schools.)
  - educational app (e.g. Mini Monsters – scientific educational iPad app)
- advertising media, such as
  - TV and film advertisements (e.g. EDF recycling advertisements; No Child born to Die (Save the Children))
  - virals
- the national cultural and historical heritage, such as
  - The British Film Institute (e.g. release of British transport films)
  - The Imperial War Museum (e.g. Battle of the Somme)

providing the “raw material” which is an – sometimes the – essential ingredient for such productions.

The analogue archive business is becoming digital. Archive footage needs to be digitised, for use in digital media. Archives are investing large sums in digitising their archive footage and digital transactional licensing functionality. The commercial archives depend entirely on their sales revenues to fund digitisation. Footage costs from about £300 up to about £1,000 per hour to digitise, depending on the age and format of the original, whether restoration is needed, and other factors. Restoration and digitisation of old footage can be very dear: producing a digital restoration of a historically valuable 1902 15 minute acetate film cost more than £300,000. Investment in digitisation will only continue if it pays archives to digitise.

The UK is one of the major leaders in the international commercial archive industry. Relative to national populations and GDP the UK’s output of footage is double that of the USA, and no. 1 in the world. Within the EU it is the biggest and most mature market, offering the most diverse footage – historic, cultural, scientific, news, entertainment – in the most advanced digitisation, digital restoration, digital sales and delivery processes.

### **FOCAL welcomes some of the proposals**

FOCAL welcomes some of the government’s proposals:

- a solution for orphan works
  - as far as this is possible, given the international legal context – and
- a Digital Copyright Exchange
  - as a portal linking customers with right holders in all media including audiovisual.
  - Many FOCAL member libraries already offer easy-to-use on-line sales and delivery. Content creators can easily find and license content through them. Digital content can already be delivered instantly. Analogue content can be sourced and digitisation can be requested. FOCAL’s website and widely distributed handbook connect would-be users with archives and expert footage researchers. A DCE which complements these on-line facilities, for example by directing potential users to them, will be welcome - and
- an exception allowing archives to digitise content for preservation.

#### **Orphan works**

- Please distinguish true orphan works (where a right holder can’t be found, so a user can’t get copyright permission) from unwillingness by users to clear rights (where a user does not wish to check and clear rights, and would like to be able to exploit without risking being sued for infringement anyway).
- Canada has had an orphan work solution for some 22 years. Some 288 licences to use orphan works in various media have been granted during that time, one of which was for archive footage.
- An orphan work solution can only apply within the UK. This is because UK legislation cannot prevent a right holder from suing for infringement committed in a foreign country. Most archive footage is exploited internationally (in films, broadcasts, multimedia, apps).
- Legitimate use of *known* rights without clearing them can only be achieved by *collective licensing*. We deal with this separately, below.

#### **Digital Copyright Exchange**

- The basis for this already exists and operates successfully in the archive footage sector. FOCAL’s website directs users to the archives which supply the kind of footage they are looking for, and to licensing and other research assistance.
- Archives which have been able to afford the investment make instantly accessible digital content

available from their websites (e.g. ITN Source, BBC). These can be reached direct, or novices who don't know the sector can be directed to them by the FOCAL website.

- Standard purchases can be made online. Archives are creating bespoke rights solutions for specific requirements. Offline discussion is also available for customers with more complex requirements.
- Tracking, digital rights/metadata management technology and other digital processes required to make digital exploitation safe from the right owner's perspective – given the ease of making perfect digital copies, stripping out metadata, and other misuses in the digital environment – are being developed and adopted rapidly in the UK and abroad.
- This is producing a market for archive footage in which cost of transaction is minimised and ease of transaction maximised.
- A DCE in which archives can participate – which at least will help direct would-be customers to the archives' online sales sites - will be welcome.
- Ideally a DCE will be compatible with an orphan work solution, allowing an archive to exploit its orphan works, too.
- Please distinguish technologically enabled and enhanced direct licensing as described above – including instant online purchasing - from *collective* licensing, which we deal with below.

#### **Exception for archiving**

- Current law allows organisations such as the British Library to copy books to preserve them. The government is proposing to open this exception to more organisations and media.
- Commercial archives hold significant national historical and cultural records in obsolescent media. They should also be included in this exception, to digitise threatened audiovisual media to preserve them.
- No organisation – state-subsidised or commercial – should be allowed to exploit such material without permission (from the right holders, or as orphan works).

### ***Some of the consultation's proposals threaten the viability of the archive sector***

However, some of the proposals threaten the viability and existence of most of the UK's footage libraries.

This sounds extreme. But the proposals would affect archives disproportionately because

- footage libraries depend on their exclusive right to license their copyrights, and
- archive footage is mostly used in small amounts (5, 10, 20 second "clips" inserted into documentaries, advertisements, video games, etc.)

Both of these business models are threatened by the proposals, which include

- introduction of Extended Collective Licensing
  - "Collective" licensing destroys exclusive ownership
  - developing digital sales models are transaction based, user-facing and direct between licensor and licensee – introducing legislation to increase collective licensing would be retrograde and counter to progressive digital models
- widening exceptions to copyright
  - exceptions allow copyright material to be used without permission or payment. Even marginally increasing the amounts which can be used without payment will affect footage libraries disproportionately
    - because of new ways in which footage will be allowed to be used without payment, and

- because the archives depend on sales of small amounts.
- The archives' business model depends on many sales of small amounts of footage (10, 20, 30 seconds each). Changing the exceptions to copyright so that slightly more of a novel or an opera can be quoted without paying may not have a significant effect on its basic economic value. The same change for archive footage would have a huge impact on the industry.
- Diverse inputs contribute to the making of a digital production (such as a multimedia production, iPhone App, educational DVD) – including original programming, pre-existing software, creative input such as original text and design, overhead costs. These elements – or the wages of the persons who contribute them – are all paid for.
- As for the copyright content – which is sometimes the kernel of the production – it is easy to see why *access* to it should be as simple and user-friendly as possible: archives are increasingly providing this, driven by the competitive marketplace. See the comments on the DCE above.
- However, it is hard to see why just copyright content – alone of all the various elements in a digital production – should be free of charge given that there are considerable costs in storing and managing access to these collections. The more so when the copyright content is the kernel, even if time-wise not a significant part, of the digital production.
- Perspective: a documentary for exhibition on BBC4 would typically be valued at between £100,000 and £200,000 per hour, often up to £300,000 per hour. It might typically contain up to two minutes' archive footage – used for historical authenticity or scientific value - valued at £1,000 per minute. The remaining £80,000+ is spent on presenter and interview fees, production staff, studios and facilities, editing, historic/scientific advisers, music. The programme would often be licensed to overseas broadcasters: world TV rights (including US networks), digital, Internet, DVD rights etc. would typically be valued at £400,000, and the corresponding archive footage licence fee £4,000 per minute. Thus the annual £112 million of archive sales are incorporated into productions worth 10 times that amount or more. Feature films *The King's Speech* and *J Edgar* show the crucial value of archive footage and sound respectively – even though the quantities were small.
- If content is not paid for, the incentive to invest in further digitising, or to maintain these collections, will disappear.
- Changing the exceptions to copyright so that significantly less footage must be paid for will *in the short term* allow those who have access to archive footage to reduce their production costs by the amount representing the copyright fee no longer payable. *In the longer term*, the disruption of the business model will mean that archives invest in less, or no further, digitisation – depending on their individual financial circumstances – and thus less rather than more digitised footage available for the creative industry.

#### **Extended Collective Licensing**

ECL means that a licensing organisation can license content for use where the right owner hasn't granted the rights. A right owner who hasn't granted the right to license his content receives the same payment as those who have. He can only prevent his work being licensed by *withdrawing* it ("opting out") from the ECL scheme in advance.

ECL is not suitable for archive footage, because

- footage isn't licensed collectively – sales are individual and there is no standard industry standard rate card
- many organisations hold copies of each others' footage, "raw" and incorporated in productions – but

only the right owner should be entitled to determine licence fees, or whether or not to make a sale

- sales are increasingly digitised, made from easy-to-use right holder-facing interfaces, so collective licensing isn't necessary
- creating industry-standard ratecards for collective licensing would present competition law problems
- "opting out" is highly risky for archives – unlikely to work properly - because copies of their footage are often held elsewhere, not always properly identified, and "opting out" of overseas exploitation (more than 60% of sales include overseas rights) is ineffective
- ECL exposes archives to claims – for example, where an archive has licensed exclusively for a period, and another licenses the same footage at the same time using ECL
- introducing collective licensing would be a seriously retrograde "anti-digital" move in this sector, because sales are increasingly transaction-based - in which users have access to simple mechanisms to obtain licences and pay for their exact use, whilst right holders receive immediate payment. Collective licensing is by contrast slow and inexact.

FOCAL believes that ECL should not be introduced for use of archive footage. It would seriously damage the archive industry.

If legislation introduces ECL into the archive footage sector, the great majority of FOCAL member archives will withdraw their footage so that it cannot be licensed by ECL. ECL would therefore in practice be inoperable.

#### **Exceptions to copyright**

Many current exceptions to copyright exclude use of film (and sound recordings). These exclusions should be maintained, because

- Digitised film (like sound recordings) is especially easily copied and re-published.
- No sooner is a valuable or unique piece of footage digitally available, than it is out on YouTube and available in many illicit file sharing sites.
- The more digitised footage that archives must make available for free uses, the more likelihood – inevitability, in their experience – is there that much of it will soon be copied and used much more widely across the web, social media, and in other ways general production ways which cost them lost fees.
- The government is currently taking strong measures against digital piracy. It makes no sense to force right holders to make more digital content freely available without the possibility of exercising any legal control on the one hand (by wider exceptions) whilst trying to crack down on file sharing and the like on the other.
- Another government proposal is to enable copyright infringement as "small claims" – making it cheaper and easier for right owners to police infringements. This is needed and welcome. But it seems strange to give this with one hand, whilst taking away so much with the other.

Proposals of particular concern are:

#### **Criticism and review, reporting current events**

- This would be the single most damaging change for the archive industry.
- The proposal is to widen this to a general "quotation" exception.
- A mass of documentary film producers who currently pay for 10, 20 or 30 second film clips would be able to use them free of charge, no longer being limited to use for criticism and review or reporting the news.
- Small quotes would also be used unpaid in apps, multimedia productions, apps and many other digital contexts.
- Currently payments for use of very short extracts are the main source of income for archive
- Already now, these exceptions are abused. Responding to smaller production budgets, a significant number of producers claim "fair dealing" where the use is plainly commercial. Widening and generalising the exception will encourage this trend further, leading to loss of income for the archives.
- Furthermore, archives will have the cost of litigation to try and establish the extent of the Berne 3-step test in the wider "quotation" environment before they can effectively enforce it.
- We understand that the impetus for this change comes from academics who wish to quote from

learned texts. This change should be confined to that purpose, and should not include use of film.

#### **Parody**

- A new parody exception which allows truly transformative use of material could be allowed.
- However, any parody which merely uses footage as a vehicle should be paid for.

#### **Education**

- The UK's education publishing sector is strong, creative, productive and a world-leader – and especially in the audiovisual and multimedia field. Production needs investment, which means payment. Making end-uses free of charge will undermine production.
- Even in-house educational production of educational materials produced within a school or college must be budgeted and funded. Copyright content alone should not be singled out as being gratis. Its production must also be funded – it needs investment and profits.

#### **Contract override**

- The government proposes that no exception should be “overridden” by a contract term.
- Contracts clarify what has been agreed – to the advantage of all.
- Contracts also demarcate different levels of service, at different prices – where a limitation agreed for a lower price could trespasses on an exception.
- This request originates from libraries, which are risk-averse. The risk only arises because they undertake paid-for activities, such as providing digitised copies of the works in their collections. Risk is an inherent factor in every business, and it is hard to see why just libraries – which usually hold no rights at all in their collections - should be exempted from any risk when they wish to exploit rights, at a disproportionate cost for right owners.

The archives are successfully making an old analogue business into a new digital business.

They don't throw out old content. Old content is the essential ingredient of the business: archives are converting it into new, digital content and making it available from easy-to-use web-based platforms. This needs investment, which the archives pay for out of their sales – which therefore need to be profitable.

Many of the government's proposals (exceptions to copyright) will increase free use and therefore diminish sales. Others (ECL) could diminish archives' control over their own content – further removing an incentive to invest and digitise.

“Disintermediation” is highlighted as a feature of the digital environment.

- The web, social media and digital technology in general - the ease of copying, adapting and distributing digital content – make it easy, and it has opened up many new direct creator-to-user possibilities. This is usually seen as good.
- In this context, traditional mediators (publishers, producers) are often characterised as “a bad thing” – or at least, dispensable.
- But without archives, the vast majority of historically and culturally valuable archive footage will not be accessible.
- Historic creators have disappeared or do not maintain archives, so the archives must invest in keeping and maintaining the footage – which can also need investment for preservation.
- Historic content is analogue, and the archive must invest in digitising it for use by digital media.
- Without the cataloguing and adding metadata which archives do and pay for, footage can't be located – faced with a mass of cans or tapes of uncatalogued “raw” footage an untrained individual could seldom find footage on the required topic, or afford to digitise it.

- Therefore as custodians and handlers of the footage the archives are indispensable mediators. Archives need to invest in their activities – which currently include the high cost of digitisation over and above normal running costs.
- Because cataloguing this archive content is such a labour intensive activity much of it still needs to be worked on by the archives in order to contextualise the content to make it accessible.
- Archives maintain website and delivery systems 24/7, and must replace and upgrade software, hardware and infrastructure at least every 4 to 5 years.

Changes to the law which diminish or remove archives' income will therefore be damaging, not only to the archives themselves but also to the wider audiovisual sector, including the dependent digital support businesses - preservation, digitisation and media asset management services - which have grown up round the archives, as well as the content-hungry digital media themselves.

The UK's commercial footage archives are a serious and successful B2B industry. No archive material is beyond the reach of a genuine licensee. Changing UK copyright law to enable web mashers to use any UK Internet content without regard for its copyright status (and without adding appreciably to the UK economy) will merely result in a lot less material being available on the Internet to users based in the UK.

The likely effect of the proposals will be that many archives - and also digital production houses and technical suppliers – will disappear. Media leviathans – possessing and controlling the majority of available content – and individual amateur users – bloggers, YouTube posters, file sharers – will be the winners. This will produce a new, bleak media landscape of standardised and controlled mass content on the one hand and small, individual, private users self-publishing their derivative creations in largely “personal” media such as websites and social media.

A large, diverse, economically significant and culturally important sector of British creative industry – the archives and their supporting businesses – will diminish or vanish.

If this is the government's intended policy so be it. Many footage archives will choose to move abroad or close or dispose of their collections. The leviathans will subsidise their archives with funds derived partly from cannibalisation of others' content which they hold and partly from other income. It is more likely that this will require subsidy, rather than contribute to the annual £2 billion which Hargreaves predicted.

But if this is an unforeseen, unintended consequence of the proposals, they must be reconsidered before it is too late and a major part of the United Kingdom's audiovisual heritage – and a successful industry sector - disappears.

This is a summary. Further information including FOCAL's detailed response to the government's consultation is available from [focal.information@gmail.com](mailto:focal.information@gmail.com).

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