

Response sheet

Please provide evidence from those markets and media types you have experience of with a completed Response Sheet to HooperSecretariat@ipo.gov.uk no later than **Friday 10 February**.

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Please indicate which media type you work with (tick as appropriate)	<input type="checkbox"/> Music and audio <input type="checkbox"/> Performances <input type="checkbox"/> Text <input type="checkbox"/> Artworks <input type="checkbox"/> Still pictures <input checked="" type="checkbox"/> Moving pictures <input type="checkbox"/> Computer games <input checked="" type="checkbox"/> Mixed media (content that contains moving pictures, text and still pictures, e.g. a newspaper website) <input checked="" type="checkbox"/> Cross-media (the same digital content being licensed on different platforms, for example cable television and Smartphones) <input type="checkbox"/> Other (please provide details)

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Digital Copyright Exchange (DCE) Feasibility Study

Response to Call for Evidence

This response is submitted by

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FOCAL is a professional not-for-profit trade association representing commercial audiovisual archive footage libraries.

Section 1 – THE HARGREAVES HYPOTHESIS

“Copyright licensing involving rights owners, rights managers, rights users and end users across different media types, in the three defined copyright markets, is not fit for purpose in the digital age.”

Question 1:

Do you agree with this hypothesis in whole or in part?

If so, please provide evidence from those markets and media types you have experience of.

Summary

- i. FOCAL members, which are commercial archive footage libraries, are rights owners, rights managers and rights users.
- ii. There are difficulties for commercial archive footage licensing in the digital marketplace. We do not believe these difficulties arise primarily from copyright licensing *per se*, in the digital footage licensing market. There are other causes, which we describe below.
- iii. We think that a digital copyright exchange could facilitate footage copyright trade (although we realise that we are not being asked that question at this stage).
- iv. We comment on the 14 points of Section 1, below:

The seven reasons given

1 Expensive (both the licensing process and the cost of rights).

Licensing process

- v. Deficiencies of digital access in the archive footage sector arise through lack of available digitised content, which in turn arises from lack of funds to invest, which in turn is a result of downward pressure on footage licence prices in the industry.
- vi. In terms of effort involved, the actual licensing process is a relatively insignificant part of the whole start-to-finish process of using archive footage in digital productions (whether films,

smartphone apps, video games or internet virals). The knowledge required for licensing is no harder to acquire than the knowledge required for the other processes which are equally needed to create a digital production, whether for producing, programming, scriptwriting or editing – there does not seem to be any objective reason why skills required for just archive footage licensing should be singled out as a barrier to digital production, and not the other skills which are needed.

- vii. (Perhaps we should add that orphan rights are not a particularly acute problem in the commercial archive sphere – footage libraries are generally well informed as to their contents, much of which have already been provided with metadata and other licensing assistance.)
- viii. The licensing process is probably more expensive in foreign countries (e.g. licensing the use of U.S. feature films) where sales processes can be less streamlined than they generally have become in the UK.

Cost of rights

- ix. Cost of the rights themselves is determined by the footage's market value. Commercial archives need to fund management of their collections – storage, cataloguing etc. as well as management of content for the digital economy - i.e. digitisation, preservation, metadata creation - to supply the digital market to function. This is already difficult because of existing market conditions (e.g. reduced production budgets, the BBC's practice – the BBC is the largest commissioner of reused archive content - note that the BBC is both a user and a right holder, but the balance of third party content which it holds means that the balance within the organisation favours liberalisation of use rather than preserving sales). This will become more difficult (impossible for smaller archives) if prices are artificially driven down further.
- x. The vast majority of the archive footage market is characterised by more generic content which can be accessed from a number of sources. This has created competition in the market which has pushed prices down significantly over the years. For example, footage of the 2011 Royal Wedding was available for commercial licensing from AP, BBC, ITN, Press Association, SKY News (via Getty) and others. This creates healthy price competition amongst these suppliers.
- xi. Price competition is extremely common and the market ultimately determines fair value. Archives know that customers have choice of suppliers and therefore often look to agree bulk deals and discount incentives, all of which benefit customers and allow them to use more footage. Because of price competition, it is today possible for 6-10 clips (totalling 1 minute) to be used in a terrestrial TV broadcast in the UK for less than £400..
- xii. Broadcasters frequently agree favourable umbrella prices and rights definitions with archives meaning that when they commission independent producers, the producer benefits from the agreed discounted price while their required rights have been carefully and accurately defined in advance.
- xiii. "Stock footage" is often available online for a single payment which enables the licensee to use the footage throughout the world in all media for ever.
- xiv. A minority of content is more expensive. This tends to be Hollywood movies and sports footage. Because these assets are truly unique, the owners are able to command a higher price.
- xv. Many elements involved in creation and use of a digital production are paid for as a matter of course – such as programming, data storage, copyright music – and the argument which has been advanced by some startups that digital audiovisual content should be available entirely free of charge do not take account of the costs of the archives' own businesses, including the costs of digitisation.

2 Difficult to use

- xvi. The licensing process used to be something that had to be handled by professional archive researchers. This is no longer the case. Customers often organise licensing arrangements through junior researchers, assistants and interns. They do so because commercial archives have built web platforms that make the process far more intuitive, so that a newcomer to the industry can visit an archive website and easily understand how to license the content. Archives have understood in recent years that as new user groups emerge, they will expect the licensing process to be simpler and the archives have responded accordingly.
- xvii. FOCAL itself provides education which includes instruction in licensing and copyright, at entry, general practitioner and advanced levels, for would-be entrants into and current practitioners in the sector. Recently Skillset supported entry level education, but its funding only lasted for one year.
- xviii. Certain skills must be acquired in order to use archive footage in productions of any kind – whether digitally or in analogue media. The skills needed to license-in archive content are of no greater order than the other skills needed to produce an audiovisual production, to create a computer game, or to put together a multimedia product. As mentioned above archives have simplified and in some cases automated online licensing processes. There is nothing inherently more difficult in using archive content in a digital production than in participating in any other of the processes involved in making a digital production. Therefore, we do not see any reason for special pleading on behalf of simplifying the licensing of archive footage, as opposed to the other creative processes of which it is usually a relatively small a part.
- xix. The average archive library footage licence terms and conditions are shorter and far less complicated than typical digital conditions (such as the contracts for submitting an App for sale by the AppStore, or terms offered by Amazon, Google and YouTube).

3 Difficult to access

- xx. In general, archive footage is not difficult to access. Many archives which have digital footage (both historic analogue material which they have digitised and newer digital material) offer access via download or FTP, while most archives at least provide metadata relating to non-digitized footage so that customers are aware that it exists. Most archives can deliver non-digitised footage within 24 hours.
- xxi. In terms of digital footage, access is a factor of investment. Archive footage which is held in analogue formats must be digitised, sometimes restored and/or preserved, and metadata must be created, to enable digital access. In the commercial archive sector, this is funded commercially out of sales/licensing.
- xxii. There has been a strong downward pressure on prices in recent years (from reduced production budgets, “fair dealing” of footage where this is not legally justified but is uneconomic to pursue, new BBC acquisition licensing practices).
- xxiii. Further reductions in sales income will result in less digitisation of material, and smaller archives may go out of business or only supply analogue content while demand continues.
- xxiv. Audiovisual heritage content will be at risk of loss or destruction or at best deposited with national archives such as the BFI, British Library, National Archive (who do not currently have adequate resources to take on this task) thus increasing the financial burden on them.
- xxv. Some archives which have been able to afford the investment have produced a great deal of instantly-accessible digital content “off the shelf” direct from their websites (ITN Source, BBC). If the commercial archive sector remains viable, this will increase. If prices are driven down further, this will remain the preserve of the few larger archives; and some smaller archives may go out of business, or out of digital business, or not enter the digital business.

- xxvi. Also, less frequently used content is less likely to be presented in this way since it is not of immediate, obvious commercial value, even though culturally or historically valuable.
- xxvii. Participation in an appropriate DCE should increase ease of access to digitally functional archives.

4 Insufficiently transparent

- xxviii. Footage is licensed B to B (typically archive to production company) by individual licences and licence fees. (Occasionally large projects can involve large amounts of footage, but the footage is still individually selected by someone – from licensee or licensor - for the production in question.) The licence terms are fairly standard across the archive industry, dictated by the market and the nature of the material. Material is priced in a free market, bearing in mind that commercial archives must recoup their preservation, digitisation and metadata creation costs from their sales prices (this is not necessarily true for archives which are subsidised by public funds, such as the BBC, BFI or BL, which may have access to other sources of funds for these activities). The licensing terms are clear to a prospective licensee before he enters into the transaction. We do not believe that there is a lack of transparency in digital licensing by commercial archives.
- xxix. Whilst standard terms are available online for most commonly required transactions, there is also offline discussion with customers if particular rights are required. Owing to the competitive nature of the business, archives are obliging in creating bespoke rights solutions for specific requirements.
- xxx. We can see that there can be a lack of transparency where rights are licensed collectively. For example, a user may not be able to find out whether his payment is actually accounted to the specific right owner or creator of the licensed content, and a right owner may not be able to ensure that his receipts correspond to individual uses of his content. In the archive sector this can be an issue for secondary licensing, but the annual amount involved across the whole sector in the UK was only some £70,000 in 2011. This could be improved by improving/increasing creation of metadata, and a DCE could contribute to greater ability to track collectively licensed uses and thus increase transparency.

5 Siloed within individual media types

- xxxi. Some archives hold different media, e.g. footage and stills; footage and audio (BBC); footage and artefacts (Imperial War Museum). A DCE which built up metadata pointing to the sources of different types of media content would be valuable for all parties.
- xxxii. Those archives which are owned by multi-media companies are moving increasingly towards mixed-media licensing (e.g. AP offers footage and stills (and soon text) to UK customers, Corbis and Getty offer photos and footage together;, whilst Thought Equity recently announced the addition of photos to its video offering.
- xxxiii. FOCAL is currently extending contacts across visual media: in the UK FOCAL cooperates with BUFVC, and is entering discussions with BAPLA to develop common practices and interoperability of systems across footage and stills. Internationally FOCAL cooperates with FIAT - <http://www.fiatifta.org/> on metadata standards, format and interoperability issues, and with AMIA (U.S.A. - <http://www.amianet.org/>), and has a member of ACSIL (U.S.A. - <http://www.acsil.org/>) on the FOCAL board.
- xxxiv. We do not think the fact that some archives hold different types of content (e.g. audiovisual, photographic, literary) – if this is what is meant by “siloed” - is avoidable, in the present state of technological development.
- xxxv. On the other hand, we believe that an attempt to move large amounts of actual content of different media types held by different organisations to a single, multimedia archive (say, a DCE which actually housed the content) at this stage of technological development would require (1) enormous investment, (2) changes of the law to circumvent individuals’ rights of

ownership, and would probably result in destruction of a significant part of the commercial archive sector with concomitant losses of jobs and revenue. We think this could in reality only be attempted by the state, funded by a significant part of the £2 billion per year which is projected to be raised; and unavoidably a great deal of material of national cultural significance would be lost in the process. Other large-scale national digital/IP projects (such as the NHS) have not been successful yet.

- xxxvi. Furthermore, associated traditional industries that offer restoration, digitisation media asset management services would also suffer, as would new small start up industries also suffer if the commercial imperative for investment in archives fails and is not replaced by commensurate state investment in archives.

6 Misalignment of incentives

- xxxvii. Commercial archives need to sell their footage to survive. Selling into the digital market involves digitisation, preservation and creation of metadata – as well as evolving sales methods (technical and business) which reach the maximum market share in the rapidly changing market. Not many years ago, archive sales were largely for use in films (documentaries, advertisements, etc). Now archive footage is used extensively in video games, smartphone applications, internet virals to name only a few new uses. The industry has adjusted technically and in business methods to enable this to happen, funded by commercial sales of footage.
- xxxviii. We are aware that some digital startups would like to have free content. Whether the law is adjusted to provide for this (perhaps in part by a wide interpretation of all the proposed changes to the copyright exceptions) is obviously a policy decision for government. However, as explained elsewhere significant reduction in income is likely to result in less not more digital archive content being made available by commercial archives, and could ultimately result in a disappearance of significant archive supply. (Obviously publicly supported organisations can choose to subsidise these activities.)
- xxxix. In 2009 40% of archive content was held on digital tape and 10% in other HD sources (71% was held on tape, digital and analogue; 20% on film). This gives an idea of the amount of digitising which remains to be done – or, to look at it another way, the amount of material which can be made available for use in the content-hungry digital environment, as long as the archives are able to invest in the digitisation.

7 Insufficiently international in focus and scope

- xl. Archives supplying content for worldwide exploitation; some archives are themselves multinationals (e.g. AP, Getty).
- xli. Purely national productions of any size are rarely economically viable (e.g. films are most often co-productions involving investors from more than one country).
- xlii. The most significant difficulty for international exploitation arises from complex differences between national copyright laws – especially in relation to old material. Film was protected in different ways and for different periods in different countries, and recent harmonisations have not provided transitional provisions to update or harmonise these old rights. International harmonisation of copyright laws is beyond the scope of the UK government acting alone. FOCAL provides expertise to deal with these complex issues.
- xliii. As relevant metadata are built up, they could be added to (or accessible from) an appropriate DCE. This has to be a gradual process; the time and cost of dealing with such issues on more than a case-by-case basis as necessary is incalculable and unattainable.

The seven claims made about copyright licensing

1. Size of pie for rights owners/managers smaller than it could be.

- xliv. As explained above, the size of the slice of the pie for rights owners/managers has been decreasing. But this is not a result of the licensing *system*. It is a result of economic forces in the market. For example, when the BBC began to acquire Public Service Rights in archive content, the archives' primary sales income decreased by approximately 20%. It has not proved possible to make up for this loss by profit shares or "back end" deals. This was not to do with the licensing *system* – rather, the BBC's market position is such that it could in effect impose this arrangement on commercial archives.
- xliv. Further pressure in this direction is likely to reduce the incentive for archives to participate in "back end deals," i.e. to reduce initial licensing fee for a share of later profits from the new production.
- xlvi. One result of some of the Hargreaves/consultation proposals for the footage industry is likely to be that once content is exposed it will become harder - in some cases impossible - to control useage or generate income from new uses.
- xlvii. The financial outlook for the broadcast market is not great, with few broadcasters expecting significant growth in the coming years. Archives see the growth coming from the digital markets, and they recognise that serving digital customers requires digital content. Removing the ability to charge for supplying digital content will kill the digital supply. Or, to put it another way, remove the requirement to pay for content and you remove the pie altogether. The only reason a commercial archive will digitise its content is to make a commercial return.
- xlviii. Free access to digital content would make digitisation into a liability – archives would choose to keep their analogue, and control it.

2. Size of the pie going to rights owners is smaller than it should be.

- xliv. Archives are right owners and/or right managers. For example, ITNSource owns ITN footage; it administers Reuters and other footage; OTAB or the Huntley Archive own all their own footage.
 - I. What has been said in 1 above above applies here, too.

3. New digital businesses are being held back.

- li. We do not believe that interaction with the archive footage industry can be holding new digital businesses back – given, that is, the worldwide copyright basic premise, that copyright content can only be used with the copyright owner's consent. There is nothing inherently more difficult in accessing and using a piece of digitised copyright footage than in accessing and using other digital components. Some software licences are available online, others are not; so with digital footage, some is available online and some not. More complex and bespoke software must be negotiated and licensed case-by-case by people with the expertise to know what they are doing; more unusual and perhaps as-yet undigitised footage must likewise be sourced and licensed case-by-case by similarly knowledgeable people. Archive footage – at least, choice footage which may have been restored and digitised with skill – is not floating in the Cloud ready to be plucked down and used at will free of charge, just as most other digital components are not.
- lii. It would be nice if there were more digitised archive content for digital businesses to use – but this depends on investment which the archive industry is able to make in creation of the digital footage – expecting a return on this investment. Making digital content available free of charge will result in supply failure.

- liii. On the other hand, as explained above, increasing amounts of digitised and ready-to-use footage are becoming available, as archives invest in the digital market. It is obviously in their interests to preserve the competitive edge by doing so.

4. Innovation is being held back

- liv. We do not believe that current footage licensing arrangements can hold back digital innovation. The archives are constantly creating innovative ways to meet their market – to increase sales and of course because the commercial archives are in competition with one another.
- lv. We are aware of producers who would like to launch products which would be able to use copyright archive footage free of charge, i.e. use copyright content without paying for it. However, as explained above, if archive footage is to be made available free of charge, production of further digitised footage will diminish proportionately or cease, as archives pay for digitisation from sales receipts.
- lvi. Further, there is no argument as far as we are aware that for example software writers should produce their copyright programs free of charge for digital producers, or that the App Store should forego its share of royalties from the sale of apps on its site. Therefore, it is hard to understand why specifically copyright footage owners, who must also invest to make their footage available, should be expected to forego or reduce their already market-driven fees.

5. Infringement of copyright remains persistent

- lvii. In the archive footage industry sector, direct copyright infringement by copying without consent (e.g. copying a broadcast or a DVD) is not a particularly big problem.
- lviii. However, infringement by mis-use of the copyright act is a big and increasing problem. In order to cut production budgets, some producers interpret exceptions to copyright more widely than current jurisprudence, in particular section 30(2) fair dealing for criticism or review. It is increasingly common for an archive to hear, “We won’t pay for the footage, we’ll ‘fair deal’ it.” Only the largest archives faced with the most egregious infringements are able to take action, as not only the cost but the time involved in a complex infringement action of this nature is beyond the money and personnel resources of most archives. The cost and complexity are illustrated by the famous *Clockwork Orange* case involving Channel 4 and the *Pro Sieben Media v Carlton Television* case about Mandy Allwood.
- lix. We believe that widening the exceptions to copyright – in particular making a general “citation” exception instead of our current section 30, will “open the floodgates” actually encouraging a much wider adoption of this practice – which may seem attractive in the short term for individual producers, but in the medium to long term will see a great reduction of availability of further digitised archive footage.
- lx. On the other hand, a transparent and robust DCE could be of help in reducing infringement. In particular, owners should be able to follow up uses of their materials and check on suspected unauthorised uses, making use of transparently available metadata.
- lxi. Tracking and other digital processes are becoming more widespread, to help police copyright infringement.
- lxii. Most of the statements above (licensing difficult, expensive, holding back innovation, etc.) tend to infer that licensing should be curtailed in some way. Less carefully controlled access to copyright content could lead to *increased* infringement.

6. The end user is deprived of access to a significant amount of commercially and culturally valuable content, e.g. archive material.

- lxiii. Increasingly as digitisation of archive footage progresses, content is available for easier access – including on archives’ websites.

- lxiv. Availability is limited only by availability of funds to digitise, restore and make metadata. More funds mean more footage, less funds mean less footage, because the commercial archives must digitise commercially and culturally valuable material from sales revenues without assistance from the state. (Organisations which receive taxpayers' support, such as the BBC, BFI and BL can be exceptions to this, if public funds are directed to that use.) Film Archives UK already has problems in obtaining funding.
- lxv. If licensing and copyright systems enable the archives to invest less, because less material will be paid for, then less material will be available.
- lxvi. Another way would be for the £2 billion – or some of it – which is proposed to be raised by 2020 to be made available to a state supported organisation, to establish a national film archive into which as much UK archive footage would be deposited as it was possible to collect, and to digitise and manage it. Most of the private commercial archive sector would disappear over time, as doubtless would considerable amounts of archive footage. However, a substantial national cultural archive would be assured of preservation and – within the scope of funds made available – access by end users.

7. £2 billion growth in GDP by 2020.

- lxvii. In 2009, the archive footage industry generated €430 million. We do not have exact statistics as to what proportion of this was generated in the UK, but many of the world's biggest and most content-rich and significant archives are held in the UK, and FOCAL's informed estimate is that considerably more than one third of this figure is generated by UK-based archives, probably more.
- lxviii. We do know that 64% of footage sales are made to organisations based within the UK, and 36% to organisations based outside the UK (2009 figures). However, of both these percentages considerably more than 80% is *exploited* cross-border – i.e. licences are granted for multi-territory or worldwide use of the footage in the production in which it is used.
- lxix. International licensing of audiovisual content – especially old content – presents special problems (referred to above). These problems are only ultimately amenable to international legal solutions, which are beyond the scope of the UK government acting alone. However, increasing use of metadata and data handling technology and systems facilitates these issues, thus contributing to more efficient and easier licensing processes. Introduction of these is expensive and dependent on significant and continuing investment. Participation in a suitable DCE would be an important step in this progress.
- lxx. Our fear is that short-term national solutions – in particular the (probably unintended) consequences of widening UK copyright exceptions and unselective application of extended collective licensing on the archive footage industry in particular – will lead to a significant reduction of income, thus to less investment, and thus to a lower level of digitisation, participation in DCE, and other steps which would make more digital content available more easily.
- lxxi. Therefore, in the above context we would forecast a lessening of archive libraries' contribution to GDP – with a significant effect on other industries, too: loss of production houses, digitisation and similar industries and new start up industries (e.g. offering ingest and media asset management services) which have grown up around the archive industry as it has moved into the digital era, or loss of jobs in them; and of course loss of digital content for use by the digital media industry.
- lxxii. Many commercial archives are divisions of larger parent companies. Revenue from the archives also supports the activities of the parent companies, which are often news organisations which use the revenue to fund newsgathering. Expectations of revenues that the archive will deliver are factored into the cost calculation of the creation of the content in the first place, so a reduction in licensing income could mean that it is no longer viable to create certain kinds of content.

- lxxiii. We do not have the means to investigate whether these potential losses in terms of overall national media-related GDP would be made up in other ways in other media sectors. The potential destruction of a particular industry sector as a matter of policy touches on wider policy decisions which we do not have insight into.
- lxxiv. We realise that the legal issues touched on above are not the subject of this consultation, but we raise them here in general terms because the DCE will not operate in isolation, but as part of the overall proposed changes to the copyright system. We explain the issues in detail in our response to the government's copyright consultation.

Section 2 – DEFINITIONS

Question 2:

Do you agree with these definitions; if not why not; suggest better.

General comment

- lxxv. We believe that the overall import of the definitions and market model – read into the context of the archive footage industry – is too simplistic, in particular not taking into account the complex inter-relationship between rights owner and rights manager (for example, much “creation” of digital content is made thanks to the investment of rights managers in digitisation, preservation and metadata creation), nor the transitional issues from digital to analogue which is a central feature of this particular industry – in which the old/analogue cannot be abandoned in favour of new/digital – the old/analogue must be *transformed* into the new/digital, a process which requires considerable investment raised entirely from sales revenues.
- lxxvi. Below we comment only on those definitions or statements which are relevant.
- The rights user accounting to the rights owner/manager for the content actually used.**
- lxxvii. In the archive footage industry, customers usually order large quantities of potentially suitable footage to view (increasingly this can be done online), from which they select usually small quantities of footage for inclusion in the final production (sometimes 10, 20 or 30 seconds).
- lxxviii. This is always **licensing to incorporate an original copyright work into another work**.
- lxxix. Therefore, the process is often not amenable to automated handling arrangements – and thus not suitable for collective licensing arrangements (such as are used for recording a cover version of a song or recording a broadcast programme off-air).
- lxxx. Two levels of picture quality are involved – low resolution for access/viewing selection; high resolution for inclusion in final production. Perhaps this process could be automated, i.e. the different fee paid for the high resolution material.
- lxxxi. However, some kinds of archive footage are suitable for more or less fully automated handling – standard ready digitised stock footage available on line, for example – and in these cases the licensing can also be carried out online.
- lxxxii. This suggests two kinds of licensing would be possible through a DCE – on the one hand, material which is ready for use with “instant” online purchase using a “click wrap” licence, and potential purchasers obtaining details from the DCE which enable them to contact the right holder and follow up, obtain material etc., and ultimately make their purchase of selected material.
- lxxxiii. FOCAL members, the archive libraries, are
- **rights owners** (archives which own the copyright in the material which they license) and/or
 - **rights managers** (managing rights in footage which are owned by others)
 - many are **both**, managing their own copyright material and also representing the archive content of other rights owners e.g. ITN, BBC.
- lxxxiv. **The archives license rights to rights users** (typically producers of feature, documentary or advertising films, internet virals, digital applications such as smartphone apps, video games, multimedia productions such as educational productions or productions featuring music, art works, literature etc.)

- lxxxv. Further, answering the challenges of digital developments, **archives are increasingly becoming rights users**, in that they themselves develop products containing footage for the digital market – sometimes in partnership with other rights users, sometimes acting independently – which they then exploit.
- lxxxvi. Archives do not supply material to **end users**. In other words, members of the public do not buy “raw” archive footage in the same way that they buy a download from iTunes or streamed content from Spotify.

Referring to Figure 1, defined copyright markets

- lxxxvii. Clearly this is theoretically correct: according to the definitions which have been given, rights owners’ rights are licensed into the market by rights users.
- lxxxviii. However, this is too simplistic a picture to describe the footage archive industry:
- lxxxix. As stated above, archives can be either rights owners or rights users, and are usually both; and are becoming rights users in the digital marketplace.

Segment A

- xc. There is also ambiguity between rights owners and the markets, especially in the case of the bigger players represented by **segment A**: for example, the BBC is a rights user of archive material, as shown in Figure 1 – but the BBC is at the same time the biggest right owner and rights manager of archive material. The BBC’s holdings are divided between material which it owns and material which it manages. One of its stated aims is to be able to use material which it manages as easily and cheaply as possible, an aim which clearly conflicts with – and proportionately far outweighs – imperatives to commercially exploit the archive footage which it owns. It is commonly believed in the industry that the BBC licenses *in* more than twice as much archive content rights which are owned by others as it *sells* archive content rights in which it owns itself (although figures are not made available). Another media organisation which reflects the same “conflict” is Fremantle Media.

Segment B

- xci. The archive footage industry also supplies **segment B**, which includes not only medium sized TV companies, but also many new media digital production organisations, from computer games through smartphone apps to viral productions. Educational uses mostly fit into category B, not C: for example digital productions (film documentaries, interactive/multimedia productions, apps) for educational purposes. These are commercial productions (analogous to published text books) and use archive footage on a commercial basis, as they do the rest of their contents.

Segment C

- xcii. The archive industry could well supply a startup digital company making an app (say, archive footage for a historical app about battles of the Second World War) which would require sophisticated media production skills to get the product off the ground, of which rights handling would be a relatively minor part - so arguments for simplification of rights are not relevant in that market place. However, end users, individual educational institutions etc. only use footage as it has been included in a production already, by an A or B sector participant.

Media types

- xciii. 1 to 8 of the media types are different *types* of content, which are (more or less) all defined in the copyright act.
- xciv. However, 9 refers to the *use* of copyright content, therefore it doesn’t really seem to belong in this list.

The digital age

Creative destruction of incumbent analogue businesses

- xcv. In the archive footage industry, it would be truer to say that the digital age is *built on* analogue businesses. The point of archive footage is largely that it is historical, cultural, etc. Therefore pre-existing analogue footage must be digitised. Pre-existing analogue businesses will only be *destroyed* if developing patterns of business (including digital developments, in particular where mandated on the industry by changes in law and/or mandatory business practices) prevent adequate investment in the processes needed to continue making the analogue business digital. Of course, this is a historic issue: new material, the archives of tomorrow, are created digital. But it is a historic issue of big proportions which will occupy the industry for many years still.

The cost of copying and distributing digital content

- xcvi. The cost of copying and distributing content which is already digital is indeed less than the analogue equivalents. However, what characterises the archive footage industry is the opposite: the costs of digitising old analogue material (which is the very stuff of the archive) are high, sometimes higher where complicated restoration of old analogue material is needed. There have also been many digital technologies over the last 30-40 years which are themselves now obsolete, and the machinery and skills to repair and operate it are expensive, because they involve people not merely technology, many man-hours and sometimes training.

The erosion of monopoly status

- xcvii. This phrase calls to mind an issue particular to the archive footage industry. Largely because of the way satellite news feeds work, many news archives in particular contain much content rights in which are in fact owned by another news archive, which of course also has the material in its own archive. Copyright ownership enables an archive to retain exclusivity and control over licensing of its own material. Bearing in mind that the great proportion of sales are of extracts of 10, 20 or 30 seconds, any weakening of exclusivity would be likely to lessen an archive's licensing income, and thus investment in further digitisation.

If the content is digitisable, then sooner or later in the digital age it will be digitised.

- xcviii. This does not seem to be true of the archive footage industry. High quality, historically and culturally valuable footage requires much investment to digitise. If the structures which evolve for licensing archive footage in the digital environment – whether mandated by law, regulation or imposed technological solutions – result in less licensing income, there will be less digitisation and valuable material will disappear. There will be no incentive for an owner to keep it, if there are no funds to preserve, digitise and exploit it. Or the owner could migrate abroad to a country where conditions are less unfavourable (archives are sometimes sold abroad – a significant British archive has recently been sold to Australia.) There are examples from the past: migration from older to new formats in the past (for example, from 16 or 35 mm film to Digibeta) or change of ownership (of broadcasting rights) resulted in enormous quantities of historic content held by big, nationally significant archives being dumped in the skip – today it is not uncommon to see or hear a historic programme which survived only because an engineer happened to keep a copy in his attic – discarded tapes have even been found beneath floorboards of large broadcasting organisations, years later. This can happen again now, if archives are not able to invest in digitisation. It has happened and is happening now in many other countries where funds are not available for preservation and digitisation and important cultural and historical documents are lost (e.g. India, many African countries – FOCAL and UNESCO have cooperated to try and address this important cultural and historic issue, e.g. see <http://www.focalint.org/events-calendar/event/131/come-celebrate-unesco-world-day-for-audiovisual-heritage-with-focal-international-and-bafta>).
- xcix. In fact, the *opposite* is true of the archive footage industry. In general digitisation permits easier access, copying and exploitation. If the digital environment – whether legal (e.g. extensive exceptions to copyright or lack of control over extended collective licensing) or

practical (lack of control over access) – poses a risk of free use, right owners will specifically look to restrict access and keep their footage out of the public sphere.

The fixed internet is effectively borderless, a global service on a single platform. Traditional copyright licensing in the analogue age was/is managed by territories (e.g. Canada) and by platform (e.g. terrestrial free to air television).

- c. Both these sentences are factually correct. It is tempting simply to wish the second sentence away. However, international legal obligations (Berne, WIPO, WTO, Treaty of Europe, etc.) will not allow this to happen. Great Britain cannot protect British market participants from claims of infringement brought by aggrieved right holders in foreign territories; indeed, Great Britain's international obligations can see judgments in such foreign claims enforced against British organisations, and even Britons extradited to answer such claims in foreign countries (such as the U.S.A.).
- ci. In the footage archive industry, investment is again the key. Rights management information (metadata) is key to identifying and handling rights in the digital environment – and this is recognised internationally, with treaty-mandated international standards of protection for data management information and technological protection measures now in every significant country's copyright law. Effective rights management goes hand in hand with digitisation, and increasingly valuable archive material is available in digital form such that it can be handled and the rights can be managed throughout the world in all forms of digital exploitation. An environment which allows the archive industry to continue to invest in digitisation will promote this practical solution: failure of income to invest will result in less digitised rights-ready content available for exploitation.
- cii. Digital customers can either geo-block their products, so that only specified markets can access their products; alternatively archives offer internet rights that are valued on the principal market, with other markets defined as being "unintentional overspill," e.g. a national newspaper's website pays for UK rights as the vast majority of its readership is in the UK, although others in other countries also use the website – in this scenario and archive will price the rights so as not to unfairly penalise the customer for the lack of online "international borders."