

HARGREAVES REVIEW OF INTELLECTUAL PROPERTY AND GROWTH

Responding to the consultation

About You and your organisation

Your name

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Job Title

Advocate, solicitor

Organisation Name

FOCAL International Limited

Organisation's main products/services

FOCAL is the industry body which represents commercial audiovisual footage archives. FOCAL members in the UK include AP, BBC, BP, 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 www.focalint.org.

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INTRODUCTION

- 1) 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. Productions in all digital media use comedy, current affairs, entertainment, history, medical, music, natural history, science, sport, war and conflict and many other genres of archive footage.
- 2) The UK's commercial audiovisual archive sector is a world industry leader. FOCAL estimates that UK archives contain upwards of 17 million hours of footage, and that UK archive footage, text and image sales in 2011 totalled in excess of £112 million. Licensing revenues of several larger individual archives each exceeded £10 million. Relative to national populations and GDP the UK's output of footage is double that of the USA, and no. 1 in the world. It is investing large amounts in digitisation of footage and digital transactional licensing functionality. Footage costs from about £90 up to about £500 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. Some large archives are investing between £1m and £2m each year on digitisation. The archive industry thus also supports UK digital preservation, digitisation and media asset management businesses.*
- 3) Larger news archives support the news organisations of which they are part. They supply archive footage, and revenues from their footage sales provide financial support or their parent organisations' news gathering activities.
- 4) The archive industry is thus part of an interdependent media "ecosystem" which is much larger than the archive industry alone. More information about the industry is set out in FOCAL's submission to the initial Hargreaves enquiry.
- 5) FOCAL welcomes:
 - a *Digital Copyright Exchange*, which can promote digital market growth.
 - FOCAL supports easier access to digital content: its members have invested and are investing large sums to achieve this

* We have compiled these estimates from figures provided by individual archives.

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- FOCAL and many of its members already have the technology in place to join in a cross-media portal from day one
 - FOCAL submitted a response to Richard Hooper's call for evidence supporting a DCE
 - an *archive exception* to copyright
 - for preserving and digitising archive material should be open to audiovisual archives, as they hold much of the UK's historically and culturally valuable footage
 - a workable solution for exploiting *orphan works*
 - however, only an internationally workable solution would have significant economic impact in this industry.
- 6) FOCAL strongly opposes other proposals:
- introduction of *Extended Collective Licensing* in the archive footage sector
 - collective licensing is not practised in the archive footage sector
 - introducing collective licensing and then extending it would destroy archives' exclusive control of much of their footage, thus their ability to set the price and control the sales
 - *widening of exceptions* to copyright applicable to use of archive footage
 - such as introducing a general "quotation" exception
 - archive sales are mostly small amounts of footage (10, 20, 30 seconds)
 - therefore allowing even marginally more use free of charge would affect footage archives disproportionately, in comparison with many other media.
- 7) Introduction of these proposals would adversely affect the economy of the archive industry seriously
- *Extended Collective Licensing*
 - In his economic impact assessment, Hargreaves stated, "If the licensing process becomes more efficient it is difficult to see how rights owners are likely to lose" (Hargreaves Review, Supporting Document EE, page 12). This is potentially true of the DCE, which FOCAL supports and will willingly participate in.
 - Introduction of ECL for archive footage licensing will result in significant losses for right owners: loss of income (deduction of collecting society commission, across-the-board fees cannot take account of premium sales)

and loss of rights (including limitation on the right to payment and loss of remedies for infringement). There is no evidence that these losses are counterbalanced by economic gains. Loss of exclusive control over use of footage can also give rise to legal or contractual damages. Licensing may become *easier* for the user (where a blanket licence can be obtained) but there is no evidence that this means “more efficient” in economic terms.

- *Widening copyright exceptions*

- The consultation Impact Assessment “Introducing/widening certain copyright exceptions” states (on p.1) that “[the government] plan[s] to introduce exceptions to copyright to the extent that they will allow people greater freedom over use of works, supporting useful economic and social activity, without undermining incentives to creators.” The effect of the proposals singled out above, if applied to the UK archive footage industry, will be to undermine incentives to produce digital content and make it available for digital consumers.

8) In the Nordic countries, where ECL is currently used, it is permitted in limited, defined circumstances. The UK copyright statute currently applies many exceptions to copyright to selected, defined media. Neither ECL nor the proposed exceptions mentioned above should be applied where they will adversely affect successful digital markets, including the audiovisual footage archive industry.

9) 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).

10) A safe IP environment makes investment in creating digital IP economically worthwhile.

11) Weakening copyright protection – by weakening exclusive rights and widening exceptions – would be a move in the opposite direction

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

12) The cumulative effect of introducing ECL and widening unpaid use of copyright footage will mean that

- archives’ income will be seriously diminished
- archives will be able to invest less in digitising footage and digital licensing solutions

- some archives will no longer be able to invest in digitisation
- incentive to make digital content available will be diminished
- some archives and supporting businesses will disappear, either leaving the country or ceasing to trade.

13) This will lead to a significant loss to the UK of commercially and culturally valuable audiovisual material.

14) Much historic footage will no longer be available: it is only accessible to a digital user because archives digitise it.

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

16) Hargreaves' figure of £2.2bn cannot be delivered by the consultation's proposals taken together because

- The figure is linked to cross-border licensing. The report on which it is based presupposes a single digital market across Europe. This consultation, however, deals exclusively with UK law. Important aspects (including orphan works and ECL) cannot be implemented cross-border *inter alia* because of the UK's obligations under Berne and TRIPs and lack of corresponding provisions in foreign countries.
- Implemented by the UK alone many of the consultation's proposals will result in weaker protection of rights in the UK by comparison with other countries – this is not the same thing as producing an efficient licensing system and environment in the digital environment which by its nature is international.
- It is generally acknowledged that “all of the contemporary advanced economies have strong property rights, and data shows a strong correlation between property rights, productivity, living standards and innovation.” (Harvard Business Review accessed on 15 March 2011 at http://blogs.hbr.org/2012/03/would_you_invest_in_this_kid.html?awid=7588133383359027571-3271) It is commonplace that this is a main reason why the USA adopted the Sonny Bono Copyright Term Extension Act in 1998, and indeed extended the duration of US copyright to 50 years p.m.a. in 1978.
- Footage archives are primarily B2B businesses – like many participants in the commercial audiovisual media industry. Digital disintermediation helps “everyone to be a creator,” but legal changes which support citizen re-writers at the cost of industry participants are unlikely to contribute to economic growth.
- The proposed additional and wider exceptions to copyright may result in more copyright material being used free of charge in the short term, but in the longer term “copyright lite” in the UK will result in a race to the bottom of collectively licensed copyright fees and loss of some and migration abroad of other content-creating industries.
- Some foreign content producing industries have already said that they will not license their content into the UK under the proposed regime.

17) Concerning the audiovisual sector as a whole, the consultation and impact assessments have not taken full account of the sector's component industries and how they function together, with the result that many of the consultation's proposals will result in a transfer of revenue from one sector of the media industry to another, rather than in generation of new revenue.

THE CONSULTATION QUESTIONS

ORPHAN WORKS

Summary

- 1) A system enabling the use of individual orphan works would be useful.
- 2) Such a system is unlikely to be widely used or have significant economic impact in the digital audiovisual sector unless it can license use of orphan footage cross-border/internationally. This is not currently legally possible. Take-up of a national solution would be as small in the UK as it has been in Canada.
- 3) Orphan works are not a significant problem in the archive footage sector: less than 0.5% of most archives' holdings are orphan, although a few have more.
- 4) On the other hand, some users of footage tend to conflate orphan works with holdings where the rights are known but require permission for use. Orphan work solutions do not solve this issue. We address it under ECL, below.
- 5) A register of orphan works would be a helpful guide, but could not be definitive. The Digital Copyright Exchange could usefully include this function.
- 6) An internationally effective legal solution for commercial exploitation of orphan works is far off, therefore at this time investment directed towards operational issues, especially improving availability of information about orphan works through the DCE, is likely to be most productive.

The consultation questions

- 1 *Does the initial impact assessment capture the costs and benefits of creating a system enabling the use of individual orphan works alone, as distinct from the costs and benefits of introducing extended collective licensing? Please provide reasons and evidence about any under or over-estimates or any missing costs and benefits?*

- 1) The only functional orphan work system including all media is that operated in Canada. We do not know what the Canadian Intellectual Property Office spends in overheads, staff and other costs, to operate the system.
- 2) In the past 22 years 288 orphan works licences have been issued in Canada . If the users have paid typical market-rate licence fees for their licences, on such a small scale it seems unlikely that CIPO's costs together with the fees reserved for authors who claim later on can have been covered.

- 3) Of the 288 licences, one was for use of audiovisual archive footage in a documentary film.² We do not know whether the licence fee covered CIPO's administrative costs, proportionately, as well as the await-claim fee.
- 4) Including transaction costs, it seems likely that the overall cost of an orphan work licence would be higher than the equivalent licence for a work of a known author. The additional cost could be borne by the taxpayer/state, the organisation issuing the licence (if different from the state) or the licensee. The first option (cost borne by the taxpayer) seems unpalatable.
- 5) The second option (cost borne by the licensor) is unreasonable – the licensing organisation would distribute licensing fees less administration costs to right holders (e.g. PRS for Music, or indeed FOCAL) and why should known right holders bear the cost of selling rights of other right holders, merely because they are unknown – and who may indeed later appear and claim their fee? Therefore the third option, that the cost of administering an orphan work licence should be borne by the applicant for the licence seems preferable. The licensee has the choice of using another similar known work, or no work – or, as today, of taking the risk. The proportion of orphan authors who later come forward is said in all studies to be very small.
- 6) Only an orphan licence authorising international exploitation is likely to have significant economic benefit in the digital audiovisual sector. Economically significant productions are likely to be co-productions. Typically different co-production partners are based in different countries, partly to get maximum benefit from the widest range of tax breaks and other financial incentives available. Digital productions are typically intended for international exploitation, partly to maximise returns and partly because of the borderless nature of the Internet. The benefit of a national orphan licence are therefore very limited. No statistics are available about the number of Canadian audiovisual producers who have *not* applied for orphan licences. Anecdotal evidence in the industry is that producers choose not to go to apply for a Canadian orphan licence as the time and cost of a diligent search and the cost of the licence fee are outweighed when the risk of using the orphan content in the rest of the world is unaffected.

The Government is particularly interested in the scale of holdings you suspect to be orphaned in any collections you are responsible for. Would you expect your organisation to make use of this proposed system for the use of individual orphan works? How much of the archive is your organisation likely to undertake diligent searches for under this proposed system?

- 7) Most audiovisual archives have few genuine orphan works³ – generally considerably less than 1% of holdings. The Imperial War Museum estimates

² Information from the Copyright Board of Canada's website: <http://www.cb-cda.gc.ca/decisions/unlocatable-introvables-e.html> visited on 21 February 2011. The footage licence was for inclusion of an 8-second clip from "A New World in the Yukon" in a documentary film.

³ Broadcasters' archives (such as the BBC's or ITV's) hold footage from other archives which has been incorporated into their programmes. The broadcaster's programme details identify this footage. It will initially have been licensed for the uses which the broadcaster chose at the time of production. As incorporated in the programme the footage can subsequently be licensed for more uses, should the broadcaster wish to exploit the programme or the extract further.

However, many archives, both in the UK and around the world, can hold copies of the same footage. Some of this can be orphan footage.

that 0.25% of its holdings are orphan. It estimates that it could increase its earnings by between 2 and 5% if it were able to exploit its orphan footage commercially. This is typical. However the Huntley Archive has as much as 20% of orphan holdings.

- 8) A contributory reason for the relatively small proportion of orphan holdings is that the term of copyright protection for older films is significantly shorter than the current term. Therefore proportionately more older film footage is in the public domain than are older books or artistic works. (Underlying rights, such as music which a film contains, may have a longer term of protection.)
- 9) It is important to 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). All businesses involve risk, including media businesses. Media production businesses and collective rights organisations build rights-related risk into their business models, and have long operated "await claim" budgets. Intellectual property rights are property rights, and providing a legislative solution for orphan works should not be confused with using legislation to shift the balance of business risk to disadvantage ascertainable right holders.
- 10) The Impact Assessment about orphan works (at p.3) states, "Hargreaves suggests that the annual cost to the BBC and British Library to clear its archives would be £320m per annum over ten years. This is because tracing the rightful owners of the various rights in order to obtain permissions is time-consuming and therefore expensive. From its Archive Trial, the BBC found that checking 1,000 hours of factual programming (which is less complex than drama/comedy) for rights implications cost them 6,500 person hours." The issue here is not in the first instance orphan works: the rights in the archive programmes need to be cleared because the BBC did not obtain the rights when the programmes were made (e.g. because only limited rights are customarily bought in the first instance; in older programmes perhaps because Internet rights had not been legislated). Many of the rights in question are not orphan: the owners are in the programme records and further rights can be

This has come about because of original distribution patterns. All archives (public and private) acquire from multiple sources - other film collections, amateurs, projectionists, film makers - who ever will be able to take them in. News archives acquire from the multiple news feeds.

When a film is made and edited, those elements are probably stored at a film laboratory. As they go out of business, the negatives are usually thrown away. So often the only surviving film elements are positives (most archive have 90% positives and 10% negatives).

From the 1910s through to the 1970s before the days of mass television watching – especially VCRs and DVDs - educational institutions, industry, groups, clubs, film societies, the WI, religious clubs, works committees, working men's clubs watched films and documentaries. In addition, newsreels were shown in all cinemas. Wide distribution opportunities which have now totally disappeared once existed to supply and service all these distribution needs.

So while the original film producer and the film itself in its negative form have probably disappeared, distribution copies which were sent out to various outlets remain – sometimes many of them. This is one reason why many archives can hold copies of the same footage.

But this does not mean that all the archives which hold the copies also have the rights to the film – which have been transmitted in accordance with the provisions of copyright law, and may be owned or administered by a single archive. Some of these films can of course be orphan works.

cleared on request and payment. Some of the rights will be orphan, and a licensing system such as Canada's could issue licences for those rights on application. No evidence is given as to how much of the £320m the availability of orphan licences would save. As each orphan licence would involve carrying out or paying for a diligent search, which the BBC carries out anyhow ("tracing the rightful owners of the various rights in order to obtain permissions") it seems unlikely that significant or any savings could be achieved specifically in relation to orphan works.

What would you like to do with orphan works under a scheme to authorise use of individual orphan works?

- 1) Orphan footage could be exploited in the same way as footage whose right holders are known. Once again, we emphasise that this is not the same thing as exploiting rights which a user could clear but does not wish to have to.

2 *Please provide any estimates for the cost of storing and preserving works that you may not be able to use because they are/could be orphan works. Please explain how you arrived at these estimates.*

- 1) We do not have this figure.
- 2) Archives preserving and digitising footage which they will be able to license, in order to recover the costs.

3 *Please describe any experiences you have of using orphan works (perhaps abroad). What worked well and what could be improved? What was the end result? What lessons are there for the UK?*

- 1) The documentary for which orphan archive footage was licensed in Canada had strictly local appeal, to be exploited in Canada only (the licence was for the reproduction and incorporation of a film clip from "A New World in the Yukon").
- 2) An orphan work licence from CIPO can only cover use in Canada. Digital productions of any size are only commercially viable if distributed internationally. Co-productions, often international, are also common. Therefore although Canada has one of the world's most vibrant documentary industries, a CIPO orphan work licence is of little practical use to the audiovisual industry.

4 *What do you consider are the constraints on the UK authorising the use of UK orphan works outside the UK? How advantageous would it be for the UK to authorise the use of such works outside the UK?*

- 1) Meaningful authorisation to use orphan works must *inter alia* remove the user's liability for infringement. It does not seem possible for the UK to legislate against infringement by an act committed in another jurisdiction, e.g. where an orphan work is made available outside the UK. A scheme could require non government organisations (such as collecting societies) to indemnify users of orphan works: indemnities to cover potential infringement claims worldwide would be beyond the means of all but the very biggest organisations.
- 2) In the audiovisual field it would be advantageous for the UK to authorise the use of orphan works outside the UK because productions of any size are only commercially viable if they can be exploited worldwide. Many are international co-productions.

5 *What do you consider are the constraints on the UK authorising the use of orphan works in the possession of an organisation/individual in the UK but appearing to originate from outside the UK:*

a) for use in the UK only

- 1) There is a practical constraint: the search for the foreign right owner may be more difficult and more time consuming (language barrier, different business practices) and less thorough (ignorance of local resources, lack of local knowledge) which may lead to works being wrongly considered orphan, thus increasing the risk of claims for infringement.
- 2) There is also a legal restraint: traditional legal interpretation would have said that the UK's countries' courts are exclusively entitled to apply UK law in relation to copyright restricted acts carried out within the countries of their jurisdiction within the UK – accordingly a foreign right owner would need to sue for infringement in a UK court, which would apply the UK orphan rights provision and find in favour of the UK lawful user. However, national courts are increasingly assuming cross-border copyright jurisdiction, especially in relation to Internet use where the effect of the act done in the UK is felt in the foreign country.

e.g. *Pirate Bay Sweden's Högsta Domstol*, Mål nr Ö 5095-09, 12 May 2010, *Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Internet Providers* 2004 SCC 45 ("Tariff 22"), *National Football League v TV Radio Now Corp. d/b/a iCraveTV* No. 00-121 (W.D. Pa. filed Jan. 20, 2000) settled Jan. 28, 2000 53 U.S.P.Q. 2d 1831, *Twentieth Century Fox Film Corp. v iCraveTV* No 00-121 (W.D. Pa. filed Jan. 20, 2000) (iCraveTV), *Cannan Communications, Inc. v. Prime Time 24 Joint Venture* (N.D. Texas); *CBS, Inc. et al. v. Prime Time 24 Joint Venture* (S.D. Fla.); *ABC, Inc. v. Prime Time 24 Joint Venture* (M.D. N.C.); *National Football League v. Prime Time 24 Joint Venture* 24 211 F.3d 10 (2d Cir. 2000) (Prime Time 24), *United States of America v Elcom Ltd a/k/a ElcomSoft Co. Ltd and Dmitry Sklyarov* (Northern District of California, San Jose Division No. CR 01-20138 RMW).
- 3) Therefore it seems likely that a foreign right owner could obtain judgment in some foreign courts (without, or with different orphan works legislation) in respect of acts committed in the UK (covered only by the UK's orphan works provisions). Perhaps a UK court might be persuaded not to enforce such a judgment, as not being available in the UK. Nevertheless, it seems likely that the defendant could face sanctions in the country of judgment, and in the case of criminal copyright sanctions perhaps extradition from the UK to that country, e.g. under a European arrest warrant or under an extradition treaty.

b) for use outside the UK?

How advantageous would it be for the UK to authorise the use of such works in the UK and elsewhere?

- 4) The same issue as in question 4 above – except that here the right holder complaining of infringement in the foreign country would be a national or resident of the foreign country, rather than of the UK.
- 5) In either case, the decisive factor in persuading the foreign court to be seized of the infringement action is likely to be that the harm was suffered in its jurisdiction, rather than the nationality or domicile of the claimant.
- 6) In relation to treatment of orphan works in general, but particularly in relation to cross-border issues, the government should implement provisions which are consistent with the European Commission's current orphan works policies (such as Europeana's Memorandum of Understanding on orphan works).

6

If the UK scheme to authorise the use of orphan works does not include provision for circumstances when copyright status is unclear, what proportion of works in your sector (please specify) do you estimate would remain unusable? Would you prefer the UK scheme to cover these works? Please give reasons for your answer.

- 1) If (as seems likely) a UK scheme could only effectively cover exploitation in the UK, most commercial archives would generally not find it practical to digitise and provide metadata etc. for orphan footage, as the investment required could not be covered by UK-only exploitation.

7

If the UK's orphan works' scheme only included published/broadcast work what proportion of orphan works do you estimate would remain unusable? If the scheme was limited to published/broadcast works how would you define these terms?

- 1) Whether the work has been published or broadcast or not should be a factor which the licensing organisation takes into account when deciding whether to grant a licence, on a case by case basis.
- 2) A legal definition of "published" in respect of older films is difficult. Most archives take the pragmatic view that professional productions have been published unless that is clearly not the case, but that rushes and amateur footage have not been published.

8

What would be the pros and cons of limiting the term of copyright in unpublished and in anonymous and in pseudonymous literary, dramatic and musical works to the life of the author plus 70 years or to 70 years from the date of creation, rather than to 2039 at the earliest?

- 1) The current provisions for use of anonymous and pseudonymous literary, dramatic and musical or artistic works (section 57 CDPA) enable such works to be used commercially whilst preserving the rights of an author who may be identified later, in a way analogous to Article 7 of The Copyright and Performances (Application to Other Countries) Order 2005 (SI 2005 No. 852) (“springing copyrights” when a foreign country is added to the Schedule – a pragmatic balance between the investment made by someone who has exploited a work in the public domain and the author’s newly acquired UK right).
- 2) Similar provisions relating to use of works could apply to the use of orphan works in the UK.
- 3) There seems no practical reason to make further changes.
- 4) On the other hand, providing 70 years’ protection from creation seems impractical. Date of creation – as opposed to publication – would often be unknown, especially when an author is not available. Change to the term of protection if an author appeared, and the term thus became life + 70 years p.m.a., would be confusing. The change would seem to introduce complication and uncertainty for no advantage in view of the existing provision.

9

In your view, what would be the effects of limiting an orphan works’ provision to non-commercial uses? How would this affect the Government’s agenda for economic growth?

- 1) Genuinely non-commercial uses would presumably not produce commercial revenue. This does not mean that they would not contribute to economic growth, as digitisation and other technical resources would be needed and would need to be funded and paid for, in order to make the orphan content available for non-commercial digital users.
- 2) As explained above, making genuine orphan archive footage commercially available is not likely to increase the overall archive sales revenues significantly (the Canadian example, and the relatively small amount of archive holdings which are truly orphan). Non-commercial uses would increase revenues that much less.

10

Please provide any evidence you have about the potential effects of introducing an orphan works provision on competition in particular markets. Which works are substitutable and which are not (depending on circumstances of use)?

- 1) In 11 we recommend that administration costs of an orphan work licence (including diligent search) should be paid for by the licensee. This cost would

be in addition to the licence fee (kept in escrow for the missing right owner) and technical costs (the footage is unlikely to be digitised, as archives do not digitise footage which they cannot license).

- 2) Therefore the cost to the user of licensing orphan footage is likely to be higher than that of equivalent non-orphan footage.
- 3) (N.B. this answer applies to “use of individual orphan works alone” (question 1). ECL applied to orphan works would have a significant depressive effect on the market. We deal with this below.)

11

Who should authorise use of orphan works and why? What costs would be involved and how should they be funded?

- 1) A licensing organisation must have sufficient expertise and knowledge of the particular market, *inter alia* to
 - conduct the diligent search, or judge effectively whether the diligent search has been conducted adequately
 - apply other media- and market-relevant factors in deciding whether or not to grant a licence (e.g. the nature of the work, the nature of the proposed use)
 - ensure that the licence fee is paid to the right archive (many different archives and other organisations often hold copies of the same footage)
 - set an appropriate price taking account of all relevant factors (including consulting the archive about technical costs which must be covered, such as digitisation where needed and delivery costs)
 - have a system in place to deal with many copies of archive footage held by different bodies.
- 2) Self evidently, the authorising organisation should not be an organisation which itself holds and exploits archive footage. This would produce an unacceptable conflict of interest, regardless of whether the organisation were privately or publicly funded. The BFI has said that it would like to undertake this task. As it is the state-funded holder and exploiter of one of the country’s largest collections of audiovisual material, rights in most of which are owned by others, the majority of FOCAL members have said that this would not be appropriate.
- 3) In the case of archive footage, FOCAL could undertake this task. Alternately, if the government/IPO were to undertake this task, FOCAL could provide the necessary expertise and experience to cover the issues mentioned above.

- 4) Unless a policy decision is taken that the authorisation should be carried out by the IPO and funded by the state/taxation, the applicant for an orphan license should fund the costs of the application, including the licence fee. It is not right that known right holders or their organisation should fund the issuing of orphan licences: they are not responsible for the fact that a licensee wants to use content whose author is missing.

12 *In your view what should constitute a diligent search? Should there be mandatory elements and if so what and why?*

- 1) Clearing rights is a common task in film and similar productions, carried out by archive film researchers.
- 2) The requirements are no different for an orphan work.
- 3) FOCAL can provide a check list of what is required for a diligent archive film rights clearance specific to the industry, consistent with Europeana principles.

13 *Do you see merit in the authorising body offering a service to conduct diligent searches? Why/why not?*

- 1) An organisation with expertise in the field should either carry out the search or certify that the search has been properly carried out by the applicant. (The latter happens in Canada. The former is likely to be cheaper for the applicant – an expert will be efficient and thorough, whilst an inexperienced applicant may be sent back to perform further searches.)
- 2) If the authorising body doesn't have the expertise in the particular specialised field, it should subcontract an expert organisation.

14 *Are there circumstances in which you think that a diligent search could be dispensed with for the licensing of individual orphan works, such as by publishing an awaiting claim list on a central, public database?*

- 1) We are strongly opposed to dispensing with a diligent search.
- 2) Archives' experience during recent years has been of a steep increase of use of footage without consent/rights clearance. Archive footage is often available from sources other than the right holder, including other productions in which it has been used and even YouTube. Users increasingly simply credit footage as "YouTube" because they have seen it there.
- 3) Uploaders to YouTube and other online platforms often first remove the metadata from the footage.

- 4) Most archive footage right holders are not difficult to find and legitimate footage is not hard to buy: FOCAL offers a web-based service, from which users can obtain guidance, services of expert researchers, and websites of archives from which they can make web-based purchases.
- 5) Providing a public await claim list on the other hand will be an invitation for unscrupulous producers to use footage without making a diligent search or attempting to pay the licence fee up front – it will produce a *de facto* compulsory licence, use now and pay later (if you are spotted).

15

Once a work is on an orphan works registry, following a diligent search, to what extent can that search be relied upon for further uses? Would this vary according to the type of work, the type of use etc? If so, why?

- 1) A search should not be relied on absolutely. At least some level of further search should be conducted before issuing another licence. A work is orphan only because the author cannot be found - it's not a case of once an orphan work, always an orphan work. For example, an author could turn up after the earlier search, yet not make himself known being unaware of the earlier licence.
- 2) A search will be conducted with the prospective use in mind. It may not be reliable for a different use. This would be the case for example regarding territorial licences, if the UK provision envisages the issue of orphan licences for foreign works, or for use of works abroad.
- 3) The licensing body should have the expertise in the specialised field to judge the extent of the search needed in the circumstances: a previous search would be a factor which it would take into account when determining what constitutes a diligent search in respect of the application before it.
- 4) A registry which was decisive of orphan status (analogous with entry in the register at Stationers' Hall in past times or under the 1909 U.S. Copyright Act) would contravene Article 5(2) of the Berne Convention.

16

Are there circumstances in which market rate remuneration would not be appropriate? If so, why?

- 1) The licensee should be required to bear the cost of issuing the licence (including the licensing organisation's costs, and the cost of the diligent search whoever conducts it) as well as the technical costs of supplying the content and the fees for the rights (including the await claim amount for the missing right holder).
- 2) It seems likely that this would be dearer than the cost of a licence for archive footage which is digitised, rights-cleared, and ready and available for instant online sale. The extra cost should be borne by the user who wants the footage.

17

How should the authorising body determine what a market rate is for any particular work and use (if the upfront payment system is introduced)?

- 1) Some costs are actual (e.g. technical delivery costs).
- 2) The footage will be owned by an archive. It seems reasonable that the archive should set the price, as it does of all its other footage. The market rate of footage varies between less than £500 per minute to more than £10,000 per minute depending on the archive and other factors such as purpose of the use and territories, media and duration of exploitation.
- 3) The archive should be obliged to demonstrate to a right owner who later claimed payment that the price was in line with the archive's usual pricing policy.
- 4) The licensing body (or its expert subcontractor) should be notified of orphan sales, to ensure that orphan prices are not distorting the market.
- 5) We think this arrangement would be practical, and would avoid competition law problems arising from setting an industry-wide standard "orphan price."

18

Do you favour an upfront payment system with an escrow account or a delayed payment system if and when a revenant copyright holder appears? Why?

- 1) Payment for orphan footage would need to be upfront, with an escrow account for the part of the payment attributable to orphan rights.
- 2) Footage archives incur costs in digitising and providing metadata to analogue content, and also costs in delivering content to a licensee. These technical costs must be paid for if the footage is to be supplied.
- 3) It would be impractical to make two charges for orphan footage: a technical charge on delivery, and a rights-related charge later on if a right owner appears. (For example, a film production team would have been disbanded and the budget signed off.)
- 4) Film contains rights other than those of the owner(s) of the copyright in the film - such as script, music, actors. Any of these rights can be orphan, whilst the other right holders are known and (depending on the contracts) may need to be paid when the archive makes the sale. It would be impractical to make a charge for the known right holders on delivery, and a further charge later on if the missing right holder(s) appear.

What are your views about attribution in relation to use of orphan works?

- 1) All the same rules and conventions must apply as to analogous uses of non-orphan works.
- 2) One of the main aims of a legislative orphan works solution must be not to prejudice the rights of an author who subsequently appears more than is absolutely necessary for the use of the work in the author's absence.
- 3) Some uses of orphan works may continue after an author has reappeared. The absent author was not present when the orphan licence was granted, to negotiate terms of attribution.
- 4) In that situation, the author should be entitled to the same kind of attribution as an equivalent author who was able to negotiate a licence.
- 5) Many film production contracts require waiver of moral rights (which means that the right of paternity is not asserted, see section 78 CDPA). Commercially, those entering such contracts often have the choice of waiving their moral rights or not entering into the contract. An archive which owns orphan footage must be able to decide whether or not to waive moral rights, and consequently whether or not to supply the footage.
- 6) There can be good reasons for not waiving moral rights or not supplying footage (e.g. use of concentration camp or other war atrocity footage, footage featuring individuals for use in an unsuitable context such as political, smoking, gambling). An archive which owns such orphan footage must be able to refuse to waive moral rights or to supply the footage.
- 7) Some "sensitive" footage as described in paragraph 6 does not have moral rights (because it is too old) or the archive does not control them. In such cases, the archive must be able to include binding contractual terms of use in its licence.
- 8) The licensing body must take account of ownership of footage, and only grant orphan work licences to footage owners.
- 9) As explained elsewhere (in footnote 1 on page 2), often many copies of footage are extant, in the possession of different organisations and available from many sources. Such footage can only be legitimately used with the right holder's licence. A provision for use of orphan archive footage must reflect this.

20

What are your views about protecting the owners of moral rights in orphan works from derogatory treatment?

- 1) What has been stated in 19 about the right of paternity applies equally to the right of integrity.

21

What are your views about what a user of orphan works can do with that work in terms of duration of the authorisation?

- 1) Archive footage is licensed for varying periods for use in various media. Some footage can be licensed for worldwide use in all media for ever. However, the obvious commercial desire (including of archives themselves) to exploit footage for the maximum possible time, territories and media in the digital media's potential worldwide reach is sometimes limited by factors such as: an archive may be administering footage under a licence for a limited period, rights may only be available for certain territories.
- 2) The same factors apply to orphan footage.
- 3) Where one right holder of many cannot be found, the terms of the orphan licence must correspond to the terms of the licence derived from the known authors' rights.
- 4) In rare circumstances where footage is entirely orphan, the archive which owns it will be best placed to judge what is appropriate, by comparison with similar non-orphan footage held and exploited.

EXTENDED COLLECTIVE LICENSING

Summary

- 1) Archive footage is not licensed collectively, and is not suitable for collective licensing.*
- 2) If collective licensing were introduced and extended, the great majority of footage archives would withdraw their rights ("opt out") so ECL would in practice be unworkable in the sector.
- 3) Introduction of ECL would result in less income for footage archives: the licensing organisation would deduct commission, standard pricing and the length of time before an archive receives payment via a collecting society would negatively impact the sector's economy – resulting in less income available for investment in continued digitisation, preservation, metadata management, etc.
- 4) Footage archives have been – and are – investing large amounts in digital licensing solutions, enabling individual web-based transactional licensing and delivery worldwide. This is the thinking behind the DCE, which we support. Introduction of collective licensing would be a retrograde and anti-digital step – as well as reducing archives' income available for digital investment.
- 5) Some holders of large audiovisual collections assert that ECL is essential where the rights are known, but require permission for use. Contractual solutions are currently being negotiated for specific current situations. In the longer term, the solution for the digital economy must be digital-technological-transactional. Archives are already a successful part of this market, and are investing heavily to participate more fully.
- 6) In view of the unsuitability of collective licensing to archive footage, the industry will not adopt it voluntarily. Therefore, the only way in which ECL could be introduced into the sector would be by way of extended *compulsory* licence (if that were permissible under the UK's current international obligations).
- 7) Compulsory introduction of collective licensing (whether extended or not) would be contrary to Article 5,5 of Directive 2001/29/EC and Article 5(2) of the Berne Convention, in that the right holder's normal exploitation is by licensing his exclusive rights, and compulsory licensing would deprive the right holder of the right to dispose of his property in this way, as well as depriving him of legal remedies accorded to an exclusive right holder.
- 8) To the extent that a right holder was not able to withdraw from an extended collective licence (e.g. through not being able to withdraw retrospectively if his work had been used without his knowledge of the licence) he would be deprived of his fundamental human right to peaceful enjoyment of his possessions under Article 1, protocol 1 of the ECHR, under which "possessions" include copyright (see *Bălan v Moldova* [2009] E.C.D.R. 6).
- 9) In Nordic countries *each individual ECL contract* must be approved by the government, which publishes detailed reasons in each case. Nothing less should be accepted if ECL

is introduced into the UK – especially if (as seems to be proposed at the date of writing) the permitted scope of UK ECL is to be wider than Nordic ECL.

- 10) UK extended licensing organisations and their licensees will be highly exposed to potential foreign infringement claims, if ECLs license primary exploitation of audiovisual material. A UK ECL law would not be able to protect a UK licensing organisation against a claim of assisting or authorising infringement, and its licensee from a claim of infringement, brought by a foreign right owner in a range of circumstances. It seems unlikely that the government would put up a big enough financial indemnity to cover UK licensing organisations' and their licensees' risks. This appears to be implicitly recognised in the consultation impact assessment's statement (at p.1) that amendment to copyright legislation would "require agreement on the European and international fronts."

* There is a very small collective income under section 35 DCPA.

The consultation questions

22 *What aspects of the current collective licensing system work well for users and rights holders and what are the areas for improvement? Please give reasons for your answers.*

- 1) Archive footage is not licensed collectively.
- 2) Archive footage is licensed transactionally, including by web-based licensing and delivery. This is efficient, cost-effective and transparent.
- 3) The great majority of footage archives have told us that they do not wish to introduce collective licensing.
- 4) We are aware of proposals that Extended Collective Licensing should be introduced for licensing of archive footage. ECL is an extension of collective licensing – i.e. collective licensing extended in such a way that that rights which have not been granted to the collecting society can be licensed along with rights which the collecting society holds, unless those who have not granted their rights to the collecting society withdraw their rights ("opt out").
- 5) Collective licensing is not suitable for archive footage, because:
 - many organisations hold copies of each others' footage, "raw" and incorporated in productions, but only the right owner should be entitled to decide whether or not to license it, and the licence terms (including fee)
 - sometimes archives hold others' footage under agreements, e.g. to conserve it, to digitise it, to exploit it – in which case there is a direct contractual relationship
 - licensing is increasingly digitised, made from easy-to-use right holder-facing interfaces, but transactions are individual and not standardised (unlike the typical collecting society licensing functions) – archives invest large amounts in improving the data available to prospective licensees, developing better

websites, upgrading the storage and preservation of their collections, and bringing subject matter into more detailed and user-friendly groupings

- not all archive footage has the same value – prices range from less than £500 per minute to more than £20,000 per minute depending on the archive and other factors such as purpose of the use and territories, media and duration of exploitation – all easily managed in transactional licensing (including web-based) but not by collective rate card
 - creating industry-standard ratecards for collective licensing would present competition law problems
 - introducing collective licensing would be a retrograde “anti-digital” move in this sector, because licensing is transaction-based increasingly with web-based solutions - in which users have access to simple mechanisms to obtain licences and pay for their exact use, whilst right holders receive immediate payment – appropriate for the digital market. Introducing ECL would be a disincentive to continue investing in these solutions.
- 6) Data about the small amount of income which FOCAL receives collectively (approx.. £70,000 p.a. under section 35 CDPA) is insufficiently granular to enable it to be attributed to the corresponding right owners.
- 7) If collective licensing were made legally obligatory in the archive footage industry (the industry will not adopt it voluntarily), *extending* collective licensing would in itself be unsuitable for footage sales. Archives’ experience during recent years has been of a steep increase of use of footage without consent/rights clearance. The exceptions to copyright are increasingly abused where the use is commercial and payment should be made (this is explained further below). Sometimes the fact that a use is digital is seen as an entitlement to exploit copyright content without checking and clearing rights *and* without the associated business risk of being sued for infringement. Because archive footage is often available from sources other than the right owner, extending a collective licensing system (if there were one) would encourage this trend, in effect providing a *de facto* compulsory licence, giving users the risk-free right to exploit now and pay later (if they are spotted).
- 8) All but a very few archives have said that if ECL is introduced, they will withdraw their rights from it. For example, British Pathé archive have said that if ECL is introduced, “On day one we would send a listing of our 95,000 films and 11 million still photographs and tell them we are opting out for all our content.” (The exceptions are a few repositories of much content, in which they do not control a significant proportion of rights in the content which they hold.) This would make ECL inoperable in practice.
- 9) Probably the largest holder of archive footage in the UK is the BBC, which holds archive footage of others which it has licensed for use in its programmes. The BBC wrote (in its response to the Hargreaves Review, pp. 5ff.) about the difficulty and cost of clearing digital rights in its historic programmes. However, this is not applicable to the vast majority of third party archive footage included BBC programmes:
- Partly because of the way it licenses rights when it initially licenses the footage (e.g. only for limited UK broadcasts), partly because of legislative changes (e.g. introduction of performers’ rights retroactively, introduction of

the Internet distribution right) it must license further rights from right owners (including archives) to exploit much of its archive digitally.

- In relation to archive footage, licensing further rights to re-use a programme containing clips is not a new or difficult issue: the BBC has always licensed archive footage in this way, and its own programme data obviously identify the archive footage used. As explained above licensing is increasingly transaction based and streamlined.
 - The BBC and FOCAL members are currently negotiating standard contract terms which will facilitate re-licensing.
 - The difficulties of tracing relatives of dead actors and such like do not apply to footage archives; and where ownership of a catalogue may have changed, the archive or FOCAL can nearly always provide the necessary information.
- 10) Therefore a collective licensing solution is unsuitable and unnecessary – without which an extended collective licence is not applicable.
- 11) FOCAL is a member of the Educational Recording Agency and receives a small amount of income collectively (approx. £70,000 p.a.) under section 35 CDPA. FOCAL does not distribute this income because it does not receive data identifying the broadcasts which have been recorded. Therefore, with its members' agreement, FOCAL uses the income to further its members' collective interests at their direction. If broadcast data were available and the costs of distribution justified it, FOCAL would distribute this income to its members.

23

In the Impact Assessment which accompanies this consultation, it has been estimated that the efficiencies generated by ECL could reduce administrative costs within collecting societies by 2-5%. What level of cost savings do you think might be generated by the efficiency gains from ECL? What do you think the cost savings might be for businesses seeking to negotiate licences for content in comparison to the current system?

- 1) As mentioned above, archive sales are increasingly transaction-based - in which users have access to simple online mechanisms to obtain licences and pay for their exact use, whilst right holders receive immediate payment. This is in progress, involving considerable investment. It is expected that administrative costs will be reduced in time.
- 2) It is hoped that participation in a DCE could produce further efficiency savings.
- 3) In this context, introducing collective licensing into the archive footage industry would significantly increase operating costs (the costs of the collecting society) and reduce income to right owners (by the collecting society's commission and standardisation of licensing fees). There is no economic reason to make the

large investments which this kind of licensing would require. Revenue distribution is likely to be less accurate than individual transactional sales. Collective licensing would be a retrograde move away from the digital transactional licensing trends mentioned above.

- 4) Extending any such collective licensing would not reduce operating costs.
- 5) The archives are unanimous that enabling other organisations to exploit their archive footage would mean a loss of total income.
- 6) It would also destroy valuable ancillary markets for their archive footage.

24 *Should the savings be applied elsewhere e.g. to reduce the cost of a licence? Please provide reasons and evidence for your answers.*

- 1) If there were savings, they could be used to fund digitisation and preservation of more archive footage. This would result in more digitised content being available.

25 *The Government assumes in the impact assessment for these proposals that the cost of a licence will remain the same if a collecting society operates in extended mode. Do you think that increased repertoire could or should lead to an increase in the price of the licence? Please provide reasons for your answers.*

- 1) Nearly all archive footage sales are transaction-based, so this does not apply.
- 2) In the uncommon situation where there is a collective licence (such the payment under section 35 CDPA for educational off-air recording) the price of the licence and payment received by FOCAL from the licensing body should increase to reflect the extra repertoire licensed and extra right holders included by extending the collective licence.
- 3) After all, if the ECL is necessary, this must mean that there are more right holders whose works are being used, and who therefore need to be paid, than there are members of the licensing body.

26 *If you are a collecting society, can you say what proportion of rights holders you currently represent in your sector?*

- 1) FOCAL represents nearly every commercial archive footage library in the UK (and a large number abroad). Non-member UK commercial archives are very few, and represent a very small amount of archive footage.

27

Would your collecting society consider operating in extended licensing mode, and in which circumstances? If so, what benefits do you think it would offer to your members and to your licensees?

- 1) FOCAL will only operate ECL where collective licensing is already established (e.g. under section 35 CDPA) provided that appropriate safeguards are legislated.

28

If you do not intend to operate in extended licensing mode, can you say why?

- 1) Section 35 CDPA above applies only to broadcasts within the UK.
- 2) In relation to any wider ECL involving foreign rights, it seems unlikely that the government could offer adequate protection for the licensing organisation in relation to foreign right holders' claims. Adequate legal protection cannot be provided, and it seems unlikely that the government would offer an adequate financial indemnity:
 - An ECL requires a legal framework in which the licensing organisation is protected from claims for assisting or authorising infringement brought by right owners who have not granted rights, and whose works have been used when the right owners have not withdrawn their works from the licence.
 - Without this statutory protection, the licensing organisation would have significant exposure to claims for infringement.
 - With this statutory protection, a right owner has only a claim for remuneration, limited in time.
 - A UK ECL law would not be able to protect a UK licensing organisation against an infringement claim brought by a foreign right owner in a range of circumstances:
 - for example, for contributory or vicarious infringement of (say) US copyright, before a US court, in respect of an Internet use licensed in the UK by ECL but not in the USA whose copyright law has no ECL provisions. A US claim could include substantial statutory damages.
 - A UK defendant could currently be extradited to the USA before the US claim has been heard in court.
 - A US judgment could be enforced by the English court.

- Everything that has been said above also applies to the UK licensing organisation's licensee under an ECL. The licence is only valid because it has been "extended" to cover rights which are not held by the licensing organisation but which have not been withdrawn by the right owner. Therefore, under a foreign law without ECL provisions the licensing organisation has merely purported to license rights which it does not hold: the purported licensee is therefore an infringer.
 - Typical Nordic ECLs license activities covered by reciprocal agreements with foreign collecting societies which provide mutual indemnities, so foreign claims are unlikely. Also, the secondary acts of licensed use are typically not of high value.
 - However, if primary rights in audiovisual works were to be licensed in the UK by ECL without the benefit of reciprocal contractual indemnities with foreign organisations (because there are no such organisations operating in this sphere) UK licensing organisations will be highly exposed to potential foreign infringement claims.
- 3) The European Commission has stated that it is opposed to wider application of ECL: specifically, collecting societies must have right holders' mandates. It has also warned against the use of ECL cross-border (in a speech given by Maria Martin Prat, Head of Unit "Copyright", Intellectual Property Directorate, Internal Market and Services DG, European Commission at Upphovsrätten utveckling in Stockholm on 2 December 2011).

29

Who else do you think might be affected by the introduction of extended collective licensing? What would the impact be on those parties? Please provide reasons and evidence to support your arguments.

- 1) Collective licensing is extremely limited in the audiovisual archive industry. Therefore the scope of extending it is also extremely limited.
- 2) The great majority of FOCAL members do not wish to see the use of collective licensing extended in the industry, and will not agree to participate in it. The industry is moving towards digital transactional licensing.

30

What criteria do you think should be used to demonstrate that a collecting society is "representative"? Please provide reasons for your answer.

- 1) ECL is an extension of existing voluntary collective licensing.
- 2) Therefore, the collecting society must demonstrate that it holds the relevant rights or agency mandates from the majority of the holders of the class(es) of rights which are to be licensed.
- 3) In the case of commercial footage archives:

- If the government legislates for the possibility that ECL can licence use of UK rights, the collecting society would need to demonstrate that it holds the relevant rights of the majority of UK commercial footage archives.
 - However, if the government legislates for the possibility that ECL can license use of UK and foreign rights, it would surely be necessary for the collecting society to show that it holds the relevant rights of the majority of commercial footage archives throughout the world. In the case of commercial footage archives, this would be difficult although probably not impossible. In the case of many other media, this would be impossible – for example, book or journal publishers, or music publishers.
- 4) This is less of an issue in the Nordic countries, because
- The populations – and number of relevant businesses – are very small indeed
 - The uses licensed under ECL are mostly exceptions to copyright (i.e. right holders are paid for them) or other restricted uses which cannot be managed individually.
- 5) Film is mostly excluded from ECL in the Nordic countries, under the provisions of their copyright laws.

31

Do you think that it is necessary for a collecting society to obtain the consent of its members to apply for an ECL authorisation? What should qualify as consent- for example, would the collecting society need to show that a simple majority of its members have agreed to the application being made?

- 1) A majority of members must agree to the application.
- 2) After all, an ECL is a contract, which the majority of members will have to agree before ECL can go ahead.
- 3) Where voluntary collective licensing is already operative for a specific licensing activity, the majority must agree to extend it.
- 4) Where no collective licensing operates, a majority of members would need to grant their rights voluntarily for collective licensing to be implemented, before it could be extended by majority agreement.
- 5) Where the extended licence is to provide payment for an exception to copyright and/or an activity which cannot be licensed individually (as in Nordic countries, where reprographic copying by businesses is by ECL) a simple majority of members should be enough.

- 6) Where the extended collective licence will license principal business activities which are usually conducted transactionally (such as footage sales, or re-licensing footage for further exploitation) a large majority – perhaps ¾ of members – should be required.

32 *Apart from securing the consent of its members and showing that it is representative, are there other criteria that you think a collecting society should meet before it can approach the Government for an ECL authorisation? Please give reasons for your answer.*

- 1) All the criteria concerning transparency, good governance, etc. dealt with below must be met.

33 *When, if ever, would a collecting society have reasonable grounds to treat members and non-member rights holders differently? Please give reasons and provide evidence to support your response.*

- 1) In the Nordic countries, a non-member is always entitled to payment – even where members have agreed not to receive individual payment but to put the funds to another mutually beneficial use. This seems fair, and should be introduced in the UK, too, in the event that ECL is introduced at all.

34 *Do you have any specific concerns about any additional powers that could accrue to a collecting society under an ECL scheme? If so, please say what these are and what checks and balances you think are necessary to counter them? Please also give reasons and evidence for your concerns.*

- 1) An archive (or other organisation) which holds and/or exploits footage must not be able to operate as a collecting society offering ECL, because of the self evident danger of conflict of interest.
- 2) As stated above, many organisations – other archives and many other organisations and individuals - hold copies of a typical archive's footage, sometimes as "raw" footage and sometimes incorporated in productions. If such organisations wish to use the footage they hold for purposes other than the licensed use, they should be obliged to get the necessary licence from the right holder, and not license the footage through a collecting society. An archive must preserve its exclusive rights to protect its brand (including ensuring that its footage is not associated with party politics, alcohol, smoking, gambling, etc.) as well as the pricing of its footage.
- 3) The collecting society should be obliged to conduct a search and make appropriate enquiries before accepting a mandate to license footage from an archive. Mandates to the collecting society must be widely advertised (including on easily accessible websites) so that other archives can check on potential sales of their material under ECL, and notify the collecting society of their rights.

- 4) Subjecting archive footage to ECL would deprive an archive of its exclusive rights as a copyright owner, thus depriving it of an essential tool in commercialising its assets – including whether to sell the footage, at what price, for use in what context, etc. Just as movie producers legitimately exploit their films in windows to maximise returns, archives take commercial decisions about how their footage can best be exploited. ECL (or indeed CL) would remove this important commercial tool – which, conferred as it is by copyright law is also a property right.
- 5) Where archives administer others' footage, their contracts often contain restrictions on the period during which the footage may be licensed, and other restrictions. Such provisions could not be observed or enforced under ECL.
- 6) Collecting societies must not be authorised to grant ECLs in respect of works which are in the public domain. There is no legal basis for issuing a copyright licence, and the collecting society has no other legal basis for contracting (for example, ownership of the film itself). In the case of unpublished material, such a licence would potentially conflict with rights conferred under SI 1996/2967.
- 7) As explained above, experience suggests that ECL would be likely to lead to copyright abuse – use now and hope not to pay later.
- 8) As also explained, the great majority of footage archives would not grant their rights to a collecting society, and would opt out of ECL.

35

Are there any other conditions you think a collecting society should commit to adhering to or other factors which the Government should be required to consider, before an ECL authorisation could be granted? Please say what these additional conditions would help achieve?

- 1) We are very concerned that a UK ECL legal provision will apparently not define the specific kinds of licensing/uses of works for which ECL may be used.
- 2) Only in the Nordic countries is ECL significantly used, as far as we are aware. In those countries, the kinds of uses which an ECL may license are strictly defined, either by law or in limited circumstances by reasoned decisions of the legal authority (e.g. the Danish Ministry of Culture). If ECL is introduced into the UK, similar oversight must be exercised: a collecting society should not be entitled to negotiate and agree an ECL with licensors without government approval.
- 3) Further, the kind of permitted licensed uses must be clearly defined in statute. Neither Article 5,5 of Directive 2001/29/EC and Article 9(2) of the Berne Convention (the Berne 3-step test) nor the provisions of Berne on compulsory licences allow provision for an ECL which can license any kind of exploitation of the author's exclusive rights as mandated by the Berne minimum standards. It is sometimes said that the "general" ECL provision introduced into the Danish copyright law in 2008 (article 50(2) of the copyright law of 2010) allows any kind

of ECL: this is simply not the case. It allows individual ECLs to be granted in clearly specified and restricted circumstances.

36 *What are the best ways of ensuring that non-member rights holders are made aware of the introduction of an ECL scheme and that as many as possible have the opportunity to opt out, should they wish to?*

- 1) Extensive advertising in trade and general press, radio and TV publicity campaigns, notification of relevant trade and professional bodies would be a minimum.
- 2) In particular, a long lead time would be required.
- 3) Notification of foreign right holders (including UK national right holders resident abroad) would be especially problematic.

37 *What type of collecting society should be required to advertise in national media? For example, should it need to be a certain size, have a certain number of members, or collect a certain amount of money?*

- 1) Any collecting society which is authorised to operate ECL must be obliged to advertise as widely as possible.
- 2) It must be obliged to advertise at regular frequent intervals for a considerable period – at least a number of years. The concept of ECLs is entirely unknown in the UK, and the idea that an organisation can license one's exclusive rights without one's explicit licence, unless one withdraws, is totally alien to the UK and the copyright world – with the exception of a population smaller than the home counties, concerning media until recently almost exclusively in minority languages.
- 3) The introduction of ECL into the UK – one of the world leading media hubs in the world's most widely used language – would be an extraordinary revolution.
- 4) If ECL were to permit use of foreign works, in the UK only or abroad too, advertisement would have to be worldwide, to try and avoid international consequences for the UK.

38 *What would you suggest are the least onerous ways for a rights holder to opt out of a proposed extended licensing scheme?*

- 1) A right *holder* (as suggested by your question) must be able to opt out, on behalf of the right owner, being the party entrusted with the administration of the right.

- 2) The right owner must also be able to opt out.

- 3) It must be possible for a right holder to opt out in respect of:
 - all rights in all works which it controls: it would be unreasonably onerous for a large right holder to opt out in respect of every individual work

 - reasonably identified groups or classes of works or rights

 - individual works or rights.

- 4) As in the Nordic countries, a right holder's notice of withdrawal served on either party to the extended collective licence (the collecting society or a user) must be sufficient. Each party must have the obligation to notify the other of a withdrawal notice.

- 5) A simple website process must be available to right holders, but any reasonable written or emailed notice must be accepted.

- 6) The opt out process must be effective and effectively policed.

- 7) Accurately identifying opted out works would be difficult in the case of some kinds of right holders - such as large news archives, which hold millions of items, especially where copies of footage are also held in many collections. A book is readily identifiable by its ISBN number, whereas footage metadata is only readable by and intelligible to a professional.

- 8) If ECL is to permit licensing of foreign works, the opt out arrangements must be advertised widely internationally. We suppose that web-based withdrawal would be the only practical possibility, although any reasonable written or emailed notice would have to be accepted.

39

Should a collecting society be required to show that it has taken account of all opt out notifications? If so, how should it do so? Please provide reasons for your answers.

- 1) Yes.

- 2) At least on a readily accessible and well advertised website. Telephone enquiries should also be accepted.

- 3) Perhaps except where ECL provides a payment for an act which is strictly an exception to copyright (which the right holder is therefore not entitled to prevent), ECL is a serious incursion into a right holder's exclusive rights.

- 4) Therefore a right holder must be able to know clearly and easily that his opt out is being properly observed.
- 5) A user must be able to know that it can't use a withdrawn work clearly and easily – otherwise it is in danger of infringing copyright. Convenience of some licensees must not increase another licensee's risk of infringement.

40

Are there any groups of rights-holders who are at a higher risk of not receiving information about the introduction of an ECL scheme, or for whom the opt-out process may be more difficult? What steps could be taken to alleviate these risks?

- 1) Overseas right holders are particularly at risk, if ECL allows foreign works to be used.
- 2) In the Nordic context, historically ECL has been used in very limited circumstances where national users and right holders are relatively few, and the system has been in use for many years and is well known, in the situations where it is allowed.
- 3) There is some “overspill” – e.g. between Nordic CMOs relying on “rights” under ECLs to license their foreign counterpart CMOs, and Nordic CMOs permitting use of foreign rights under ECLs which their licensing CMOs do not have. But Nordic content and languages are almost *de minimis* in world terms, so these issues are in practice ignored. They would become significant issues if ECL were used on a wider scale.
- 4) If ECL is introduced for wider licensed uses in the UK, especially digital uses, English-language media being widespread and originating and being exploited throughout the Internet, notifying foreign right holders about UK ECLs would seem highly problematic. The more so, as ECLs are unknown in large parts of the English-language media consuming world, such as the USA and India.
- 5) It seems problematic for an author from a remote part of the USA or India (for example) to be expected to opt out of a UK system of which she is not aware and of which she has no experience.
- 6) The risk could be avoided by applying ECL only to UK rights licensed for use in the UK. In the audiovisual industry generally the resulting licence would unlikely to be of any commercial use or able to promote economic growth.

41

What measures should a collecting society take to find a non-member or missing rights owner after the distribution notice fails to bring them forward?

- 1) Widest possible advertisement – national (and if relevant as above international) advertising would be needed, at least in the first years of the arrangement.
- 2) As this kind of arrangement is unknown in the UK, a long lead time would be required before introduction.

42

How long should a collecting society allow for a non-member rights holder to come forward?

- 1) The Nordic countries have 3 years – but there the system is well established and well known by the relatively small number of potential beneficiaries, who are also made aware of their entitlement by unions.
- 2) As the system would be unknown in the UK, and most especially if it could be used to license more significant rights than the Nordic ECLs, then initially monies must be held for considerably longer than 3 years. We would suggest at least the civil limitation period of 6 years. Perhaps this could be reduced over time, though we do not see why it should be. This is supposed to be about ease of licensing, not avoiding paying copyright income.

43

Aside from retention by the collecting society or redistribution to other rights holders in the sector, in what other ways might unclaimed funds be used? Please state why you think so?

- 1) We assume that “aside from” means that these possibilities are excluded. We think that this is right, as copyright law should not give a collecting society or a right holder the property of another, for no reason other than introduction of a licensing system convenient for users.
- 2) Lack of transparency in handling of large amounts of collective income is one of the main concerns about collective licensing in general.
- 3) In the case of footage archives:
 - *Orphan* footage is owned by an archive, which makes the investment in making the footage available, including digitising and preserving it, and the technical costs of delivery in the medium and format required by the licensee. These costs should be paid to the archive.
 - ECL should not license footage where rights in footage are owned by an identifiable archive. The right owning archive will have invested in

digitisation, metadata, and all the other necessities of digital sales. Copyright law should not intervene and prevent it from recovering its investment by removing its exclusive rights. This would be a powerful incentive to archives to stop investing in digitising footage and modern web-based licensing and delivery solutions.

- 4) If there were any unclaimed finds they should be transparently identified and used accountably for an identified benefit of the class of right holders, the benefit being decided democratically by the right holders, where possible to the equal benefit of non-members and members of the collecting society.

COLLECTING SOCIETIES

Summary

- 1) Collective licensing of footage is non-existence in the audiovisual archive sector.
- 2) There is a very small collective income under section 35 CDPA which FOCAL administers.
- 3) FOCAL is authorised to administer any further collective income to which its members may become entitled.
- 4) FOCAL is committed to, and fully supports, the utmost transparency of collective administration.
- 5) FOCAL supports and would adopt any appropriate code of conduct.
- 6) Strict, detailed and fully transparent government regulation *and control* is required over any organisation operating ECL - especially because rights and money of non-members are administered.
- 7) In Nordic countries *each individual ECL contract* must be approved by the government, which publishes detailed reasons. Nothing less should be accepted if ECL is introduced into the UK – especially if (as seems to be proposed at the date of writing) the permitted scope of UK ECL is to be wider than Nordic ECL.

The consultation questions

44 *What do collecting societies do well under the current system? Who benefits from the way they operate? Please explain your response and provide evidence for it.*

- 1) Collective licensing in the footage archive industry is *de minimis*.

45 *What are the areas for improvement in the way that collecting societies operate at present? Who would benefit from these improvements, and what current costs (if any) could be avoided? Please give reasons and provide evidence for your response.*

- 1) FOCAL would like clear attribution of the collective income it receives on its members' behalf.

- 2) This would enable accurate and properly attributable payments to be made to right holders.

46 *Do you agree with the analysis contained in the impact assessment of the costs and benefits for collecting societies and their users? Are there additional costs and benefits which have not been included, or which you are able to quantify? Please provide reasons and evidence for your response.*

- 1) This is not relevant to FOCAL members, as collective licensing is *de minimis*.

47 *Who else do you think would be affected by a requirement for collecting societies to adhere to codes of conduct? What would the impact be on them? Please provide reasons and evidence for your response.*

48 *Is one year a sufficient period of time for collecting societies to put in place a code of conduct? Please provide reasons for why you agree or disagree? Please also provide evidence to show what a workable timeline would be?*

- 1) If FOCAL were to undertake collective licensing it would put a code of conduct in place before commencing activities.

49 *What other benefits or rewards could accrue to a collecting society for putting in place a voluntary code? Please provide evidence for your answer.*

- 1) The main benefits and rewards should accrue to the members in whose interests the collecting society is supposed to operate.
- 2) If FOCAL were to undertake collective licensing it would aim for utmost transparency to its members.

50 *In your view, does it make a difference whether there is a single code, one joint code, or several joint codes? Please give reasons for your answer.*

- 1) Different codes may be appropriate for different sizes of collecting society. Compliance with an elaborate code might be disproportionately costly for a small society, thus penalising the members through reduction of income receivable.

- 51 *Are there any other areas that you think should be covered in the minimum standards, or areas which you think should be excluded? Please give reasons for your response, including evidence of alternative means of securing protection in relation to any areas you propose should be excluded from the minimum standard.*
- 52 *Are there any additional undertakings that a collecting society should give with regard to its members and the manner in which it represents them? Should any of the proposed minimum standards about members be excluded? Please provide reasons and evidence to support your response*
- 53 *Are there any additional undertakings that a collecting society should give with regard to its licensees, or should any of the proposed minimum standards be excluded? Please give reasons and evidence for your response, included why you consider any standards which you propose should be excluded to be unnecessary.*
- 54 *Are there any additional expectations for licensees that should be set out by a collecting society in its code, or should any of those listed be excluded? Please give reasons why.*
- 55 *Are there any additional measures that a collecting society should put in place to ensure proper control of the conduct of its employees, agents, and representatives? Should any of the proposed standards be excluded? Please say what these are and provide evidence to support your response.*
- 56 *Are there any additional provisions that you believe would enhance the transparency of collecting societies? Should any of the proposed provisions be excluded? Please give reasons and evidence to support your response.*
- 1) Strict, detailed and fully transparent government regulation *and control* is required over any organisation operating ECL, especially because rights and money of non-members are administered. Any non-member must be able to access full details of money collected, money distributed, commission deducted, and any other uses of income attributable to his rights.

- 57 *Are there any other criteria that a collecting society should report against? Should any of the proposed criteria be excluded? Please give full reasons and evidence for your answer, describing what impact it would have and on whom.*
- 58 *Are these criteria sufficient for the creation of a complaints procedure that is regarded as fair and reasonable by the members and users of collecting societies? Should any proposed criteria be excluded? Please provide reasons and evidence to support your response.*
- 59 *Please indicate whether you think a joint ombudsman or individual ombudsmen would work better. Please say why you would prefer one over the other?*
- 60 *Is the ombudsman the right person to review the codes of conduct? Please give reasons for your answer, and propose alternatives if think the ombudsman is not best placed to be the code reviewer.*
- 61 *What do you think about the intervals for review? Are they too frequent or too far apart? Please provide reasons for your answers.*
- 62 *What initiatives should the Government bring forward to provide recognition of high performance against voluntary codes of conduct? Please give reasons and evidence for your response.*
- 1) All collecting societies' activities should be fully transparent and proper performance should be a *sine qua non*.
- 63 *What do you consider the process and threshold for non-compliance should be? For example, should Government test compliance on a regular basis (say by following Ombudsman's reports) or on an ad-hoc basis? What evidence would be appropriate to demonstrate non-compliance? Please give reasons for your response.*

64 *What, in your view, are suitable penalties for non-compliance with a statutory code of practice? For example, are financial penalties appropriate, and, if so, what order of magnitude would be suitable? Please give reasons and provide evidence for your answer.*

65 *Do you agree that the imposition of a statutory code should be subject to review? How long should such a code be in place before it is reviewed? Please give reasons for your response.*

66 *If you are a collecting society which may qualify as a micro-business, would you be likely to introduce a voluntary code? If you are a user of collecting societies, what do you believe the Government should do to encourage good practice in any collecting societies which are exempt from the power to introduce a statutory code? Please give reasons for your response.*

- 1) If collective licensing in some form were introduced in the audiovisual archive sector, FOCAL would expand its role in relation to monies received from the Educational Recording Agency under section 35 CDPA, to collect revenues and distribute them to its members (and if ECL were introduced, to non-members). In this role FOCAL might qualify as a micro-business, and would introduce a voluntary code.

EXCEPTIONS TO COPYRIGHT

General issues

1. Introducing new or widening existing exceptions must not disrupt established markets for archive footage.
 - This would be contrary to the “Berne 3-step test” (Article 5.5 of Directive 2001/29/EC and Article 9(2) of the Berne Convention) by conflicting with the right holder’s normal exploitation of his rights.
 - It is also a settled rule of European Community jurisprudence that any derogation from a right granted by Community law must be construed strictly.
 - Therefore, the existing archive footage market must be taken into account.
 - This principle is also recognised in Review Option 5 of the Hargreaves Hypothesis: “The proposals only relate to short extracts, and the Government ‘had no intention of dismantling copyright licensing in educational establishments.’” However, the archive footage industry is to a very large degree built on the sale of short extracts. All exception proposals which can affect sales of short extracts have the potential to disrupt the archive footage business disproportionately. This must be taken into account when framing any new exceptions or changes (in compliance with Article 5.5 of Directive 2001/29/EC and Article 9(2) of the Berne Convention).
 - In the CDPA as it stands, some exceptions apply only to some kinds of works. This principle must be preserved.
2. Special care is needed not to conflict with the right owner’s normal exploitation – i.e. the existing established markets - when opening exceptions to film which have previously not been available to film.
 - It is necessary to look beyond the legal formulation of the exception. Providing a digital copy of a published scholarly article to enable citation of a quotation poses a different level of risk from providing a digital TPM-free copy of a popular film – thus the potential to conflict with the right holder’s normal exploitation is different.
 - The environment in which the exception will be used is highly relevant. For example, providing a digitised scholarly article to a scientific research institution poses a different level of risk from providing a TPM-free copy of a film to an educational environment where some hold the free discourse culture and Copy Left theories. These are respectable academic doctrines in the media field and legitimately taught in educational institutions - yet subscribers to them may publish copyright content without consent as a matter of principle.
3. Exceptions must be proportionate to the different risks inherent in different media, uses, and circumstances of use, and must not require right owners to jeopardise their normal

commercial exploitation.

4. The overall effect of the proposed changes to exceptions would be more footage used without payment in digital productions.
 - Copyright content – in our case archive footage – is only one element among many in new digital productions. Other elements include the cost of staff, overheads, software development, software licences, hardware, data networks and storage, etc. All these elements must be managed and paid for.
 - As well as digitising footage, many archives already provide online selection, purchase, and increasingly delivery of digitised footage – in response to the market. This makes buying of footage easy, no special training is required. Where specialist knowledge is required, the archives themselves assist, and FOCAL provides specialist researchers. The DCE will contribute.
 - Digitisation, preservation, restoration and delivery of archive footage all involve costs, which an archive needs to recoup.
 - Thus the negative effect of the proposals overall on the archive footage industry will be disproportionate to their effect on the users of archive footage.

Private Copying

1. FOCAL members are not opposed in principle to a private copying exception, allowing the owner to format-shift, provided that TPMs are not circumvented.
2. Parties must be able to contract – otherwise the exception will limit the growth of new services and devices, raise consumer prices, and the risk of infringement and piracy will be unacceptably high.

Replacement copies of works (archiving exception)

1. FOCAL members should be able to preserve and digitise footage under this provision.
2. Their holdings include a large amount of the nation's valuable historical and cultural heritage.

Research and private study – parody – criticism & review – reporting current events – lectures & speeches

1. FOCAL strongly opposes “widening” the existing exceptions, either individually or as a general “quotation” exception.
2. Footage archives license their footage for use in documentaries, educational publications, apps, etc. in small amounts – typically 10, 20 or 30 seconds. Therefore,

increasing the *amount* of footage which can be used free of charge will disproportionately affect archive' existing business.

3. Similarly, widening the *kinds* of use which can be made free of charge will disproportionately affect archives. For example, currently quotation of historical material does not fall within an exception, but could well do so under a general quotation exception. A short informative (rather than critical) quotation taken from a history book may perhaps not significantly affect the value of the author's rights. However, where most footage sales are for amounts no greater than 10, 20 or 30 seconds, such free use would seriously affect footage archives' existing business.
4. Introducing a general quotation exception would enable many currently paid-for uses to be made free-of-charge.
5. Introducing a parody exception would have the same effect. Parody is imitation of a style – therefore not an infringement of copyright - not slavish copying. If a parodist wishes simply to use material literally, he should pay for it.
6. US archives have observed that recent progressive widening of fair use under US copyright law is a factor in diminishing revenues, resulting in less investment in digitising and preserving footage and closure of some archives. Widening of this set of exceptions – individually or as a single quotation exception – can be expected to have the same effect in the UK.

Education

1. The current educational exceptions function well, and should not be widened in the audiovisual field.
2. Those exceptions which do not currently include film should not be extended to include it.
 - Exceptions must balance the potential impact on the author's exclusive property right with the free use which the exception permits, within the parameters of Article 5,5 of Directive 2001/29/EC and Article 9(2) of the Berne Convention.
3. Most film is commercially exploited with TPMs. Making film freely and widely available TPM-free in educational institutions is – unfortunately – an invitation to illicit copying and widespread distribution.
 - Copy Left and the free culture discourse and activity (such as art by appropriation) are prominent in many educational institutions, and whilst perfectly legitimate fields of study pose a specially high risk to film – which is primarily a commercial entertainment medium – in contrast to, say, learned academic articles.
4. Archives' own educational services which include archive footage, and audiovisual products using archive footage produced by the educational publishing industry, are a very significant UK industry, in a well developed, efficient and successful market which

functions well for schools and colleges.

- The cost of providing TPM-free copies for many individual educational institutions would be disproportionate, when on the one hand there is a well-functioning market and on the other hand the risks of infringement would be greatly increased.

Text & data mining

1. Data mining – where it is done in the audiovisual sector – is done under licence. We have no evidence that an exception is wanted in the audiovisual sector.
2. Any exception should not be extended to film.
3. In any event, a text and data mining exception must not conflict with the *sui generis* database right exception (in Section 20 of SI 1997/3032 as amended, including by SI 2003/2501).
4. This means that only an authorised user of the database may benefit from the exception.
5. Access to a database can require technical measures, and can involve security risks. A data mining exception can involve access to a business's entire database, and can permit copying of an entire database. Therefore, any exception must be subject to contract, so that the parties can agree all appropriate terms.
6. The exception could only encompass databases within UK jurisdiction and should exclude the Internet, because a UK law could not provide effective protection against foreign right owners' claims.

Official celebrations

1. Film should not be included in an exception. This would remove a significant market for archive footage, whilst not appreciably reducing the overall cost of such events.

Contract override

1. Right owners and users must be able to agree contractual terms in the context of exceptions.
 - Use of TPMs is the norm in exploitation of film. Right owners must be able to agree terms of use where TPM-free film is provided, otherwise the risk of illicit copying and piracy can destroy the right owner's legitimate market.
 - TPMs must not be circumvented without the right owner's consent, as provided in Article 6 of Directive 2001/29/EC.

2. Rapid and effective development of digital transactional licensing, including micro transactions, need

- The ability to contract and manage contract terms digitally
- New or wider exceptions must not hinder the developing market
- e.g. right owner and customer must be able to agree limitations on uses corresponding to desired pricing levels – maximum permitted use will result in reduced consumer choice and highest prices.

The consultation questions

Private copying

General comments

- 1) We do not believe that a private (i.e. non-commercial) copying exception will contribute to *growth*.
- 2) Any appreciable economic effect will be to reduce sales (apart from sales of blank media, to the extent that these are used any more – however, the government does not propose to introduce compensation, although Recital 38 of Directive 2001/29/EC states that “Member States should be allowed to provide for an exception or limitation to the reproduction right for certain types of reproduction of audio, visual and audio-visual material for private use, *accompanied by fair compensation*).

67

Do you agree that a private copying exception should not permit copying of content that the copier does not own?

- 1) Yes.

68 *Should the private copying exception allow copying of legally-owned content for use within a domestic circle, such as a family or household? What would be the costs and benefits of such an exception?*

1) No.

69 *Should a private copying exception be limited so that it only allows copying of legally-owned content for personal use? Would an exception limited in this way cause minimal harm to copyright owners, or would further restrictions be required? What would be the costs and benefits of such an exception?*

1) We think that private copying for format shifting is happening extensively despite there being no exception.

2) However, we do not believe that this justifies the introduction of a general private copying exception. Recital 38 of Directive 2001/29/EC (38) provides that “Member States should be allowed to provide for an exception or limitation to the reproduction right for certain types of reproduction of audio, visual and audio-visual material for private use, accompanied by fair compensation.” The consultation does not propose to provide fair compensation, despite the recital’s statement that “[d]igital private copying is likely to be more widespread and have a greater economic impact.” On page 5 of the Impact Assessment Malta, Cyprus and Luxembourg are cited as not providing for compensation. They too small to be used as models for the UK’s enormous digital media market, also lack the UK’s “hub” status in world media trade.

70 *Should a private copying exception be explicitly limited so that it only applies when harm caused by copying is minimal? Is this sufficient limitation by itself, or should it be applied in combination with other measures? What are the costs and benefits of this option?*

1) Private copying is an exception intended for use by the general public. Making it subject to a legal definition of “harm” therefore seems difficult and likely to result in uncertainty.

2) Directive 2001/29/EC relates “harm” to compensation payable to right owners (Recitals 35 f), which the government does not propose to make payable.

3) Would “harm” be something over and above the Berne 3-Step Test, in which case what extra elements or what extra restrictions would it add?

4) An exception – especially a new one, and one intended for the general public – should be as clear as possible.

5) We don’t think “harm” is a good idea.

Should the current mechanism allowing beneficiaries of exceptions to access works protected by technological measures be extended to cover a private copying exception? What would be the costs and benefits of doing this?

- 1) TPMs should not be circumvented, and parties must be able to agree contractual terms of use (compliant with Article 6 of Directive 2001/29/EC – this is explained in our answer to question 103).
- 2) This exception would be for use by the general public. Therefore if it is a mandatory exception without the possibility of agreed contractual terms one would expect that very large numbers of people would ask for TPMs to be removed (e.g. people wanting all their collection of films on DVD unlocked so that they can view them on a hand-held device, likewise with eBooks and music).
- 3) If the public were to make full use of a mandatory exception, this would therefore place an enormous financial burden on right holders. The cost to right holders/industry (of dealing with the requests and providing unlocked copies – aside from any cost in terms of rights) would probably be enormous.
- 4) Article 5,2(b) of Directive 2001/29/EC provides that the right owner should receive “compensation which takes account of the application or non-application of technological measures” but the consultation has ruled out payment of compensation to right holders.
- 5) Therefore a mandatory exception which could not be modified by agreed contract terms could therefore be expected to result in increased consumer prices in the UK.
- 6) A mandatory exception which could not be modified by agreed contract terms would limit the range of products available: there is an established, successful market for digital products giving different levels of access and versatility at different prices. If users’ unlimited ability to format shift is mandated by law, this is also likely to result in a smaller range of products dearer to the consumer in the UK.
- 7) Consumer audiovisual content is nearly always exploited with TPMs. A wide mandatory exception where conditions of use could not be limited by agreed contract terms would also be open to abuse by infringement and piracy. This risk is explained further in our answer to question 75.

Replacement copies of works

72 *Should the preservation exception be extended:*

- *to include more types of work?*
- *to allow multiple copies to be made?*
- *to apply to more types of cultural organisations, such as museums?*

How might this be done, and what would be the costs and benefits of doing it?

- 1) The preservation exception should be extended to include audiovisual content.
- 2) The preservation exception should permit only the reasonably necessary number of copies to be made, e.g. for digital backup/security purposes.
- 3) Commercial audiovisual archives are repositories of valuable historical and cultural material, which they maintain at their own cost, and they should therefore also be able to apply to benefit from the preservation exception.
- 4) No exploitation (commercial or non-commercial) should be permitted under this exception.
- 5) Digitised copies made under this exception should not be used pursuant to other exceptions (such as educational exceptions) without the right holder's licence.
- 6) e.g. - the Imperial War Museum has about 8,000 reels of historical testimony in danger, which it cannot justify preserving and digitising unless it can exploit it commercially. An exception such as this, together with an orphan work provision, would enable this material to be preserved and digitised. The benefit would primarily be the long-term survival of the testimony: the IWM would expect at least to recoup the cost of preservation over time by licensed commercial exploitation.
- 7) A transparent application system should be provided. Applications (including details of the material to be copied) should be published on a public website and affected right owners should be given the chance to object in writing and at a hearing (probably pursuant to Copyright Tribunal rules). Authorised organisations should be reviewed at regular intervals, and published on an easily accessible website.

73 *Is there a case for simplifying the designation process which is part of Section 75? How might this be done and what would be the costs and benefits of doing it?*

- 1) It would be helpful if the process could be reasonably quick – but time should be allowed for publication of applicants and possible objections.

- 2) Beneficiaries of section 75 (simplified or not) should be reviewed at regular intervals, and published on an easily accessible website.

Other library and archive exceptions

74 *Should any other changes be made to the current exceptions relating to libraries and archives, and what would be their costs and benefits?*

- 1) No.

Research and private study

75 *Would extending the copyright exception for research and private study to include sound recordings, film and broadcasts achieve the aims described above? Can you provide evidence of its costs and benefits?*

- 1) No.
- 2) The private copying exception can allow access to films for research and private study, to the extent that they need to be viewed on a medium other than that in which they are available.
- 3) Section 35 (in an educational institution) and section 70 (private time shifting) can allow access to broadcasts for research and private study, if they need to be viewed at a time other than when they are broadcast. Other broadcasts are available on demand, etc.
- 4) Therefore no further exception is needed.
- 5) Much film is available protected by TPMs. The cost and risks involved in providing unencrypted copies will be disproportionate. This is explained above, in our answer to question 71.
- 6) Films and recordings of broadcasts as such should not be copied and distributed in digital format in the results of research and private study (e.g. in computer file or DVD format) without the right owner's licence.
- 7) This is because digitised film is especially easily copied and re-published. Often no sooner is a valuable or unique piece of footage digitally available, than it is widely available through illicit copying and distribution. A look at Youtube is an indicator that this is widespread (e.g. check any major campaign in either WWI or WWII) - footage which has been made available for research and private study is made available worldwide online without the right owner's licence or payment.

- 8) Footage is separated from its metadata before being illicitly uploaded onto YouTube and other online platforms, and file shared.
- 9) The government's consultation document recognises the possibility of "a free for all" that enables abuse of a new exception for "purely entertainment purposes". Digitised film is especially open to this abuse.
- 10) 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 commercial ways which cost them lost fees. The government is currently taking strong measures against digital piracy. It makes no sense to make more digital content freely available without giving the right owner the ability to exercise legal control on the one hand (by wider exceptions) whilst trying to crack down on file sharing and the like on the other.
- 11) The consultation does not appear to take the cost of preventing the potential abuse which it recognises into account in assessing the impact of this proposal. It would be a significant cost to the industry, in increased action against infringement and further lost sales.
- 12) 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. These important measures must not be undermined by widening exceptions to copyright which will encourage illicit use.

76

Should the copyright exception for research and private study permit educational establishments, libraries, archives or museums to make works available for research or private study on their premises by electronic means? What would be the costs and benefits of doing this?

- 1) This already happens, extensively, by licence (e.g. the BFI shows films at terminals under licence).
- 2) The cost of making this an exception to copyright will be loss of licence fees to the archive industry.
- 3) This cost would amount to a transfer of income from the private sector (commercially funded archives) to the public sector (the schools, libraries, museums etc. are mostly state funded organisations – though there are some public schools and private universities), and would disrupt the existing business (Article 5.5 of Directive 2001/29/EC and Article 9(2) of the Berne Convention).

Text and data mining

77

Would an exception for text and data mining that is limited to non-commercial research be capable of delivering the intended benefits? Can you provide evidence of the costs and benefits of this measure? Are there any alternative solutions that could support the growth of text and data mining technologies and access to them?

- 1) We understand that the wish for data mining is primarily in print media for scientific research with content which is published and available on open access. FOCAL has no objection to an exception which permits this. However, there is no widely accepted definition of “non-commercial” in the copyright context, and examples (including the consultation’s own example of “malaria”) appear to be largely commercial in application. Non-commercial is not the same as “useful for the general good.”
- 2) The government’s impact assessment only deals with text mining, and appears to be based on only text-related evidence, and no financial data are available.
- 3) Any data mining exception should not be extended to film.
- 4) There appears to be no evidence that the higher risks involved would be outweighed by any advantages.
- 5) Only a lawful user of a database which has been made available to the public should be entitled to benefit from any exception to copyright permitting data mining to avoid potential conflict with section 20 of SI 1997/3032 (as amended, including by SI 2003/2501).
- 6) The criteria for protection of a database by copyright and the *sui generis* rights are not the same, but it is unlikely that a database protected by copyright – therefore requiring this exception – is not also protected by the *sui generis* rights. (The criteria giving rise to protection mean that the opposite is much more likely to be true.)
- 7) SI 1997/3032 has no exception for reutilisation of data, only for extraction. Many data mining activities involve reutilisation of the data, as well as extraction. The impact assessment does not examine whether in view of this a copyright exception would have significant practical application.
- 8) This is a case where licence terms under which a user gains access to a database should prevail:
 - A database may be made available on licence terms which take into account the value of the database and the permitted uses. Allowing data mining may undermine the value, resulting in dearer licences.
 - Obliging a right owner to allow data mining may prevent some right owners from releasing their products or allowing any public access to them.
 - TPMs must be respected, to avoid the negative costs consequences to right holders referred to in 71. An exception must take account of Article 6 of Directive 2001/29/EC.

- 9) The purpose of Directive 96/9/EC (see e.g. Recital 12) is to protect investment. Undermining the value of investment in a database by mandating uncontrolled access will discourage investment.

- 10) Digitised film (like sound recordings) is especially easily copied and re-published. Consequences of this for piracy and illicit use are described in paragraph 75. As stated above, a data mining exception should not include audiovisual media. In any event, a data mining exception without enforceable licence terms would allow a user to copy the whole of a database, which is the first step towards piracy of an entire business. FOCAL has examples of this having been done (illicitly of course): a legal exception should not allow the first step in the process.

- 11) No legal sanction (or lack of an exception to copyright) will deter a determined hacker. However, the balance of risk which this proposal poses is an unacceptable level of threat to an entire digitised footage archive, when access can and is given by contract, with the legal and technical safeguards which that allows.

- 12) Any exception should not extend to the Internet. This is because a UK law could not protect a person in the UK mining a foreign database via the Internet – or indeed mining foreign content on the Internet (treating the Internet itself as a database). This issue is explained in our answers to 4, 5 and 28. *Copiepresse v Google* (Belgian Court of Cassation September 25, 2003 C030026N) is an example of this: Internet activities which Google argued were permitted under U.S. copyright provisions nevertheless breached Belgian copyright provisions, and the Belgian Court found against Google.

- 13) The great majority of the audiovisual material encountered in data mining of the Internet is likely to be infringing material. In view of the government's strong anti-piracy policy, and the general provision and enforcement of exclusive intellectual property legal rights, it would seem unwise to permit data mining of audiovisual material on the Internet under a provision of UK law. It would give the appearance of endorsing infringement.

Parody

78

Do you agree that a parody exception could create new opportunities for economic growth?

- 1) The consultation's Impact Assessment states that there is insufficient evidence to indicate that introducing a parody exception would produce a cost or a benefit. FOCAL opposes introduction of a parody exception to UK copyright law.

- 2) Below we explain that a parody exception would produce a cost for the archive footage industry, and that benefits if any would be to non-commercial copyright uses (such as legalising copyright infringement on social media) which do not contribute to growth.

- 3) Parody has been part of the UK's audiovisual media landscape for years. The essence of parody is imitation of or reference to style or character. This alone cannot infringe copyright. If a parodist (or humorist) wishes to copy, he should pay for the copy he uses.
- 4) Media productions which generate significant revenues, thus having capacity to contribute to economic growth, are professional productions. A successful example is Spitting Image which began broadcasting in 1984 and continued until 1996. It won a BAFTA award. It is still exploited commercially today. Harry Hill's TV Burp, 10 O'Clock Live, Russell Howard's Good News contain contemporary examples.
- 5) YouTube and similar parodies made by an amateur on his MacBook in his bedroom mostly generate little or no income. However, the few which go viral can generate significant amounts of money.
- 6) The consultation impact assessment (at p.2) states that a parody can benefit copyright owners if they experience more sales from greater publicity afforded to their work as a result of the parody. This could be the case for the singer-songwriter of an original song or author of an original poem used for parody, but not for footage archives which supply the clips used for parody in professional productions such as those mentioned above.
- 7) It seems self evident that an increased number of successful parody productions – as of any kind of successful productions such as dramas, documentaries, music shows - would produce economic growth. Whether such growth could be significant is not clear - there must be a saturation point for parodies in the various media.
- 8) The production costs of a professionally produced series are considerable, with sophisticated production budgets.
- 9) It has been argued that more parody productions would be made if copyright clearance fees were not payable. Copyright clearance fees are only one of many budget lines in a production. If copyright clearance fees should not be paid in order to encourage parody production, then why should other budgeted production costs also not be paid in order to encourage parody production, such as costs of lighting, props and scenery, scriptwriters, music and production staff? An exception only for copyright content allows the producer to benefit from the economic growth but does not allow the owner to share in it.
- 10) The subject of the parody is its genesis - the single indispensable item to the whole production. Without it there is no parody. Where this is a copyright work, there is no justification why the creator should not be rewarded for his key – indispensable – contribution to the parody. An archive which supplies footage for use in a parody production must invest no less in digitisation, metadata etc. because the footage is used for a parody rather than for a serious documentary. There is no reason why this first essential foundation of a parody should not be paid for.
- 11) Amateur YouTube and similar parodies made by an amateur on his MacBook in his bedroom could be made legitimately with an exception – but most of

these generate little or no income, so the exception would not provide growth here. The few which go viral generate large amounts of money, and then there is no reason why the right owner whose work provides the basis of the parody should not receive fair recompense for his indispensable contribution. After all, his payment enables him to invest in more creation – whether he is an artist, a composer, or an archive.

- 12) This consultation is about economic growth, therefore we focus on payment and returns. The government's consultation paper refers to copyright owners having parody using their copyright content removed from YouTube (at 7,109: "The BBC did not object to this as it used their own material, but other similar parodies risk challenge and removal by copyright owners"). In the UK authors can invoke section 80 CDPA to prevent their material being used in a derogatory way, and we assume that a parody exception will not deprive the author of this right, as existing comparable exceptions (e.g. section 30) do not. Therefore, parodies will continue to risk challenge as they do now, after introduction of an exception.

79

What is the value of the market for parody works in the UK and globally?

- 1) We don't know.

80

How might a parody exception impact on creators of original works and creators of parodies? What would be the costs and benefits of such an exception?

- 1) Copyright laws balance the owner's exclusive rights with public interest. It is clearly not in the public interest that a politician can assert copyright in his speech to prevent an unfavourable news report of it, or an author to prevent an unfavourable review of her poem.
- 2) But as explained elsewhere shifting the balance further towards free uses of archive footage – which would be the cumulative effect of the present proposals if implemented as the consultation document suggests – will result in less investment by archives and less available digital content.
- 3) As explained above, the original copyright work is the genesis, foundation, basis of the parody. In audiovisual media there is a complex matrix of creators and users – some participants being both, e.g. a film producer uses works by script writers and musicians and performances of actors, but creates the film from them, which in turn is used by a broadcaster, whose broadcaster is in turn used by an educational institution, and so on.
- 4) Disrupting the market by removing the creators' payment will obviously impact on the creators – unpaid, they will create less.
- 5) It is open to producers to reduce their production budgets in many ways.

- 6) Cutting out payment for just copyright content from the whole production budget seems arbitrary and logically unjustified.
- 7) We understand that SACEM's rule is that the original author is paid c. 80% of royalties generated by parody. The rule in music publishing should also be compared - where the copyright in an adaptation (e.g. an arrangement) is assigned to the owner of the copyright in the original.

81

When introducing an exception for parody, caricature and pastiche, will it be necessary to define these terms? If so, how should this be done?

- 1) Above it has been referred to as a "parody" exception.
- 2) Now it is referred to as a "parody, caricature and pastiche" exception.
- 3) It should be only a "parody" exception, and the Courts should be allowed to apply the dictionary meaning as they usually do.
- 4) Pastiche should not be included: a pastiche could typically be a medley of clips put together, exploited commercially (whether revenue is generated by a broadcast or DVD sales or advertising-related viewing). The right owner should therefore be paid.
- 5) Pastiche also raises moral rights issues: through association of a clip with others. The newspaper headline copyright owners successfully objected to juxtaposition of their headlines with others, beyond their control, in the Belgian case *Copiepresse a.o. v Google Inc.* (Tribunal de Première Instance de Bruxelles 06/10.928/C 13).

82

How should an exception for parody, caricature and pastiche be framed in order to mitigate some of the potential costs described above?

- 1) It should be a "parody" exception.
- 2) It should not apply to the use of film.
- 3) The essence of parody is transformation of the parodied original, particularly in style or character. If it is considered essential to introduce a parody exception which includes film, the exception should only apply when the film is itself the subject of the parody, and the parody alters the film in a substantially transformative way.

- 4) Merely using a film clip to “hang” a parody on should not fall within an exception. The maker of such a parody should either pay for the film which has been made at another’s expense, or make his own.

83 *Would making this a “fair dealing” exception sufficiently minimise negative impacts to copyright owners, or would more specific measures need to be taken?*

- 1) As stated in 82, if the exception has to apply to film at all, the film must itself be treated in a transformative way.
- 2) It should be necessary to consider the film copyright and the rights in the underlying works in a film individually.
- 3) For example, if parody lyrics are substituted for the original lyrics of a song but the music is left unchanged, the lyrics could be subject to the parody exception but the mere copying of the music should not be (e.g. *Williamson Music Ltd v Pearson Partnership Ltd* [1987] F.S.R. 97). If a satirical song is substituted for the original in a music video but the visuals are left unchanged, the song could be subject to the parody exception but the film and choreography copyrights and performers’ rights should not be.

84 *Are you able to provide evidence of the costs and benefits of such an exception?*

- 1) No.
- 2) As explained elsewhere, the costs to the archive industry of new and wider exceptions will be cumulative – partly through less footage use being paid for and partly through increased illicit use of footage encouraged by greater availability and use of digital footage free of contractual control.

Education

85 *How should the Government extend the education exceptions to cover more types of work? Can you provide evidence of the costs and benefits of doing this?*

Section 32

- 1) Section 32(2A) should not be amended to include films.
- 2) There is a well developed and economically significant market in audiovisual educational products, which are supplied on terms which do not require any exceptions to copyright for their effective use in the classroom and generally as required for their purpose.

- 3) Archive footage is licensed direct to producers of audiovisual educational content, and products are sold to educational institutions at a fee per pupil. Institutions budget for these products as they do for textbooks, staff salaries and overheads.
- 4) To combat piracy some archives provide lower quality digital material for educational purposes: perfectly adequate for its educational purpose, but not good enough for use in a professional commercial production. Including film in educational exceptions generally would enable educational institutions to copy high quality footage (e.g. from legitimately bought productions) with the consequent increased risk of further illicit use.
- 5) The education market is already a thriving part of the digital economy, with big players such as Pearson and Elsevier and small, individual producers producing bespoke product. This market has grown in answer to “every child shall have a computer” and continues to grow.
- 6) It has also grown in response to modern educational requirements – which have been influenced by digital culture. Copying of “raw” extracts has largely been superseded by purposed educational products. Film footage is included in sophisticated educational products (in physical media or online subscriptions).
- 7) Disrupting this substantial market by introducing an exception will cause loss to the economy – lost sales and loss of incentive to invest – but the substituted material, being used by way of exception to copyright, will contribute nothing to economic growth.
- 8) Disrupting this market will also interfere with the normal exploitation of footage in this market (see Article 5.5 of Directive 2001/29/EC and Article 9(2) of the Berne Convention).
- 9) Broadcast material can already be used under section 35 CDPA.

Section 33

- 10) Section 33 should not be extended to film.
- 11) The section allows extracts from books etc. to be copied and handed out to students in compilations.
- 12) Films on the other hand are shown, and section 34(2) already allows this.
- 13) (When we say “shown” we mean what is described in CDPA as “public performance” of the film, but which since *Football Premier League a.o. v Murphy a.o.* C-403/08, C-429/08 must be “communication to the public” of the film.)

- 14) Further, commercially available copies of films are subject to TPM. It would not be practical or economically viable for right owners to unlock copies on the scale which schools and universities would require in order to make compilations of extracts, even if compensation were payable (which the consultation has ruled out in other contexts).
- 15) As explained elsewhere, providing digital copies of film poses a risk of infringement and piracy which is disproportionately high when the material is available in protected format without copying. Schools and colleges would pose no less a risk than a cross section of the general public. Schools and colleges are part of the digital interconnected world. Interactive whiteboards are networked and Internet enabled, and learners share media through laptops and smartphones, including via social media. Virtual learning environments are not always secure or respected by all participants.
- 16) FOCAL has examples of educational DVDs which contain many hours of archive footage, all used without clearance claiming “fair dealing” when this is not justified. It is costly for right owners to take such cases through the courts – but if this is not done, such productions simply proliferate. Introducing an exception which allows schools or colleges to compile such products will be an open invitation for them to be sold – perhaps between institutions, possibly more generally – as well as for pirate copies of the originals to be file-shared, posted on YouTube, and similar activities.

Section 34

- 17) Section 34(2) provides for the showing of films in educational institutions, and does not need to be amended.
- 18) Paid access (e.g. subscription services to educational packages such as TV Espresso’s service to primary schools offering Channel 4 and ITN content, and Pathé’s archive educational service) should remain unaffected (see (7) under section 32 above)

Section 35

- 19) Please see the evidence submitted by the Educational Recording Agency. FOCAL is a member of ERA and supports ERA’s submission.

Section 36

- 20) This section should not be extended to film.
- 21) The section allows photocopies to be made and handed out to students.
- 22) However, films or extracts of them are shown to students. This is already permitted by section 34(2).

23) Copies of films should not be made and given to students – the reasons are explained above.

86 *Would provision of “fair dealing” exceptions for reprographic copying by educational establishments provide the greater flexibility that is intended? Can you provide evidence of the costs and benefits of such an exception?*

87 *What is the best way to allow the transmission of copyright works used in teaching to distance learners? What types of work should be covered under such an exception? Should on-demand as well as traditional broadcasts be covered? What would be the costs and benefits of such an exception?*

- 1) In the case of film, this should be managed under contract, which can easily be updated to accommodate changes in the institutions and rapidly developing technical standards and security requirements.
- 2) Making changes to the statute is too slow, and consequently detailed technical statutory provisions tend to frustrate their intended purpose before long.
- 3) This area is already extensively and satisfactorily managed by contract.
- 4) Web-based transactional contracts coupled with corresponding controlled access is the way the rest of the digital world is heading: ordinary members of the public buy downloads and access to media of their choice extensively in this way. The same people are well able to operate these systems in their professional capacity as educators.
- 5) Education institutions generally pay licence fees – but as higher educational institutions charge their students and state education is funded by the taxpayers, and all pay their staff, for their overheads, teaching equipment, etc., there is no good reason why only copyright content should not be paid for, especially where this will disrupt functioning and economically successful markets.

88 *Should these exceptions be amended so that more types of educational body can benefit from them? How should an “educational establishment” be defined? Can you provide evidence of the costs and benefits of doing this?*

- 1) “Educational establishments” must be clearly distinguished from general educational productions.
- 2) Failure to make this distinction can have economic implications. It can also be contentious. For example, BBC ‘Coast’ series was originally claimed to be

educational as it was made by the Open University (i.e. the cost of the licenced footage was lower), but was exploited commercially.

- 3) The consultation impact assessment proposes that museums' and galleries' educational activities should be included in educational exceptions. FOCAL does not believe that this is appropriate, for the reasons given above in the answer to question 76.
- 4) Permitting uncontrolled access to and use of digital audiovisual content in particular in educational establishments poses risks. Most film is commercially exploited with TPMs. Making film freely and widely available TPM-free in educational institutions is – unfortunately – an invitation to illicit copying and widespread distribution. Copy Left and the free culture discourse and activity (such as art by appropriation) are prominent in many educational institutions, and whilst perfectly legitimate fields of study pose a specially high risk to film – which is primarily a commercial entertainment medium – in contrast to, say, learned academic articles.
- 5) We have anecdotal evidence that some educational establishments are run with less strict standards than others, for example in relation to application for study visas for overseas students.
- 6) In view of the piracy and infringement potential of digital film footage, we would expect the government to define “educational establishment”, and to verify and inspect educational establishments, with the same rigour in relation to copyright as in relation to other aspects of the law, such as immigration and visa status.
- 7) Archives' own educational services which include archive footage, and audiovisual products using archive footage produced by the educational publishing industry, are a very significant UK industry, in a well developed, efficient and successful market which functions well for schools and colleges.
- 8) The cost of providing TPM-free copies for many individual educational institutions would be disproportionate, when on the one hand there is a well-functioning market and on the other hand the risks of infringement would be greatly increased.

89

Is there a case for removing or restricting the licensing schemes that currently apply to the educational exceptions for recording broadcasts and reprographic copying? Can you provide evidence of the costs and benefits of doing this, in particular financial implications and impacts on educational provision and incentives to creators?

- 1) Please see evidence submitted by the Educational Recording Agency. FOCAL is a member of ERA and supports ERA's submission in respect of section 35 CDPA.

Visual impairment and deafness

90 *How should the current disability exceptions be amended so that more people are able to benefit from them? Can you provide evidence of the costs and benefits of doing this?*

- 1) In relation to digital audiovisual content, the risk of infringement must be contained by permitting contractual agreement.
- 2) Only the disabled person herself should be able to benefit from the exceptions, unless her disability requires someone else to carry out the activity. The Danish legislature (for example) specifically recognises the risk of infringement, and strictly limits the permitted use by contract. For example, permitted private copying by a handicapped person may be carried out by the handicapped person's care assistant only where the handicapped person cannot operate the copier herself because of her handicap, and this contract is limited to a term of 2 years. (*Godkendelse i henhold til ophaveretslovens §50, stk. 4, jf §50, stk. 2 of 18 March 2010 issued by the Ministry of Culture to Copydan.*)
- 3) Special caution is needed in introducing exceptions into this category. Digital media are particularly suited to adaptation such as required for disabled people, and industry is developing many products suited to disabled people's needs. Removing the value of the copyright – i.e. the basis of the sales, in many media-related products – by introducing an exception can remove the basis for investment and thus for further innovation and development in this market.

91 *How should the disability exceptions be expanded so that they apply to more types of work? Is there a case for treating certain works differently to others? What would be the costs and benefits of amending the exceptions in this way?*

92 *What are the costs and benefits of the current licensing arrangements for the disability exceptions, and is there a case for amending or removing them?*

93 *How should this exception be modified in order to simplify its operation?*

Criticism and review

94

Should the current exception for criticism and review be amended so that it covers more uses of quotations? If so, should it be extended to cover any quotation, or only cover specific categories of use? Can you provide evidence of the costs or benefits of amending this exception?

- 1) We understand that the main impetus to widen the current exception comes from scholars wishing to quote more widely than currently permitted when writing academic texts. This is outside the scope of our industry.
- 2) Including audiovisual material in the exception would have a great and negative impact on the UK's archive footage industry. It would probably be the single most damaging change for the archive industry.
- 3) Widening the exception so that slightly more of a text can be quoted in an academic paper without paying may not have a significant effect on the economic value of the text. Such citation could in fact enhance its scholarly value. A wider quotation exception should be confined to this use.
- 4) However, the same change for archive footage would have a huge impact on the industry. Many sales of small amounts of footage (10, 20, 30 seconds each) are the biggest part of archive sales. Many archives' sales are 100% short clips. Short clips are 60-75% of the Imperial War Museum's sales. Archives can earn as much from licensing a shorter clip with wider rights as from a much longer clip with fewer rights.
- 5) A mass of documentary film producers who currently pay for 10, 20 or 30 second film clips would be able to use many of them free of charge, no longer being limited to use for criticism and review (or reporting the news).
- 6) Small quotes could be used unpaid in apps, multimedia productions, apps and many other digital contexts.
- 7) Already now, the existing exceptions are significantly abused in this industry sector. Responding to smaller production budgets, a significant number of producers claim "fair dealing" where the use is plainly commercial, and use copyright footage without licence or payment. Widening and generalising the exception will encourage this trend further.
- 8) Archives will have the cost of litigation to try and establish the extent of the Berne 3-step test in the new, wider "quotation" environment before they can effectively enforce it. The current judicial applications of the 3-step test are applied to criticism and review: these will no longer be good law in the new, wider context (e.g. *Time Warner Entertainments v Channel Four a.o.* CA [1994] E.M.L.R. 1 "Clockwork Orange" and *Pro Sieben Media v Carlton U.K. Television a.o.* CA [1999] 1 W.L.R. 605 "Mandy Allwood").
- 9) Diverse inputs contribute to the development and 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, staff and overhead costs. These elements are all paid for.

- 10) As for the copyright content, 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 (and accordingly support the DCE).
- 11) However, it is hard to see why copyright content – alone of all the various elements in a commercial digital production – should be free of charge. The more so when the content is a significant part – or even the kernel – of the digital production, and when the archive has borne the cost of digitising and maintaining the footage, and of making it accessible and available.
- 12) If content is not paid for, the incentive to invest in digitising content will disappear.
- 13) Rather than widening the whole current section 30(1), with the wider and (probably unintended) negative consequences set out above, it could be possible to provide an exception specifically allowing more general quotation from texts for non-commercial academic purposes – to address the specific concern which has been raised.
- 14) In the USA, §107 U.S.C.17 allows “fair use.” Fair use has progressively “widened” – i.e. a wider range of uses has been considered “fair” – as the “free discourse” culture propounded by *inter alia* Lawrence Lessig (*Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* New York, Penguin Press 2004) gained influence. Max Segal, Managing Director of HBO Archive in the USA comments:
 - “High costs of doing business: staff, storage, old format conversions, digitizing, broadband space, marketing, etc.
 - Broader reaching of Fair Use
 - It was these combined factors, Fair Use being one of these, that led to the shut-down of MacDonald & Associates and the John E Allen Library. Additionally, longtime Fox Movietone historian, Peter Bregman saw his job eliminated. The loss of these deep libraries gets us closer to the day when their one-of-a-kind material will no longer be accessible.
 - Financials and Fair Use pressures continue. It wouldn’t surprise us to see at least another two US-based midsized libraries go away this year as well.
 - That being said, the abuse and stretching of Fair Use is a very deep and high concern to each ACSIL (*Association of Commercial Stock Images Licensors – US archive organisation*) member library.”

Reporting current events

95 *Is there a need to amend or clarify the exception for reporting current events? Could this be done as part of a quotation exception, or would a separate measure be needed? What would be the costs and benefits of doing this?*

- 1) In the audiovisual archive industry – and in the media industry in general – there is a generally clear understanding of the parameters of the current exception for reporting current events. This has been formalised, for example in the Sports Access Code.
- 2) There can be differences of interpretation of the current provision. E.g. a broadcaster used the Imperial War Museum's footage for a news broadcast relating to the anniversary of Dambusters initially under this exception, subsequently agreeing that it should be paid for.
- 3) This also illustrates why clear exclusive rights are important to the archive industry: the broadcaster already held the IWM's footage.
- 4) Iskra TV archive regularly licenses clips of a few seconds each for use in *Have I Got News For You*. Although the show's title contains the word "news" the use of the clips in the programmes could not be classified as "reporting current events" and rights in the clips are paid for. A wider "quotation" exception could allow such clips to be used without payment. The archive might be paid to supply some clips which were not otherwise available to be copied – but even in that case it would have lost future opportunities to supply those who chose instead to copy the clip out of the programme.
- 5) For all the reasons stated above, the costs in lost sales through wider unpaid use and in litigation to establish new norms would far outweigh any benefits.

Delivery of lectures, addresses, speeches and sermons in public

96 *Is there a need to amend the existing provisions relating to speeches and lectures, and what would be the costs and benefits of doing so? Should these provisions be combined within a quotations exception?*

- 1) The provisions should not be amended.
- 2) They should not be combined within a quotation exception.
- 3) We are strongly opposed to the introduction of a general quotation exception for the reasons given above.

A combined “quotation” exception: questions 94, 95 and 96 (and questions 78 to 84) together

- 4) ITN states that 42% of its licensing income would be lost under a general quotation exception (ITN does not include free uses under a parody exception or wider educational exceptions in this figure).
- 5) Addressing a combined “quotation” exception, the IPO asked us how archive footage libraries function in continental countries whose copyright laws have such all-in-one quotation exceptions:
 - Despite the apparently wide wording, these exceptions are in reality very restrictive. Even though the *kinds* of uses may be wider (e.g. more than criticism and news) the *actual use* of quoted material is more limited, because of the “authors’ rights” legal approach.
 - Under this approach, not only must the quote which is taken bear the imprint of authorship (i.e. to be protected by copyright), but also its use must bear the imprint of authorship. Taking a film clip and merely reproducing it is unlikely to fall within an author’s rights quotation exception.
 - This was illustrated by the Belgian case *Copiepresse a.o. v Google Inc.* (Tribunal de Première Instance de Bruxelles 06/10.928/C 13). Belgian copyright law has such a general quotation exception, yet copying small parts of newspaper article headlines (as appearing in urls) infringed copyright. (We may experience this approach increasingly in our English and other UK courts, since *Infopaq (Infopaq International A/S v Danske Dagblades Forening* ECJ Case C-5/08) has been applied by the English CA in *NLA v Meltwater (The Newspaper Licensing Agency Limited a.o. v Meltwater Holding BV a.o. CA [2011] EWCA Civ 890)*.
 - Most continental footage archives have traditionally been largely non-commercial, funded as public bodies (e.g. as part of national broadcasters) – including funding for digitisation and digital projects, which are sometimes free to the user. Ina, the French national footage archive, and Nederlands Instituut voor Beeld en Geluid, the Dutch national footage archive, are examples. More recently continental footage archives have begun to commercialise their holdings.
 - It is sometimes said that the Netherlands has the most “generous” European copyright law, in relation to exceptions and free uses of copyright material. This may have a bearing on the fact that Europeana, a single online access point to millions of books, paintings, films, museum objects and archival records that have been digitised throughout Europe, for cultural purposes, is based in the Netherlands. Nevertheless, it is worth noting that the greatest contributor of archive footage to this free-to-use project is the UK: this suggests that the UK is indeed a leader in digitisation of archive footage, and also that significant quantities of cultural and historical archive footage can be exploited digitally by UK museums, libraries and similar institutions under the current UK copyright law.

Would there be additional benefits if all three types of exception examined by this section were combined?

- 1) As explained above, expanding exceptions, especially the exception for criticism and review, would have a disastrous effect on the UK's audiovisual archive industry.
- 2) The cumulative effect of rolling three exceptions into one would increase the effect of the expansion, and hasten the demise of archive business.
- 3) The legal uncertainty – which organisations and individuals wishing to use archive footage free of charge would exploit to the full – would disrupt the industry both through loss of revenue and through the cost of legal actions necessary to try and establish the parameters of the new all-in-one exception. The breadth of the exception and the newness of such a general provision in UK copyright law would ensure that many cases over a long period would be needed, to establish the limits and characteristics of the main permitted uses.
- 4) It is obviously impossible for us to suggest figures, when the proposal is for an entirely new legal landscape. However, the consequences are likely to be that some archives would move overseas (this is easily done in the digital age - the famous and historic British Movietone archive recently moved to Australia), and others would close.
- 5) One of the purposes of the DCE is to simplify copyright licensing, enabling creators and users to license more easily and thus promoting economic growth. It would be a pity if, with the other hand, the government complicated copyright law to the extent that right owners needed to resort to the courts to clarify it. This would act as a powerful disincentive to invest in digitisation: owners would keep as much content as possible in analogue media, to retain control over it physically, where the law failed whether through lack of protection or uncertainty.
- 6) Ina, the French national archive, has said that it will cease to sell footage in to the UK if these proposals are implemented, as the legal protection of its footage in the UK will be inadequate.

Public administration

How should the current exceptions for use by public bodies be amended to support greater transparency? How could such exceptions be limited to ensure that incentives to copyright owners are not undermined? Can you provide evidence of costs or benefits of doing this?

99 *Should a new exception for time-shifting of broadcasts by social institutions be introduced? What would be the costs and benefits of doing this?*

Religious and official celebrations

100 *Should a new exception for use during religious celebrations or official celebrations organised by public authorities be introduced? What would be the costs and benefits of doing this?*

- 1) Introducing this exception so that it applied to the audiovisual archive industry would cause significant losses. Archive footage is used (and paid for) at official celebrations such as Falklands Commemoration (footage supplied by the Imperial War Museum), New Year's Eve London Eye Celebration, the 2012 London Olympic Opening & Closing Ceremonies. For example, the 60th anniversary of the Normandy Landings brought in around 1.5% of the Imperial War Museum's footage revenue for that year, from news programmes. The IWM uses all revenue to preserve its holdings which are historically important.
- 2) The cost of the footage is an *extremely* small part of the total cost of such events to the organisers. The average cost of archive footage at several such world-wide broadcast events was less than 0.0001% of each event budget.
- 3) We are unable to say what proportion of individual or overall archive sales are for such events.
- 4) However, there is no justification as to why of all the elements which go into such events, many of which such as crowd control and security, fly-pasts, staging and scaffolding, portable power generation are very costly and which are paid for out of the event budget, only copyright content (including archive footage) should be free of charge.

Representation and advertisement of artistic works

101 *Should our current exceptions be expanded to cover use for public exhibition or sale of artistic works on the internet? What would be the costs and benefits of doing this?*

Demonstrating and repairing equipment

102 *Should our current exceptions for the demonstration and repair of equipment be expanded? What would be the costs and benefits of doing this?*

Contract override

103

What are the advantages and disadvantages of allowing copyright exceptions to be overridden by contracts? Can you provide evidence of the costs or benefits of introducing a contract-override clause of the type described above?

- 1) As under current law, specific exceptions which may not be overridden by contract should be identified in the statute, with the extent or limitations of the prohibition.
- 2) It must be clear that any provision limiting contract override applies only to exceptions to copyright. It has been suggested that no contract term should be valid where a copyright has expired. This cannot be right. The effect of such a limitation would be far reaching and chaotic: e.g. a contract for sale of a reel of film would be invalid where the film was in the public domain. Such a provision would produce intolerable conflicts with other legal property rights, and much else besides.
- 3) Advantages of allowing contract terms to override exceptions include:
 - Ability to agree to exclude specific exceptions can provide a more convenient or cheaper service
 - Inability to exclude exceptions by contract can expose a licensor to potential liabilities
 - In particular, inability to agree contractual terms regarding TPM and DRM can mean that a product cannot be made available, or rights cannot be licensed for use in a product
 - Agreed contract terms can be to users' advantage as much as to right owners'
 - Individual transactional licences are increasingly preferred in the digital media environment – including with the general public, e.g. Amazon, iTunes, Kindle, Spotify.
- 4) Disadvantages of not being able to agree to override exceptions include:
 - Services leaving the UK because of inadequate protection
 - Services not coming on-shore for the same reason (see in a in 97).
- 5) It must always be possible for the licensor and user to agree conditions applicable to digital copies which are protected by DRM, where a copy is made available for use under an exception:

- Article 6,1 of Directive 2001/29/EC provides that Member States shall provide adequate legal protection against the circumvention of TPMs. Article 6,4 requires Member States to ensure that right holders make the permitted exceptions available where a user has legal access to the protected work, in the absence of voluntary measures taken by rightholders, including agreements between right holders and other parties concerned.
 - First, therefore, it is clear that TPMs may legally be applied to media in contexts where exceptions to copyright apply.
 - Secondly, it is clear that in those situations right owners and users may lawfully agree access by contract.
 - If an exception requires TPM-protected content to be made available without TPMs, it must be possible for the parties to agree contract terms governing its use: otherwise an unprotected copy of the work must be provided in circumstances where the right owner cannot ensure that the unencrypted copy is suitably protected and secure.
 - In view of the dangers of illicit copying and piracy, obliging a right holder to release a digital copy of an audiovisual production in this uncontrolled way clearly conflicts with the right holder's normal exploitation of a work which he normally only releases protected by TPMs, contrary to Article 5,5 of Directive 2001/29/EC and Article 9(2) of the Berne Convention.
 - Especially in the UK, which is a very important market for audiovisual media – much bigger than just the UK's domestic population, being the hub of the vast international English-language market – denying the right holder contractual protection in this situation would also probably amount to a disproportionate interference with the right owner's fundamental human right to peaceful enjoyment of his possessions under Article 1, protocol 1 of the ECHR, under which "possessions" include copyright (see *Bălan v Moldova* [2009] E.C.D.R. 6).
- 6) It must be possible for the licensor and the user to agree contractual restrictions on use of sensitive material (e.g. the Imperial War Museum licensing footage showing genocide, concentration camps, etc. for legitimate use – e.g. a museum exhibition about DRC or Kosovo history – the material must not be able to be re-used in a political film, under the proposed "quotation" exception. This can only be achieved by contract term. If this cannot be done, such content will not be made available for digital productions.
- 7) A large public media organisation has complained about the consequences of voluntarily acquiring copyright material under a contract term which states, "No fair dealing." The answer to that is either negotiate the term away (the complainant is very large and has immense bargaining power) or don't acquire the material. Large public organisations' bargaining power doesn't need a change in the law to help them negotiate a contract.

- 8) The main impetus for this provision comes from libraries, which are exceptionally risk averse:
- As publicly funded libraries increasingly commercialise their holdings, they should accept the concomitant business risks. The private sector accepts them. Changing the law to favour publicly funded libraries amounts to a transfer of income from the private sector (the copyright owners) to the public sector (the libraries, who wish to exploit the copyrights risk-free).
 - Rights for the kind of transactions contemplated (such as providing copies of documents to readers online) are increasingly licensed transactionally by computer programs, services which the big libraries are increasingly buying in.
 - Contract terms agreed with licensors are logged when a new licence is entered into, and can be updated. Typically this work is contracted out.
 - When a user requests a copy of a document – say, an article from a journal - electronically, the automated system provides it if the library has the rights, through a contract with a publisher or with a collecting society in the UK or abroad.
 - If the library does not have the rights, the reader is automatically forwarded to the right holder (in the UK or abroad) where she can usually obtain a licence online. Reliance on exceptions (and introduction of ECL) is rapidly becoming obsolete. Changing the law now simply for this purpose is unnecessary and retrograde.
 - If libraries cannot continue to function unless exceptions cannot be overridden by contract, then:
 - This provision must apply only to the specific library exceptions where it is essential
 - It must apply only to specified libraries (analogous to section 75 CDPA)
 - It must apply only to specified uses of works pursuant to the applicable exceptions
 - TPM must not be removed unless specifically agreed by the right holder by contract.
 - Care must be taken that an exception for libraries does not result significantly in transfer of revenues from private companies to the public institutions which are the beneficiaries of the exception.

COPYRIGHT NOTICES

Summary

- 1) As copyright notices could not be binding on the Courts, we do not think that they would be helpful.
- 2) If many used them (perhaps because they would be free of charge) there would be a danger of a *de facto* dual system of justice arising – Court judgments and extra-judicial interpretations by the IPO.
- 3) This would introduce an unacceptable quasi-judicial function to government, but without underlying judicial principles such as *audi alteram partem* which are essential to British justice.
- 4) Introduction of the small claims track for copyright disputes should help impecunious claimants.
- 5) On the point of cost, an issue of copyright law giving rise to a dispute which is too complex for the small claims track is also likely to be too complex for an IPO opinion, as officers of the IPO are not judicially trained, and should not be expected to carry out quasi-judicial functions.
- 6) On the other hand, we recognise that there is still a general need for basic education about intellectual property rights. For example, it is surprising how and where “it is on the Internet so it must be free” is still encountered. The IPO website already contains very useful guidance. Perhaps further educational initiatives could be developed.

104

Are there specific and or general areas of practical uncertainty in relation to copyright which you think would benefit from clarification from the IPO? What has been the consequence to you or your organisation of this lack of clarity?

- 1) No
- 2) On the other hand we believe that there is a general need for basic education about intellectual property rights. For example, it is surprising how and where “it is on the Internet so it must be free” is still encountered. The IPO website already contains very useful guidance. Perhaps further educational initiatives could be developed.

105

Who do you think would benefit from this sort of clarification? Should it be reserved for SMEs as the group likely to produce the greatest benefit in economic growth terms?

- 1) Mention of SMEs suggests that the consideration is avoiding the cost of legal advice and/or litigation.
- 2) An issue of copyright law giving rise to a dispute which is too complex for the small claims track is also likely to be too complex for an IPO opinion, as officers of the IPO are not judicially trained, and should not be expected to carry out quasi-judicial functions.
- 3) On the other hand, SMEs which are new entrants into the intellectual property sphere could benefit from educational initiatives.

106 *Have you experienced a copyright dispute over the last 5 years? If so, did you consult lawyers and how much did this cost?*

- 1) In relation to reducing cost of litigation, introduction of the small claims track for copyright disputes should help impecunious claimants.

107 *Do you think that it would be helpful for the IPO to publish its own interpretation of problem areas which may have general interest and relevance? What sources should it rely on in doing so?*

- 1) No. This is for the Courts.
- 2) Legal opinions issued by the IPO would introduce an unacceptable quasi-judicial function to government.

108 *Do you agree that it would be helpful to formalise the arrangements for these Notices through legislation? Please explain your reasons.*

109 *How do you think that the IPO should prioritise which areas to cover in these Notices?*

110 *Does there need to be a legal obligation on the Courts to have regard to these Notices? Please explain your answer.*

- 1) Copyright notices issued by the IPO could not be binding on the Courts.

- 2) We think non-binding notices would be unhelpful and potentially confusing.
- 3) If many used them (perhaps because they would be free of charge) there would be a danger of a *de facto* dual system of justice arising – Court judgments and extra-judicial interpretations by the IPO.

111 *Are there other ways in which you think that the IPO can help clarify areas where the law is misunderstood? How would these work?*

112 *Do you think it would be helpful for the IPO to provide (for a fee) a non-binding dispute resolution service for specific disputes relating to copyright? Who would benefit and how? Are there any disadvantages of IPO operating such a service?*

113 *What would you be prepared to pay for a dispute resolution service provided by the IPO? Please explain your answer, for example by comparison with the time and financial cost of other means of redress.*

114 *Which would you find more useful: general Notices on the interpretation of the law (free) or advice on your specific dispute (for which there would be a charge)? Please explain your answer.*