EUROPEAN COMMISSION GREEN PAPER:
COPYRIGHT IN THE KNOWLEDGE ECONOMY

Comments by the Fédération Internationale des Archives du Film (FIAF)

The Fédération Internationale des Archives du Film (FIAF) is an affiliation of some 140 film archives and cinémathèques in more than 70 countries world wide, including national film archives and smaller institutions, all not-for-profit organizations. Its joint role is to protect the audio visual heritage and to ensure that this important heritage survives to be enjoyed and studied for generations to come.

As film archives, FIAF affiliates are even more concerned by the digital challenge than other cultural institutions: The investment which digitization of audiovisual material entails is huge; due to the young age of this art form only a minimum of works is in public domain and can be published; the majority however is out of distribution and the amount of works with unclear copyright status striking; the figure of presumed orphan works enormous; the access therefore heavily restricted.

This is the framework film archives are dealing with, although the historical, cultural and educational value of film as the authentic memory of the 20th Century is undoubted and one of the most important for research, science, education.

The current copyright legislation does affect quite decisively the rate of digital preservation and accessibility of audiovisual content.

Therefore FIAF appreciates the initiative for this Green Paper and its purpose "to foster a debate on how knowledge for research, science and education can best be disseminated in the online environment".

As film archives are concerned by this debate, FIAF would like to state that its members define themselves subsumed under "public interest establishments" in the Green Paper´s wording. It states further that the notion of "publisher" in the current text should be changed into "right holder/owner" as to extend the relevance to all stakeholders involved in this debate.

The comments stated below are formulated by the Association des Cinémathèques Europénnes (ACE) after a discussion with FIAF, mainly with the FIAF Commission for Programming and Access to the Collection (PACC).

Q1 Should there be encouragement or guidelines for contractual arrangements between right holders and users for the implementation of copyright exceptions?

No.
What is needed in the current situation are clear definitions and reliability of legal acts leading to harmonization in the EU. "Public interest establishments" have to be assured in fulfilling their public tasks.

Q2 Should there be encouragement, guidelines or model licenses for contractual arrangements between right holders and users on other aspects not covered by copyright exceptions?

In certain cases, guidelines and model licenses can be useful to allow especially the use and online accessibility of works in copyright: the model licenses for the offline and online use of works out-of-print/distribution, approved by the High Level Group for the Digital Library Initiative, might be used as an example. The idea was to provide an incentive to wider dissemination of digitized material, by facilitating the consensual arrangements between the two main players: right holders and those institutions who invested in digitization of out-of-print works.

On the other hand it has to be doubted that contractual arrangements between right holders and institutions might help to solve the problem of orphan works with legal certainty.

In general, all voluntary arrangements between stakeholders sharing the aim of maximizing access to European cultural heritage and fostering long term societal goals, such as the preservation of cultural and linguistic diversity, are to be appreciated. Also models of public private partnership are to be considered, all under the condition of voluntary negotiation between the parties.

However, achieving contractual arrangements with right holders can be a time consuming and rather unsatisfying procedure: since 1997 ACE is negotiating a model contract on voluntary deposit with FIAPF (Fédération Internationale des Associations de Producteurs de Films) in order to replace and modernize an antiquated contract from 1971; in 2005 with regard to the unsuccessful negotiations, the European Commission offered help by moderating the procedure which ACE gratefully accepted. The contract was revised again. This time, both parties recognised the need to adapt the contract to the requirements and characteristics of a new digital environment as well as the expansion of the European Union. Questions in discussions were e.g. screenings and free circulation of films among ACE members, digitisation and duplication for preservation purposes, intranet use and password protected internet use. An officially finalized version was ready to be signed at Cannes Film Festival in May 2007.
However, instead of signing, FIAPF modified the text once more by including new restrictions. As a consequence, negotiations had to be resumed – to date still without success.

Q3 Is an approach based on a list of non-mandatory exceptions adequate in the light of evolving Internet technologies and the prevalent economic and social expectations?

No.
As the Green Paper itself admits, the Member States have interpreted the exceptions in different ways which led to a lack of harmonization. Joint European cultural initiatives using the Internet such as Europeana are seriously hampered by this development.

Therefore mandatory exceptions have to be clearly defined with a strong obligation to implement them into Member states´ legislation.

Mandatory exceptions give the “public interest establishments” the legal certainty in fulfilling their tasks. They are needed for encouraging (expensive) preservation through digitization, facilitating the accessibility of material, assuring users and the public in general. There is an enormous amount of film works which is created mainly with taxpayers’ money and is safeguarded and studied by publicly funded institutions the purpose of which is to disseminate culture, information and data on behalf of the wider public, including the same taxpayers.

Legal uncertainty leads to the fact that cultural heritage materials are no longer accessible and run the risk of fading from the collective memory. This situation contradicts the public demand for promoting and protecting cultural diversity.

Using the Internet to advance knowledge and educational levels is nowadays common practice of the general public and cannot be left to the interests of the private sector alone. Therefore institutions will make every effort to increase access to their collections by exploiting the opportunities offered by the Internet. And no doubt that content of high cultural, historical and educational value made accessible online will result in re-use, innovation and creation of new works with social, educational and economic impact.

Desirable would be a list of mandatory exceptions in combination with non-mandatory ones, the latter flexible enough to cover new social, economic and technical developments – and a legislative process that easier allows amendments.

For the certainty and for the reliability of the legal framework cultural institutions are in need for, the European Union should adopt provisions that the benefits of previously granted exceptions are guaranteed for the future.

Q4 Should certain categories of exceptions be made mandatory to ensure more legal certainty and better protection of beneficiaries of exceptions?

Yes.
See above.

Q5 If so, which ones?

First, a clear definition of beneficiaries is desirable, extended to a broad range of institutions in public interest, one that does not allow Member States to restrict exceptions only to their National Library and Archive.

Preservation:
In all public-interest-institutions there is a need for archival reproduction, be it analogue or digital, for preservation purposes that should be allowed without the consent of the right holders. The structure of high costs and small benefits (preservation) suggests that market forces, by themselves, may not be up to the task. Here we are dealing with a case of provision of a public good, of the kind, which often is referred to as a global public good, especially in a European context.

For preservation purposes there is a need for shifting from analogue to digital, and from a given digital format into the next necessary one, which should be allowed without the consent of the right holder.

The number of copies, necessary for preservation purposes, should not be limited, technical devices such as DRM should not hamper the preservation process.

Access on the premises:
For film archives there is a need to be included in the circle of those institutions that are permitted to give access to the holdings on their premises without the consent of the right holders.

There is a need for presenting the artifact in the circumstances it was produced for, i.e. the screen, in the establishment of the institution which takes care of it, without asking the right holder for permission and for free.

Works digitally preserved by one public interest institution should be permitted to be transferred to another public interest institution to avoid duplication of digitization.

Publishing;
Catalogue law / usage rights for publishing: non film material like photographs and posters, voluntarily deposited by right holders/owners, are now allowed to be published in analogue formats when connected with the work. This right should be extended to the Internet and other digital formats.

Right of quotation: in the cultural, historical, educational framework of the institution access to and online publication of cinematographic parts up to two minutes should be free, without consent of the right holder.

Online access:
In General, exceptions for the non-commercial use of works for archival purposes, study, research, educational and exhibition purposes should be mandatory.
An exception is highly desirable that allows libraries, archives and museums to make copyright material available online.

This could be the case for:
- unpublished works (archival material, letters, notes, photographs, manuscripts),
- orphan works and
- copyrighted material accessible in closed networks for scientific and educational purposes

In order to protect the interests of rights owners this might be limited, for instance by:
  - o disallowing the exception if a relevant licensing scheme is available;
  - o excluding works currently available commercially;

- imposing a time limit on the unauthorized publication by these means of unpublished works, perhaps of 50 years from creation; and
- limiting the exception in the case of unpublished works to works which are already legitimately available to the public on-site under the member state's access legislation.

Q6 Should the exception for libraries and archives remain unchanged because publishers themselves will develop online access to their catalogues?

First: a catalogue is a metadata repository giving access only to information about works and not to the works themselves. Libraries, archives and audiovisual collections are not concerned by published catalogues of the private sector.

Second: If "online access to catalogues" means online access to digitized works the initiatives of the private sector can be appreciated as such. But for the benefit of science, research and education far more public efforts in digitization and online accessibility are crucial. The digitization of works in the catalogues of right holders normally is based on economic purposes and business models, whereas the institutions have to serve the public interest.
Leaving the interests of the market to the market, one has to ask however which works in the rich collections of libraries, museums and archives deserve to be accessible and studied when there is no economic interest in publishing them. Thus without economic interest or market there is no preservation and no making accessible for the public.

That is why in the case of film heritage, up to 85% of the European cinematographic works since 1895 are out of distribution.

Nevertheless the initiatives of right holders can avoid duplication efforts. There should be accordant contractual arrangements between right holders and institutions aiming at making more works accessible online. Right holders might also be able to contribute to Europeana by making their own publications available, but that will contribute but a small part of the whole.

Q7 In order to increase access to works, should publicly accessible libraries, educational establishments, museums and archives enter into licensing schemes with the publishers? Are there examples of successful licensing schemes for online access to library collections?

See answer to Q 6

Q8 Should the scope of the exception for publicly accessible libraries, educational establishments, museums and archives be clarified with respect to:

(a) Format shifting;

Yes, see answer to Q 5, Preservation

(b) The number of copies that can be made under the exception;

Yes, see answer to Q 5, Preservation

Nothing prevents copyright law to take into account this quite obvious technological background and steer clear of posing unnecessary obstacles to digital preservation. All what is required in this regard from a legal viewpoint is that copyright law allows for the creation of an open-ended number of digital copies. Indeed, if the original creation of multiple copies and the subsequent creation of additional copies are permitted to the extent required to evolve (or "shift") the original copies into the formats which from time to time appear on the technological horizon, then a modicum of technological foresight is required to enable progressive migration at the same pace as formats and platforms evolve.

(c) The scanning of entire collections held by libraries?

First of all, scanning is reproduction and does not imply making available online. The number of works to be preserved digitally should not be limited. See answer to Q 5.

Q9 Should the law be clarified with respect to whether the scanning of works held in libraries for the purpose of making their content searchable on the Internet goes beyond the scope of current exceptions to copyright?

Yes.
Again, it is not a question of the technological process of duplication.

In fact the structure of publicly funded expensive digitization and the benefits for this public has to be in balance. Nowadays, making the content searchable online would infringe the communication to the public right. For arguments in favour of a change to allow such a use see above answer to Q 5.
The simplest way to achieve this would be to transfer art. 5(2)(c) of the Directive into art. 5(3). The change should of course apply to all relevant institutions, not only libraries.

Q10 Is a further Community statutory instrument required to deal with the problem of orphan works, which goes beyond the Commission Recommendation 2006/585/EC of 24 August 2006?

Yes.

An exception which enables film archives, archives, museums and libraries to make orphan works lawfully available online is very important.

All other non-legislative initiatives do not solve the fact that using orphan works constitutes a copyright infringement.

Indeed, it is quite problematic to stick to a contractual approach in a situation where by definition the correct party to the contract cannot be located or even identified in the first place. In the case of works for which there are licensing bodies able and willing to issue licenses covering the use of orphan works, such a license is currently only of limited benefit and imposes risks on both the licensor and the licensee. Unless the licensor is authorised by the rights owner to issue the license, there is nothing currently to prevent the rights owner from suing both the licensor for authorising an infringement and the licensee for infringing use. Any indemnity offered by the licensor merely deals with the costs and penalties of such an action; it does not preclude the action itself and does not prevent the court awarding other remedies against the licensee such as an injunction. In serious cases, both the licensor and licensee could even be liable for criminal prosecution.

The recommendations of the “subgroup copyright” within the High Level Expert Group for the Digital Library Initiative are an important first step: rights clearance centres, dedicated databases. This applies accordingly to the “Memorandum of Understanding” and the guidelines as a result of the sector specific working groups between stakeholders who tried to define criteria for a diligent search that has to be fulfilled prior to the use of an orphan work.

But on the other hand, this procedure also clearly showed the limits of contractual arrangements:

- they are referring to Scandinavian extended licensing schemes not common in the entire EU,
- they delegate legislative acts to Member States,
- therefore they cause the danger of not harmonized regulations,
- in facing this danger they are build upon the concept of “mutual recognition” of differing solutions between the Member States,
- and finally they are not able to solve the above mentioned fundamental dilemma.

All because such an enabling provision unfortunately is not to be found anywhere in the relevant EU Directives.

Q11 If so, should this be done by amending the 2001 Directive on Copyright in the information society or through a stand-alone instrument?

This should be achieved by a stand-alone instrument if no other amendment of the Information Society Directive is made.

One can envisage specific new EU legislation concerning orphan works, to the effect that, under given conditions, the reproduction, distribution, communication to the public and the other acts concerning orphan works could be considered either altogether admissible or at least subject to what the current US bills call “a limitation on remedies”. Thereby meaning that reappearing right holders may claim compensation but not damages and/or injunctions.

Furthermore legislation is needed for another purpose: All rights clearance mechanisms are hitherto foreseen for single works and not entire collections (photographs, newspapers long gone out of print, books with illustrations etc). There should therefore also be provision for the sampling of such collections in order to determine whether or not they are primarily constituted of orphan works.

Q12 How should the cross-border aspects of the orphan works issue be tackled to ensure EU-wide recognition of the solutions adopted in different Member States?

See answers to Q 10 and 11.

Q13-Q18
These are outside the scope of ACE/FIAF to comment.

Q19 Should the scientific and research community enter into licensing schemes with publishers in order to increase access to works for teaching or research purposes? Are there examples of successful licensing schemes enabling online use of works for teaching or research purposes?

This seems desirable (again: not only with publishers), but will overstress the power and time of these communities when negotiating on a case-for-case basis.

Audiovisual: Yes, encouraged by the Governments for example in closed networks in Norway, the UK and the Netherlands.

Q20 Should the teaching and research exception be clarified so as to accommodate modern forms of distance learning?

Yes, certainly.

Intranet, dedicated terminals on the premises, classrooms, special courses:
That’s no distance learning.
And it does not make a lot of sense that accessibility is reserved to the few EU citizens sitting in a special course or living in the neighborhood of the physical location where the digitized resource is available. Access for any interested person in any part of the globe is indeed most welcome.

EU legislation should adopt the principle set out in the Gowers report and repeated in the Green Paper, so that the exception would “be defined by category of use and activity, not by media or location.”

With regard to e-learning, archives should benefit from this exception and be allowed to use digitized material as a basis for developing electronic learning environments.

Q21 Should there be a clarification that the teaching and research exception covers not only material used in classrooms or educational facilities, but also use of works at home for study?

Yes.
See above.

Q22 Should there be mandatory minimum rules as to the length of the excerpts from works which can be reproduced or made available for teaching and research purposes?

Not for the length, but for the use:
Respecting the integrity of the work, no violation of the author´s intention.

Q23 Should there be a mandatory minimum requirement that the exception covers both teaching and research?

Yes. Research is just as essential to the development of the knowledge economy and the information society as education.

Q24 Should there be more precise rules regarding what acts end users can or cannot do when making use of materials protected by copyright?

Probably not, except answer to Q 22.

Q25 Should an exception for user-created content be introduced into the Directive?
No, there seems to be no need for.
But the EU could encourage citizens to use Creative Common Licenses to enrich free available Internet content for the benefit of the heritage.

Additional comment, as invited by chapter 4 of the Green Paper

Although the attitude of artists as stakeholders is quite understandable, the extension of the copyright protection for performing artists and session musicians is the wrong signal, will encourage other groups of artists to demand the same, and will for sure not facilitate the making available (songs in film, film music) of audiovisual material.

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