DIGITAL SINGLE MARKET COPYRIGHT PROPOSALS PUBLISHED BY THE EU COMMISSION ON 14 SEPTEMBER 2016

COMMENTS FROM THE BRITISH SCREEN ADVISORY COUNCIL (BSAC)

6 December 2016

Executive Summary

BSAC welcomes recognition of the importance of the copyright framework to the Digital Single Market. However, any proposals must respect the EU principles of subsidiarity and proportionality. Moreover, we are very concerned that the EU Commission's proposals have not taken full account of how copyright licensing works to provide incentives to invest in the great range of content that consumers enjoy. Legislative changes must not risk compromising the principle of territorial copyright licensing.

The continued ability to license copyright on a territorial and exclusive basis is of critical importance to the continued success of the audiovisual sector in making and distributing audiovisual content, reflecting cultural differences and supporting cultural diversity. Not all of the factors relevant to whether or not audiovisual services are available across borders have been assessed, which leads to, in our view, misleading conclusions about possible problems and may result in negative outcomes from regulatory intervention. Proposals directed at alleged copyright problems could have very damaging consequences.

Making better enforcement of copyright a priority would, moreover, be the best approach to delivering a greater number of services providing content legally to consumers across the EU and properly rewarding authors and artists.

The following points are in particular important regarding the Commission's proposals[1]:

The proposed transmissions Regulation

- Legislative proposals should be accompanied by a clear picture of the extent to which there will be contractual freedom to license rights on a territorial basis, including on an exclusive basis. Amending the EU regulatory framework without a proper impact assessment is clearly in contradiction with the EU better legislation requirements.

- Mandating the use of the country of origin principle for certain "ancillary online services" in the face of the current uncertainty risks unintended consequences which could be very damaging to the interests of EU consumers and a leading EU industrial sector.

- A Recital indicating that the proposed country of origin rule for "ancillary online services" does not prevent contracts limiting the scope of availability under certain circumstances may be worthless depending on the outcome of the European Commission's competition law case concerning cross-border pay-TV and any follow-on competition cases resulting from the e-commerce sector inquiry or otherwise.

- The principle of exclusive territorial licensing must also not be undermined by other of the Commission's initiatives during the legislative debate in the Council and Parliament. In line with the 2006 Services Directive, it is fundamental that the draft Geoblocking Regulation excludes content services and audiovisual services in particular.

- Undermining territorial exclusivity and windowing would seriously undermine the economic value of rights in the audiovisual sector, impair future investments, and result in substantially fewer benefits for the European single market and EU consumers.

- With regard to the proposals on retransmissions, retention of the broadcaster's veto on retransmissions, as proposed in the draft Regulation, is crucial.

The proposed DSM copyright Directive

Article 10: Negotiation mechanism

- Parties to possible licensing of audiovisual content must not be compelled to use an impartial body for assistance where licensing is not agreed and the costs of such a body must not fall on those who do not want to use such a

[1] We have not commented on the draft Regulation and Directive to implement the Marrakesh Treaty, as explained in paragraph 1.5

body. Contractual freedom must be upheld and the voluntary nature of the negotiation mechanism must be preserved.

Articles 7 to 9: Out-of-commerce works

- Facilitating the licensing of out-of-commerce works held in archives by regulating to permit the extension of collective licensing to non-mandating right holders is helpful, so long as the safeguards as in UK law apply (including the ability to opt-out) and forum shopping cannot undermine those safeguards. The definition of "out-of-commerce" should be clarified so that it does not affect the commercial value of works.

Article 13: Certain uses of protected content by online services

- A forum where stakeholders can explore possible co-operation on the role of online services giving access to content uploaded by users could be established by the UK IPO now.

Articles 14 to 16: Fair remuneration in contracts of authors and performers

- Encouraging more collective agreements, of the sort that apply in the UK, is a better approach to deliver fair remuneration for authors and performers without the risk of the damaging consequences (particularly in the form of lower content investment) likely from the proposals in the draft Directive.

- Rewards in a contract reflect the risk being taken, and rights holders today have many more opportunities to go direct to market (or to a wide variety of other intermediaries) if they are unhappy with the terms on offer from a particular intermediary. Interfering in freely negotiated contracts is not justified.

- Intervention, if any, in this area should take into account sectoral differences and deal at most with the most extreme asymmetry between parties. Accordingly, agreements of the type that exist in the UK, collective and individual, that provide for payments to authors and performers linked to future exploitation of content should in no circumstances be capable of being re-opened. There should be very clear criteria to establish the very limited set of circumstances, if any, in which a contract could be opened up retrospectively.

Article 4: Use of works and other subject matter in digital and cross-border teaching activities

- Narrowly tailored exceptions to copyright permitting limited use of copyright material for educational purposes are helpful, but the safeguards as in UK law, including on the amount of material that can be copied and the ability to override the exception by licensing, are important to ensure a fair balance.

- There is a risk of forum shopping, which arises from the flexibility granted to different Member States by the draft Directive to define the details that

apply to educational exceptions combined with freedom to use that material cross-border. This could undermine safeguards that apply in the UK.

Article 5: Preservation of cultural heritage

- Making mandatory the existing exception that provides for digital preservation of content in archives is valuable but the exception should, as provided in the draft Directive, continue to be limited to activity that is solely for preservation purposes.

The DSM copyright Communication

- Non-legislative interventions can be helpful where they are directed at clear market failures, such as exploring increased efficiency for subtitling and dubbing.

- The proposal for a single content identifier would be difficult and expensive with no benefits greater than the alternative of ensuring different identifiers are interoperable.

- Linking funding to cross-border licensing should not be supported. Some works are targeted towards a specific national public or towards cultural or regional sub-groups within a nation and would not necessarily travel easily and appeal to the public in other cultures.

1. Introduction

1.1 The British Screen Advisory Council (BSAC) is an independent, industry-funded umbrella group bringing together many of the most influential people working across the value chain in the UK audiovisual industry, including television, film, video games and new digital media businesses. BSAC Members include not only all of the segments in the UK audiovisual value chain (including development, production, sales, acquisition and licensing of content), but also leading technology firms and ISPs[2].

1.2 Copyright, including the ability to license copyright on a territorial and exclusive basis, underpins the success of the audiovisual sector in making and distributing content that is valued by consumers. The audiovisual sector is just one part of the creative industries, one of the most important sectors in the UK in terms of their economic contribution. This importance can be seen as measured by GVA, employment, exports and growth. We have set out figures that illustrate this both for the creative industries in general and certain sectors, including the audiovisual sector which includes television, films and games, in our recent paper making recommendations to Government on the UK's new arrangements with Europe[3]. In particular, the creative industries added 87.4bn GBP to the UK economy in 2015

[2] See complete list of BSAC membership at http://www.bsac.uk.com/membership/

[3] See paragraphs 5 and 6 in particular of BSAC's paper making recommendations relevant to the UK's decision to leave the EU at http://www.bsac.uk.com/wp-content/uploads/2016/10/BSAC-Recommendations-to-Government-on-Brexit-FINAL.pdf, BSAC's "Brexit paper".

(5.3% of UK GVA) and have grown 34% since 2010 compared to 17% for the economy as a whole.

1.3 The regulatory framework in the UK in the copyright area is therefore extremely important to BSAC Members. Most of the businesses represented by BSAC Members are also active in many European countries and so the regulatory framework in the EU, even if the UK were no longer bound to comply with this in all respects, remains very important too[4]. Some significant changes to the EU regulatory framework in the copyright area were published by the EU Commission on 14 September 2016. The recognition of copyright as a key issue to the success of the Digital Single Market is welcome, but we do have some major concerns that some of the proposed changes to the copyright framework are neither justified nor based on an accurate assessment of the evidence. Any proposals must, moreover, respect the EU principles of subsidiarity and proportionality. We are therefore providing comments on the proposals, particularly those that are of most relevance to the audiovisual sector. We hope our comments, and particularly our concerns, will be taken into account as discussions on those proposals are taken forward in Europe and any other fora. We have already noted that the Digital Single Market copyright workstream is one of the policy areas where it is more important than ever for the UK to engage proactively with current policy debates[5].

1.4 We have previously commented on the Regulation proposed by the EU Commission on portability of audiovisual services and raised a number of concerns[6]. However, we are pleased to see that many of these concerns have been taken into account in the Council agreement on a general approach. As agreement on the Regulation is taken forward in negotiations with the EU Parliament, it will, though, be important to ensure that, amongst other things, the scope of the Regulation remains limited to only mandating portability for services that are paid for by a subscription or a specific transaction to enable temporary access to content. Those providing free to air services, should, though, be able to opt in to the provisions in the Regulation, subject to the same levels of verification as other providers[7]. We do not, however, intend to provide further comments on that proposed Regulation in this document.

1.5 We are also not providing any comments on the proposed Regulation and Directive to implement the WIPO Marrakesh Treaty, which were part of the copyright package published on 14 September, as those do not apply to audiovisual content. The comments below therefore relate to:

---

[4] In our Brexit paper as referenced in footnote 3 we comment on a number of issues, including copyright, and set out key priorities that should in our view underlie negotiations on Brexit.

[5] See paragraph 24 of our Brexit paper as referenced in footnote 3

[6] See BSAC's response of 12 February 2016 to the IPO's call for views on cross-border portability of digital services at http://www.bsac.uk.com/wp-content/uploads/2016/04/BSAC-Response-IPO-Portability-of-Digital-Services-Feb-2016.pdf

[7] That Regulation, assuming it remains limited in scope as we have indicated, will, moreover, in due course be part of the EU regulatory framework that it will be important to maintain after Brexit. Paragraph 46 of the Brexit paper referenced in footnote 3 warns that for the consumer benefits of the portability Regulation to continue post-Brexit, then it will be essential for the UK to be treated in the same way as now by EU Member States so that the provisions about copyright licensing apply to UK services that consumers wish to enjoy while in other Member States

- The proposed Regulation laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmission of television and radio programmes (the draft "transmissions Regulation");
- The proposed Directive on copyright in the Digital Single Market (the draft "DSM copyright Directive"); and
- The Communication from the Commission on promoting a fair, efficient and competitive European copyright-based economy in the Digital Single Market (the "DSM copyright Communication").

We have grouped our comments using the headings in the DSM copyright Communication. This does not, though, mean that we necessarily agree that the proposals made by the Commission will have the effects indicated by these headings, or that the aims implied by the headings are ones that should be addressed, especially by changes to the copyright framework.

1.6 In this respect we published a paper relevant to the policy debate on copyright in the Digital Single Market about a year ago and many of the points made in that paper are still valid[8]. Some of that paper was directed at the issue of portability where the debate has, of course, moved on somewhat as indicated above. But we also considered issues relevant to cross-border access and provided a considerable amount of evidence. Our comments and the evidence in that paper are still very relevant to the current proposals where cross-border access is engaged.

1.7 It remains the case that great care should be taken to ensure that there is no change to the copyright framework that would amount to right holders being forced to license on a de facto pan-European basis. That would have a seriously damaging impact on the incentives to invest in the great range of content that consumers enjoy. This content reflects the cultural differences across the EU and so supports cultural diversity. There is evidence in our earlier paper relevant to how there is limited demand for content without localisation and how audience preferences vary in different Member States[9]. The paper also explores how consumers benefit from exclusive territorial rights and warns that less European content would be made without them[10].

1.8 The points we made in our paper are now fully supported by a detailed report on the economic consequences of undermining territorial licensing, which was published in May this year and which has been provided to the Commission[11]. That report found that changes to copyright and other initiatives at the EU level could result in substantially lower levels of investment in TV and film content, with consumer welfare losses worth up to €9.3bn a year, as a result of those consumers losing access to content they currently enjoy, being charged more, or being priced out completely. Ensuring that copyright can continue to be licensed on a territorial

[8] See the BSAC paper "Copyright-Protected Audiovisual Services: Portability and Cross-Border Access" published on 20 October 2015 at http://www.bsac.uk.com/wp-content/uploads/2015/10/bsac-portability-and-cross-border-access-in-europe-final.pdf

[9] See Section 3 of the BSAC paper referenced in footnote 8.

[10] See section 4 of the BSAC paper referenced in footnote 8.

[11] See "The impact of cross border access to audiovisual content on EU consumers" published by economic consultancy Oxera and media consultancy Oliver & Ohlbaum in May 2016 at http://crossborderaccessreport.eu/

and exclusive basis therefore remains a crucial policy objective that should underlie how any legislative changes and non-legislative interventions are developed.

2. Measures to ensure wider access to content across the EU – proposals in the draft transmissions Regulation

2.1 The draft transmissions Regulation raises issues that are extremely important to BSAC Members. The proposals have their origins in the Satellite and Cable Directive 1993. The provisions in that Directive work in ways that some BSAC Members have found very useful to facilitate licensing and receive royalties, within its limited scope of application. We do, therefore, continue to support that Directive[12]. Indeed, as we have stated previously, the continued application of the country of origin principle to satellite broadcasts having their origin in the UK and rules to facilitate cable retransmissions in EU countries is of great value to some BSAC Members and should be retained as part of the UK's new relationship with the EU[13].

2.2 The draft transmissions Regulation does, however, take principles in the Satellite and Cable Directive and expands their scope significantly. We are extremely concerned about the considerable expansion of the country of origin rule as it risks effectively undermining territoriality and exclusivity, especially given the broader context. The European Commission is concurrently looking at territorial restrictions in the context of both its pay-TV investigation and its e-commerce sector inquiry. It is currently unclear what the outcome of the case will be or what follow on action, if any, the European Commission may take following completion of the sector inquiry. Nor is it clear how those cases may cut across the principles of the draft transmissions Regulation. However, it is clear that a full analysis of both the underlying IP regime and the important economics of content production must be taken into account when looking at these cases and when considering the impact of expanding the country of origin rule. The draft Geoblocking Regulation, where we understand that some legislators have questioned the Commission's proposal to exclude content services and audiovisual from its scope, is also relevant. This draft Regulation must continue to exclude content services and audiovisual services in particular in the same way that this is the case for the 2006 Services Directive[14]. The principle (and demonstrable benefits) of exclusive territorial licensing must not be undermined by any of these actions and initiatives, whether individually or as a result of the interplay between them.

[12] As confirmed in the BSAC response of 16 November 2015 to the EU Commission consultation on the review of the EU satellite and cable Directive – see http://www.bsac.uk.com/wp-content/uploads/2015/11/bsac-response-eu-satellite-and-cable-directive-review-consultation-2015-final.pdf

[13] In order to ensure this after Brexit, it will be essential that EU Member States treat the UK in the same way as now for satellite broadcasts having their origin here (and vice versa).

[14] See Article 2(2)(g) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market

2.3 ***Online transmissions by broadcasting organisations – extension of Country of Origin principle***

As explained above, we have previously assembled a significant amount of evidence that illustrates the very damaging effects of regulatory intervention that would prevent a rights holder being able to exclusively license and sell audiovisual content on a territory-by-territory basis. In our most recent paper devoted to the policy debate on copyright in the Digital Single Market we explained how such intervention would:

- negatively affect innovation and investment in film and television content production and distribution, to the detriment of the long-term welfare of both creators and consumers;
- put at risk investment in new content and services for consumers, as well as jobs, growth and innovation in the EU's audiovisual industries; and
- undermine cultural differences, public policy goals and the Council of Europe treaty goals on co-production[15].

Whilst the proposals in the draft transmissions Regulation may stop short of mandating cross-border access for any audiovisual services, the concerns that we identified in that earlier paper are still extremely relevant to these proposals.

2.4 Any legislative changes must not jeopardise the ability to license audiovisual content on a territorial and exclusive basis. We therefore welcome the fact that Recital 11 in the draft transmissions Regulation indicates that the proposed country of origin rule should allow parties to continue to be able to agree to limit the availability of an ancillary online service in certain circumstances. We note that the Recital does not, however, specifically refer to limiting availability by territory rather than certain technical means of transmission or certain language versions. The country of origin rule for certain ancillary online services must not lead to any undermining of the choices that can be made by rights holders (whether broadcasters or owners of the copyright in content licensed to broadcasters) about whether to offer a content service to, or to license content for, one, several or all Member States as appropriate in ways that meet consumer demand and ensure that there can be a return on the investment to enable content to be produced and distributed in the first place. The use of a Recital and not even a substantive Article to recognise the principle of contractual freedom and territoriality is, moreover, certainly not adequate to ensure that current choices about licensing can continue.

2.5 We are also concerned that the safeguard indicated in Recital 11 may be of no value depending on the outcome of the European Commission's pay-TV case or other future cases. Indeed, the EU Commission acknowledges that "it is not possible to predict the future effects that the application of the free movement of services principle and competition law may have on territorial licensing of rights" and then admits that it has not attempted to assess the impact of the legislative changes in combination with the potential application of competition law[16]. This lack of data

[15] See the BSAC paper referenced in footnote 8.

[16] See page 28 of the Impact Assessment provided by the EU Commission to accompany these proposals where the statement saying that "it is not possible to predict the future effects that the application of the free movement of services principle and competition law may have on territorial licensing of rights" is

on the impact of the proposals is also confirmed by the material that the Commission has published about its 2017 work programme[17]. There should certainly be no legislative intervention if the full effect of the proposed legislation is not even fully established or understood. It is completely unacceptable that the Commission has failed to assess the impact of the potential application of competition law in combination with the new country of origin rule before bringing the proposal forward. This is clearly in contradiction with the EU better legislation requirements.

2.6 There is therefore a need for assurances beyond anything currently provided in the draft transmissions Regulation that there is no danger that the proposed country of origin rule will limit the type of copyright licensing possible, per se or in combination with other EU initiatives.

2.7 Even if there are assurances for future copyright licensing contracts that can be relied upon, we note that Article 5 of the draft transmissions Regulation seems to impose the country of origin rule to existing contracts. We cannot see how this would do anything other than clearly conflict with the supposed freedom to agree territorial and exclusive licences, even if there is no impact from how competition law might be applied. There is no mechanism to enable all of these contracts to be revisited to ensure that the country of origin rule only permits services to be received in those Member States where right holders agree this. Nor is it clear how the payment can be fixed as indicated in paragraph (2) of Article 2 of the draft Regulation where there are existing contracts.

2.8 Turning to the detail of the proposed new country of origin rule, this seems to be based on online service concepts that are out-of-date and in a number of respects lack clarity. For example, the definition of "ancillary online service" in Article 1 of the draft transmissions Regulation includes a time limit, but it is not clear whether this means a limitation to simulcast and catch-up television services only, or whether library content could also fall within the scope of the definition, or whether the intention is for the time limit to be left for negotiation between service providers and right holders. It is not clear whether services delivered only via the internet are outside the scope of the proposed rules. It is essential that such services are not included as right holders would be in a very weak position if any agreement for such a service would automatically mean rights are cleared for transmission to all Member States because exclusive territoriality was lost. It is also not clear whether or not the primary service must be available in each Member State where an ancillary online service is made available. Finally, it is not clear how the country of origin rule applies when content is included in an ancillary online service without

followed by the statement that the Impact Assessment "does not attempt to assess the impacts that the proposed intervention may have in combination with these rules". The "rules" referred to are those on country of origin.

[17] Regarding the "Review of the Satellite and Cable Directive 93/83/ECC" in the Commission Staff Working Document "Regulatory Fitness and Performance Programme REFIT and the 10 Priorities of the Commission" accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Commission Work Programme 2017 Delivering a Europe that protects, empowers and defends", there is the statement that *"Due to the limited availability of data, both the costs and benefits of the current Directive and the savings of the Commission proposal could not be quantified."* The Commission proposal referred to here is the draft transmissions Regulation.

agreement with right holders, ie activity that infringes rights. The rule must not make it more difficult than now for right holders to enforce their rights.

2.9 The impact of the country of origin rule applying to an ancillary online service could grow over time and it could alter the negotiating position of producers. In the future the rights for an "ancillary online service" may become more important than the rights for a traditional broadcast, that is the services within the scope of this definition will no longer be "ancillary" but, rather, primary services. If the main focus of the negotiations is the rights in "ancillary online services", the country of origin rule will mean that producers do not have any right to ensure content can be delivered to only certain territories if exclusive territoriality has been undermined. In that case it would also be important to understand whether or not a country of origin rule for ancillary online services might have a negative effect on right holders' willingness to agree to grant any licences for such services and the impact this might have on the availability of such services.

2.10 We have set out a number of concerns with the proposals in the draft transmissions Regulation regarding a country of origin rule for certain online transmissions of broadcasting organisations. There are many reasons why such online content is not necessarily made available across borders. Indeed, the Commission has acknowledged this but seemingly then not tried to assess whether factors other than copyright licensing are relevant[18]. We have explored some of these issues in the past, as discussed in paragraph 1.6 above. Any proposals that affect how copyright licences can be agreed must not undermine how territorial and exclusive licensing can work to support financing for the creation of a wide range of content that consumers enjoy. It is crucial that all the relevant issues and the impact of parallel EU action and initiatives like the pay-TV competition case are fully understood and taken into account. Undermining territoriality and windowing would result in higher prices in many countries and fewer benefits for the single market and EU consumers.

2.11 ***Retransmissions of television programmes***

Regarding the proposal on retransmissions of television programmes, it is crucial that the broadcaster retains a veto on what can be retransmitted. We therefore welcome recognition of this in Article 4 of the draft transmissions Regulation.

2.12 The extension of the rule on retransmissions to cover more than cable as in the Satellite and Cable Directive as provided in Article 3 of the draft transmissions Regulation, when interpreted with the definition in Article 1, is presented as only covering services equivalent to those provided by cable operators. We are not sure what this actually means, or that this is clearly the case. The clarity of what is covered is important here, but there is a more general concern where the possible scope of what might be agreed on any of the proposed legislative changes could be open to significant broadening if the definitions are not very tightly and

[18]See for example page 15 of the Impact Assessment provided by the EU Commission to accompany these proposals where it is acknowledged that the Impact Assessment does not directly address non-copyright issues.

unambiguously drawn. In this respect we are in particular concerned about possible interpretation by the CJEU of the definitions in the Regulation[19]. We cannot, therefore, support the current drafting to deliver an extension of the rule that applies to cable retransmissions in the Satellite and Cable Directive. For example, certain "cable-like" systems which operate on the internet would certainly consider themselves "closed", such as those that geofilter or provide an Aereo-like infrastructure, (such as for example, retransmitting linear streams online on a one-to one basis)[20].

2.13 Some BSAC Members would, though, support a limited extension of the rule on retransmissions to a narrow range of genuinely closed services that are clearly equivalent to cable services in a narrow sense, for example because they are subject to the same sort of more general regulation that applies to cable and operate over a controlled facility. It should be noted that there are relatively few broadcasts from other Member States which are retransmitted in the UK. But there will still be an impact on UK stakeholders from retransmissions of UK content in other Member States so it is important to ensure that definitions are clear and of genuinely limited scope.

3. Measures to ensure wider access to content across the EU – proposals in the draft DSM copyright Directive

3.1 *Article 10: Negotiation mechanism*

Article 10 of the draft DSM copyright Directive seems to be directed at an issue of market failure, but the exact nature of what this issue is requires more clarification. Moreover, it is not clear what types of licensing the proposals are aimed at, namely the licensing of primary or secondary rights, main rights or underlying rights and so on.

3.2 Although there is no evident need in the UK for a body of the type required by Article 10 of the draft Directive, a provision of this sort may, subject to certain safeguards, be acceptable. The first important safeguard that is needed is to ensure that the costs of establishing and running the impartial body are entirely borne by those who wish to make use of the body. The second important safeguard is to ensure that the body should be entirely voluntary. It must not be used to force a party to negotiate, or agree deals, about licensing when they do not wish to do so. Seeking the assistance of the impartial body must be voluntary and contractual freedom must be upheld.

[19] As a Regulation, the definitions have direct effect with no possibility of any clarifying provision in implementing law in a Member State in contrast to the Satellite and Cable Directive. Given that the final arbiter on the meaning is, moreover, the CJEU, definitions have to be considered in the light of how judgements from that Court have elaborated on the meaning of various terms in earlier EU copyright law, sometimes in very unexpected ways.

[20] In the US, there is litigation against Aereo-like models which are attempting to shoehorn themselves into the compulsory retransmission framework by saying "we're just like cable". While efforts by right holders have mostly been successful, changes to EU law which are not clear would mean that similar services would be likely to make similar arguments in the EU.

3.3 The priority is to ensure that unwanted consequences are avoided, including during any amendment of the current proposal, or during implementation in Member States because the parameters of what can be done are not clear. In this respect, we would welcome clarity regarding the Recitals. Recital 29 indicates circumstances when rights might not be licensed, immediately before Recital 30 about the establishment of an impartial body to assist with licensing, with the implication that there may be a desire to see that body used to compel licensing when it is not taking place for the reasons indicated in Recital 29. Such an effect would be completely unacceptable as it could undermine the ability to license content on a territorial basis when this is appropriate and so lead to all of the concerns that we have explained in, for example, paragraph 1.7 above.

3.4 ***Articles 7 to 9: Out-of-commerce works***

We support the principle of possible licensing for out-of-commerce works held in archives in order to make them available to the public, but the detailed proposals in Articles 7 to 9 of the draft DSM copyright Directive do give rise to some concerns. It is important to ensure that the proposals do not have unintended consequences. In particular, there should not be any provision that would lead to licensing that permits use of a type of work where most rights holders in such works have not agreed to this. The possibility of collective licensing being extended to cover the works of right holders who have not mandated a collective management organisation to act for them is, of course, a concept recently introduced into UK law[21]. The UK provision includes a number of important safeguards, such as the ability for right holders to opt-out of collective licensing and to ensure that collective licensing cannot be extended to cover the works of many right holders when very few have mandated licensing by the collective management organisation. It will be important that all the safeguards in UK law are permitted, or even required, by the provision in the Directive and this is not clearly the case at the moment.

3.5 It is also necessary to consider very carefully the cross-border effects of the provisions in the draft Directive. Licensing in one Member State could have the effect of making works available in another Member State where the same works are also held in an archive but where there has been no agreement on licensing, or where right holders have opted out of licensing in that second Member State. The rules in paragraph 4 of Article 7 of the draft Directive may have been designed to avoid this scenario, but they do not clearly do so where, for example, an audiovisual work has co-producers located in more than one Member State. Forum shopping must not be able to undermine any safeguards in the provisions.

3.6 The experiences of the British Film Institute (BFI)[22] do, however, illustrate the current difficulties with licensing "out-of-commerce" works and so we hope that

[21] The overlap of the current UK provisions with any provisions in the draft Directive will need to be considered. We note that at the moment there is no Collective Management Organisation (CMO) in the UK which is currently seeking to utilise the UK provisions for the audiovisual sector.

[22] The BFI's lottery funded Unlocking Film Heritage digitisation programme for archive material has provided practical experience of the many difficulties associated with copyright clearance of archival films where the work is still in copyright but is not orphaned. Significant resources have been deployed to trace rights holders who have then been given the option either of a standard contract, where the film is offered on a commercial basis through the BFI-Player and they receive 50% of any revenue, or waive

solutions to the problems we have indicated can be found. It will be important to look at how the provisions apply to films where issues may be more complicated due to the more extensive range of contractual provisions which might have applied there. For the audiovisual sector, there will also need to be an agreement on the meaning of "out-of-commerce", including to ensure that it does not affect the commercial value of works[23].

4. Measures to achieve a well-functioning marketplace for copyright – proposals in the draft DSM copyright Directive

4.1 ***Article 13: Certain uses of protected content by online services***
Article 13 of the draft DSM copyright Directive raises a number of important and difficult issues. We note that paragraph 3 of Article 13 proposes that Member States should facilitate co-operation between stakeholders. We see no reason to delay such action until there is final agreement on such a provision. We therefore urge the UK IPO to establish a forum in the near future in which possible co-operation between stakeholders might be explored.

4.2 ***Articles 14 to 16: Fair remuneration in contracts of authors and performers***
The provisions in Articles 14 to 16 of the draft DSM copyright Directive do not take into account the structure of rights agreements in the UK and the audiovisual production value chain. In the UK there are strong unions which reach collective agreements with producers and broadcasters to ensure that underlying right holders are generally treated fairly. Even if the main effect of the proposal were just in other Member States, this would still be a provision of concern to many UK stakeholders who have production businesses in other EU Member States. A provision that might have been designed to deal with possible problems in other Member States could have serious unintended consequences in the UK including a drop in content investment due to uncertainty and risk around costs; a drop in remuneration for authors and performers as money is inevitably held back to cover the possibility of future demands; deadweight administrative costs due to an ill-defined obligation to provide information. The idea of re-opening contracts at some future date needs to be treated very carefully indeed.

4.3 The rewards likely to be agreed in a contract quite properly reflect the risk being taken by the exploiter of an author's work or performer's performance with rewards for something that is less compelling and/or more obscure likely to be lower where the risk that the production will not be successful is higher for the exploiter. In this respect, it is important to remember that the majority of audiovisual works lose money and the returns from a few hits are essential to

---

the commercial option and allow the work to be made available freely (in the UK). In some instances, particularly in the case of television works which have remained unavailable since their initial transmission, and where the further exploitation rights are circumscribed by the terms of the original commissioning contract and the need to ensure the rights of underlying rights holders are met, there have been additional difficulties.

[23] For television, for example, we assume that programmes produced pre-2004 will need to be treated differently to some extent from those produced after 2004 given the changes enacted to the terms of trade between broadcasters and producers that year.

subsidise the production of these "failures". Interfering in freely negotiated contracts is not justified at a time when it is easier than ever for an artist to go straight to market themselves if he/she is unhappy about the terms being offered by one of an ever increasing range of intermediaries.

4.4 Turning to the detail of the current proposals in the draft Directive, it is not clear who would be bound to supply information to whom under the obligation for transparency. For example, it would not be appropriate for an individual musician to demand information about use of a sound recording of his or her performance on a streaming service from the operator of that service. That information should only go to the record label which has granted the rights to the streaming service, which can then pass information on to the musician when appropriate, subject to any requirements to respect the confidentiality of any commercially sensitive information.

4.5 As we have said, there are various collective agreements in the UK and these already cover the possibility of payments that provide a share of any success for the content. It would not be right to suggest that there could be a second payment for the same thing. Individual contracts may also make provision for payments if and when the content is successful in the future. There can be no justification for a mechanism that would permit the re-opening of such agreements. A better approach to address any perceived problems that the proposals in the draft Directive seek to address would be to encourage collective agreements in those Member States where they do not exist. This is likely in any case to be more effective than the complicated mechanisms that would need to be established in order to deliver the proposals in the draft Directive. Moreover, if there is a provision that could mean the amount to be paid to an author or performer could be re-opened at some point in the future, this could, as we have indicated, have the unintended consequence of payments under initial contracts being less as money is held back for possible future payments. Another unintended consequence we would like to stress again could be fewer new dramas and films, if the revenue from the few hits can no longer be used to pay to make the large number of absolute or relative failures.

4.6 Any intervention providing a contract adjustment mechanism should therefore deal at most with the most extreme asymmetry between parties. There would need to be very clear criteria to establish the very limited set of circumstances, if any, in which a contract could be opened up retrospectively. The criteria should take account of differences between sectors and at the very least ensure that agreements, collective and individual, are not capable of being re-opened where they already provide for payments to authors and performers linked to future exploitation of content.

5. Measures to adapt exceptions to digital and cross-border environments – proposals in the draft DSM copyright Directive

5.1 ***Article 4: Use of works and other subject matter in digital and cross-border teaching activities***

We support the broad objective of Article 4 of the draft DSM copyright Directive as we understand the value to educational establishments and learners of being able to use content protected by copyright in digital teaching activities. But the uses permitted by an exception to rights must be limited and must not generally replace the need to purchase material or obtain licences to access and use the material in many situations, especially where more than short extracts from a copyright work are to be used. Moreover, given that the provisions in Article 4 of the Directive would permit cross-border supply of material that has been used as permitted in one Member State, it is important to ensure that an exception does not lead to forum shopping for the supply of educational material. Activity in one Member State under an exception, which cannot be overridden by licensing and/or does not engage the payment of fair compensation, could in particular mean that educational material might be supplied from that Member State to large numbers of students in another Member State where such conditions do apply to an exception. Right holders would then receive no recompense for what is being used in a significant way in the second Member State where they would receive something if the activity were taking place solely in that second Member State.

5.2 Some of the problems with the current proposal might be solved by first of all ensuring that there is a clear definition of an "educational establishment". Rather than provide options about when licensing can override the exception or when payments to right holders might be due, specific limitations could be incorporated into Article 4 of the draft Directive about how provision must be made in each Member State. Article 4 could also specifically set out how exceptions should be limited to comply with the three-step test, as would be required by the Article 6 of the draft Directive. The exception could, for example, be limited to short extracts of works. This approach of further elaboration about what is permitted might solve a number of problems with the current proposal.

5.3 It will, as indicated above, be important to ensure that the exception cannot apply to unfair uses of content across borders. For example, an establishment claiming to be "educational" could be set up in one Member State where the copyright exception is not limited to short extracts and where there is no remuneration for right holders, and that establishment could upload a very large back catalogue of content claimed to be for "educational purposes" with few or even no students undertaking a course of education at that establishment in that Member State. That "educational" establishment could then invite people in other Member States to sign up as "students" of the establishment in order to give them access to the uploaded material.

5.4 The exceptions in UK law that permit use of copyright works for educational purposes provide good examples of how a fair balance can be struck between the need to facilitate educational use of material protected by copyright in the digital environment and the need to preclude uses that could undermine the legitimate

interests of right holders. It will be important as negotiations on the proposals in the Directive are taken forward, not only to ensure that the UK exceptions can be maintained as they are, but also, regarding any cross-border use that is permitted, to ensure that the proposals do not lead to the concerns we have identified.

5.5 ***Article 5: Preservation of cultural heritage***

There is, of course, already a very valuable exception to copyright in UK law that permits the preservation of cultural heritage and has important benefits for consumers and citizens in ensuring that works remain in an accessible state. We therefore support the need for such exceptions in all Member States as would be delivered by Article 5 of the draft DSM copyright Directive. We are pleased to note that the provision in Article 5 is limited to activity for the "sole" purpose of preservation of copyright works. Any other use of the works must continue to be only as permitted by other exceptions to copyright or by licences agreed with right holders.

6. Measures to ensure wider access to content across the EU – Non-legislative proposals in the DSM copyright Communication

6.1 The DSM copyright Communication has referred to a number of non-legislative proposals that the Commission intends to take forward. We do not intend to comment on each of these in detail, not least because there is at the moment very little information about what they are and how they might be pursued. In general, though, we welcome the benefits that might arise from some non-legislative actions to address clear market failures. Indeed, we have in the past encouraged a dialogue on some practical measures that might be helpful[24]. Some of our suggestions are in the same areas as those proposed by the Commission, such as the issue of language versioning and content identifiers. However, on the latter we are very concerned that the Commission seems to be proposing a single identifier rather than ensuring that different identifiers are interoperable. The latter could be helpful, but the former would be extremely difficult to implement and lead to very significant costs for those who do not currently use what has been chosen as the standard, for no greater benefit than could be achieved with interoperability. Experience in the UK also shows that pursuing a single identifier would need significant resources to try and make it work[25].

6.2 We are opposed to proposals that would force more cross-border availability, such as making this a condition for support from the Creative Europe Media programme. There are other proposals that are not entirely clear, such as the idea of licensing hubs. It is not clear what such hubs are and how they might work in practice. In general, we support non-legislative proposals where clear market failures have been identified, such as exploring increased efficiency for subtitling

[24] See, for example, paragraph 6.7 of the BSAC response to the EU Commission's Licenses for Europe initiative published on 9 October 2013 at http://www.bsac.uk.com/wp-content/uploads/2013/10/satisfying-consumer-demand-av-content-europe-final.pdf

[25] PACT, the UK trade association representing the commercial interests of UK independent television, film, digital, children's and animation media companies, administered ISAN for a number of years until a few months ago after concluding that the model doesn't work and the revenues are unsustainable. The resources needed to try and make it work were very costly in both time and money.

and dubbing. But we do not support non-legislative proposals that seem designed to remove the freedom to decide whether or not to license content on a territorial and exclusive basis. These decisions are based on many factors. For example, some works are targeted towards a specific national public or towards cultural or regional sub-groups within a nation and would not necessarily travel easily and appeal to the public in other cultures. As we have already explained, even the Commission accepts that there are many reasons why content is not available across borders[26]. We do not support any proposals that are aimed at changing how content is made available in ways that would undermine how a return on the investment in the production of the content can be obtained. We note that the Commission intends to launch a dialogue with the major European animation studios that might explore alternative models of financing, production and distribution. This should not result in any pressure being imposed to adopt changes that would undermine the ability to obtain a return on investment. Moreover, it would be important to engage with small businesses too via the relevant trade associations.

7. Enforcement of rights

7.1 We note the comments about enforcement of rights in the DSM copyright Communication, but are concerned that there is not the same degree of urgency attached to those proposals compared to the recent package of copyright proposals for the Digital Single Market. Improvements to enforcement of rights should be taken forward urgently and certainly should not depend on or be linked to progress on the Digital Single Market proposals. We have previously urged that priority be given to the enforcement workstream[27] and this does not seem to be happening. We also commented that the far greater challenge to the creative industries playing the role that is apparently expected of them in stimulating the creation of new content, services, jobs and growth across the EU than anything in the copyright framework is the blight of unlawful expropriation of copyright content. Delivering better enforcement as soon as possible is therefore the best approach to delivering more services making content available legally to consumers across the EU.

[26] See footnote 19

[27] See section 6 of the paper referenced in footnote 8 (BSAC paper "Copyright-Protected Audiovisual Services: Portability and Cross-Border Access" published on 20 October 2015 at http://www.bsac.uk.com/wp-content/uploads/2015/10/bsac-portability-and-cross-border-access-in-europe-final.pdf)