

European Commission - Public Consultation
Digital for Cultural Heritage

22 June 2020 – 14 September 2020

EUROCINEMA's contribution

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EUROCINEMA represents audiovisual producers in Europe.

We notably represent audiovisual catalogue owners. With this in mind, we have been involved for many years now, with cultural institutions, into the digitization process of copyrighted audiovisual cultural heritage.

We note that this consultation aims at assessing the 27th October 2011 Recommendation (2011/711/UE) on the digitization and online accessibility of cultural material and digital preservation¹.

Even though we understand that this new step might be necessary for many other fields of activities, in the audiovisual sector, it ought to be noted that, in the meantime:

- a new Directive dated 25th October 2012 on Certain uses of orphan works has been voted². The purpose of this legislative instrument, implemented in all the member states, is precisely to clarify the rules of what is an orphan work and how the diligent search of rightsholders ought to be carried out. We trust that this step has been an efficient answer to facilitate the access to audiovisual heritage (provided that we ever acknowledge that there has been a lack of accessibility, point which was not shared by an overwhelming majority of the stakeholders of the audiovisual industry). The online offer is already wide and ought to be certainly more popularized.
- a stakeholders' dialogue called "License for Europe" has been carried out by the commission of this topic in 2012 through its Working Group #3 ("Audiovisual sector and cultural heritage institutions").
- Article 13.2 of the AVMS directive 2018/1808 provides that 30% of the works available on the VOD platforms should be European. Its implementation by each Member States is in process. This provision will stimulate even more the presence of European audiovisual heritage works online.
- Article 6 of the Copyright Directive 17 April 2019/790³ specifically foresees an authorization to copy cultural heritage works that are in their collections for preservation purposes only.

¹ <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32011H0711&from=EN>

² Directive 2012/28/EU on certain permitted uses of orphan works | <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32012L0028&from=EN>

³ Article 6 - **Preservation of cultural heritage**: "*Member States shall provide for an exception to the rights provided for in Article 5(a) and Article 7(1) of Directive 96/9/EC, Article 2 of Directive 2001/29/EC, Article 4(1)(a) of Directive 2009/24/EC and Article 15(1) of this Directive, in order to allow cultural heritage institutions to make copies of any works or other subject matter that are permanently in their collections, in any format or medium, for purposes of preservation of such works or other subject matter and to the extent necessary for such preservation*".

There must be no confusion between the preservation of the heritage and its exploitation which are two different questions and fields of activities. Of course, the audiovisual works are aimed to be seen by the largest possible public. But our sector is grounded by the copyright law with which we produce works in Europe. If we are totally in favor of measures that would help a better access to copyrighted European cultural heritage, it ought to be through licenses. The digitization of cultural heritage in our field of activity is already a reality that is incentivized by the neighboring rights that are being granted to the producers and cultural institutions who finance it.

I. Clearance of rights for heritage works online⁴

Online access to heritage audiovisual works is already a reality. The main audiovisual works are being digitized by cataloguists who invest in this field. The investment in digitization confer them neighboring rights which are a consideration for the amounts invested.

More specifically, what is therefore at stake is the clearance of the rights of these copyrighted works. This implies the identification of the rights holders (see point A) and that an agreement be agreed upon between them (see point B).

A. Identifying the rightholders

1. The ownership of the masters produced during the digitization of a work.
These digital and analog masters produced in the course of the digitization of a work become the property of those covering the costs. So that these costs be recoupable, the principle of revenue sharing shall apply.
2. The authors and the role of European film heritage institutions/catalogue owners.
These European film heritage institutions and catalogue owners play a crucial role in identifying and locating the rightholders since they must obtain the consent of the latter for the online use of the works (in accordance with the laws of the territory of the institutions) in full compliance with all the applicable European and international legislation, in particular the 2012/28/EU Orphan Works' Directive and the Annex provisions relevant to audiovisual works.

The rightholders, by default, are:

- Producers, directors, authors of the screenplay/dialogue, and composers of music specifically created for use in the work, who own or control rights in the work as a whole, and any other party in a similar position.
- Any film heritage institutions/catalogue owners that are holding materials of the works concerned.

B. Agreement between the rightholders (where agreed upon between the parties since the online exploitation of the works should remain optional):

If the rightholders agree upon an online exploitation of a work, an agreement must be concluded⁵ whereby:

- The rights granted are limited to those necessary for the uses considered in relation to the project of digitization and (where necessary) restoration

⁴ Our organization is not concerned by the audiovisual works in the public domain but remains alert on the full respect of the authors' rights without any new exceptions than the one provided into the Copyright Directive

⁵ This agreement is without prejudice to the international treaties, EU directives and national legislations in force, the 2008 Code of ethics of the international federation of film archives (FIAF <https://www.fiafnet.org/pages/Community/Code-Of-Ethics.html>), the rights owners' interests and the moral rights of the parties involved.

- Analog and digital masters produced in the course of digitization of a work become the property of those covering the costs of the digitization.
- The principle of revenue sharing should apply i.e there should be an agreement between the parties as to how the cost of the digitization will be recouped through the exploitation by the Film heritage institution and/or any rights owner.
- Right owners should have access to the masters to make new copies subject to prior approval by all right owners and agreement upon a contribution compensating the costs of the digitization.

II. The COVID-19 focus

The consultation emphasizes on the fact that the COVID crisis has been a major shift which should be taken into account to renew the future practices in the cultural heritage sector.

Without daring taking a position for the other cultural sectors, in the audiovisual field of activity our opinion is different.

Of course, during the lockdown, the consumption of the audiovisual works has increased significantly, but this is exactly the reason why we think that there is no problem of availability.

The European citizens have had the choice between many VOD platforms.

The concern is rather now:

- the concentration of the consumption on few of them⁶ and the curation structures⁷ issue is becoming crucial. Most of the Festivals have been digitized in our sector. We acknowledge the fact that it has been a good intermediary solution, but we remain certain that the true meeting of people remains essential. Same for the artistic mediation.
- the financial needs of heritage cultural institutions to efficiently proceed to their researches of right owners of patrimonial audiovisual works and to face the digitization costs

Article 6 of the 2011 Recommendation⁸ addresses our field of activity. It suggested three further reflections to which answers have been mostly given:

- the orphan works directive has been voted and implemented in each Member States.
- the licensing legal framework has been discussed during the "Licensing for Europe" stakeholder's dialogue. This work has been useful (notably the FIAF's contribution) and remains a tool.
- the audiovisual sector is continuously working on an improvement of the meta data of the works (identification numbers such as ISAN⁹ for instance is widely used by catalogue owners) in order to allow a better access to the latter and to help a better use of the recognition tools used against piracy.

⁶ Three US platforms currently have roughly 90% of the EU market.

⁷ By "curation structures" we mean cinemas, festivals, media literacy nonprofit associations, libraries etc

⁸ Article 6 - **Digitisation and online accessibility of in-copyright material** (EC Recommendation 2011/711/EU on the digitisation and online accessibility of cultural material and digital preservation): " 6. *improve conditions for the digitisation and online accessibility of in-copyright material by:*

- a) *rapid and correct transposition and implementation of the provisions of the Directive on orphan works, once it is adopted, with consultation of interested parties ahead of adoption in order to facilitate a rapid implementation; a close monitoring of the Directive's application once it is adopted;*
- b) *Creating the legal framework conditions to underpin licensing mechanisms identified and agreed by stakeholders for the large-scale digitisation and cross-border accessibility of works that are out-of-commerce;*
- c) *contributing to and promoting the availability of databases with rights information, connected at the European level, such as ARROW;"*

⁹ <https://www.isan.org>