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ALCS Response to Green Paper

On the online distribution of audiovisual works in the European Union: opportunities and challenges towards a digital single market

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Introduction

The Authors' Licensing and Collecting Society Limited ('ALCS') is the UK collective management organisation for writers. Established in 1977 and wholly owned and governed by the writers it represents (of whom there are 85,000) ALCS is a not-for-profit, non-union organisation. Since its foundation, ALCS has paid writers over £270 million in fees and today it continues to identify and develop new sources of income for writers.

ALCS exists to ensure that writers receive a fair reward when their works are used in situations in which it would be impossible or impractical to offer licences on an individual basis.

By entering into partnerships with bodies representing creators and other rightsholders in the UK and internationally, ALCS provides high-volume rights clearance solutions, enabling simple, flexible access to content for enjoyment, learning and business development.

Our member's testimonies confirm that the secondary rights licensing income we collect and pay to them from the legitimate use and re-use of copyrighted material plays an important role in sustaining the creation of new works.

Summary of key points

- In its introductory comments the Green Paper highlights a number of barriers to the creation of a digital single market for audiovisual works, however the subsequent discussion and questions primarily focus on one issue: complexity associated with copyright licensing. It is important from the outset of this debate to recognise copyright's role as an enabler of markets for audiovisual works by protecting original creations and establishing licensing frameworks for national and international access.

- We would argue that the most significant barrier to a single market identified in the paper is "the prevalence of deep-seated cultural and linguistic differences." Within Europe music, art and literature are, to varying degrees, more susceptible to cross-border markets than audiovisual productions which tend to focus on national audiences. Logically, a full assessment of the likely *scope* of a European digital single market should precede an analysis of specific measures needed to deliver such a market.

- Within Europe the national markets for on-line and on-demand delivery of audiovisual works are evolving, some products succeed, others fall by the wayside. Inevitably broadcasters and producers will focus their efforts and resources on establishing services for local markets before making commercial decisions regarding distribution of any sub-set of works suited to the wider European market.

- When such multi-territory markets do become established, the means for licensing content, recording usage and exchanging data and distributing payments will need to be sufficiently flexible to cope with the more varied and fragmented distribution models associated with digital use.

- Digital distribution of audiovisual content introduces new players into the traditional value chain linking the original creator, producer, distributor and end-user. Commercial intermediaries providing products and services enabling recording, storage, mobile access and sharing offer consumers the chance to extract the full value from audiovisual works; it is important that authors share in this added value, particularly where new usage models result in a decline in traditional revenues streams.

Questions

1. What are the main legal and other obstacles – copyright or otherwise – that impede the development of the digital single market for the cross-border distribution of audiovisual works? Which framework conditions should be adapted or be put in place to stimulate a dynamic digital single market for audiovisual content and to facilitate multi-territorial licensing? What should be the key priorities?

We don't see copyright as an obstacle. Copyright establishes a framework whereby works are protected, this enables the establishment of licensing systems to grant access to content on terms that reward its creator. These rewards in turn promote and encourage the creation of new content, thereby regenerating the whole cycle.

The challenges facing the development of a European digital single market for the cross-border distribution of audiovisual works are myriad and diverse; chief amongst these being a reliable analysis of the market demand. The Green Paper acknowledges that often content is licensed into specific territories based on demand driven by factors such as cultural and linguistic preferences. The competition wider cross-border distribution models face from these established content markets adds to the commercial uncertainties, as noted in the KEA report prepared for Information Society and Media D-G last year.

"Furthermore, the long-term impact of international licensing on audiovisual production funding is unclear, as it remains to be seen whether internationally-operating VOD providers will be able to meet the levels of finance that broadcasters and local distributors currently invest in the ecosystem of audiovisual finance."[1]

The framework conditions that will need to evolve in response to the emergence of a digital single market for audiovisual content include: flexible licensing solutions, improved data exchange standards and systems for reporting use and making payments, and adequate enforcement measures to ensure nascent products are not forced out of the market by competition from unlicensed services.

2. What practical problems arise for audiovisual media services providers in the context of clearing rights in audiovisual works (a) in a single territory; and (b) across multiple territories? What rights are affected? For which uses?

Arguably the main practical problem service providers are likely to face is securing a comprehensive licence in content which, by its nature, involves multiple contributors and rights. To

[1] Multi-Territory Licensing of Audiovisual Works in the European Union, KEA European Affairs, 2010

an extent this is dealt with by the licences secured by producers where exploitation rights are acquired through various individual and collective rights clearance models.

For more traditional models based on linear delivery the chain of authority is relatively simple (author – producer – distributor – user) and the remuneration models reflect this certainty. Where content is made available on-demand user behaviour will vary (content is not simply watched when broadcast, but may be copied, stored, retransmitted, shared etc.). This fragmentation of use potentially presents practical problems in securing the flows of authority and remuneration along the above chain. Where delivery occurs across multiple territories, the challenge increases. Secondary use markets are therefore likely to be significant in the context of regulating this fragmented use.

A further practical problem may arise in the context of archive material for which producers only have ownership or licences in respect of broadcasting rights, but not for on-demand uses. In such cases solutions for large-scale 'back-dating' of rights clearance will be required before this content can be used directly or included in new licences to third party providers.

3. Can copyright clearance problems be solved by improving the licensing framework? Is a copyright system based on territoriality in the EU appropriate in the online environment?

Clearly an effective licensing framework is required to cope with the added demands of the digital-use environment and the Commission, through its IPR strategy published earlier this year, is developing various proposals aimed at achieving this. Allied to this is the ongoing work to improve databases identifying rightsholders and works based on common numbering standards, and achieve greater linkage between such databases to offer further opportunities to initiate complex rights clearances processes at a single point. The Commission has sponsored the development of the ARROW system for published works and the experiences and partnerships from this programme may prove useful in developing comparable networked services for audiovisual rights clearances.

In our answer to question 1 we highlight the commercial decisions involved in selling content internationally. The online environment may be notionally 'borderless' but it doesn't follow that all content should therefore be released on a pan-European basis. To recoup investment producers need to identify markets that will provide an adequate return and various factors – cultural, linguistic, financial, etc. – create different markets in different Member States. There may be other reasons why content cannot be made freely available across all territories. In the UK the BBC is publicly-funded and programmes are available via its iPlayer service to a UK audience. Separately, to test the international market for an iPlayer service the commercial division of the BBC has launched a subscription VoD model in a number of selected territories using programmes chosen to suit demand and establish value.

4. What technological means, for example, individual access codes, could be envisaged to enable consumers to access "their" broadcast or other services and "their" content, irrespective of their location? What impact might such approaches have on licensing models?

Consumers want platform-neutral content which can be accessed wherever they are. To meet this need broadcasters are developing mobile services (e.g. BBC iPlayer app, Sky Go) for streaming

and on-demand access. At the same time major media companies are developing 'Cloud locker' services for individuals to store and access their own copied/recorded content via portable devices such as laptops and tablet computers. These new services lead to greater flexibility for consumers, generating new commercial value represented by sales of devices and subscriptions to services.

Authors, like all creators, want to connect their work with an audience and these new technological means help to achieve that. To keep pace traditional licensing models designed to address broadcast fees and royalties for DVD sales and rental will need to evolve and adapt to ensure that authors receive a fair return from the value generated when content flows through new services for mobile access.

5. What would be the feasibility, and what would be the advantages and disadvantages of, extending the "country of origin" principle, as applied to satellite broadcasting, to online audiovisual media services? What would be the most appropriate way to determine the "country of origin" in respect to online transmissions?

The country of origin principle provides a degree of certainty to the extent that communicating programmes through an uplink process is directly related to the satellite broadcaster, creating a fixed point for licensing content. However this model reflects the technology in place at the time the Cable and Satellite Directive was conceived - connecting the technical act with the physical location of the broadcaster. Today servers anywhere in Europe (or elsewhere) could hold content for download in any other part of the world; licensing content from the Member State where the server happens to be located seems to make little sense.

Establishing the point for the initial licensing of content on-line may need to focus on factors establishing the country of production, notwithstanding the challenges in finding a clear definition for this. Flexibility in licensing structures will be needed in terms of cross-border delivery of audiovisual media services to ensure that the initial licence to the provider is supplemented by secondary use schemes covering any copying or retransmission in the territory of consumption.

6. What would be the costs and benefits of extending the copyright clearance system for cross-border retransmission of audiovisual media services by cable on a technology-neutral basis? Should such an extension be limited to "closed environments" such as IPTV or should it cover all forms of open retransmissions (Simulcasting) over the internet?

The current retransmission system grew out of the practice of commercial providers relaying signals beyond the original licensed territory. The Directive formalized this process enabling broadcasters to license this activity and establishing collective licences for cable operators, which in turn secured remuneration for authors and other rightsholders. The benefits in the current system include the retransmitter accessing a one-stop licence for a large-volume rights repertoire, the broadcaster / producer being relieved of the administration of accounting to multiple rightsholders and the interlinking of collective management structures across Europe to create networks to cope with the increased complexity of the retransmission of national programmes across different borders.

This model was designed for "simultaneous, unaltered and unabridged retransmission", notably the relay of entire channels where the high-volume, low-administration cost model is most effective.

Where new technologies emerge that effectively replicate the "simultaneous, unaltered and unabridged retransmission" delivery of entire channels, the benefits outlined above should act as stimulants for the markets in these new delivery models.

7. Are specific measures needed in light of the fast development of social networking and social media sites which rely on the creation and upload of online content by end-users (blogs, podcasts, posts, wikis, mash-ups, file and video sharing)?

If the content uploaded is created by the end-users, the copyright protection they have in their creations is already well established, as for other works. Where third-party content is uploaded to such sites, the right for its author to be consulted and approve or deny permission does not evaporate simply because the focus of the site in question is social networking.

Increasingly broadcasters and other content providers are establishing dedicated channels on social network platforms; in the UK the BBC and ITV have channels on YouTube while Channel 4 and Five also use the platform to host their VoD services. No specific measures are needed where content is simply expanding from one licensed platform to another. However the development of such sites has created a wider debate about the use of copies of works by individuals for 'non-commercial uses'. This is an issue that is relevant in all Members States and the review referred to in the Commission IPR strategy around the existing private copying regime must address the current imbalances whereby content uses can have markedly different results for author's remuneration depending on the territory of use.

8. How will further technological developments (e.g. cloud computing) impact upon the distribution of audiovisual content, including the delivery of content to multiple devices and customers' ability to access content regardless of their location?

In the past accessing audiovisual content 'on-demand' involved buying or renting videos/ DVDs and building home libraries of recorded content. For authors contractual royalties on sales, the introduction of rental rights and the requirement of fair compensation for private copying provided the basis for their remuneration when their work was accessed in this way.

The digital on-demand model offers greater convenience, flexibility and choice for consumers and for this they pay subscriptions direct to companies, often as part of a multiple communications package. Within these packages, catch-up services, purchase/ 'rental' of film and TV on-demand and automated home recording services all add significant value. In other parts of the digital media, sharing content between subscribers to the same service is being developed, to enhance consumer flexibility and open up to routes to new customers.

In addition to the enhanced 'at home' services, cloud computing 'lockers' and large-screen mobile devices (tablets etc.) add full mobility to enjoy selected audiovisual content on the move.

To protect the source of the content that drives these markets, licences and secondary remuneration schemes should capture this added value and provide proportionate returns to authors, particularly where traditional delivery means are being displaced by these new services.

9. How could technology facilitate the clearing of rights? Would the development of identification systems for audiovisual works and rights ownership databases facilitate the clearance of rights for online distribution of audiovisual works? What role, if any, is there for the European Union?

Digital technology increases the diversity of content delivery models and allows works to be accessed several stages removed from the point at which they were first communicated. This technology should also be harnessed to identify rightsholders and works both at the point of licensing and consumption. This data can be used across international networks to improve the efficiency of licensing transactions and the distribution of the resulting payments. A number of initiatives are already operating or in development:

The *International Standard Name Identifier* (ISNI) standard aims to uniquely identify the names of those involved in the creative content industries (writers, publishers, actors etc.). It will reduce the duplication of effort that is currently prevalent in identifying contributors to works, and it will improve accuracy in sharing distribution and repertoire data. ALCS has been involved in developing the standard from its inception.

The *International Documentation on Audio-visual Works* (IDA) database is a CISAC tool that records all information about TV programmes, radio programmes and films that is relevant to the licensing and collective management environment. Each programme is given a unique number, which can then be used in royalty claims and distribution statements. ALCS contributes to IDA details on UK writers. All contributors to works listed in *IDA* must be registered with the IPI system (below).

Linked to this is the *Interested Parties Information* (IPI) database that records and uniquely identifies the members of CISAC societies. Under CISAC rules, all claims for royalties made to fellow CISAC societies must be made in reference to IPI. ALCS registers all new members that have an interest in audiovisual works with the IPI system

These initiatives are largely driven by the organisations directly involved in managing large-scale repertoires of works and administering payments. In terms of a role for the EU, the support provided to the development Arrow system has been central to the development of a framework for linking European databases for the publishing sector. The present review should investigate whether similarly supported projects may be appropriate for the wider audiovisual sector.

10. Are the current models of film financing and distribution, based on staggered platform and territorial release options, still relevant in the context of online audiovisual services? What is the best means to facilitate older films which are no longer under an exclusivity agreement being released for online distribution across the EU?

11. Should Member States be prohibited from maintaining or introducing legally binding release windows in the context of state funding for film production?

12. What measures should be taken to ensure the share and/or prominence of European works in the catalogue of programmes offered by on-demand audiovisual media service providers?

We feel that questions 10, 11 and 12 are best answered by those more closely involved in the financing and distribution processes.

13. What are your views on the possible advantages and disadvantages of harmonizing copyright in the EU via a comprehensive Copyright Code?

The IPR strategy refers to a possible EU Copyright Code in the context of harmonizing the way that exceptions and limitations are applied within different Members States i.e. a codification of an existing set of regulations, whereas the Green Paper is reviewing a framework for development of a potential market. A policy approach that makes the functioning of the European audiovisual market contingent on the successful establishment of a European Copyright Code is unlikely to succeed as central regulation will struggle to keep pace with changing technology, market developments and consumer expectations. The better approach on harmonization, as identified in the KEA report, is to focus on existing initiatives in the areas of enforcement and rights management to create a supportive environment for the development of innovative business models.

14. What are your views on the introduction of an optional unitary EU Copyright Title? What should be the characteristics of a unitary Title, including in relation to national rights?

There seems to be a contradiction inherent in the proposals to introduce an optional unitary title under Article 118 TFEU, which is designed to achieve "uniform protection" of intellectual property rights. Can an optional measure achieve a uniform outcome? We would be very concerned at the possibility of the creation of two-tier scheme of protection. The language of Article 118 also envisages a fairly grand design, "the setting up of centralised Union-wide authorisation, coordination and supervision arrangements." We query whether this kind of potentially unwieldy regulation will suit a fast-moving environment like the audiovisual sector. The better approach is to develop and support the projects referred to in our answer to Question 9 to co-ordinate and link data on rightsholders and works to facilitate licensing in the EU market and beyond.

15. Is the harmonization of the notion of authorship and/or the transfer of rights in audiovisual productions required in order to facilitate the cross border licensing of audio visual works in the EU?

As the Green Paper acknowledges, the discretion in Article 1 of the Cable and Satellite Directive has produced varied approaches to authorship of films and audiovisual works across the EU. Despite the variations, in the vast majority of Member States the writer of the script is considered as one of the authors of the audiovisual work. There is a logic to this: the script is the core running through a work; for works of fiction it provides the narrative, characters and their interaction, for documentary works the script imparts information, bringing raw facts to life. Given the essential contribution they make to the finished audiovisual work, there is a strong argument for a harmonised position whereby scriptwriters are expressly considered to be one of the authors of the work and receive protection for their economic and moral rights in that work.

The transfer of rights between authors and producers of audiovisual works happens in various ways across the EU, reflecting the differing legal traditions and rights management structures that exist in different Member States. As the European market for audiovisual works across digital

networks develops, these structures will need to adapt and evolve to ensure efficient clearance of rights and transparent system of rewards for authors.

16. Is an unwaivable right to remuneration required at European level for audiovisual authors to guarantee proportional remuneration for online uses of their works after they transferred their making available right? Is so, should such a remuneration right be compulsorily administered by collecting societies?

17. What would be the costs and benefits of introducing such a right for all stakeholders in the value chain, including consumers? In particular, what would be the effect on the cross-border licensing of audiovisual works?

It is vital that authors receive proper reward for all uses of their work and that these rewards reflect the value the work achieves in the wider market place.

In the case of a broadcast to a known audience this value equation is relatively straightforward but consumption patterns for audiovisual works are changing; for example, the number of programmes requested on the BBC iPlayer has increased from 1.7m per day in 2009 to 4.4m per day in 2011. While predictions of the demise of linear broadcasting proved premature, it is clear that future uses will involve more on-demand access, fragmentation of use and portability of content. In such a world making available rights are increasingly important for authors, not least to counterbalance any displacement of traditional income streams, such as broadcast fees and residuals from physical sales or rentals.

Achieving ‘proportional remuneration’ for authors poses challenges on two levels. Firstly the value received by the author should reflect the value in the transaction between the producer and distributor. Where broadcasters own and operate systems such as iPlayer, the value chain is evident and relatively simple; however this becomes more complex where broadcasters/ producers sell programmes for use on third party platforms, particularly when these platforms are operated overseas, possibly across multiple territories. Transparency of payments back along the chain is a key challenge, starting with the party receiving direct value from the use of making available rights.

The second challenge in securing ‘proportional remuneration’ for authors concerns the allocation of value amongst individual programmes. The on-demand use model by its nature provides far more scientific tools for measuring audience share for individual programmes than with traditional broadcasting. Data on the number of times each programme is requested from a catch-up or VoD site can be used to inform distribution models amongst contributors, which in the case of cross-border delivery can be used to ascribe value to national repertoires of works included on multi-territory platforms. Making effective use of this data will to a significant extent rely on the initiatives referred to in our answer to question 9: the adoption of standard identifiers for contributors and works, developing linkage between national repertoire databases and establishing common systems and rules for the flow of distribution data and fees.

Where authors making available rights are subject to collective management schemes, confidence in the system will be enhanced by transparency on tariff setting and distribution methodologies. In this context the proposed Framework Directive should provide a useful set of core standards around transparency, accountability and governance to inform national initiatives in this area.

18. Is an unwaivable right to remuneration required at European level for audiovisual performers to guarantee proportional remuneration for online uses of their works after they transferred their making available right? Is so, should such a remuneration right be compulsorily administered by collecting societies?

19. What would be the costs and benefits of introducing such a right for all stakeholders in the value chain, including consumers? In particular, what would be the effect on the cross-border licensing of audiovisual works?

We feel that questions 18 and 19 are best answered by our colleagues representing performers.

20. Are there other means to ensure the adequate remuneration of authors and performers and if so which ones?

It is important to be clear and consistent on terminology. The previous question addresses the need for 'proportional remuneration' rather than 'adequate remuneration'; the former is more useful as it can be linked to tangible measures affecting an author's work, like the overall value of a transaction and its identified usage levels, whereas the latter is susceptible to a subjective interpretation.

In our response to questions 16 and 17 we outlined some core elements towards securing proportional remuneration for authors: licensing the commercial source, bringing value back along the chain to authors, harnessing data to allocate value according to actual use, developing internationally adopted data exchange standards and systems for cross-border delivery and the adoption of common rules ensuring transparency in collective rights management.

The means by which these elements are delivered will be determined by the rights management structures in Member States and how these adapt and evolve to service emerging digital markets both nationally and internationally.

21. Are legislative changes required in order to help film heritage institutions fulfill their public interest mission? Should exceptions of Article 5(2)(c) (reproduction for preservation in libraries) and of Article 5(2)(n) (in situ consultation for researchers) of Directive 2001/29/EC be adapted in order to provide legal security to the daily practice of European film heritage institutions?

22. What other measures could be considered?

Again we need to be clear about terminology. In the Green Paper the phrase "public interest mission" (of a film heritage institution) is discussed in relation to the need for a mandatory, harmonised application of two exceptions included in the Copyright Directive. One for specific acts of reproduction for non-commercial purposes (such as preservation), the other for acts of communication/ making available for study by individuals via dedicated terminals on the premises of the film heritage institution. In neither case is the wider making available of content on-line permitted or envisaged. However the current proposals for a new directive on orphan works are

being developed to provide the means for permitting film heritage institutions to make such works available to the wider public on-line in pursuit of their “public interest mission”.

In reality it is the flexibility envisaged by the latter that is required. There is little point in investing in digitising content for preservation purposes if it is then never seen, or if it can only be viewed via a terminal on the site of a given institution. Flexible licensing solutions are needed for the libraries/ archives/ heritage bodies to select material for on-line access on terms that respect the rights of authors and other rightsholders. This work is already well under way in other sectors with the extension of the ARROW project to new Member States under the ARROW Plus programme and the MoU signed between rightsholders and libraries for ‘out of commerce’ works and it is important that the current review acknowledges this wider sphere of activity.

The complexity and resource involved in high-volume rights clearance for audiovisual archives suggests that collective licensing models may offer pragmatic solutions. In the UK the British Copyright Council[2] has developed a proposal which would address licensing of orphan works alongside existing schemes, while the Educational Recording Agency[3] is developing models to deliver flexible, digital solutions for accessing audiovisual material for educational purposes.

23. Which practical problems arise for persons with disabilities to have access on an equal basis with others to audiovisual media services in Europe?

24. Does the copyright framework need to be adapted to improve accessibility to audiovisual works for persons with disabilities?

25. What would be the practical benefits of harmonizing accessibility requirements to online audiovisual media services in Europe?

26. What other actions should be explored to increase the value of accessible content across Europe?

Before considering adaptation of the copyright framework, it is important that the debate within the audiovisual sector acknowledges some of the solutions for access by persons with disabilities currently under review in other sectors. The challenge identified here is to secure a network of accessible works for distribution around wider territories based on agreed terms. The European (ETIN) and WIPO (TIGAR) projects are developing frameworks for establishing such networks based on collaboration between representatives of disabled persons, resource centres and rightsholders. Similar approaches could be investigated in the context of the European audiovisual works market.

[2] http://www.britishcopyright.org/
[3] http://www.era.org.uk/