



Response to EC Consultation on Green Paper on the Online Distribution of Audiovisual Works in the European Union: Opportunities and Challenges towards a Digital Single Market

Submission by the Intellectual Property Foresight Forum –
(<http://www.ipforesightforum.ac.uk/>).

Response to consultation 11: 2011

Introduction

The Intellectual Property Foresight Forum is a grouping of independent intellectual property academics in the United Kingdom. We actively promote intellectual property and media law research and it is our aim to assess and respond to new and emerging challenges for IP and media law. We are therefore grateful to have the opportunity to respond to the EC consultation on *Green Paper on the online distribution of audiovisual works in the European Union: opportunities and challenges towards a digital single market*.

This response is prepared by Dr James Griffin. Dr James Griffin is a lecturer at the University of Exeter. He is a co-director of the 'Science, Culture and Law at Exeter' group. He specialises in copyright law, with particular emphasis on digital copyright, and how historical approaches in copyright can be relevant to the modern day law. Dr Abbe Brown, a lecturer in Information Technology law at the University of Edinburgh, is an individual signatory to this response.

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?

Impediments to a digital single market for audiovisual works are numerous. They extend from the cultural and linguistic, through to the regulatory. As this is the response of the IPFF, this response will focus upon the regulatory points.

Firstly, copyright itself differs between the various Member States. Although there have been numerous Directives, for instance the 2001/29 Information Society Directive, there remains significant differences in the way in which copyright is granted, the ways in which infringement is established, and the manner in which judgments can be enforced. At a basic level, mainland Europe remains wedded to the notion of moral rights, whereas the UK utilises a notion of economic rights. Authors in the UK may assign their rights, whereas in most of mainland Europe the moral rights cannot be so transferred. This may pose an issue to smaller right holders who do not have immediate or easy access to legal advice, who will be likely to lack understanding as to the differences in the focus of the respective regulatory systems. In addition to these regulatory differences, right holders themselves will often have in place territorial agreements, to split up global markets. This is likely to continue in the online digital era due to the ability to separate countries through the use of IP addresses.

A framework, if adopted, should not just limit itself to the issues specific to the audiovisual sector nor simply cross border transactions. Today, the key issues that are holding back the development of a single market with such works are the differing sets of copyright regulation, broader issues pertaining to the uncertainty of copyright law, and the use of territorial licensing agreements. Those issues should be key priorities and are not just limited to the audiovisual sector.

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?

A common problem in relation to a single territory or common territory is the complexity and lack of clear signposting not just as to how to clear rights, but even whether clearance is necessary. In the case of many remixed works, for instance, musicians may be unclear whether they may be potentially committing a copyright infringement. This must be borne in mind when implementing any clearing system which can be enforced by rights holders.

In relation to the rights clearing system itself, if (for instance) a musician decides to clear rights, then even within a single territory a number of rights will probably need to be

cleared over the re-use of a single piece of music covered by copyright. For instance, in the UK, in relation to music clearance will then often need to be obtained over, at the very least, the performance studio who recorded the music, and the rights that the distributor may hold over the music itself. In addition to that, there can be difficulty in identifying who the right holders are. When the issue becomes one involving multiple territories, these issues are magnified, and in addition to that, the difficulty in identifying the different clearance procedures in each Member State arises. This will directly impact on those who wish to distribute their works across Member States when that work involves reproduction of an earlier copyright work.

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?

Improving the licensing framework will only result in change if it affects the licensing practices of right holders. The current practice typically revolves around territorial concerns, and so an EU licensing framework needs to be able to interface with the differing rules in Member States. A licensing framework needs to address the key issues involving the identification of right holders. However, if the issues pertaining to the identification of right holders are resolved, this may undermine the development of systems currently used by publishers and distributors to clear their works, since many authors rely on publishers to clear their works.

Broader copyright clearance issues may still exist even after improving the general framework. One key issue has been licensing rates, which can be disproportionately high for certain re-uses. The licensing framework will need to be able to address the impact of right holders swapping licensing from a national to EU level, particularly in terms of costs to users.

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?

In implementing the WIPO Copyright Treaty Article 11, the EU has already provided wide scale legal protection for technological measures that protect digital copyright works. The utilisation of these technological protection systems, whilst being able to limit which individuals of member states may access certain content, may also be used as the same means by which access to content may be enabled. The impact of new technologies upon licensing models might therefore be negligible. Market forces may, however, change this over time, but licenses are still likely to be the governing agreement.

That the same mechanisms are used to permit access as restrict access means that legislative focus should instead be more upon requiring access to content in certain specific circumstances within the confines of the three steps test of TRIPS and the Berne Convention.

In the US, the possibility of access codes (provided in exchange for payment) were used as the reason for introducing “access control” protection within the Digital Millennium Copyright Act 1998, which was the US version of the implementation of Article 11 of the WIPO Copyright Treaty. However, the way in which the access control provisions were written came to mean that any access to digital content could conceivably have come under that “access control” provision. Consequently, care should be taken when dealing with providing specific protection for access codes.

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 key concerns to extending this principle in relation to the “country of origin” are complications and confusions that could arise. One such issue could concern the applicability of copyright subsistence, which differs between the EU member states. However, the application of the principle would be one way in which right holders could test the waters of the markets in other Member States. Nonetheless, the application to an audiovisual work *per se* may be difficult in the online environment because the uploader of the content (or indeed the service provider) may not be the right holder and may be uploading without authorisation.

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 main benefit would be that it could allow easier cross border transmission for cable services. However, if this provides a competitive advantage then this may distort the market in favour of cable services rather than broader on demand broadcasting. An extension to all forms of transmission would, however, raise issues of how application of the system would affect uploaders of audiovisual works on, for example, commercial internet video services (e.g. see Q5).

One thing to note is that extending the licensing system could mean a relinquishment of national control over certain aspects of the clearance system. Currently the UK is considering the creation of a Digital Copyright Exchange. The scope of that exchange is still under consideration, but it has been mooted that it might not just cover the creation of a comprehensive database, but also the setting and regulation of licensing rates.

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)?

Thought does need to be given to the rise of uploaded content. Whilst much has been made of the impact of file sharing upon copyright law, uploading of content also poses issues in relation to the general structure of copyright law which has often been geared towards protecting the interests of publishers. If authorship of uploaded works is to become increasingly common, then law making bodies should seek a way in which to canvas the views of these individuals. If this is not done, they risk offending these groups and resulting in continued widespread disobedience.

At a more specific level, the rise of such content within the EU could pose jurisdictional issues in relation to copyright subsistence. This is because such end-user uploading is not normally limited to particular jurisdictions, and consequently not based around the traditional geographical markets favoured by traditional publishers.

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?

It should first be noted that cloud computing does not automatically mean that users will be able to access content regardless of location. In China, for instance, controls have been used to limit access to unauthorised content through cloud services, and such measures could be imposed to limit cloud access to services. Technological measures are also likely to be used that could make uploading of others copyright content to a cloud service more difficult.

Ultimately it will be for right holders to decide to what degree users can access content from different locations, however, it is clear that the rise in mobile computing will lead to differences in access to digital content, and that much content will be stored remotely. That will raise the issue that works may be sold less and less, with more works accessed on a licensed basis and a possible rise in rentals and licensing. This, in turn, may change the copyright balance in that it could lead to the UK's distribution right being ameliorated resulting in harm to the second hand markets. However, market demands may lead to downloads to multiple devices becoming the norm. It might therefore be desirable for legal rules to acknowledge this to a greater degree of commonality throughout the EU. For instance, the UK does not currently have a specific exemption for private copying.

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?

Many right holders currently hold databases to enable the clearing of copyrights that they own. For end users, technology facilitates rights clearing to a degree through the use of e.g. the Creative Commons licence as administered by the Creative Commons. This provides clear identification of the author (as identified by the person who provided the information) and what re-uses are or are not permissible. A similar system of identification has been recently instituted by the UK's Copyright Licensing Agency (CLA). However, a database of rights could also provide a system from which rights can be requested by an end user. Such a system is a possibility for the proposed UK Digital Copyright Exchange. The EU could facilitate a similar system at the EU level. However, providing such a system could affect the operation of the market, in that it could undermine the dominance of existing publishers by providing a licensing system directly accessible to members of the public. Currently, many creators rely on publishers to clear their rights.

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?

Such models may still be relevant in that they can provide for different quality of content (e.g. SD v HD v UHD), and special content may be provided for additional monies. That may remain the case for older films. However, for works where copyright is no longer being exploited in that manner then this may encourage cross border distribution but this may in turn discourage free competition.

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

Member States may wish to retain this for cultural reasons, subject to rules within the EU as to whether such an impediment to the free movement of goods is justified.

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

First of all, it must be questioned what the Copyright Code seeks to achieve. What aspects of copyright law are to be harmonised? Is harmonisation going to be the sole goal of the Copyright Code? To what degree will harmonisation occur? Cook and Derclaye have considered this issue in an insightful and comprehensive paper in the IPQ (Cook and Derclaye, *An EU Copyright Code: What and how, if ever?* [2011] IPQ 259. They also raise concerns as to the manner in which the code would be implemented – would it be through regulation, directive or a recommendation? This would have a considerable impact upon its effectiveness.

A comprehensive EU copyright code has been proposed by the Wittem Project. One of the main issues with such a code are variances between Member States, in particular the UK and continental Europe with the distinctions between the system of economic rights and moral rights. Both systems have different historical bases, and the way in which they operate radically varies. Any attempt to codify the system needs to be aware of this, otherwise the interpretation of the code may vary considerably from one Member State to another. For the purposes of harmonisation, it should be noted that these matters are not just commercial in nature, but also cultural since the justifications also have a different bias. It also has to be borne in mind that many copyrights are of long duration (e.g. life of the author plus 70 years), and so any attempt at a Copyright Code will need to respect those copyrights. A clear court or tribunal structure may also need to be implemented, depending on the content of the proposed code. However, any attempt at codification could lead to greater transparency for clearing rights (if not reducing the issue of complication) and make cross border clearance of rights considerably easier, for instance by providing one central point of access.

To facilitate deeper discussion on this point, the EU should consider a Green Paper specifically on the issue of a Copyright Code.

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?

An optional unitary title would, presumably, be one included within the Treaties. In the short term, an optional title (with the parallel system that implies) may lead to considerable confusion whilst some Member States seek to make their law conform with the proposed rules, whilst others do not. However, a comparison may be drawn with the EU Charter of Fundamental Rights. Whilst not initially binding, it has led to greater awareness of certain rights within the EU, and following treaty amendments, it is now binding. Again, the question of how far harmonisation should occur under such a title needs to be addressed. National variance, in particular the economic and moral rights distinction, needs to be considered, and the very least the varying impacts between different types of work, author and users.

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

In the harmonisation of audiovisual works, there is a need to question what specific copyrights are involved. Any audiovisual work may involve a number of copyright elements, and consequently the issue of who the author of a particular work is will require greater harmonisation of how copyright elements are identified. Furthermore, the requirements such as originality in the UK, or minimal creativity in some parts of continental Europe, mean that there are considerable differences in the way in which authorship is perceived. However, it must still be recalled that underpinning these differences are moral and economic rights with different histories and aims.

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? If so, should such a remuneration right be compulsorily administered by collecting societies?

This is in many respects a policy question for the EU but given the unequal bargaining rights of many creators, this may help to resolve the issue of restrictive contracts. However, one key issue here is how such remuneration would be obtained. A Collecting Society would be one means but this would require a degree of enforcement that, given (e.g.) a lack of threats provisions within UK law for copyright infringement, could lead to an encouragement to seek money from many re-users.

Responses to Q17-19 are the same as Q16.

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

In addition to the introduction of an unwaivable right of remuneration, other methods that can & could recompense authors and performers include:

- The current copyright system
- A compulsory licensing system for each re-use of a copyright work
- A system of levies. For digital works, an online monitoring system across popular services could provide insight as to how to achieve that.

21. Are legislative changes required in order to help film heritage institutions fulfil their public interest mission? Should exceptions of Article 5(2)(c) (reproduction for preservation in libraries) and of Article 5(3)(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?

One important issue is that there should be a clear system of rights clearance for orphan works at the EU level. There also needs to be clearer and more effective provisions for the situations where technological protection measures limit the ability of such institutions to meet their public interest missions, as identified in greater detail in Q23, below.

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

Whilst there is a requirement for right holders to produce fully accessible works, which may for instance include works protected by technological protection measures, the current legislative framework provides insufficient ability for people to legally challenge such measures. Art 6(4) of the 2001 Information Society Directive provides the basis of national measures, but these have been criticised as inadequate. See, for instance, the Gowers Review comments regarding the implementation of that article in the UK's CDPA s.296ZE (Gowers Review of Intellectual Property, HMSO, 2006 at 73).

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

A more specific wording within Article 6(4) and an EU wide mechanism for complaint would ensure the efficacy of the section. See Q23 above.

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

There would be greater availability, more common means of access, and this in turn should lead to greater standardisation. Currently, the accessibility technology available needs to access many different formats of information – if this is standardised, this would make production of products to make works more accessible easier to achieve. This may also lead to further interoperable products, but this may have the potential to erode future markets for the current right holder. Furthermore, requiring such access to technologically protected content can undermine the efficacy of the technological protection mechanism.

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

There could be financial incentives provided to encourage the availability of such content, in conjunction with above (see Q23) amendment to the Information Society Directive which would encourage right holders to make greater re-use of the content possible when protected by technological protection measures.

End of submission