* **Do you represent an organisation?**
	+ **EUscreen Foundation**, registration number **217307412669-09**
* **Type of respondent**
	+ Institutional user
	+ Publisher/Producer/Broadcaster

The EUscreen foundation is a gathering of audiovisual and broadcast archives and related networks who have worked on and contributed to the Video Active and EUscreen portals – web platforms where educational, creative industry and general users can access audiovisual and broadcast archival content from across Europe. Some of the partners in the foundation have prepared their proper responses to the copyright consultation – in particular, the European Broadcasting Union and its members[[1]](#footnote-1) and Ina, which should be read separately from this response.

**Rights and the Functioning of the Single Market**

**Territorial scope**

1. **Have you faced problems when seeking to provide online services across borders in the EU?**

From an intellectual property point of view, audiovisual heritage materials are probably the hardest to publish online. Rights for programme materials are varied and complex, residing with a range of stakeholders including (but not restricted to) actors, performers, writers, directors, composers, production companies and, at times, broadcasters themselves. Rights not only vary across different European countries, but also - for historical and commercial reasons - widely within each country.

Whereas single state broadcasters in television’s early years may have negotiated directly with individuals or agents and unions representing the range of stakeholders working in television, recent deregulation and expansion of products, services and channels means that independent production companies now not only have a commercial stake in the television industry but also add a layer of negotiation and ownership.

All these different factors mean that the clearance of rights for audiovisual materials, and television programming in particular, can be both costly and time consuming. The situation is complicated enough when reusing or repurposing archive materials on television itself, whether for repeat transmission or for use in, for example, news, documentary or clip compilation programming. The problem becomes even more acute, however, when clearing rights for use on the Internet. The web had not even been conceptualised when many rights between broadcasters and the wide range of stakeholders were agreed. Even in those instances where rights had been cleared on programming forms for (re-)use on television, they often have to be negotiated again for the internet. Finally, in some cases, rights holders cannot be identified or, if they can be identified, they cannot be located.

Massive conservation and digitization efforts have allowed cultural and memory institutions, public broadcasters and audiovisual archives to preserve their collections and expand public access to their holdings. In many cases, however, these organizations can only provide restricted access and use to their collections due to the IPR issues indicated above.

Archives participating in EUscreenXL deal with IPR and other rights issues on several levels, which makes selecting audiovisual archival content to showcase publicly online a complex undertaking. The differences in national legislations make an international exchange of audiovisual material even harder. Archival agreements for open educational use that exist in certain countries are limited to that territory only. One such example is the type of online access Hungarian archive NAVA provides to educational institutions. Scandinavian and UK partners are bound by geo-blocking regulations to make their national audiovisual histories available online to fellow Europeans.

1. **How often are you asked to grant multi-territorial licences? Please indicate, if possible, the number of requests per year and provide examples indicating the Member State, the sector and the type of content concerned.**

EUscreen developed a highly interoperable platform that allows global exploration of European audiovisual heritage content and metadata. It makes materials from over 20 EU member states publicly available to researchers, educational users, the creative industries and general users alike. The content is integrated into and harmonized with Europeana and made available online under differing archive agreements and local legislations.

Archives and broadcasters are investing in on-line services that provide selective access to their own archive material, but many of them are reluctant to ‘lease’ this material to other sites for public access. The EUscreen project has demonstrated that it is possible to clear the rights for online access for thousands of hours of in-copyright content without undue expense. Rights to a large range of factual material, covering news, current affairs and documentaries have been cleared. Meanwhile, content providers have found it very challenging to contribute popular archival materials such as drama, music (pop, traditional and classical) and sport.

To provide an example of the resources spent on providing access we provide the numbers of EUscreen. Unfortunately for our purpose, the IPR activities were integral part of the work package on content provision, so the numbers are quite indicative. The selected works from the collections and archives were presumed to be digitally available. An indicative calculation of the costs of providing access in the EUscreen project, from 2009-2012:

* Total amount of PM was 1110,53
* Total amount of PM supported financially by the EC was €3.944.845,60 (80% x €4.931.057)
* An average PM throughout the project was € 4.440,- gross (€4.931.057 / 1110,53 = € 4.440,27)
* Content provision was organized in work package 3 Information and Access, including selection, annotation and researching and clearing rights
* The amount of *person months* for this work package was estimated up to 338 PM
* In total the specific activities of *content provision* consumed €1.500.720, - this is almost ⅓ of the total EUscreen budget
* Excluded here are PM devoted to researching and solving IPR questions on a project and policy level.

It must also be noted here that content selected by archivists was deemed feasible to clear, i.e. the costs stated above might have been very different if more challenging, proprietary or revenue-expecting collections had been selected.

1. **If you have identified problems in the answers to any of the questions above – what would be the best way to tackle them?**

Increased use of digital technologies has prompted a corresponding increase in the public’s expectations regarding access to content. The EUscreenXL consortium responded to these expectations by gathering European broadcasters and audiovisual archives to develop a platform with a dedicated, international scope. In the set-up of this endeavour, copyright law structures are clearly in play and influence many of the relationships among users, creators, and distributors of copyrighted content. Working with such a varied consortium of stakeholders across the field, we support the view that they should represent a balance among the legitimate interests of the different entities working with copyrighted materials.[[2]](#footnote-2) We believe that copyright should be adapted to the digital world we live in, that national rules should be harmonised and that, as the Satellite and Cable Directive (93/83/EEC) lays out, there should be no digital borders within the single market. For both users and service providers across the continent, there should be clear and coherent ways to know if what they do is legal or not. As the CEPS Digital Forum report states, unification through a EU regulation that establishes uniform copyright titles throughout the EU would be an appropriate choice for this.[[3]](#footnote-3)

1. **Do you think that further measures (legislative or non-legislative, including market- led solutions) are needed at EU level to increase the cross-border availability of content services in the Single Market, while ensuring an adequate level of protection for right holders?**

For audiovisual archives and public broadcasters the further harmonisation of copyright rules is needed. To fulfil and strengthen their public function and reach, they need to be able to adapt to the changing needs of users and user communities, both of which are by default not bound by EU borders. The opportunities that arise in terms of new content services are rarely ever limited to EU borders. To participate in the development and innovation of content services (in a competitive way) and to be able to address user demands appropriately, the further integration of cross-border availability is highly necessary.

**Need for more clarity**

1. **Is the scope of the “making available” right in cross-border situations – i.e. when content is disseminated across borders – sufficiently clear?**

The objectives of the EUscreen foundation are to collect and make available audiovisual content related to the cultural history of Europe for purposes such as education, creative reuse and comparative scientific research, in order to increase the knowledge of and involvement in European cultural heritage. The foundation achieves this objective by creating and managing an online environment that gives access to a unique and vast transnational collection with translations and contextual data.

With the limited and publicly funded resources that are available to audiovisual archives and public broadcasters to spend on rights clearance, the most acceptable way to provide more clarity with regards to the scope of the 'making available' right would be to apply a country of origin principle.[[4]](#footnote-4) An approach based on targeted audiences would create increased burdens since dissemination through platforms such as EUscreen or Europeana is explicitly targeted at users in all member states. Applying a targeted approach would therefore make it more difficult for archives and cultural heritage institutions to make their works available via transnational projects.

**Linking and browsing**

1. **Should the provision of a hyperlink leading to a work or other subject matter protected under copyright, either in general or under specific circumstances, be subject to the authorisation of the rightholder?**

No, it should not. Linking to online resources does not constitute an act of making available. Requiring authorisation to link to works that are available online would undermine the fundamental principles of the web, which is especially true for platforms such as EUscreen and Europeana, which link to works published on the websites of audiovisual archives and public broadcasters and increase awareness about the existence and the findability of relevant cultural and archival sources. Requiring authorisation from rights holders would introduce significant legal uncertainty.

1. **Should the viewing of a web page where this implies the temporary reproduction of a work or other subject matter protected under copyright on the screen and in the cache memory of the user’s computer, either in general or under specific circumstances, be subject to the authorisation of the right holder?**

It should not. Requiring the authorisation of the rights holder for viewing and reading content that is already available online creates legal uncertainty for Internet users and would undermine a core functionality of the web, that is: to make information and culture accessible.

**Registration of work**

1. **Would the creation of a registration system at EU level help in the identification and licensing of works and other subject matter?**

No opinion.

1. **What would be the possible advantages of such a system?**

Although audiovisual content is now being digitised and some of it is already available online, access to audiovisual archives, television in particular, remains fractured and scattered. An international registry of archival materials available in audiovisual archives would facilitate the work of researchers, scholars and the general public in retrieving audiovisual documents more easily. On the other hand, audiovisual and broadcast archives are often also right holders to a huge amount of works; thus, registration would require additional administrative tasks, staff and costs for a sector that struggles with issues of funding.

A registration system would increase the amount of information about rights holders available to all types of users, including cultural heritage institutions, which would make it easier for users to check the copyright status of a work and obtain permission for use from the rights holders. One of the biggest problems facing cultural heritage institutions attempting to make their collections available online is the lack of comprehensive, easily (ideally automatic) accessible information about the copyright status of works, and the identity and location of rights holders. Introducing a registration system at a European level would be a massive step in ensuring that such information is more readily available in the future.

1. **What would be the possible disadvantages of such a system?**

It would require extra effort from rights holders to register their works, create extra costs caused by regulation, administration and monitoring, would need to be mandatory, which requires changes to international agreements that the EU has signed up to and would in itself not retroactively solve the existing problem with orphan works and mass digitisation.

*

**How to improve the use and interoperability of identifiers**

1. **What should be the role of the EU in promoting the adoption of identifiers in the content sector, and in promoting the development and interoperability of rights ownership and permissions databases?**

The European Union could play an important role in promoting identifiers. If it does take up this role, it should ensure: (1) that identifiers as well as rights ownership and permission databases are based on open standards, available to all content creators and that they can be read by all market participants free of charge; (2) that all identifiers as well as rights ownership and permission databases are interoperable and work across all of Europe (and beyond).

Any system that is developed would have to be developed in a true multi-stakeholder approach (e.g. not only by rights holders and intermediaries) and should be reflective of work already undertaken. Rights ownership and permission databases in particular should be publicly accessible via machine-readable interfaces. They should also include the ability to store information on out-of-copyright (Public Domain) and openly licensed works.

**Access to content in libraries and archives**

**28(a) [In particular if you are an institutional user:] Have you experienced specific problems when trying to use an exception to preserve and archive specific works or other subject matter in your collection?**

Whilst the consultation document limits itself to activities of libraries and archives, the questions in this section are equally relevant for museums and other cultural heritage institutions. In fact, the relevant exceptions and limitations explicitly apply to ‘publicly accessible libraries, educational establishments or museums, or [...] archives’. The 2012 Orphan Works directive clarifies this to include 'film or audio heritage institutions and public-service broadcasting organisations'. In line with this, the following answers should be read as applying to all cultural heritage institutions falling within this scope.

EUscreen provides access to audiovisual works as a service for and by pan-European audiovisual archives and public broadcasters. It is essential for the functioning of EUscreen and the mission of the partnering institutions that they can digitise all works in their collections regardless of their copyright status. Institutions increasingly digitise works in their collections not only to prevent harm to the work, but also to be able to better fulfil their missions. Digital copies of cultural heritage works provide many advantages such as being (automatically) indexable, being easier to access and having lower storage costs.

1. **If there are problems, how would they best be solved?**

The best solution would be to broaden the existing exception in article 5(2)c of the copyright directive, so that it allows audiovisual archives and public broadcasters to make reproductions of all works in their collection, as long as these are not intended for direct commercial advantage. This exception should be made mandatory for all member states. Also Art. 6 of the InfoSoc directive should be revised in order to enforce exceptions and limitations and to ensure legitimate utilisations of protected works, regardless of format or mode of dissemination.

1. **If your view is that a legislative solution is needed, what would be its main elements? Which activities of the beneficiary institutions should be covered and under which conditions?**

The main element would be a broadening of the existing exception in article 5(2)c of the copyright directive. Instead of only allowing specific acts of reproduction, it should allow all acts of reproduction necessary for publicly funded audiovisual collection/content holders to achieve aims related to their public-interest missions. This should include reproductions made as part of mass digitisation efforts, back-up copies and reproductions for format shifting.

Reproductions should be limited to internal use which is not for direct commercial or economic advantage or use in line with other exceptions and limitations allowed for by the directive (such as the broadened version of the exception foreseen in article 5(3)n that we propose in answer to question 34). Reproductions would explicitly be allowed for the purposes of increasing the operational efficiency and reducing costs of the beneficiary institutions. The exception should only apply to works that are part of the permanent collection of an institution and not to works that have been loaned from other institutions (such as interlibrary loans or loans from museum exhibitions).

Broadening the scope of the extension along these lines mirrors the recommendations made as part of the European Commission commissioned 'Study on the application of directive 2001/29/EC on copyright and related rights in the information society' from December 20138.

Also Art. 6 of the InfoSoc directive should be revised in order to enforce exceptions and limitations and to ensure legitimate use of protected works, regardless of format or mode of dissemination.

**Off-premises access**

### 32. (a) [In particular if you are an institutional user:] Have you experienced specific problems when trying to negotiate agreements with rights holders that enable you to provide remote access, including across borders, to your collections (or parts thereof) for purposes of research and private study?

1. **If there are problems, how would they best be solved?**

The EUscreen foundation agrees with the approach supported by various European cultural institutions in that the best solution would be to broaden the existing exception in article 5(3)n of the InfoSoc directive, so that it allows institutions to make available digital copies of out-of-commerce works in their collections via electronic networks such as the internet for non commercial purposes. This is also in line with the recommendations found in the 'Study on the application of directive 2001/29/EC on copyright and related rights in the information society' that was commissioned by the European Commission in 2013.

1. **If your view is that a legislative solution is needed, what would be its main elements? Which activities of the beneficiary institutions should be covered and under which conditions?**

The main element would be a broadening of the existing exception in article 5(3)n of the InfoSoc directive. Instead of limiting the making available to dedicated terminals on the premises of the institutions it should also apply to making the works available online via public networks such as the internet. The scope of the exception should further be expanded to not only include ‘the purpose of research or private study’ by ‘individual members of the public’ but should apply to all non-commercial uses.

Furthermore, It seems reasonable to limit the scope of the exception to ‘works and other subject-matter not subject to purchase or licensing terms’ as long as they are still commercially available. This should be combined with an opt out-clause that would allow rights holders to either prevent the making available of their works or to negotiate licensing terms with the institutions (either on an individual basis or collectively).

These conditions are crucial to ensure that the new broadened exception meets the requirements of the three step test. The fact that the exception would be limited to non commercial uses of the works made available and that authors can decide to opt-out of the exception would ensure that 'the legitimate interests of the author' are not necessarily prejudiced. In fact, many authors would benefit from improving online access to out-of-commerce works because works that they have created are kept available via cultural heritage institutions and audiovisual archives and are available to them to build upon or to do research. As a result citizens, researchers and educators also greatly benefit, because they are granted access to works that wouldn't be available through market players.

This solution would also be in line with the relevant recommendations made in the 'New Renaissance' report. The report recommended that 'National governments and the European Commission should promote solutions for the digitisation of and cross-border access to out of distribution works' and that 'For cultural institutions collective licensing solutions and a window of opportunity should be backed by legislation, to digitise and bring out of distribution works online, if rights holders and commercial providers do not do so'.[[5]](#footnote-5)

**Mass digitisation**

1. **Would it be necessary in your country to enact legislation to ensure that the results of the 2011 MoU (i.e. the agreements concluded between libraries and collecting societies) have a cross-border effect so that out of commerce works can be accessed across the EU?**

The 2011 Memorandum of Understanding is by nature limited. It focuses on not commercially available academic books and articles - books and ‘learned’ articles out of commerce. The MoU does not bind the Member States and will not bind them in the future, nor does it impose strict obligations on the signatories.[[6]](#footnote-6)

For the scope of the undertaking EUscreen has dedicated itself and its consortium partners to, both this question and the following are too limited. The issue of mass digitization is broader than what can be addressed with the 2011 MoU and the 2012 Orphan works directive (the other relevant European policy instrument in this area). Copyright issues related to the mass digitization of collections and the subsequent making available of digitized works require a comprehensive approach that cannot be based the principles of due diligence search and licensing. If we want to enable European audiovisual archives and cultural heritage institutions to transfer their collections into the digital age, we need a far more comprehensive approach.

Both the 2012 directive on certain permitted uses of orphan works and the 2011 MoU on out of commerce works are insufficient to address the copyright issues arising from mass digitisation projects. In addition, the extremely slow uptake of the MoU clearly illustrates that even in the library world the MoU is not a suitable mechanism for enabling mass digitization on a large scale.

The Orphan Works Directive, which has a bigger focus on audiovisual collections, is ill-suited to enable mass digitisation projects. While it will enable publicly accessible libraries, museums and archives to make orphan works available after a due diligence search has been carried out for specific works, the requirement of carrying out due diligence search makes it effectively unusable for mass digitisation projects as this would require an huge additional investments in both time and money - resources already scarce for a costly undertaking.

The inadequacies of both the OW directive as well as the Memorandum of Understanding can be addressed by an extension of the scope of the exception created by article 5(3)n of the InfoSoc directive as outlined in the answer to question 34 above. Doing this would provide audiovisual archives, public broadcasters and cultural heritage institutions a clear legal framework for operating in the digital environment that would allow us to to achieve the aims related to our public-interest missions. Under this approach the online activities of audiovisual archives and cultural heritage institutions would be covered by:

* An exception covering the making of reproductions (an expanded version of the current exception defined in 5(2)c)
* An exception covering the making available online of out-of-commerce works (an expanded version of the current exception defined in 5(3)n)
1. **Would it be necessary to develop mechanisms, beyond those already agreed for other types of content (e.g. for audio- or audio-visual collections, broadcasters’ archives)?**

This is certainly necessary. The public has a legitimate interest in having online access to the collections of all publicly accessible libraries, museums and (audiovisual) archives across Europe (see article 27.1 of the Universal Declaration of Human Rights). There is no good reason for limiting mechanisms that create such access to certain types of content. The approach proposed in reaction to questions 40 and 34 above, would cover all types of works and other subject matter that are held by these institutions.

This solution would also be in line with the relevant recommendation made in the 'New Renaissance' report of the Commission appointed 'Comite de Sages' that was published in 2011. The report recommended that ‘solutions for orphan works and out of distribution works must cover all the different sectors: audiovisual, text, visual arts, sound.’[[7]](#footnote-7)

1. In the EUscreen foundation, these include RTBF, CT, DR, ERT, RTÉ, RAI, RTP, RTVSLO, BBC [↑](#footnote-ref-1)
2. Dulong de Rosnay, Melanie, and Juan Carlos De Martin, eds. *The Digital Public Domain: Foundations for an Open Culture*. Cambridge: Open Book Publishers, 2012. http://www.communia-association.org/wp-content/uploads/the\_digital\_public\_domain.pdf. [↑](#footnote-ref-2)
3. Mazziotti, Giuseppe. *Copyright in the EU Digital Single Market: Report of the CEPS Digital Forum*, 2013. http://www.ceps.eu/ceps/dld/8192/pdf. [↑](#footnote-ref-3)
4. Hargreaves, Ian, and P. Bernt Hugenholtz. *Copyright Reform for Growth and Jobs: Modernising the European Copyright Framework*, May 29, 2013. http://www.lisboncouncil.net//index.php?option=com\_downloads&id=847. [↑](#footnote-ref-4)
5. Niggemann, Elisabeth, Jacques De Decker, and Maurice Lévy. *The New Renaissance. Reflection Group on Bringing Europe’s Cultural Heritage Online*. Brussels: European Commission, January 10, 2011. http://ec.europa.eu/information\_society/activities/digital\_libraries/doc/reflection\_group/final-report-cdS3.pdf. [↑](#footnote-ref-5)
6. Oostveen, Manon A. A. “European Cross-Border Copyright Clearances for Cultural Heritage Institutions,” June 9, 2013. [↑](#footnote-ref-6)
7. Niggemann, Elisabeth, Jacques De Decker, and Maurice Lévy. *The New Renaissance. Reflection Group on Bringing Europe’s Cultural Heritage Online*. Brussels: European Commission, January 10, 2011. http://ec.europa.eu/information\_society/activities/digital\_libraries/doc/reflection\_group/final-report-cdS3.pdf. [↑](#footnote-ref-7)