

# Out-of-Commerce

## How the Existing Copyright Practices in Film Archives Impact on Widening Public Access to Cultural Heritage

by **Melanie Stockton-Brown\***

**Abstract:** Article 8 of the EU Copyright in the Digital Single Market Directive 2019 addresses the issue of out-of-commerce works, enabling cultural heritage institutions (“CHIs”) to provide public access to these copyright works in certain circumstances. This article addresses the problem of out-of-commerce works within the context of film archives, through data gathered through ethnographic and interview research. It will be discussed how copyright shapes and orchestrates wider archival practice. A copyright regime of archival practices is formulated here that proposes a deeper analysis of the likelihood of successful incorporation of out-of-commerce works into existing archival practices. This copyright regime is conceptualised as a discursive system that brings together the different elements of archiving practices: meanings, materials, and competences. Three sub-regimes are proposed: the Oppressive regime; the

Pragmatic Compliance regime; and the Active Agency regime. The value in understanding the existing copyright regime of archival practices is in formulating a theoretical framework for exploring and understanding the diverse copyright practices present and performed in the film archives, as this informs the incorporation of future legal reforms. This article then builds on the formulated theoretical framework, considering the practical likelihood of film archives being able to incorporate Art. 8 into their working practices, drawing on the empirical data gathered. This article concludes that issues of funding, copyright specialism, and fears of reputational harm may weaken the likelihood of successful incorporation into existing practices. Also, the inability to exploit the works commercially is likely to hinder the appeal to film archives, who need to generate revenue to continue their day-to-day work.

**Keywords:** out-of-commerce; theory; copyright; archives; cultural heritage

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### A. Introduction

1 Within the cultural heritage sector, film archives are particularly impacted by the problem of out-of-commerce works. Within Europe, there are approximately 1.03 million hours of film material in cultural heritage institutions including film archives.<sup>1</sup>

Film archives have estimated that 76% of the film works in their collections are under copyright, and that about 60% of the feature films under copyright are presumably orphan works or out-of-commerce.<sup>2</sup>

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AIDA Italian Annals of Copyright XXVIII, Giuffrè Francis Lefebvre, 2019; Melanie Stockton-Brown, Finding the Lost Films: Out-of-Commerce Works in the Archive (Illustrated Zine) 2021; and Melanie Stockton-Brown “Out-of-commerce Copyright Works in EU Film Archives: A Solution?” Journal of Film Preservation (2021) 105, pp. 29-38.

1 Nick Poole “The Cost of Digitising Europe’s Cultural Heritage: A Report for the Comité des Sages of the European Commission” (The Collections Trust, November 2010), 3.  
2 Gilles Fontaine and Patrizia Simone (eds.), *The access to*

This means that there are hundreds of thousands of hours of films held by these archives, that have not been digitised or made available to the public.

- 2 The introduction of the EU's Copyright in the Digital Single Market Directive 2019 ("CDSM"),<sup>3</sup> brings the legislative change needed for CHIs to make use of their out-of-commerce works and is a change that scholars have strongly advocated for.<sup>4</sup> Article 8 CDSM addresses the issue of out-of-commerce works, enabling cultural heritage institutions ("CHIs") to provide public access to these copyright works in certain circumstances. Article 8 enables CHIs to obtain licences from collective management organisations ("CMOs"), avoiding the need to negotiate with each individual rightholder. Article 8(2) expands this and enables CHIs to make out-of-commerce works available for non-commercial purposes without seeking the rightholder's permission where there is no representative CMO. However, copyright reform alone is insufficient, unless it is accompanied by working practices and knowledge within these institutions that can incorporate this legal reform. This research

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*film works in the collections of Film Heritage Institutions in the context of education and research* (European Audiovisual Observatory, 2017), 32.

- 3 Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, referred to in this thesis as the "DSM Directive".
- 4 For example, Guibault and Schroff have advocated for Extended Collective Licensing, see Lucie Guibault and Simone Schroff, *Extended Collective Licensing for the Use of Out-of-Commerce Works in Europe: A Matter of Legitimacy Vis-à-Vis Rights Holders* (2018) 49(8) *IIC*, pp. 916-939; Borghi and Karapapa have advocated for a copyright exemption when the work is no longer commercially exploited, see Maurizio Borghi and Stavroula Karapapa, *Copyright and Mass Digitization* (OUP, 2013); Dusollier has advocated for "re-aligning" economic rights with the actual exploitation of the work, see Severine Dusollier "Realigning Economic Rights With Exploitation of Works: The Control of Authors Over the Circulation of Works in the Public Sphere" in Bernt Hugenholtz (ed.) *Copyright Reconstructed: Rethinking Copyright's Economic Rights in a Time of Highly Dynamic Technological and Economic Change* (Kluwer Law International, 2018); see also Stef van Gompel and P. Bernt Hugenholtz *The Orphan Works Problem: The Copyright Conundrum of Digitizing Large-Scale Audiovisual Archives, and How to Solve It* (2010) 8(1) *Popular Communication*, pp. 61-7; and European Copyright Society "Answer to the EC Consultation on the review of the EU copyright rules" (European Copyright Society, 2014).

addresses the problem of out-of-commerce works within the context of film archives and puts forward a theoretical framework.

- 3 This article streams from ethnographic research conducted in three film archives, prior to the national implementations of the CDSM. This then led to the formulation of a theoretical framework to understand the copyright regime of archival practices, which articulates the ways in which copyright shapes archival practice and can act as a barrier to certain activities. This copyright regime is the basis for this article and is conceptualised as a discursive system that brings together the different elements of archiving practices: meanings, materials, and competences. Three sub-regimes are proposed: the Oppressive regime; the Pragmatic Compliance regime; the Active Agency regime.
- 4 The value in understanding the existing copyright regime of archival practices is in formulating a theoretical framework for exploring and understanding the diverse copyright practices present and performed in the film archives. This enables a consideration of the practical likelihood of film archives being able to incorporate Article 8 into their working practices, drawing on the empirical data gathered. Furthermore, it provides detailed evidence to policymakers and legislators regarding the barriers to successful incorporation into existing archival practices. Practice theory shapes the focus of the theoretical framework to be on the *film archivists* and their practices as well as the *film archive* itself as an organisation. It also highlights any self-regulation that is carried out to maintain adherence to these meanings.<sup>5</sup>
- 5 This article will discuss the following: (B) a contextual overview of the relevant film archives; (C) an overview of the copyright regime of archival practices; (D) the Oppressive sub-regime found in Archive 1; (E) the Pragmatic Compliance sub-regime found in Archive 2; and (F) the Active Agency sub-regime found in Archive 3.

## B. A Contextual Comparison of the Archives

- 6 Ethnographic research was conducted at three film archives, two in the UK (when the UK was still in the EU) and one in the Netherlands. In total, just under 6 weeks was spent across the three film archives.

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5 See Elizabeth Shove, Mike Pantzar and Matt Watson *The Dynamics of Social Practice: Everyday Life and how it Changes* (SAGE Publications, 2012), 52; see also Norbert Elias *Technicization and civilization* (1995) 12(3) *Theory, Culture and Society*, pp. 7-42, 25.

The length of time at each archive varied according to what the film archive was able to accommodate logistically. Below is a table that places the archives in their wider contexts. The archives are anonymised with a number.

Comparison of Archives	Oppressive Sub-Regime Archive (Archive 1)	Pragmatic Compliance Sub-Regime Archive (Archive 2)	Active Agency Sub-Regime Archive (Archive 3)
<b>Archival Scope</b>	Regional in the UK	National in the UK	National in the Netherlands
<b>Nationality</b>	UK	UK	The Netherlands.
<b>Size of Archive</b>	Small – approx. 10 staff	Very large, approx. 450- 500 staff members across the organisation (not all involved in curation & film archiving)	Large, about 165 staff members across the organisation (not all involved in curation & film archiving)
<b>Funding</b>	Received some national funding, but this very limited. The majority of the archive’s funding is raised through commercial revenue of commercial licensing or digitisation projects for clients	Government funding, funding from TV broadcasters; and Lottery funding. Also obliged to self-fund some of its income (approx. 30%).	Government funding; Amsterdam funding; and several local and regional funds; and some private foundations. Also self-funds some of its income.
<b>Collection size and nature</b>	Approximately 75,000 films and TV programmes held in various formats, including a regional TV collection	Has the world’s largest collection of screen heritage. Its film collections include approximately 20,000 silent films; 60,000 fiction films, including features; 120,000 non-fiction films, approximately 750,000 television titles; and audio and video recordings of Parliamentary sessions and proceedings. Approximately 12.5% of all daily broadcast TV is captured and stored in the Archive.	The national film archive of the Netherlands, and its archive holds approximately 40,000 films, and is a combination of many different film works. It is therefore the largest film library in the Netherlands.
<b>When founded</b>	Founded in early 2000s	Founded in 1930s	Founded in early 2010s, bringing together a number of existing Dutch film institutions.
<b>Film institutional memberships</b>	Member of the Film Archive UK (“FAUK”) is the UK film organisation that comprises the national and the regional film archives.	Member of both FAUK, ACE and FIAF. Federation of Film Archives (“FIAF”) is the leading international body for national film archives (approx. 95 film archives globally).	Member of FIAF and ACE. Association of European Cinematheques (“ACE”) is an affiliation of 49 European national and regional film archives, that aims to protect and advocate for film heritage.
<b>Archival projects likely to have involved out-of-commerce works</b>	Part of the UK’s Unlocking Film Heritage programme, which ran between 2014 and 2018. It digitised 5,000 film titles from the national archive and an additional 5,000 titles from the regional archives. It is very likely that this project made many out-of-commerce works available to the public, as the majority of these films had been “unknown and unseen for decades.”	Part of the Unlocking Film Heritage programme. Also led the <i>Missing Believed Wiped</i> campaign, which aims to locate historic UK TV programmes that there is no known copy of, to share with the public. It is highly probable that any such works would be out-of-commerce works.	Part of the “Images for the Future” project which ran with other Dutch partners from 20017 to 2014. It digitised hundreds of thousands of hours of film, audio, and more than 2 million photos.
<b>Contributes/ contributed to the EU’s Orphan Works Database of the EUIPO</b>	No	Yes, prior to UK leaving the EU – but far fewer than the Active Agency Sub-Regime Archive	Currently has listed 780 orphan works on the Database (although many are still being processed by the archive)

7 None of the film archives had a specific, formal copyright or intellectual property policy. At all three, staff had someone to ask specific copyright questions to or with, but how this was coordinated varied. The general copyright culture in each of the film archives was observed to be collaborative and supportive, with no shaming of staff or practices being observed or commented on by participants.

of the archive”. They hope it will help with future commercial sustainability for the archive, which is “particularly important” for film archives that are charities. This is an interesting comment given that out-of-commerce works cannot be commercialised, which this participant understood, and suggests that the film archives anticipate that making these works available to the public will attract more viewers.

Copyright Sub-Regime	Official written IP/ copyright policy	Staff able to ask copyright questions to someone in the organisation	Official staff training related to copyright	Copyright specialist within the organisation (self-identifying)
Pragmatic Compliance	No	Yes, via email and in person and at copyright clinic sessions	Some staff	Yes
Oppressive	No	Yes, more informally discussed as a group	None that was commented on or observed	No
Active Agency	No	Yes	Some staff	Yes

8 Individuals at each of the three archives were positive about the concept of out-of-commerce works, viewing it as potentially very beneficial for film archives. It was commented by many of the individuals that they believe there are many out-of-commerce works in the archives; and that the concept is well aligned with the desire to make these films publicly available. To illustrate, a participant commented that they believe that there, “would be loads of out-of-commerce films in the archive; and it could maybe help raise the archive’s profile if they were used.” It was also commented that the out-of-commerce works, “could be used for anything if it works well... [it could be] very useful for us, as a large chunk of our remit is making stuff available for educational and public access.”

This in turn could attract more commercial interest in the archive’s collection. This notion could offer reassurance to film archives wishing to prioritise commercial activities to support their limited funding, and thus do not view making available out-of-commerce works as a financially viable activity. If this were viewed as attracting additional revenue over a longer period of time, this could be a more attractive option.

9 A meaning of making films available for public access was strongly intertwined with the narrative of out-of-commerce works, and it was observed that they were viewed as potentially very beneficial for enabling public access. It was observed from the list of films in their collections and the discussions generally that many of the films appear to be out-of-commerce, as they are thought not to be available anywhere else, according to the curators. Likewise, another participant noted that their organisation is hopeful that the out-of-commerce works scheme could be “very useful”, even more so if “it allows more public engagement and for us to be able to give more access; and raise more money, as we are a charity.”

### C. A Proposed Copyright Regime of Archival Practice

11 Practice theory is a theoretical framework employed by a variety of disciplines, that focus on the practice of a task. This article utilises the understanding of practices as being made up of materials, meanings, and competences, as set out by Shove et al:

*materials - including things, technologies, tangible physical entities, and the stuff of which objects are made; competences - which encompasses skill, know-how and technique; and meanings - in which we include symbolic meanings, ideas and aspirations.*<sup>6</sup>

10 Another participant noted that out-of-commerce works could potentially be a way of “supporting the archive” financially and of “building awareness

12 Links are made between the elements that constitute a practice, as well as between the multiple practices that individual elements form parts of.<sup>7</sup> Shove et al.

6 Elizabeth Shove, Mike Pantzar and Matt Watson *The Dynamics of Social Practice: Everyday Life and how it Changes* (SAGE Publications, 2012),14.

7 Shove, Pantzar and Watson (n.7) 36-37.

also introduce the concept of the “proto-practice”,<sup>8</sup> meaning a potential new practice in which the links between the meanings, materials and competences has not yet taken place. That is, a reproduced practice has not yet been formed from these constituent parts. New practices “exploit” the connections made by practices that already exist.<sup>9</sup> In addition, these new interactions are “transformative” in that the materials, competences and meanings are “mutually shaping” and impact on one another.<sup>10</sup> Film archives making out-of-commerce works available can be viewed as a proto-practice: as there is a desire from the film archives to make these works available; there are many out-of-commerce works in the film collections and the materials to digitise them and place them online; and there are individuals with specialist knowledge concerning copyright law and out-of-commerce works.

- 13 In this sense, the needed constituent parts to form a practice of making these works available to the public are present. However, it is not as simple as willing the practice into being.<sup>11</sup> Practices need to recruit carriers to continue,<sup>12</sup> consequently there need to be individuals who are personally interested and committed to performing the practice, and engaging others in doing the same. From the ethnographic research, it is clear that there are individuals in the film archives who are keen to make these works available to the public.
- 14 Of crucial importance is how the new practice interacts with existing practices. If a new practice demands too much time that is allocated for existing practices or uses too many resources currently allocated to other practices, it is unlikely to be taken up by many practitioners. There are demands on time, resources, and staff at the archives, with significant backlogs of processing, cataloguing films and tasks. For this reason, the new practice of making out-of-commerce works available needs to fit within the current practices and demands, or it will not be performed.
- 15 The copyright regime of archival practices set out in this article considers how materials, meanings, and competences come together to form an individual practice; and how these individual practices come together to create a holistic network or web of overlapping practices and attitudes, which shapes

decision-making and daily activities. This network of multiple or overlapping practices forms what is referred to in this article as a regime of practices.

- 16 “Meanings” is being used to mean the spoken, written, unwritten, explicit, and implied narratives that are present within the film archives. For example, copyright compliance and a desire to provide public access to the films are meanings evident in the ethnographic study. Materials are the objects that are involved in the practice. In this research, examples of materials include the films themselves, policy documents, and donor or deposit agreements. Competences refers to the technical skills, knowledge, and abilities of the individuals within the archive, such as knowledge of copyright law, and film restoration skills. It was evident in the ethnographic research that the competences, materials, and meanings are interwoven, and the existing archival practices rely on each constituent part.
- 17 Within the copyright regime proposed here, three distinct sub-regimes were apparent: the copyright as “Oppressive” regime; “Pragmatic Compliance” to copyright; and “Active Agency”. These three distinct sub-regimes could be thought of sitting on a scale of strong copyright compliance motivated by copyright fear, to active resistance to copyright on the other end.
- 18 Each of the three archives within this research had an institutional approach that adhered to one of these regimes. Not all individuals within the archive adhered fully to the sub-regime of the archive to extent, but the overall adherence to the archive’s institutional copyright regime was evident. This is likely the result of the power dynamics and dominant meanings in each film archive. The staff in the archives were keen to adhere to what was perceived as proper or correct legal compliance, including concern for rightholders and avoiding reputational harm.
- 19 The table below sets out the copyright sub-regimes found in the film archives; a comparative table is provided for ease of analysis.<sup>13</sup>

- 13 The data gathered during the ethnographic research was analysed using discourse analysis, which involves coding the texts, to identify emergent themes. The interviews were individually coded. They were coded to initially identify emergent themes and discourses (or meanings) of copyright, and other topics. There is subjectivity in this coding as the researcher is interpreting the meaning and significance of what was said or observed. The coding themes were chosen with the specific focus on out-of-commerce works. Coding themes:

*Copyright fear/ wariness, Orphan Works Directive and orphan works, Specialist knowledge and roles, Non-commercial/ Commercial use, Out-of-commerce works definition, including cut-off date, Out-of-commerce works beneficial to film archive, Rightholders, CMOs, Reputational harm and risk, Copyright clearance, Copyright internal processes, Financial concerns.*

8 Shove, Pantzar and Watson (n.7) 24, 25.

9 Shove, Pantzar and Watson (n.7) 67.

10 Shove, Pantzar and Watson (n.7) 32.

11 Shove, Pantzar and Watson (n.7) 68.

12 Shove, Pantzar and Watson (n.7).

Copyright Sub-regime	Materials	Meanings	Competences
<b>Oppressive</b> - Copyright is experienced as oppressive and restrictive on other activities. Strict legal compliance.	Contracts Policies (no formal copyright policy) Records spreadsheets and index cards Physical film materials and equipment	Copyright fear Copyright compliance Fear of reputational harm Strong concern for the archive's longevity Commercial licensing focus due to limited funding Public access Gatekeeping	Limited specialist copyright knowledge Avoidance of copyright activities deemed 'risky' Specialist knowledge of staff within their roles Record-keeping Liaising with rightholders Technical archiving skills (digitising, preserving, restoring, etc.) Fundraising skills Commercial revenue generating
<b>Pragmatic Compliance</b> - Copyright is restrictive, but more a logistical barrier than oppressive. Legal compliance is adhered to, with some limited exceptions where staff lack confidence or knowledge	Contracts Policies (no formal copyright policy) Records spreadsheets Internal documents and information memos to staff Emails containing information Physical film materials and equipment	Copyright fear (some staff) General copyright compliance Hesitant about legal compliance that is limited Fear of reputational harm Limited concern for the archive's longevity Public access Gatekeeping	Specialist copyright knowledge Avoidance of copyright activities deemed 'risky' Specialist knowledge of staff within their roles Record-keeping (historically lax) Liaising with rightholders Liaising with national government Technical archiving skills (digitising, preserving, restoring, etc.) Fundraising skills Commercial revenue generating
<b>Active Agency</b> - Copyright is restrictive, but not oppressive. Legal compliance to the extent that it is deemed necessary, and some active departure from copyright.	Contracts Policies (no formal copyright policy) Records spreadsheets Physical film materials and equipment	Copyright compliance that is balanced with professional judgement, some active departure. Fear of reputational harm Confidence in the archive's longevity Public access Gatekeeping	Specialist copyright knowledge Specialist knowledge of staff within their roles Record-keeping Liaising with rightholders Liaising with national government Technical archiving skills (digitising, preserving, restoring, etc.) Fundraising skills Commercial revenue generating

- 20 Within the meanings identified in the copyright sub-regimes of archival practice, there are both dominant meanings and subordinate meanings present. The term “dominant meanings” refers to what “should” or “ought to be” done: the meanings that set standards of best practice. “Subordinate meanings” are meanings that are exhibited by some individuals but are not the meaning held at the institutional level across the archive. It is important to acknowledge the existence of these subordinate meanings as it is an over-simplification to state that all individuals within the film archives adhere to the organisational culture and dominant meanings of the archives.
- 21 For example, in the Pragmatic Compliance regime, there is a dominant meaning present that legal compliance and copyright compliance should be adhered to. In most of the observations and interviews, this appeared to be followed. However, in other team meetings it was observed that some legal compliance was limited, either because it had been “fudged”, or because separate teams had control over supervising their own legal compliance. Therefore, what was observed to be happening in practice was a dominant meaning of general (but not complete) legal compliance, and a meaning of hesitancy around these areas of limited legal compliance.

## D. The Oppressive Sub-Regime found in Archive 1

- 22 In the “Oppressive” copyright regime of archival practices, copyright is experienced as oppressive and restrictive on other activities. Strict legal compliance was prioritised over providing public access. This shaped archiving through the prohibition of any archival activities that could infringe copyright, for example reusing someone’s film or making it available online. Copyright concerns had an overt effect on the choice of films made available on the archive’s website, for filmmakers and students to reuse, and for commercial licensing. In this sense, copyright has a core orchestrating impact on wider archival activities.
- 23 Copyright orchestrates the archival practices considerably. Only the films with a clear and known copyright status were allowed to be reused. Also, copyright compliance led to a strong copyright fear within the regime. This in turn culminated in a practice of always re-seeking rightholder permission when access or reuse is requested by a third party, to avoid reputational harm. This practice limited the available films for reuse and public access.
- 24 It was accepted by the staff that the archive’s desire to provide public access to material must be superseded by copyright concerns. This is a result of the fact that over-compliance is preferable to under-compliance regarding copyright, and as such there may be concern about using *out-of-commerce works in case they are actually in commerce or the rightholder objects.*

## I. Meanings

- 25 The meanings observed in the Oppressive regime of practices were the following: copyright fear; copyright compliance; fear of reputational harm; a strong concern for the archive’s longevity; commercial licensing focus due to limited funding; public access; and gatekeeping. Public access practices in particular were observed as a crucial part of the archives’ daily functions.
- 26 Copyright fear and copyright compliance were dominant meanings, and it was viewed that copyright compliance would lessen the chance of reputational harm for the archive. For instance, A (a member of the archive) noted that copyright is a “nightmare, coupled with threat”, and that “you are confined by copyright”. Copyright fear and a strong meaning of legal compliance culminate in a risk-averse approach to reuse, with many films regarded as too complex to get copyright permission to reuse. This emphasises that concerns about the copyright status of some of their films prevent them from using them, and that it restricts the ability to allow reuse of materials.
- 27 There was also a conflict noted in the meanings of providing public access and of needing to generate revenue though generating commercial revenue from some of the collection. A participant noted that their fundamental goal of access therefore necessitates some commercialisation of the archive, “... but the archive needs to be able to provide access, so we need commercial revenue to keep going.” It was therefore observed that commercial sales of films within the archive are a core practice by which the archive is maintained, and therefore how public access is enabled. The commercial activities and access activities are therefore part of the same practice. The nature of the specific archival collection particularly lends itself to commercial re-uses of these films.
- 28 A meaning of gatekeeping or protecting donors and rightholders was present, with the view held by the staff that the film archive has an ethical or moral duty to protect donors and rightholders. They were very cautious about what they allow to be done with the film material, as a lot of it is very sensitive or personal. A participant noted that “[y]ou have to be sensitive” about allowing the use of certain content, including amateur films with private moments such

as strip teases, etc. These are ethical issues that are seriously considered, alongside the copyright ownership. An overlapping of ethical and copyright concerns was observed in each of the archive, with copyright acting as a shorthand for wider legal, moral, or ethical concerns.

## II. Competences

- 29 The competences observed in the Oppressive copyright regime of archival practices: limited specialist copyright knowledge; avoidance of copyright activities deemed 'risky'; specialist knowledge of staff; record-keeping; liaising with rightholders; technical archiving skills (digitising, preserving, restoring, etc.); fundraising skills; and commercial revenue generating.
- 30 Competences were observed to be held by individuals in specific roles, with individuals being highly specialised and knowledgeable about their specific roles. It was common for specific individuals to be deferred to for set tasks or topics. All individuals observed and spoken to have the ability and the desire to generate commercial revenue, and to prioritise commercial client projects. All individuals who encountered copyright decisions (either customer or public facing, or in charge of creating film projects) displayed avoidance of copyright activities deemed 'risky'. This was evident alongside a strong meaning present that, if in any doubt about the legality of something, it is best to avoid the use or activity.
- 31 W is the person who primarily deals with copyright; they are not a legal specialist and do not have a legal background. As W describes, knowledge and process have been built upon and established over time regarding copyright: "There's no particular protocol in place, we all just know what to do". W noted that, "[a] lot of the procedures are sensible and common sense. And lots is done on a case-by-case basis, so a stringent policy in place doesn't work for everything."
- 32 Record-keeping was regarded as very important. Digital files and physical files including index cards were all maintained. This practice appeared linked to the copyright fear discourse and overall strict legal compliance discourse, it was observed to generate a culture of strict adherence to rules and procedures.
- 33 They were involved in liaising with rightholders, donors and commercial clients, and had set internal norms for these interactions. Commercial clients were prioritised, as a result of the strong desire to generate income. This was also linked to competences in fundraising and commercialisation of their archive: they offer archival footage searches to po-

tential clients as a way of obtaining income from licence fees. The focus on maintaining good relationships with clients was prevalent throughout all activities and practices in the archive, as reputational harm was perceived as likely to dissuade clients from licensing with them.

- 34 Also, there was an observed avoidance of activities regarded as 'risky' from a copyright perspective. As D (a member of the archive) noted in relation to a co-creation project on women using the archive's films: "I'll have to get them to choose way more footage than they'll need, so I can go through and say 'woah! Definitely not that one for rights!'"

### 1. Materials

- 35 There is also no formal written copyright policy. There is also no legal specialist, which was observed to correlate with strict legal compliance practices, as there was no desire to resist copyright. This contrasts with the Active Agency regime. D noted that "copyright is very important, [so we do] anything that makes us feel more confident, more comfortable." W commented that concerning copyright "[i]t's on a case-by-case basis. It's 'can I do this?' We ask [person] and [person] if we have any questions."
- 36 As D also noted, "[w]e don't have a standard policy for copyright. But I'm the new kid on the block, so maybe I don't know. But it's all about procedure here, and we do this in a uniform way."
- 37 They have set contracts that they use with their clients, which was observed to provide legal reassurance. They struggle with lawyers from commercial clients trying to adapt their contract or remove parts, as they fear this could lead to potential liability for them. D further commented that there is a: "uniform approach to contracts, written by a legal advisor/ IP person...We feel fully indemnified...We feel bullied a lot by lawyers from big companies, as they try to remove our indemnity clause."
- 38 They have clear policy documents, which are public-facing and available on their website. The policies, including access policies, are clear and aimed at providing detailed information to potential users, and to donors. As the archive is particularly focussed on revenue generation from commercial licensing, this practice seems linked to the fear of reputational harm to the archive, and a desire to be seen as legally compliant and rigorous.

## 2. A Key Issue in the Oppressive Sub-Regime: Funding Issues & Commercialisation

39 One of the significant materials lacking from the archives in order to make out-of-commerce works available is the required levels of funding. The archives face continually diminishing funds, and greater pressure from the government for them to be more financially independent. Many film archives, even those that receive national funding, are required to self-fund to some extent. For some film archives, they need to be almost wholly self-funded, as they receive only a small amount of national or public funding. As a result, they are hesitant to spend time and money on utilising out-of-commerce works, when Article 8 only allows them to do so for non-commercial purposes.

40 The Oppressive sub-regime archive is a UK regional film archive. The UK regional archives have developed in an “ad hoc” manner and have been considerably shaped by their funding situation and challenges.<sup>14</sup> Historically, regional film archives have suffered from a lack of funding from the UKFC when it was operational, as their agendas have not been aligned with the UKFC’s funding agenda.<sup>15</sup> Kelly states that regional film archives in the UK “all supplement their income through project-based funding and commercial activity” and this activity is “high-risk, short-term and geared towards priorities set in accordance with external criteria”.<sup>16</sup> She therefore concludes that this is “highly inappropriate for long-term management of screen heritage”, and prevents the regional film archives from “attending to many of the basic collections management tasks that underpin widespread access.”<sup>17</sup>

41 The archive in the Oppressive sub-regime in particular has a fundamental funding gap and has to prioritise commercial activities over non-commercial activities. From observing general conversation and from the interviews, it is clear that funding is a primary concern, and the focus therefore is on all activities that can generate income. It was commented in conversation between two staff members that it is a “month to month” worry about funding and being able to continue the archive. The fact that out-of-

commerce works can only be used for non-commercial purposes is also deemed a significant concern for its usefulness:

*[i]t’s difficult, as we need to generate revenue, so the non-commercial uses for out-of-commerce works doesn’t help with that. It’s great from a public point of view, but the archive needs to be able to provide access, so we need commercial revenue to keep going.*

42 At all of the archives, it was commented and observed that due to both space and budgets, decisions have to be made as to which material is kept, and which material is to be prioritised for digitisation and access. This was an issue for the individual film archives to varying degrees. Backlogs of digitisation and preservation were observed at each of the archives. Shelves in the film vaults were stacked with material that is uncatalogued, yet to be accessioned, viewed, and digitised. The focus within the archives is therefore to manage this backlog before considering other less urgent projects and utilising the out-of-commerce provisions is likely to fall down the priority list.

43 One of the competences demonstrated by the archives was the ability to align their activities to the objectives of their funders, as a way of increasing their funding. The regional archives in particular need to adapt to the direction of the sector and the funders’ requirements, to ensure their longevity. The archive in the Oppressive sub-regime has intentionally aligned their projects with the national film archive funder, as D commented: “[we] align our strategic objectives with what’s going on in the film cultural sphere...If you’re not aligned to them, you’re counting yourself out...”. This alignment to the activities of funders suggests that the regional film archives may be more likely to use Article 8 if the national film archives do. In other words, if national film archives lead the way in making use of out-of-commerce works, the regional film archives may do the same.

44 An interesting concept that arose at each of the three archives in multiple interviews alongside the issue of funding was the parallel need to therefore generate revenue through commercial revenue streams. This is complicated by the fact that each of the film archives is a registered charity (or local equivalent). Due to the severe funding issues, the Oppressive regime views commercial activities as having priority over non-commercial activities, due to necessity. In contrast, the other two sub-regimes have dominant meanings that public access non-commercial work should take priority. This difference in approach is a result of reduced funding in the Oppressive regime; as well as differences in categorisation of what is “commercial”.

14 James Patterson, *The National Strategy for Screen Heritage: A Personal View* (2009) 6(2) *Journal of British Cinema and Television*, pp. 313-318, 316.

15 *Ibid.*

16 Ruth Kelly (ed.) “Strategy for UK Screen Heritage” (UK Film Heritage Group, 2007), 13.

17 *Ibid.*

- 45 Many of the commercially exploited films at the film archives studied were orphan works or public domain films, as they are easier to manage from a copyright perspective than works with a known copyright owner. Article 8 provides the ability to provide widened access to out-of-commerce films in their collections, but not to commercially exploit these films. Inherently, it seems that the out-of-commerce provisions sit at odds with the reality of daily archival practice and misunderstand the fundamental commercial roles the archives are required to play. Being unable to commercialise the out-of-commerce films, whether members of FIAF or not, does not address the funding gap that many archives face.
- 46 If a film archive's existence is at risk due to financial uncertainty, and by extension the livelihood of the individuals working within the film archive, provisions that focus on non-commercial use are unlikely to be regarded as a key priority. The regional film archives face the greatest financial uncertainty and are therefore more likely to adopt policies and projects that focus on commercial uses of the collection

## E. Pragmatic Compliance Copyright Regime found in Archive 2

- 47 In the "Pragmatic Compliance" copyright regime of practice, copyright is experienced as restrictive on archival activities, but more a logistical barrier than oppressive. Overall, legal compliance is adhered to. This shaped archiving through the avoidance of archival activities that could infringe copyright, for example reusing someone's film or making it available online. Copyright concerns had an overt effect on the choice of films made available on their website, for filmmakers and students to reuse, and for commercial licensing. In this sense, copyright has a core orchestrating impact on wider archival activities. However, this regime differs to the one discussed above in that there is not an *absolute prohibition* on activities with an unclear copyright status, as some staff members are more willing to engage with them anyway.
- 48 Films with a clear and known copyright status were preferred for reuse, and some film titles are viewed as not able to be utilised due to copyright concerns. As was noted in the Oppressive regime, there is a practice of avoiding situations deemed too 'risky' from a copyright perspective. In the Pragmatic Compliance sub-regime, this presented more through a meaning of hesitancy around limited legal compliance, than a full prohibition. It was accepted by staff at this archive that copyright compliance is important, but there is not the same belief that over-compliance is better than under-compliance. There is hesitancy about legal compliance that is limited, however. It was also an accepted truth that the archive's desire to provide public access to material must be superseded by copyright concerns in some instances.
- 49 The archive has been a user of the EU Orphan Works Scheme (prior to the UK leaving the EU) and is able to undertake detailed and lengthy diligence to track down rightholders; demonstrating the high level of legal expertise of a small number of individuals at the archive.

## I. Meanings

- 50 The meanings observed in the Pragmatic Compliance regime of practices were the following: copyright fear (some staff); general copyright compliance; hesitancy about legal compliance that is limited; a fear of reputational harm; limited concern for the archive's longevity; public access; and gatekeeping. Meanings of funding concerns and a fear of reputational harm were noted in the interviews with the staff. Copyright fear and copyright compliance were dominant meanings, and it was viewed that copyright compliance would lessen the chance of reputational harm for the archive.
- 51 There were a number of staff who were wary about speaking about copyright, and especially saying something "incorrect". It was common when speaking with people for them to comment in a similar way to T: "I'm not a lawyer and I don't really know much about copyright" and to state that there are other people who might be able to answer the questions better. T was also reluctant to discuss specific issues concerning copyright or rights clearance and made a comment at the end of the discussion that they would "have to go and brush up on the rights strand", implying that the conversation had made them feel unsure of their knowledge. Z also explained that people are "quite nervous" in the archive about copyright and about "saying things and sharing whether decisions worked". Z said that they personally used to be "hesitant" in relation to copyright but are not anymore. They commented that an "agreed, basic kind of approach" to copyright and rights is needed, but that this is difficult when there is misunderstanding and ignorance of copyright "across the board" within the archive.
- 52 Despite this copyright fear evident in some of the individuals, the overall copyright approach remains one of pragmatic compliance. This was due to the presence of a copyright specialist, which is not present in the Oppressive regime. This specialist individual provided reassurance and guidance to their colleagues, which lessened the depth of the copyright

fear present. It is common in the archival sector that individuals have specialist roles and knowledge, so this legal specialism is accepted and aligned with wider archival practice.

- 53 As was noted in the Oppressive regime, there is a practice of avoiding situations deemed too ‘risky’ from a copyright perspective. In the Pragmatic Compliance regime, this presented more through a meaning of hesitancy around limited legal compliance, such as in relation to orphan works. It was noted that the existing orphan works scheme is “trying to do too many things”, and that the end result is “awkward”, largely because the orphan works scheme does not work well with royalties, and that the film industry works on royalties.
- 54 It was noted across various observations and interviews that there is a discourse of copyright issues being considered at the end of projects, and not *holistically part of them*. During an informal project meeting between several members of the team, the project made for the next few months was examined. It was noted that “Rights” is at the end of this timeline with no specific date attached to it. K joked in relation to this that “...we’re like the ugly cousins no one wants to claim...we’re always forgotten about and put to the end”. This sentiment was echoed in several other discussions and group meetings, that rights clearance is only considered *after* the other work has been completed, and not always as a cohesive part of it. This can lead to situations in which the rights clearance of a film became impossible, even after a significant effort had been made to physically repair and digitise the film.

## II. Competences

- 55 The competences observed in the Pragmatic Compliance regime of practices were the following: specialist copyright knowledge; an avoidance of copyright activities deemed ‘risky’; specialist knowledge of staff; record-keeping (which has been historically lax); liaising with rightholders; liaising with national government; technical archiving skills (digitising, preserving, restoring, etc.); fundraising skills; and commercial revenue generating.
- 56 Despite the lack of a formal copyright policy, there were clear practices observed and commented upon in the interviews, which indicated a specific individual, Z, who is consulted for copyright advice both formally and informally by others. Competences are embodied by key personnel within the archive, and thus archiving practices require coordination between those who have copyright competences and those who do not and who may be handling the management of the archive. There are a few team members who are consulted in relation to copyright. As was observed by a participant in relation to Z: “[Z is] a mine of information and [they] answer a lot of our questions, we send [them] a lot of questions all the time... [They are] great; [they will] just know something off the top of [their] head.” Z is emailed and spoken to about copyright issues and queries by staff from other teams too, and other have commented that they are a “fountain of knowledge”. It is therefore clear that certain members of the team are highly skilled in relation to copyright and others seek them out for information. A staff member, E, from another team in the archive, commented that
- from my experience in the heritage sector, you have small pockets of people who understand copyright in-depth, and then there is a spectrum of understanding from everyone else. And everyone then asks those few people all the questions. Curators especially can lack this depth of knowledge.*
- 57 Copyright training sessions were only observed to be given to only individuals or teams deemed likely to ‘need’ it, presumably to reduce cost and staff time. These training sessions were a place for the individuals to ask questions and to share best practices with one another, as well as receive training and guidance from Z. These were very open, informal sessions led by Z in which Z was honest about areas the archive lacked clear processes or guidance on. This in turn was observed to enable the team to feel more confident in asking questions, as there was no culture or feeling of shame for anyone who lacked knowledge.

### 1. Materials

- 58 There is no specific written copyright or related policy that is followed within the archive, but there is an increasing internal focus on copyright compliance at the archive. For example, Z noted that there has been both an external and internal review of copyright processes and systems recently. This review consulted people across various departments to ask them whether they came across copyright issues often and where they look for information. From this review, functional issues, data issues, and technical issues were found. Some of these changes have been implemented, and some are ongoing. This internal review emphasises that strict copyright compliance has not been adhered to, and historically there has been a lax approach to compliance.
- 59 It was commented by Z that prior to internal changes in 2014, there was very little written down within the team regarding policies and procedures; and that historically there has been “anecdotal, subjective decision-making”. Z noted that a lot of decisions are made during “informal conversations”; and often no record is kept of these. Z explained that this

subsequently made it very difficult to understand historic decision-making and rationales, especially when staff left. This has also led to historic legal and factual “misunderstandings” regarding rights ownership becoming clear upon investigation, regarding incorporating the Orphan Works Scheme. This evidences that historically copyright has not been a primary orchestrator of practices. This has changed in recent years, with the rise of copyright infringement litigation causing concern, and so copyright has been focussed on much more.

- 60 The material documents at the archive concerning copyright and licensing deals are not consistent across the archive’s various teams and leave potential gaps in the distribution of knowledge, as some teams manage their own copyright research and copyright licensing, with the two teams “swapping notes” to share knowledge. It was noted by staff members that the archive’s approaches and internal practices have sometimes later transpired to be incorrect. For instance, it was noted that the archive’s internal guidance relating to Crown Copyright films was “incorrect”.

## 2. Key Issue in the Pragmatic Sub-Regime: Reputational Harm

- 61 Reputational harm (both actual and perceived) to the archive and to the individual archivist was discussed in relation to copyright by many individuals across the archives. Any potential reputational harm to the archive was seen as very serious. Reputational harm was observed as having a very negative impact on the film archive in a financial and professional sense. This was viewed as likely to occur if the archive suffers from a reputation of being careless with copyright works, of not respecting rightholders, and of failing to comply with legal requirements. The focus on the relationship with rightholders was of key importance, as without rightholders agreeing to allow their material to be stored and used, the film archives could not continue.
- 62 Reputational risk is an issue that, from speaking to the participants, can be separated into a fear of harming relationships with four distinct groups: current or future financial donors; current or future donors of material to the collection; members of the public or users of the collection; and other CHIs or partner institutions. No individual or archive articulated the fear of reputational harm as having these four aspects, but they appeared through analysing the comments made. It was the potential reputational harm to current or future financial donors; and current or future donors of material to the collection that was spoken about by many of the participants. This fear of reputational harm is itself interlinked with

on-going fears of funding and the continuing viability of the archive, as discussed above. The avoidance of reputational harm was therefore seen to be motivated by: the fear of legal action for any infringements; an ethical sense of duty and care towards rightholders; and a risk of rightholders ceasing to engage with the archive.

- 63 This fear led to avoidance of activities that were perceived as likely to lead to reputational harm. This avoidance of activities deemed to risk reputational harm was observed across the three sub-regimes and seemed to create a particular barrier for the Practical Compliance sub-regime. To illustrate, a participant commented that existing rightholder relationships will not be risked by utilising the out-of-commerce provisions, even if the works are eligible: “[w]e would never consider anything OOC if we were in contact with the rights holder(s), even if it would fit the bill.”
- 64 Reputational harm and the relationship with rightholders are paramount to the individual archivists, and shapes access practices. As a participant commented: “reputation as an archive is really important”. This is clearly evidenced through access practices, in that:

*[a]ccess to material that is still in copyright is only open to rights holders (regarding their own material) and third parties who have acquired the rights holders’ permission unless permission is not required such as under the in-situ exception.*

- 65 It is likely that they would adopt a similar approach with out-of-commerce works if they were to utilise them; seeking permission from rightholders and donors to do so, as a “courtesy”. This could lessen the likelihood of film archives making out-of-commerce works available. On the other hand, rightholder concerns about Article 8 will be best addressed through close stakeholder dialogue. If the film archives are seen to be considering the best interests of the rightholders in their collections, this will strengthen these professional relationships and trust.

## F. Active Agency Copyright Regime found in Archive 3

- 66 In the “Active Agency” copyright regime of archival practices, copyright is experienced as restrictive to archival activities, but not oppressive. There is legal and copyright compliance to the extent that it is deemed necessary, and there is some active departure from copyright. Crucially, legal compliance is adhered to the extent *deemed necessary and compatible* with its public access goals. This departure is based on professional judgement of the archivists.

This shaped archiving through the understanding that public access to films is of the utmost importance and that copyright law offers the archive opportunities to make use of their collection, as well as placing restrictions on its use. Whilst individual wariness of copyright was still present and was seen to restrict some individual curatorial activities, there was a wider institutional acceptance that there can be some resistance to copyright.

- 67 Some films with an unclear copyright status or no rightholder permission could not be made available to the public, but many films are made available, even without express consent. Only the films with a clear and known copyright status were allowed to be reused. Within the Active Agency regime, it was accepted by all individuals involved in the research that copyright compliance is important, but that this compliance must be balanced with professional judgment and with the view to providing public access.

## I. Meanings

- 68 The meanings observed in the Active Agency regime of practices were the following: copyright compliance that is balanced with professional judgement, with some active departure; fear of reputational harm; confidence in the archive's longevity; public access; and gatekeeping. Copyright compliance and ethical practice is regarded as very important to the practices at the archive. As S noted regarding the archive's copyright approach: "...our policy is to respect the law. We are a public institute, and we take that seriously...We work with these issues on a daily basis and we're really respectful of that."
- 69 There was also a dominant meaning of expertise and professional judgement noticed across various issues and roles. Legal compliance is adhered to the extent deemed necessary and compatible with its public access goals. The archive only consults the sources it deems necessary during a diligent search, even if this means omitting sources that are legally required to be consulted. As stated by their legal specialist, the "sources are only consulted if they are relevant *even if they are mandatory according to law*" (emphasis made by the legal specialist themselves). The reason for omitting certain irrelevant sources is that it saves time, and therefore money, as otherwise this can be a cumbersome task. This approach demonstrates a focus on the law's intention, more so than its direct wording. Copyright adherence is therefore *balanced* with internal professional judgement, and there is some departure from copyright compliance.
- 70 This discourse is strongly correlated to the discourse of knowledge and roles being highly specialised across the archive. For example, a participant

commented that "[e]ach person has a role in the film heritage circle. It is a finely tuned machine; every cog is critical". Many of the staff are reassured by F, the copyright specialist at the archive. Some of this practice was observed to be informal conversations and emails, as well as more formal delegation of responsibility for certain tasks. For instance, F is the primary individual for conducting copyright research; they note that, "...establishing the rights status (in or out of copyright, orphaned) or looking for rights holders, that's something that really only I do at the moment".

- 71 There was observed to be a widely accepted practice of relying on F for copyright guidance, as B noted: "[F] gives us the rules". C commented that for approximately 80% of cases it is clear what the copyright situation is, and for the remaining 20% it is "unclear, but [F] does those". Staff members from across the archive engage with copyright, but it is primarily F who manages "rights clearance" to obtain the necessary copyright permissions. This emphasises that copyright research and permission practices are, where a specialised individual is present, carried out almost exclusively by that person. This logically accounts for the absence of copyright training given to individuals across this film archive, as it appears that this is not viewed as essential.

## II. Competences

- 72 The competences observed in the Active Agency regime of practices were the following: specialist copyright knowledge; specialist knowledge of staff; record-keeping; liaising with rightholders; liaising with national government; technical archiving competences (digitising, preserving, restoring, etc.); fundraising competences; and commercial revenue generating.
- 73 Historically, limited record-keeping and documentation occurred. M commented that when they joined the archive, there was a "huge backlog" of registration of contracts for acquisitions, and consequently these acquisitions were not registered anywhere. M noted that they therefore were unsure "what rights/licences were agreed upon, or the duration". M was part of the efforts to clear this backlog, and therefore "I really got to know how these contracts work".
- 74 Understanding the copyright position of a film is only possible with accurate and sufficient information about the film. B noted that fully cataloguing a work in their records "can take a long time, up to **10 years** for the result" (emphasis added). This length of time is due to an issue with incorrect IDs for the films, and a lack of information about the films. They consequently must "look down different routes and

speak to the public”, to find more information. Due to these complexities, the research into some films is “on the back burner” and remains an ongoing task.

- 75 Furthermore, B noted that this is complicated by the fact that they have a “very little limited budget now” at the film archive. They noted that this significantly impacts the film restoration activities, and that they are consequently “very selective now” about which films are taken in and restored. In this sense, decisions and archival practices are influenced by what is economically viable; and therefore, often choose to prioritise the films with either the greatest national significance, or the films with a stronger chance of generating commercial revenue.

## 1. Materials

- 76 There is no formal copyright policy, as F commented:

*[t]here are no policies as in written manifests or anything like that. But everybody within the organisation is (made) aware that copyrighted material cannot be used without the proper clearance. In case of doubt, colleagues usually ask me. Especially when in doubt about the applicability of copyright exceptions...*

- 77 B noted that the archive has adopted an approach of first “clearing copyright”, before deciding whether to restore the film, as there is a lack of money (and spending the considerable money to digitise a film that cannot be used commercially for copyright reasons is viewed as economically unviable). This demonstrates how copyright impacts upon curatorial choice and archival practice. B noted that archivists do not want to be too concerned about copyright and commented that once the copyright research for a film has been completed “I try not to think about it too much” after doing the research. This is another example of copyright orchestrating archival practices, as it shapes which films and collections the archive chooses to focus on in their work projects.

## 2. Key Issue for the Active Agency Sub-Regime: The Difference Between “Commercial” or “Non-Commercial” Use

- 78 The issue of whether a particular use is “commercial” was a significant concern for all of the archives. This issue was regarded as essential for the successful incorporation of Article 8 by the archives, as a lack of clarity on this renders Article 8 ineffective. Uses such as research and education were generally viewed by the participants as non-commercial. One individual noted: “[s]ome things are clearly commercial and some things are clearly non-commercial, and others

on a sliding scale, depending on who you talk to as well”. This recognises the subjectivity in determining whether a work is commercial or non-commercial, and that people within the same archive can hold differing views on this.

- 79 Likewise, there is a meaning that views all of the archive’s own activities as non-commercial, as all revenue generated goes back into supporting the archive’s public access mission, and many film archives are charities. That said, what is viewed as non-commercial might be different when a member of the public wants to carry out a similar use of one of the archive’s films. A highly contextual approach to the meaning of commercial and non-commercial was observed. When the archive itself was the copyright user, individuals within the organisations commented that they then tended to interpret the meaning of commerciality differently to when charging commercial clients. This seemed to correlate to the belief at the archive that all of their activities are inherently non-commercial.<sup>18</sup> The archive in the Active Agency sub-regime in particular regards all of their activities as non-commercial, as they are a non-profit organisation:

*“[w]e are an archive, we are a museum; commercial is where you make a profit. Everything we make goes back into the funds to keep us going, so we make no profit.” There is a difference of approach when discussing the reuses of the films by clients, with a tendency towards assuming these will be commercial. A participant at the archive regarded academic and educational uses as most likely non-commercial, but “I consider some of it as commercial”.*

- 80 In the Pragmatic Compliance sub-regime, the view was likewise shared that, in theory, all of their activities are non-commercial: “[n]othing the [archive] does makes a profit as it all goes back into the institution...In some ways, we could say that everything we do is non-commercial”. However, in practice it was noted that this view is not held as strongly or boldly as in the Active Agency sub-regime; and in reality, great caution is exercised in uses that could be viewed as commercial. As Q noted, non-commercial use is when “no one is making any money at all – is the simple answer”.

18 The FIAF Code of Ethics: “3.1. Archives recognise that the materials in their care represent commercial as well as artistic property, and fully respect the owners of copyright and other commercial interests. Archives will not themselves engage in activities which violate or diminish those rights, and will try to prevent others from doing so. 3.2. Unless and until commercial rights in items from their collection shall have expired or been either legally annulled or formally vested in their institution, archives will not exploit those items for profit.” See. FIAF, “FIAF Code of Ethics” FIAF, “FIAF Code of Ethics” Available at: < <https://www.fiafnet.org/pages/Community/Code-Of-Ethics.html> > Accessed on 17<sup>th</sup> May 2019.

81 Advert revenue was a cause of uncertainty for some archives, as to whether it is non-commercial. As one individual in the Pragmatic Compliance sub-regime commented: “[i]t’s becoming more difficult to distinguish between commercial and non-commercial use... [This situation has been] blurred with YouTube, as ad revenues on the side, are potentially quite a lot of money.” Furthermore, sponsorship on websites was raised by one individual, who viewed advert revenue on YouTube as commercial, but was “not sure” whether sponsored content would be. This was because it was regarded as being “more difficult to distinguish when it’s indirect revenue.”

### 3. Second Key Issue for the Active Agency Sub-Regime: A Need for Cut-Off Dates

82 The Netherlands was the first country to implement the CDSM nationally. The UK chose not to implement the CDSM Directive prior to leaving the EU.<sup>19</sup> Neither the UK nor the Netherlands have a sufficiently representative CMO for film works. Therefore, Dutch film archives wishing to utilise Article 8 would have to use the fall-back exception.

83 In the Netherlands, there is also no official extended collective licensing scheme in place,<sup>20</sup> but various CMOs operate in the Netherlands who are affiliated to the official Association of Organisations for the Collective Management of Intellectual Property Rights (or “VOI©E” in Dutch).<sup>21</sup> VOI©E was set up in 2008 as a trade association for CMOs.<sup>22</sup> A voluntary Dutch CMO Quality Mark assessment for CMOs was subsequently established. A report into the effectiveness of the CMO Quality Mark found that:

*[t]here is increased transparency for users where rates and licence terms are concerned. The CMO Quality Mark encourages CMOs to work together closely where possible and good progress has been made in this area... The CMOs have, for example, started a project to harmonize their financial affairs and reporting.*<sup>23</sup>

84 The collective management of rights therefore appears to have a strong position nationally in the Netherlands, despite the lack of extended collective licensing scheme or CMO for film. The CMO Quality Mark further protects rightholders. This prominence of CMOs in the Netherlands is something that has been achieved in recent years. Before this, within Dutch copyright implementation, “self-regulation has always been a core strategic choice”,<sup>24</sup> Hoorn elaborates on this in detail, and notes that there are many instances of “a broad involvement of diverse stakeholders”.<sup>25</sup>

85 Therefore, the trust and accountability of CMOs in the Netherlands appears to be especially well established, meaning that a CMO appearing for film there would have a strong chance of being representative. The strong culture of collective management of copyright in the Netherlands and the strong stakeholder dialogue presents a solid foundation for a CMO for films to appear in the future.

86 What was clear across the three film archives was a need for workable, clear definitions of “out-of-commerce works”, which ideally included cut-off dates. This need becomes even higher for the EU countries without sufficiently representative CMOs for film works (or other relevant categories of works), as this means that the CHIs need to have the confidence to clearly distinguish which works should be deemed out-of-commerce. Cut-off dates give far greater clarity and allow CHIs to explain to rightholders how these decisions have been made. As has been discussed, avoiding potential reputational harm through meaningful rightholder dialogue is essential to the proper functioning of film archives, and cut-off dates can help to facilitate it.

87 Many at the archives believed that without a clear timescale at which a work could be deemed to be out-of-commerce, it would be too onerous to be used. The length of the cut-off was discussed, with differing suggestions given by those interviewed. It was noted by some that the rightholders are likely to

19 However, there is no barrier to the UK choosing to implement domestic legislation that mirrors in substance the provisions of the DSM Directive, including Art. 8. As it stands, there are no intentions within the UK government to implement similar changes to those that the DSM Directive will bring to the EU.

20 European Commission “Cultural heritage Digitisation, online accessibility and digital preservation Report on the Implementation of Commission Recommendation 2011/711/EU 2013-2015” (European Commission, 2016), pg. 39.

21 <https://business.gov.nl/regulation/copyright/>

22 Stichting Reprorecht, “Today’s rights management the Dutch way: Transparency and governance in collective management of copyright and neighbouring rights in the Netherlands: a progress report” (Stichting Reprorecht, 2013) 8.

23 Stichting Reprorecht (n. 23) 12.

24 Esther Hoorn “Contributing to Conversational Copyright: Creative Commons Licences and Cultural Heritage Institutions” in Guibault, L. and Angelopoulos, C. (eds.) *Open Content Licensing: From Theory to Practice* (Amsterdam University Press, 2011), 209-211.

25 *Ibid.*

lobby for this limit to be as long as possible, if one is introduced. Time limits are therefore essential to the usability and proper functioning of out-of-commerce works within archival practice. A participant commented: “[w]e have heard proposals for twenty years, but that seems unrealistic. Likely the rights holders would collectively oppose such a proposal. But forty years could work”.

- 88 In contrast, another participant suggested a time-limit of approximately “a couple of years ... two-five years maybe with six months’ notice of intention”. It was further noted by this participant that before a time limit could be set, it would have to be established how long is required for an agreement to be made: “how long does it take to do a deal somewhere? Rightholders need to have the chance to negotiate with people.” These suggested cut-off limits were therefore positioned to safeguard and respect the rightholder, not simply to benefit the film archive.
- 89 The individuals who discussed a cut-off date all related it back to negotiations with rightholders and agreeing a position that rightholders view as fair to them. This focus on the relationships with rightholders reiterates the desire to utilise out-of-commerce works for instances in which there is no likelihood of commercialisation, as opposed to encroaching on the right of the copyright owner to commercialise their work. This is aligned to the meaning of avoiding reputational harm present in each of the copyright regimes.
- 90 Different cut-off dates for different genres of film work were suggested, as different genres have their own unique commercial life cycles. A participant stated that the cut-off date chosen is likely to be influenced by the film distribution timeline, as films tend to have natural breaks in their lifetimes.<sup>26</sup> Z stated that during these natural commercial “breaks” it is unlikely the work could be considered out-of-commerce. These discussions further highlight the need for sector-specific guidance and definitions, as commercial film works do not follow the same commercial life cycles as works such as books.
- 91 Given the lack of clarity in the definition, it is unclear how many out-of-commerce works there are in the film archives. A lack of accurate figures weakens the incentive for film archives to invest time and money in bringing these works to the public, as it is unclear what the potential scale of the benefit is for the archive.

26 For example, a six-month break between theatrical release and DVD sales.

## G. Concluding Remarks

- 92 For Article 8 to be beneficial to film archives in providing public access to out-of-commerce works, understanding the practices of copyright is crucial, as their current response to copyright is a likely indicator of the success of future copyright provisions. A theoretical framework, based on empirical research, enables us to understand potential barriers to incorporation of legal reform, and to adequately address these barriers. Furthermore, it provides detailed evidence to policymakers and legislators regarding the barriers to successful incorporation into existing archival practices.
- 93 This article proposes a copyright regime of archival practice. The different sub-regimes of copyright in each archive establish how the various elements of archiving come together, and the meanings of copyright and legal incorporation. This contributes a theoretical framework for the understanding of how copyright shapes archival practices and decision-making. The three copyright sub-regimes of archival practice are: an Oppressive Regime; Pragmatic Compliance regime; and Active Agency regime. This article applies the copyright regime of archival practices to out-of-commerce works. In doing so, it examines how existing practices are likely to face barriers in the introduction of a new proto-practice of making out-of-commerce works available.
- 94 It seems likely that the archives that adhere to an “Active Agency” copyright regime, with a legal specialist that is knowledgeable and confident about copyright, are the most likely to utilise Article 8. This is due to this copyright sub-regime of displaying less copyright wariness and fear. It is also due to the fact that this regime involves copyright compliance balanced with professional judgement and departure from copyright when it is deemed too restrictive or too onerous, such as the departure from the Orphan Works Directive diligent search requirements.
- 95 It is suggested here that this copyright regime will be most aligned to making use of Article 8(2) in particular, as utilising the fall-back exception will require the film archive to have copyright confidence, and confidence that this action will not cause reputational harm with rightholders and donors, to do so. For film archives aligned to this regime in a Member State with a sufficiently representative CMO for film, it seems very likely that they would seek to liaise with the CMO to agree a non-exclusive licence. This is due to the same confidence that this action will not cause reputational harm with rightholders and donors, especially in countries with effective stakeholder dialogue.
- 96 Conversely, for archives aligned to the “Oppressive” copyright regime, it seems very unlikely that they

will be able to incorporate utilising out-of-commerce works into their practices. The current lack of clarity of terms including “commercial use”; “non-commercial use”; “out-of-commerce” and “customary channels of commerce” are likely to be incompatible with the meanings of strict legal compliance, copyright fear, and fear of loss of jobs if the archive closes. For this reason, it is unlikely that archives aligned to this copyright regime would feel able to utilise the fallback exception, as it will be deemed too high-risk.

- 97 There is more likelihood that they would consider utilising Article 8(1) if there is a sufficiently representative national CMO, as this places less onus on the archive itself to make copyright decisions, as the licensing process will be led by the CMO. That said, the strong meaning of fear of reputational harm with existing and future donors and rightholders could lead to the decision that agreeing non-commercial licences with a CMO would discourage rightholders from trusting the film archive and its motives.
- 98 The “Pragmatic Compliance” copyright regime is positioned between the Active Agency and Oppressive regime, as legal compliance is adhered to in almost all areas, with some limited exceptions where the staff lack confidence or knowledge. Its meaning of general compliance, hesitancy about limited legal compliance, and fear of reputational harm suggest that there is a lesser chance of utilisation in these archives than Active Agency regimes, but more so than Oppressive regime archives.
- 99 As there is general copyright and legal compliance, it is possible that film archives aligned to this regime will feel able to utilise Article 8(1) at least, as they have more legal clarity and the CMO will lead the process for them once a licence is agreed. However, it was noted in this regime, that there is some “mistrust” of CMOs. This relationship with CMOs would have to be strengthened considerably for Article 8(1) to be utilised by film archives. It could be that this mistrust stems from a lack of engagement with CMOs. With this mistrust in mind, it remains possible that Article 8(1) would be utilised.
- 100 Future research could apply the sub-regimes proposed here to a wider variety of film archives and CHIs, to test their generalisability, which would widen the scope of this framework. The author is very keen to hear from any researchers or cultural heritage institutions who are interested in testing or applying this theory more widely—and to improving its usefulness.