

# Deposit systems for audiovisual works

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# Deposit systems for audiovisual works

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# Foreword

It is with great pleasure that I present the first joint publication of the European Audiovisual Observatory (EAO) with the Intellectual Property Office of the European Union (EUIPO). A Memorandum of Understanding signed between the two organisations in October 2016 has sealed a collaboration intent that I trust will be fruitful and long-lasting.

The topic chosen is an excellent example of how the interests of two apparently distant bodies can meet at a crossroads. Registration and deposit systems serve in fact both cultural heritage tools and copyright enforcement mechanisms, and clearly show the relevance of a two-folded approach.

This binary insight runs like a red thread through the whole publication, whose topics range from the international and European regulatory framework to national implementation models, while also delving into case-law and industry-driven initiatives. This composition mirrors perfectly the structure of the IRIS Plus series of the EAO, which hosts this joint report.

**Susanne Nikoltchev**  
**Executive Director, European Audiovisual Observatory (EAO)**

Deposit systems play an essential role in the preservation of cultural heritage and are also important tools to facilitate IP enforcement. They have a long history in many Member States, and an exciting future within the EU, especially given the potential of digital deposit systems. These digital systems can offer an effective and low cost means of preserving creative works and making them widely available, while also managing and helping to protect often complex rights. The Orphan Works database maintained by the EUIPO is one example of how works for which right(s) holders cannot be identified can be recorded and searched. Looking forward, there is a significant opportunity to extend the use of digital technology for copyright-protected works and other creative content. As always, before acting, it is essential to understand more clearly what deposit systems in Member States and at the EU level already exist, and how they can interact in the most effective manner. This joint report with the European Audiovisual Observatory is an excellent first step in that direction.

**António Campinos**  
**Executive Director, European Union Intellectual Property Office (EUIPO)**



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# Introduction

Today, deposit systems frequently serve national policy ends by ensuring the preservation of a country's cultural heritage. In addition, they also play an important role in some countries by helping right(s) holders to establish proof of ownership of copyright: they provide more legal certainty, in particular where the anteriority of authorship or the priority of a claim to a title must be resolved in a trial.

It was established long ago under international law that the enjoyment and the exercise of copyright shall not be subject to any formality. It is, however, also commonly acknowledged that certain national rules of evidence or procedures linked to deposit applicable to court proceedings facilitate in practice the enforcement of copyright and may be considered in line with this principle.

This publication provides an overview of the regulatory framework concerning deposit systems, starting, in Chapter 1, with the origins of the deposit of copyright-protected works so as to show the different types of deposit systems that may be encountered throughout Europe. The various types of classification that may be used to describe these systems (public or private; on a mandatory or voluntary/contractual basis; different pursued goals, etc.) are described according to their main purpose.

Chapter 2 delves into the international and European legal framework concerning legal and voluntary deposits systems for preservation and cultural heritage purposes, exploring the common legal background of the different systems in place. The variety of conventions in force are analysed together with the policy measures that have been set up at EU level in order to protect audiovisual heritage.

The main findings of a stakeholder survey carried out by the EUIPO in 12 EU Member States (Belgium, France, Germany, Hungary, Italy, Lithuania, Luxembourg, Netherlands, Portugal, Romania, Sweden and UK) are reported in Chapter 3. The survey covers deposit systems for both preserving cultural heritage and facilitating the enforcement of intellectual property rights. Summaries for each of the analysed countries are provided in national factsheets.

Chapter 4 provides an overview of the main pan-European initiatives that have been put in place by the industry. Various umbrella organisations exist in the preservation field and interesting initiatives from CMOs and the industry can be reported in relation to the voluntary deposit of creative works for copyright enforcement purposes.

Chapter 5 gives an insight into selected case-law of national courts that shows how important it is for rightsholders to be in a position to prove authorship or ownership of rights, and thus also the relevance of appropriate deposit systems.

The report concludes, in Chapter 6, taking stock of the most recent initiatives at European level in this domain, such as recommendations of the Council of Europe and the proposal of a new copyright EU directive, which envisages the introduction of a new exception in respect to specific acts of reproduction also concerning archives.

# 1. Setting the scene

This chapter will describe the various deposit systems in place throughout Europe, based on their main purpose. On the one hand, we will present the main features of public deposit systems, either on a mandatory or on a voluntary/contractual basis for purposes of preservation and archiving; on the other hand, we will look at the different types of deposit systems aimed at facilitating the enforcement of intellectual property rights (IPR), whether public or private, including those offered by the commercial private sector and by collective management organisations (CMOs) for works' administration purposes. We will highlight some of the main legal issues related to these systems and describe the challenges they face today. At market level, we will provide some available data from the European Audiovisual Observatory and the European Intellectual Property Office ('EUIPO'), on, respectively, the use of works from the film heritage, and the infringement of copyright-protected works.

Based on this introductory background, Chapter 1 will describe the methodology followed by the European Audiovisual Observatory and the EUIPO in the survey conducted with the public sector and industry stakeholders with a view to identifying the different types of deposit systems currently in place in a selection of European countries.

## 1.1. Nature and role of deposit systems

### 1.1.1. The origins of deposit systems

Deposit systems for copyright-protected works have existed since the 16<sup>th</sup> century and have had different objectives throughout that time. It was in France, under the reign of King François I, that the first mandatory deposit system was set up in 1537, through the "*Ordonnance de Montpellier*", which provided that no book would be sold in France before a copy of it had been deposited at the Royal Library. The purpose of such an obligation was both to create a nation's public heritage, and to serve as a repository of original publications, before any further modifications could be incorporated into them.<sup>1</sup>

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<sup>1</sup> "Nous avons délibéré de faire retirer, mettre et assembler en notre librairie toutes les oeuvres dignes d'être vues qui ont été ou qui seront faites, compilées, amplifiées, corrigées et amendées de notre tems pour avoir recours aux dits livres, si de fortune ils étaient ci-après perdus de la mémoire des hommes, ou aucunement

The origins of deposit systems are in fact closely linked to the invention and development of printing and, later, to the protection of copyright. Thus, it is almost at the same period, in 1538, that Henry VIII, with England's Royal Proclamation, prohibited the printing and publishing of ecclesiastical and other books without prior licence, as well as the importation, sale and publication of English language texts printed on the continent. Later, in 1557, the Worshipful Company of Stationers (usually known as the Stationers' Company) obtained the monopoly over the printing and distribution of books, thereby securing the control over printed books for censorship purposes.<sup>2</sup>

A few years later, in 1610, a deposit system was put in place through an agreement between the library of Oxford University and the Stationers' Company, according to which the library of Oxford University was to receive free copies of all new books printed by members of the Company. Such a system was confirmed by a law and became a legal requirement in 1662.

This early deposit system laid the foundations of what is considered to be the first Copyright Act, the so-called Statute of Anne<sup>3</sup>, adopted in 1710, which already contained one of the bases of copyright as we know it today: the protection of the author's economic interests, which provides an incitement to produce new works.

Back to France and to the "*Ordonnance of Montpellier*", the legal deposit obligation was not widely implemented in France. It was abolished during the French Revolution in 1790 in the name of freedom of expression, and later reintroduced in 1793 as a voluntary deposit system, which served as a formality to obtain copyright protection. However, in 1886, the first international treaty on copyright, the so-called Berne Convention for the Protection of Literary and Artistic Works<sup>4</sup>, prohibited the attaching of formalities to copyright protection. All over Europe, most countries that had deposit systems in place maintained them, although their censorship and copyright formality purposes evolved into purposes of archiving and the preservation of a nation's cultural heritage.

Currently, different types of deposit systems co-exist, depending on the countries and the purposes followed. In most countries, legal deposit systems mainly serve national public policy interests by ensuring the preservation of a national published cultural heritage through the acquisition, recording, presentation and availability to citizens or researchers of a country's collection of published material. In addition, other types of voluntary or contractual deposit systems also exist that collect, store and manage relevant data related to copyright-protected works, their authorship and the rights of

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immués, ou variés de leur vraye et première publication.", Ordonnance de Montpellier, 28 December 1537, see Fournier, C., "Le dépôt légal" (1993) 39:2 Documentation et bibliothèques.

<sup>2</sup> See Cabrera Blázquez F. J., Cappello M., Grece C., Valais S., "Exceptions and limitations to copyright", IRIS Plus 2017-1, European Audiovisual Observatory, Strasbourg 2017, <http://www.obs.coe.int/documents/205595/8682894/IRIS+Plus+2017-1+Exceptions+and+limitations+to+copyright/b3410fd0-f574-419f-aba8-c81ba79f9fd1>.

<sup>3</sup> The text of the Statute of Anne is available at: [http://avalon.law.yale.edu/18th\\_century/anne\\_1710.asp](http://avalon.law.yale.edu/18th_century/anne_1710.asp).

<sup>4</sup> See Section 2.1.1.1. of this publication.

ownership as provided by registrants, which may also serve as reliable evidence to be used in a trial by rightsholders.

## 1.1.2. The different types of deposit systems

### 1.1.2.1. Deposit aimed at the preservation of the cultural heritage

#### 1.1.2.1.1. Legal deposit (“legal deposit system”)

In many countries, national laws provide that publishers of printed works – be they individuals or legal persons – are required to deposit or file one or more of these publications in certain libraries or archives, with the primary purpose of collecting and preserving the results of intellectual production that takes place in the country. This requirement, usually referred to as “legal deposit”, is defined by UNESCO as a:

*(...) “statutory obligation which requires that any organization, commercial or public, and any individual producing any type of documentation in multiple copies, be obliged to deposit one or more copies with a recognized national institution.”<sup>5</sup>*

According to a survey carried out in 2010 by the World Intellectual Property Organization (WIPO) on “Voluntary Registration and Deposit Systems”<sup>6</sup>, the majority of respondent countries had a legal deposit system in place. The main function of legal deposit is usually to help ensure the preservation of the national published cultural heritage (archiving, publishing national bibliography, and developing libraries’ services), allowing for the collection of statistical information and the creation of databases on registered works and supporting research and development. In countries where there is a legal deposit system in place, the deposit is most commonly set by law as a mandatory obligation, less often as a voluntary option.<sup>7</sup> When embedded in legal provisions, the deposit is usually contemplated within the laws governing national libraries or in specific laws on legal deposit.<sup>8</sup> Although legal deposit provisions are in some cases included in

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<sup>5</sup> Larivière, J., Guidelines for legal deposit legislation, A revised, enlarged and updated edition of the 1981 publication by Dr. Jean Lunn, UNESCO, Paris, 2000, <http://www.unesco.org/new/en/communication-and-information/resources/publications-and-communication-materials/publications/full-list/guidelines-for-legal-deposit-legislation/>.

<sup>6</sup> WIPO Second Survey on Voluntary Registration and Deposit Systems, June 2010, [http://www.wipo.int/copyright/en/registration/registration\\_and\\_deposit\\_system\\_03\\_10.html](http://www.wipo.int/copyright/en/registration/registration_and_deposit_system_03_10.html).

<sup>7</sup> See WIPO Summary of the Responses to the Questionnaire for Survey on Copyright Registration and Deposit Systems, Section B on legal deposit, [http://www.wipo.int/export/sites/www/copyright/en/registration/pdf/legal\\_deposit\\_summary\\_responses.pdf](http://www.wipo.int/export/sites/www/copyright/en/registration/pdf/legal_deposit_summary_responses.pdf).

<sup>8</sup> Ricolfi M., Morando F., Rubiano C., Hsu S., Ouma M., De Martin J-C., Survey of private copyright documentation systems and practices, September 2011, p. 11, [http://www.wipo.int/export/sites/www/meetings/en/2011/wipo\\_cr\\_doc\\_ge\\_11/pdf/survey\\_private\\_crdocsystems.pdf](http://www.wipo.int/export/sites/www/meetings/en/2011/wipo_cr_doc_ge_11/pdf/survey_private_crdocsystems.pdf).

copyright legislations and compliance can be imposed by administrative or enforcement actions, these provisions are not really about copyright but requirements for the administration and preservation of culture.

According to the 2010 WIPO survey, there is a connection between legal deposit and copyright protection in most countries where legal deposit is a requirement. Thus, for instance, the deposit also serves as *prima facie* evidence in copyright claims or legal actions for plagiarism and other proceedings, such as those related to verifying the fact of publication or the year of publication and, generally, who is credited with the ownership of rights in the work or publication. However, in a large number of countries, there is no such connection.<sup>9</sup>

Legal depositary bodies are typically the national library or the national registry of copyright or other official bodies (for example, the government or parliamentary library, the national archives or the main university library, etc.). The subject(s) or entities responsible for delivering the legal deposit are usually the publishers, producers and distributors, in addition to the rightsholders.

The object of legal deposit generally refers to all kinds of published material (or provided in “multiple copies”), mainly in the literary, artistic and scientific domains, in whatever format. The notion of “publication” is to be understood in a broad way and covers any means of distribution to the public, including through public performance, communication to the public and broadcasting.

Deposited objects can be either in written form (for example books, newspapers, microforms, maps, brochures, pamphlets, sheet music, etc.), in audiovisual formats (sound recordings, films, videos, multimedia kits, microforms, etc.) or even in electronic formats in some countries.<sup>10</sup> Some exceptions to this list may be introduced at national level, depending on the cultural specificity of each country. In addition, national laws may differ as to the scope of the definitions of the material included and the conditions attached to its deposit (for example, in relation to new formats of the same content, such as new editions of the same book, or for related content, translations, etc.).

The obligation of legal deposit generally applies to the content of all material produced/printed in the member state concerned, independently of the place of distribution. One of the legal issues related to the scope of the legal deposit is to determine the origin or place of publication for each object deposited. Most countries limit the deposit to their national production of publications issued in various formats,

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<sup>9</sup> WIPO summary of the responses to the questionnaire for survey on copyright registration and deposit systems,

[http://www.wipo.int/export/sites/www/copyright/en/registration/pdf/legal\\_deposit\\_summary\\_responses.pdf](http://www.wipo.int/export/sites/www/copyright/en/registration/pdf/legal_deposit_summary_responses.pdf).

<sup>10</sup> There are two types of electronic publications that may be concerned by the deposit and registration systems: the first one relates to physical publications available on a physical data carrier (such as a CD-ROM), for which the deposit is similar to that of printed products as they are mainly distributed as physical objects. The second category of electronic material refers to online content that exists only as a unique copy on a host service on the Internet. For more details, see Larivière, J., “Guidelines for Legal Deposit Legislation”, op. cit. p. 40 and following.



based on the place and date of publication, whereas other countries also include imported publications. From a legal point of view, as with other laws, the scope of national legal deposit laws is limited to the national territory. Thus, for works of citizens published abroad, the national deposit library has to acquire their works through regular acquisition (unless the law specifies that national residents publishing abroad shall also register their work in their country of residence). However, the question of the nationality of the work takes on another interesting dimension in the digital environment, as the criteria used to determine the geographic location of an electronic work might differ from country to country (geographic location given in the publication or its accompanying metadata; location of the publishing organisation; the author's place of residence; the author's nationality, etc.).

The person responsible for the deposit may be the author(s), publisher(s), printer(s), and/or the importer, depending on the country.

As for the procedures for the deposit, according to the 2011 WIPO survey, these may vary among countries. National legislations provide for very different solutions concerning the number of copies that need to be deposited and the time requirements for such a deposit. Most of the time, the same conditions and rules apply for hard copy works and electronic formats. In the vast majority of countries, the legal deposit is free of charge. Access to the deposited material - or to part of it - is often open to the general public through both off-line and online search facilities and is also usually free of charge.

Legal deposit systems have evolved over time to adapt to new forms of publishing, new types of documents as well as new organisation systems. Their purposes have also evolved from mere conservation and preservation ends to national heritage ends and to the creation of a nation's bibliography for research purposes. In more recent years, new challenges have arisen for legal deposit systems, with new types of online electronic material making it necessary to review and adapt important technical, organisational and legal aspects related to their implementation, in particular in view of the new risks of the uncontrolled dissemination of copyright-protected material.

#### 1.1.2.1.2. Film archive deposit ("film archive deposit system")

Due to their cultural value and their importance to a nation's cultural identity as a source of historical information about a society and its people at a determinate point, cinematographic works constitute an essential part of a nation's cultural heritage. European countries ensure that cinematographic works that are part of their audiovisual heritage are systematically collected, catalogued, preserved, restored and made accessible to the public, through legal or contractual deposits with one or more film heritage institutions (FHIs).

According to the European Commission's 2012-2013 Implementation Report on Film Heritage in the EU<sup>11</sup>, contrary to the legal deposit, which refers to the legal obligation on producers or distributors to submit a copy of the cinematographic work to the FHI, contractual deposit can also take place, whereby a contract between a national or regional film funding authority and a producer foresees that a copy of the supported film shall be submitted by the producer to the FHI in counterpart for funding.

It is also worthwhile noting that other voluntary deposits can be made in relation to foreign films and film-related material, usually through a contract signed by the archive and the rightsholder, which should define the rights and obligations of each party.

The role of a film archive is to receive the final product of a film production, whatever its technical format and properties, preserve it and provide access to it. This is one of the biggest challenges for FHIs as there is a great diversity of formats available (for example, discs, CDs, films, videotapes, videodiscs, etc.) which require the depositary institution to use specific technological equipment that may become obsolete over time.

In addition, the preservation of audiovisual material usually requires the transfer of the work onto new supports after a certain amount of time, through the making of copies by the depositary institution, which may ultimately conflict with the national copyright legislation in the absence of a clear exception or limitation in respect of specific acts of reproduction made for preservation purposes.

#### 1.1.2.2. Copyright deposit

##### 1.1.2.2.1. Public deposit ("IP deposit systems")

According to the results of the 2010 WIPO survey in relation to copyright registration and recordation<sup>12</sup>, 48 member states (out of the 80 surveyed) had put in place a "copyright voluntary registration" (or deposit) system, the majority of which were public ones.<sup>13</sup> Where a mandatory system had been established, this only applied to nationals. In the majority of cases, the depositary bodies were not interconnected to other copyright data systems provided either by public or private entities.

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<sup>11</sup> European Commission, Film Heritage in the EU, Report on the implementation of the European Parliament and Council Recommendation on Film Heritage 2012-2013, Brussels, 1 October 2014, <https://ec.europa.eu/digital-single-market/en/news/european-commissions-report-film-heritage>.

<sup>12</sup> See WIPO Summary of the responses to the questionnaire for survey on copyright and registration and deposit systems, Section A on copyright registration and recordation, [http://www.wipo.int/export/sites/www/copyright/en/registration/pdf/registration\\_summary\\_responses.pdf](http://www.wipo.int/export/sites/www/copyright/en/registration/pdf/registration_summary_responses.pdf).

<sup>13</sup> These included: Albania, Algeria, Armenia, Argentina, Austria, Bahrain, the Republic of Belarus, Belize, Bhutan, Brazil, Burundi, Chile, China, Colombia, Costa Rica, Croatia, Czech Republic, Denmark, Ecuador, Finland, Ghana, Greece, Guatemala, Guinea, Hungary, Ireland, Jamaica, Japan, Italy, Kenya, the Kingdom of Saudi Arabia, the Republic of Korea, Latvia, Liechtenstein, Lithuania, Luxemburg, Madagascar, Mali, México, the Republic of Moldova, Mongolia, Monaco, Montenegro, Namibia, Nepal, New Zealand, Norway, Oman, Pakistan, Peru, Romania, Russia, Serbia, Singapore, South Africa, Spain, Sri Lanka, Sweden, Thailand, Tunisia, Ukraine, the United Kingdom and United States of America.

It appears from the 2010 survey that most legislation refers to the general notion of literary and artistic works in relation to the works that may be deposited. Some countries also add expressly computer programs to the list. The procedures for deposit are usually similar for each category of works. However, substantial differences exist among countries as to the possibility of depositing related rights (such as performances, broadcasts, sound recordings).

The elements of any request for deposit are basically the same for the different categories of works and usually include at least some of the following: the author's personal information; the category of the work; the title of the work or performance; the date and place of publishing; and the fee payable.

According to the WIPO survey, in the majority of the respondent countries, legislation does not establish registration (or deposit) as a prerequisite or as an obligation for the initiation of court proceedings.<sup>14</sup> In practice, most of the countries adopt an incitative rather than a repressive approach, for example by offering additional benefits to rightsholders in return for copyright deposit (rather than legal sanctions for lack of deposit). Thus, copyright voluntary deposit can serve as reliable evidence presented by rightsholders in a trial. In fact, a certificate of registration can provide the legal (rebuttable) presumption of validity or anteriority of the copyright ownership on a work. In some countries, this presumption may also come with other advantages in an infringement procedure, such as the shift in the burden of proof to the defendant or, concerning civil remedies and statutory damages, with the possibility for registered rightsholders to receive a minimum amount of compensation without the burden of proving the actual monetary loss.

One of the new challenges for copyright voluntary deposit systems in a digital context is linked to the difficulty of proving the identity of a rightsholder .

#### 1.1.2.2.2. Private deposit ("private deposit systems")

Deposit systems are not the specificity of the public sector. In fact, private companies and organisations also offer services of collection, storing, and management of the same type of data related to works as provided by registrants to public systems. These can also be used as independent evidence in courts.

Private deposit systems often present the advantage of being more flexible and quicker to adapt to new technological environments than public ones. In fact, due to their extensive use of digital technologies, private deposit systems can collect data related to any kind of digital files, including certain types of content with frequent updates, such as websites, portals and blogs, and register them almost instantaneously. They can also offer

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<sup>14</sup> In the United States of America, registration is voluntary for the initiation of proceedings related to foreign works, but it is mandatory for national works in order to institute legal action. In such cases, the court has no jurisdiction until a registration has been filed and, in certain cases, completed. For more details, see WIPO, Second Survey on Voluntary Registration and Deposit Systems, op. cit.

registrants a range of complementary services such as, for example, the delivery of a copyright certificate signed by a notary public as evidence for trial in litigation cases, the sending of notice and take-down letters, etc.

Beyond their evidentiary functions in litigations – which in certain countries is exclusively reserved by law to the public registries –, private deposit systems can also provide certain types of customised copyright licences to the public for the re-use of registered works. They can also propose different types of interactions and synergies with social platforms and online communities that share and re-use the works. Complementary services may also include the provision of bar-codes or other special identifiers, such as a permanent Internet address to identify a work, back-up solutions, etc.<sup>15</sup>

#### 1.1.2.2.3. Deposit by collective rights management organisations (“CMO deposit systems”)

As part of their mission to collect royalties pertaining to the exploitation of works and pay rightsholder(s) accordingly, collective management organisations (CMOs) encourage rightsholders to document (or register) all the works they create, as this will allow the effective exercise of their rights. The basic information required for an appropriate documentation of works includes details on the rightsholder(s) and on the work in question. This documentation will enable CMOs to fulfil their mission appropriately. At international level, centralised files are established by CMOs around the world, constituting worldwide repertoires for each category of works. This process has been particularly achieved in the music field where the collective administration of rights is broadly extended. In the case of audiovisual works, attempts are also being made to centralise information concerning the author’s part, on the one hand, and the incorporated music part, on the other.

On a practical level, the documentation (or registration) form is a legal document which identifies the work by providing for a minimum amount of information, such as its title, genre and duration, and the names of the rightsholders and their respective shares. The registration form must be dated and signed by all the rightsholders without exception, whether or not they are members of the CMO. This way, it is also a contract between the various joint authors of a work, which formalises everyone’s approval as to the apportionment of royalties based on their respective contribution. A copy of the work will usually accompany the registration form. Depending on each CMO’s statute, specific rules may be established by category of works.

The registration form is instrumental in keeping track of any adaptation of a work over time. If a work is used, or adapted, or if a rightsholder adapts or borrows from another author’s work, the registration form will help identify all the authors (original authors and authors of the derived version). When a registration is received, it is stamped with the CMO’s name and the date of reception. The work is then registered in the CMO’s

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<sup>15</sup> For more details on private copyright documentation systems and practices, see Survey of private copyright documentation systems and practices, op. cit.

repertoire according to the category to which it belongs, and an international code number is given to each rightsholder. The work also receives a digital code which will be used for international documentation exchange. This exchange will be carried out by means of standardised forms. In the case of audiovisual works, the exchange is carried out by means of “cue-sheets”, that is to say, a list of the works included in the audiovisual work, whether they are pre-existing works or ones specially written for it. The names of the literary and visual rightsholder (the director, screenwriter, etc.) should be given on the same cue-sheet.

As for any other forms of deposit, although works are protected from their creation without any formality, the documentation of works by CMOs can also serve to provide *prima facie* evidence in court litigations. However, in some countries, CMOs propose another type of deposit in order to protect creators even before that stage of the documentation of the work. In fact, a certain amount of time may elapse before a work is edited, fixed on a support, exploited and documented to a CMO, during which the creator of that work will have to give copies of it to possible editors, producers or distributors. During that period, some difficulties may arise and the author(s) need to be able to prove that they are the creator(s) of that work at a determinate time. To help creators to provide (rebuttable) evidence of their authorship, some CMOs propose to their members and non-members, as an additional service, the possibility of depositing a copy of their works for a period of around five years. The conditions of such a deposit differ depending on the CMOs (physical and/or digital deposit, payment of a fee, etc.). Unlike the work's documentation, such a deposit does not involve any entrustment of rights or mandate by the creator to the CMO. A different contract of entrustment (or mandate) therefore needs to be concluded between the rightsholder and the CMO in order to authorise the CMO to collect and administer royalties on behalf of the rightsholder.

### 1.1.3. New challenges related to the digital environment

One of the main challenges for depositary institutions derives from the digital environment, as most of the published material is now made available simultaneously in print and in digital format or only in digital format.

Although the legal deposit of offline electronic content (that is to say, physical content fixed on an electronic carrier, such as a CD-ROM) is quite similar to that of printed products since it is mainly distributed as a physical object, new types of online electronic content available on the Internet and new business models related to it require deposit systems to evolve to keep up-to-date with these latest developments. Among these, online media, e-journals and diverse multimedia material, accessible either through controlled-access Internet websites or on the open Internet, and e-books that can be ordered from the publisher's database, etc. constitute valuable material for national depositary collections that need to be preserved for future generations and made accessible to the public.

However, the preservation of all types of digital content represents a great challenge for depositary institutions, not only in terms of information technologies and

resources but also from a legal point of view. On the technological side, digital content can be subject to quicker degradation than content in analogue form, often with no notice to the human eye, and to quick technological obsolescence. Digital content can then require media migration and 'format-shifting' (that is to say, copying content onto more adequate media or formats). It can also warrant proactive preservation from the day works are deposited in the collection. Digital preservation is thus seen as a continual process, which confronts depositary institutions with complex, open technical questions and can imply considerable costs.

From a legal perspective, the inclusion of digital content in national collections, its preservation and access to the public also raises a number of copyright issues for depositary institutions, which often face legal uncertainty in the new technological environment. In particular, preserving digital content requires, in many cases, copying it. Although most of the EU countries include exceptions to the reproduction right for preservation purposes<sup>16</sup> in their law, the scope of these exceptions is sometimes narrow, unclear, not adapted or not explicit enough to cover preservation in digital environments and of works in digital form. In addition, the way in which digital material kept in libraries and archives is accessed is also raising serious copyright questions, as authors and publishers are becoming ever more concerned about the risk of the uncontrolled dissemination of their work to the detriment of their legitimate commercial interest, and they might want to limit access to it.

Another particular difficulty facing depositary institutions relates to the so-called "dynamic publications" characterised by a high update frequency in which any component of the publication can change at any time (such as websites and networked databases). There are different views as to the appropriateness of including such dynamic content in national legal deposit collections. Some consider that the very nature of this material, based on constant updating, is not meant to be preserved for posterity, whereas others consider that it is the responsibility of national depositary institutions to collect, preserve and make available this material as part of the cultural heritage of a country at one particular moment. From a technological and practical perspective, the legal deposit of such dynamic content raises a set of new questions, such as: what type of material should be deposited (for example, some "snapshot" sent by the publisher on a regular basis), and when should it be deposited (for example, when the dynamic publication ceases to be available online, etc.)?

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<sup>16</sup> At EU level, the InfoSoc Directive provides for an optional exception for "specific acts of reproduction" by certain institutional users. For more details, please refer to Chapter 2 of this publication. See also, Cabrera Blázquez F.J., Cappello M., Fontaine G., Valais S., Exceptions and limitations to copyright, op. cit.

## 1.2. Market considerations

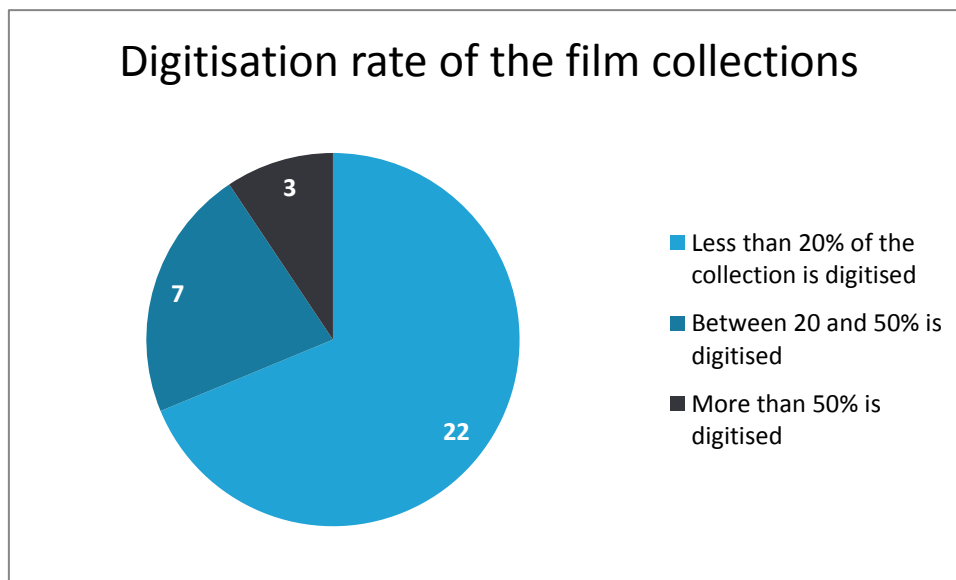
### 1.2.1. The access to and distribution of heritage film works

#### 1.2.1.1. Heritage film works in the film heritage institutions

The European Audiovisual Observatory, in the framework of a research project supported by the European Commission<sup>17</sup>, analysed the collections of the Film Heritage Institutions (FHIs) which are members of the Association des Cinémathèques Européennes (ACE).

The survey was completed by 32 FHIs representing collections of over 1.1 million film works. Fifteen percent of the film works in the FHIs' collections are available in digital format, with strong variations among FHIs: half of the sample has a digitisation rate equal to or lower than 6%. Feature films (that is to say, films with a theatrical release) represent 42% of the film work collections. The digitisation rate for feature films is similar (16%) to that of film works in general, again with very strong disparities among FHIs.

**Figure 1 - Digitisation rate of film collections (in a number of FHIs)**



Source: European Audiovisual Observatory

<sup>17</sup> Fontaine, G., Simone, P., The access to film works in the collections of Film Heritage Institutions in the context of education and research, European Audiovisual Observatory, May 2017, <http://www.obs.coe.int/documents/205595/264623/The+Access+to+Film+Works+in+the+Collections+of+Film+Heritage+Institutions+-+Final.pdf/c62dec10-417c-4ed9-b32c-772191e44425>.



A large majority (76%) of the feature films in the FHLs' collection are under copyright. However, the copyright status of a significant share of the films remains uncertain (23%). Furthermore, according to FHLs, orphan works represent an estimated 8% of their feature film collections, while out-of-commerce feature films represent at least 39% of all feature films.

#### 1.2.1.2. The challenges of copyright clearance

The survey showed that FHLs face significant issues when it comes to identifying the copyright status of films. Understanding the status of the film works in the collections implies both practical and methodological challenges. Many FHLs do not necessarily have the resources to verify ex-ante the category to which a given title belongs (unless they either manage or closely deal with the management of the legal deposit and can therefore easily assess whether a film is in the public domain or not). Therefore, the copyright status of a film work is usually investigated on a case-by-case basis, often after a request for screening is received. Furthermore, other categories related to the copyright or commercial status of the film collections may be unclear or difficult to assess. Several FHLs have claimed that, from a practical point of view, identifying orphan works is particularly challenging. Even more respondents stressed that ascertaining whether a film work is out-of-commerce is extremely complex due to the lack of specific tools or criteria to verify this status.

When the copyright status of the film has been clarified, copyright clearance remains challenging, often because of difficulties in identifying the rightholders in the absence of a centralised source of information on rights.

#### 1.2.1.3. Digital decreases the cost of commercial distribution of heritage film works

The digitisation of cinemas has theoretically lowered the cost of re-releasing older films, as expensive traditional print copies are no longer necessary. Hence, a growing number of territories are opening up to film heritage in cinemas, increasing the number of national players active in the market. Video-on-demand (VOD) could also represent an opportunity to make film heritage works available again. However, accessing the on-demand services may be challenging. Indeed, data gathered by the European Audiovisual Observatory suggests that EU heritage films struggle to access VOD; at the same time, the DVD crisis has impacted the film heritage market segment in different ways. The "cinophile" market has resisted to a certain extent, as no substitute was available to replace DVD collection box sets of classic and cult films. In turn, catalogue films that are not well-known appear to have suffered the most from the crisis in the sector and from the competition with TV



channels, which has further narrowed the DVD film heritage market to a niche of film lovers<sup>18</sup>.

### 1.2.2. Available data on infringement of copyright protected work

Copyright gives rightsholders exclusive rights to control the use (or economic exploitation) of their works, for example, their reproduction, distribution, adaptation, translation, performance or public communication. The economic aspects of copyright are complex, reflecting various trade-offs between the interests of creators, distributors, performers and consumers.

In a study carried out by the EUIPO and the European Patent Office (EPO)<sup>19</sup>, it was estimated that approximately 7% of the EU Gross Domestic Product (GDP) is directly generated by industries using copyright intensively. It was also estimated that 11.6 million jobs are directly generated in the European Union by copyright-intensive industries, with a further 3.6 million jobs arising from industries providing for inputs, resulting in a total of 15.2 million jobs generated directly and indirectly by copyright-intensive industries in the European Union.

The perception and behaviours of European citizens regarding intellectual property (IP) and piracy were also assessed as part of an EU-wide survey. This survey<sup>20</sup> revealed that although citizens recognise the value of IP, in principle, they tend to justify their infringements as a consequence of individual circumstances. For instance, 10% of individuals admitted to having accessed content from illegal sources intentionally and 35% of respondents believed it acceptable to obtain online content illegally if it is for personal use. This last piece of information, among other results from this survey and in addition to Worldwide Governance Indicators from the World Bank, was used in a study carried out by EUIPO to quantify the economic losses caused by piracy in the recorded music industry<sup>21</sup>, the result of which was an estimated 5.2% loss in revenue in the European Union due to music piracy.

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<sup>18</sup> The Exploitation of Film Heritage Works in the Digital Era, Gilles FONTAINE & Patrizia SIMONE, European Audiovisual Observatory, June 2016.

<sup>19</sup> EUIPO/EPO (2016) Intellectual property rights intensive industries and economic performance in the EU. [https://euiipo.europa.eu/tunnel-web/secure/webdav/guest/document\\_library/observatory/documents/IPContributionStudy/performance\\_in\\_the\\_European\\_Union/performance\\_in\\_the\\_European\\_Union\\_full.pdf](https://euiipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/IPContributionStudy/performance_in_the_European_Union/performance_in_the_European_Union_full.pdf).

<sup>20</sup> EUIPO (2016) EU citizens and intellectual property study, [https://euiipo.europa.eu/tunnel-web/secure/webdav/guest/document\\_library/observatory/documents/IPContributionStudy/2017/european\\_public\\_opinion\\_study\\_web.pdf](https://euiipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/IPContributionStudy/2017/european_public_opinion_study_web.pdf).

<sup>21</sup> EUIPO (2016) The economic cost of IPR infringement in the recorded music industry. [https://euiipo.europa.eu/tunnel-web/secure/webdav/guest/document\\_library/observatory/resources/research-and-studies/ip\\_infringement/study7/Music\\_industry\\_en.pdf](https://euiipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/resources/research-and-studies/ip_infringement/study7/Music_industry_en.pdf).

A study carried out by the European Commission<sup>22</sup> estimated that one unpaid first viewing of a movie displaces about 0.37 units of paid viewings. Based on a survey of almost 30 000 individuals in six EU countries, the results imply that unpaid movie viewing reduces movie sales by about 4.4% and that the loss in sales differs substantially from country to country, ranging from 1.65% in Germany to 10.4% in Spain.

## 1.3. Methodology

### 1.3.1. Scope of the study

#### 1.3.1.1. Types of deposit systems covered by the study

The present study focuses exclusively on the audiovisual (AV) sector. It covers a variety of deposit systems that may be of relevance for this sector.

First, it covers legal (mandatory) deposits, which are, in most cases, administered by national (film) archives or ministries in the audiovisual field, and which serve the preservation of cultural/film heritage.

Secondly, it covers voluntary registration and/or deposit systems. The voluntary deposit of AV works and related material can, for example, be based on contractual agreements between producers and funding agencies and/or archives (also referred to as contractual deposit). Usually, such a deposit mainly fulfils the function of preserving cultural heritage. In the present study, voluntary or contractual deposit with film archives or film funds will be referred to as “film archive deposit”. As mentioned above, voluntary registration and/or deposit of works and other content may also fulfil the function of facilitating Intellectual Property Rights (IPR) enforcement by providing evidence of the existence of a work or other subject matter at a certain moment in time. Public authorities (for example ministries or IP offices), collective management organisations (CMOs), or private entities can manage such voluntary registration and/or deposit systems. In the present study, these systems will be referred to as “IP deposit system”, “CMO deposit system” and “private deposit system”, respectively.

The nature and purpose of the different types of deposit systems have been described above, in section The different types of deposit systems.

Both mandatory and voluntary registration and/or deposit systems may be digital and operate online, and/or entail the physical deposit of copies of works and related material. This study covers both physical and digital deposit.

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<sup>22</sup> European Commission (2016) Movie piracy and displaced sales in Europe: evidence from six countries. [https://mpira.ub.uni-muenchen.de/80817/1/MPRA\\_paper\\_80817.pdf](https://mpira.ub.uni-muenchen.de/80817/1/MPRA_paper_80817.pdf).

### 1.3.1.2. EU member states covered by the study

In order to keep the scope of the study at a manageable level, twelve member states were selected for closer research: the Benelux countries (Belgium, Luxemburg and the Netherlands), France, Germany, Hungary, Italy, Lithuania, Portugal, Romania, Sweden and the United Kingdom.

The selection was based, amongst other things, on a representative geographical spread and on knowledge about/prior research on the existence of different models of deposit systems in the EU member states.

## 1.3.2. Data relating to deposit systems

### 1.3.2.1. A questionnaire on deposit systems

In order to gather information and base the present study on the most complete, objective and thorough knowledge possible, the EUIPO and the European Audiovisual Observatory created a questionnaire for an electronic stakeholder survey (see Annexes).

The questionnaire contained questions relating to the identification of the deposit system (contact details of the entity managing the system, type of entity, main purpose of the system), and to the main characteristics of the deposit system (mandatory/voluntary, legal basis of the system, physical/digital deposit, type of content accepted/required, depositors, information required, main steps in the deposit procedure, rights acquired by the deposit body, accessibility to the general public, main benefits and challenges of the system).

### 1.3.2.2. Electronic survey and additional research

The questionnaire was sent to a number of stakeholders of the EUIPO's European Observatory on Infringements of Intellectual Property Rights, who have knowledge in the audiovisual sector.

The survey was circulated to public sector contact persons in the field of copyright in the relevant member states; they were asked to respond to the questionnaire and/or to forward it to other national institutions that might be able to contribute.

Moreover, the survey was circulated to selected private sector stakeholders of the EUIPO's Observatory, namely to EFADS (European Film Agency Directors)<sup>23</sup>, SAA (Society of Audiovisual Authors)<sup>24</sup>, ACTE (Association of Commercial Television in Europe)<sup>25</sup>, and IVF

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<sup>23</sup> <http://www.efads.eu/> accessed August 2017.

<sup>24</sup> <http://www.saa-authors.eu/> accessed August 2017.

<sup>25</sup> <http://www.acte.be/> accessed August 2017.

(The International Video Federation)<sup>26</sup>. The questionnaire was also sent to BEUC (The European Consumer Association)<sup>27</sup>, which represents the interests of European consumers. In addition, other associations with expertise in the audiovisual sector and in the field of preserving film heritage were contacted, namely ACE (Association of European Film Archives and Cinematheques)<sup>28</sup>, and FIAPF (The International Federation of Film Producers Associations)<sup>29</sup>.

The associations were asked for input from their members in the 12 member states covered by the study. Multiple replies were possible, that is, respondents were encouraged to submit several replies with regard to different deposit systems they had knowledge of.

Where information appeared to be missing, additional desk research was carried out after the survey. The European Audiovisual Observatory's correspondents in the different member states were consulted where necessary.

Country sheets were created which summarize the findings for each country concerned. A general overview table (see Annexes) shows the main findings side by side.

Information on IP deposit systems, CMO deposit systems, legal deposits and film archive deposits was gathered through the stakeholder survey and additional research. Previous research carried out by the EUIPO relating to IP deposit systems available in a number of EU member states was also taken into account. As regards private deposit systems, companies or other entities such as non-profit organisations providing deposit services were identified in some member states. The relevant country sheets describe selected business models by way of example only.

The information contained in the country sheets, in the horizontal summary of findings and in the overview table is not taken to be exhaustive, and other systems might exist parallel to the ones identified.

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<sup>26</sup> <http://www.ivf-video.org/index.php?category/Home> accessed August 2017.

<sup>27</sup> <http://www.beuc.eu/> accessed August 2017.

<sup>28</sup> <http://www.acefilm.de/> accessed August 2017.

<sup>29</sup> <http://www.fiapf.org/> accessed August 2017.

## 2. International and European legal framework

This chapter looks at the current relevant legal framework developed at international and European level, and provides an overview of the most significant legal instruments that position legal or voluntary deposit systems as central tools for cultural heritage or copyright evidence purposes. Relevant binding rules will be presented, as well as soft law instruments, including European policy documents and support programmes.

### 2.1. Legal and voluntary deposit under international law

The variety of systems put in place for the deposit of audiovisual works is closely connected with the purpose they serve, be it for abiding by copyright formalities, and these are mostly voluntary ones, or for preserving cultural heritage, where mandatory systems are often the case. The common legal background for these systems, both at international and European level, will be explored in the following sections.

#### 2.1.1. Legal deposit and copyright formalities

##### 2.1.1.1. The Berne Convention

According to Article 5 of the Berne Convention signed in 1886,<sup>30</sup> the fundamental pillar for copyright protection is the principle of national treatment. Accordingly, works which have as country of origin one of the signatories (so-called Union countries), should benefit in all other Union countries from the same protection that the latter give to the works of their nationals.

The second pillar, which is the one of direct relevance for our topic, is the principle of automatism and independence, as enshrined by paragraph 2 of this Article. This principle implies that the protection of literary and artistic works should not envisage

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<sup>30</sup> Berne Convention on the Protection of Literary and Artistic Works, signed in Berne in 1886 and last amended in 1979, [http://www.wipo.int/wipolex/en/treaties/text.jsp?file\\_id=283698#P109\\_16834](http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=283698#P109_16834).

any formality as a pre-requisite, and that the full enjoyment and exercise of any copyright, be it moral or economic rights, shall be granted regardless of the existence of any sort of protection in the country where the work has been created:

*The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work. Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.*<sup>31</sup>

As is explained in the Guide to the Berne Convention,<sup>32</sup> protection may not be made conditional upon the observance of any formality whatsoever, where the word ‘formality’ “must be understood in the sense of a condition which is necessary for the right to exist – administrative obligations laid down by national laws, which, if not fulfilled, lead to loss of copyright”. As examples of formality, the WIPO Guide includes “the deposit of a copy of a work”.

Nevertheless, the Convention signatories remain free to subordinate the existence or exercise of the rights over a work in that country to such a type of formality, as this is a matter of domestic law. In any case, outside the country of origin, a “Union author” may demand protection without being obliged to prove compliance with any formalities demanded in the country of origin of his work.

There is therefore an important distinction to be made between obligations that apply at international level for the existence and the exercise of rights, and other obligations that may apply nationally.

#### 2.1.1.2. The Universal Copyright Convention

The Copyright Convention (UCC),<sup>33</sup> adopted in Geneva in 1952 by an international conference convened under the auspices of UNESCO, is also in line with the Berne Convention. The UCC did not abrogate any other multilateral or bilateral conventions or arrangements between two or more member states; where there are differences, the provisions of the UCC are to prevail, except as regards the Berne Convention, which takes priority.<sup>34</sup>

The main principle set by the UCC is that any formality that a contracting state may decide to impose cannot affect the rights already obtained in the country of origin: in

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<sup>31</sup> Article 5(2) of the Berne convention, cit.

<sup>32</sup> WIPO, Guide to the Berne Convention,  
[http://www.wipo.int/edocs/pubdocs/en/copyright/615/wipo\\_pub\\_615.pdf](http://www.wipo.int/edocs/pubdocs/en/copyright/615/wipo_pub_615.pdf).

<sup>33</sup> The Universal Copyright Convention, Geneva, 1952,  
[http://portal.unesco.org/en/ev.php-URL\\_ID=15381&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=15381&URL_DO=DO_TOPIC&URL_SECTION=201.html).

<sup>34</sup> Dubin J.S., The Universal Copyright Convention, 42 Cal. L. Rev. 89 (1954),  
<http://scholarship.law.berkeley.edu/californialawreview/vol42/iss1/8>.

other words, it exempts foreign works from compliance with the domestic formalities of a contracting state, as long as the copyright sign “©” has been inserted, as well as the name of the rightsholders and the place and year of first publication.

At the same time, domestic freedom with regard to imposing formalities is safeguarded in Article III(2), and this may include deposit obligations as under the Berne Convention. For the specific matter of the burden of proof, the deposit of the works may be required, as provided for by Article III(3):

*2. The provisions of paragraph 1 of this article shall not preclude any Contracting State from requiring formalities or other conditions for the acquisition and enjoyment of copyright in respect of works first published in its territory or works of its nationals wherever published.*

*3. The provisions of paragraph 1 of this article shall not preclude any Contracting State from providing that a person seeking judicial relief must, in bringing the action, comply with procedural requirements, such as that the complainant must appear through domestic counsel or that the complainant must deposit with the court or an administrative office, or both, a copy of the work involved in the litigation; provided that failure to comply with such requirements shall not affect the validity of the copyright, nor shall any such requirement be imposed upon a national of another Contracting State if such requirement is not imposed on nationals of the State in which protection is claimed.<sup>35</sup>*

As has already been stated,<sup>36</sup> Article III of the UCC is an exception to the rule of national treatment, similar to the exception provided by the Berne convention, with the difference that it sets a uniform and standardised formality, namely the use of the “©” sign.

### 2.1.1.3. The TRIPS Agreement

Furthermore, the TRIPS agreement<sup>37</sup>, which was signed in 1994 under the auspices of the WTO, mentions the issue of formalities, but limitedly to certain types of intellectual property rights (Trademarks, Geographical Indications, Industrial Designs, Patents, Layout-Designs):

*Members may require, as a condition of the acquisition or maintenance of the intellectual property rights provided for under Sections 2 through 6 of Part II, compliance with reasonable procedures and formalities. Such procedures and formalities shall be consistent with the provisions of this Agreement.<sup>38</sup>*

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<sup>35</sup> Article III(3) of the Universal Copyright Convention, cit.

<sup>36</sup> Van Gompel S, Formalities in Copyright Law: An Analysis of Their History, Rationales and Possible Future, Wolters Kluwer, Amsterdam, 2011, p. 150-152.

<sup>37</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), [https://www.wto.org/english/docs\\_e/legal\\_e/27-trips\\_01\\_e.htm](https://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm).

<sup>38</sup> Article 62(1) of the TRIPS Agreement, cit.

As for formalities concerning copyright (Section 1, which is not recalled by the above-quoted Article 62), Article 3(1) of the TRIPS Agreement makes a general reference to the Berne Convention:

*Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property, subject to the exceptions already provided in, respectively, the Paris Convention (1967), the Berne Convention (1971), the Rome Convention or the Treaty on Intellectual Property in Respect of Integrated Circuits.<sup>39</sup>*

This means that by recalling the Berne Convention, the TRIPS Agreement confirms the prohibition of formalities, which is strongly anchored in international copyright law.

The only exception is therefore laid down by the UCC through the uniform and standardised “©” notice. It is worth mentioning that the influence of the UCC is in any case to be considered as minor, since most countries adhere to the Berne Convention and the TRIPS Agreement.<sup>40</sup>

## 2.1.2. Legal and voluntary deposit for the preservation of the public domain

### 2.1.2.1. WIPO developments in relation to the preservation of the public domain

WIPO's activities in relation to the public domain are based on recommendations by member states under the WIPO Development Agenda. In particular, two of these recommendations are relevant for the preservation of the public domain: they fall under the so-called Cluster C, concerning “Technology Transfer, Information and Communication Technologies (ICT) and Access to Knowledge”, and one of them (No. 16) has been identified by the WIPO General Assembly for immediate implementation.

*Consider the preservation of the public domain within WIPO's normative processes and deepen the analysis of the implications and benefits of a rich and accessible public domain. (Recommendation 16)*

*Promote norm-setting activities related to IP that support a robust public domain in WIPO's member states, including the possibility of preparing guidelines which could assist interested member states in identifying subject matters that have fallen into the public domain within their respective jurisdictions. (Recommendation 20)<sup>41</sup>*

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<sup>39</sup> Article 3(1) of the TRIPS Agreement, cit.

<sup>40</sup> Van Gompel S., cit, p. 157.

<sup>41</sup> WIPO, 45 Recommendations Related to a WIPO Development Agenda (PCDA), Geneva, 2007, <http://www.wipo.int/ip-development/en/agenda/recommendations.html>.



In April 2009, the Committee on Development and Intellectual Property (CDIP) approved a Thematic Project on Intellectual Property and the Public Domain, which contains components on patents, trademarks and traditional knowledge, in addition to copyright and related rights, for implementation beginning in the 2010-2011 biennium.<sup>42</sup> According to its description:

*Recognizing the importance of the public domain, the project will comprise a series of surveys and studies that will analyze good practices and the currently available tools for identifying content that is in the public domain and to preserve such content from individual appropriation. The surveys and studies should facilitate the planning of the subsequent steps of possible preparation of guidelines and/or possible development of tools to facilitate the identification of and access to public domain subject matter.*<sup>43</sup>

The first result of the implementation of the Thematic Project was the publication of a Scoping Study on Copyright and Related Rights and the Public Domain,<sup>44</sup> which provides an illustrative comparison of national legislations that directly, or indirectly, define the public domain, and a survey of initiatives and tools which may affect access, use, identification and location of public domain material.

Legal deposit is explicitly mentioned in the Study as having a particular role in ensuring the promotion of the public domain and is included in the final Recommendations:

*As far as the availability and sustainability of the public domain is concerned:*

*(a) The availability of the public domain should be enhanced, notably through cooperation with cultural heritage institutions and UNESCO (through its work on the preservation of intangible cultural heritage).*

*(b) Legal deposit should be encouraged at national level, which might involve some financial and logistical help for developing countries. At international level, catalogues and cross-referencing of deposited works should be set up.*<sup>45</sup>

#### 2.1.2.2. UNESCO developments in relation to preservation of and access to cultural heritage

Heritage is explained in UNESCO documents as “our legacy from the past, what we live with today, and what we pass on to future generations.” A heritage is something that is, or should be, passed from generation to generation because it is valued.<sup>46</sup>

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<sup>42</sup> CDIP, Thematic projects, adopted at the 3<sup>rd</sup> Session, April 27 to May 1, 2009 Geneva, Switzerland, [http://www.wipo.int/edocs/mdocs/mdocs/en/cdip\\_3/cdip\\_3\\_4\\_add.pdf](http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_3/cdip_3_4_add.pdf).

<sup>43</sup> CDIP, Thematic projects, cit, Annex I, Development agenda recommendations nos. 16 and 20, Project document.

<sup>44</sup> Dusollier S., Scoping Study on Copyright and Related Rights and the Public Domain, Geneva, 2011, [http://www.wipo.int/edocs/mdocs/mdocs/en/cdip\\_7/cdip\\_7\\_inf\\_2.pdf](http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_7/cdip_7_inf_2.pdf).

<sup>45</sup> Dusollier S., cit, Recommendation No. 2(a) and 2(b), p. 71.

In 2003, UNESCO adopted a Charter on the Preservation of the Digital Heritage,<sup>47</sup> which lays down a set of general principles concerning, in particular, the actions and measures that should be undertaken in order to preserve heritage and prevent losses.

Among the protection measures envisaged by the Charter, both legal and voluntary deposit systems are cited:

*Member States need appropriate legal and institutional frameworks to secure the protection of their digital heritage.*

*As a key element of national preservation policy, archive legislation and legal or voluntary deposit in libraries, archives, museums and other public repositories should embrace the digital heritage.*

*Access to legally deposited digital heritage materials, within reasonable restrictions, should be assured without causing prejudice to their normal exploitation.*

*Legal and technical frameworks for authenticity are crucial to prevent manipulation or intentional alteration of digital heritage. Both require that the content, functionality of files and documentation be maintained to the extent necessary to secure an authentic record.*<sup>48</sup>

Well before this Charter, a UNESCO Recommendation concerning audiovisual heritage was adopted in 1980, and this also considers the deposit of the works to be a crucial element for abiding with cultural heritage purposes.<sup>49</sup> Among the legal and administrative measures that are recommended to the member states, deposit is mentioned both in terms of a voluntary arrangement and a mandatory system:

*To ensure that moving images forming part of the cultural heritage of countries are systematically preserved, Member States are invited to take measures whereby officially recognized archives are able to acquire for safeguarding and preservation any part or all of their country's national production. Such measures may include, for example, voluntary arrangements with the holders of rights for the deposit of moving images, acquisition of moving images by purchase or donation or the institution of mandatory deposit systems through appropriate legislation or administrative measures. (...)*<sup>50</sup>

After a very detailed list of measures that are recommended for mandatory legal deposit systems, the recommendation also mentions voluntary arrangements for foreign works in the countries where they are exploited:

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<sup>46</sup> UNESCO portal, Digital Heritage, <http://www.unesco.org/new/en/communication-and-information/access-to-knowledge/preservation-of-documentary-heritage/digital-heritage/concept-of-digital-heritage/>.

<sup>47</sup> UNESCO, Charter on the Preservation of the Digital Heritage, Paris, 2003, [http://www.unesco.org/new/fileadmin/MULTIMEDIA/HO/CI/CI/pdf/mow/charter\\_preservation\\_digital\\_heritage\\_en.pdf](http://www.unesco.org/new/fileadmin/MULTIMEDIA/HO/CI/CI/pdf/mow/charter_preservation_digital_heritage_en.pdf)

<sup>48</sup> Article 8, UNESCO Charter, cit.

<sup>49</sup> UNESCO, Recommendation for the Safeguarding and Preservation of Moving Images, Paris, 1980, [http://portal.unesco.org/en/ev.php-URL\\_ID=13139&URL\\_DO=DO\\_TOPIC&URL\\_SwedenCTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13139&URL_DO=DO_TOPIC&URL_SwedenCTION=201.html).

<sup>50</sup> UNESCO, Recommendation, cit, point No. 9.

*To ensure that moving images forming part of the cultural heritage of countries are systematically preserved, Member States are invited to take measures whereby officially recognized archives are able to acquire for safeguarding and preservation any part or all of their country's national production. Such measures may include, for example, voluntary arrangements with the holders of rights for the deposit of moving images, acquisition of moving images by purchase or donation or the institution of mandatory deposit systems through appropriate legislation or administrative measures.<sup>51</sup>*

Expanding on this recommendation, UNESCO published its Guidelines for Legal Deposit Legislation, which were revised in 2000.<sup>52</sup> The purpose of this document is to provide some guiding principles for national libraries, both in developing and developed countries, on how to prepare proposals for the legal deposit of electronic publications and on how to house and maintain such publications.

The guidelines touch upon the various elements of a legal deposit scheme (origin of the publication, comprehensiveness, the depositor, the depository, number of copies, compensation, and time of deposit) and identify the biggest challenge for legal deposit within an electronic or digital environment with the issue of preservation for future generations.

### 2.1.2.3. Standard-setting activities of the Council of Europe for the protection of audiovisual heritage

As the guardian of human rights, hereunder freedom of expression, cultural heritage holds a particular status when it comes to the activities of the Council of Europe.

In 2001, a convention on audiovisual heritage was signed,<sup>53</sup> which recognises the relevance of both legal and voluntary deposit systems as means for preserving cultural heritage. The convention is accompanied by a Protocol on the Protection of Television Productions.<sup>54</sup> (ETS No. 184). The convention and its protocol are the first binding international instruments in this field; they introduce the systematic storage of audiovisual works in film archives, where the latest conservation and restoration technology can be used for the long-term prevention of deterioration, harnessing technology to art so as to preserve a record of the past for future generations.

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<sup>51</sup> UNESCO, Recommendation, cit, point No. 11.

<sup>52</sup> UNESCO, Guidelines for legal deposit legislation, Paris, 1980-2000, <http://unesdoc.unesco.org/images/0012/001214/121413eo.pdf>.

<sup>53</sup> Council of Europe, European Convention for the Protection of the Audiovisual Heritage, Strasbourg, 8 November 2001, ETS No. 183, <http://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168008155f>. See McGonagle T., Adoption of New Convention for Protection of Audiovisual Heritage, IRIS 2001-9:3, <http://merlin.obs.coe.int/iris/2001/9/article3.en.html>.

<sup>54</sup> Council of Europe, Protocol to the European Convention for the Protection of the Audiovisual Heritage, on the Protection of Television Productions, Strasbourg, 8 November 2001, ETS No. 184, <http://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680081560>.

Central to the convention and the protocol is the principle of compulsory legal deposit of all moving-image material produced or coproduced and made available to the public in each signatory state. Legal deposit involves a requirement not just to deposit a reference copy with an officially designated archive but also to look after the material and do the necessary conservation work. In addition, the material has to be available for consultation for academic or research purposes, subject to the international or national rules on copyright.

Chapter II is devoted to legal deposit systems, and sets a general obligation for the contracting parties to introduce mandatory deposits for audiovisual works, exception made for cases where deposit is already ensured elsewhere:

*Article 9 (General obligation of legal deposit)*

*1. Each Party shall introduce, by legislative or other appropriate means, the obligation to deposit moving image material forming part of its audiovisual heritage and having been produced or co-produced in the territory of the Party concerned.*

*2 Each Party shall be free to provide for an exemption from legal deposit if the moving image material is legally deposited in one of the other Parties concerned.<sup>55</sup>*

When it comes to voluntary deposit systems, which are dealt with in Chapter III, the convention sets an obligation of means for the contracting parties, namely the duty to encourage the adoption of such systems:

*Article 11 (Promotion of voluntary deposit)*

*Each Party shall encourage and promote the voluntary deposit of moving image material forming part of its audiovisual heritage, including ancillary material, which does not qualify under Article 5 of this Convention.*

*Article 12 (Availability to the public)*

*Each Party shall encourage voluntary deposit bodies to specify by contract with the rights holders the conditions under which the deposited moving image material may be made available to the public.<sup>56</sup>*

Considering the relatively small number of ratifications of the convention,<sup>57</sup> the Parliamentary Assembly of the Council of Europe has called upon the Committee of Ministers to recommend that the member states access the convention and that those who have signed it, provide also for its ratification.<sup>58</sup>

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<sup>55</sup> Article 9 of the Convention of the Council of Europe, cit.

<sup>56</sup> Articles 11 and 12 of the Convention of the Council of Europe, cit.

<sup>57</sup> As of September 2017, only ten countries had ratified the Convention, and nine countries had signed but not ratified it, whereas all the remaining Council of Europe members, among them many EU/EEA countries, had not yet signed (BE, CY, CZ, DK, EE, ES, FI, IE, IT, LV, LI, MT, NL, NO, PL, SE, SI). See [http://www.coe.int/en/web/conventions/home/-/conventions/treaty/183/signatures?p\\_auth=1riFxUPD](http://www.coe.int/en/web/conventions/home/-/conventions/treaty/183/signatures?p_auth=1riFxUPD) for an updated overview.

<sup>58</sup> PACE, Recommendation 2001 (2012) on the Protection of and access to the audiovisual cultural heritage, <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=18725&lang=en>.

## 2.2. Legal and voluntary deposit systems under EU law

Whilst at intergovernmental level a certain number of binding legal instruments have been developed, considering the European Union's lack of exclusive competence when it comes to cultural policies, the existing set of regulatory tools in the field of deposit of audiovisual works is mostly of a soft-law nature.

Their common feature is that they build upon the European Convention for the Protection of the Audiovisual Heritage, which appears as a central tool for the European-wide policy in this domain.

### 2.2.1. EU cultural audiovisual heritage policy

#### 2.2.1.1. The main policy documents concerning the deposit of audiovisual works

In 2001, the European Commission adopted the so-called Cinema Communication,<sup>59</sup> which, amongst other things, examined the legal deposit of audiovisual works at national or regional level as one of the possible ways of conserving and safeguarding the European audiovisual heritage, and launched a stocktaking exercise of the situation regarding the deposit of cinematographic works in the member states.

Following up on these conclusions, the European Parliament adopted a resolution in 2002<sup>60</sup> underlining the importance of safeguarding the cinematographic heritage and supporting the approach of the European Convention for the Protection of the Audiovisual Heritage of the Council of Europe. In particular the Parliament:

*Stresses the need for compulsory legal deposit of works by the Member States, in line with the European Convention for the protection of the Audiovisual Heritage and the Additional Protocol on TV productions; calls on the public support funds for the audiovisual sector, as a transitional measure, to make it compulsory for their beneficiaries to deposit copies of any of their works which have received State aid through these funds.*<sup>61</sup>

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<sup>59</sup> Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions of 26 September 2001 on certain legal aspects relating to cinematographic and other audiovisual works,

<http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52001DC0534>.

<sup>60</sup> European Parliament Resolution on the Commission communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions on certain legal aspects relating to cinematographic and other audiovisual works,

<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.CE.2003.271.01.0176.01.ENG&toc=OJ:C:2003:271E:TOC>.

<sup>61</sup> European Parliament Resolution cit, point 9.

The following year, the European Council adopted a resolution on the deposit of cinematographic works<sup>62</sup>, inviting the European Commission to encourage best practices and the member states to:

*Put in place efficient systems of deposit and preservation of the cinematographic works forming part of their audiovisual heritage in their national archives, film institutes or similar institutions, if such systems do not yet exist. The systems should cover national cinematographic works as far as practicable, or at least, those cinematographic works that have received public support at national and/or Community level. The systems could be based on a legal or contractual obligation, or on other measures having the same effect in terms of preserving the cinematographic heritage.*<sup>63</sup>

In the following Film Heritage Recommendation of the European Parliament and the Council of 2005,<sup>64</sup> it was acknowledged that all member states already have systems in place for collecting and preserving cinematographic works forming part of their audiovisual heritage, and that 4/5 of these systems are based on a legal or contractual obligation to deposit all films, or at least those films that have received public funding. This recommendation took note of the European Commission's intention to consider making it compulsory for the beneficiaries of EU funding to deposit a copy of the EU-funded films in at least one national archive, and recommended that member states undertake:

*the systematic collection of cinematographic works forming part of their audiovisual heritage through a mandatory legal or contractual deposit of at least one high quality copy of such cinematographic works with designated bodies.*<sup>65</sup>

A later Resolution of the Council of 2010<sup>66</sup> continued along the same lines, and invited the member states to

*Adapt the existing instruments establishing mandatory legal or contractual deposit of cinematographic works forming part of their audiovisual heritage, taking into account the transition to digital production and distribution, and ensure appropriate enforcement of these instruments.*

*Promote the voluntary deposit of films and the use of the FIAPF/ACE agreement on the voluntary deposit of films in preservation archives.*<sup>67</sup>

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<sup>62</sup> Council Resolution of 24 November 2003 on the deposit of cinematographic works in the European Union, [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32003G1205\(03\)](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32003G1205(03)).

<sup>63</sup> European Council, Recommendation cit, point 1.

<sup>64</sup> Recommendation of the European Parliament and of the Council of 16 November 2005 on film heritage and the competitiveness of related industrial activities, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32005H0865>.

<sup>65</sup> European Parliament and Council Recommendation cit, point 7.

<sup>66</sup> Council conclusions on European film heritage, including the challenges of the digital era, 18-19 November 2010, [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.C\\_.2010.324.01.0001.01.ENG](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.C_.2010.324.01.0001.01.ENG).

<sup>67</sup> Council Conclusions cit, point 7.

### 2.2.1.2. The Europeana strategy

Among the various initiatives concerning cultural heritage, the so-called Europeana strategy deserves particular attention, considering its exponential growth from an initial project as a common library to a wider portal allowing any citizen to freely access various genres of works.

It all started in 2005 with a letter from the then presidents and premiers of France, Germany, Hungary, Italy, Poland and Spain to the President of the European Commission recommending the creation of a virtual European library to make Europe's cultural heritage accessible to all.<sup>68</sup>

The project was called European Digital Library Network (EDLnet) and a prototype was launched in 2008.<sup>69</sup> The initial idea of a virtual library had already expanded to the collections of galleries and museums from the capitals of Europe, but in 2009 EDLnet was replaced by Europeana. This new initiative gives national cultural heritage organisations access, through metadata, to digital objects that are materially stored nationally; it is managed by a foundation under Dutch law.<sup>70</sup>

The Europeana project was particularly boosted by a resolution of the European Parliament in 2010.<sup>71</sup> Interesting connections were made with out-of-commerce and orphan works, which were considered to be ideal targets for digitisation, preservation and dissemination purposes. In this resolution, the Parliament also urged the European Commission to put forward a legal initiative on this matter and to develop a European database of orphan works.

The following recommendation of the European Commission of 2011<sup>72</sup> on digitisation and online accessibility recognised explicitly the positive relation between deposit systems and Europeana, while recommending that the member states:

*make the necessary arrangements for the deposit of material created in digital format in order to guarantee its long-term preservation, and improve the efficiency of existing deposit arrangements for material created in digital format.*<sup>73</sup>

During the subsequent years of development (2011-2015), the Europeana strategy consisted of four main elements:

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<sup>68</sup> Letter dated 28 April 2005,

[http://ec.europa.eu/information\\_society/newsroom/cf/dae/document.cfm?doc\\_id=5978](http://ec.europa.eu/information_society/newsroom/cf/dae/document.cfm?doc_id=5978).

<sup>69</sup> See the milestones of Europeana at

[https://web.archive.org/web/20110122000251/http://www.europeana.eu/portal/aboutus\\_background.html](https://web.archive.org/web/20110122000251/http://www.europeana.eu/portal/aboutus_background.html).

<sup>70</sup> On the governance of Europeana see <https://pro.europeana.eu/our-mission/who-we-are>.

<sup>71</sup> European Parliament Resolution of 5 May 2010 on 'Europeana - the next steps', <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2010-0129+0+DOC+XML+V0//EN>.

<sup>72</sup> European Commission Recommendation of 27 October 2011 on the digitisation and online accessibility of cultural material and digital preservation, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32011H0711>.

<sup>73</sup> European Commission Recommendation, cit, point 10.



1. *Aggregate content to build the open, trusted source of European heritage;*
2. *Facilitate knowledge transfer, innovation and advocacy in the cultural heritage sector;*
3. *Distribute their heritage to users wherever they are, whenever they want it;*
4. *Engage users in new ways of participating in their cultural heritage.*<sup>74</sup>

Under the current Strategic plan, the priorities are the following:

1. *Make it easy and rewarding for Cultural Heritage Institutions to share high-quality content;*
2. *Scale with partners to reach our target markets and audiences;*
3. *Engage people on our websites and via participatory campaigns.*<sup>75</sup>

Further EU-funded projects are connected with Europeana and they all serve the same purpose of enhancing the preservation of and accessibility to cultural heritage.<sup>76</sup>

### 2.2.1.3. Binding instruments within the Digital Single Market strategy

#### 2.2.1.3.1. The Orphan works directive and connected database

A significant part of national archives is made up of those works for which none of the rightsholders have been identified or, even if they have been, they have not been located, despite a diligent search for the rightsholders having been carried out and recorded.

This type of works has been subject to a harmonisation initiative through the Orphan Works Directive,<sup>77</sup> adopted in 2012, which identifies deposit tools as one of the sources for carrying out the “diligent search” which is envisaged as a necessary pre-requisite before a work can be considered to be an orphan work. The Orphan Works Directive contains an explicit provision stating that it “shall be without prejudice to provisions concerning in particular (...) legal deposit requirements (...)”.

On the basis of this directive, an online EU-wide database for Orphan Works has been established and is managed by the EUIPO.<sup>78</sup> The database was launched in 2014<sup>79</sup> and contains information about a variety of orphan works, such as works in the print sector (books, journals, newspapers, magazines or other writings); cinematographic or audiovisual works and phonograms; unpublished works under certain conditions; works

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<sup>74</sup> Europeana, Strategic Plan 2011-2015, [http://pro.europeana.eu/files/Europeana\\_Professional/Publications/Strategic%20Plan%202011-2015%20\(colour\).pdf](http://pro.europeana.eu/files/Europeana_Professional/Publications/Strategic%20Plan%202011-2015%20(colour).pdf).

<sup>75</sup> Europeana, Strategic Plan 2015-2020, <http://strategy2020.europeana.eu/update/>.

<sup>76</sup> Information on the various projects connected to Europeana can be found at <http://www.europeanaconnect.eu/related-projects.php>.

<sup>77</sup> Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32012L0028>.

<sup>78</sup> The Orphan works database can be accessed from <https://euipo.europa.eu/orphanworks/>.

<sup>79</sup> EUIPO Press Release, 27 October 2014, <https://euipo.europa.eu/ohimportal/en/web/observatory/news/-/action/view/1595189>.



embedded or incorporated in other works or phonograms (pictures, photographs); and partial orphan works (those for which some rightsholders have been identified and located and have given permission to use the work in relation to rights they hold). The database serves a variety of functions, including allowing cultural organisations to record information about works identified as orphans, as well as giving rightsholders the possibility of searching for orphan works and putting an end to this status. By enabling potential rightsholders to claim their rights over works, the database also plays an important role in preventing and bringing to an end possible copyright infringements.

Similarly, in relation to orphan works, the FORWARD (Framework for an EU-Wide Audiovisual Orphan Works Registry) project was set out in 2013, with the aim of creating an EU-wide, standardised system to assess and register the rights status of audiovisual works with a focus on orphans.<sup>80</sup> The system was set up in 2013 and its targets are the following:

- Build a pan-European system to assess the rights status of audiovisual works;
- Systemically record the diligent searches performed;
- Create a permanent registry for audiovisual orphan works;
- Coordinate with the European Orphan Works Database managed by EUIPO;
- Support European film heritage institutions to implement the Orphan Works Directive.

#### 2.2.1.3.2. The copyright exception for preservation purposes

Even though legal deposit systems are put in place for legitimate preservation purposes, these may interfere with copyright protection rules.

For this reason, libraries, archives, and museums and other institutions, whose purpose it is to preserve a collection of copyright-protected works and to provide access thereto for research, education or private study, benefit from several exceptions under EU law. Such exceptions limit copyright to accommodate the libraries' key public interest missions, such as the preservation of and access to knowledge and culture.<sup>81</sup>

These exceptions aim to ensure the preservation of the collections and are mainly contained in the InfoSoc Directive<sup>82</sup> and in the Rental and Lending Directive<sup>83</sup> in order to:

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<sup>80</sup> Further information on FORWARD can be found at <http://project-forward.eu/forward-new/>.

<sup>81</sup> For a more comprehensive overview of the exceptions in the EU acquis, see Cabrera Blázquez F.J., Cappello M., Fontaine G., Valais S., *Exceptions and limitations to copyright*, IRIS Plus, European Audiovisual Observatory, Strasbourg, 2017, <http://www.obs.coe.int/documents/205595/8682894/IRIS+Plus+2017-1+Exceptions+and+limitations+to+copyright/b3410fd0-f574-419f-aba8-c81ba79f9fd1>.

<sup>82</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, <http://eur-lex.europa.eu/legal-content/FR/TXT/?uri=CELEX%3A32001L0029>.

<sup>83</sup> Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property,

- ensure the preservation of the collections (Article 5(2)c of the InfoSoc Directive);
- enable the public to consult works on the premises of the establishment (Article 5(3)n of the InfoSoc Directive);
- authorise public lending by libraries (Article 6 of the Rental and Lending Directive).

However, all these exceptions are formulated in broad terms that allow a great degree of flexibility as to their implementation by member states.

The most significant exception when it comes to issues concerning the deposit of protected works is certainly Article 5(2)c of the InfoSoc Directive, which authorises member states to provide for an exception or limitation “in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage.”

At the time of adoption of the directive, libraries were only emerging as digital actors, and the activities of preservation and restoration undertaken by them at that time did not include the same activities as exist today in a digital environment. Another open issue concerns the number of copies authorised, the possibility of making digital copies, or the types of works which can be reproduced in the framework of this exception.

## 2.2.2. Absence of “IP enforcement” deposit system at EU level

Deposit systems for facilitating the enforcement of intellectual property rights, including copyright, by providing the depositor with evidence of the existence of the deposited content are made available in a number of European countries. At the time of this publication, there is no such type of system at EU level created under the auspices of the European Union.<sup>84</sup>

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<http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32006L0115>.

<sup>84</sup> EU-wide registration systems, on the other hand, are available for some Intellectual Property Rights, for example the European Union Trade Mark and the Registered Community Design.

## 3. National

### 3.1. Main findings from the stakeholder survey

Based on the information gathered through the replies to the stakeholder survey on a variety of deposit systems for both preserving cultural heritage and facilitating the enforcement of intellectual property rights (“IPR”), previous research carried out by the EUIPO<sup>85</sup>, and additional desk research done by the European Audiovisual Observatory, a number of conclusions can be drawn. This chapter summarizes these findings. The structure of the chapter roughly follows the questions included in the stakeholder questionnaire (see Annexes). It should be kept in mind that the information provided is non-exhaustive, and more deposit systems may exist in the 12 countries covered by the survey.

As regards private deposit systems, companies or other entities such as non-profit organisations providing deposit services were identified in some member states. The relevant country fact sheets describe selected business models by way of example only. Therefore, these private sector deposit systems do not form part of the general horizontal analysis, but have been mentioned as examples when of interest.

Summaries of the information gathered for each of the 12 countries are provided in the country fact sheets in section Country fact sheets below.

#### 3.1.1. Coexistence of a variety of deposit systems

##### 3.1.1.1. Deposit systems identified in the survey

In each of the 12 EU member states covered by the study, at least one deposit system was identified. In Lithuania, only one system was identified; in Belgium and France, more than five systems, and in nine countries, less than five systems (Hungary, Romania, Portugal, the United Kingdom, the Netherlands, Sweden, Germany, Luxemburg and Italy).<sup>86</sup> It appears noteworthy that in France and Italy, a great variety of systems coexist.

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<sup>85</sup> Previous EUIPO research relates to public sector voluntary deposit systems (“IP deposit systems”) available in a number of EU member states for facilitating the enforcement of IPR.

<sup>86</sup> These numbers do not include private deposit systems.

Furthermore, some supranational/regional deposit systems were identified (see, for example, the ‘i-DEPOT’ managed by the Benelux Intellectual Property Office, BOIP). In addition, some respondents referred to the Common Information System (CIS) managed by the collective management organisations through the International Confederation of Authors and Composers Societies (CISAC<sup>87</sup>) to streamline rights data management.<sup>88</sup>

### 3.1.1.2. Main purpose of the deposit systems

According to the survey replies, the different deposit systems have typically been established for one of the following main purposes: to facilitate the enforcement of Intellectual Property Rights (1), or to preserve cultural heritage (2). In all countries covered by the survey, the same types of system were classified by survey respondents under one of these two main categories.

#### 3.1.1.2.1. Facilitation of Intellectual Property Rights enforcement

Systems established for facilitating the enforcement of IPR include IP deposit systems<sup>89</sup>, private deposit systems<sup>90</sup> and CMO deposit systems<sup>91</sup>.

In France, Belgium and Italy, the survey results show the highest number of coexisting IP and CMO deposit systems established for the main purpose of facilitating the enforcement of IPR. In the Netherlands and Luxembourg, only one such system was identified in the survey replies.

The majority of countries covered by the study have IP deposit systems (the Benelux countries, France, Italy, Romania, Portugal, and Hungary). No IP deposit systems were identified in the United Kingdom, Lithuania, Germany<sup>92</sup> or Sweden.

The survey replies provided information about CMO deposit systems in Belgium, France, Romania, and the United Kingdom, as well as about the international system managed by CISAC<sup>93</sup>.

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<sup>87</sup> See the country information for Portugal.

<sup>88</sup> It should be noted that several systems are open to national as well as non-national users. See *infra* on ‘depositors’.

<sup>89</sup> Depending on the system concerned, these might nationally be referred to as deposit or as registration systems.

<sup>90</sup> The survey replies did not provide any information about commercial private sector deposit systems; therefore, the examples used were identified by additional research. The initiatives referred to are examples of business models that companies might have in providing deposit services to customers.

<sup>91</sup> In the case of CMO deposit/register systems, these are mostly used to collect and distribute royalties and residuals, see, for example, the UK Authors’ Licensing and Collecting Society register, but are also used for facilitating the enforcement of IPR. On deposit by CMO, see *supra*, section Deposit by collective rights management organisations.

<sup>92</sup> The German IP office (DPMA) manages a physical deposit system/a registry for anonymous and pseudonym works. See the website of the DPMA, [https://www.dpma.de/dpma/aufgaben/verwertungsges\\_urheberrecht/anonyme\\_werke/index.html](https://www.dpma.de/dpma/aufgaben/verwertungsges_urheberrecht/anonyme_werke/index.html), accessed September 2017.

As for private deposit systems, examples of different business models were selected from those identified in a number of EU member states (Germany, France, the Netherlands, Italy, and the United Kingdom).

#### 3.1.1.2.2. Preservation of cultural/film heritage

Systems established for the preservation of cultural heritage exist in all member states covered by the study.

According to the survey replies, such systems can be sub-divided into legal (mandatory) deposit systems and film archive systems (voluntary/contractual)<sup>94</sup>. All 12 member states surveyed have established a deposit system in at least one of these two subcategories. France, Sweden, Germany, Luxemburg, Italy and Portugal have deposit systems of both categories.

Legal deposit systems exist in the following countries forming part of the survey: France, Germany, Hungary, Italy, Lithuania, Luxemburg, Portugal, Romania<sup>95</sup>, and Sweden. In Belgium, the Netherlands and the United Kingdom, there is no legal deposit for audiovisual materials.

Film archive deposit systems have been mentioned in the survey results for the following countries: Belgium, France, Germany, Italy, Luxemburg, the Netherlands, Portugal, Romania, Sweden and the United Kingdom.

#### 3.1.1.2.3. Other objectives

Apart from the preservation of cultural heritage or the facilitation of IPR enforcement, survey results show a few other objectives that voluntary systems may have; these include “cultural diffusion”<sup>96</sup>, “public information”<sup>97</sup>, “humanities research”<sup>98</sup>, the establishment of a

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<sup>93</sup> On CIS, the Common Information System operated by CISAC, see *infra*, section CIS.

<sup>94</sup> In a contractual system, a contract between a national or regional film funding authority and a producer foresees that a copy of the supported film is submitted by the producer to the Film Heritage Institution (FHI) in counterpart for funding. See, for example, the film archive deposit system in the Netherlands: producers receiving funding from the Nederland Film Fund are required to deposit their film at the EYE Filmmuseum. Other voluntary deposits can be made, for example, in relation to foreign films and film-related material, usually through a contract signed by the archive and the rightsholder, which should define the rights and obligations of each party. In France, for example, voluntary deposits are governed by general agreements which specify the respective commitments and responsibilities of the depositors and of the CNC once a deposit has been accepted and entrusted to the French Film Archives. On film archive deposit systems, see also *supra*, section Film archive deposit.

<sup>95</sup> The national film archive Arhiva Nationala de Filme (ANF) maintains a legal deposit of Romanian films (including related materials) made before 1997 with financing from the state budget, from the budget of some state units or from the National Center of Cinematography.

<sup>96</sup> IT, Cineteca Nazionale and Luigi Chiarini Library of the Fondazione Centro Sperimentale di Cinematografia.

<sup>97</sup> IT, General Public Register, Cinematographic Public Register.

<sup>98</sup> SE, the National Library of Sweden.

rights management system<sup>99</sup> and “collecting and distributing royalties and residuals”<sup>100</sup>. Some of the private deposit systems that were identified also offer content management features, allowing creators to publish, share or license their works.

### 3.1.1.3. Types of entities administering the deposit systems

The IP deposit systems identified are managed by national IP or copyright offices (France – INPI, Hungary – HIPO, Romania – ORDA, the Romanian Copyright Office), or by ministries (Italy – Ministry of Culture). In the three Benelux countries (the Netherlands, Belgium, and Luxemburg), BOIP (the Benelux Intellectual Property Office), which falls under the jurisdiction of the three Ministries of Economic Affairs in the Benelux area, manages the ‘i-DEPOT’. In Portugal, the Inspeção Geral Das Actividades Culturais (IGAC) administers the system.

A number of CMO deposit systems established to help authors to prove anteriority were identified, namely the OnlineDepot managed by Sabam/Artes (Belgium), the e-dpo managed by Scala (Belgium/France) and the Clicdépôt managed by Scam (France). More generally, as part of their mission to collect royalties pertaining to the exploitation of works and pay rightsholder(s) accordingly, CMOs encourage rightsholders to document (or register) all the works they create, as this will allow the effective exercise of their rights.<sup>101</sup>

As mentioned above, private commercial entities may also offer deposit services aimed at facilitating the enforcement of the depositors’ rights and, sometimes, also the exercise of those rights. A number of such private deposit systems were identified as examples and their business models are described in the country fact sheets in section 3.2 (see, for example, the country fact sheets for Germany, France, Italy, the Netherlands and the United Kingdom). The possibility of a deposit with a notary public was also mentioned in the survey results as an option for keeping evidence of the existence of a work (see the country fact sheets for Germany and the Netherlands).

In the field of cultural heritage preservation, the contractual or voluntary systems and the deposit systems identified are usually managed by film archives/film funds.<sup>102</sup>

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<sup>99</sup> A “worldwide audiovisual rights management system and online database that Authors Societies consult to get accurate information on audiovisual works and rights owners” (CISAC).

<sup>100</sup> GB, ALCS. On the nature of CMO deposit systems see *supra*, section Deposit by collective rights management organisations (“CMO deposit systems”).

<sup>101</sup> On the nature of CMO deposit, see *supra*, section Deposit by collective rights management organisations (“CMO deposit systems”).

<sup>102</sup> See the Overview Table (see Annexes) for contact details of the entities administering the different deposit systems.

## 3.1.2. Main features of the deposit systems

### 3.1.2.1. Mandatory and voluntary deposit

IP deposit systems, established mainly for evidentiary purposes, are voluntary<sup>103</sup>, while in the field of cultural heritage preservation, legal and voluntary and contractual deposits coexist. Voluntary and contractual deposits are referred to hereafter as film archive deposit systems.

Deposit with a CMO is voluntary in all the systems identified.

“Contractual” deposit was sometimes classified as “mandatory” in the survey replies. Usually, producers commit (by agreement) to depositing a copy of their work with an archive or a film fund in order to receive funding. Contractual systems were identified in Belgium, the Netherlands, Portugal, Sweden and the United Kingdom. Systems that allow “voluntary” deposit were identified in Germany, France, Luxembourg, Italy and Romania.

Legal deposit is mandatory in all member states where such a system was identified (France, Germany, Hungary, Italy, Lithuania, Luxemburg, Portugal, Romania, and Sweden).

The same body may be competent for both legal and voluntary deposit (see, for example, Luxemburg). Legal and voluntary/contractual deposits may coexist within the same member state (see *supra* on the main purpose of the deposit systems).

### 3.1.2.2. Legal bases of the deposit systems

Not all of the systems identified have a legal basis. While the administration of IP deposit systems and legal deposit systems is regulated, many other systems have been established without a legal basis.

All the IP deposit systems are based on provisions of national law. These provisions can usually be found in the Intellectual Property Code (France) or in the Copyright (and Related Rights) Act/Code (Portugal, Italy, Hungary, and Romania), as well as in decrees (Hungary and Romania). The i-DEPOT, run by the regional Benelux IP office (BOIP), is based on Article 4.4bis Benelux Convention on Intellectual Property and Part IV implementing regulations.

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<sup>103</sup> Deposit/registration with the Italian General Public Register is mandatory according to the survey replies, although ‘registration’ only has declaratory value. Failure to deposit with the General Public Register may be subject to an administrative penalty. However, it does not prejudice the acquisition or exercise of copyright (Law 633/41 Art. 106). The procedures for deposit and registration serve an administrative public information purpose. Registration of transfers of rights and other changes in ownership is voluntary. As explained in Chapter 2, copyright protection of original (foreign) works may not be made conditional upon the observance of any formality, including an obligation to deposit a copy of the work. See *supra*, section Legal deposit and copyright formalities.

All legal deposits for the preservation of cultural heritage have a specific legal basis in the national law.<sup>104</sup>

According to the information gathered in the survey, film archive deposit systems may have a legal basis (Portugal and Romania). However, many of these systems identified do not have a legal basis (Belgium, the Netherlands, Germany, Luxemburg, Italy, Sweden, and the United Kingdom).

CMO deposit systems usually do not have a legal basis.<sup>105</sup>

### 3.1.2.3. Digital (online) and physical (offline) deposit

Most systems established for the enforcement of IPR, that is, for evidentiary purposes, provide the possibility of digital deposit. In the field of cultural heritage preservation, physical and digital deposits appear to coexist, and no clear trend was identified.

Some IP deposit systems operate both a digital and an offline system (for example, the Benelux countries and France). In Portugal and Romania, the possibility of digital deposit exists. The systems in Italy and Hungary accept physical deposit.

The private deposit systems identified usually offer digital online services (see, for example, the country fact sheets for France, Italy, and the United Kingdom).

The CMO deposit systems identified in Belgium and France as well as the system managed by CISAC<sup>106</sup> are operated digitally; the one in Romania accepts physical deposit.

As for legal deposit, both physical and digital deposit is possible in France, Hungary, Italy and Sweden. The legal deposit systems in Romania, Germany and Lithuania are physical/operated offline.

The film archive deposit systems identified in Belgium (Cinémathèque de la Fédération Wallonie-Bruxelles), Germany, Italy, Romania, Sweden and Portugal accept physical (offline) deposit. The contractual deposit systems identified in Belgium (Vlamse audiovisuele fonds / Centre de l'audiovisuel et du cinema), the Netherlands and the United Kingdom accept both digital and physical deposit.

### 3.1.2.4. Type of content accepted in the deposit systems

In the field of preservation, almost all deposit systems are audiovisual (AV)-specific. Evidentiary systems used in the enforcement of IPR are usually not restricted to AV content, although a few AV-specific systems were identified.

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<sup>104</sup> Please see the Overview table for an overview of the legal bases of the relevant systems (see Annexes).

<sup>105</sup> In Hungary, it appears that according to article 106 (8) of the Act LXXVI of 1999 on Copyright (Copyright Act), a CMO can also provide an 'IP registration service'. In the field of music, the CMO Artisjus appears to operate such a 'registration system'. No CMO deposit system relevant for the audiovisual sector was identified during the survey.

<sup>106</sup> See the country sheet for Portugal.



As for IP deposit systems, the French ‘Enveloppe Soleau’/‘e-soleau’ and the Benelux ‘i-DEPOT’ accept ‘any type of content’. The systems in Romania, Portugal and Hungary appear to accept content protected by copyright or related rights. Italy hosts three different registers: the General Public Register for works protected under the Italian Copyright Law (the RPG); the Cinematographic Public Register (PRC); and the Special Public Register for computer programs (R. Software). The Cinematographic Public Register registers instruments for the sale of a film; instruments for the transfer or pledge of proceeds from a film; and the settlement in whole or in part of liabilities deriving from these instruments.

CMO systems may be open to AV-specific content only (see for example CISAC<sup>107</sup>, Romania). According to the survey replies, the CMO systems e-dpo (Belgium and France) and OnlineDepot (Belgium) are open to ‘any type of content’.

None of the private deposit systems identified appear to exclusively accept AV content.

All the film archive deposit systems identified in the survey and by further research are open to AV-specific content only (the Netherlands, Germany, Luxemburg, Belgium, Sweden, Portugal, Italy, Romania, and the United Kingdom).

The legal deposit systems identified in France (Centre national du cinema et de l’image animée, CNC), Germany, Luxemburg, Hungary, Lithuania, and Italy accept AV-specific content. Some legal deposit systems are open to a larger variety of content. In France, the system managed by the Institut national de l’audiovisuel (National Audiovisual Institute - INA) accepts sound documents and AV works broadcast on radio and television in France. The deposit managed by the Bibliothèque de France (BnF) accepts any printed, graphic, photographic, sound, audiovisual or multimedia document as well as software and databases. The legal deposit in Sweden (managed by the National Library of Sweden) also accepts computer games.

### 3.1.2.5. Depositors

IP deposit systems may in some cases only be open to nationals or national works; in other cases, they do not impose any nationality requirements. Legal deposit is only mandatory for national persons or entities of the country concerned. As for the film archive deposit system for the purpose of the preservation of cultural heritage, no clear trend was identified.

Regarding IP deposit systems, the i-DEPOT is open to users within and outside the European Union. In terms of volume, most i-DEPOTs appear to come from Benelux users.<sup>108</sup> In Italy, the three public registers include works of Italian authors, works

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<sup>107</sup> See the country sheet for Portugal.

<sup>108</sup> There is different information as to whether an evidential value also exists outside the territory of the Benelux. One reply to the survey raised doubts as to whether the Benelux Convention on Intellectual Property had a limited territorial scope of application.

published for the first time in Italy and works by foreign authors resident in Italy, when they are published for the first time in Italy. Some IP deposit systems are open to depositors of any nationality (for example, Hungary and France<sup>109</sup>).<sup>110</sup>

As regards CMO deposit systems, the systems identified in Belgium, France and Romania appear to be open for depositors of any nationality. More generally, as part of their mission to collect royalties pertaining to the exploitation of works and pay rightsholders accordingly, CMOs encourage rightsholders to document (or register) all the works they create, as this will allow the effective exercise of their rights.<sup>111</sup> That is, depositors will be members of the CMO (see, for example, ALCS, the United Kingdom).

The survey results did not contain information on the nationality requirements of commercial private deposit systems, however, desk research in relation to the businesses identified showed that many operate internationally. Their websites are provided in different languages.

As for film archive deposit systems, the answers varied. The contractual deposits identified in Portugal and the United Kingdom are open to production companies receiving funding (no nationality requirements appear to apply). The contractual deposit in Sweden also covers any entity receiving import and/or distribution subsidies from the Film Institute, including non-national films distributed in Sweden. The voluntary deposit system identified in Italy appears to be open to depositors of any nationality. The system identified in the Netherlands accepts content from EU nationals. In contrast, the film archive deposit systems identified in Belgium and Romania appear to be open to national depositors only.

Legal deposit with the systems identified in Germany, Luxembourg, France, Italy, Hungary, Lithuania and Sweden is mandatory for nationals/national productions only. As regards France, French and foreign short films and feature films exhibited in theatres are subject to the legal deposit obligation at the CNC, as long as they have received the screening visa under Article L.211-of the Code du cinema et de l'image animée.

#### 3.1.2.6. Rights acquired by the deposit body

Deposit bodies managing IP deposit systems do not usually acquire any rights in relation to the content deposited. In the field of cultural heritage preservation, the deposit bodies may acquire certain rights, but no clear trend was identified.

As for the IP deposit systems identified in the Benelux countries, Italy, Hungary and Romania, the deposit body does not appear to acquire any rights with regard to the

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<sup>109</sup> It was pointed out that the procedure of depositing an Enveloppe Soleau is confidential; therefore, no information about the nationality of depositors is available.

<sup>110</sup> No information was provided for the system in place in Portugal; it appears that the users of the system are mainly nationals.

<sup>111</sup> On the nature of CMO deposit, see *supra*, section Deposit by collective rights management organisations ("CMO deposit systems").

content deposited.<sup>112</sup> The same holds true for the CMO systems identified in the survey (France, Belgium, Romania, CISAC<sup>113</sup>).<sup>114</sup>

Deposit bodies (that is to say, archives and film funds) managing film archive deposit systems acquire certain rights in the systems identified in the Netherlands and in the United Kingdom. The EYE Film Museum in the Netherlands, for example, has acquired the right to organise non-commercial viewings.<sup>115</sup>

As for legal deposit, the deposit bodies identified in Germany, Hungary, Sweden and Lithuania have acquired some rights in relation to the content deposited. The German Bundesarchiv-Filmarchiv, for example, has acquired the right to digitise the copies deposited and to make copies available to the public.<sup>116</sup>

### 3.1.2.7. Accessibility of the work to the general public

IP deposit systems do not usually make the content deposited available to the general public. In the field of cultural heritage preservation, the content may be made available to the public to varying degrees.

Neither IP deposit systems (see the Benelux countries, France, Hungary, Italy<sup>117</sup>, Romania, and Portugal) nor CMO deposit systems (see Belgium, France, Romania, CISAC<sup>118</sup>, and the United Kingdom) usually make the content deposited accessible to the general public. The Benelux system, however, offers depositors the possibility to publish their i-DEPOT either partly or completely.<sup>119</sup>

The survey results did not contain information about accessibility to content deposited in private deposit systems, however, desk research showed that some initiatives offer content management features. These may, *inter alia*, allow users of the system to license and share their works on the platforms in question.<sup>120</sup>

As regards film archive deposit systems, the systems identified in Belgium (Cinémathèque de la Fédération Wallonie-Bruxelles)<sup>121</sup>, the Netherlands, Sweden<sup>122</sup>, Italy<sup>123</sup>

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<sup>112</sup> Information about this question relating to the public sector voluntary deposit systems in place in France and Portugal was not provided.

<sup>113</sup> See the country sheet for Portugal.

<sup>114</sup> The reply relating to ALCS (GB) mentioned that the latter receives a mandate from each member to exploit certain rights and collect and distribute the resulting income.

<sup>115</sup> For more detailed information on the types of rights acquired, please consult the relevant country sheets.

<sup>116</sup> For more detailed information on the types of rights acquired, please consult the relevant country sheets.

<sup>117</sup> In the Italian system, the work deposited is not accessible to the general public but relevant data is published online in the official bulletin.

<sup>118</sup> See the country sheet for Portugal. The works are open to all CISAC member societies.

<sup>119</sup> Either the i-DEPOT certificate, including the attached files, will be published (complete publication); or only one or more of the attached files that the depositor selects will be published (partial publication). This last option is only available for i-DEPOTs submitted on or after 27 September 2016. See the website of the BOIP at <https://www.boip.int/fr>, accessed September 2017.

<sup>120</sup> See, for example, the country fact sheets for Italy or the Netherlands.

<sup>121</sup> Content is made accessible only for education and cultural operators (viewing purposes only).

and the United Kingdom<sup>124</sup> appear to make content deposited accessible to the public under certain conditions. In the Cinémathèque Royale de Belgique (Belgium) and Portugal, the content deposited does not appear to be generally accessible to the public.

Entities managing legal deposits appear to make the deposited content accessible to the general public in the majority of systems identified (Germany, Italy<sup>125</sup>, Lithuania<sup>126</sup>, Luxemburg<sup>127</sup>, and Hungary<sup>128</sup>). In Sweden, works are accessible for research purposes only.<sup>129</sup>

### 3.1.3. Main benefits and challenges of deposit systems

The respondents to the survey were asked about their opinion on the main benefits and challenges of the deposit system(s) to which their answer relates. Not all respondents answered the question on benefits and challenges, and some only provided a partial reply.

Overall, there appears to be consistency between the main purpose of the systems and what is perceived to be their main benefit (facilitation of IP enforcement/preservation of cultural heritage). Within both categories, the existence of digital systems is perceived as beneficial. At the same time, digitisation is considered as a challenge. The provision and collection of information about works and rightsholders can play a role in both categories. The dissemination of works is considered a benefit for users of private deposit systems (where these offer such a feature), but also for end-users in general in the area of cultural heritage preservation. The absence of a legal basis for certain systems or the fact that deposit with a system is not mandatory has been criticised in both main categories.

As for IP deposit systems, the user-friendliness of online deposit systems was stressed (Benelux). The fact that a system is open to any type of digital content was also perceived as a benefit (Benelux). The replies also mentioned cost efficiency (Benelux and Hungary); the provision of reliable information on right(s) ownership at the moment of deposit/registration (Italy); and the fact that the evidence generated by the system was used in courts (Hungary). One of the challenges mentioned was the absence of a digital deposit (Hungary).

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<sup>122</sup> Viewing copies may become general for theatrical screenings, with the authorisation from the rights holder. All deposited films can be viewed in low-res copies in the deposit body's library which is open to the public.

<sup>123</sup> The content may be accessible after a decision of the entity administering the system.

<sup>124</sup> Accessibility is subject to rights clearance.

<sup>125</sup> Three years after the date of deposit.

<sup>126</sup> According to the terms of the deposit agreement

<sup>127</sup> The content may be accessible after a decision of the entity administering the system.

<sup>128</sup> After a decision of the entity administering the system

<sup>129</sup> Researchers have access to the National Library's audiovisual collections. This includes persons writing a university-level paper or thesis; authors or journalists; and persons carrying out research for artistic activities. The files from the electronic deposit are not made available.

In relation to CMO deposit systems, the cost-efficiency, user-friendliness (Belgium) and swiftness (CISAC) of the digital deposit procedure were highlighted. The replies also mentioned the high probative value of the evidence in courts and therefore the protection of authors (France and Romania); the considerable number of users of the system (CISAC); and the provision and collection of data and information on (audiovisual) works (CISAC, United Kingdom). According to the survey replies, one of the main challenges for CMO deposit systems appears to be the lack of a legal basis which could be a threat to the evidentiary value of the deposit in court proceedings (Belgium).

The replies to the survey did not provide information on the benefits and challenges of private deposit systems run by commercial businesses. On their websites, the businesses managing such deposit services describe where they see the benefits for users of their system. These usually correspond to the main features of the systems, such as the user-friendliness of the digital systems; the value of keeping proof of the existence of a creation at a certain moment in time; or the different content management features, allowing authors to promote, license and share their works. Information on possible challenges of these systems is not available.

As regards film archive deposit systems, the main benefit mentioned is the preservation of (film) heritage (Belgium, Portugal, Italy, and the United Kingdom), including digital preservation (the Netherlands), and the scope of the repertoire and materials preserved (Sweden and Belgium), which can include non-national films (Sweden). Further benefits are thought to be the dissemination of films (Belgium) and accessibility where a sole deposit exists (Romania). The costs and technical aspects of digitisation (the Netherlands and Romania) were among the main challenges identified.

The preservation of cultural (film) heritage (Germany and Luxemburg), including in digital form (Sweden) and the completeness of collections (Hungary) are considered the main benefits of legal deposit systems. The dissemination of films (Italy) and of information about rightsholders were also mentioned (Lithuania). The costs and technical aspects of digitisation (for example, the rapid change of formats) (Germany and Luxemburg); awareness-raising among depositors (Luxemburg and Hungary); and the non-availability of the works to the general (national) public, where this is the case (Sweden), are considered to be challenges for mandatory/legal deposit.

## 3.2. Country fact sheets

### 3.2.1. Belgium

#### 3.2.1.1. Deposit systems established to facilitate the enforcement of IPR

##### 3.2.1.1.1. IP deposit systems

The Benelux-Bureau voor de Intellectuele Eigendom (BBIE)/Benelux Office for Intellectual Property (BOIP), which falls under the jurisdiction of the three Ministers for Economic Affairs in the Benelux area and is part of the Benelux Organization for Intellectual Property, manages a voluntary deposit system, the “i-DEPOT”.<sup>130</sup> The main purpose of the i-DEPOT is to help depositors facilitate the enforcement of their IP rights by providing proof of the existence of certain content at a specific point in time.

The system has a legal basis (art. 4.4 bis of the Benelux Convention on Intellectual Property and Part IV of its implementing regulations). Both physical and digital deposit is possible since the i-DEPOT is operated both online and offline. Any type of content is accepted, and any type of user can open an i-DEPOT. The i-DEPOT is open to users within and outside the European Union. In terms of volume, most i-DEPOTs appear to come from Benelux users (98%).<sup>131</sup> Depositors must provide a description of the content (for example, a screenplay) and the files have to be uploaded. Upon payment of the regular fee (EUR 35 for a five-year-term deposit/EUR 50 for a ten-year-term deposit) proof of online deposit is handed to the depositor. Alternatively, the depositor can order an i-DEPOT envelope and pay the fee in advance. In that case, an identical document describing or depicting the concept or idea is to be put in both parts of the envelope; one part is sent back to the depositor and the other part is stored in BOIP's archive after giving it an official date. Depositors may hand in the deposit under the guidance of an IP counsellor. The depositor has the option of making the i-DEPOT (partly) public during the entire period of deposit.<sup>132</sup> In general, the i-DEPOT is not public, and BOIP does not acquire any rights in relation to the content deposited.

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<sup>130</sup> See the website of the BOIP, <https://www.boip.int/wps/portal/site/ideas/>.

<sup>131</sup> There is different information as to whether an evidential value also exists outside the territory of the Benelux. One reply to the survey raised doubts as to whether the Benelux Convention on Intellectual Property had a limited territorial scope of application.

<sup>132</sup> Either the i-DEPOT certificate, including the attached files, will be published (complete publication); or only one or more of the attached files that the depositor selects will be published (partial publication). This last option is only available for i-DEPOTs submitted on or after 27 September 2016. See the website of the BOIP, <https://www.boip.int/en>, accessed September 2017.

#### 3.2.1.1.2. Private deposit systems

In the present study, private deposit systems were only selected by way of example. No example was selected for Belgium. Moreover, the replies to the survey and further desk research provided no information about voluntary deposit systems run by private companies based in Belgium.

#### 3.2.1.1.3. CMO deposit systems

According to the survey replies received, two deposit systems, open to any type of content, are managed by different CMOs.

SCALA S.A.R.L., a branch of the SACD<sup>133</sup>, manages the service ‘e-dpo’, a voluntary deposit system.<sup>134</sup> The SACD, SACD Belgium, the SOFAM<sup>135</sup> and de Auteurs<sup>136</sup> form the Het Huis van de Auteurs in Brussel/Maison des Auteurs (the House of Authors in Brussels). The House of Authors is competent for deposits in a Benelux country. The online digital deposit system ‘e-dpo’ was established to facilitate IPR enforcement. Rightsholders, producers and CMO members of any nationality can deposit any kind of content. To that end, depositors need to create an online account and upload the relevant files (up to 10 MB). Upon payment of the fee (EUR 20 for a five-year-term deposit), certification is provided. Deposits can be extended for consecutive terms of five years. There are no requirements as to the information that depositors must provide about the content deposited. The deposit body does not acquire any rights with the act of depositing, and the deposit is never accessible to the general public. Only a bailiff can be granted access to the deposit in order to confirm the anteriority of a work in the context of proceedings involving a conflict of authorship. The platform guarantees a secure environment.

SABAM/ARTES<sup>137</sup> manages the OnlineDepot, a voluntary digital deposit system operated online. The main purpose of the system is to facilitate the enforcement of IPR in relation to the content deposited. The system does not have a legal basis. There are no restrictions as to the type of content, the nationality of the depositor, or to the categories of persons/entities who may deposit. Depositors are asked to fill in a form and provide certain details. Notably, the depositor must indicate the (working) title of the work and the genre. Up to four files per deposit can then be uploaded. A confirmation is then sent to the depositor. A fee of EUR 30 is charged for the production of a certificate of deposit in the context of a dispute. Extensions of the five-year term of deposit are possible (fee:

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<sup>133</sup> Société des Auteurs et Compositeurs Dramatiques, Society of Dramatic Authors and Composers, <http://www.sacd.be/fr/>.

<sup>134</sup> <https://www.e-dpo.com/nl/>.

<sup>135</sup> SOFAM (Auteursvennootschap voor visuele kunstenaars) is based in Brussels and represents the interests of visual artists.

<sup>136</sup> De Auteurs represents the interest of Dutch-language authors active in the domains of audiovisual, performing arts, literature, comics and illustration.

<sup>137</sup> ARTES is the entity for audiovisual, literary and theatre authors and visual artists of SABAM, the Belgian Association of Authors, Composers and Publishers.



EUR 10 per extension). The deposit system does not acquire any rights in the content deposited, and the work is never accessible to the general public.

### 3.2.1.2. Deposit systems established for the preservation of cultural heritage

#### 3.2.1.2.1. Legal deposit system

No legal deposit system exists in Belgium for audiovisual works.

#### 3.2.1.2.2. Film archive deposit systems

There is no single national archive in Belgium. All subsidised films are deposited with the Cinémathèque Royale de Belgique / Koninklijk Belgisch Filmarchief (the Royal Film Archive of Belgium) by two funding bodies: the French-speaking Centre de l'audiovisuel et du cinéma, and the Dutch-speaking Vlamse audiovisuele fonds.

The contractual deposit system, which does not have a legal basis, operates both offline and online; that is, depositors can deposit both physical and digital copies. AV-related content such as films, TV series, screenplays, posters and photos may be deposited. Only Belgian nationals/producers receiving funding must deposit in order to receive the last instalment of the funding. Depositors must provide full metadata of the work. The procedure differs between the Flemish and the French centres; in simple terms, the producer signs the contract and has to deposit with the Royal Film Archive of Belgium. The latter checks, approves and classifies the deposit. The deposit body does not acquire any rights in the works deposited, which are not accessible to the general public.

Another contractual deposit system is administrated by the Cinémathèque de la Fédération Wallonie-Bruxelles. Any film (short film, fiction, documentary, etc.), receiving money from the Centre du Cinéma must be deposited in physical form. National producers must deposit films (and non-film material such as promotional material or scripts, casting, budget, etc.) in order to receive the last 15% of the funding. There is no legal basis for the system. The depositor has to provide information on publication details, the place of publication and the time of deposit. The deposit body does not acquire any rights with the act of depositing. The deposited work is not generally accessible to the public and the content is made accessible only for educational and cultural operators, for viewing purposes only.



## 3.2.2. France

### 3.2.2.1. Deposit systems established to facilitate the enforcement of IPR

#### 3.2.2.1.1. IP deposit systems

The French IP Office (INPI) operates the voluntary deposit system ‘enveloppe Soleau’.<sup>138</sup> In the physical version of the deposit system, any type of content may be submitted via a sealed envelope with two compartments serving as proof of anteriority. The electronic version of the deposit system, the ‘e-Soleau’<sup>139</sup> allows secure deposit via the INPI website. The working principles of the ‘enveloppe Soleau’ are defined in article R.511-6 of the French IP Code (Code de la propriété intellectuelle)<sup>140</sup> and in a government decree of 9 May 1986<sup>141</sup>.

The deposit process is the same for all types of content deposited. Deposit at the INPI establishes a simple presumption of authorship, and provides evidence of the state of creation. It appears that courts recognise the deposit as dating evidence. The presumption of ownership can be overturned by any form of relevant and credible proof (for example, a third party can prove that he or she created the content before the deposit of the ‘enveloppe Soleau’). Only the holder of the deposit or a court (in the context of a legal dispute) can access the content of an ‘enveloppe Soleau’. Third parties cannot ask for disclosure. The INPI does not examine the information submitted by depositors upon filing. The deposited content is kept for 5 years, and the deposit can be renewed once. The deposit fee is EUR 15 for a five-year period. The system is used by individuals, representatives and businesses.

#### 3.2.2.1.2. Private deposit systems

There are a number of private companies based in France that offer services related to the deposit of content. An example of such a business model consists in the voluntary deposit of works that may be protected by copyright for the purpose of facilitating rights enforcement (proof of anteriority). Companies or individuals can deposit in the system. The service promises a fast registration procedure; recognition of the evidence generated by courts; the conformity of the certificates with international standards (electronic

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<sup>138</sup> See, INPI’s website: <https://www.inpi.fr/fr/proteger-vos-creations/lenveloppe-soleau/enveloppe-soleau> accessed August 2017.

<sup>139</sup> See, INPI’s website: <https://www.inpi.fr/fr/services-et-prestations/e-soleau> accessed August 2017

<sup>140</sup> The French text is available at [https://www.legifrance.gouv.fr/affichCode.do?sessionId=63C418467017899CDC373B31C4811B81.tpdila21v\\_2?idSectionTA=LEGISCTA000006179088&cidTexte=LEGITEXT000006069414&dateTexte=20170828](https://www.legifrance.gouv.fr/affichCode.do?sessionId=63C418467017899CDC373B31C4811B81.tpdila21v_2?idSectionTA=LEGISCTA000006179088&cidTexte=LEGITEXT000006069414&dateTexte=20170828) accessed August 2017.

<sup>141</sup> Arrêté du 9 mai 1986 fixant les modalités pratiques de recours aux moyens de preuve de la date de certaines créations.

signature, digital timestamp); the translation of filing into different languages; and cost management.

Evidence is generated by digital signature, electronic online timestamping and automatic registration by email with the official bailiff. After deposit/registration of a creation with the official seal and stamp, an electronic receipt of registration, containing a legal proof of date of deposit, is sent to the depositor. The content deposited is stored for 30 years. The service offers three types of 'package deals' depending on the number of creative works deposited.

#### 3.2.2.1.3. CMO deposit systems

The SACD / SCALA (Société des auteurs et compositeurs dramatiques) administers the deposit system e-dpo<sup>142</sup>. The main purpose of the system is to provide authors with the means to prove their authorship. Deposit may be made both in digital and in physical form. The website explains the main steps in the procedure of online deposit, and how the deposit may be used in the context of litigation.<sup>143</sup>

In brief, the author or depositor provides the required information for the deposit envelope or for online deposit (1), pays the deposit fee (2), and receives a deposit confirmation (3). When deposit is done physically, the content has to be enclosed in a specific SCALA envelope. Any type of content may be deposited in the system. Natural persons (of any nationality) who are the author of the work to be deposited or persons acting in the name of the author may deposit. The depositor is required to provide information about the time of deposit, the type of work or content deposited, the title of the work, the first name and last name of the authors, the first name, last name and address of the depositor, and the signature of the depositor.

The CMO does not acquire any rights in the content deposited. The work deposited is never accessible to the general public. The deposit can be opened in the context of legal proceedings; a bailiff must be present. Deposit is a confidential procedure - once the deposit is completed, the envelope or the file is sealed.

For film scripts or audiovisual works' storylines, another deposit system is proposed by the Scam, which is the CMO representing authors from different fields (film directors, radio commentators, video-makers, writers, translators, journalists, photographers, and cartoonists.) through the "Clicdépôt" managed by the association Scam Vélasquez.<sup>144</sup> The ClicDépôt<sup>145</sup> offers Scam's members and non-members the possibility of depositing their work as a means to prove their authorship. The deposit can be done physically using an envelope, according to the same type of procedure as for the SACD, or online. The fee for the service depends on the depositary (moral or physical

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<sup>142</sup> See the website [www.e-dpo.com/fr](http://www.e-dpo.com/fr) accessed August 2017.

<sup>143</sup> See [https://www.e-dpo.com/fr/faq/#topic\\_2](https://www.e-dpo.com/fr/faq/#topic_2) accessed August 2017.

<sup>144</sup> <http://www.scam.fr/Rep%C3%A8res-juridiques/Association-Scam-V%C3%A9lasquez>

<sup>145</sup> <http://www.clicdepot.org/>.

person) and on the duration of the deposit (two to three years, renewable once) and varies between EUR 23 and EUR 140.

The deposit of scripts can also be done at the Société des Gens de lettres (SGDL)<sup>146</sup>, which represents writers of any type of written works. The deposit can also be done physically using an envelope, or online, and costs EUR 45 for a renewable period of four years.

In addition, some national unions, such as the Syndicat national des auteurs et des compositeurs (SNAC), also make available to all authors and composers a deposit service for all literary and artistic works protected by the Intellectual property - with the exception of works of visual or graphic arts – whether or not the depositor was previously a member of the union. As far as audiovisual works are concerned, scripts and film music can be deposited. Procedures for the deposit are similar to those proposed by other CMOs but can only be done physically. The services costs EUR 35 for a renewable five-year-term deposit.<sup>147</sup>

### 3.2.2.2. Deposit systems established for the preservation of cultural heritage

#### 3.2.2.2.1. Legal deposit system

According to the French heritage code<sup>148</sup>, the obligation of legal deposit consists in the obligation for any publisher, printer, producer, or importer, to deposit any document they publish, print, produce or import in any of the organisations entitled by law for it. It aims to enable the collection and preservation of documents made available to the public; the establishment and dissemination of national bibliographies; and their consultation by the public, in accordance with IP law and compatible with their preservation.

The legal deposit of videograms was established in 1975. Since 1992, the legal deposit of animated images is carried out by three organisations: (1) the Centre national du cinéma et de l'image animée (Cnc)<sup>149</sup> for feature films with a screening visa; (2) the Institut national de l'audiovisuel (INA)<sup>150</sup> for TV programmes; (3) the Bibliothèque nationale de France (BnF)<sup>151</sup> for any form of animated images made available to the public by means other than television and cinematographic exploitation (DVD, Blu-Ray). In practice, considering the large number of audiovisual productions, the collection carried out by the BnF serves merely as a sample base at national level without any preservation

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<sup>146</sup> See <https://www.sgdL.org/sgdl/services-aux-auteurs/la-protection-des-oeuvres/depot-classique>.

<sup>147</sup> See <http://www.snac.fr/pdf/noticedepot.pdf>.

<sup>148</sup> Code du patrimoine: Articles L131-1 to L133-1 and R131-1 to R133-1, the text in French is available at <https://www.legifrance.gouv.fr/affichCodeArticle.do?cidTexte=LEGITEXT000006074236&idArticle=LEGIART100006845515> accessed August 2017.

<sup>149</sup> <http://www.cnc.fr/web/fr> accessed August 2017.

<sup>150</sup> <http://www.ina.fr/> accessed August 2017.

<sup>151</sup> <http://www.bnf.fr/fr/acc/x.accueil.html> accessed August 2017.

of heritage ends. In 2016, 10 273 video works were deposited under the legal deposit obligation.<sup>152</sup>

#### 3.2.2.2.2. The Bibliothèque nationale de France (BnF)

The BnF is competent for the collection under the legal deposit obligation of any printed, graphic, photographic, sound, audiovisual, or multimedia document, regardless of their technical production, editing or distribution process, as soon as they are made available to the public. However, documents intended for a first exhibition in cinematographic theatres shall be subject to the obligation of legal deposit once they have obtained the cinematic exploitation visa (provided for in Article L. 211-1 of the Code of Cinema and Animated Image). Software and databases are also subject to the obligation of legal deposit as soon as they are made available to the public by the distribution of a material medium, whatever the nature of this medium. In addition, signs, signals, writings, images, sounds or messages of any kind communicated to the public by electronic means (Internet) are also subject to legal deposit.

As far as audiovisual works are concerned, the Audiovisual Department of the BnF receives the legal deposit of any videogram fixed on any physical carrier or in dematerialised form, as long as it is rented, sold, distributed, imported or made available to the public – even to a limited public and for free.

The legal deposit is mandatory and free of charge. Through this deposit, the State becomes proprietary of the deposited carrier, but never of the rights attached to it.

The deposit must be realised by the publisher, producer, “sponsor” (commanditaire) or importer. Each document shall be deposited in two copies at the latest on the day it is made available to the public. The legal deposit can be carried out online or by post.

#### 3.2.2.2.3. The Institut national de l’audiovisuel (INA)

Since 1992<sup>153</sup>, the INA has been the legal depository for sound documents and audiovisual works broadcast on radio and television in France, provided they are of French origin and are first of all broadcast in France. Thanks to a mechanism of digital capture by satellite and optical fibre liaisons, the collection of programmes is realised directly 24h/24h for 120 television and radio channels.

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<sup>152</sup> For more information on figures, see the information provided by the BnF [http://www.bnf.fr/documents/dl\\_observatoire\\_2016.pdf](http://www.bnf.fr/documents/dl_observatoire_2016.pdf) accessed August 2017.

<sup>153</sup> Law n° 92-546 of 20 June 1992 on legal deposit, in its consolidated version of 6 October 2017, <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006079299>, and implementing Decree N° 93-1429 of 31 December 1993 on legal deposit, <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006082758>.

The mission of the INA was expanded in 2006 through the Law DAVDSI on the information society<sup>154</sup> to include the collection and dissemination of information published online, for all sites and content related to audiovisual communication. The INA, in the continuity of its audiovisual collections, collects, as part of the legal deposit of the Internet, more than 14 000 websites, collected 24 hours a day, several times a week, thanks to the implementation of “crawlers” (collection robots) specially adapted to the needs of the archive (these are software programs that record all the resources – pages, images – present on a website). Eighteen thousand social network accounts publishing videos are continuously monitored and collected, as well as 400 social network feeds linked to programmes, audiovisual personalities or exceptional events. Twitter accounts and hashtags, and videos from hosting and sharing platforms build “augmented” archives for study and analysis.

#### 3.2.2.2.4. Centre national du cinéma et de l’image animée

French and foreign short films and feature films exhibited in theatres are subject to the legal deposit obligation at the CNC, as long as they have received the screening visa under Article L.211-of the Code du cinéma et de l’image animée<sup>155</sup>. The CNC is also depositary of all promotional material related to films. Advertising films and institutional films are also concerned by the legal deposit obligation.

The CNC has been depositary for these type of films since 1992. The film heritage directorate of the CNC ensures the collection and preservation of cinematographic works, the constitution and diffusion of national bibliographies and filmographies, as well as the consultation of documents by accredited researchers.

In the case of French cinematographic works (and French co-productions), the producer is responsible for the legal deposit. In the case of foreign cinematographic works, it is up to the distributor to comply with the legal deposit obligation. Non-compliance with this obligation may give rise to a fine of up to EUR 75 000.

#### 3.2.2.2.5. Film archive deposit system

Voluntary deposits are governed by general agreements which specify the respective commitments and responsibilities of the depositors and of the CNC once a deposit has been accepted and entrusted to the French Film Archives.<sup>156</sup>

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<sup>154</sup> Law N° 2006-961 of 1 August 2006 related to copyright and related rights in the information society, <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000266350&dateTexte=&categorieLien=id>.

<sup>155</sup> Currently provided under the French heritage code, Article L131-1 to L133-1 and R132-24 to R132-32, op. cit.

<sup>156</sup> See the website of the CNC <http://www.cnc.fr/web/fr/depot-volontaire-et-conventions>, accessed August 2017.

### 3.2.3. Germany

#### 3.2.3.1. Deposit systems established to facilitate the enforcement of IPR

##### 3.2.3.1.1. IP deposit systems

The replies to the stakeholder survey do not provide information about IP deposit systems in Germany.<sup>157</sup>

##### 3.2.3.1.2. Private deposit systems

In Germany, several law firms take care of all aspects of the deposit of works protected by copyright with a notary public.

Deposit with a notary accredited in Germany is usually done in a personal meeting. The author can then request notarial certification of the deposit at any time.<sup>158</sup> The certification is known as a declaration of priority and has evidentiary value, including at international level.<sup>159</sup>

A private company that offers the online service of depositing works in a digital and encrypted way with a notary public was identified. The works mentioned on the website include screenplays, cinematographic works and TV formats. It is recommended that works be deposited at regular intervals, even before they have been finalised. In the case of cinematographic works/films, the deposit procedure consists in creating a user account on the company's website, saving the video in a file, and uploading the file via an encrypted internet connection. An accurate timestamp is generated by a Trust Centre (in accordance with the act on qualified electronic signature<sup>160</sup>). A single document which clearly identifies the file is generated and, together with data about the author, deposited with a notary public. The notary issues a notarial certification which the service provider sends to the depositor by mail. A single deposit (50 MB) costs approximately EUR 50. A subscription with a monthly fee of approximately EUR 100 allows an unlimited number of deposits (500 MB).

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<sup>157</sup> The German IP office (DPMA) manages a physical deposit system/a registry for anonymous and pseudonym works. See the website of the DPMA, [https://www.dpma.de/dpma/aufgaben/verwertungsges\\_urheberrecht/anonyme\\_werke/index.html](https://www.dpma.de/dpma/aufgaben/verwertungsges_urheberrecht/anonyme_werke/index.html), accessed September 2017.

<sup>158</sup> According to section 5 of the official regulations for notaries (DoNot), certificates must be kept for 100 years. See [https://www.bnotk.de/Notar/Berufsrecht/DONot.php#Anker\\_5](https://www.bnotk.de/Notar/Berufsrecht/DONot.php#Anker_5), accessed October 2017.

<sup>159</sup> „Die zehn wichtigsten Antworten zum Urheberrecht“, förderland, 20 June 2008, available at <http://www.foerderland.de/gruendung/news-gruenderszene/artikel/die-zehn-wichtigsten-antworten-zum-urheberrecht>, accessed August 2017.

<sup>160</sup> Bundesgesetz über elektronische Signaturen (Signaturgesetz - SigG), the German text is available at <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10003685&FassungVom=2016-06-30>, accessed August 2017.

### 3.2.3.1.3. CMO deposit systems

The replies to the stakeholder survey do not provide information about any other specific deposit systems managed by CMOs in Germany apart from the traditional documentation of works system.

### 3.2.3.2. Deposit systems established for the preservation of cultural heritage

#### 3.2.3.2.1. Legal deposit system

The national archive Bundesarchiv–Filmarchiv<sup>161</sup> manages a mandatory physical film deposit, based on the Federal Archives Act<sup>162</sup> and on the Film Funding Act<sup>163</sup>. German rightsholders and producers deposit in the system. They are required to provide information about publication details and the type of work/film deposited, as well as information relating to the copyright and technical specifications of film formats, especially in relation to digital material.

In brief, the deposit procedure consists in the deposit of the content, the certification of the deposit and the description of the content. The deposit body acquires the right to digitise the copies deposited and to make copies available to the public. The work deposited is automatically accessible to the general public.

#### 3.2.3.2.2. Film archive deposit systems

It appears that the member associations of the Kinematheksverbund (the Federal Film Archive') encourage, to the extent possible, voluntary deposit of films and related material.<sup>164</sup>

The Kinematheksverbund was founded in 1978 following an agreement between the Federal Government and the State of Berlin. Its members are the Bundesarchiv-

<sup>161</sup> [www.bundesarchiv.de](http://www.bundesarchiv.de) accessed August 2017.

<sup>162</sup> Gesetz über die Nutzung und Sicherung von Archivgut des Bundes (Bundesarchivgesetz - BArchG) vom 10. März 2017 (BGBl. I S. 410), <http://www.bundesarchiv.de/DE/Navigation/Meta/Ueber-uns/Rechtsgrundlagen/Bundesarchivgesetz/bundesarchivgesetz.html>, accessed August 2017.

<sup>163</sup> Gesetz über Maßnahmen zur Förderung des deutschen Films (Filmförderungsgesetz – FFG) in der Fassung der Bekanntmachung vom 23. Dezember 2016 (BGBl. I S. 3413), <http://www.ffa.de/ffg.html>, accessed August 2017.

<sup>164</sup> According to information collected by the European Commission; see the Questionnaire on the implementation of the Recommendation of the European Parliament and the Council of 16 November 2005 on "Film heritage and the competitiveness of related industrial industries" (Germany), available at [http://sharedox.prod.oami.eu/share/proxy/alfresco/api/node/content/workspace/SpacesStore/36885306-9687-4bec-ab04-2501161b74ad/FH\\_replies%20to%20EC%20questionnaire%2c%202014%20DE\\_de.pdf](http://sharedox.prod.oami.eu/share/proxy/alfresco/api/node/content/workspace/SpacesStore/36885306-9687-4bec-ab04-2501161b74ad/FH_replies%20to%20EC%20questionnaire%2c%202014%20DE_de.pdf), p 14, submitted in the context of the European Commission's Progress report 2012-2013 on the Implementation of the 2005 European Parliament and Council Recommendation on Film Heritage, 2014, available at <https://ec.europa.eu/digital-single-market/en/news/european-commissions-report-film-heritage>, accessed August 2017.



Filmarchiv (see *supra*), the German Filminstitut (DIF)<sup>165</sup> and the Deutsche Kinemathek Museum für Film und Fernsehen<sup>166</sup>. Through the cooperation of these German institutions for film-makers, the Kinematheksverbund fulfils the function of a central German cinemathèque/film archive.<sup>167</sup>

The film funding guidelines of the Bundesfilmförderung (BKM)<sup>168</sup> also foresee the deposit of the starting materials of a film on a voluntary basis.

Contractual arrangements for voluntary deposits are handled in different ways by the member institutions of the Kinematheksverbund. The German Filminstitut (DIF), for example, uses the model contract created by ACE<sup>169</sup>-FIAPF<sup>170</sup>.

## 3.2.4. Hungary

### 3.2.4.1. Deposit systems established to facilitate the enforcement of IPR

#### 3.2.4.1.1. IP deposit systems

The Hungarian Intellectual Property Office (HIPO) manages a physical voluntary registration system.<sup>171</sup> That system finds its legal basis in article 112(5) of the Copyright Act<sup>172</sup>, and in Decree 26/2010 (XII.28.) of the Ministry of Justice on the detailed rules on the voluntary registration of works. Art. 94/B of the Copyright Act establishes a rebuttable presumption of authorship in works voluntarily registered at the HIPO. Any type of work and other subject matter defined in article 1 of the Copyright Act can be submitted. There are no restrictions as to the nationality and the type of persons who may register works. Applicants must attach the original or a copy of the work in a certain format to their application.

Information about the name and address of the applicant, name and (business) address of the representative (if applicable), the title, genre and medium/carrier of the

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<sup>165</sup> The German film institute; for more information about its film archive, see <http://deutsches-filminstitut.de/archive-bibliothek/filmarchiv/> accessed August 2017.

<sup>166</sup> The German cinemathèque/film archive, museum for film and television; for more information about its archive, see <https://www.deutsche-kinemathek.de/en/archives/film-archive/general-information> accessed August 2017.

<sup>167</sup> See <https://kvb.deutsche-kinemathek.de/> accessed August 2017.

<sup>168</sup> Film funding at the federal level, see [https://www.bundesregierung.de/Webs/Breg/Germany/Bundesregierung/Beauftragte fuer Kultur und Medien/media/filmfoerderung/\\_node.html](https://www.bundesregierung.de/Webs/Breg/Germany/Bundesregierung/Beauftragte fuer Kultur und Medien/media/filmfoerderung/_node.html), accessed August 2017.

<sup>169</sup> The Association des Cinématèques Européenne, <http://www.acefilm.de> accessed August 2017.

<sup>170</sup> The International Federation of Film Producers Associations, <http://www.fiapf.org/> accessed August 2017.

<sup>171</sup> See the website of HIPO: <http://www.sztnh.gov.hu/en/copyrights-and-related-rights/how-can-my-copyrights-be-protected/voluntary-register-of-works> (accessed August 2017).

<sup>172</sup> Act LXXVI of 1999 on Copyright. An English version is available at [http://www.sztnh.gov.hu/en/English/jogforras/hungarian\\_copyright\\_act.pdf](http://www.sztnh.gov.hu/en/English/jogforras/hungarian_copyright_act.pdf), accessed in August 2017.



work, and information enabling the unique identification of the work (where necessary), is also required. Applications may be filed in person or by post/fax. The procedure is the same for different types of content. HIPO does not store a copy of the work (that is to say, there is no 'deposit'): a certificate and a copy of the work (attached in a sealed envelope) are returned to the applicant or to his or her representative.

In the certificate, HIPO certifies that the applicant(s) indicated as author(s) has/have recognised the attached copy of the work or other subject matter as their own. As long as the seal and the envelope are intact, the certificate can be used as evidence in courts for an unlimited time. No renewal is possible. The system has a public search facility: the bibliographical elements provided in the request form may be accessible to the public in cases where the applicant has given his or her authorisation. Once the administrative fee of HUF 5000 is paid, a reference number is communicated to the applicant. HIPO does not acquire any rights in the content submitted/registered.

#### 3.2.4.1.2. Private deposit systems

In the present study, private deposit systems were only selected by way of example. No example was selected for Hungary. Moreover, the replies to the survey and further desk research provided no information about voluntary deposit systems run by private companies based in Hungary.

#### 3.2.4.1.3. CMO deposit systems

According to Article 106(8) of Act LXXVI of 1999 on Copyright (Copyright Act), a CMO may offer an IP registration service. However, the replies to the survey did not provide information about a deposit system for audiovisual works run by a CMO.<sup>173</sup>

### 3.2.4.2. Deposit systems established for the preservation of cultural heritage

#### 3.2.4.2.1. Legal deposit system

The Hungarian National Film Archive<sup>174</sup>, which is owned by the Hungarian National Film Fund<sup>175</sup>, administers a physical mandatory film deposit system, which was established for the main purpose of preserving cultural heritage. The deposit of films in the system,

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<sup>173</sup> The CMO Artisjus manages a voluntary registration/deposit system. See the website of Artisjus <https://www.artisjus.hu/english/>. FILMJUS, the Hungarian Society for the Protection of Audiovisual Authors' and Producers' Rights, does not appear to manage a specific deposit system for audiovisual works. See the website of Filmjus, <http://www.filmjus.hu/>, accessed August 2017.

<sup>174</sup> The website of the Film Archive is currently being revised: <http://www.filmintezet.hu/>, accessed August 2017.

<sup>175</sup> Ministry of Human Capacities, Emberi Erőforrások Minisztériuma. The website provides information about the current archive regulation, see <http://www.kormany.hu/hu/emberi-eroforrasok-miniszteriuma>, accessed August 2017.

which finds its legal basis in Act II of 2004 on Motion Picture<sup>176</sup> and Government Decree 60/1998. (III. 27.) on providing and using the mandatory copy of media products ("sajtótermékek kötelezpéldányainak szolgáltatásáról és hasznosításáról"), is mandatory for national productions, Hungarian co-productions, and distributed foreign films.

Material that may be submitted includes films, TV series, screenplays, storyboards and any other documents that may be protected by copyright and that may be used in the pre-production of an audiovisual work, film photos and film posters. Depositors must submit a report that includes information about the title, the director, the year of production, the place of publication, the type of work deposited, the name of the production company and the distributor, and proof of rights ownership. Full technical specifications (for example, audio channels, aspect ratio, screening speed, time code) of the archive data carriers which contain the film must be submitted.

As for the deposit procedure, the person commissioned by the rightsholder submits the materials, and information about possible access restrictions. The National Film Archive fills in a detailed handover/takeover form in case state funding for film production is received. Next, the submitted materials are processed and stored for preservation. The individual access restrictions to the processed archive data carriers are published in the Film Archive's local database.

In general, the Hungarian National Film Fund owns all the film rights (ownership and distribution rights, except the author rights) to films produced before 1989. The film rights to later films usually belong to the production companies or their successors. The Film Archive has a preservation and conservation obligation as regards the main archive copies (final print and its negatives), but has no right to duplicate or distribute these films. Usage for screenings and making duplications is prohibited. If the rightsholder's master copy gets lost or damaged, the National Film Archive grants the owner access to the archive materials for the sole purpose of duplication. If the rightsholder submits screener copies and grants permission, the latter can be made accessible for research purposes on the premises of the National Film Archive. All other deposited material (screenplay, dialogue lists, photos and posters) can be searched for in the National Film Archive. Any other exploitation of the works requires the rightsholders' authorisation.

The digital preservation of Hungarian cultural heritage, including audiovisual works, has been undertaken by the Hungarian National Digital Archive and Film Institute (MaNDA) since 2011.<sup>177</sup> MaNDA, *inter alia*, collects, preserves, restores and manages Hungarian and international film materials and written or other documents, giving high priority to Hungarian features, documentaries, newsreels, experimental and animation films and related products.<sup>178</sup>

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<sup>176</sup> An English version is available at <http://www2.ohchr.org/english/bodies/cescr/docs/E.C.12.HungaryN.3-Annex15.pdf>, accessed August 2017.

<sup>177</sup> See the website of MaNDA, <http://mandarchiv.hu/> accessed August 2017.

<sup>178</sup> See the website of the European Film Gateway, [http://www.europeanfilmgateway.eu/about\\_efg/partners\\_contributors/magyar\\_nemzeti\\_filmarchivum](http://www.europeanfilmgateway.eu/about_efg/partners_contributors/magyar_nemzeti_filmarchivum), and the Questionnaire on the implementation of the Recommendation of the European Parliament and the Council of

The National Audiovisual Archive (NAVA)<sup>179</sup> administers a mandatory (legal) deposit system for national broadcasters. The digital deposit system was established for the main purpose of preserving cultural heritage, and finds its legal basis in Act CXXXVII. of 2004 on National Audiovisual Archives and related regulations. Programmes by national broadcasters produced in or relating to Hungary must be deposited.

#### 3.2.4.2.2. Film archive deposit systems

According to information collected by the European Commission, it appears that “the organisations that allocate public funds set the provision of a legal deposit of the funded cinematographic work as a condition for funding.”<sup>180</sup>

In addition, “voluntary deposit is an option and is regulated by appropriate legal procedure, but rarely occurs in practice. [...]”<sup>181</sup>

### 3.2.5. Italy

#### 3.2.5.1. Deposit systems established to facilitate the enforcement of IPR

##### 3.2.5.1.1. IP deposit systems

Article 103 of the Law on Copyright (Law No.633 of April 22, 1941 as amended and integrated, LDA)<sup>182</sup> provides for three Public Registers: the General Public Register for works protected under the LDA (RPG); the Cinematographic Public Register (PRC); and the Special Public Register for computer programs (R. Software). Both the RPG and the PRC are physical deposits, and are administered by the Ministry of Culture.

As regards the General Public Register, the procedures for deposit and registration are laid down in the Regulations implementing the LDA (Royal Decree [RD] No 1369 of 18 May 1942). Royal Decree-Law No 1061 of 16 June 1938, which became Law No 458 of 18 January 1939, establishes those for the Cinematographic Public Register.

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16 November 2005 on “Film heritage and the competitiveness of related industrial industries” (Hungary), available at [http://ec.europa.eu/newsroom/document.cfm?action=display&doc\\_id=4332](http://ec.europa.eu/newsroom/document.cfm?action=display&doc_id=4332), submitted in the context of the European Commission’s Progress report 2012-2013 on the Implementation of the 2005 European Parliament and Council Recommendation on Film Heritage, 2014, available at <https://ec.europa.eu/digital-single-market/en/news/european-commissions-report-film-heritage>, accessed August 2017.

<sup>179</sup> See the website of NAVA, <http://nava.hu/> accessed August 2017.

<sup>180</sup> Questionnaire on the implementation of the Recommendation of the European Parliament and the Council of 16 November 2005 on “Film heritage and the competitiveness of related industrial industries” (Hungary), see *supra*, p 4 *et seq.*

<sup>181</sup> *Idem*, p 5.

<sup>182</sup> An English version is available at <http://www.wipo.int/wipolex/en/details.jsp?id=2569>, accessed in August 2017.

The General Public Register of protected works provided for under LDA Article 103 comprises, *inter alia*, works covered under Title I of the LDA, including cinematographic works; the registration of instruments *inter vivos* transferring in whole or in part the rights recognised in law or constituting in addition thereto rights of enjoyment or security interests; instruments of apportionment or company instruments relating thereto; and measures to expropriate copyright and to withdraw a work from the market (LDA, articles 104, 113, 142).

The Cinematographic Public Register, pursuant to article 12 of Royal Decree-Law 1061/1938, records (1) instruments for the sale of a film; (2) instruments for the transfer or pledge of proceeds from a film; (3) the settlement in whole or in part of liabilities deriving from the instruments referred to in the preceding subparagraphs.

The deposit/registration of works with the General Public Register and the Cinematographic Public Register is mandatory, however, it is of a declarative nature only. Failure to deposit – although subject to an administrative penalty – does not prejudice the existence or exercise of copyright in the work. In the context of legal proceedings, the act of deposit establishes a rebuttable presumption of authorship and ownership. The registration of cinematographic works also provides access to state funds that are intended to encourage film production and distribution.

Rightsholders and producers of Italian works and works released for the first time in Italy<sup>183</sup> have to deposit/register their films (and synopsis) with the General Public Register.<sup>184</sup> Information relating to publication details, the place and date of publication and the time of deposit has to be submitted. In addition, the depositor must provide information about the author(s) of the synopsis, the screenplay, the music, the film director, the main performers, and the title, producer and duration of the film. It is not necessary to deposit a copy of the film. A copy of the screenplay corresponding to the film produced and a sufficient quantity of photographs or stills to identify the work are accepted. Deposit can be made in person or by posting a copy of the work. It has to include a copy of the screenplay, some photographs or stills, and two application forms, completed and signed. Each form must be legalised with a EUR 16 stamp or, in case of variation, with a stamp of the value prescribed by law. The system does not acquire any rights in the content deposited. The work is never accessible to the general public, however, data regarding the deposit is available online in the official bulletin.

The Cinematographic Public Register holds all records for registrations (entries and records of instruments) made since 1938. It is subdivided into sections, depending on whether they are feature films, short films or documentaries (registration for these was provided for under pre-existing legislation on cinematography). The basic requirement for registration purposes involves the company producing the film submitting its application to the register once it has received, via the Cinema Department at the Ministry, the notice

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<sup>183</sup> See article 185-189 of Law 663/41.

<sup>184</sup> This system, which forms part of the General Public Register for works protected under the LDA, is operated by Service II Bibliographic Heritage and Copyright of the Ministry of Cultural Heritage and Activities and Tourism, General Direction for Libraries and Cultural Institutes, [www.librari.beniculturali.it](http://www.librari.beniculturali.it) accessed August 2017.

of commencement of work submitted by the producer. Registration therefore occurs before the film is made.

#### 3.2.5.1.2. Private deposit systems

A private company based in Italy offering a digital deposit system for creative works, the generation of evidence and some content management features was identified. The service allows its users, amongst other things, to publish or share works in a secure manner. The system is open to anyone; the service's main target audience includes musicians, photographers, writers, journalists, researchers, designers, IT developers, or persons who create derivative works such as remixes or mash-ups.

Types of works covered include music, design, literature, poetry, photography, code, painting, screenplays or visual arts. The digital timestamping technology generates proof of anteriority, apparently legally valid internationally, for the existence of a creative work. Three types of account subscriptions are available, at different costs (free trial, EUR 2.50 per month, EUR 5 per month), and with different features. The most advanced option, for example, allows users to register an unlimited number of works (up to 500 MB each), to download an unlimited number of certificates, and to add an unlimited number of co-authors (who are also users of the system). It also offers several other benefits, including advanced privacy settings and five free blockchain timestamps.

#### 3.2.5.1.3. CMO deposit systems

Previously, the Cinematographic Public Register was administered by SIAE<sup>185</sup>. It is now managed by the Ministry of Culture (see *supra*).

### 3.2.5.2. Deposit systems established for the preservation of cultural heritage

#### 3.2.5.2.1. Legal deposit system

The national archive Cineteca Nazionale and Luigi Chiarini Library of the Fondazione Centro Sperimentale di Cinematografia<sup>186</sup> administers a mandatory deposit system for films. Its main purpose is the preservation of cultural heritage and cultural diffusion. The system, which is operated both online and offline, finds its legal basis in Legge 14/11/2016 No. 220 Article 7 that substitutes D. L.vo 22/12/2004 No. 28, Article 24, Decreto del Presidente della Repubblica Italiana 03/05/2006 No. 252 Article 26, and Legge No. 1213 del 04/11/1965 and subsequent amendments and additions.

The Italian Ministry of Cultural Heritage also provides for the digital deposit of screenplays and storyboards in the Luigi Chiarini Library. Only nationals have to deposit.

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<sup>185</sup> SIAE, Società Italiana degli Autori ed Editori, <https://www.siae.it/it> accessed August 2017.

<sup>186</sup> <http://www.fondazioneccsc.it/>, accessed August 2017.

One high-quality copy of the work must be deposited within 60 days of the first public release. The depositor must also submit a letter that describes the materials deposited. The archive does not acquire any rights in the content deposited. Three years after the date of deposit, the works are accessible to the general public in the Cineteca Nazionale.

#### 3.2.5.2.2. Film archive deposit system

The Museo Nazionale del Cinema Foundation<sup>187</sup> in Turin administers a physical voluntary deposit system for films. There is no legal basis for the system. There appear to be no specific requirements as to the type of persons that can deposit in the system. The time of deposit must be indicated. During the deposit procedure, the materials are inspected for evaluation (the evaluation of the state of the materials is important), the depositor delivers the materials, and the deposit contract is finalised.

The Museo Nazionale del Cinema does not acquire any rights in the content deposited. Works may be accessible to the general public, after a decision of the entity administering the system.

### 3.2.6. Lithuania

#### 3.2.6.1. Deposit systems established to facilitate the enforcement of IPR

##### 3.2.6.1.1. IP deposit systems

It appears that there is no IP deposit system in Lithuania.

##### 3.2.6.1.2. Private deposit systems

In the present study, private deposit systems were only selected by way of example. No example was selected for Lithuania. Moreover, the replies to the survey and further desk research provided no information about voluntary deposit systems run by private companies based in Lithuania.

##### 3.2.6.1.3. CMO deposit systems

The replies to the survey provided no information about CMO deposit systems for the facilitation of IPR enforcement in Lithuania.

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<sup>187</sup> <http://www.museocinema.it/it>, accessed August 2017.

### 3.2.6.2. Deposit systems established for the preservation of cultural heritage

#### 3.2.6.2.1. Legal deposit system

The Office of the Chief Archivist of Lithuania<sup>188</sup> is a national archive that administers a mandatory physical deposit system for films.

The legal basis for the deposit system is defined by the Lithuanian Cinema Law.<sup>189</sup> Only Lithuanian nationals and entities have to deposit in the system. There are no requirements as to the categories of persons or entities who can deposit in the system or to the information that has to be provided with regard to the work deposited. After receiving the original materials of a film, the Archive provides the producer with a certificate which has to be submitted to the administrator of the Film Register. The archive acquires the right to digitise copies of the film. Deposited films are accessible to the general public in accordance with the deposit agreement.

#### 3.2.6.2.2. Film archive deposit system

It appears that currently no contractual deposit system exists in Lithuania.

The replies to the survey provided no information about voluntary film archive deposit systems in Lithuania.

## 3.2.7. Luxembourg

### 3.2.7.1. Deposit systems established to facilitate the enforcement of IPR

#### 3.2.7.1.1. IP deposit systems

The Benelux-Bureau voor de Intellectuele Eigendom (BBIE)/Benelux Office for Intellectual Property (BOIP), which falls under the jurisdiction of the three Ministers of Economic Affairs in the Benelux area and is part of the Benelux Organization for Intellectual Property, manages a voluntary deposit system, the 'I-DEPOT'.<sup>190</sup> The main purpose of the I-DEPOT is to help depositors facilitate the enforcement of their IP rights by providing proof of the existence of certain content at a specific point in time.

The system has a legal basis (Article 4.4 bis of the Benelux Convention on Intellectual Property and Part IV of its implementing regulations). Both physical and

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<sup>188</sup> [www.archyvai.lt/lt/lvat.html](http://www.archyvai.lt/lt/lvat.html) accessed August 2017.

<sup>189</sup> LIETUVOS RESPUBLIKOS KINO ĮSTATYMAS, 2002 m. kovo 5 d. Nr. IX-752. The text of the provision can be found at <https://www.e-tar.lt/portal/lt/legalAct/TAR.C828E20E430B> accessed August 2017.

<sup>190</sup> See the BOIP website: <https://www.boip.int/wps/portal/site/ideas/>, accessed August 2017.



digital deposit is possible since the I-DEPOT is operated both online and offline. Any type of content is accepted, and any type of user can open an I-DEPOT. Only nationals and entities of the Benelux countries can deposit (the Benelux IP Convention has a limited territorial scope of application).

Depositors must provide a description of the content (for example, a screenplay) and the files to be uploaded. Upon payment of the regular fee (EUR 35 for a five-year-term deposit/EUR 50 for a ten-year-term deposit), proof of online deposit is handed to the depositor. Alternatively, the depositor can order an I-DEPOT envelope and pay the fee in advance. In this case, an identical document describing or depicting the concept or idea is to be put in both parts of the envelope; one part is sent back to the depositor and the other part is stored in BOIP's archive after giving it an official date.

Depositors may hand in the deposit under the guidance of an IP counsellor. The depositor has the option of making the I-DEPOT (partly) public during the entire period of deposit. In general, the I-DEPOT is not public, and BOIP does not acquire any rights in relation to the content deposited.

#### 3.2.7.1.2. Private deposit systems

In the present study, private deposit systems were only selected by way of example. No example was selected for Luxembourg. Moreover, the replies to the survey and further desk research provided no information about voluntary deposit systems run by private companies based in Luxembourg.

#### 3.2.7.1.3. CMO deposit systems

It appears that there are no deposit systems managed by CMOs in Luxembourg.

### 3.2.7.2. Deposit systems established for the preservation of cultural heritage

#### 3.2.7.2.1. Legal deposit system

The Centre national de l'audiovisuel (CNA)<sup>191</sup>, which is supervised by the Ministry of Culture, manages the Service du dépôt legal. The mandatory system, which allows both physical and digital deposit, finds its legal basis in the Règlement grand-ducal du 6 novembre 2009 relatif au dépôt legal. According to the latter, audiovisual and sonic works as well as multimedia audiovisual works are subject to legal deposit at the CNA<sup>192</sup>.

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<sup>191</sup> See the CNA webpages concerning the deposit of moving images and audio documents: <http://www.cna.public.lu/fr/film-tv/depot-images-animees/index.html>; <http://www.cna.public.lu/fr/audio/depot-audio/index.html>, accessed August 2017.

<sup>192</sup> See <http://legilux.public.lu/eli/etat/leg/rgd/2009/11/06/n8/jo>, accessed August 2017.



National rightsholders and producers deposit copies of films, TV series and other documents that may be protected by copyright and that may be used in the pre-production of an audiovisual work (for example, screenplays or storyboards). Information relating to publication details, the place of publication, the time of deposit, the type of work deposited as well as many metadata related to the audiovisual documents must be submitted. As for the different steps in the deposit procedure, the workflow has been defined internally by the CNA, without direct approval from the Ministry of Culture. The CNA does not acquire any rights in the content deposited. Works deposited may be accessible to the general public, after a decision of the CNA.

In Luxembourg, the funding of productions is dealt with separately from conservation. Good collaboration is therefore necessary to collect material.

#### 3.2.7.2.2. Film archive deposit system

The CNA also accepts the voluntary deposit of certain audiovisual, cinematographic and sound documents. Under certain conditions, the department for film and TV accepts the deposit of additional copies of productions, subject to statutory deposit, as well as amateur films made before 1950.<sup>193</sup>

### 3.2.8. The Netherlands

#### 3.2.8.1. Deposit systems established to facilitate the enforcement of IPR

##### 3.2.8.1.1. IP deposit systems

The Benelux-Bureau voor de Intellectuele Eigendom (BBIE)/Benelux Office for Intellectual Property (BOIP), which falls under the jurisdiction of the three Ministers of Economic Affairs in the Benelux area and is part of the Benelux Organization for Intellectual Property, manages a voluntary deposit system, the 'I-DEPOT'.<sup>194</sup>

The main purpose of the I-DEPOT is to help depositors facilitate the enforcement of their IP rights by providing proof of the existence of certain content at a specific point in time. The system has a legal basis (Article 4.4 bis of the Benelux Convention on Intellectual Property and Part IV of its implementing regulations). Both physical and digital deposit is possible since the I-DEPOT is operated both online and offline. Any type of content is accepted, and any type of user can open an I-DEPOT.

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<sup>193</sup> More information about the conditions of voluntary deposit are available on the CNA website: <http://www.cna.public.lu/fr/film-tv/depot-images-animees/depot-volontaire/index.html>, accessed August 2017.

<sup>194</sup> See the BOIP website: <https://www.boip.int/wps/portal/site/ideas/>, accessed August 2017.

Only nationals and entities of the Benelux countries can deposit (the Benelux IP Convention has a limited territorial scope of application). Depositors must provide a description of the content (for example, a screenplay) and the files to be uploaded. Upon payment of the regular fee (EUR 35 for a five-year-term deposit/EUR 50 for a ten-year-term deposit) proof of online deposit is handed to the depositor.

Alternatively, the depositor can order an I-DEPOT envelope and pay the fee in advance. In this case, an identical document describing or depicting the concept or idea is to be put in both parts of the envelope; one part is sent back to the depositor and the other part is stored in BOIP's archive after giving it an official date.

Depositors may hand in the deposit under the guidance of an IP counsellor. The depositor has the option of making the I-DEPOT (partly) public during the entire period of deposit. In general, the I-DEPOT is not public, and BOIP does not acquire any rights in relation to the content deposited.

#### 3.2.8.1.2. Private deposit systems

Experts consulted in the Netherlands pointed out that a notary public can date a document by means of a date stamp (endorse/visa) or by drawing up an authentic document. These physical documents may be used for evidence purposes (see Article 157 of the Dutch Code of Civil Procedure)<sup>195</sup>.

A private company offering an online deposit/registration and content management service for works protected by copyright and other content was identified. Any type of content that can be submitted in the form of a PDF file is accepted (for example, television formats, film scripts, lyrics, audio works, videos, or contracts). The service promises that the document, once uploaded, cannot be modified or deleted from the cloud; that the exact moment in time of uploading is established; and that the document is inextricably linked to the depositor's name. Via their account, users of the system can send registered documents to third parties (including accompanied by a text). The moment in time of the sending of these documents, as well as the email address of the recipient are registered by the system.

Users of the system may use a notice of registration on their website. The service also offers a platform through which users of the system can advertise/license their work. For certain agreements concluded on works deposited in the system, the managing entity earns 10% of the total agreed payment. Two types of yearly subscription are possible (EUR 7,50 / EUR 75); both allow the sharing and advertising of works on the platform provided by the system. Only the more expensive option allows the registration of an unlimited number of documents.

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<sup>195</sup> Wetboek van Burgerlijke Rechtsvordering (geldt in geval van niet-digitaal procederen), the Dutch text is available at

<http://wetten.overheid.nl/BWBR0039872/2017-04->

[01#BoekEerste\\_TiteldeelTweede\\_AfdelingNegende\\_Paragraaf2\\_Artikel157](http://wetten.overheid.nl/BWBR0039872/2017-04-01#BoekEerste_TiteldeelTweede_AfdelingNegende_Paragraaf2_Artikel157), accessed August 2017.

#### 3.2.8.1.3. CMO deposit systems

The replies to the survey provided no information about CMO deposit systems for the facilitation of IPR enforcement in the Netherlands.

### 3.2.8.2. Deposit systems established for the preservation of cultural heritage

#### 3.2.8.2.1. Legal deposit system

It appears that no legal deposit system exists in the Netherlands.

#### 3.2.8.2.2. Film archive deposit system

Producers receiving funding from the Nederland Film Fund<sup>196</sup> are required to deposit their film at the EYE Filmmuseum<sup>197</sup>, a digital national archive. The system has no legal basis. Only Dutch and EU producers of an audiovisual or cinematographic work deposit in the system. According to the regulations of the Dutch Film Fund, an applicant (producer) who receives production funding is required to deposit the film (in digital format) and all relevant information (for example, publication details, information about the type of work or the content deposited, proof of authorship or ownership of rights and contracts with rightsholders of the audiovisual work), marketing and promotion material, etc. at the EYE Film Museum. After the film's release, the final instalment of funding is paid once the film and related material have been deposited according to the digital standards agreed upon (between the archive, producers and post-production companies). The deposit body acquires the right to organise non-commercial viewings. The deposited work may be accessible to the general public after a decision of the EYE Filmmuseum.

Moreover, in accordance with funding agreements made with film-makers, the Dutch Film Fund deposits specified digital film elements with the EYE Film Instituut Nederland<sup>198</sup>. Normally, the EYE Film Instituut acquires the rights for museological use, as specified in the agreement with film-makers. The rightsholders' permission is necessary for other types of use.

Television productions may be deposited at the Institute for Sound and Vision (Beeld and Geluid)<sup>199</sup> by public broadcasters (producers submit their productions directly to broadcasters).

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<sup>196</sup> <https://www.filmfonds.nl/>, accessed August 2017.

<sup>197</sup> <https://www.eyefilm.nl/>, accessed August 2017.

<sup>198</sup> [www.eyefilm.nl](http://www.eyefilm.nl), accessed August 2017.

<sup>199</sup> <http://www.beeldengeluid.nl/>, accessed August 2017.

## 3.2.9. Portugal

### 3.2.9.1. Deposit systems established to facilitate the enforcement of IPR

#### 3.2.9.1.1. IP deposit systems

The Inspeção Geral Das Actividades Culturais (IGAC) – the General Inspection for Cultural Activities<sup>200</sup> – manages a voluntary registration/deposit system for content protected by copyright and related rights. Deposit can be made in digital form. The legal basis for the system is Article 213 *et seq.* of the Portuguese Copyright and Related Rights Code, as well as Decree Law No. 143/2014 for the registration of copyright protected works (which gives rightsholders the possibility of filing an application for registration). There are different requirements for deposit/registration for different types of works, including for audiovisual works. Deposit establishes a rebuttable presumption of authorship, and provides evidence of the date of deposit, which can be used in court. Only the legal representatives of the rightsholder or the rightsholder him- or herself can ask for the disclosure of any deposited elements. The system is confidential, and bibliographic elements about the content are not published.

To file an application, depositors have to indicate the work title, the type of work, a description of the work, data about the applicant and information on the authorship. They also need to attach either a storage device with the content of the work or a sample of the work itself. The registration may be requested by the owners of the intellectual property rights of the work, under the terms of the Copyright and Related Rights Code (Código dos Direitos de Autor e dos direitos Conexos) or by their representatives, provided they are duly authorised. Further requirements are mentioned in article 24 of the Decree Law n.º 143/2014, depending on the type of work deposited. The information is examined upon filing. A copy of the work, or the storage device with the content of the work, is kept at the registry. Deposit may be revoked or new contents added to the work already registered; transfer of the content may be recorded. Users of the system are mainly nationals; the system is used by individuals as well as by representatives and businesses.

#### 3.2.9.1.2. Private deposit systems

In the present study, private deposit systems were only selected by way of example. No example was selected for Portugal.

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<sup>200</sup> See <https://www.igac.gov.pt/formularios>, accessed August 2017.

### 3.2.9.1.3. CMO deposit systems

The International Confederation of Societies of Authors and Composers (CISAC)<sup>201</sup> manages a worldwide digital audiovisual rights management system. It also runs an online database that CMOs consult to obtain accurate information about audiovisual works and rightsholders. Audiovisual productions such as films, TV programmes, documentaries, series, and short audiovisual works can be deposited.

Only CMOs can deposit in the system. A minimum set of information is required for deposit of a work: the original title, the foreign title, the subtitle, the production company, the year and country of production, the shooting language, rightsholder(s), the ISAN (International Standard Audiovisual Number), IPI (Interested Party Information), the exploitation purposes, a unique IDA code (unique IDA codes are used between CMOs when exchanging information on an audiovisual work), and the type of rights (primary and/or secondary public communication) with regard to the work or content deposited. CMOs use the IDA code to identify the transmitted audiovisual production and the rightsholders, and to retrieve and process the information before distributing the royalties to the identified sister organisations.

The sister organisation itself will transfer these royalties to the authors. The deposit body does not acquire any rights in the content deposited. The deposited work is never accessible to the general public, however, the deposited work is open to all CISAC member societies.

### 3.2.9.2. Deposit systems established for the preservation of cultural heritage

#### 3.2.9.2.1. Film archive deposit

The Cinemateca Portuguesa Museu de Cinema IP<sup>202</sup>, a film archive, manages a physical (offline) contractual deposit system, which has a legal basis in the national law (Decree-Law No. 124/2013 of 30 August<sup>203</sup>, that regulates Law No. 55/2012 of 6 September). Only production companies of films with state funding from the Portuguese Film Institute (ICA)<sup>204</sup> deposit in the system.

When the film is finalised, the beneficiaries of state funding deposit two copies of the final work.<sup>205</sup> The time limit for deposit depends on the type of work (for example, feature films, short films, animated films, etc.). The deposit body does not acquire any

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<sup>201</sup> [www.cisac.org](http://www.cisac.org), accessed August 2017.

<sup>202</sup> [www.cinemateca.pt](http://www.cinemateca.pt), accessed August 2017.

<sup>203</sup> Decreto-Lei n.º 124/2013, de 30 de agosto, <https://www.anacom.pt/render.jsp?contentId=1172454>.

<sup>204</sup> <http://www.ica-ip.pt/en/>, accessed August 2017.

<sup>205</sup> The type of copies to be deposited depends on the type of support the work was released on, see *Despacho n.º 5775/2014 - Estabelece as especificações técnicas relativas aos suportes da versão definitiva das obras beneficiárias dos apoios à produção cinematográfica e audiovisual*, <http://www.gmcs.pt/pt/despacho-n-57752014-estabelece-as-especificacoes-tecnicas-relativas-aos-suportes-da-versao-definitiva-das-obras-beneficiarias-dos-apoios-a-producao-cinematografica-e-audiovisual>.

rights in the content deposited. The work deposited is not generally accessible to the general public. The cinematographic works and related materials deposited at the Cinemateca Portuguesa-Museu do Cinema are safeguarded for preservation/deposit purposes. Therefore, access to the deposited works is restricted, however, their content might become accessible through copies or other forms of access that do not entail using the original storage device.

#### 3.2.9.2.2. Legal deposit system

According to Article 92 of Law No. 27/2007 of 30 July 2007 (Television and On-demand Audiovisual Media Services Law),<sup>206</sup> the recordings of programmes that are deemed to be of public interest due to their historical or cultural importance shall be subject to legal deposit, for the purpose of long-term conservation and access for research. This legal deposit will be governed by a specific statutory instrument, which will safeguard the interests of authors, producers and operators.

The ICA is currently the entity responsible for registering all cinematographic and audiovisual works.<sup>207</sup> The legal regime is provided for in Article 47 *et seq.* of Decree-Law No. 124/2013. The registration may be requested by the owners of the intellectual property rights of the work, under the terms of the Copyright and Related Rights Code (Código dos Direitos de Autor e dos direitos Conexos), by their representatives, provided they are duly authorised, or by subjects with obligations to them.

For all works produced, distributed or displayed on national territory, whatever their type, format, medium or duration, the following acts may be registered: legal facts that determine the constitution, transmission, encumbrance, alienation, modification or extinction of the copyright; acts that have as a main or accessory aim the constitution, reform, declaration of nullity or annulment of a registration or its cancellation; and the respective final decisions as soon as they have become final.

The registration of the work is done electronically, at the request of the interested parties, preceded by the registration of the applicant in the ICA registry of audiovisual and cinematographic companies.<sup>208</sup> The registration fee amounts to 20,00 EUR (30,00 EUR, if urgent). The registry is mandatory for all Portuguese (including co-production) films and audiovisual works.

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<sup>206</sup> Law No. 27/2007 of 30 July 2007, Television and On-demand Audiovisual Media Services Law (Rectified by the Statement of Rectification No. 82/2007, of 12 September and altered and republished in the annex to Law No. 8/2011, of 11 April).

<sup>207</sup> Pursuant to Law No. 55/2012 of 6 September, modified by the one of 19 May and Ordinance No. 254/2015 of 20 August.

<sup>208</sup> See <http://www.ica-ip.pt/en/ica/what-we-do/company-registration/>.

## 3.2.10. Romania

### 3.2.10.1. Deposit systems established to facilitate the enforcement of IPR

#### 3.2.10.1.1. IP deposit system

The Romanian Copyright Office (ORDA)<sup>209</sup> administrates six national registers for different categories of works protected by copyright, including the National Registry for Videograms; the National Registry for Multipliers of CD's, Audio and Video Tapes; the National Registry for Private Copy; and the National Registry for Work. The system has a legal basis (Law No.8/1996 on copyright and related rights, with its subsequent amendments and completions, and Governmental Ordinance No. 25/2006 with subsequent completions and modifications). Registration establishes a presumption of authorship but it does not provide evidence of the date of creation; however, the courts do recognise the deposit in relation to dating evidence.

Only nationals may deposit in the system. The deposit can be done electronically and it is designed using cryptographic methods such as electronic timestamps, signatures etc. Users of the system are authenticated. Information submitted by depositors is examined upon filing, and ORDA keeps a copy of the work. The system has a public search facility; however, the deposited elements are kept confidential. Depositors can revoke, renew or transfer the deposit, or license the content. The deposit fee is determined according to the methodological norms and tariffs established by Government Decision. Registration is optional, and the existence and content of a work may be proven by any means of evidence, including its presence in the repertoire of a collective management organization.

#### 3.2.10.1.2. Private deposit systems

In the present study, private deposit systems were only selected by way of example. No example was selected for Romania. Moreover, the replies to the survey and further desk research provided no information about voluntary deposit systems run by private companies based in Romania.

#### 3.2.10.1.3. CMO deposit systems

The collective management organisation for Romanian authors of audiovisual works, DACIN- SARA<sup>210</sup>, operates a physical deposit system. According to the title "Copyright deposit of audiovisual projects and scenarios" of DACIN-SARA's statutes, films, synopsis, scripts, clippings, audiovisual formats etc. (independently of their disclosure to the public)

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<sup>209</sup> <http://www.orda.ro/default.aspx?lang=en>, accessed August 2017.

<sup>210</sup> The society of Romanian authors of audiovisual works, <http://dacinsara.ro/>, accessed August 2017.



may be deposited. Once the work(s) has/have been deposited, the CMO issues a copyright number and a date. The certificate has legal value in the context of litigation.

The system is open to depositors (rightsholders and producers of audiovisual works) of any nationality. The depositor has to provide information on the time of deposit and the type of work or content deposited, the name of the author, and proof of identity (a copy of his or her identity card). The work will then be registered in the legal deposit system. It will be sealed in an envelope and kept in the legal deposit archive for five years. The deposit body does not acquire any rights, and the work or content deposited is never accessible to the general public.

### 3.2.10.2. Deposit systems established for the preservation of cultural heritage

#### 3.2.10.2.1. Legal deposit system

The National Library of Romania administers a legal deposit system organised according to Law No. 111/1995 on the Legal Deposit of Documents, republished in November 2007. It is authorised at central level to exert the role of National Agency for Legal Deposit. The legal deposit is organised at a local level, by the county libraries and by the Bucharest Metropolitan Library. However, according to Article 5 of Law 111/1995, artistic and documentary full-length and short-reel films; advertisement supplies for commercial purposes; and items containing classified information are not considered to be legal deposit items and must not be sent to the legal deposit.

The national film archive Arhiva Nationala de Filme (ANF)<sup>211</sup> (see below) maintains a legal deposit of Romanian films (including related materials) made before 1997 with financing from the state budget, from the budget of some state units or from the National Center of Cinematography.

#### 3.2.10.2.2. Film archive deposit system

The national film archive Arhiva Nationala de Filme (ANF)<sup>212</sup> administers a physical (offline) deposit system. The system has a legal basis (Article 4(2) and (3) of Romania's Government Resolution No. 1063 of 8 September 2005 regarding the organisation and the function of the National Film Archive)<sup>213</sup>. The primary and intermediate materials and copies of films produced by Romanian private producers are kept in the custody of the Arhiva Nationala de Filme as a voluntary deposit.

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<sup>211</sup> <http://www.anf-cinemateca.ro/>, accessed August 2017.

<sup>212</sup> <http://www.anf-cinemateca.ro/>, accessed August 2017.

<sup>213</sup> HOTĂRÂRE nr.1.063 din 8 septembrie 2005 privind organizarea și funcționarea Arhivei Naționale de Filme. The text in Romanian is available at [http://www.cdep.ro/pls/legis/legis\\_pck.http\\_act\\_text?id=67114](http://www.cdep.ro/pls/legis/legis_pck.http_act_text?id=67114), accessed August 2017.



There are no requirements as to the information which the depositor has to provide with regard to the work or content deposited. The main steps in the procedure are (1) submission of an official deposit request; (2) deliverance of an official answer; (3) submission of content; (4) deposit. The deposit body does not acquire any rights in the content deposited. The films may be accessible to the general public after a decision of the national archive.

## 3.2.11. Sweden

### 3.2.11.1. Deposit systems established to facilitate the enforcement of IPR

#### 3.2.11.1.1. IP deposit systems

It appears that there is no IP deposit system in Sweden.

#### 3.2.11.1.2. Private deposit systems

In the present study, private deposit systems were only selected by way of example. No example was selected for Sweden. Moreover, the replies to the survey and further desk research provided no information about voluntary deposit systems run by private companies based in Sweden.

#### 3.2.11.1.3. CMO deposit systems

The replies to the stakeholder survey do not provide information about deposit systems managed by CMOs in Sweden.

### 3.2.11.2. Deposit systems established for the preservation of cultural heritage

#### 3.2.11.2.1. Legal deposit system

The National Library of Sweden, a governmental authority belonging to the Ministry of Education and Research<sup>214</sup>, manages a legal deposit system.

The system was established for the main purpose of humanities research. It is operated both offline and online. Sweden has had a legal deposit law for books since the 17<sup>th</sup> century and for audiovisual material since 1979. The Legal Deposit Act for Electronic

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<sup>214</sup> The Swedish government regulates the National Library's activity by adding more detailed instructions each year.

Materials serves as a complement to the Legal Deposit Act, and has been in effect since 1 July 2012. The system is open to films and related materials, including screenplays, storyboards and any other documents that may be protected by copyright and that may be used in the pre-production of an audiovisual work, or music. Computer games are also deposited. Only Swedish producers of audiovisual or cinematographic works, broadcasters and distributors make deposits.

The depositor is required to provide information on the publication details and metadata with regard to the work deposited (for example, a CD with its booklet or electronic materials/files with metadata). As for the main steps in the deposit procedure, physical objects have to be manually catalogued. For digital deposits, the files of the metadata are processed automatically and cross-referenced in the Swedish Media Database<sup>215</sup> or in libris<sup>216</sup>. Researchers (and depositors) have access to the National Library's audiovisual collections. Works contained in the library's collections may be used, watched, or listened to by persons who are writing a university-level paper or thesis; by authors or journalists; or by persons doing research for artistic activities. The files from the electronic legal deposit are not made available.

#### 3.2.11.2.2. Film archive deposit system

The Svenska Filminstitutet<sup>217</sup> administers a contractual physical (offline) film deposit, which has been in place since 1980. The Swedish Film Institute is a publicly funded foundation, which performs the duties of a national film archive and a national film funding body.

Producers and distributors (of any nationality) receiving funding subsidies from the Film Institute have to deposit certain elements with the archive (for example, information about the time of deposit and about the type of work or content deposited). The archive also comprises non-film material such as posters, stills, or manuscripts. The depository determines the specifications of the material. Deposit is a condition for receiving full funding, and for being eligible for funding in the future. Since 1 January 2017, contractual deposit also covers any entity receiving import and/or distribution subsidies from the Film Institute; that is, the archive also comprises some non-national films distributed in Sweden. If the rightsholder grants authorisation, viewing copies (DCPs) can become generally available to the public for theatrical screenings. Low resolution copies of all deposited films can be viewed in the Film Institute's library, which is open to the public.

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<sup>215</sup> <http://libris.kb.se/?language=en>, accessed in August 2017.

<sup>216</sup> <http://www.kb.se/english/find/databases/>, accessed in August 2017.

<sup>217</sup> <http://www.filminstitutet.se/filmarkivet>, accessed in August 2017.

## 3.2.12. United Kingdom

### 3.2.12.1. Deposit systems established to facilitate the enforcement of IPR

#### 3.2.12.1.1. IP deposit systems

It appears that there is no IP deposit system in the United Kingdom.

#### 3.2.12.1.2. Private deposit systems

Digital deposit and content management systems administered by private entities based in the United Kingdom were identified. One such online service, run by a not-for-profit organisation, offers its users the possibility of registering, licensing and sharing creative works and other content. Users select an 'IP tag' and provide information relating to the names of the creators and their permission for usage of the work (license and payment terms can be inserted). The system automatically generates a unique URL which, together with the 'IP tag', can be inserted into the respective content in order to identify the creator/owner and the terms of use.

Users of the system can share content through the file transfer system offered by the entity managing the system. Three different types of subscription entailing different costs and features are available (free; approximately GBP 45 per year; approximately GBP 125 per year). The last option offers advanced content management features, including data storage (that is, deposit).

#### 3.2.12.1.3. CMO voluntary registration/deposit systems

Members of the Authors' Licensing and Collecting Society ("ALCS")<sup>218</sup> "register" their works so that ALCS can collect and distribute royalties and residuals.

The system has no legal basis in the national law. It is operated both physically (offline) and digitally (online). Only members of ALCS can deposit films, TV series, screenplays, storyboards, and any related material that may be protected by copyright. The depositor is required to provide information on the type of work or content deposited, as well as proof of authorship or ownership of rights. A copy of the work itself is not deposited with ALCS, only the data relating to it. The data relating to audiovisual works is stored in a private database and used to match against data on the licensed use of works to enable distribution of fees. ALCS receives a mandate from each member to exploit certain rights and collect and distribute the resulting income. The work deposited is not accessible to the general public.

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<sup>218</sup> <https://www.alcs.co.uk/>, accessed August 2017.

### 3.2.12.2. Deposit systems established for the preservation of cultural heritage

#### 3.2.12.2.1. Legal deposit system

There appears to be no legal deposit for audiovisual works in the United Kingdom.

#### 3.2.12.2.2. Film archive deposit system

The British Film Institute (BFI)<sup>219</sup> is a film fund that manages a contractual deposit system.

The system has no legal basis in the national law. It is operated both offline and online. Films, screenplays, storyboards and any other documents that may be protected by copyright and that may be used in the pre-production of audiovisual work, such as stills and posters, may be deposited. Only companies or productions (rightsholders and producers) that receive production funding from the BFI Film Fund deposit in the system.

The depositor is required to provide information on the type of work deposited, proof of authorship or ownership of rights, and contracts with rightsholders of the audiovisual work. Awards are given to producers who meet a range of criteria, including the above-mentioned. Producers in receipt of lottery funding via the Film Fund have to deliver their material as part of funding deliverables. The material is delivered to the BFI Film Fund who then liaises with the BFI National Archive<sup>220</sup> to deposit and preserve digital items. The delivery of archive materials is obligatory, and provided in the funding agreement. The deposit body acquires the right to digitise copies for preservation. The work deposited is accessible to the general public subject to rights clearance.

## 3.3. Concluding remarks

Deposit systems exist in all twelve countries covered by the stakeholder survey.<sup>221</sup> Different types of deposit systems coexist within the EU and within (most) Member States. In theory, deposit systems may fulfil multiple functions. According to the survey replies, however, the different deposit systems have been established for a main purpose, which is usually either the preservation of cultural (film) heritage, or the facilitation of enforcement of IP rights. Legal deposits and film archive deposit systems fall within the former category; IP deposit systems, CMO deposit systems and private deposit systems within the latter. Deposit systems established for the main purpose of preserving cultural (film) heritage exist in all 12 Member States. IP deposit systems were identified in eight Member States; they coexist alongside CMO and private deposit systems. As to the features of the different types of systems, certain overlaps could be spotted. To name an

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<sup>219</sup> <http://www.bfi.org.uk/>, accessed August 2017.

<sup>220</sup> <http://www.bfi.org.uk/archive-collections>, accessed August 2017.

<sup>221</sup> The Benelux countries (Belgium, Luxembourg, the Netherlands), France, Germany, Hungary, Italy, Lithuania, Portugal, Romania, Sweden and the United Kingdom

example, legal deposits and well as some film archive deposit systems, and IP deposit systems, all managed by public bodies, usually have a legal basis. There are also differences or at least variations between, but also within, the systems in the two main categories, as well as within the types of systems in the different countries looked at. These may relate, for example, to the accessibility of the works deposited by the general public, the rights acquired by the deposit body or the possibility of digital deposit.



## 4. Pan-European initiatives from the industry

Both copyright enforcement and the preservation of the audiovisual heritage are issues that are normally handled on a country per country basis.<sup>222</sup> However, these issues have a global impact and require coordination at international level. For example, a film that is illegally offered on the Internet from a single country will be available worldwide. Even if copyright is territorial by nature<sup>223</sup>, copyright enforcement raises important questions of jurisdiction and applicable law in cases of infringement of rights online.<sup>224</sup> The preservation of our common audiovisual heritage is equally a matter for global attention. Often, there is a single copy of a given film hidden in a film archive and virtually nobody is aware of that fact. If this film gets lost or destroyed because of a lack of support for its preservation in its country of origin, the audiovisual work contained therein may be lost forever.

This chapter describes the main umbrella organisations in the field of audiovisual heritage preservation at European and international level. Furthermore, it looks at different initiatives from CMOs and the industry in relation to the voluntary deposit of creative works for copyright enforcement purposes. It analyses a number of private

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<sup>222</sup> EU law has, however, to a certain extent, harmonised measures and remedies for the enforcement of IPR such as injunctions or damages. See, in this context, the provisions of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (the Enforcement Directive); Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (article 8); or Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market. In addition, the TRIPS Agreement contains provisions on the means of enforcing IPR, which are common standards applicable at international level and implemented in all EU member states. International conventions to which all EU member states are parties and which also contain provisions on the means of enforcing IPR include (in the field of copyright and related rights) the Berne Convention for the Protection of Literary and Artistic Works, and the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (see recitals 4, 5 of the Enforcement Directive).

<sup>223</sup> See Cabrera Blázquez F.J., Cappello M., Grece C., Valais, S., *Territoriality and its impact on the financing of audiovisual works*, IRIS Plus, European Audiovisual Observatory, Strasbourg, 2015,\* <http://www.obs.coe.int/documents/205595/8261963/IRIS+plus+2015en2.pdf/ad5c5a8f-4e85-4e3c-b763-9c763895da1e>

<sup>224</sup> See Cabrera Blázquez F., Cappello M., Grece C., Valais, S., *Copyright enforcement online: policies and mechanisms*, IRIS Plus, European Audiovisual Observatory, Strasbourg, 2015, <http://publi.obs.coe.int/documents/205595/8261963/IRIS+plus+2015en3.pdf/890ed458-f2a3-40b1-b4a6-2ac0d6310cbe>.

initiatives, based on the information gathered through the survey and additional desk research.

## **4.1. Umbrella organisations in the preservation field**

### **4.1.1. ICA**

The International Council on Archives (ICA)<sup>225</sup> is dedicated to the effective management of records and the preservation, care and use of the world's archival heritage through its representation of records and archive professionals across the globe.

The ICA strives to protect and ensure access to archives through advocacy, setting standards, professional development, and enabling dialogue between archivists, policymakers, creators and users of archives.

### **4.1.2. IASA**

The International Association of Sound and Audiovisual Archives (IASA) was established in 1969 in Amsterdam to function as a medium for international co-operation between archives that preserve recorded sound and audiovisual documents.

IASA has members from 70 countries representing a broad palette of audiovisual archives and personal interests which are distinguished by their focus on particular subjects and areas, for example, archives for all sorts of musical recordings; historic, literary, folkloric and ethnological sound documents; theatre productions and oral history interviews; bio-acoustics; environmental and medical sounds; linguistic and dialect recordings; as well as recordings for forensic purposes.

### **4.1.3. FIAF**

The International Federation of Film Archives (FIAF)<sup>226</sup> has aimed to preserve and provide access to the world's film heritage since 1938. Its affiliates are committed to rescuing, collecting, preserving, screening, and promoting films which are valued both as works of art and culture, and as historical documents. Its missions are the following:

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<sup>225</sup> <https://www.ica.org/en>.

<sup>226</sup> <http://www.fiafnet.org>. As of May 2017, FIAF comprises more than 164 institutions in 75 countries.



- to uphold a code of ethics<sup>227</sup> for film preservation and practical standards for all areas of film archive work;
- to promote the creation of moving image archives in countries which lack them;
- to seek the improvement of the legal context within which film archives carry out their work;
- to promote film culture and facilitate historical research on both a national and international level;
- to foster training and expertise in preservation and other archive techniques;
- to ensure the permanent availability of material from the collections for study and research by the wider community;
- to encourage the collection and preservation of documents and materials relating to the cinema;
- to develop co-operation between members and to ensure the international availability of films and documents.

#### 4.1.4. FIAT/IFTA

The Fédération Internationale des Archives de Télévision/The International Federation of Television Archives (FIAT/IFTA)<sup>228</sup> is a global network of broadcast archives founded in 1977. Its mission is the promotion of co-operation amongst radio and television archives, multimedia and audiovisual archives and libraries, and all those engaged in the preservation and exploitation of moving image and recorded sound materials and associated documentation. Its main objectives are the following:

- to provide a forum for exchange of knowledge and experience between its members,
- to promote the study of any topic relevant to the development and valorisation of audiovisual archives and
- to establish international standards on key issues regarding all aspects of audiovisual media management.

FIAT/IFTA encourages and organises an annual conference in different locations in the world, as well as international seminars, and local and regional meetings. It also develops a specific action through the “Save your Archive” programme, aimed at those collections or archives in need of urgent assistance or financing. Furthermore, it awards an annual Archive Achievement Award to projects involving the best use of audiovisual archive material, the most innovative use of an archive, and the best archive preservation project.

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<sup>227</sup> FIAF Code of Ethics, <http://www.fiafnet.org/pages/Community/Code-Of-Ethics.html>.

<sup>228</sup> <http://fiatifta.org>. It is composed of more than 250 member organisations.

#### 4.1.5. ACE

The Association of European Cinémathèques (ACE) is an affiliation of 44 national and regional preservation film archives from all over Europe. Its role is to protect the European film heritage and to ensure that the audiovisual records of the past can be enjoyed and studied for generations to come. ACE's main aims are to guarantee the survival of the European film heritage and to ensure and enhance its continuing visibility on the cinema screen as well as through digital technologies.

To achieve these aims, ACE strives to:

- promote public interest in European film culture and its history;
- awaken awareness of its cultural and economic value among European decision-makers and the audiovisual industry;
- create favourable economic and legal conditions to allow the European film archives to fulfil their professional tasks;
- raise sufficient funds to safeguard the medium;
- co-ordinate support for the preservation, restoration and digitisation of films preserved in European archives; and
- encourage European-wide technical and scientific research in the field of preservation, restoration and digitisation of film materials.

### 4.2. Initiatives at international or European level

#### 4.2.1. Copyright enforcement

##### 4.2.1.1. CIS

CISAC operates the Common Information System (CIS)<sup>229</sup> which is a worldwide digital rights management system, based on the standardised identification of creative works and linked data exchange networks between the CISAC societies. It also runs an online database that CMOs consult to obtain accurate information about audiovisual works and rightsholders. This voluntary system does not have a legal basis. Audiovisual productions such as films, TV programmes, documentaries, series, and short audiovisual works can be deposited. Only CMOs can deposit in the system. A minimum set of information is required to deposit a work: the original title, the foreign title, the subtitle, the production company, the year and country of production, the shooting language, the rightsholders, the ISAN (International Standard Audiovisual Number), IPI (Interested Party Information), the exploitation purposes, a unique IDA code (unique IDA codes are used between CMO

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<sup>229</sup> <http://www.cisac.org/What-We-Do/Information-Services>.

when exchanging information on an audiovisual work), and the type of rights (primary and/or secondary public communication) with regard to the work or content deposited. CMOs use the IDA code to identify the transmitted audiovisual production and the rightsholders, and to retrieve and process the information before distributing the royalties to the identified sister organisations. The sister organisation itself will transfer these royalties to the authors. The deposit body does not acquire any rights in the content deposited. The deposited work is never accessible to the general public; however, the deposited work is open to all CISAC member societies.

#### 4.2.1.2. Private deposit services at international level

As previously mentioned, our desk research shows that there are many services that operate internationally, with websites in different languages and even with one main domain name declined nationally (for example, domainname.es, .pt, .fr, etc.). These services offer registration online from anywhere in the world, creating proof of anteriority for the existence of a work.



## 5. Case law

In every case of copyright infringement, the first thing that has to be determined is the identity of the author or rightsholder whose rights have been allegedly infringed upon. This is important in cases of direct copyright infringement, for example, the unauthorised making available of a copyright-protected work on the Internet. It is even more important in cases where the authorship of a work is disputed, or an author is accused of plagiarising another author. In order to rule on such issues, national courts<sup>230</sup> have to decide on a case-by-case basis who has the burden of proof and whether such proof is admissible and, most importantly, definitive.

This chapter presents selected case law from different EU countries, with special focus on France. Its aim is to present in a non-comprehensive manner recent examples of how national courts deal with legal issues related to the proof of authorship/ownership in copyright court litigation. They demonstrate, if need be, how important it is for rightsholders to be in a position to be able to prove authorship or ownership of rights.

### 5.1. Copyright infringement

#### 5.1.1. Proof of ownership

Video sharing platforms like YouTube allow the making available of an unlimited amount of works, many of them copyrighted. Everybody knows that you can find everything on YouTube. But if a rightsholder just goes to the judge and says: “Hey, YouTube is allowing the sharing of my works”, the judge will answer with at least two questions: “Which works are you talking about?” and “How do I know that these are your works?”. In other words, courts require strict proof of ownership.

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<sup>230</sup> The issue of authorship of a cinematographic or audiovisual work has been harmonised at EU level (but only in a partial way) in recognising the principal director of a film as its author or one of its authors. However, the way to prove authorship of a work is a question that remains outside of the *acquis communautaire*, and, accordingly, there is no relevant case law from the Court of Justice of the European Union. See Report from the Commission to the Council, the European Parliament and the Economic and Social Committee on the question of authorship of cinematographic or audiovisual works in the Community, COM/2002/0691 final, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52002DC0691:EN:HTML>.

The French broadcaster TF1 knows this only too well. On 29 May 2012, the Paris Regional Court rejected its claims as well as those brought by its subsidiaries (the channel LCI, TF1 Vidéo and TF1 International) against YouTube on the grounds of infringement of copyright, unfair competition and parasitic use. According to the plaintiffs, YouTube had made available a whole range of their films, series, sports events and broadcasts, including some prior to any broadcasting or commercial use in France. However, the court found that the applicant parties had not produced proof of the rights they invoked. For example, the court observed that TF1 Vidéo was not the holder of the economic rights of the producers of the videograms at issue since it had only acquired the right to use them and failed to provide proof of the exclusivity it claimed. Similarly, the company TF1 Droits Audiovisuels, depending on the works involved, either did not prove that it was the actual producer, or did not provide proof that it had reached an agreement with other co-producers or had their authorisation to act alone. Concerning the channels TF1 and LCI themselves, reproducing their programmes and making them available to the public were indeed subject to their authorisation, in accordance with Article 216-1 of the French Intellectual Property Code. But the court recalled that there was no presumption of ownership of rights as required in order to be able to benefit from this protection. It was for the party making the claim to demonstrate the existence of the programme and the proof that it had been broadcast before it was allegedly shown again on YouTube. In the case at hand, the court deemed the documents produced as proof (programme schedules, press files, etc.) insufficient, and the claims brought by the channels on the basis of Article L. 216-1 of the CPI were declared inadmissible except for some sport-related content for which the required elements of proof had been produced.

Sometimes, the rightsholder has proof of ownership, but this is not accepted by the court. The judgment of the German Bundesgerichtshof (Federal Supreme Court - BGH)<sup>231</sup> of 19 November 2010 is a good example of this. Here, the BGH had to decide, amongst other things, on the ownership of photographs related to a film production in a case concerning the use of photographs taken in connection with the production of a film. The defendant operated an online archive of around 400 000 photographs from various films, including some whose rights are owned by the plaintiff, a film producer. The plaintiff argued that this service breached her rights over the photographs and film recordings under Articles. 72, 91, 94 and 95 UrhG and demanded compensation from the defendant. Regarding the right of non-cinematographic exploitation of the images (Articles. 72 and 2 paragraph 1 No. 5 UrhG), the BGH ruled that this belonged, in principle, to the photographers. The plaintiff claimed that she had acquired the rights from the photographers, but she had not provided sufficient proof that this was the case. However, the BGH upheld complaints submitted with the appeal, according to which the Court of Appeal had made a procedural error by refusing the plaintiff's request to produce evidence that she had acquired these rights. The Court of Appeal first pointed out to the

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<sup>231</sup> Judgment of the Federal Supreme Court, of 19 November 2009, case no: I ZR 128/07, <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=df81ca3401f6b8ef8e6bc2ca0b713282&nr=52132&pos=0&anz=1&Blank=1.pdf>. For more information on this case see Yliniva-Hoffmann A., "BGH Rules on Unauthorised Use of Film Images", IRIS 2010-7/14, <http://merlin.obs.coe.int/iris/2010/7/article14.en.html>.

plaintiff in the oral hearing on 5 July 2007 that the dispute may be judged in a substantive and legal manner different from that of the Regional Court and that it could therefore depend on the contractual agreements with the cameramen. Consequently, the plaintiff should have been given the opportunity<sup>232</sup> to adjust to the legal assessment which differs from the opinion of the first court and to bring forward new means of proof which have therefore become necessary. Consequently, the BGH annulled the appeal court's decision and referred the case back for a new hearing and ruling.

### 5.1.2. Anteriority

If copyright law had existed in the Elizabethan era and had its term been eternal, William Shakespeare would have been in deep legal trouble. *Romeo and Juliet's* sources go back to the forgotten Arthur Brooke's *The Tragical History of Romeus and Juliet*, and he, in turn, owes it all to Ovid's *Pyramus and Thisbe*. Hamlet was based on *Amleth, Prince of Denmark* from the *Gesta Danorum* of Saxo Grammaticus, which was written in about 1185 but based on older oral tradition...<sup>233</sup>

An unauthorised reproduction of a work which infringes someone else's copyright necessarily implies that the infringing work was created after the infringed one. That is why proof of anteriority is fundamental in a court case concerning copyright infringement. A French scriptwriter who claimed that the film *The Artist*, released in October 2011, plagiarised his project for a silent cinema film in black and white learned this at his own expense. The scriptwriter sued the author and the director of the film *The Artist* together with the film's producers for infringement of copyright. In the case at hand, the plaintiff argued that he had written two versions of his screenplay, one in 2006 and the other in 2008, and claimed the anteriority of his screenplay, on which he had worked for more than ten years. The plaintiff based his claim on the production of two screenplay handouts, testimony, attestations from various cinema technicians, and correspondence in relation to financing for the applicant's 'Timidity' project. However, the Court concluded that none of the documents produced by the plaintiff made it possible to determine the content of his projects, or the exact date of the creation of the screenplays. Actually, the earliest date the Court could ascertain was seven months after 'The Artist' had been released; therefore, the Paris Regional Court ruled that the plaintiff had no standing in taking legal action for infringement of copyright, and his claims were judged totally inadmissible.<sup>234</sup>

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<sup>232</sup> See § 139 para. 2 of the *Zivilprozessordnung* (Code of Civil Procedure), [https://www.gesetze-im-internet.de/zpo/\\_139.html](https://www.gesetze-im-internet.de/zpo/_139.html). An English version is available at: [https://www.gesetze-im-internet.de/englisch\\_zpo/englisch\\_zpo.html](https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html).

<sup>233</sup> See Cabrera Blázquez F.J., "Plagiarism: an Original Sin?", European Audiovisual Observatory, 2005, [http://publi.obs.coe.int/documents/205602/2407425/FCabrera\\_Plagiarism\\_EN.pdf](http://publi.obs.coe.int/documents/205602/2407425/FCabrera_Plagiarism_EN.pdf).

<sup>234</sup> The defendants also brought a counterclaim on the grounds of abuse of process. The Court found that the plaintiff (now defendant) had caused the defendants (now plaintiffs) prejudice by damaging their reputations, and therefore ordered him to pay EUR 18 000 to the producers and the executive producer of "The Artist". See

A similar case concerned a Hollywood animated blockbuster, *Finding Nemo*, and a less famous illustrated children's book entitled *Pierrot le poisson clown* (Pierrot the clown fish). On 20 April 2005, the Paris Regional Court decided that the applicant company did not have copyright in respect of either the work *Pierrot le poisson clown* and its cover or the character itself. According to the court, no proof had been brought in the present case that the co-authors of the work had assigned their rights to the applicant publishing company. The Court applied the same reasoning to the rights claimed by the company in respect of the clown fish. Regarding the claims based on infringement of copyright in the trade name registered by the company, the court examined the chronology of events and found that the plaintiff had had knowledge of *Finding Nemo* (the trailer, for example, had been shown in France as early as September 2002) before the trade name was registered on 18 February 2003 and indeed before the company itself had been registered. Thus, it was demonstrated that the plaintiff's manager had been able to complete the graphic illustration of Pierrot after he had seen the graphic image of Nemo, as the illustrations produced prior to 2002 were very different from those finally registered for the Pierrot character. The Court, noting furthermore that the applicant company claimed infringement of copyright more than four months before the trade name was registered, found that the registration had been made solely with a view to preventing the companies Disney and Pixar from registering the trade name and commercially exploiting their spin-offs. The Court therefore declared the registration of *Pierrot le poisson clown* null.

### 5.1.3. Burden of proof

Drawing the boundaries of copyright infringement in cases of plagiarism is an exercise of legal virtuosity; only in very precise cases might acts of plagiarism constitute copyright infringement and therefore be sanctioned through civil and criminal law penalties.<sup>235</sup> In order to determine infringement, three conditions must be cumulated:

- 1) the plagiarised work must be protected by copyright;
- 2) the author does not give authorisation for the use of his/her work; and
- 3) there is a false attribution of authorship.

The most blatant case of plagiarism is of course an unauthorised reproduction of a work with false attribution of authorship. But plagiarism is rarely just plain copying. In most cases the plagiarist will “mask” his larceny, for example, by changing the form, style, time and place of the plot or by introducing new characters. In such cases, the infringing work

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Blocman A., “Court finds alleged victim of screenplay piracy guilty of abuse of process against authors and producers of ‘The Artist’”, IRIS 2016-4/12, <http://merlin.obs.coe.int/iris/2016/4/article12.en.html>.

<sup>235</sup> For a detailed discussion of plagiarism as copyright infringement see Cabrera Blázquez F.J., *op.cit.*



is actually a derivative work from the infringed one. This implies that the plagiarist had access to the original work, and excludes cases in which a work shows similarity with another, but with no connection between them. That is, for instance, the case of parallel creations, in which two authors independently create similar works at the same time.

Proving access to the original work is often very difficult to achieve. That is why placing the burden of proof on the rightsholder is fundamental in cases of plagiarism. In a judgment of 2 October 2013,<sup>236</sup> the French Court of Cassation decided that it was up to the alleged infringer to prove that he could not have access to the work. In this case, the plaintiff was the author of a novel and claimed that several episodes of a television series, broadcast on a French TV channel, had used the subject, plot and main characters of his novel. He brought an action for infringement of copyright and infringements of his honour against the broadcaster and the producers of the series.

According to the Court of Appeal, in order to dismiss application for infringement, the applicant for infringement must establish that the author of the second work had, depending on the specific circumstances of each case, been in a position to have knowledge of the first work. According to the court, the plaintiff did not adduce evidence that the producers and broadcaster of the series could have been aware of the novel before writing the screenplay and shooting the allegedly infringing episodes, or even before they were broadcast.

The Court of Cassation overturned this judgment by recalling that, according to Articles L. 111-1, L. 111-2 and L. 122-4 of the Intellectual Property Code, together with Article 1315 of the Civil Code, the infringement of a copyrighted work results from its mere reproduction and can only be ruled out where the contesting party proves that the similarities between the two works arise from a fortuitous encounter or of reminiscences from a common source of inspiration.<sup>237</sup> According to the Court of Cassation, it is up to the alleged infringer to prove that he/she could not have had access to the work. The case was referred to the Lyons Court of Appeal.<sup>238</sup>

It is noteworthy here that French jurisprudence has consistently excluded “good faith” as defence against infringement in civil law cases.<sup>239</sup>

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<sup>236</sup> Judgment of the Court of Cassation of 2 October 2013 (12-25.941), First Civil Chamber, <https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000028039256>.

<sup>237</sup> See also Cordelier M., « Charge de la preuve de la coïncidence en matière de contrefaçon et exclusion de la bonne foi en propriété intellectuelle », <http://lexone.fr/charge-de-la-preuve-de-la-coincidence-en-matiere-de-contrefacon-et-exclusion-de-la-bonne-foi-en-proprieete-intellectuelle>.

<sup>238</sup> See also Blocman A., “Novel’s Copyright Allegedly Infringed by a Television Series”, IRIS 2013-10/21, <http://merlin.obs.coe.int/iris/2013/10/article21.en.html>.

<sup>239</sup> See for example, Blondieau A., « Contrefaçon : la bonne foi du contrefacteur, élément indifférent devant le juge civil », <https://www.village-justice.com/articles/Contrefacon-bonne-contrefacteur-element,15105.html>.

#### 5.1.4. Metadata as proof

Long gone are the times in which photography meant film, a dark room and developing chemicals. If there are still some people who prefer to shoot film, they are a passionate, although small minority.<sup>240</sup> For good or for bad, in the 21<sup>st</sup> century, photography means digital.

A digital photograph (the same goes for a digital copy of an audiovisual work) is actually a computer file,<sup>241</sup> and as such, it is possible to store additional information about the image in the digital file itself via metadata, that is, data that provides information about other data,<sup>242</sup> like for example, the identification of the author of the work, the date of creation, or any other information relevant to the work in question.

In a judgment of 28 March 2017,<sup>243</sup> the Austrian Supreme Court clarified the extent to which metadata included in a digital file amounts to proof of authorship. In this case, a photographer had made a portrait photo of a lawyer who wrote numerous articles in the daily newspaper published by the defendant. The photographer sent the photograph to the newspaper as an electronic file in JPEG format, the IPTC<sup>244</sup> metadata containing, amongst other things, the name of the author. The newspaper used this photo to illustrate the contributions of the journalist without quoting the name of the photographer. The association commissioned by the photographer to exercise her rights requested that the defendant not publish the photograph without quoting the photographer's name in accordance with § 74 Abs 3 UrhG.

The Court of First Instance had dismissed the photographer's claim because the photographer had neither stated in the invoice nor in the accompanying letter that the photograph may only be used with a quote of the photographer's name. Although her name was mentioned in the metadata under the heading "author", the defendant was neither the photographer's direct contractual partner nor did the defendant have to pay particular attention to copyrights, since the photographer's client had apparently given them the photograph. There was not such a close connection between the photographer's name and the photograph that the defendant had to have been aware of it in the normal course of events.

The Court of Appeal sided with the plaintiff and granted the injunction request. Since the defendant had received the photograph with the metadata, the court assumed that the photographer had made it sufficiently clear in the metadata that she wanted her name to be included in all publications of the photograph. It would have been reasonable for the defendant to look at the photographer's details (included in the metadata).

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<sup>240</sup> See for example, Cornwell S., "12 Reasons Photographers Still Choose to Shoot Film over Digital", <https://petapixel.com/2015/04/24/12-reasons-photographers-still-choose-to-shoot-film-over-digital/>.

<sup>241</sup> See [https://en.wikipedia.org/wiki/Image\\_file\\_formats](https://en.wikipedia.org/wiki/Image_file_formats).

<sup>242</sup> <https://www.merriam-webster.com/dictionary/metadata>.

<sup>243</sup> Judgment of the Austrian Supreme Court, case 4Ob43/17b, 28 March 2017, [https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JJT\\_20170328\\_OGH0002\\_00400\\_B00043\\_17B0000\\_000](https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JJT_20170328_OGH0002_00400_B00043_17B0000_000).

<sup>244</sup> See <https://iptc.org/standards/photo-metadata/iptc-standard/>.

The Supreme Court accepted the request to review the defendant's claim in order to clarify the legal situation, but upheld the Court of Appeal's decision. The Supreme Court made reference to its decision in *Rennbahn-Express*<sup>245</sup>, where it was considered sufficient for the required close connection if the name was written on the wrapping of the negative films, on the plastic bags used for the slides or on the reverse side of paper prints. According to this case law, the photographer does not have to make his name visible on the actual photograph. According to established jurisprudence, it is rather decisive for the obligation to mention the name whether it is possible for the defendant to take note of the photographer's name in the normal course of events when reproducing the photograph.<sup>246</sup> The Court of Appeal had rightly assumed, in the sense of the previous case law, that the metadata contained on the photograph was sufficiently linked to the photographer. If the wrapping of negative films or the reverse side of a paper print is sufficient, this must apply all the more so to the metadata of an image file, especially since the metadata is an easily retrievable part of the electronic file for the user.<sup>247</sup>

## 5.2. Preservation

### 5.2.1. Copyright exception for archives

Libraries, archives, and museums and other institutions, whose purpose it is to preserve a collection of copyright-protected works and to provide access thereto for research, education or private study, (may) benefit from several exceptions under EU law. Such exceptions limit copyright to accommodate key public-interest missions of the libraries, such as the preservation of and the access to knowledge and culture. However, all these exceptions are formulated in broad terms that allow a great degree of flexibility as to their implementation by member states.<sup>248</sup>

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<sup>245</sup> Judgment of the Austrian Supreme Court, case 4Ob341/86, 16 September 1986, [https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JIT\\_19860916\\_OGH0002\\_00400B00341\\_8600000\\_000](https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JIT_19860916_OGH0002_00400B00341_8600000_000).

<sup>246</sup> See *Rechtssatz* RS0077155, [https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JJR\\_19931012\\_OGH0002\\_00400B00121\\_9300000\\_001](https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JJR_19931012_OGH0002_00400B00121_9300000_001).

<sup>247</sup> For information on other relevant case law concerning proof of authorship regarding photographs in Germany see: Wagenknecht F., "Beweis und Vermutung der Urheberschaft an Bildern", <https://www.rechtambild.de/2011/03/beweis-und-vermutung-der-urheberschaft-an-bildern/>. See also Nimrod Rechtsanwälte, "Nachweis der Urheberrecht bei unberechtigter Bildernutzung", <https://nimrod-rechtsanwaelte.de/2017/08/22/nachweis-der-urheberrecht-bei-unberechtigter-bildernutzung/>.

<sup>248</sup> See Cabrera Blázquez F.J., Cappello M., Fontaine G., Valais S., *Exceptions and limitations to copyright*, IRIS Plus, European Audiovisual Observatory, Strasbourg, 2017, <http://www.obs.coe.int/documents/205595/8682894/IRIS+Plus+2017-1+Exceptions+and+limitations+to+copyright/b3410fd0-f574-419f-aba8-c81ba79f9fd1>.

In France, the Institut national de l' audiovisuel (National Audiovisual Institute - INA) has the mission of preserving and exploiting national audiovisual archives. It exercises the rights to exploit the audiovisual archives of the national programme companies in compliance with the moral and economic rights of holders of copyright or rights related to copyright and their successors in title. However, by way of derogation from Articles L. 212-3 and L. Article 212-4 of the French Intellectual Property Code, Article 49(II) of Act No. 86-1067 of 30 September 1986 on freedom of communication (Loi L  otard)<sup>249</sup> provides that the conditions governing the exploitation of performances by performers in the said archives and the remuneration for such exploitation shall be governed by agreements concluded between the performers themselves or the organisations of employees representing the performers and the INA. Such agreements specify in particular the scale of remuneration and the methods of payment of such remuneration.

On 14 October 2015, the French Court of Cassation had to rule on the scope of this derogation.<sup>250</sup> According to the Paris Court of Appeal's judgment, the INA had, without the rightsholders' authorisation, marketed videograms and a phonogram reproducing the performances of a deceased jazz drummer. His successors in title requested compensation for the alleged infringement of their performer's rights under Article L. 212-3 of the Intellectual Property Code, according to which the performer's written authorisation is required for the fixation of the performance, its reproduction and communication to the public, as well as for any separate use of the sound and image of the performance when it has been fixed for both sound and image.

The Court of Appeal held that the derogation provided for in Article 49(II) of the Loi L  otard applied only if the performer had authorised the fixation and the first destination of his performance. However, the Court of Cassation did not agree with this interpretation of the Loi L  otard, and ruled that, by making the application of the derogatory regime instituted for the benefit of the INA conditional on proof that the performer has authorised the first exploitation of his performance, the Court of Appeal had added a condition to the Loi L  otard and therefore had violated the law.

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<sup>249</sup> Loi n   86-1067 du 30 septembre 1986 relative    la libert   de communication (Loi L  otard), [\L "LEGIARTI000006420604](https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006068930)

<sup>250</sup> Judgment of the Court of Cassation of 14 October 2015 (14-19917), First Civil Chamber, <https://www.legifrance.gouv.fr/affichJurilJudi.do?oldAction=rechJurilJudi&idTexte=JURITEXT000031331624&fastReqlId=1749077316&fastPos=1>.

## 6. State of play

### 6.1. Ongoing initiatives from the Council of Europe

On a parallel track to what has been developed with the European Convention for the Protection of the Audiovisual Heritage, described in Chapter 2, the Council of Europe has been stressing the need to consider these issues in a holistic way. In the words of Goethe, when asserting the concept of collective ownership and the protection of heritage: “All works of art belong as such to the whole of humankind and their possession entails the duty to take care of their conservation”.<sup>251</sup>

In the recent Recommendation on the Internet of citizens adopted in 2016,<sup>252</sup> the section entitled “From consumers to prosumers and creative citizens” recalled that:

*Works from the 20th century which are out of distribution, have not been digitised and are very often ‘orphan works’, yet do not come within the scope of legal instruments of other international organisations, as well as a great quantity of cultural objects which are out of circulation, not usable or simply unavailable in the digital environment for reasons such as poor indexing and/or description, lack of interoperability, etc., should be preserved and made digitally available.*<sup>253</sup>

Following up on this recommendation, the Council of Europe is engaging with assessment activities aimed at understanding the impact of digitisation on culture on the basis of the assumption that “digitisation must be accompanied by enlightened cultural policies, if opportunities for access and participation, individual and collective creativity are to be fully used”.<sup>254</sup> Since 2013, annual exchange platforms have been set up; the 4<sup>th</sup> platform took place in Karlsruhe in October 2017 in order to discuss “Empowering Democracy through Culture – Digital Tools for Culturally Competent Citizens”.<sup>255</sup>

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<sup>251</sup> Goethe J. W. (von) (1799), Propyläen. Eine periodische Schrift, Tübingen, quoted in Swenson A. (2013), The rise of heritage. Preserving the past in France, Germany and England, 1789-1914, Cambridge University Press, p. 278.

<sup>252</sup> Council of Europe Recommendation of the Committee of Ministers to member States on the Internet of citizens, CM/Rec(2016)2, 10 February 2016, [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=09000016805c20f4#k=ams](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805c20f4#k=ams).

<sup>253</sup> Council of Europe Recommendation, cit, point 3.4.

<sup>254</sup> See <https://www.coe.int/en/web/culture-and-heritage/culture-and-digitisation>.

<sup>255</sup> See <https://www.coe.int/en/web/culture-and-heritage/karlsruhe>.

Another recommendation is, at the time of publication of this document, at the negotiation stage and will concern Big Data for culture, literacy and democracy.<sup>256</sup> It recalls:

*the need to develop strategies and policies and to create appropriate legal and institutional frameworks to preserve the digital heritage of lasting cultural, scientific, or other value, in co-operation with holders of copyright and neighbouring rights and other legitimate stakeholders in order, where appropriate, to set common standards and ensure compatibility and share resources; in this regard, access to legally deposited digital heritage materials, within reasonable restrictions, should also be assured.*<sup>257</sup>

Appendix I to this draft recommendation contains Guidelines concerning Processing of cultural Big Data, Critical digital media and information literacy, and Multistakeholder dialogue and action in which there is a reference to the need for the Council of Europe member states to promote “competences for individuals and communities to make informed choices and decisions on cultural Big Data and its possible effect on their cultural choices” by, amongst other things, “using digital means to unlock the potential of heritage for the creative ‘re-purposing’ of cultural content, new forms of expression, and cultural dialogue”.

## 6.2. Ongoing initiatives at EU level

### 6.2.1. The proposal of a new Copyright Directive

#### 6.2.1.1. New exception to the preservation of cultural heritage

As has already been said in Chapter 2, in the case of cultural heritage institutions (CHIs), Article 5(2)c of the current InfoSoc Directive provides an optional exception to the right of reproduction “in respect of specific acts of reproduction made by accessible libraries, educational establishments or museums, or by archives” provided that there is no economic exploitation of the protected works.

Typically, cultural institutions are allowed to make copies of the works which form their collections for the specific purpose of preservation, which may be particularly significant for the purposes of preserving film heritage. However, CHIs in some member

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<sup>256</sup> Draft Recommendation CM/Rec(2017) of the Committee of Ministers to member States on Big Data for culture, literacy and democracy, included in the minutes of the 6<sup>th</sup> meeting of the Steering Committee for Culture, Heritage and Landscape (CDCPP) on 10-12 May 2017, as reported in Appendix V to the agenda of 1295<sup>th</sup> meeting of the Committee of Ministers’ deputies on 27 September 2017, [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=090000168073c72a](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=090000168073c72a).

<sup>257</sup> Committee of Minister’s Draft Recommendation, cit, recital.

states are not able to engage in the digitisation of their collections because, for instance, the making of digital copies is not permitted by national laws (for example, because format-shifting or digital copying is not allowed).

Furthermore, CHIs are generally not allowed to engage in the “mass preservation” of their collections because the optional exception has, as a rule, been narrowly implemented across member states (only “specific” acts of reproduction are covered). CHIs may then be required to ask for the rightsholders’ permission to digitise their works, especially in large preservation projects which involve the copying of works that are not in need of preservation (implying certain acts of reproductions that do not fit the “specific” nature covered by article 5(2)(c) of the InfoSoc Directive).

This situation is likely to change should the new Copyright Directive be approved,<sup>258</sup> given the provision of a mandatory exception to allow CHIs “to make copies of any works or other subject matter that are permanently in their collections, in any format or medium, for the sole purpose of the preservation of such works”.

Article 5 of the proposed Copyright Directive takes into account the need for content in digital forms and the use of digital technology for preservation purposes when introducing a new mandatory exception:

*permitting cultural heritage institutions to make copies of any works or other subject-matter that are permanently in their collections, in any format or medium, for the sole purpose of the preservation of such works or other subject-matter and to the extent necessary for such preservation.*

#### 6.2.1.2. The set-up of a Union legal deposit system for publications dealing with Union-related matters

Although not directly connected to audiovisual works, an interesting initiative as regards libraries is the amendment proposed by the JURI Committee of the European Parliament with regard to the introduction of a new Article 10(a) in the new Copyright Directive setting up a Union legal deposit system for any publication that is related to matters of the European Union.

This new mandatory deposit would see as actors of the new obligations not only the publishers of electronic publications concerning the EU in various disciplines, but also printers and importers of publications, and the European Parliament Library would be conceived as the Union depository library. As explained by the new Recital 30a, “not only should such heritage be preserved through the creation of a Union archive for

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<sup>258</sup> European Commission, Proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market, 14 September 2016, COM(2016) 593 final, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016PC0593&from=EN>. For an overview of related documents see European Parliament, Legislative train schedule, Modern copyright rules: Directive on copyright in the digital single market, <http://www.europarl.europa.eu/legislative-train/theme-connected-digital-single-market/file-directive-on-copyright-in-the-digital-single-market>.



publications dealing with Union-related matters, but it should also be made available to Union citizens and future generations”.

## 6.2.2. Absence of EU initiatives on “IP enforcement” deposit systems

At the time of publication of this document, there is no legislative initiative for the creation of a deposit system at EU level for facilitating the enforcement of intellectual property rights, including copyright, by providing the depositor with evidence of the existence of their content.<sup>259</sup>

In 2016/2017, the European Observatory on Infringements of Intellectual Property Rights at EUIPO<sup>260</sup> carried out a feasibility analysis regarding a digital platform at EU level. The aim of such a platform would be to enable authors, inventors and other creators to upload their works or other content to a central repository in a secure and confidential manner so as to keep evidence of the existence of their creation, invention or other content at a certain moment in time. The feasibility analysis concluded that the creation of any such system would necessitate an EU legal basis, which, at the date of publication of this document, does not exist.

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<sup>259</sup> As mentioned in Chapters 2 and 3, a number of European countries have created such types of systems.

<sup>260</sup> European Observatory on Infringements of Intellectual Property Rights, Work Programme 2017, [https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document\\_library/observatory/documents/about\\_us/observatory\\_work\\_programme\\_2017\\_en.pdf](https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/about_us/observatory_work_programme_2017_en.pdf).



## 7. Annexes

## 7.1. Overview: types of deposit systems in the countries concerned by the study (BE, DE, NL, LU, FR, PT)

Type of entity	BE	DE	NL	LU	FR	PT
Deposit systems established for the facilitation of enforcement of IPR						
Voluntary deposit systems						
Public body	<p>I-Depot</p> <p><b>Benelux Office for Intellectual Property (BOIP)</b> Bordewijklaan 15, 2591 XR Den Haag, Netherlands <a href="https://www.boip.int">https://www.boip.int</a></p>	n/a	<p>I-Depot</p> <p><b>Benelux Office for Intellectual Property (BOIP)</b> Bordewijklaan 15, 2591 XR Den Haag, Netherlands <a href="https://www.boip.int">https://www.boip.int</a></p>	<p>I-Depot</p> <p><b>Benelux Office for Intellectual Property (BOIP)</b> Bordewijklaan 15, 2591 XR Den Haag, Netherlands <a href="https://www.boip.int">https://www.boip.int</a></p>	<p>Enveloppe Soleau / e-Soleau</p> <p><b>INPI</b> 15 rue des Minimes - CS50001 92677 Courbevoie Cedex</p> <p><a href="https://www.inpi.fr/fr/protoger-vos-creations/lenveloppe-soleau/enveloppe-soleau">https://www.inpi.fr/fr/protoger-vos-creations/lenveloppe-soleau/enveloppe-soleau</a></p> <p><a href="https://www.inpi.fr/fr/services-et-prestations/e-soleau">https://www.inpi.fr/fr/services-et-prestations/e-soleau</a></p>	<p><b>Inspecção Geral Das Actividades Culturais (IGAC)</b> Praça dos Restauradores 57 1150-193 Lisboa <a href="https://www.igac.gov.pt/formularios">https://www.igac.gov.pt/formularios</a></p>
	<p>Legal basis: Article 4.4bis <u>Benelux Convention on Intellectual Property</u> Part IV implementing</p>		<p>Legal basis: Article 4.4bis <u>Benelux Convention on Intellectual Property</u> Part IV implementing</p>	<p>Legal basis: Article 4.4bis <u>Benelux Convention on Intellectual Property</u> Part IV implementing</p>	<p>Legal basis: <u>Article R 511-6 Code de la propriété intellectuelle</u></p>	<p>Legal basis: Portuguese Copyright and Related Rights Code – article 213.º et seq and Decree Law</p>

	regulations		regulations	regulations		n.º 143/2014 for the registration of literary and artistic works
CMO	1. OnlineDepot  <b>Sabam/Artes</b> Aarlenstraat 75-77, 1040 Brussel <a href="http://www.sabam.be/nl/contacts">http://www.sabam.be/nl/contacts</a> <a href="http://sabam.depotonline.eu/startpage.aspx?Language=NL">http://sabam.depotonline.eu/startpage.aspx?Language=NL</a>	n/a	n/a	n/a	e-dpo <b>scala</b> <b>Société des auteurs et compositeurs dramatiques (SACD)</b> 11bis / 9 rue ballu 75009 Paris <a href="https://www.e-dpo.com/fr/">https://www.e-dpo.com/fr/</a>	<b>CISAC</b> 20 - 26 boulevard du Parc 92200 Neuilly-sur-Seine France <a href="http://www.cisac.org/">http://www.cisac.org/</a> (international system)
	2. e-dpo  <b>Huis van de Auteurs</b> Koninklijke Prinsstraat 87 1050 Brussel <a href="https://www.e-dpo.com/nl/">https://www.e-dpo.com/nl/</a>				Clicdépôt <b>Société civile des auteurs multimedia (Scam)</b> 5 avenue Vélasquez 75008 Paris <a href="http://www.scam.fr/Reper%C3%A8res-juridiques/Association-Scam-V%C3%A9lasquez">http://www.scam.fr/Reper%C3%A8res-juridiques/Association-Scam-V%C3%A9lasquez</a>	
Private entity	No system was identified.	Deposit with a notary public Online service was identified (time stamping and deposit with notary public)	Deposit with a notary public System identified (digital deposit/registry and management of content protected by copyright)	No system was identified.	System identified (digital deposit and generation of evidence)	No system was identified.

Deposit systems established for the preservation of cultural heritage						
Voluntary/contractual deposit systems						
Film archive/ film fund	<p>1. Cinémathèque Royale de Belgique / Koninklijk Belgisch Filmarchief</p> <p>Films deposited by two film funds:</p> <p>a. <b>Vlaamse audiovisuele fonds</b> (Dutch-language film fund) Bld Bischoffsheim 38, 1000 Bruxelles, Belgium <a href="http://www.vaf.be/">http://www.vaf.be/</a></p>	<p><b>Kinematheksverbund</b> c/o Deutsche Kinemathek – Museum für Film und Fernsehen Potsdamer Straße 2 D-10785 Berlin <a href="https://kvb.deutsche-kinemathek.de/">https://kvb.deutsche-kinemathek.de/</a> (umbrella organisation)</p>	<p><b>EYE Filmmuseum</b> IJpromenade 1, 1031 KT, Amsterdam T: +31 20 5891 427 eyefilm.nl</p> <p>EYE Collectie Centrum / Film Conservation &amp; Digital Access Asterweg 26 1031 HP Amsterdam</p>	<p><b>CNA – Centre national de l'audiovisuel</b> 1b, rue du Centenaire L-3475 Dudelange <a href="http://www.cna.public.lu/fr/film-tv/depot-images-animees/depot-volontaire/index.html">http://www.cna.public.lu/fr/film-tv/depot-images-animees/depot-volontaire/index.html</a></p>	No information was provided.	<p><b>Cinemateca Portuguesa-Museu do Cinema, IP</b> Rua Barata Salgueiro, 39 1269-059 Lisboa <a href="http://www.cinemateca.pt">www.cinemateca.pt</a></p>
	<p>b. <b>Centre de l'audiovisuel et du cinema</b> (French-language film fund) <a href="http://www.audiovisuel.cfwb.be/index.php?id=avm_cinema">http://www.audiovisuel.cfwb.be/index.php?id=avm_cinema</a></p>		<p><b>Nederlands Filmfonds</b> Pijnackerstraat 5 1072 JS Amsterdam <a href="http://www.filmfonds.nl">www.filmfonds.nl</a></p>			<p>Legal basis: DL n.º 124/2013 of 30 August, that regulates the Law n.º 55/2012 of 6 September</p>
	<p>2. <b>Cinémathèque de la Fédération Wallonie-Bruxelles</b></p> <p>Bd Léopold II, 44 1080 Bruxelles <a href="http://www.cinematheque.cfwb.be/index.php?id=8838">http://www.cinematheque.cfwb.be/index.php?id=8838</a></p>		<p><b>Nederlands Instituut voor Beeld en Geluid</b> Media Park, Postbus 1060 1200 BB Hilversum <a href="http://www.beeldengeluid.nl/en/visit">http://www.beeldengeluid.nl/en/visit</a> (broadcasting)</p>			<p><b>Portuguese Film Institute (ICA)</b> Praça Bernardino Machado, 4 1750-042 Lisboa <a href="http://www.ica-ip.pt/en/">http://www.ica-ip.pt/en/</a> (film fund)</p>
Mandatory deposit systems						
Film archive	n/a	Bundesarchiv - Filmarchiv Fehrbelliner	n/a	Service du dépôt legal	Centre national du cinéma et de l'image animée (CNC)	Portuguese Film Institute (ICA) Praça Bernardino

		<p>Platz 3 D-10707 Berlin <a href="http://www.bundesarchiv.de">www.bundesarchiv.de</a></p>		<p><b>CNA – Centre national de l'audiovisuel</b></p> <p>1b, rue du Centenaire</p> <p>L-3475 Dudelange</p> <p><a href="http://www.cna.public.lu/fr/audio/depot-audio/index.html">http://www.cna.public.lu/fr/audio/depot-audio/index.html</a></p> <p><a href="http://www.cna.public.lu/fr/film-tv/depot-images-animees/index.html">http://www.cna.public.lu/fr/film-tv/depot-images-animees/index.html</a></p>	<p>2, rue de Lübeck 75784 Paris cedex 16 <a href="http://www.cnc.fr/web/fr">http://www.cnc.fr/web/fr</a></p>	<p>Machado, 4 1750-042 Lisboa <a href="http://www.ica-ip.pt/en/">http://www.ica-ip.pt/en/</a></p>
		<p>Legal basis: <a href="#">Gesetz über die Nutzung und Sicherung von Archivgut des Bundes (Bundesarchivgesetz - BArchG) vom 10. März 2017 (BGBl. I S. 410)</a> <a href="#">Gesetz über Maßnahmen zur Förderung des deutschen</a></p>		<p>Legal basis: <a href="#">Règlement grand-ducal du 6 novembre 2009 relatif au dépôt légal, des documents audiovisuels et sonores et les oeuvres audiovisuelles multimédias sont soumis au dépôt légal en faveur du Centre national de l'audiovisuel</a></p>	<p><b>Institut national de l'audiovisuel (INA)</b> <a href="http://www.ina.fr/">http://www.ina.fr/</a></p> <p><b>Bibliothèque nationale de France (BnF)</b> Quai François Mauriac 75706 Paris <a href="http://www.bnf.fr/fr/ac/c/x.accueil.html">http://www.bnf.fr/fr/ac/c/x.accueil.html</a></p> <p>Legal basis: <a href="#">Code du patrimoine: Articles L131-1 to L133-1 and R131-1 to R133-1</a></p>	<p>Legal basis: <a href="#">Law no. 27/2007 of 30 July 2007, Television and On-demand Audiovisual Media Services Law</a> (Rectified by the Statement of Rectification no. 82/2007, of 12 September and altered and republished in the annex to Law no. 8/2011, of 11 April) <a href="#">Article 47 and following of Decree-Law no. 124/2013</a></p>

		<u>Films</u> <u>(Filmförderun</u> <u>gsgesetz –</u> <u>FFG)in der</u> <u>Fassung der</u> <u>Bekanntmach</u> <u>ung vom 23.</u> <u>Dezember</u> <u>2016 (BGBl. I</u> <u>S. 3413)</u>				
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## 7.2. Overview: types of deposit systems in the countries concerned by the study (IT, HU, LT, RO, SE, UK)

Type of entity	IT	HU	LT	RO	SE	UK
Deposit systems established for the facilitation of enforcement of IPR						
(Voluntary) deposit systems						
Public body	Ministry of Cultural Heritage and Activities and Tourism <i>Mandatory with declaratory character</i> General Direction for Libraries and Cultural Institutes - Service II Bibliographic Heritage and Copyright Via Michele Mercati, 4 00197 Roma <a href="http://www.librari.beniculturali.it">www.librari.beniculturali.it</a>	Hungarian Intellectual Property Office (HIPO) Property Office 1081 Budapest, II. János Pál pápa tér 7 <a href="http://www.sztnh.gov.hu/en/copyrights-and-related-rights/how-can-my-copyrights-be-protected/voluntary-register-of-works">http://www.sztnh.gov.hu/en/copyrights-and-related-rights/how-can-my-copyrights-be-protected/voluntary-register-of-works</a>	n/a	Romanian Copyright Office (ORDA) Calea Victoriei 118 București 030167 <a href="http://www.orda.ro/default.aspx?lang=en">http://www.orda.ro/default.aspx?lang=en</a>	n/a	n/a
		Hungarian National Digital Archive and Film Institute (MaNDA) <a href="http://mandarchiv.hu/">http://mandarchiv.hu/</a>				
	Legal basis: <a href="#">Law No.633 of</a>	Legal basis: Art. 112(5) of <a href="#">Act LXXVI of</a>		Legal basis: <a href="#">Law no.8/1996 on copyright</a>		

	<p><u>April 22, 1941 as amended and integrated (art. 103)</u></p>	<p><u>1999 on Copyright</u> Decree 26/2010 (XII.28.) of the Ministry of Justice on the detailed rules on the voluntary register of works Art. 94/B of the Copyright Act (rebuttable presumption of authorship)</p> <p><b>National Audiovisual Archives (legal deposit archive of national broadcasters)</b> Office: MTVA M épület, 1037 Budapest, Bojtár u. 41. Post address MTVA – NAVA, 1037 Budapest, Kunigunda útja 64. <a href="http://nava.hu">http://nava.hu</a></p> <p>Legal basis: Act CXXXVII. of 2004 on National Audiovisual Archives <u>Related regulations</u></p>		<p><u>and related rights, with its subsequent amendments and completions</u> Governmental Ordinance no. 25/2006 with subsequent completions and modifications</p>		
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## DEPOSIT SYSTEMS FOR AUDIOVISUAL WORKS

<b>CMO</b>	SIAE (deposit/registration system now administered by the Ministry of Culture)	n/a	n/a	<b>DACIN SARA</b> 102-104 Mihai Eminescu Street, 1st floor, apartment 4, 2 <sup>nd</sup> District Bucharest <a href="http://dacinsara.ro/">http://dacinsara.ro/</a>	n/a	<b>ALCS</b> Barnard's Inn 86 Fetter Lane London, EC4A 1EN <a href="https://www.alcs.co.uk/">https://www.alcs.co.uk/</a>
<b>Private entity</b>	System identified (digital deposit, generation of evidence, content management)	No system was identified.	No system was identified.	No system was identified.	No system was identified.	System identified (content management, generation of evidence, digital deposit)
<b>Deposit systems established for the preservation of cultural heritage</b>						
<b>Voluntary/contractual deposit systems</b>						
<b>Film fund/ Film archive</b>	<b>Museo Nazionale del Cinema</b> via Montebello 22, 10124, Torino <a href="http://www.museocinema.it">www.museocinema.it</a> <b>Foundation</b>	No information was provided.	n/a	<b>Arhiva Nationala de Filme (ANF)</b> Sos. Sabarului nr. 2, Jilava <a href="http://www.anf-cinemateca.ro/">http://www.anf-cinemateca.ro/</a>  Legal basis: <a href="#">Romania's Government Resolution no. 1063 / 8 September 2005 regarding the organization and the function of the National Film Archive</a>	<b>Svenska Filminstitutet</b> PO Box 27 126 102 52 Stockholm <a href="http://www.filminstitutet.se/filmarkivet">http://www.filminstitutet.se/filmarkivet</a>	<b>BFI Film Fund British Film Institute</b> 21 Stephen Street London W1T 1LN <a href="http://www.bfi.org.uk/">http://www.bfi.org.uk/</a>
<b>Mandatory deposit systems</b>						
<b>Film archive</b>	<b>Cineteca Nazionale and Luigi Chiarini</b>	<b>Hungarian National Film Archive</b>	<b>Office of the Chief Archivist of Lithuania</b>	<b>Arhiva Nationala de Filme (ANF)</b>	<b>National Library of Sweden</b> Box 5039	n/a

	<p><b>Library of the Fondazione Centro Sperimentale di Cinematografia</b> via Tuscolana, 1524 00173 Roma <a href="http://www.fondazionecsc.it/">http://www.fondazionecsc.it/</a></p>	<p>1021 Budapest, Budakeszi út 51/E <a href="http://www.filmintezet.hu/">http://www.filmintezet.hu/</a></p>	<p>Mindaugo g. 8, LT-03107 Vilnius, Lithuania <a href="http://www.archyvai.lt/lvat.html">http://www.archyvai.lt/lvat.html</a></p>	<p>Sos. Sabarului nr. 2, Jilava <a href="http://www.anf-cinemateca.ro/">http://www.anf-cinemateca.ro/</a> <i>Romanian films made until 1997 with public funding.</i></p>	<p>S-102 41 Stockholm <a href="http://www.kb.se/english/fi nd/databases/">http://www.kb.se/english/fi nd/databases/</a> <a href="https://smdb.kb.se/">https://smdb.kb.se/</a> <a href="http://libris.kb.se/?language=en">http://libris.kb.se/?language=en</a> <a href="http://www.kb.se/english/fi nd/regina-libris/regina/">http://www.kb.se/english/fi nd/regina-libris/regina/</a></p>	
	<p>Legal basis: <a href="#">Legge 14/11/2016 n.220 art. 7</a> that substitutes D. L.vo 22/12/2004 n. 28, art.24, Decreto del Presidente della Repubblica Italiana 03/05/2006 n.252 art. 26, and Legge n.1213 del 04/11/1965 and subsequent amendments and additions</p>	<p>Legal basis: <a href="#">Act II of 2004 on motion picture</a> Government decree 60/1998. (III. 27.) on providing and using the mandatory copy of media products ("sajtótermékek kötelezpéldányainak szolgáltatásáról és hasznosításáról")</p>	<p>Legal basis: <a href="#">LIETUVOS RESPUBLIKOS KINO ĮSTATYMAS, 2002 m. kovo 5 d. Nr. IX-752</a></p>	<p>Legal basis: <a href="#">Romania's Government Resolution no. 1063 / 8 September 2005 regarding the organization and the function of the National Film Archive</a></p>	<p>Legal basis: Sweden has had a legal deposit law for books since the 17th century and for audiovisual material since 1979. The Legal Deposit Act for Electronic Materials serves as a complement to the Legal Deposit Act and has been in effect since 1 July 2012.</p>	
<b>Film fund</b>	<p><b>Emberi Erőforrások Minisztériuma</b> Ministry of Human Capacities H-1054 Budapest, Akadémia u. 3. <a href="http://www.kormany.hu/hu/emberi-eroforrasok-miniszteriuma">http://www.kormany.hu/hu/emberi-eroforrasok-miniszteriuma</a></p>	<p><b>Emberi Erőforrások Minisztériuma</b> Ministry of Human Capacities H-1054 Budapest, Akadémia u. 3. <a href="http://www.kormany.hu/hu/emberi-eroforrasok-miniszteriuma">http://www.kormany.hu/hu/emberi-eroforrasok-miniszteriuma</a></p>				
	<p>Legal basis:</p>					



		<u>60/1998. (III. 27.) Korm. rendelet</u> <u>a</u> <u>sajtótermékek</u> <u>kötelepéldányainak</u> <u>szolgáltatásáról</u> és <u>hasznosításáról</u>				
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## 7.3. Joint Publication on Audiovisual Deposit Systems – Stakeholder Survey

### Background of the survey

The European Observatory on Infringements of Intellectual Property Rights, located at the European Union Intellectual Property Office (EUIPO), is working together with the European Audiovisual Observatory (EAO)<sup>261</sup> on a joint publication in the field of deposit systems in the audiovisual sector. In order to gather information and base the publication on the most informed, objective and thorough knowledge possible, EUIPO and EAO have created this short questionnaire and would be grateful for your input into the questions set out below.

### Types of audiovisual deposit systems covered by the survey

The study is focussed exclusively on the audiovisual (AV) sector and will cover a variety of deposit systems that may be of relevance for this sector.

The different types of deposit systems may fulfil different functions: for example, they may facilitate the enforcement of Intellectual Property Rights (IPR), by providing evidence of the existence of a work or other subject-matter at the moment of deposit. Another function that deposits may fulfil is the preservation of cultural heritage. Deposits of AV works can be mandatory (legal), creating an obligation to deposit, for example with designated national archives; they can also be voluntary, and for example based on contractual agreements between producers and funding agencies.

In the context of another project, EUIPO has already collected information on existing public sector deposit systems in certain EU Member States. The focus of the previous research was information about systems that provide evidence of the date of deposit, which could be used, for example, in disputes between the depositor and third parties. Examples of such systems in digital format are i-Depot in the Benelux<sup>262</sup> or e-Soleau in France<sup>263</sup>.

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<sup>261</sup> The [European Audiovisual Observatory](#) (EAO) is a public service organisation forming part of the Council of Europe. It provides information on the various audiovisual (AV) markets in Europe and on their financing, and analyses and reports on the legal issues affecting the different sectors of the audiovisual industry.

<sup>262</sup> The i-depot is administered by the Benelux Intellectual Property Office (BOIP). For more information, see [BOIP's website](#).

<sup>263</sup> The e-Soleau is the electronic version of the Enveloppe Soleau, which is administered by INPI, the French IP Office. See [INPI's website](#) for more information.

The previous research did not cover **private sector deposit systems**<sup>264</sup>, **CMO deposit systems**<sup>265</sup>, **mandatory deposit** systems creating an obligation to deposit<sup>266</sup> or **voluntary deposits** such as those based on **contractual agreements** between producers and funding agencies. Therefore, the present survey was created to gather knowledge about such systems as the joint publication of EUIPO and EAO is intended to cover all types of AV deposit systems.

In order to keep the scope of the study at a manageable size, twelve Member States were selected for closer research based, inter alia, on a geographical spread, namely **Belgium, Luxemburg, the Netherlands, France, Germany, Hungary, Italy, Lithuania, Portugal, Romania, Sweden and the United Kingdom**.

Please provide any information on one of **the systems outlined in bold above** for the **countries mentioned in bold**, by replying to the questions below with regard to that system. If you have information about more than one system, we would be grateful if you could fill in the questionnaire for each system you mention.

In case you have information you consider relevant which falls outside the scope mentioned above (e.g. about a different system or another country), please feel free to also mention it in addition (in that case, choose “other”).

Please send us your answers by **7 May 2017** at the latest.

If you have any questions about the survey or about this study in general, please do not hesitate to contact the EUIPO Observatory, [observatory@euipo.europa.eu](mailto:observatory@euipo.europa.eu).

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<sup>264</sup> One example is the Spanish company SafeCreative which provides evidence through the technology of time stamping.

<sup>265</sup> The system offered by the Italian CMO SIAE could serve as an example.

<sup>266</sup> For example with designated national archives.

## 1 Your contact details

Please identify your institution (name and address).

[...]

## 2 Identification of the deposit system

2.1 Please name the Member State to which your answer relates [**multiple choice question**].

- Belgium
- France
- Germany
- Hungary
- Italy
- Lithuania
- Luxembourg
- Netherlands
- Portugal
- Romania
- Sweden
- United Kingdom
- Other

If your answer is OTHER, please specify:

[...]

2.2 By what type of entity is the deposit system administered? [**multiple choice question**]

- Public institution (e.g. a ministry)
- Private entity(company)
- Collective management organisation
- National archive
- National library
- Film fund
- Other

If your answer is OTHER, please specify:

[...]

2.3 Please provide name and address of the entity administering the deposit system and, if possible, a website link.



[...]

2.4 In what context was the deposit system established (i.e. what is the main purpose of the system)? **[multiple choice question, multiple answers possible]**

- Preservation of cultural heritage
- Facilitation of enforcement of intellectual property rights (e.g. proof of ownership, anteriority of authorship)
- Other

If your answer is OTHER, please specify:

[...]

### 3 Main characteristics of the deposit system

3.1 Is deposit with the described system voluntary or mandatory? **[multiple choice question]**

- Mandatory
- Voluntary

3.2 Is there a legal basis for the deposit system/ a reference to the system in the law? **[multiple choice question]**

- Yes
- No

*If the answer is 'yes':*

3.3 Please provide the reference of the legal text:

[...]

3.4 Is the system operated offline or online (i.e. is it a physical or a digital deposit) **[multiple choice question, multiple answers possible]**

- Physical/offline
- Digital/online

3.5 Which type of content is accepted or required in the system **[multiple choice question, multiple answers possible]**

- Any type of content
- Films
- TV series



- Screenplays, storyboards, and any other documents that may be protected by copyright and that may be used in the pre-production of an audiovisual work
- Music
- Other

If your answer is OTHER, please specify:

[...]

3.6 What nationals/entities can/have to deposit in the system [multiple choice question, multiple answers possible]?

- Nationals/entities of the Member State
- EU nationals/entities
- Non-EU nationals/entities
- Other

If your answer is OTHER, please specify:

[...]

3.7 Are there any requirements/restrictions as to the categories of persons/entities who can/have to deposit in the system? [multiple choice question]

- Yes
- No

*If the answer is 'yes':*

3.8 Who can/has to deposit in the system **[multiple choice question, multiple answers possible]**

- Right(s) holder
- Producer of an audiovisual/cinematographic work
- Member of CMO
- Other

If your answer is OTHER, please specify:

[...]

3.9 Are there any requirements as to the information that the depositor needs to provide with regard to the work/other content deposited? **[multiple choice question]**

- Yes
- No

*If the answer is 'yes':*

3.10 What information does the depositor have to provide with regard to the work/other content deposited? **[multiple choice question, multiple answers possible]**

- Publication details
- Place of publication
- Compensation
- Time of deposit
- Type of work/content deposited
- Proof of authorship/ownership of rights
- Contracts with right(s) holder(s) of the audiovisual work
- Other

If your answer is OTHER, please provide details:

[...]

Please add more detail or specification in relation to the answers selected above, in case relevant:

[...]

3.11 Please describe the main steps of procedure of the system.

[...]

3.12 Please describe any other features of the system that you find important.

[...]

3.13 Does the deposit body acquire any rights with the act of depositing a work protected by copyright/other content deposited? **[multiple choice question]**

- Yes
- No

*If the answer is 'yes':*

3.14 What rights does the deposit body acquire with the act of depositing a work protected by copyright/other content deposited? **[multiple choice question, multiple answers possible]**



- Digitising copies
- Making copies available to the public
- Other

If your answer is OTHER, please provide details:

[...]

2.15 Is the work deposited accessible by the general public **[multiple choice question]**

- Yes, automatically
- Yes, after a decision of the entity administering the system
- Possibly, after a decision of the entity administering the system
- No, not generally
- Never
- Other

If your answer is “No, not generally” or “Never”, please provide details:

[...]

If your answer is OTHER, please specify:

[...]

3.16 What do you consider to be the main benefit of this deposit system (notably from a user's perspective)? What are the main challenges?

[...]

Thank you for your input on this survey!

Do you know any other AV deposit system?

- Yes
- No

*[Instructions for the electronic survey:*

*If “yes is chosen”, questionnaire automatically goes back to empty template (needs to be registered as separate answer by the system).*

*When “No” is selected, thank you message and choice to “send answer”.]*



A joint report of the European Audiovisual Observatory and  
the EUIPO published in the IRIS *Plus* Series