

Statement of Principles and Procedures for facilitating the digitisation of, access to and increased interest of European citizens in European cinematographic heritage works.

This statement (hereafter the “Statement”) has been developed in the framework of the Stakeholders’ Dialogue “Licenses for Europe - Working Group 3” facilitated by the European Commission further to the adoption of the Communication “Content in the Digital Single Market” on December 18th, 2012.

The Statement will facilitate discussions among the parties concerned on the relevant terms for digitisation and access to European cinematographic heritage works conserved in European film heritage institutions.

This Statement is agreed by the following organisations: ACE, FERA, FIAPF and SAA¹. Other stakeholders are invited to consider using the principles and procedures set out below (hereafter “Principles and Procedures”).

ACE, FERA, FIAPF and SAA have agreed to promote and recommend the use of the Principles and Procedures to their respective members.

The signatories of this Statement share the view that European cinematographic heritage works constitute unique cultural elements as well as valuable assets in the European digital economy.

Therefore :

-They pledge to strengthen their mutual collaboration and that with the European Commission and Member States relating to European cinematographic heritage works ;

- At the same time, conscious of the investments necessary fully to seize the opportunities offered by digital technologies, they call on the Member States and the EU institutions to introduce financial mechanisms to support projects launched under this Statement to digitise European cinematographic heritage works and to promote their accessibility and increased discoverability by European citizens.

1. General Provisions:

1.1 The parties involved in any transaction derived from the use of this Statement are understood to be:

¹ Association des Cinémathèques Européennes, Federation of European Film Directors, International Federation of Film Producers Associations, and Society of Audiovisual Authors.

- a. all rightsowners involved, either directly or legally represented. In this Statement, “Rightowners” means producers, directors, authors of the screenplay/dialogue, and composers of music specifically created for use in the cinematographic work who own or control rights in the work as a whole, and any other party in a similar position
- b. European film heritage institutions, or publicly funded, not-for-profit, public mission institutions that are holding materials of the works concerned by this Statement (hereafter “EFHIs”).

1.2 This Statement defines Principles and Procedures to facilitate reaching an agreement between the parties involved in the context of the digitisation of European cinematographic heritage works conserved in EFHIs.

1.3 The Principles and Procedures set out in this Statement could also be used for any further steps involved in the restoration and providing access to European cinematographic heritage works for European citizens.

1.4 The approach of the Statement is voluntary and does not concern works which the Rightowners have opted, for whatever reasons, to withdraw from circulation.

1.5 The Statement preserves the respective rights of the parties involved.

1.6 This Statement is based on the mutual understanding that preservation of and access to European cinematographic heritage works can be achieved only through a close collaborative relationship between Rightowners, EFHIs and other relevant parties when and where applicable.

1.7 The Statement is without prejudice to and shall be considered in the light of:

- a. international Treaties and European Community provisions and national legislation in force on copyright and related rights;
- b. the Code of Ethics of the International Federation of Film Archives (FIAF) which the EFHIs referred to in this Statement must adhere to;
- c. Rightowners’ commercial and artistic interests; and
- d. the moral rights of all parties involved.

2. General Principles:

2.1 The Statement applies to European cinematographic heritage works. In this context, European cinematographic heritage works are understood to mean works made to be screened in theatres and include fiction and non-fiction works, of any length.

2.2 Considering the voluntary approach agreed by the signatories, any potential party can initiate the procedures set out in Section 3 below (hereafter Procedures) – i.e. the EFHI, or

any of the Rightsowners. Section 3.4 defines the parties involved in the discussions. The party initiating the Procedures is not by default party to the discussions.

- 2.3 Other parties holding European cinematographic heritage works in their archives could consider using the Principles and Procedures when considering the digitisation and accessibility of said works.
- 2.4 The rights granted through the use of these Procedures are limited to those necessary for the use(s) considered in relation to the project of digitisation, and restoration where applicable, being the object of the negotiations. Possible uses may include digitisation / restoration / various offline exploitation forms / various online exploitation forms.
- 2.5 All masters produced in the course of the digitisation of a work become the property of those covering the costs of digitisation. The masters include both digital and analogue elements that are created in the process and are referred hereafter as “Master Elements”. Any parties relevant to the discussion must be given the opportunity to share, wholly or partially, in the costs involved in digitisation as well as a restoration if under consideration for the project concerned. Ownership of the physical property of the Master Elements has no effect on the exploitation and remuneration rights in the work concerned.
- 2.6 In order to contribute to making digitisation projects sustainable, the principle of revenue-sharing shall apply (with specific provisions further detailed in Section 3.8 below).

3. Procedures for authorising the use of a European cinematographic heritage work by EFHIs:

- 3.1 Discussions on a digitization/restoration project are initiated by one of the parties involved (EFHI or Rightowners).
- 3.2 If a Rightowner initiates the project, the EFHI is invited to express its intention to commence discussions.
- 3.3 All agreements resulting from the application of these Principles and Procedures are referred to as the “Arrangements” below.
- 3.4 The EFHI identifies and locates – with the support of the Rightowners where necessary and appropriate – the relevant right holders who must consent to the use of the work by the EFHI in accordance with the relevant laws in the territory of the EFHI as well as the rights involved by the uses under consideration and the ability of the Rightsowners to grant them. It is understood that this will be in full compliance with all applicable European and international legislation, in particular the 2012/28/EU Orphan Works’ Directive and the Annex provisions relevant to audiovisual works.

Rightsowners are represented by default by:

- a. The producer of the film, or his mandated entity (hereafter collectively referred to as the “Producer”), insofar as he is entitled to represent the rights concerned by the uses under consideration by law or by contract for the territory (ies) concerned.²
 - b. To the extent that all rights concerned by the uses under consideration are not all represented by the Producer by law or by contract, then the following also need to be considered:
 - The director (if identified and/or located). If not identified and/or located, then the collective management organisation representing the director.
 - The screen writer(s) (if identified and/or located). If not identified and/or located, then the collective management organisation(s) representing the screen writer(s).
 - Any other right holders that may be relevant to the uses under consideration for the territory (ies) concerned. Organizations representing these individuals should be invited to decide on the terms of representation when and where the individuals cannot be identified or located.
- 3.5 The right holders involved in the discussions on the Arrangements, as defined in Section 3.4 are hereafter referred to as the “Rightsowners Concerned”.
- 3.6 All Rightsowners Concerned are contacted to ascertain if any of them is entitled to and has opted to remove the work from circulation as provided for in Section 1.5. If that is not the case, the parties proceed to Section 3.7.
- 3.7 The EFHI requests an authorisation/license to use the work from the Rightsowners Concerned. This takes the form of a draft Arrangement from the EFHI setting out the proposed uses and any proposed deal terms.
- 3.8 The draft Arrangement shall include proposals on the following elements:
- a. *Specification of the uses requested by the EFHI:*

The EFHI is invited to set out all the uses for which rights should be cleared. Uses are understood to cover: digitisation / restoration / various offline exploitation forms / various online exploitation forms. It is left up to the EFHI and the Rightsowners Concerned to agree on the uses relevant to the particular work concerned and project proposed.
 - b. *Concerning the digitisation:*

The estimated costs for the digitisation which the EFHI pledges fully to cover. However, the Rightsowners Concerned are invited to consider contributing partially or fully to the estimated costs.
 - c. *Terms as regards access to the Master Elements produced (see Section 2.5):*

Agreement among the parties as to how the cost of the digitisation will be recovered, for example out of any revenues derived from the exploitation by the EFHI or the Rightsowners Concerned of the Master Elements.

In the event the EFHI partially or fully owns the Master Elements, access to them shall be provided for any Rightsowners Concerned to make new copies or

²[without prejudice to final clarification on this point, which the parties undertake to reach by 15/11/2013]

transfers from the Master Elements, subject to prior approval by all Rightsowners Concerned. Those technical activities shall be carried out under the supervision of the EFHI and shall not in any way jeopardize the quality, state and integrity of the Master Elements produced.

In the event the EFHI fully owns the Master Elements, the Rightsowners Concerned shall pay the EFHI reasonable financial compensation for the use of the Master Elements. Where the Master Elements are not fully owned by the EFHI, the Rightsowners Concerned and the EFHI shall agree on the appropriate method for authorisation of and payment of any compensation for the use of the Master Elements by any Rightsowners Concerned.

This may consist in particular of a fixed refund or a pro-rata refund to the operating profits limited to the costs of making the initial Master Elements. The Rightsowners Concerned and the EFHI shall decide on the appropriate method.

d. Concerning the restoration:

The Principles and Procedures shall also apply to restoration projects.

Furthermore, the EFHI shall identify the best existing materials in its collection and shall consider extending the search for best materials within the membership of ACE. In the latter case, other EFHIs may become party(ies) to the Arrangements.

e. Concerning providing access to the work concerned:

Territory(ies):

The Arrangements shall cover at least the territory where the EFHI is located. Arrangements facilitating accessibility to the work in several European territories are strongly encouraged.

Duration of the Arrangements between the parties:

It is recommended that the duration of the Arrangements be at least 5 years. It is suggested that the appropriate duration be defined as a function of the costs involved in the project. Agreements of unlimited duration are not recommended.

Provisions on the terms for a possible extension of the Arrangements after the end of the initially agreed duration shall be agreed between the parties.

Exclusivity:

The Arrangements shall set out whether the EFHI acquires the relevant rights on an exclusive or a non-exclusive basis.

f. Sharing revenues between the EFHI and the Rightsowners Concerned.

The parties shall agree terms to cover their respective rights to exploit the work through use of the Master Elements, on the collection of revenues, any revenues to be set off against recovery of the costs of digitisation/restoration, and any further sharing of revenues among the parties. The possibility of

sharing revenues shall apply from the first Euro (or local currency) generated by the exploitation of the work. In the event the EFHI does not take appropriate measures to generate revenues – such as exploiting the work exclusively on free services, etc. – the parties are encouraged to add a clause specifying a minimum amount to be transferred to the Rightsowners Concerned. This clause should apply in addition to the sharing of revenues between the EFHI and the Rightsowners Concerned.

3.9 The Rightsowners Concerned shall respond to the proposed Arrangements within a reasonable time period, indicating whether permission is authorised or denied, or whether further discussion is required, together with any proposals for new or amended terms and conditions from one or more of the Rightsowners Concerned.

3.10 Negotiations shall take place between the EFHI and the Rightsowners Concerned. Where applicable, negotiations shall also take place between the Rightsowners Concerned themselves. Once agreement is reached, the parties shall proceed to Section 3.11.

3.11 The Arrangements shall be executed and signed by all parties.

3.12 The relevant uses shall be reported by the EFHI to the Rightsowners Concerned and any royalties or fees due shall be paid. The reporting, accounting and administration procedures shall follow common practices in the sector and country concerned