
The Protection of Cinematographic Heritage in Europe

Cinematographic films are not purely for entertainment. They are also a valuable record of our times and, above all, an important part of our culture. But does this mean they are systematically preserved in collections like other documentary material and cultural assets? And does it mean members of the public have access to them like to books in a public library or to works of art in a museum?

Not all films are necessarily preserved in collections, nor is their collection necessarily automatic. Property rights and the public interest associated with ensuring films are preserved and readily accessible are aspects that have to be reconciled with each other, either by law or by agreement between the parties involved. This edition of *IRIS plus* looks at how different countries deal with this problem and what initiatives have been taken in this area at European level.

Below you will have a chance to read about the different deposit systems that have been developed, about film preservation methods, and about the accessibility of deposited works.

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Introduction¹

The idea of cinema as an art form and as an invaluable historical record of the last century, worthy of being preserved, has only fairly recently become a well-established notion in Europe. At the time of its invention in the 1890s, and for a significant number of years thereafter, cinema was generally viewed merely as a form of entertainment and the value of films was considered not to stretch beyond the period of their commercial exploitation. Thus, having been exploited, films were either destroyed or abandoned in conditions which led to their irreparable decay. Whole “waves” of destruction occurred at times of transition in film history, such as the passage from silent to sound film and from nitrate to acetate based film. As a result of this, a significant part of cinema heritage has been lost forever. That some films from the past have survived is due mainly to a number of passionate individuals who from the early 1930s started to collect and restore films, working mostly in secret through “unofficial” channels. Among these individuals were the founders of some of the present-day European film archives, which continued this more or less unofficial work of rescue and to which we owe the fact that parts of our cinematographic heritage have reached us today.

It was not until fairly late in the history of cinema that film started to be fully recognised as an integral part of a nation’s cultural and historical heritage, and that countries began to adopt public policies for its preservation. In a number of European countries this was done by way of the introduction of mandatory deposit systems for films, along the lines of existing compulsory deposit laws for printed material.² In France, which is historically the European country with the most comprehensive legal deposit system, the deposit of films was effectively introduced only in 1977.³ Aside from these legal measures, in a number of countries State intervention has also taken the form of public financing of plans for the rescue and restoration of older works.⁴

The particular physical characteristics of the film medium however, namely its extreme fragility requiring very expensive and sophisticated conservation conditions and the high costs of the material itself, have rendered the elaboration of public preservation policies in this field subject to more complex considerations than for other types of material. While no country in Europe would today question the need to ensure the preservation of its cinema heritage, important differences still exist between states as to how this should be achieved. Although all Member States of the European Union, currently have some system in place for collecting and preserving cinema works,⁵ these systems vary significantly, with some countries operating legal deposit schemes and others operating voluntary systems of deposit. In fact it would appear that in some countries the systematic collection of films is still not being achieved with the

result that important parts of national cinema production are still not guaranteed protection. A number of supranational initiatives have however developed at the European level in the last few years, bearing witness to an increase in the importance attributed by European countries to this part of their heritage. At the same time, the emergence of new opportunities for exploitation has also meant that the cinema industry is becoming more responsive to the need for organising proper preservation of its products.

This article will attempt to draw a picture of the current measures which exist for the protection of cinema heritage in Europe, looking also at the European initiatives that have recently been taken to guarantee better conservation of this heritage. Existing national mandatory and voluntary deposit systems will be analysed first, following which the relevant action taken by the Council of Europe and the European Union will be reviewed. The specific copyright aspects that need to be addressed in order that the film archives⁶ should be able to fulfil their tasks of preserving and making available the films deposited in their care will also be analysed.

It should be noted that European states have also adopted, or are presently considering the adoption of measures to ensure the protection of other types of audiovisual works (for instance television broadcasts), in addition to films. This article however will specifically focus on the case of cinematographic works.

Deposit Systems

Mandatory Deposit Systems

A number of European countries have chosen to ensure the protection of their cinema heritage by introducing provisions in their national laws prescribing the comprehensive mandatory deposit of films in designated national archives.⁷ These laws appear to be based on a pre-emptive rationale, namely that it makes more sense to ensure that films are collected and stored in the best possible conditions when they are produced, rather than having to embark on very costly plans at a later stage to rescue whatever can still be saved. Among the countries that have adopted this approach are France, Italy, Norway, Finland and Denmark.⁸ In some countries this deposit obligation is contained in a general legal deposit law⁹ which also covers other types of material (this is the case in France¹⁰ and in Norway¹¹), while in others, deposit has been regulated under the film law of the country (for instance in Italy¹² and in Denmark¹³). In Finland, there is a specific Act dealing exclusively with the deposit of film works.¹⁴ However, even in the countries where the deposit of film has traditionally been dealt with separately from other materials, there appears now to be a trend towards the consoli-



dition of existing legal deposit provisions into a single law covering all materials subject to deposit. This is for instance the case in Denmark where the Ministry of Culture is currently preparing a proposal for a new Legal Deposit Law, which will consolidate into one single Act the provisions hitherto contained in the Legal Deposit Act and in the Film Act.¹⁵

The existing laws providing for the legal deposit of films share a common objective, namely guaranteeing the collection, preservation and making available for research (and/or cultural) purposes of the national film heritage, for the benefit of present and future generations.¹⁶ The laws generally provide for the deposit of films which are shown to the general public or “which have been made for public showing”.¹⁷ Some laws also provide for the deposit of published videos and DVDs.¹⁸

For the most part compulsory deposit systems only apply to national and co-produced films, although in some cases, for instance in France, the obligation to deposit also extends to foreign films distributed in national cinemas,¹⁹ based on the belief that these works also contribute to shaping a country’s cultural identity. The systems usually cover both feature and short films, irrespective of genre.²⁰

A very important aspect of the deposit systems relates to the nature of the material that has to be deposited. Indeed, it is of the utmost importance that material of the best possible quality is deposited in order to render long-term preservation (at a minimum cost) possible, and allow for the fulfilment of the laws’ objectives. For this reason, most laws provide for the deposit of the original material (that is the original negatives or other acceptable pre-print materials,²¹ from which further copies of the film can be obtained).²² In some countries, both the original material and a projection print of the work have to be deposited.²³ In addition, certain laws also provide for the deposit of materials ancillary to the films such as, for instance, advertising materials.²⁴

One question that the relevant laws do not appear to address explicitly is whether the physical ownership of the materials subject to deposit is transferred to the depository or whether the depositor retains ownership. This question will generally be dealt with in the contracts that are entered into between the archives and the depositor at the time of deposit. In the case of Denmark, for instance, the deposit contracts normally provide for the ownership of the material to be transferred to the State and thus to the designated depository, the Danish Film Institute. Where the depository acquires ownership of the original material, the depositor will retain a right to access the material.

The laws usually specify the time for deposit and the person responsible for deposit who will normally also bear the cost of the deposited material (usually the producer or the distributor). Sometimes penalties are provided for in the case of failure to deposit.

Apart from these comprehensive deposit systems, most European countries have a system in place providing for the deposit of publicly funded films. This can be organised in different ways: in some cases the obligation to deposit is provided for in the

contracts for the granting of the state funding (for instance in the Netherlands), while in others it is contained in the relevant legislation regulating public funding (e.g. Austria²⁵). In certain countries where virtually all national films receive some form of public funding, the effect of these systems can be generally equated to that of comprehensive legal deposit laws.²⁶

Voluntary Deposit Systems

Some European countries, on the other hand, have opted to provide for the collection and preservation of films by relying on systems of voluntary deposit organised by means of contractual agreements between the competent national archives and producers (or distributors). These are generally the countries where the State has traditionally taken a less interventionist approach in cultural matters and where the cinema industry has been able to exert sufficient influence to prevent the introduction of mandatory deposit systems,²⁷ such as the United Kingdom and the Netherlands.²⁸ Considerations of cost for both the State and the industry play an important part in such choices.²⁹ As these systems largely depend on the goodwill of producers and on their relationship with the relevant archive, their level of success varies from country to country. In some countries, however, voluntary deposit has been openly recognised as an unsatisfactory tool: the United Kingdom is an example of this. Here, in spite of repeated attempts and recommendations to establish legal deposit for films, such works have up to now been collected by the British Film Institute on a voluntary basis. The system was recently appraised by a Working Party set up by the Government to advise on the desirability of extending legal deposit legislation to non-print publications.³⁰ Analysing the situation in regard to films, the Working Party noted that “[t]he problems with a voluntary deposit system are most clearly illustrated by the experience of the British Film Institute. In the 63 years since the founding of the National Film Archive the Institute has been operating voluntary procedures, and they have been unable to secure full co-operation from the industry and what co-operation has been received has been at best shifting and haphazard. Copies handed over have often been in poor condition; damaged goods, in fact.” The Working Party concluded that voluntary arrangements would never be adequate to constitute a representative national archive and recommended that legal deposit legislation be extended to cover films and videos as well as other non-print material. It was thought that in the long term an efficient statutory deposit scheme would also lead to cost savings, as the acquisition of material in good condition at the start of the archive process would ensure a substantial reduction in restoration costs at a later point in the cycle.³¹ It should be noted that the proposal did not envisage the deposit of all works, but rather an obligation to give notice to the repository of all audiovisual works shown, played or published, and the possibility then for the repository to request materials “within the context of established selection criteria and guidelines”.³² However, the Bill that was subsequently drawn up to extend the existing UK deposit legislation (which led to the Legal Deposit Libraries Act 2003), did not cover films.³³ Apparently this was due to the particular difficulties encountered for this field and “the need for more collaboration between various parties”.³⁴ The deposit of



films will therefore for the time being continue under a voluntary scheme.³⁵

Appraisal of the Systems

These varying deposit systems reflect the profound differences which exist among European countries as regards their perception of the principles which should form the basis of their national policies on cultural and historical heritage. The choice is essentially between exhaustiveness and selection. At one end lies the view, which is best represented in the French approach, that all films deserve to be preserved irrespective of their nature, quality and commercial success because each constitutes a unique element of the country's historical and cinematographic memory.³⁶ At the other end is the belief that collecting and preserving all works is neither feasible nor desirable and that the only sensible option is to take a selective approach.³⁷

In principle, a comprehensive legal deposit system would appear to be the best way of preserving the cinema heritage for future generations. It ensures that good material is deposited and avoids the dangers which are implicit in selection. Indeed, a selective approach requires that choices be made as to the importance or quality of a film, but it is extremely difficult to determine the criteria on which to base such choices. How can it be known today what will be perceived as important and of worth by future generations and who in fact should have the authority to make this decision? As has been pointed out, exhaustiveness guarantees neutrality.³⁸

In practice, however, there are other factors that come into play, both from the point of view of the State which may not wish, or be able, to bear the costs of conserving every single work produced, and from the point of view of producers who worry about the financial burden that this type of obligation imposes on them. In the case of films that receive public funding, the producers' concerns should be partially solved and it would seem desirable for all European countries to enforce this type of obligation. However, while in some countries this would cover almost all the national production output, in other countries this would not be the case and independent production would end up not being deposited, which would not appear to be a desirable result. If a selection has to be made at all, this should be carried out as much as possible according to standards carefully elaborated for the very purpose of preserving and transmitting the heritage, rather than depend on state funding or on the different levels of commitment of depositors. In this sense, the Kenny Report proposal³⁹ would appear to represent a sensible compromise.

Initiatives at European Level

In recent decades, the debate on the issue of the protection of films, and more generally of audiovisual works, has reached the international arena and has been taken up in a number of fora, reflecting a general increase in countries' awareness of the need to take action in order to protect this part of their heritage. The General Assembly of UNESCO made a first step in 1980 when it adopted a Recommendation calling on States to adopt all

necessary measures (including legislative and administrative measures) to ensure the safeguarding and preservation of moving images for future generations⁴⁰. More recently, the issue has been addressed at a European level in the context of the Council of Europe and the European Union.

Council of Europe

The work of the Council of Europe in this field culminated in the adoption in 2001 of a European Convention for the Protection of the Audiovisual Heritage.⁴¹ The Convention is part of the Council of Europe's initiatives on cultural co-operation and aims to ensure that audiovisual works are effectively protected across the whole of Europe. To this end it sets out common rules in order to harmonise existing national measures and raise the awareness of States as to the need to adopt adequate legislation where this does not yet exist. The Convention is the first binding international instrument in this field and is founded on the belief that the fragility and importance of this heritage warrant this type of intervention. Its central requirement is the introduction of mandatory legal deposit for all moving image material produced or co-produced and made available to the public in each signatory state (Article 5). The general principles set out in the Convention cover all moving image material, but upon its entry into force the Convention will only apply to cinematographic works. For other types of materials, specific protocols are to be drawn up to determine the particular modalities of legal deposit for each category (Article 3.2). A first Protocol regulating deposit of television broadcasts was adopted at the same time as the Convention.⁴² As regards cinematographic works, the Convention provides for the legal deposit of *all* national and co-produced films, based on the belief that such works are an essential component of our cultural heritage deserving absolute protection and that therefore a sampling system cannot be applied to them (Article 3.1). The specific conditions of deposit are left for each Party to decide, although the Convention indicates that the object of deposit should be "the original or a material from which the original quality can be reconstituted" (Article 8.1) and sets a time limit for deposit.⁴³ Alongside legal deposit of national productions, the Convention provides for the promotion of voluntary deposit for other works, such as foreign works distributed within the territory of the Parties and older works produced prior to the entry into force of the Convention (Article 11). In line with the established objectives of legal deposit, the Convention provides for the preservation and making available of the deposited material, and in addition makes provision for the designation of depository bodies and for co-operation among such bodies so as to facilitate, *inter alia*, exchanges of information and development of common standards and procedures.

The Convention was opened for signature on 8 November 2001 and has been signed by twelve countries⁴⁴ but has been ratified by only two (Lithuania and Monaco).⁴⁵ It is difficult to predict within what time frame other European countries will decide to join the Convention. This instrument, however, at least provides a framework within which countries can consider the elaboration of appropriate national measures and has provided the opportunity for the parties concerned to come together to attempt to negotiate acceptable compromises.



European Union

A number of initiatives have also concurrently been taken at a European Union level. The European Commission, in particular, has closely analysed this matter through a number of consultations as well as a stocktaking exercise on the situation regarding deposit of cinematographic works in the Member States and in the accession and EFTA countries. The initial consultations showed agreement on the need for action to preserve the audiovisual heritage (especially cinematographic works) but a lack of consensus as to which type of measure – and whether EU intervention – would be appropriate.⁴⁶ Following the completion of its stocktaking exercise and further consultations, however, the Commission has now adopted a Proposal for a Recommendation of the European Parliament and of the Council covering all aspects of film heritage.⁴⁷ Indeed, the Commission points out that according to its latest consultations, private initiative or voluntary systems cannot ensure the systematic deposit and preservation of cinema works. The proposed Recommendation therefore calls for the introduction by Member States of appropriate legislative or administrative measures to ensure the systematic collection, cataloguing, preservation, restoration and making available⁴⁸ of cinema works forming part of their national heritage, where these do not yet exist. As far as the deposit of works is concerned, however, the terms of the proposed Recommendation are less ambitious than the legal deposit obligation set by the Council of Europe Convention for the Protection of the Audiovisual Heritage. Indeed, the proposed Recommendation calls for the systematic collection of cinematographic works through a legal or contractual obligation, covering at least those productions or co-productions that have received public funding at national or regional level.⁴⁹ This though, appears to be the situation already existing in almost all Member States, except that the present deposit systems cannot always be said to be enforced “systematically”. As mentioned, the proposed Recommendation also addresses the issues of cataloguing, preservation, restoration and making available of works as well as creation of databases and co-operation between designated bodies. An interesting point is the reference to the Commission’s consideration of making EU funding subject to an obligation to deposit the funded films in at least one national archive. The Recommendation will now have to be considered by the Parliament and the Council, which have meanwhile also taken a number of initiatives on this issue. The Council has already adopted two Resolutions⁵⁰ on this matter, one of which calls for the establishment of efficient systems of deposit and preservation of cinema works, while the European Parliament has in its Report on the Cinema Communication stressed the need for compulsory legal deposit.⁵¹ The terms of the proposed Recommendation however seem to indicate that exhaustive legal deposit of films still represents too ambitious a plan for Europe, at least for the time being.

Preservation

As mentioned above, one of the central objectives of legal deposit legislation is to ensure the long-term preservation of the deposited material. Furthermore, this is also one of the central missions of film archives in respect of works which are collected

through other channels such as voluntary deposits or donations. Because of the fragility and perishable nature of the physical material on which films are stored, the long-term preservation and restoration of films requires that they be reproduced and transferred onto new supports. This is true in varying degrees for all film materials which have been used up to now, from nitrate to acetate and most likely also for polyester. Reproduction is therefore an integral part of the preservation process.

However, the making of copies of works by the archives for the purposes of preservation and restoration constitutes in principle an infringement of the reproduction right of the copyright and neighbouring rights owners of the film.⁵² It is therefore important that designated depository bodies acquire the necessary rights in order to be able to carry out this part of their mission.⁵³ This can be arranged through a contractual agreement between the depository and the depositor or, where the latter is not – or is not the only – rightsholder, the relevant rightsholders. However, a clearer solution consists in the inclusion of a specific copyright limitation in national law permitting the reproduction of works by archives for the purposes of preservation and restoration. This significantly facilitates the archives’ work, allowing them to run a coherent preservation policy, without having to deal with each case individually. The existence of such a limitation is also of particular value as regards situations in which the archives encounter difficulties in tracing the relevant rightsovers and no written contractual agreement exists. This concerns a large proportion of the current collections of archives, especially in the case of older films. Also, as regards legally deposited materials, if rightsholders were able to block the preservation of the materials this would defeat the very purpose of the legal deposit laws.

In a number of European countries, a provision to this effect already exists or is currently in the process of being adopted. This type of limitation falls within those permitted under the EC Directive on Copyright in the Information Society⁵⁴ (hereinafter “Copyright Directive”), Article 5(2)c of which allows Member States to adopt limitations 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 commercial advantage. The Directive⁵⁵ also requires that such limitations be structured so as to comply with the established “three-step test”, according to which, in order to be permitted, limitations must be applied only in certain special cases, must not conflict with a normal exploitation of the protected subject-matter and must not unreasonably prejudice the legitimate interests of the rightsholders.⁵⁶ The shape and scope of these limitations varies among Member States. In Belgium for instance, a provision presently exists that specifically permits duplicates, copies, restorations and transfers to be made by the *Cinémathèque Royale de Belgique* for the purpose of preserving the film heritage.⁵⁷ Other countries have adopted broader provisions that cover the reproduction acts for preservation purposes of a wider range of institutions (libraries, archives, museums). The Netherlands has for instance recently included this type of limitation in its Copyright Act.⁵⁸ A further approach is that taken by France, where the current Bill for the implementation of the Copyright Directive provides for the introduction of such a limitation into the present Legal Deposit Law. This



would allow for the reproduction, by the designated depository bodies only, of works, on any support and by any procedure, as is necessary to fulfil the legal deposit obligations of collection, preservation and consultation.⁵⁹

An important point is that these limitations should also permit the copying of films onto digital supports.⁶⁰ Indeed, the making of digital copies of films already forms part of established archival restoration techniques and in the future may also become a useful long-term conservation tool (as well as a means of keeping films which are stored on obsolete materials “readable”). The wording of the French proposal clearly covers this as it refers to the reproduction of works “on any support and by any procedure”. Similarly, the limitation which has just been introduced in the Dutch Copyright Act is also intended to cover both digital and analogue reproductions. The same is true of the relevant limitation that Belgium is currently proposing to adopt.⁶¹

In general, alongside the development of systematic collection policies, it would be highly desirable that all European countries adopt such an exemption so as to facilitate the fulfilment of the aims of deposit. This type of provision should not be particularly controversial insofar as proper preservation of deposited works is in the interests of all parties and does not affect the rightsowners’ economic rights. The 2004 Commission Proposal for a Recommendation on film heritage indeed encourages the introduction of national legislation (or the use of other methods) to permit the carrying out of these activities by the archives, including the reproduction of films on new storage mediums.⁶²

Making Deposited Works Available

Alongside collection and preservation, the other fundamental task of film archives is to provide access to the material in their care. Indeed, there would not be much point in conserving films if these could not be made accessible. This is the case both for works deposited under legal deposit and voluntary deposit schemes. In the case of legally deposited works however, the emphasis is usually placed on making the material available for specific purposes, such as research, educational and cultural purposes, often within strictly defined conditions of consultation. This is because legal deposit is generally considered more as an instrument of protection than as an instrument of promotion.⁶³ Voluntary deposits on the other hand, are often conceived so as to give archives greater opportunities to present the deposited films for general promotion of culture purposes.⁶⁴ As a result, the contracts regulating voluntary deposit will usually grant archives wider rights to show the films to the general public. As in the case of preservation, the rights needed by the depository bodies to make works available within the boundaries of the specific aims of each type of deposit, can be acquired either contractually or through the existence of specific provisions in national legislation permitting certain uses by the archives without the need to obtain the consent of the rightsowners of the film. For the same reasons discussed in the context of preservation, the latter solution is, in general, strongly advocated by the archives.

It should first of all be noted that the possibilities of providing access to the deposited films are strictly limited by preservation considerations. Indeed, each time a film is played this contributes to its wear. It is therefore particularly important for the archives to be able to copy the original deposited material, in order to provide a consultation copy of the film and keep the original for strict preservation purposes. The archives however need to acquire the necessary rights to carry out such reproduction, as this constitutes in principle an infringement of copyright. It can be argued that the limitations discussed above with regard to preservation can also be interpreted to cover the making of a copy for consultation as this is necessary for the purposes of preservation, that is, in order not to damage the original material. Some countries however, specifically provide for a limitation allowing archives to make copies of works for the purposes of consultation. As already mentioned, France is for instance, proposing to include such a provision in its Legal Deposit Law. Again, this type of limitation would appear to be permissible under Article 5(2)c of the Copyright Directive and would presumably not cause excessive concerns for the rights-holders.

Most archives arrange for the consultation of deposited films by researchers and students on an individual basis on the premises of the archive. In general, this type of one-to-one consultation would not be considered as a public performance of the film⁶⁵ and should therefore not pose particular problems for the archive from a copyright point of view.⁶⁶ For the sake of clarity though, the possibility of providing for such consultation is often specifically dealt with contractually.⁶⁷

Showing a deposited film to a wider group of people however, even where this is composed of a restricted group of individuals (e.g. researchers or students), will in most countries constitute a public performance of the film and therefore fall under the exclusive right of authors and neighbouring rightsowners to authorise or prohibit the public performance of their work. The rights to carry out this type of activity can once again be obtained by the archives through contractual arrangements, but in certain countries specific exemptions allowing such uses have been incorporated into national law. In the Netherlands, for instance, performances provided by non-profit making institutions exclusively for the purposes of education⁶⁸ or scientific purposes are not deemed to be public and therefore do not require the rightsowners’ consent. This provision would appear to allow the Dutch Film Museum to screen the films it holds to specific groups of students and researchers. Another example is the Italian Film Law,⁶⁹ which provides that the *Cineteca Nazionale* (the national film archive) may, after three years from the time of deposit and for strictly non-profit purposes, organise cultural and educational screenings of deposited films, without seeking the consent of or paying remuneration to the rightsowners. Any such limitations will of course have to comply with the Berne three-step test. While these types of limitations are repeatedly called for by film archives, it would appear that the likelihood of their being adopted and their scope will continue to vary significantly from country to country.

The possibilities for archives to grant access to the films in their care are presently being revolutionised by the advent of



digital technologies. Digitisation is indeed seen today as an optimal opportunity for improving the accessibility of archival film heritage and plans for digitising national collections are being considered in a number of Member States. A 2003 Report to the French Ministry of Culture, for instance, strongly recommends the digitisation of all legally deposited films in France, so as to facilitate their consultation.⁷⁰ Whether the archives will be able to digitise their collections for the purposes of consultation without having to obtain the consent of the rightsholders will again depend on whether an exception to this effect exists in national law. In principle, the making of digital copies by the archives for consultation purposes would appear to be an acceptable limitation under Article 5(2)c of the Copyright Directive. However, the question is complicated by the fact that the display by the archives of such digital copies (which is necessary for the consultation to take place) is an act that falls under the rightsowners exclusive rights of communication to the public and making available to the public of their works, pursuant to Article 3 of the Directive. Therefore, any limitation allowing the archives to display such copies for consultation would have to fall within the limitations permitted by the Directive in respect of the rights of communication and making available to the public. The only limitation that can be adopted to these rights in the specific case of the institutions listed in Article 5(2)c (i.e. libraries, museums, archives etc.) is contained in Article 5(3)n of the Directive. This Article permits limitations covering the communication or making available by these institutions of works in their collections (not subject to purchase or licensing terms), to individual members of the public by dedicated terminals on their premises, for the purpose of research and private study. Therefore, a limitation allowing for consultation of digital copies on the premises of the archive under these strict conditions would seem to be permissible under the Directive, but any other form of making available of the material (e.g. outside the archives' premises) would only be possible with the consent of the rightsowners.⁷¹ The amendments currently proposed to the French Legal Deposit Law would appear to provide for limitations covering both the making by the depository bodies of digital copies of the deposited works and the consultation of

such copies under the strict conditions defined in Article 5(3)n of the Directive.⁷²

Given the narrow scope of the limitations that would be permitted under the Directive, there seems to be agreement between the parties concerned on the need to reach solutions for the digitisation and making available of the film heritage held by archives through the negotiation of contractual agreements. While the interests involved are often difficult to reconcile, it is hoped that the opportunities offered by digitisation will lead to increased co-operation between the interested actors (archives, users and rightsholders) so as to find solutions that will benefit all sides.⁷³

Towards a Collaborative Framework

There are indeed reasons to believe that today there is the potential for the development of a new spirit of collaboration in Europe which may represent the key to an improvement in the national strategies for the protection of cinema heritage. This is due to the fact that many new opportunities for the exploitation of this heritage have recently opened up, thanks to the multiplication of new channels of delivery (such as video-on-demand, thematic pay-TV channels, DVDs etc.). As a result of this, many producers already appear to have realised that the preservation of their films is not just a burden but can be very much in their own interests, in view of the new prospects of future exploitation. However, because the majority of production companies in Europe are not in a position to ensure the conservation of their productions (both in terms of logistics and costs), an increased co-operation on their part in the context of publicly organised systems of deposit (by which preservation is financed by the State) seems to be a realistic hope.⁷⁴ It is conceivable that the cultural aims of the State in preserving the heritage can be made to converge with the economic objectives of the cinema industry. In this perspective, therefore, the adoption if not of legal deposit legislation at least of systematic deposit systems for films throughout Europe might not be such a farfetched goal.

1) The author would like to thank Giovanna Fossati, Lucie Guibault, Tarlach McGonagle, Leontien Bout, Dan Nissen, Thomas Christensen and Francisco Javier Cabrera Blázquez for their great help in the preparation of this article. Any inaccuracies are of course the sole responsibility of the author.
 2) It is interesting to note that the idea of collecting films, as historical documents, through a legal deposit obligation was already voiced at the time of cinema's beginnings in the late 1890s by the Polish photographer Boleslaw Matuszewski. This idea was however not taken up at the time.
 3) Although the legal deposit of films was already provided for in France in a law of 1925 and subsequently in a law of 1943, it was only in 1977 that a decree implementing the 1943 law was adopted, thus making deposit of films a reality.
 4) See for instance the "plan nitrate" launched in France in 1990, which aimed to transfer the films on nitrate base held in French archives onto safety stock over a period of 15 years (from 1990 to 2005).
 5) Commission Communication on the follow-up to the Cinema Communication and Proposal for a Recommendation of the European Parliament and of the Council on film heritage and the competitiveness of related industrial activities, COM (2004) 171 final, 16 March 2004, available at: http://europa.eu.int/eur-lex/en/com/pdf/2004/com2004_0171en01.pdf
 6) The term archives will refer throughout this article to the bodies entrusted by the State with the task of collecting, preserving and making available the national film heritage.
 7) For an international overview and analysis (although a bit outdated) of mandatory film deposit systems see also "A study of mandatory deposit systems" by Vincent Létang, in "Now What?" Report on the symposium The Right's Thing, FIAF Congress, Jerusalem 1996.
 8) A number of Eastern and Central European countries (for instance Bulgaria) also have laws for the compulsory deposit of films. For a detailed, albeit slightly outdated, analy-

sis of the existing deposit systems for audiovisual and cinematographic works in the countries of Central, Eastern and Southern Europe see the survey prepared by Audiovisual Eureka in "Preservation and Enhancement of the Audiovisual and Cinematographic Heritage: Legal Aspects", Istanbul Conference 4&5 May 2000, organised by Audiovisual Eureka and the Turkish Ministry of Culture.
 9) "Legal deposit is a statutory obligation which requires that any organisation, commercial or public, and any individual producing any type of documentation in multiple copies, be obliged to deposit one or more copies with a recognised national institution", IFLA Guidelines for Legal Deposit Legislation (Paris 2000).
 10) Legal Deposit Act of 20 June 1992 and Legal Deposit Decree of 31 December 1993.
 11) Act No. 32 of 9 June 1989 relating to the Legal Deposit of Generally Available Documents and Regulations Relating to the Legal Deposit of Generally Available Documents of 25 May 1990.
 12) The deposit of films has up to now been provided for under the Italian Film Law (currently Law No. 28 of 22 January 2004). Pursuant to this law, the deposit of Italian films at the *Cineteca Nazionale* (the national film archive) is a condition for the films to be inscribed in the National Registry of Cinematography and be eligible for the benefits provided for under the law. However, a new general Legal Deposit Law has recently been adopted (Law No. 106 of 15 April 2004) which also covers films. Presumably, when the regulations implementing this latter law will be adopted they will be structured in line with the existing provisions on deposit contained in the Film Law.
 13) The Film Act no. 186 of 12 March 1997.
 14) Act on the Archiving of films No. 576 of 27 July 1984 and Implementing Regulations No. 662 of 1984.
 15) See the 2003 Green Paper on Cultural Heritage (*Bevaring af Kulturarven*), available in Danish at: [http://kum.inforce.dk/graphics/kum/downloads/publikationer/bevaring_af_kulturar-](http://kum.inforce.dk/graphics/kum/downloads/publikationer/bevaring_af_kulturarven)

- ven.pdf. It is expected that the Government's proposal will be published this autumn (it should also be noted that while at present legal deposit in Denmark is in practice only enforced with regard to films that receive public funding, under the new law it will be applied to all Danish films). In Finland too, a proposal for a new law on legal deposit is currently being debated, which would also cover the legal deposit of films presently regulated in the Act on the Archiving of films. For the Finnish proposal see: <http://www.minedu.fi/julkaisut/tiede/2003/tr14/kuvailu.html>
- 64) See for instance Article 2 of the 1992 French Legal Deposit Law and Section 1 of the 1989 Norwegian Legal Deposit Law. In some cases, for instance in the French law, the cataloguing of the works is also mentioned as an objective of legal deposit.
 - 65) Essentially, therefore, films that are made for cinematographic exploitation.
 - 66) See for instance the French Legal Deposit Decree Article 18. Finland, Denmark and Norway also provide for deposit of such works (when these are issued in more than a certain number of copies).
 - 67) Articles 24 and 28 of the 1993 Legal Deposit Decree. An exception is made however for foreign films of which fewer than 6 copies have been distributed on French territory.
 - 68) In France the deposit obligation also covers institutional and advertising films (Article 27 of the Legal Deposit Decree) and in Denmark the 2003 Green Paper on Cultural Heritage proposes that Danish-produced advertisements shown in cinemas should also be subject to deposit.
 - 69) *I.e.* the inter-positive or the inter-negative.
 - 70) France for example requires the deposit of the inter-negative or inter-positive, or failing this a new positive copy of perfect technical quality.
 - 71) For instance in Norway, where there is an obligation to deposit both an unused master copy with accompanying sound track and a working copy in good condition.
 - 72) Article 25 of the French 1993 Legal Deposit Decree and Article 5 of the Finnish Act on the Archiving of films.
 - 73) Article 12(2)f of the Film Subsidies Act of 25 November 1980 (*Filmförderungsgesetz*) as amended, available in German at: <http://www.filminstitut.at/mainframe.htm>
 - 74) This is for instance the case in Spain. On this point see also Létang, "A study of mandatory deposit systems" cited at note 7.
 - 75) For an analysis of the issues that come into play when deciding whether to adopt a mandatory deposit system for films see Létang, "A study of mandatory deposit systems" cited at note 7.
 - 76) The Netherlands is one of the few countries that does not have a legal deposit system for printed materials and that organises the deposit of printed works through a system of voluntary agreements. As mentioned above, in the Netherlands films that receive public funding are contractually subject to deposit.
 - 77) See for instance the Netherlands Government Written Contribution to the Commission Staff Working Paper on certain legal aspects relating to cinematographic and other audio-visual works, available at: <http://europa.eu.int/comm/avpolicy/regul/ocenw.pdf>
 - 78) 1998 Report of the Working Party on Legal Deposit under the Chairmanship of Sir Anthony Kenny, the "Kenny Report" available at: <http://www.alpso.org/kennyrep.htm>
 - 79) See also the British Library Proposal for the Legal Deposit of Non-Print Publications of January 1996.
 - 80) Kenny Report, p.14.
 - 81) Nor sound publications.
 - 82) See ALPSP Advise Note No.20, Legal Deposit, 5 February 2003, available at: <http://www.alpso.org/legalduk.pdf>
 - 83) For a recent overview of the situation of UK Audiovisual Archives see "Hidden Treasures: The UK Audiovisual Archive Strategic Framework", March 2004, available at: <http://www.buvc.ac.uk/faf/HiddenTreasures.pdf>
 This report also highlights the disadvantages of the lack of statutory deposit for films and other audiovisual works in the UK.
 - 84) See for example "Toute la memoire du monde: rapport de la mission de réflexion sur le patrimoine cinématographique en France", by Serge Toubiana, Ministry of Culture and Communication, France, 27 January 2003, available at: <http://www.ladocfrancaise.gouv.fr/btp/notices/034000026.shtml>
 - 85) This is for instance the approach of the Dutch Government - see the Written Contribution mentioned at note 29.
 - 86) Isabelle Gianattasio, Patrimoine et dépôt legal, Premières Journées d'études européennes sur les archives de cinema, November 2002, available at: http://www.bifi.fr/doc_site/thema/patrimoine/menu.htm
 - 87) See note 30.
 - 88) UNESCO Recommendation for the Safeguarding and Preservation of Moving Images of 27 October 1980, available at: http://portal.unesco.org/en/ev.php-URL_ID=13139&URL_DO=DO_TOPIC&URL_SECTION=201.html
 - 89) European Convention for the Protection of the Audiovisual Heritage, available at: <http://conventions.coe.int/Treaty/en/Treaties/Html/183.htm> and its Explanatory Report available at: <http://conventions.coe.int/Treaty/en/Reports/Html/183.htm>
 - 90) Protocol on the Protection of Television Productions, available at: <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=184&CM=8&DF=29/07/04&CL=ENG>
 - 91) A maximum of 12 months after the final version has been shown for the first time to the public, or any other reasonable period specified by a Party (Article 8.2).
 - 92) Austria, Bulgaria, France, Greece, Iceland, Hungary, Lithuania, Portugal, Romania, Slovakia, Turkey and Monaco.
 - 93) The Convention will enter into force once it has been ratified by 5 countries (including 4 Member States).
 - 94) Commission Communication on certain legal aspects relating to cinematographic and other audiovisual works, COM (2001) 534 final, 26 September 2001, available at: http://europa.eu.int/comm/avpolicy/legis/key_doc/legispdffiles/cincom_en.pdf
 - 95) Commission Communication on the follow-up to the Cinema Communication and Proposal for a Recommendation of the European Parliament and of the Council on film heritage and the competitiveness of related industrial activities, COM (2004) 171 final, 16 March 2004, available at: http://europa.eu.int/eur-lex/en/com/pdf/2004/com2004_0171en01.pdf
 - 96) For educational, academic, research and cultural purposes.
 - 97) Voluntary deposit is suggested for foreign and older cinematographic works as well as for ancillary materials and for moving image material other than cinematographic works.
 - 98) Council Resolution of 26 June 2000 on the conservation and enhancement of European cinema heritage and Council Resolution of 24 November 2003 on the deposit of cinematographic works in the European Union.
 - 99) European Parliament Report of 5 June 2002 on the Commission Communication on certain legal aspects relating to cinematographic and other audiovisual works. The Parliament advocates compulsory deposit for publicly funded works as a transitional measure.
 - 100) Unless the copyright term in the film has expired and the film has fallen into the public domain.
 - 101) The transfer of the possession of the physical film material to the deposit bodies does not imply the transfer of copyright and neighbouring rights to film. See Recital 17 of the Commission proposal for a Recommendation on film heritage and the Explanatory Report to the Council of Europe Convention for the Protection of Audiovisual Heritage.
 - 102) 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, OJ L 167/10 of 22 June 2001. The Directive lays down in Article 5 an exhaustive list of the limitations that Member States may adopt to the reproduction right (as set out in Article 2 of the Directive) and to the rights of communication and making available to the public (as set out in Article 3 of the Directive). All the listed limitations (except one) are optional.
 - 103) Article 5(5).
 - 104) Article 9(2) of the Berne Convention lays down this three-step test for determining permitted limitations in respect of the reproduction right. Pursuant to Article 13 of the TRIPS Agreement (Agreement on Trade-Related Aspects of Intellectual Property Rights) and Article 10 of the WIPO Copyright Treaty, however, this test is now applicable in respect of limitations to all authors' rights (not just to the reproduction right). In addition, pursuant to Article 16 of the WIPO Performances and Phonograms Treaty this test is now also applicable as regards limitations in the field of neighbouring rights.
 - 105) "provided that these acts do not conflict with the normal exploitation of the work and do not harm the legitimate interests of the authors". Article 22(1)(8) of the Law of 30 June 1994 on authors' rights and neighbouring rights, as amended. The Law also specifies that the materials resulting from such acts are to remain the property of the Cinémathèque which is not to use them for any commercial or profit purposes. The current Belgian proposal for the implementation of the Copyright Directive provides for the extension of this limitation to other libraries, archives and museums. See *Projet de loi Doc 51 1137/001* (and proposed amendments) available at: <http://www.lachambre.be/kvvcr/showpage.cfm?section=flwb&language=fr&right-menu=right&cfm=flwb.cfm?lang=F&legislat=51&dossierID=1137>
 - 106) Article 16n of the Dutch Copyright Act, as introduced by the Act of 16 July 2004 amending the Dutch Copyright Act and implementing the Copyright Directive, *Staatsblad* (Official Gazette) 2004, 336, available in Dutch at: <http://opmaat.sdu.nl>
 - 107) *Projet de loi relatif au droit d'auteur et aux droits voisins dans la société de l'information*, of 12 November 2003, available at: <http://www.assemblee-nat.fr>
 - 108) A limitation allowing the making of digital copies of works for preservation purposes would appear to be permitted under Article 5(2)c of the Directive on Copyright in the Information Society, as this provision does not distinguish between reproductions made in analogue and in digital format. See Lucie Guibault, "The nature and scope of limitations and exceptions to copyright and neighbouring rights with regard to general interest missions for the transmission of knowledge: prospects for their adaptation to the digital environment", Copyright Bulletin December 2003, available at: http://portal.unesco.org/culture/en/ev.php-URL_ID=17316&URL_DO=DO_TOPIC&URL_SECTION=201.html
 - 109) See note 57. On this point see also Lucie Guibault's work cited at note 60.
 - 110) For its part, the Council of Europe Convention for the Protection of the Audiovisual Heritage simply states that each Party may include such a limitation in its national law (Article 9).
 - 111) This is the view of producers in particular.
 - 112) See, *inter alia*, the Explanatory Memorandum to the Council of Europe Convention for the Protection of the Audiovisual Heritage and also "The Right's Thing" cited at note 7, in which this distinction (and its appropriateness) are thoroughly discussed.
 - 113) See however Marie Cornu "Access to archives and authors' rights" in *RIDA* January 2003 for an analysis of how such an interpretation may not be so clear-cut in the French context.
 - 114) Although it should be noted that specific restrictions as to the use of the material may have been imposed by the depositor and/or copyright owners. On this point see *Journal of Film Preservation*, Special Issue: Manual for Access to Film Collections, Volume XXVI No 5, December 1997.
 - 115) *Ibidem*.
 - 116) Provided the performance forms part of the school work plan or curriculum. Article 12.5 of the 1912 Dutch Copyright Act as amended.
 - 117) Law of 22 January 2004, no 28.
 - 118) See "Toute la memoire du monde" Report by Serge Toubiana, cited at note 36.
 - 119) Recital 40 of the Directive indeed states that any limitation adopted for the benefit of certain non-profit making establishments (such as public libraries and archives) should be limited to certain special cases covered by the reproduction right and "should not cover uses made in the context of on-line delivery of protected works". The only exception to this appears to be that defined in Article 5(3)n.
 - 120) See note 59. In addition to a limitation allowing for the making of copies of deposited works on any support and by any procedure by the depository bodies for consultation purposes, the proposed amendments also include a limitation permitting the consultation of the works on the premises of the depository bodies by duly accredited researchers through individual dedicated consultation stations.
 - 121) See European Film Heritage on the Threshold of the Digital Era, The First Project's Final Report June 2004.
 - 122) There is also a general argument that the archives should be entitled to receive some form of remuneration for their preservation services in the event of the commercial re-exploitation of the deposited material by the rightsholders (for example a percentage of the income obtained from the re-exploitation). On this point see *inter alia* Article 15 of the European Convention on the Protection of the Audiovisual Heritage and its Explanatory Report.