APPENDIX E:
COPYRIGHT PARITY WITH EUROPE

1. Introduction

Proposition 12/06 to the 2006 Annual Conference was referred to BECTU's Copyright Committee which was asked to develop a policy document for presentation in 2007. Due to limitations on resources it has not been possible to carry out a full investigation of the issues. Instead this note, prepared for the Copyright Committee, seeks to clarify the objectives of the original proposal, to highlight some of the issues and to focus on what can be achieved. Informed by this note, the NEC and annual conference will be in a better position to assess whether resources should be made available for further work.

2. Parity with European States

The European Union does not have a single unified copyright law. Each Member State has its own copyright law which has been harmonised in a limited number of ways through the introduction and implementation of 10 European Directives in the field of copyright and related rights. Most copyright creators would agree there have been some benefits from harmonisation but there have also been some unsatisfactory compromises. Some areas remain untouched, despite the good intentions of the European Commission and despite strong lobbying by creators and their representatives. Two examples are moral rights and unfair copyright contract terms.

The original proposal had a dual focus:

"Integrity" – the two main moral rights are the right to be identified as the author of a work and the right to protect the integrity of a work. These rights are personal to their creator and are said to have no economic value. For this reason, it is argued, the European Commission is not competent to harmonise the rights.

"appropriate fruits thereof" – refers to creators' livelihoods which depend largely on copyright. Most creators are the first owners of copyright in their work and exchange those rights for payment through (in the form of option, advance, fee, royalty or repeats), through a contract. The extent of the grant of rights should depend on the amount paid. However, the bargaining power between the copyright creator and the commercial copyright user is not evenly balanced, it is tipped strongly in favour of the user. What follows are assignments of copyright for low levels of payment; little if any share in the subsequent success of a work; waivers of moral rights and the inclusion of ever more onerous general terms and conditions in their contracts. Creators tend to refer to these under the catch all of unfair copyright contract terms.

Within the European Commission, responsibility for Copyright falls under the Directorate for Harmonisation of the Internal Market. Contract law falls under the Directorate responsible for Justice.

Recent research by the Internal Market Directorate shows they are unlikely to address copyright contract law in the foreseeable future unless they have strong proof that differences in law are causing an uneven economic playing field between Member States. The Commission is showing less and less interest in the uneven playing field between

creators and users of copyright works as Europe becomes even more dependent on the global 'knowledge based economy'.

No attempt to harmonise contract law at European level has been made. The results of a consultation carried out by the Justice Directorate indicated an unwillingness on the part of European legal and economic interests to attempt to develop a single European contract law and, once again many interests say it is not competent to do so. Should the Commission attempt such a mammoth task, it seems highly unlikely that unfair copyright contract terms would be a major concern.

3. Compare and contrast the status of UK creators with European Contemporaries

There is a very big difference between the way in which UK copyright legislation is framed in comparison with that of many other countries in Europe. The UK, like America, follows the Common law tradition. Whereas many of the countries in Continental Europe follow the Civil law tradition. UK and America have copyright, focusing strongly on the economic value of the right whereas most Continental countries have Author's Rights. The way our laws are drawn up and the dependence on case law makes direct comparison quite difficult and a costly task for researchers who must have a thorough understanding of copyright and contract, both law and practice, as well as an ability to translate.

For creators, particular weaknesses in UK law waivers of moral rights, the need to assert the right to be identified for it to apply and the assignment of copyright. This is not to say that these are not possible in other European legislation, they are in some if not all. But some legislations do not encourage assignment of copyright or permit a waiver of the moral rights.

One or two legislations, Germany most notably, have legislation intend to protect the creator from unfair contract terms, even to the extent of including a 'best seller clause' which to help the creator to benefit from the subsequent success of a work and includes arbitration by its unions and professional bodies to determine fair rates retrospectively. However, recent research in the photographic sector indicates that although some laws elsewhere in Europe contain provisions aimed at counterbalancing the bargaining power as between creators and users, in practice users will find a way round such provisions.

The treatment of creators does not only differ across Europe it is very different across industries, or for different types of creators, even here in the UK. Different business and licensing models have arisen to suit different industries. What is standard practice in the music industry is not standard practice in the film and television industry. Script and Screenwriters are not given the same contractual treatment as Directors of films. Authors will have one contractual/rights agreement with their book publisher and a completely different contract/agreement with a production company. And, of course, treatment of the creator differs according to how well established or how much in demand they are. There is no 'one size fits all'.

This makes comparative research time consuming and expensive unless the research is very tightly defined.

The issues outlined above are not just a European problem, they are global. The acquisition policies of broadcasters/producers, new media companies and content providers are aimed at the global and not at the UK or regional marketplace and their

contracts and rights acquisition policies reflect this. A review of UK and regional conditions alone is likely to give incomplete and misleading picture.

4. Conclusion

Section 2 and 3 above provide an outline of the issues which need investigation and the hurdles to be overcome. However, research in this field will be costly and time consuming and a review which addresses only UK and Europe could only ever provide part of the answer.

Should BECTU consider devoting resources to such a project, its parameters will need very careful definition. Furthermore, BECTU should seek partners amongst other media industries and at European and International level which could contribute information as well as resources for such a project. However, perhaps BECTU's first priority should be to address what it could achieve from such a large scale project and whether it can afford to commit its resources in this way. This could initially be given consideration by the BECTU Copyright Committee, reporting to the NEC.