

## European Film in the Digital Era Bridging Cultural Diversity and Competitiveness European Commission Communication (15 May 2014)

### SAA comments

#### About the SAA

The [Society of Audiovisual Authors](#) (SAA) is the grouping of European collective management organisations representing the interests of their audiovisual author members, in particular screenwriters and directors. The member organisations of SAA (25 societies in 18 countries) manage the authors' rights of over 120,000 film, television and multimedia screenwriters and directors.

#### Executive Summary

SAA welcomes the Commission communication and the structured dialogue it suggests. This initiative will help gather the views on the multiple dimensions of such a complex area that touches on EU policy in the fields of copyright, financing, taxation and education.

Our main recommendations for the European Parliament are:

- **European audiovisual policy** should aim at guaranteeing online visibility and long-term availability of European works on all platforms. International services should not be able to exploit the AVMS Directive's country of origin principle to escape targeted countries' stricter policies and create unfair competition. All distributors of audiovisual works should contribute to the promotion of European works and thus to the sustainability of European production.
- **Copyright** is not an obstacle to the circulation or cross-border access of works in Europe. Authors' rights are the intellectual property that the whole audiovisual value chain is built on. It is in authors and other rightholders' interest to reach the widest possible audience. Territorial exploitation and exclusivities are economic mechanisms to gather investors and secure partners' commitment in the distribution of works. Imposing pan-European licensing would risk undermining film financing as well as a multitude of smaller exploitations.
- **Distribution** is an essential but fragile segment of the chain to bring films to the audience all over Europe. It must be better supported by public funds. It also needs more flexibility to define and test release strategies and maximise marketing efforts over platforms and countries.
- **Remuneration of audiovisual authors** – As multiple forms of exploitation develop online, authors' remuneration must also grow. Bypassing existing unfair contractual practices through a collectively administered unwaivable remuneration right would guarantee this.
- **Film heritage** – SAA is fully committed to the mass digitisation and rights clearance for the high volume of works in film heritage institutions' and public service broadcasters' archives. Collective licensing solutions are particularly suitable for the large scale clearance of rights.

- **The online market** will only deliver growth if effective measures to close down unlicensed services are implemented across Europe and the E-Commerce Directive ceases to be used by some platforms to avoid payments to creators while they use their works. In addition, reduced VAT rates for all audiovisual works, however they are accessed (cinema, TV, VOD, etc.), would help the online market develop.
- **Public support schemes** are essential for European production and should also address development, distribution and promotion. However, they should not interfere with the artistic freedom of creators.

## **The Commission communication**

The Commission communication rightly recognizes the substantial cultural, social and economic significance of the European audiovisual sector. It formulates criticisms such as the heavy reliance on public funds and the fact that many films do not reach the entirety of their potential audience. It identifies the digital revolution as an opportunity which offers more possibilities and flexibility for distribution and impacts on audience behaviour. The challenges for the industry are therefore to test new business models and audience development strategies while for public policies they are to improve cooperation at regional, national and European levels.

To facilitate such a process of change, the Commission communication proposes a transnational policy cooperation and a structured dialogue with the sector at European level to improve the complementarity between the Member States and the Union policies (the European Film Forum).

The SAA welcomes this Commission's initiative to bring everybody together to discuss the multiple dimensions of such a complex issue as European cinema in the digital era, which touches upon many aspects, be it regulatory, financial, educational or business-related.

## **The European Parliament initiative report**

The European Parliament initiative report is the first opportunity for a large debate on the assessment of the situation and the current challenges of the European film sector following the switch to digital projection in cinemas. It opens a discussion on the Commission communication's findings and proposals, before the European Film Forum starts its activities.

Further to the first exchange of views in the Culture committee on 4 November 2014, the SAA shares the European Parliament's objective of **improving the accessibility of European films in the global digital era** and would like to comment on a number of related aspects in more detail: audience engagement, film financing, distribution challenges, the respective role of copyright, film funds, audiovisual policy and the regulatory environment in general in the process of change, as well as essential basic issues such as film heritage preservation and media education.

## **Audience engagement**

Engaging with the audience is a key objective of the whole sector and in particular of authors. Screenwriters and directors make films to tell stories to the audience and want them to be seen. They expect wide promotion and international distribution of their films and maximum availability on all possible platforms. They also expect this availability to last and be able to access a large catalogue of European films on a long term basis. It is therefore not possible to consider that authors would one way or another hinder their relationship with the audience.

As Lord David Puttnam said in a [speech](#) in October 2014: "Facilitating the wider accessibility of a range of content is not only in the public interest, it's essential for rightholders and distributors too".

## **Film Financing**

A film is one of the most expensive creative works to produce. The average production budget per film in the main European markets was around €3.8 million in 2013<sup>1</sup>. Digital tools are now the rule, but, at least from a statistical point of view, their use has not significantly reduced the costs. There is however anecdotal evidence in some countries that films lacking significant external investment and operating under severe budgetary constraints are now being produced for half the budget of a comparable work 10 years ago. Unfortunately there is also an impact on the final quality and the ability of the film to get cinema exhibition. All this underlines the fact that the production of films still necessitates high levels of investment. Public funds are a necessity for creators and producers to be able to tell their stories as most private investors consider the film sector as a risky business and are reluctant to support it. However, public funds do not cover costs: as a state aid rule, they intervene to a maximum of 50% of the production costs.

The main sources of financing are at local level and in spite of the relatively limited investment in the European industry compared to the US, this continent manages to punch above its weight and produce screenwriters and directors whose works are loved the world over. This is a European success story of how we have found ways to channel our naturally fragmented continent of different languages and cultures to produce a highly visible and significant film sector.

In addition, and linking to the first point, audience engagement is also linked to the style of the creators behind a film. Some of Europe's most well-known screenwriters and directors have a guaranteed fan-base because they have been able to develop their own personal style. Unfortunately the truth is that many directors do not get the opportunity to make enough films to develop their style and fan-base. Special support often exists for first films, but is inexistent for subsequent films. Our approach to talent development needs to be more long-term to enable a broader array of creators to perfect their profession and creative voice. Alongside support to take creators beyond just their first film, screenwriters and directors could also be given access to funding (e.g. MEDIA funding) to help them in the research and development phases of their creative projects.

### **What about distribution?**

The dream of authors delivering their audiovisual works directly to an international audience on the internet faces a fundamental challenge - authors still rely on a cast and crew to make a film as well as on many intermediaries to enable them to reach audiences.

Distributing a film and attracting the media and audiences' attention is also very expensive at a time of overabundance of audiovisual experiences and multiple channels. Making a film available in a cinema or on a VOD platform will not automatically draw audiences. Neither do films cross cultural borders just because they are made available somewhere on the internet. You therefore need to put a lot of money into distribution and communication to create audience awareness and demand.

To ensure its visibility, each film needs separate 'signaling' investment, which means active marketing and distribution efforts on all platforms. There are multiple new tools to engage with audiences at the production and distribution stages (social media, fan communities, websites, apps, premieres, etc.) in addition to traditional communication tools (posters, press, radio, TV, etc.) but there is no 'one size fits all' model.

Competition for audience attention is huge. This is why flexibility and individual release strategies which make the most of each individual film, taking into account its own characteristics, is of utmost importance. Imposing pan-European licensing would not help in this context. On the contrary, it would limit flexibility and undermine film financing as well a multitude of smaller exploitations.

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<sup>1</sup> European Audiovisual Observatory Yearbook 2013 Volume 2.

Flexibility also means testing different release strategies to the classic release windows (the film is first released in cinemas, then goes to DVD, VOD, TV, etc.). New exploitation paths such as simultaneous or near-simultaneously release on video-on-demand (VOD) and cinemas, festivals, or television in several countries in response to the difficulties of some films to get a (wide) cinema release, can maximise the effects of marketing and communication efforts and provide additional audience for these films. These schemes are being explored through the ongoing [preparatory action](#) on the circulation of European films funded by the European Parliament. The SAA is supportive of these initiatives which will help the sector to better understand the impact and commercial potential of new audience behaviour.

## What is the role of copyright in the territorial exploitation of films?

We often hear that copyright or copyright territoriality is an obstacle to pan-European exploitation.

It is important to repeat here that the authors' rights in a work, at the moment of creation, are borderless and can be licensed on an international basis. Authors' rights and copyright are not a legal obstacle to pan-European or international exploitation. Territoriality is not a copyright restriction, it is just the economic reality of the European film sector, as is the case for many other cultural sectors.

The financing and distribution of European films partly relies on the territorial sale of rights and exclusivities. Most European producers do not have enough private capital to produce a film. They gather private investors and financial partners from different countries around a film project, as well as public funds. Lots of pre-sale deals are signed or initiated at film markets organized alongside international film festivals such as Cannes, Berlin or Toronto, before the film is shot, on the basis of a synopsis and a few attractive names. Acquiring rights or exclusivities secure their partners' investment.

In this context of multiple sources of financing, **pre-sales of rights** to future distributors/media partners on a language or territory basis (depending on the buyer's business model) **are strategic to financing European films**. As examples, pre-sales represented 31% of the finance plan of "Amour" by Michael Hanneke (a France/Austria/Germany co-production) and 37% of the finance plan of "A Royal Affair" by Nikolaj Arcel (a Denmark/Sweden/Czech Republic co-production)<sup>2</sup>.

As there are no copyright licensing obstacles which prevent this from happening, some films are, of course, released simultaneously across borders within the EU and beyond. A striking example of this was the documentary "Home" by Yann Arthus-Bertrand in 2009. The film was released simultaneously in cinemas, on TV channels, DVDs and on a dedicated YouTube channel in several languages, on World Environment Day. This was made possible because the PPR group (now called Kering) covered €10 out of the €12 million budget.

If you are able to fully finance a film or to acquire the rights for its international exploitation there is no doubt that you can exploit it on a multi-territorial and multi-platform basis. However, one has to keep in mind that there are no pan-European distribution companies to do that. The only operators able to distribute on a pan-European basis are the US studios or the new global operators (Google, Amazon, Apple).

This problem of pan-European distribution has been tackled by the MEDIA programme since the early 90s. The MEDIA programme supports distribution as a main objective. Its support mechanisms encourage European distributors and sales agents to work together to make films circulate around Europe. It has helped European networks of independent distributors to develop. Some of them are today building alliances in the online distribution too, such as the Wild Bunch [initiative](#).

SAA is concerned by the high degree of polarisation among stakeholders in this debate, which will undoubtedly make it very difficult to achieve progress. The proposed Forum should aim to be structured and operated in a way that breaks down some of this polarisation.

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<sup>2</sup> FIAPF, IVF and IFTA [presentation](#) at 3rd meeting of WG1 of Licences for Europe.

## **Cross-border access and portability**

Another simplistic solution for the audiovisual digital single market is to claim cross-border access for consumers, as if it was a top priority to address the 2.6% of EU citizens who live outside their country of origin. New Commission Vice-President for the Digital Single Market, Andrus Ansip, declared at his hearing in the European Parliament on 6 October 2014: "One of my priorities will be to make sure consumers have access to content across borders". He specifically targeted geo-blocking as a main restriction to be removed.

As a [blogger](#) highlighted, "there are plenty of broadcasters, especially in smaller EU countries like Estonia, from which the Commissioner hails, who would like to buy the local rights to say, an English TV series, in order to air them with Estonian sub-titles, but could not possibly afford to buy those rights absent geo-blocking, because the price would have to reflect the fact that anyone who wanted to watch the programme anywhere in Europe would be free to do so, largely untroubled by the presence of the subtitles. Accordingly, no geo-blocking would mean depriving those consumers entirely of the ability to see those programmes in their local language. (...) Hopefully, Veep Ansip's understanding of the economics of the copyright industries will become more sophisticated as he learns his way around the brief."

The Licences for Europe stakeholders' dialogue discussed the issue of cross-border access and portability constructively and identified areas for improvement. As underlined in the [Joint Statement](#) on "Cross-border Portability of lawfully-acquired content" of the audiovisual subgroup of Working Group 1, "market-led initiatives are already a reality in addressing demand for away-from-home consumption of different types of content, including a growing number of innovative consumer options" (see for example [EuroVoD's statement](#) on cross-border access to subscription-based VoD services, as well as the availability of several language versions, in accordance with granted rights). These market-led solutions, which do not need any copyright reform to be put in place, are particularly suitable for subscription services which can allow their subscribers to benefit from their services across borders.

## **How can newcomers be involved in the value chain?**

In spite of many countries' efforts to support European production and give the audience a taste for European films, the box office is still dominated by US entertainment production. In addition, online distribution is now worryingly controlled by global giants (iTunes, Netflix, Amazon, YouTube). The dominance of these services (as well as piracy) puts pressure on the value of films on the internet as a source of growth, as well as on the European legislation designed to promote Europe's creativity, competitiveness and cultural diversity.

Digital distribution offers great opportunities for the dissemination of European works but they need to be adequately seized both by market operators and legislators to become a growth driver. As a matter of principle, all distributors of audiovisual works should contribute to the sustainability of the value chain. This principle has twofold consequences:

- In a copyright policy context, any commercial user of audiovisual works such as cable operators, VOD platforms or any other exploiter of audiovisual works should get a licence and pay the creators for the use of their works.
- In a European audiovisual policy context, an audiovisual media service provider (according to the definition of the Audiovisual Media Services Directive) which offer audiovisual works should contribute to the promotion of European works.

## **Audiovisual authors' remuneration for the use of their works**

Authors' rights are the intellectual property that the whole audiovisual value chain is built on. However, audiovisual authors, such as screenwriters and directors, are too often offered non-negotiable buy-out contracts that deprive them of any possible association to the future profits of the work, or when they have the capacity to negotiate a good contract, find themselves unable to enforce their rights effectively with their value chain partners. Their remuneration therefore does not reflect the actual exploitation of their works in spite of their authorship. Improving exploitation related remuneration would help Europe's best talent commit their

careers to the European audiovisual industries as well as give them the incentive to support and encourage the success of their completed works without having to chase the next buy-out from the next project.

There is, today, a recognized need to put in place new mechanisms to secure authors a right to be remunerated according to actual exploitation. The copyright consultation which closed in March 2014 showed that end-users (the audience in our language) agreed with authors and their collective management organisations that there is a need for the EU to act to impose fair remuneration. The European Parliament adopted a [resolution](#) on the online distribution of audiovisual works which called for authors to be given an unwaivable right to remuneration for all forms of exploitation of their work<sup>3</sup>.

SAA therefore proposes by-passing existing unfair and diverse contractual practices to develop a sustainable remuneration system which would secure audiovisual authors' remuneration for their making available right in the digital market. This would be done through the introduction of an unwaivable remuneration right for the online exploitation of works which would be administered on a collective basis from commercial users and distributed to authors whose works are used. SAA's proposal does not interfere with the producer and distributor's role of deciding the distribution and licensing strategy of the works.

### **Strengthening Europe's audiovisual policy**

The AVMS Directive, which took over from the Television Without Frontiers (TWF) Directive in 2007, set up the rules for the provision of audiovisual media services across Europe. Built on the country of origin principle, it allows audiovisual media services to provide their services across Europe while only respecting the rules of the country where they are established. The TWF Directive and its successor harmonized a number of issues such as the promotion of European works, advertising rules, protection of minors, etc. As far as the promotion of European works is concerned, traditional broadcasters have to reserve a majority proportion of their transmission time to European works, while on-demand audiovisual media services shall also promote European works since 2007.

The country-of-origin principle is fair when the country of establishment is a real connecting factor which reflects the place of the main activities of an economic operator – as is the case for most broadcasters. But for online operators, in particular global ones from outside Europe, it appears that their country of establishment in Europe has been chosen for fiscal reasons only, in total disconnection from the countries they actually target for their activity.

These possible adverse effects of the country-of-origin principle can be neutralized when rules are harmonized. Harmonisation eliminates the interest for economic operators to look for the country with the least stringent rules as they will face the same rules all over. However, the AVMS rules on the promotion of European works by on-demand services are not really harmonized. Article 13 only gives examples of ways to promote European works: prominence (which can be implemented in many ways), shares in catalogues, and financial contributions to sector support funds are just optional and left to each Member State's discretion. As a result, the countries who made use of these options (in particular by imposing financial contributions) as well as the national competitors to these international services, very much suffer from services targeting their market while being established in a Member State with no such obligation.

The Member States with audiovisual policies which request all operators who distribute audiovisual works to contribute to the economy and cultural diversity of the sector started their campaign for a revision of the European framework in order to stop this unfair competition. Two ways are possible: engaging in a real harmonization of Article 13 so that the same rules apply in all Member States, or allowing derogations to the country of origin principle so that Member States with stricter policies can impose obligations on all operators active in their market. The Education, Youth, Culture and Sport Council made a declaration in this regard in its [conclusions on European Audiovisual Policy in the Digital Era](#) on 25<sup>th</sup> November 2014.

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<sup>3</sup> Paragraph 48 of the resolution.

## **Refresh the E-Commerce Directive**

In parallel to the review of the AVMS Directive, there is a need to revisit the E-Commerce Directive which has encouraged copyright avoidance behaviors on the side of online intermediaries. The liability exemption for hosting providers established by the E-Commerce Directive is currently used as an excuse by some platforms to avoid payments to creators while they use their works. Online intermediaries which take advantage of audiovisual works should contribute one way or another to the copyright ecosystem and to authors' remuneration.

## **Fight against piracy**

In addition to online intermediaries using the E-Commerce Directive's broken rules and hiding behind consumers' activities, the European film sector faces numerous obvious illegal online services who offer unlicensed films and make money with it.

Effective measures to counteract this unlicensed offering of audiovisual works has to be a priority for the European institutions and Member States. Authors' creativity and remuneration cannot develop in an environment in which nobody pays to watch their films. The declining income from DVD sales needs to be replaced by increased revenue from video-on-demand platforms who currently face unfair competition from unlicensed streaming and downloading sites.

## **Film heritage**

Film heritage institutions are essential to film preservation and film education. They are active partners of the film sector in maintaining film history and in educational activities. Film heritage institutions face specific challenges related to the conservation and preservation of their collections due to the limited public funds available for these activities. Part of these challenges relates to the maintenance of proper databases for rights identification of films in their collections.

As a result, film heritage institutions often need to ascertain the validity of the information they have in their database before being able to proceed. They therefore need the cooperation of rightholders' organisations, such as authors and producers' associations, as well as their collective management organisations. At European level, the Commission fostered cooperation between all these stakeholders to streamline joint efforts to facilitate rights clearance. A major result was achieved in WG3 (Audiovisual and Film Heritage Institutions) of the Licences for Europe Stakeholder Dialogue in 2013 with the [Statement of Principles and Procedures](#) for heritage films online concluded between ACE, FERA, FIAPF and the SAA. Film heritage institutions and rightholders' representatives now have a clear roadmap to discuss and agree terms for digitising, restoring and making available European film heritage. It will enable film heritage institutions to free up European films stored in their archives while guaranteeing rightholders an appropriate share of the rewards.

The SAA is fully committed to pursuing the project and finding a way to undertake mass digitisation and clearance projects for online uses of the high volume of older works in the archives of film heritage institutions and public service broadcasters. Audiovisual authors' CMOs have a central role to play in helping these institutions preserve and offer the public the cultural heritage of great works.

Collective licensing solutions are particularly suitable for the large scale clearance of rights. There is a clear need for proportionate and cost effective rights clearance mechanisms for large archives. This would help make a very significant amount of works available, particularly for research and educational purposes. The SAA is ready to engage in further discussions to develop a Memorandum of Understanding, or any other type of general agreement, that would propose a suitable solution for mass digitization and rights clearance of film archives based on collective management solutions.

## Public support schemes

In its comments on the public support schemes, the Commission communication judges and regrets that these schemes support the production of projects with national or regional focus targeting domestic audiences. This assertion gives a false impression of the objectives of the public support schemes and of the impact of the financing in the stories told.

The fact that a film project is supported by public funds, be-it from one country only, has no impact on its international attractiveness. Of course co-productions have more potential for circulation because they have active partners in different countries from the beginning. This is the crucial point for the circulation of films: finding partners who believe in the film and are ready to invest in its promotion. In this context, having a success in the home-country of the film is the best promotion factor to convince partners in other countries. Almost all European successes have started in their home-country. It is therefore essential to avoid attributing the difficulties of circulation of European films to the importance of public support schemes to film financing. Public support schemes are essential to the existence of a European production.

However, it is also important that public funds do not intervene in the stories told on the pretext of targeting an international audience. There is no recipe for stories which attract international audiences. Recent box office successes showed that local stories can attract international audiences<sup>4</sup>. It is therefore of utmost importance to maintain the freedom of expression and of creation of our screenwriters and directors and trust their talent to find stories that will speak to the world.

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<sup>4</sup> Intouchables by Olivier Nakache and Éric Toledano is the biggest French (non-English language) production success in the world. Released in 2011, it attracted 20 million people in cinema in France and a total of 54 million people in the world.