



Society of Audiovisual Authors
Société des Auteurs Audiovisuels

SAA White Paper on the Audiovisual Authors' Rights and Remuneration in Europe

Frequently Asked Questions November 2011

1. What is the SAA White Paper?

The Society of Audiovisual Authors (SAA) published a White Paper on Audiovisual Authors' Rights and Remuneration in Europe on 21 February 2011. The White Paper presents the situation of European audiovisual authors in terms of their rights and remuneration. It highlights existing problems and presents solutions based on the experience and know-how of authors' collective management societies.

2. What is the main proposal of the SAA White Paper?

Contractual practices in the vast majority of European countries deprive audiovisual authors of their rights and prevent them from receiving fair remuneration, in particular for the online distribution of their works. SAA believes that this cannot apply to audiovisual authors in the digital age. It is time to develop a sustainable remuneration system which would secure audiovisual authors' remuneration, take advantage of new technologies and fit into the digital market.

Therefore, in light of the digital revolution and of the development of on-demand distribution of audiovisual works, SAA proposes the establishment of a European system of direct remuneration of audiovisual authors from on-demand services through authors' collective management societies, based on the revenue streams from the distribution of their works.

The SAA proposal for European legislation would read as follows:

When an audiovisual author has transferred or assigned his making available right to a producer, that author shall retain the right to obtain an equitable remuneration.

This right to obtain an equitable remuneration for the making available cannot be waived.

The administration of this right to obtain an equitable remuneration for the making available shall be entrusted to collective management societies representing audiovisual authors, unless unions' contracts or extended collective licences already guarantee such remuneration to audiovisual authors for their making available right.

Authors' societies shall collect the equitable remuneration from audiovisual media services making audiovisual works available to the

public in such a way that members of the public may access them from a place and at a time individually chosen by them.

3. Would such a system undermine audiovisual authors' exclusive right?

SAA's proposal aims at giving audiovisual authors who are not in a strong negotiating position vis à vis producers a chance to exercise their exclusive right. In most EU countries audiovisual authors transfer their exclusive rights to producers with little guarantees as they are neither in the position to refuse nor properly protected by law. SAA's proposal would protect them from a transfer of a right with no guarantee of remuneration as European legislation would provide that they retain a right to obtain an equitable remuneration. This right should not be able to be waived by contract in order to prevent waivers being imposed for the signature of a contract.

Such a provision would not undermine the audiovisual authors who, in a very few countries such as the UK and the Nordic countries, exercise their exclusive rights through agents, guilds or their collective management societies. In such cases, the right to equitable remuneration would not apply to the extent that separate mechanisms deal with remuneration payments for the making available right. These audiovisual authors would therefore be able to maintain or develop such arrangements for the remuneration of their making available right if they consider them to be more effective.

SAA's proposal aims at offering an equal opportunity to audiovisual authors who are not in a position to be able to refuse the transfer of a right to a producer and thus achieving a level playing field in terms of remuneration for all audiovisual authors in Europe.

4. Why a compulsory collective management system?

Collective management makes it possible to enforce the right to obtain an equitable remuneration for the making available of a work.

Providing for an unwaivable right to obtain an equitable remuneration without compulsory collective management (as provided for rental in the 1992 Rental and Lending Right Directive) would leave many European audiovisual authors behind as in many countries they would not be able to enforce it individually.

The result of the Rental Directive, which only provided a limited harmonisation of the rental right, with no enforcement mechanism, was that very few authors ever benefited directly from the rental of their works.

Any level playing field can only be achieved if European legislation ensures that authors' collective management societies are empowered to negotiate and manage audiovisual authors' fair remuneration for the making available right. This is the only way to guarantee that the right to obtain an equitable remuneration will be enforced throughout Europe.

5. Why not leave this issue to contractual freedom and individual negotiation?

The SAA White Paper outlined the contractual practices between audiovisual authors and producers. It showed that these practices result in many audiovisual authors receiving a lump sum payment from the producer for the writing and/or directing of the work and no further payment for the distribution of the work through the many different channels, no matter how commercially successful the work. This is symptomatic of the weak negotiating position of authors.

The on-demand distribution of an audiovisual work today is only one of the many possible distribution channels but it is developing rapidly with many operators building and making

catalogues of cinematographic works available to the public. It is here to stay as a means of permanent access to thousands of films while many other distribution channels (cinema, TV, DVD) are more event-related. It is therefore justifiable to think about new mechanisms which would better associate audiovisual authors to this distribution channel as it will become a central point of access and consumption of films. In addition, new technologies allow for the development of automated reporting and payments well adapted to this mode of exploitation.

Taking into account this context, there are three reasons not to leave this issue to contractual freedom and individual negotiation:

- **The author's contract with a producer is signed at too early a stage to measure the on-demand exploitation of the work**

Writers' contracts are the first to be signed by a producer in order to secure the exclusivity on an idea/subject and to develop it into a script. At this early stage, the budget, casting and communication strategy are simply not defined. How could a contract define the author's participation in the on-demand exploitation of the finished work? On what grounds can this value be established?

Keeping the making available right in the initial authors' contracts would be equal to the negation of its value. Today, in most authors' contracts, it is part of the package of rights transferred to the producer for a lump sum payment with no particular value attached to it. This situation can not continue with the development of the on-demand market.

- **Difficulty in harmonising contractual practices**

Contractual practices are very different from one country to another depending on the degree of professionalisation of the industry and its organisation, the existence of representative authors' organisations able to negotiate model contracts, the acceptance and use of these models by producers, and the degree of awareness of authors about their rights. In addition, contracts deal with many issues other than the making available right such as the other economic rights, creative and moral rights, working conditions, etc.

Many authors' organisations, including collective management societies, are working on the improvement of different aspects of the contractual practices in their country. However, it is long, hard and virtually never-ending work. In addition, improved contractual practices don't necessarily mean European convergence as local specificities are important. These specificities are so important that it has not been possible to establish a European model contract so far but only guidelines, handbooks, check lists and best practices. It is therefore impossible, even if they are improved, to achieve European harmonisation through contractual practices.

- **European producers are not equipped to trace and administer payments related to multi-channel distribution**

The European production market is very much fragmented between small and very small companies or even single purpose companies set up with the aim of producing a single film. While this craft production is well adapted to accompanying authors' creativity and is responsible for most of the European "cinema d'auteur" films, it is unable to generate industrial processes and mechanisms to trace and administer payments due to authors for the distribution of their works on multiple platforms.

The contractual chain in between the author's contract with a producer and the exploitation of the work on different channels might be very long and involve many different agents which even makes it difficult for the producer to get feed-back. In this context, European producers are very much focused on the production /making aspects of the film (financing, shooting

and first promotion) and less directly involved in the distribution, which is entrusted to sale agents and distributors.

6. Would SAA's proposal interfere with the producers' role?

The SAA proposal does not interfere with the producer's role and activities. The producer remains the main partner of the authors. Good relationships between authors and producers are essential to making good films.

Authors acknowledge and do not question producers' own rights on the works in which they invest. The SAA proposal does not challenge their role and responsibility in the arbitration of the best possible commercial opportunities for the works they produce. It only aims at organising the remuneration due to authors, once the producer has decided to make the work available to the public in such a manner and at the time he chooses.

It means that any on-demand exploitation of an audiovisual work will continue to have to be cleared with producers or with the making available rightholder appointed by the producer.

7. Is there a risk of double payment of the audiovisual authors?

The making available right is currently not valued among the package of rights transferred to the producer in authors' contracts. No specific payment being currently attached to it, SAA's proposal would establish it, not repeat it.

The greater risk would be producers being tempted to lower the initial remuneration of authors in view of the revenue expected from the on-demand exploitation. However, lowering the initial payment would imply that the making available right is currently valued in contracts. Producers would therefore need to demonstrate that initial payments had increased at the time of the first inclusion of the making available right in contracts, which is not the case.

8. Who would be the debtors of such remuneration and how would it be calculated?

The debtors of the making available remuneration would be audiovisual media services who offer audiovisual works to the public on-demand. The main operators are video-on-demand (VOD) services which make catalogues of works available to the public (either to rent or to own) at the request of an individual, independent of the technology used (internet, cable, IPTV, etc.).

The calculation of the remuneration due to audiovisual authors should be based on the revenues of the on-demand services in relation to the actual use of the works. Negotiation should be conducted with authors' collective management societies in charge of the collection of this remuneration on the basis of fair criteria and clear principles for calculation which should take into account the business model of the service (individual payment, subscription, advertising, etc.).

9. How would the system work at EU level?

The foreseen harmonisation of the making available remuneration with an enforcement mechanism through collective management would make it feasible at EU level.

A VOD platform could be offered the possibility of concluding a single arrangement for all the European works of its catalogue with a one-stop-shop service which would distribute the money to audiovisual authors.

However, SAA's proposal is neutral regarding the territorial scope of a VOD service: it would apply both to VOD services offering audiovisual works in a single territory and to VOD services operating on a multi-territory basis.

10. Why authors' collective management societies are the best qualified to administer this remuneration system?

Audiovisual authors' collective management societies are authors' organisations with the professional expertise to both conduct negotiations with on-demand audiovisual media services (which necessitate market and consumption analysis, bargaining power and negotiation spirit) and to distribute remuneration to authors (which necessitates accurate databases and standardised report sheets). This expertise designates them as the best qualified to develop and invest in digital automatic processes to organise the collection and the distribution of the said remuneration at the lowest cost.

If entrusted with this new task, these societies will have to operate on a clear and transparent basis towards both audiovisual authors and on-demand audiovisual media services. SAA is open to discussing the inclusion of any possible further criteria which would ensure the efficient and transparent functioning of the mechanism.

In addition, SAA is committed to working with the European Commission, the European Parliament and the Council on the future collective management framework Directive in order to ensure the best credibility of audiovisual authors' collective management societies.

11. Would extended collective licences be an alternative solution?

An extended collective licence is a licensing agreement freely negotiated between a representative collective management society and a user for specific uses, the application of which is extended (generally through legislation) to allow the use of works of non-member rightsholders. As a general trend, non-members are remunerated on the same basis as members and rightsholders can opt out.

Extended collective licences would be able to be developed to enforce the SAA proposal in countries which practice them or as an alternative option where audiovisual authors do not transfer their making available right to producers. In both cases, the intervention of a public authority (legislator) is required for the statutory extension to operate.

However, extended collective licences are not an alternative to SAA's proposal in countries where audiovisual authors transfer their making available right to producers as there would be no grounds for authors' collective management societies to intervene.

Only SAA's proposal which suggests the establishment of a right to obtain a remuneration for the making available of a work whose enforcement is entrusted to authors' collective management societies would grant these societies the ability to intervene throughout Europe, thus ensuring a level playing field across Europe to remunerate audiovisual authors for the making available of their works.