

AUDIOVISUAL AUTHORS' RIGHTS AND REMUNERATION IN EUROPE

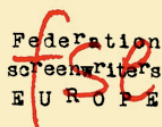
SAA WHITE PAPER

2nd edition | 2015



Society of Audiovisual Authors

Endorsed by



SOCIETY OF AUDIOVISUAL AUTHORS

The Society of Audiovisual Authors (SAA) was established in 2010 by European collective management organisations (CMOs) to represent the interests of their audiovisual author members and, in particular, screenwriters and directors.

The establishment of SAA was prompted by a perceived need to enforce the legal position of writers and directors and to fight for a fair, transparent and harmonised system to remunerate European audiovisual authors for the digital use of their work. Such a system should ensure that all authors are fairly remunerated in line with the success of their films and programmes and, at the same time, allow for easy distribution of, and access to, works.

The society believes that this objective can be achieved by:

- Securing an unwaivable right of authors to remuneration for their online rights, based on revenues generated from online distribution and collected from the final distributor. This entitlement should exist even when exclusive rights have been transferred and would secure a financial reward for authors proportional to the actual exploitation of the works.
- Ensuring that the administration of this remuneration is negotiated and administered collectively. This will guarantee that audiovisual authors are paid and establish a direct revenue stream between the market place and audiovisual authors.

SAA is committed to working with all interested parties to establish an effective system for the collective licensing and pan-European management of audiovisual authors' rights and remuneration. This will not only benefit authors but also provide a clear and transparent framework for content providers and users.

In this second edition white paper, SAA sets out the current reality of audiovisual authors' rights and remuneration in Europe, presents the sector's challenges and offers solutions that will create the right balance for a vibrant creative European audiovisual sector.

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Special thanks to Virginie Grulois
and SAA's members

March 2015
1st edition published in February 2011

design: www.delights.be

TABLE OF CONTENTS

SOCIETY OF AUDIOVISUAL AUTHORS.....	3
FOREWORDS.....	6
INTRODUCTION.....	10
SETTING THE SCENE: AUTHORS, THEIR RIGHTS, THEIR CMOs.....	11
Audiovisual Authors.....	11
Rights and Remuneration of Audiovisual Authors.....	17
Collective Administration of Audiovisual Authors' Rights in Europe.....	22
CHANGING TIMES, TIME FOR CHANGE.....	31
Audiovisual Industry Challenges.....	31
The Way Forward: Ensuring Fair Remuneration.....	36
CONCLUSION.....	43
Annex 1 – European Directives on Authors' Rights.....	45
Annex 2 – SAA Members.....	46

FOREWORDS

JANINE LORENTE
Chair of the SAA board of directors
Deputy Director General, SACD, France



SAA celebrates its 5th birthday in 2015. 120,000 writers and directors have joined forces through their audiovisual CMOs with several objectives:

- to make sure that Europe builds a legal and economic framework to create the right incentives for investment in audiovisual production that reflects our identities. Europe's cohesion depends on European citizens being able to enjoy stories told by European authors,
- to increase circulation of these works within Europe thanks to the thriving digital means available to TV and film fans.
- and above all, to put writers and directors, authors, at the heart of the whole legislative agenda linked to our cultural industries.

The latter point will be one of our main tasks in the coming years. Hence this white paper.

Our aim is to help European decision-makers better understand the process of creation of audiovisual works. To help them understand why it is so important that legislation is built with the purpose of strengthening the negotiating power of an individual author, the weakest party in a negotiation with production companies, broadcasters, Internet search engines and service providers, who are very often powerful global conglomerates.

The survival of the fittest cannot continue to be the rule in the creative industries. A study commissioned by the European Parliament acknowledges that authors, artists, are not correctly sharing in the wealth generated in the audiovisual industry. The European Commission is looking into this too. It is still very common in some EU countries for a writer or director to be paid a lump sum for developing a movie for 2 to 4 years. They then get nothing, ZERO, after the release of the work in different markets, for the whole duration of their copyright. Yet other people, and companies, continue to benefit for years from the value created by authors.

The television and film sectors in Europe generated revenues of €122 billion in 2013. That same year, audiovisual authors' collective management organisations collected just €452 million – i.e. 0.37 % – to distribute to European writers and directors. There are many reasons for this discrepancy. One of them is the lack of harmonization of audiovisual authors' rights from one EU country to another.

Let's work together so that the coming years result in a fair and equitable level playing field for audiovisual creators.



LUC AND JEAN-PIERRE DARDENNE
SAA patrons
Screenwriters and directors, Belgium

The development of Europe's audiovisual sector is a source of satisfaction and a model for the construction of the cultural and creative industries on a European scale. Our films now find audiences through a phenomenal number of channels. They reach viewers in places that would have struggled to even hear about two Belgian directors 30 years ago.

We work through co-productions in a continent where we are able to produce commercially successful films that tell powerful stories, stories of everyday heroes facing the challenges of our modern societies.

New services are appearing all the time, making films and TV programmes made by European authors available to a growing European audience. This creativity, our creativity, doesn't only feed other people's creativity, but also other activities altogether such as technology, education and tourism.

The increased availability of our works, both across Europe and the world is another source of happiness. This evolution goes to the very essence of our creation. It helps us gather the necessary resources to finance our work, the work of production companies, and the work of the many artists and technicians whose talents help make our films.

The SAA, and its audiovisual author society members, are OUR societies. We created them and we work within them to ensure that we will be able to continue to create and produce. Our collective management organisations make it possible for us to speak with one voice when we need to promote our legitimate rights and our view of the future of the European audiovisual sector within a globalised and digital cultural and creative industry.

Like the SACD and Scam do for us on a daily basis, the 25 members of SAA help their authors to be fairly remunerated for the use of their films around the world while also providing advice and useful, competent services.

Together, they act to guarantee that Europe's cultural diversity continues to be an example of how a number of countries, with their different languages and cultural traditions, can successfully live together and have a global presence.



SUSANNA WHITE
SAA patron
Director, United Kingdom

To a creator, a film or TV series can be very much like a child. An important part of ourselves goes into the creating of the work and we dedicate a significant amount of our life and emotions to it. We bring it into the world and do our utmost to develop the best in it in the time we have with it. The moment then comes where we have to stand back and let it make its own way. But there is always a connection between us. In the case of a film I am not talking of some ethereal connection, I mean our copyright or authors' rights.

I can confidently say that without the power of copyright it would be extremely hard for me to make my films and TV series. My copyright is my bargaining chip. It is what gives me the artistic freedom to bring my vision to a work. It also guarantees my remuneration and the ability to go on to make more films.

In the eyes of the public, this connection is crucial too. They want to know that they are supporting their favourite creators, as by supporting them, there will be more works for them to enjoy. It is the individual voices of film makers that the public respond to - from directors as diverse as Lone Scherfig to Mike Leigh, Claire Denis to Steve McQueen.

In Europe, screenwriters and directors are a fragile, freelance community. As a result we often find ourselves in a weak negotiating position. In Europe, our collective management organisations, like those represented by SAA, are essential in bringing back some balance.

This white paper demonstrates the situation faced by my fellow directors and screenwriters across Europe and presents a real solution. Too often Europe's best directors and screenwriters are drawn across the Atlantic where the protection of our economic rights is better (although without moral rights). The vast majority of us want to work in our home country in Europe, where the status of the author is respected, and we want our works to be available across Europe. But we also want to be fairly remunerated and have satisfactory working conditions.

As things stand, we are frequently cut off from our works once we have completed them, like a parent cut off from their child. This shouldn't happen and the European institutions have the power to do something about it.



HÅKAN BJERKING
Chair of FERA's Executive Committee
Director, President of the Swedish Film Directors (SFR), Sweden

Since 1980, our Federation of European Film Directors has been representing film directors at European level. With 35 directors associations as members from 29 countries, we speak for over 20,000 European screen directors, promoting their cultural, creative and economic interests.

As the audiovisual landscape is changing rapidly while transitioning to the digital era, us European directors want to see the emerging audiovisual scene continue to provide a flourishing ecology for film-making in Europe in which we can continue to make distinctive works which will meet their audience on all available channels, and be fairly paid for them.

We believe this 2nd edition of the SAA White Paper to be a timely input from our collective management organizations, pursuing our common objective of putting audiovisual authors back at the heart of the ongoing copyright debate.

With great challenges come great opportunities : let us meet this digital shift with ambition and a consistent approach that will empower authors to have artistic control of their works, to be fairly remunerated in their exploitation, and encourage investment in the production and distribution of the audiovisual and creative works of tomorrow.



SVEINBJÖRN BALDVINSSON
President of FSE

The Federation of Screenwriters in Europe groups 25 guilds of writers for film and television, the creators of the stories that are at the base of European businesses employing more than a million Europeans, the tellers of stories watched and loved by all Europeans.

We do not become screenwriters in order to make a fortune. All writers know that their income, if there is any, will be modest and unstable. But it has to be possible to make a living at our chosen profession. As distribution of our work moves online we are paid less and less. This is unsustainable.

The SAA proposal for an unwaivable right for the exploitation of our work online makes sense. It can easily be implemented, will cost very little as a proportion of the value of the audiovisual business in Europe, and can be managed where appropriate by our collective management organisations, now subject to stringent standards of transparency and good governance.

I am delighted to have the opportunity to endorse this proposal by the SAA and to commit FSE to work for its implementation.

INTRODUCTION

The audiovisual industry makes a vital contribution to Europe both economically and culturally. There are approximately one million people directly working in the European audiovisual industry, an industry with €122 billion in revenues in 2013. 1,551 feature films were produced in 2013, box office receipts were €6.28 billion and a staggering 8,828 television channels and more than 3,000 on-demand platforms were offering access to audiovisual programmes¹.

Since the 1st edition of this white paper in 2011, box office receipts have grown despite a difficult economic climate. There are over 1,000 new television channels and the number of on-demand platforms has grown by over 400%.

All this shows that our industry continues to evolve at quite a pace. It has never been easier to watch your favourite films and TV shows. Although more could still be done, it is clear that European works are more available than ever before. But this success is not necessarily being translated into increased remuneration for Europe's screenwriters and directors.

It is not just our industry that has evolved, so too has the political climate. 4 years ago, authors' remuneration was not on the political agenda. Since then the European Commission has consulted twice on the issue and the European Parliament has adopted a number of resolutions, as well as published a study, calling for an unwaivable remuneration right for audiovisual authors alongside work on creators' contracts. SAA's members are now also regulated by a European Directive² which should give further legitimacy to the use of collective management as a way of facilitating the creation of Europe's single digital market.

The new Parliament and Commission will take the next steps in the legislative evolution of our sector. As was underlined in the responses to the European Commission's 2014 consultation on copyright, the legitimacy of authors' rights and copyright is rooted in the link between the success of a creative work and the remuneration of its author(s). Putting authors at the heart of culture and copyright should be the starting point.

¹ European Audiovisual Observatory Yearbook 2014.

² European Council Directive 2014/26/EU on collective management of copyright.

SETTING THE SCENE: AUTHORS, THEIR RIGHTS, THEIR CMOS

AUDIOVISUAL AUTHORS

An **audiovisual work** is the product of the collaboration and creative input of a number of individuals such as authors, performers, technicians and producers. Based on the originality of their contribution, some of these individuals are recognised under national legislations as being authors, with intellectual property rights in either the completed work or their contribution to it.

The King's Speech, La Grande Bellezza, Ida, Intouchables, The Bridge, Tatort. These are some of the films and television programmes made by European screenwriters and directors whose rights are managed by SAA's members.

Limited harmonisation of authorship in audiovisual works

The collective management organisations of SAA represent two key author groups – screenwriters and directors. But under various legislations music composers, cinematographers, designers, editors and, in the case of common law countries, even producers can also be considered authors. There is currently only limited harmonisation of authorship in audiovisual works at European level so the definition and identification of the authors of audiovisual works can vary from country to country.

All the European Union (EU) Member States recognise **the principal director** of a film or audiovisual work as being an author of that work. This was set out by the 1992 Directive on the Rental and Lending Rights³, but for the purpose of that Directive only at first. Then the 1993 Directive harmonising the term of protection of copyright⁴ fully established the authorship of the director as a general principle in European authors' rights provisions.

Article 2

Cinematographic or audiovisual works

1. The principal director of a cinematographic or audiovisual work shall be considered as its author or one of its authors. Member States shall be free to designate other co-authors.
2. The term of protection of cinematographic or audiovisual works shall expire 70 years after the death of the last surviving of the following persons to survive, whether or not these persons are designated as co-authors: **the principal director, the author of the screenplay, the author of the dialogue and the composer of music specifically created for use in the cinematographic or audiovisual work.**

³ Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property.

⁴ Council Directive 93/98/EEC (codified by Directive 2006/116/EC of the European Parliament and of the Council on 12 December 2006).

Co-authors of audiovisual works

The need for a provision allowing Member States to designate other co-authors in addition to the principal director highlights the differences that exist from one country to another.

Some national legislations specifically identify the individuals who should be considered authors whilst others do not provide for a hard and fast definition but remain open to any collaborator who can demonstrate an original, creative contribution.

Examples:

The **French Intellectual Property Code** (Belgian law follows the same principles) provides that authorship of an audiovisual work shall belong to the natural person or persons who have carried out the intellectual creation of the work. Unless otherwise provided, the joint authors are: the author of the script, the author of the adaptation, the author of the dialogue, the author of a musical composition specially composed for the work, and the director. If the work is adapted from a pre-existing script or work, the author of the original work shall also be included as an author.

The **UK and Irish Copyright Acts** on the other hand, recognise the producer (i.e. the production company, not a natural person) and the principal director as co-authors. Writers and composers are authors of their underlying works.

The **Estonian Copyright Act** identifies the director, scriptwriter, author of the dialogue, the composer of specially written music, the cameraman and the designer as joint authors.

The **Czech Copyright Act** states that the director of an audiovisual work is its author, although this does not prejudice the rights of authors of works used within the audiovisual work.

Table 1

Who is an audiovisual author?

in the 18 countries where SAA has members

	Director	Scriptwriter	Music composer	Some creative technicians by law	Creative technicians can be accepted by contract	Producer
Austria	■	■	■	■		
Belgium	■	■	■			
Czech Republic	■	■	■	■		
Estonia	■	■	■	■		
Finland	■	■	■	■		
France	■	■	■			
Germany	■	*	■	■		
Hungary	■	■	■	■		
Italy	■	■	■			
The Netherlands	■	■	■	■		
Poland	■	■	■	■		
Portugal	■	■	■			
Romania	■	■	■		■	
Slovakia	■	■	■			
Spain	■	■	■			
Sweden	■	■	■	■		
Switzerland	■	■	■		■	
United Kingdom	■	■	■			■
Author of the audiovisual work		■	■			
Author of a pre-existing or separate work		■	■			

* According to the leading opinion

It is not an easy thing to create a sensation of homogeneity amongst people who express their creativity in such different ways.

Tom Tykwer
Screenwriter and director, Germany

Representative organisations

To defend their interests and represent them in their profession, most audiovisual authors become members of professional organisations. Depending on the country and on the cultural and legal traditions, they join unions, associations, guilds and/or collective management organisations. Screenwriters' guilds and associations come together in the Federation of Screenwriters in Europe and directors in the Federation of European Film Directors.

As for **collective management organisations**, brought together in the SAA, there is no single model: the scope of their role varies from one to another. Some concentrate their activities on the pure management of rights, while others also act as campaigning bodies for the defence of the interest of their members in other fields than intellectual property. However, they all emerged as a result of the desire of audiovisual authors to group together so their rights and repertoires could be collectively managed.

Table 2

Rightholders represented by SAA members

Country	SAA member	Directors	Screen-writers	Other writers and journalists *	Performing arts: directors, choreographers	Creative technicians (by law or contract)	Visual artists and photographers	Book publishers	Music composers	Music publishers	Audio-visual producers	Performers
AT	Literar-Mechana											
AT	VDFS											
BE	SABAM											
CZ	DILIA											
EE	EAAL											
FI	Kopiosto											
FR/BE	SACD											
FR/BE	SCAM											
DE	VG Bild-Kunst											
DE	VG Wort											
HU	Filmjus											
IT	SIAE											
NL	LIRA											
NL	VEVAM											
PL	ZAPA											
PT	SPA											
SK	LITA											
ES	DAMA											
ES	SGAE											
SE	Copyswede											
CH	SSA											
CH	SUISSIMAGE											
UK	ALCS											
UK	Directors UK											

* Educational, theatre, literature

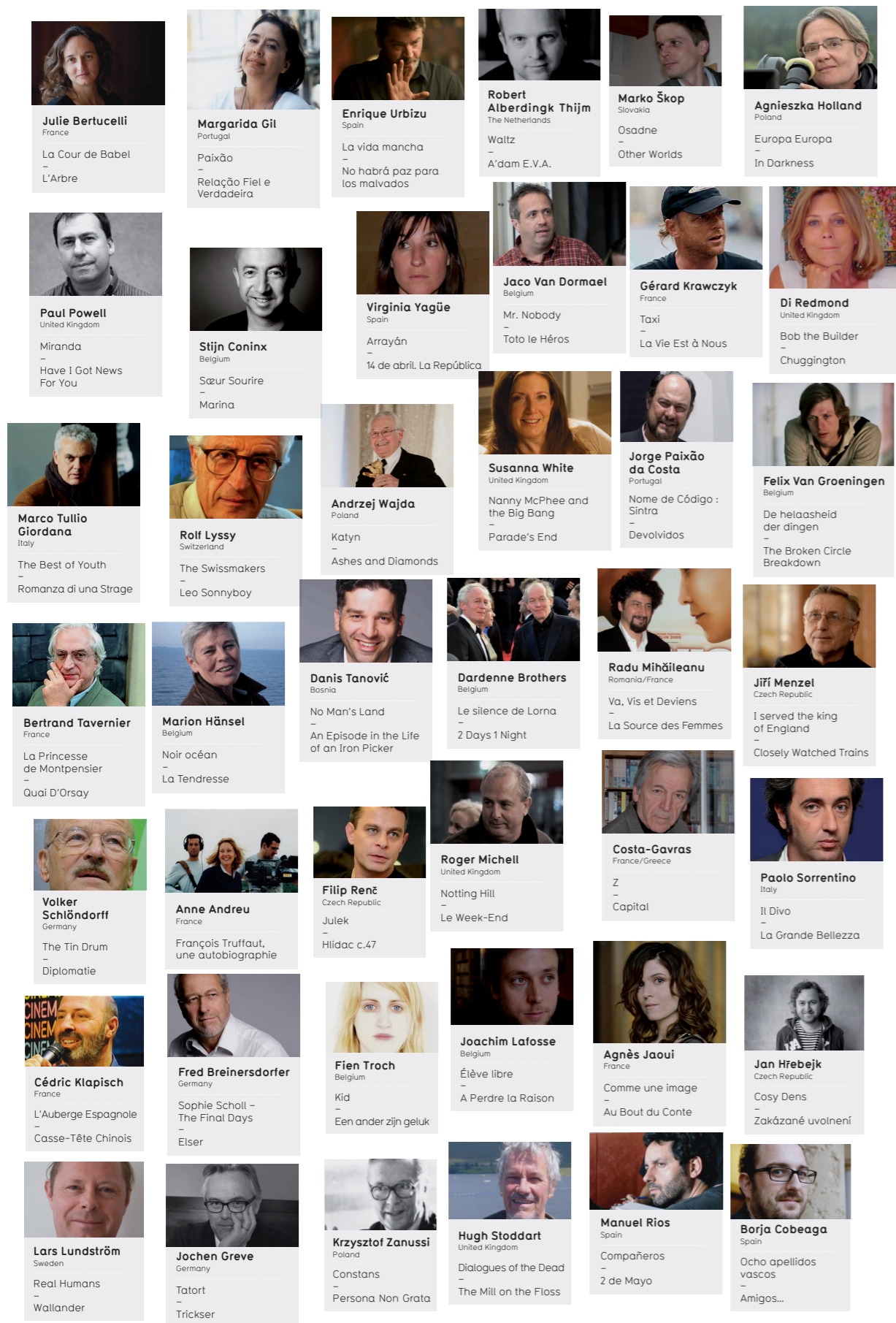
- In **Nordic countries**, Copyswede and Kopiosto are umbrella organisations for several rights-holders' organisations and repertoires and administer rights on their behalf and through extended collective licences.
- SIAE in Italy, SGAE in Spain, SPA in Portugal and SABAM in Belgium represent **authors from all repertoires**, including both audiovisual and music.
- SACD and SCAM in France and Belgium, DAMA in Spain, SSA in Switzerland, and EAAL in Estonia represent both **screenwriters and directors**, whereas in the United Kingdom and the Netherlands screenwriters and directors' rights are administered by two organisations (Directors UK and VEVAM for directors only and ALCS and LIRA for all categories of writers).
- Some collective management organisations representing writers and screenwriters also represent **book publishers**. This includes VG Wort in Germany, Literar-Mechana in Austria, Kopiosto in Finland and DILIA in Czech Republic.
- Suissimage in Switzerland, ZAPA in Poland and Filmjus in Hungary represent audiovisual authors and **producers**. VG Bild-Kunst in Germany and LITA in Slovakia represent both audiovisual authors and visual artists and in Austria, VDFS represents directors and actors.

The talents of the audiovisual industry

Authors make a unique creative contribution to a cinema or television work, a contribution that can vary from genre to genre: from fictional work to creative documentary, from film intended for cinematic release to an episode of a drama series for television, from animation to video games, etc.

The reputation and success of European cinema and television depends on the creative talent of its authors, and in particular its **screenwriters and directors**, who regularly receive awards at the most prestigious international film festivals. To name just a few:

Fatih **AKIN**, Pedro **ALMODOVAR**, Bernardo **BERTOLUCCI**, Susanne **BIER**, Jean-Claude **CARRIERE**, Liliانا **CAVANI**, Isabelle **COIXET**, Jean-Pierre and Luc **DARDENNE**, Claire **DENIS**, Stephen **FREARS**, Matteo **GARRONE**, Peter **GREENAWAY**, Michael **HANEKE**, Michel **HAZANAVICIUS**, Agnieszka **HOLLAND**, Tom **HOOPER**, Emir **KUSTURICA**, Paul **LAVERTY**, Mike **LEIGH**, Steve **MCQUEEN**, Lukas **MOODYSSON**, Cristian **MUNGIU**, Lone **SCHERFIG**, Volker **SCHLÖNDORFF**, Jim **SHERIDAN**, Paolo **SORRENTINO**, István **SZABÓ**, Danis **TANOVIĆ**, Bertrand **TAVERNIER**, Agnès **VARDA**, Lars **VON TRIER**, Thomas **VINTERBERG**, Andrzej **WAJDA**, Wim **WENDERS**, etc.



RIGHTS AND REMUNERATION OF AUDIOVISUAL AUTHORS

The current situation of audiovisual authors in terms of their rights and remuneration varies considerably from one country to another. It depends on the national legislative framework, on the contract signed with the producer and on the individual and collective capacity to enforce rights. There is however one major common feature: since its establishment by the 2001 Copyright Directive, the making available right of audiovisual authors, which forms the basis of online exploitations, has not produced additional remuneration for audiovisual authors in spite of the multiple exploitation of their works.

Fees and intellectual property rights

Audiovisual authors' income can be from two sources:

- the fee for writing the script and/or for directing the audiovisual work and,
- income based on their intellectual property rights.

The vast majority of authors are freelancers. The nature of their work and the practices of the industry are such that much of what they do can be unpaid, in particular at the development stage. A writer of a feature film will often work for months developing an idea into a script, only to be paid if and when a producer buys the right to exploit it and funding is secured. The director will work on the development of a production, making decisions on style, locations, casting to create an attractive package for potential investors – without any guarantee of payment for the time they have invested.

Audiovisual authors, therefore, rely on income from finished works to sustain unpaid time spent developing the next film or programme. This makes it doubly important that they share in the rewards of success. Any income from the exploitation of finished works allows authors to make a living while developing their next project.

Today it is quite difficult to assess screenwriters and directors earnings. In 2013, FSE, the Federation of Screenwriters in Europe, published the results of a survey among their members which found that the annual median income of screenwriters, after tax, was just €22,000 in 2012. A 2014 study by ALCS in the UK found that only 11.5% of the participating professional authors earn their income solely from writing. The median income was just £11,000 (€13,851) per year.

To assess the situation, the European Commission launched a study on authors' and performers' earnings in the music and audiovisual sectors in 10 Member States in July 2014. It is expected to publish the results in the first half of 2015.

5 FSE study – European Screenwriters' Income in Europe 2012.

6 ALCS study – What Are Words Worth Now? 2014.

European harmonisation

Since 1991, the European Union has adopted eleven Directives harmonising certain aspects of authors' rights and related rights, to establish the *acquis communautaire*. The most significant Directives for audiovisual authors are described in annex 1. Other Directives also have an impact on audiovisual authors:

Key Directives Timeline



Unfair contractual practices

In spite of European harmonisation, considerable discrepancies persist in terms of the rights of audiovisual authors that are effectively recognised, as well as the level and basis of their remuneration. This is partly due to the fact that contractual freedom can deprive authors of their rights in individual negotiations with producers.

In most European countries audiovisual authors transfer their economic rights to the producer. Fees are individually negotiated in the contract between the author and the producer resulting in many audiovisual authors receiving a lump sum payment for the writing and/or directing of the film. In some countries they receive no further payment from the producer no matter how commercially successful the film. This situation reflects the weakness of individual authors and/or their representative bodies and the dominant position of powerful producers and broadcasters in individual contractual negotiations.

Although in some countries standard contracts exist, in practice most contracts are individually negotiated. Even when authors sign contracts which respect their economic interests and provide for additional remuneration after the recoupment of costs, they rarely receive any payment automatically from the producer, whatever the success of the film.

They may, however, in some instances be entitled to payment through their collective management organisation but, as will be shown, the level and nature of payment varies widely from one country to another.

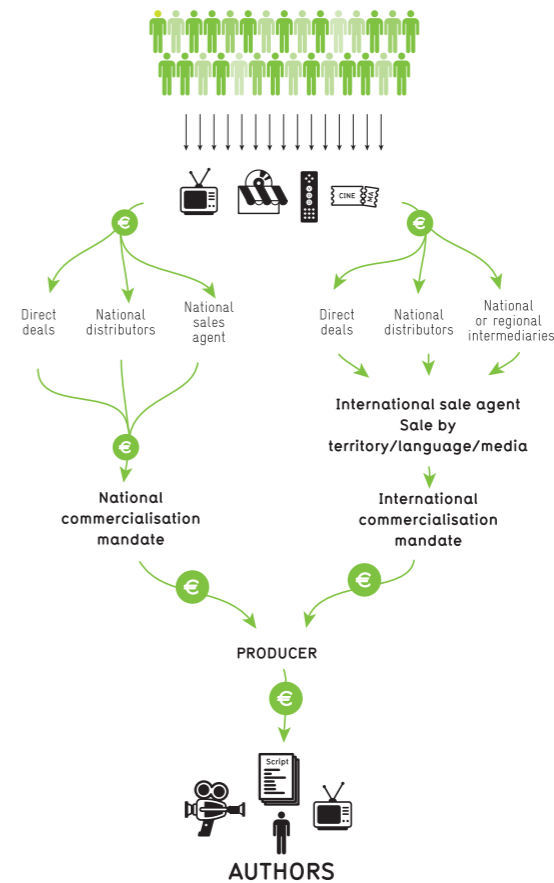
Even on a film like "Notting Hill", my contract precluded me from sharing in the massive financial success the film has enjoyed since it was released in cinemas. Nor have I seen a single cent from video or DVD sales. This is creative accounting of the very highest order!

Roger Michell,
Director⁷, United Kingdom

⁷ Worldwide theatrical box office gross of "Notting Hill" was \$363.89 million, nearly 9 times the cost of the film's production. International television distribution, DVD and video sales generated further sums.

In January 2014 a study for the European Parliament⁸ confirmed that contractual practices in the vast majority of European countries deprive audiovisual authors of the effective exercise of their rights and prevent them from receiving fair remuneration for the exploitation of their works. Unfair contractual terms imposed by producers or broadcasters in the individual negotiation of contracts were listed by the experts. These include: excessive transfer of rights in terms of scope and duration, without remuneration other than the initial production fee; waiver of rights to remuneration; clauses forcing the author to indemnify the producer against any and all claims from CMOs regarding remunerations for the exploitation of the work, etc.

The findings of this study back up those from a survey conducted by Directors UK⁹. Their study found that 70% of directors have experienced some form of fee deferral (sometimes to the extent where 'deferral' means 'waiver'); that success-based bonuses rarely materialise due to dubious accounting, the potentially weak position of producers, and the more general problem of breaks in the **long distribution chain** (e.g. due to bankruptcy or failure to report a transfer of rights).



⁸ Study on contractual arrangements applicable to creators: law and practice in selected Member States by CRIDS and KEA.

⁹ Directors UK website - <http://www.directors.uk.com/about-us/news/directors-uk-speaks-out-fair-incentives-british-filmmakers>

The European Parliament study also demonstrated the inefficiency of some legal rules to protect authors. It sets out a number of examples of “the difficulty to secure fair remuneration in digital exploitations, of the practice of buy-out contracts, of the invocation of the presumption of transfer, of the refusal to pay CMOs remuneration of authors of audiovisual works”, which “are illustrative of the shifting of power among stakeholders to the detriment of creators” and increase the situation of imbalance and lack of protection.

The conclusions of this study demonstrate the need for an unwaivable and inalienable right to remuneration to secure fair remuneration for digital exploitation.

Additional remuneration from collectively managed intellectual property rights

Most of the time, secondary payments come from collectively managed intellectual property rights. The two major rights that are collectively managed which result in payments for audiovisual authors in Europe are **cable retransmission** (as a result of harmonisation of rights in Directive 93/83/EEC) and **private copying** in the countries where levies exist. On a country by country basis, other secondary rights like the rental and public lending rights are collectively administered and result in additional payments for audiovisual authors (see Table 3).

In addition, in a few countries (eg. France, Belgium, Bulgaria) collective management organisations representing audiovisual authors are contractually entitled to collect on behalf of their members for the **TV broadcasting** of their works. In some other countries (eg. Spain, Italy, Poland) the final distributor, usually the broadcaster, is considered by law to be responsible for payments to the author. These are also paid through a collective management organisation.

The latter system is more favourable to authors who, in principle, benefit from a **payment guarantee** as the law provides that, notwithstanding the terms of the contract between the author and the producer, it is the final user who is obliged to pay the author for each use of the works through a collective management organisation. In these countries, audiovisual authors benefit from an unwaivable and inalienable remuneration right.

Such a system has not hindered the production of feature films and audiovisual works. It can be cost effective for producers who do not have sufficient means and infrastructure to monitor the works on behalf of the audiovisual authors and ensures that the latter receive remuneration proportionate to each use of the works.

These legal regimes have progressively appeared over the last twenty years. As a result, in these countries, audiovisual authors are being rewarded proportionately for the exploitation of their works.

In the end we transfer a lot of things when we transfer our rights

Cédric Klapisch
Screenwriter and director, France

What about the making available right?

Current disparities are heightened in the digital era.

The **2001 Copyright in the Information Society Directive** gives a “making available right” to audiovisual authors. However, as with other rights, its implementation in contracts with producers has proved difficult and rarely results in additional remuneration for audiovisual authors for on-demand exploitations.

Article 3 of the 2001/29/EC Directive:

Right of communication to the public of works and right of making available to the public of other subject-matter

1. Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

In some countries, solutions have been found to guarantee authors are paid for the **online/on-demand exploitation** of their works (see Table 3). However, in most European countries, audiovisual authors are not, as yet, receiving any payment for the online/on-demand consumption of their work.

The online/on-demand distribution of works is becoming an increasingly important means of dissemination and consumption. It would be unacceptable for authors to be left behind by this digital revolution.

Pan-European licensing for copyright, one-stop shop for collective rights management, online settlement of disputes, very high speed, security, interoperability, etc. As authors we must take ownership of these issues so that our creations won't get swept away by the digital tsunami.

Alok b. Nandi
Multimedia writer and director, Belgium

COLLECTIVE ADMINISTRATION OF AUDIOVISUAL AUTHORS' RIGHTS IN EUROPE

Variations in the rights administered by collective management organisations within Member States results in significant differences in the value of rights from one country to another and, by extension, the value of an author's contribution. Unfortunately, these differences have not been addressed by the Collective Rights Management Directive of 26 February 2014.

The value of audiovisual rights

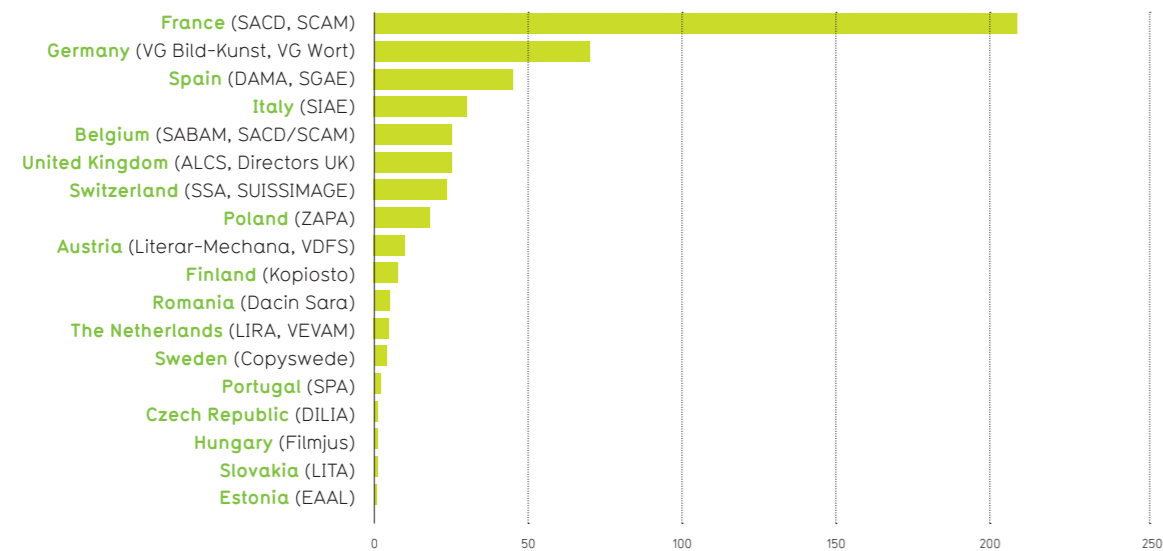
In 2013, the total collection of authors' rights royalties by European CISAC¹⁰ members was €4.7 billion, of which 83% was for musical repertoire. Audiovisual repertoire represented only 9.1%¹¹ with collections of around €431 million. The same year, the 25 SAA members collected €452 million for their audiovisual authors. Music collections represented 15.5% of the music industry's €25.3 billion turnover. Audiovisual collections represented just 0.37% of film and TV's €122 billion revenues. This demonstrates the extent to which collections for the audiovisual sector need to be strengthened.

The audiovisual sector can be split into different revenue sources. SAA members' total collections represent the following percentages of the different revenue sources in those countries where we have members:

- Cable, Satellite and IPTV – **0.26%**
- Broadcasting – **0.46%**
- On-demand/online video – **0.34%**
- Physical video rental and retail (DVD, BluRay) – **0.05%**

On a national basis, the collections of our members represent from 0.06% to 1.4% of their respective markets.

Figure 1
SAA members' audiovisual collections by country (2013)
in millions of euro



¹⁰ International Confederation of Societies of Authors and Composers.

¹¹ Figures from CISAC.

Figure 2
SAA members' audiovisual collections as a percentage of national GDP (2013)

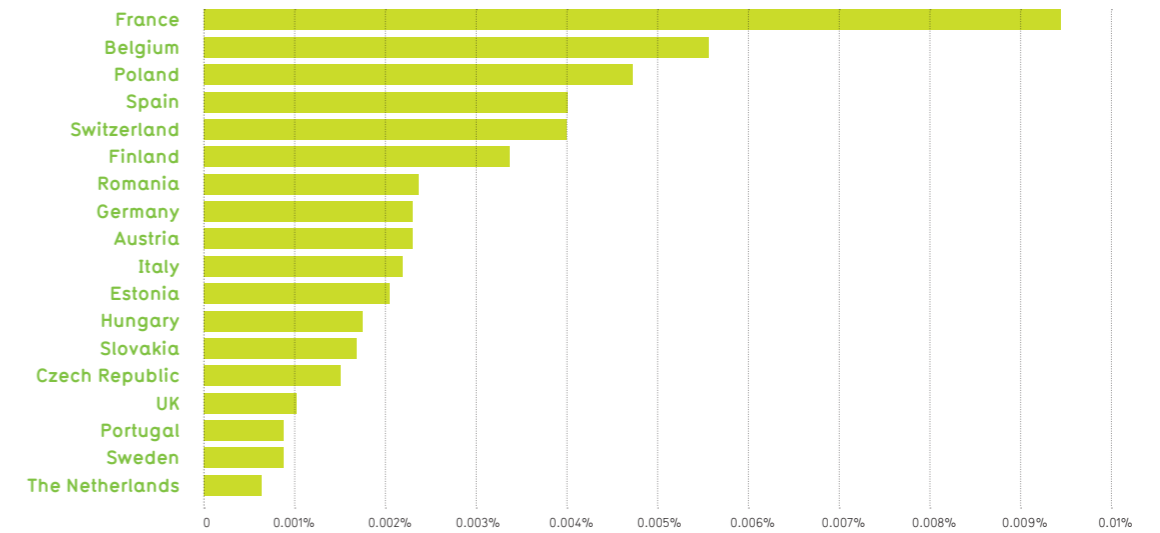


Figure 3
SAA members' audiovisual collections per inhabitant in € (2013)

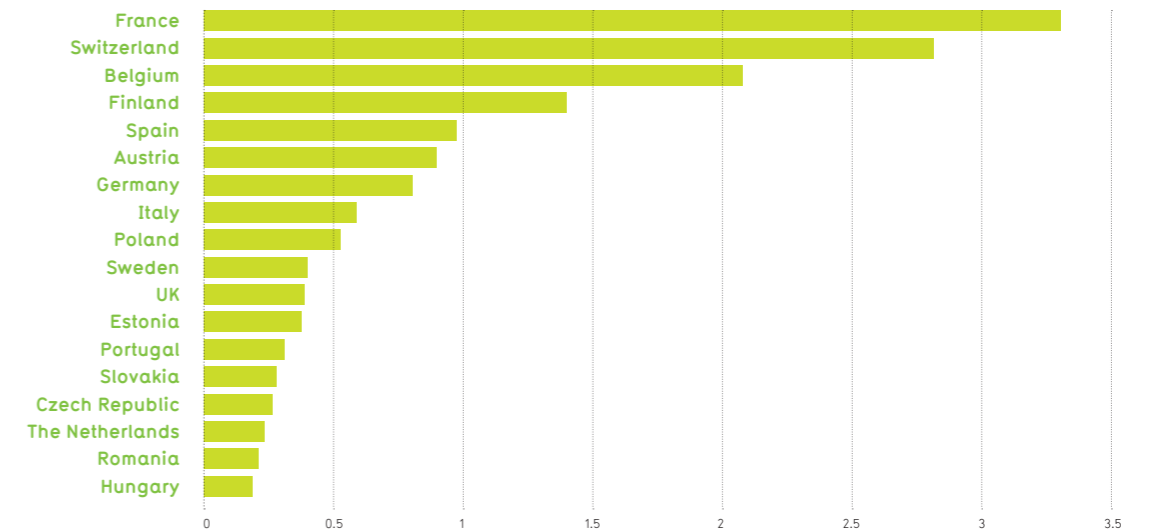
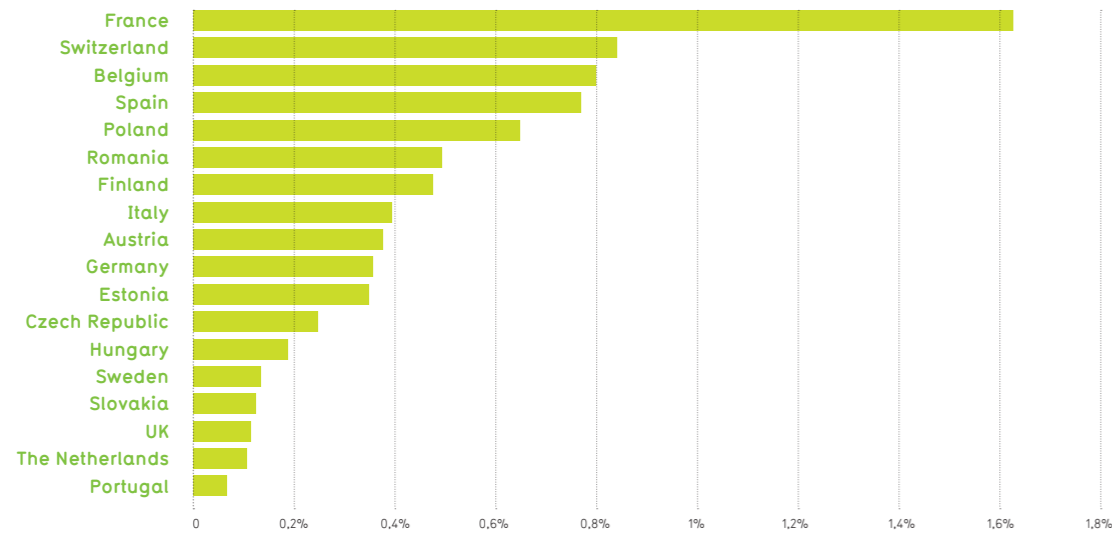


Figure 4
SAA members' collections as a percentage of national audiovisual sector revenues



Variations in the value of authors' rights are highlighted by the level of audiovisual collections of SAA member societies in the different European countries. The number and/or categories of rights managed (see Table 3) obviously have an impact.

Places like the SAA... are becoming indispensable.

Cédric Klapisch
Screenwriter and director, France

Rights administered by SAA members

Table 3 reflects the situation of the collective administration of authors' rights in the **audiovisual sector**.

Table 3
Rights managed by SAA members (2014)

Country	SAA member	Cable retransmission	Private copying	Other retransmission rights*	Online/on demand uses	TV broadcasting	Video sales	Educational uses	Video rental	TV archives	Video lending	Cinema / Public performance
Austria	Litar-Mechana											
Austria	VDFS											
Belgium	SABAM											
Belgium	SACD / SCAM											
Czech Republic	DILIA											
Estonia	EAAL											
Finland	Kopiosto											
France	SACD											
France	SCAM											
Germany	VG Bild-Kunst											
Germany	VG Wort											
Hungary	Filmjus											
Italy	SIAE											
The Netherlands	LIRA											
The Netherlands	VEVAM											
Poland	ZAPA											
Portugal	SPA											
Slovakia	LITA											
Spain	DAMA											
Spain	SGAE											
Sweden	Copyswede											
Switzerland	SSA											
Switzerland	SUISSIMAGE											
UK	ALCS											
UK	Directors UK											
TOTALS		24	23	19	17	16	15	15	11	11	9	8
Percentage		96%	92%	76%	68%	64%	60%	60%	44%	44%	36%	32%

* Satellite, IPTV

Here are the main features:

- The **cable retransmission right** is administered by all SAA members, except in Italy where there is no broadcasting retransmission by means of cable. This situation is the result of the mandatory collective administration of the cable retransmission right provided by the 1993 Directive.
- **Private copying levies** are in place in all SAA members' countries, except the United Kingdom, Spain and Finland. Spain abolished them in 2012 and replaced them by a contribution from the state budget, as did Finland at the beginning of 2015. The UK introduced a private copying exception in 2014 but with no compensation system. However, British, Spanish and Finnish audiovisual authors benefit from the remuneration of the private copying of their works in other EU countries.
- Whether by law or general agreements, **TV broadcasting rights** are collectively managed by just over half of SAA members. They are an important source of income for audiovisual authors and many SAA members see the introduction of collective management of this right as being a priority.
- **Online/on-demand uses** cover both the on-demand services of broadcasters and on-demand services developed by new players. Together they represent the fourth group of rights administered by SAA members. This group of rights partly mirrors TV broadcasting rights showing that it has been possible for some SAA members to adapt their general agreements with broadcasters to include the on-demand uses of programmes. However, despite the efforts of collective management organisations, general agreements with other internet players have been more difficult to put in place and any money collected for audiovisual authors for this group of rights is very low.
- The **rental right** which is subject to an unwaivable right to equitable remuneration according to the 1992 Directive is administered by less than half of SAA members. The Directive didn't provide for the mandatory collective administration of this right.
- **Theatrical exhibition** is only collectively administered in Spain and Poland. In Table 3, this right has been grouped together with performances in public spaces (broadcasting in hotels, bars, etc.) although they are distinct rights.
- Other secondary rights such as the lending right, copying for educational uses and archives are collectively managed in a small number of countries.

Figure 5

Respective share of the main categories of royalty collected by SAA members (2013)

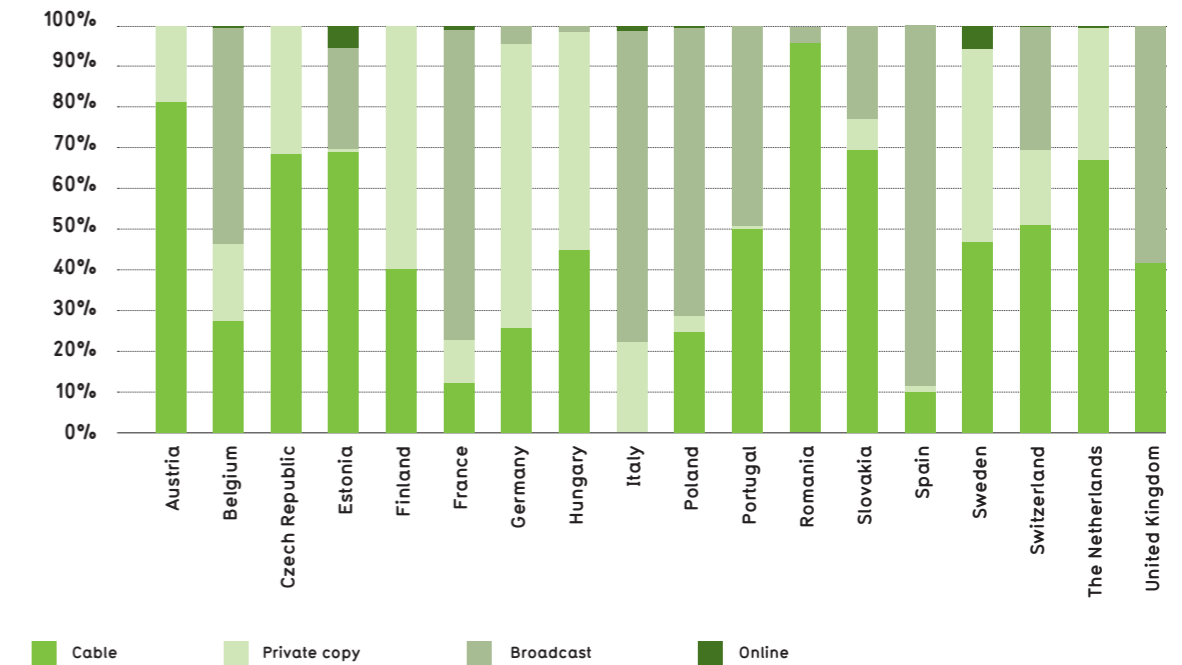


Figure 5 clearly shows how different CMOs depend on rights for the remuneration of their members.

Difficult enforcement of the cable retransmission right

SAA members' collections for cable, satellite and IPTV retransmission amounted to €85.84 million in 2013, around 19% of their total audiovisual collections. This is to be compared with the €13 billion spent by 57 million European households on cable television services in 2013¹². The leading cable operator in Europe is the US company Liberty Global (operating under brands including Virgin Media, UPC and Telenet), which operates in 12 European countries and declared €17.5 billion (\$20 billion) in revenues in Europe for the first 9 months of 2014¹³. The revenues of the 2nd largest cable company in Europe (Kabel Deutschland, purchased by Vodafone in 2013) were just €1.9 billion in 2013¹⁴.

12 EAO Yearbook 2014.

13 <http://www.libertyglobal.com/about-us.html>

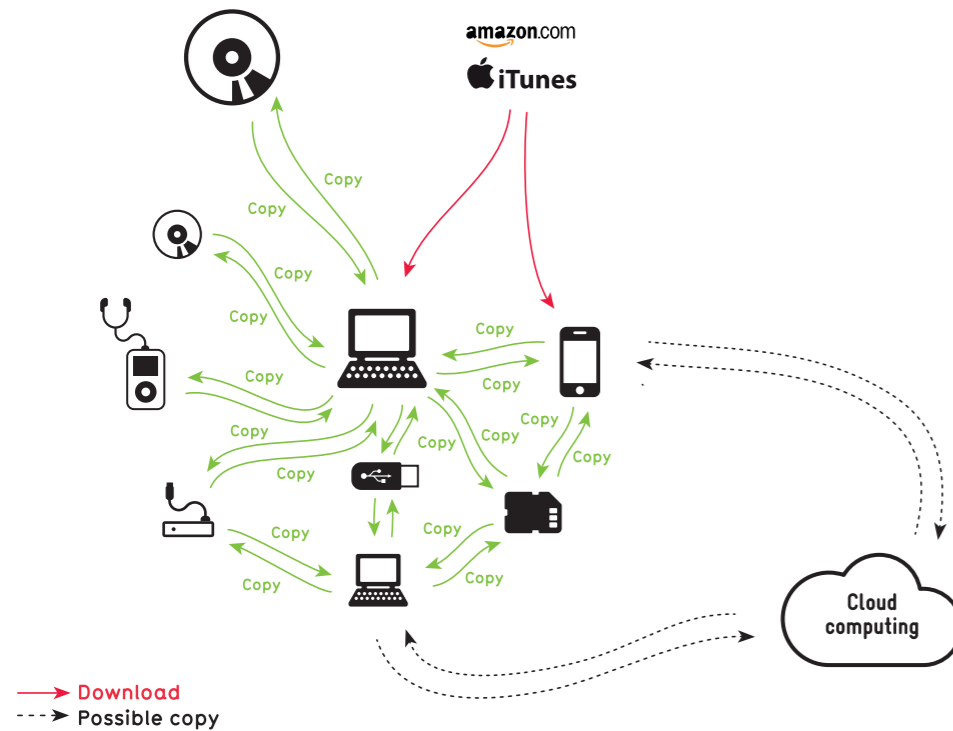
14 EAO Yearbook 2014.

The SAA is concerned that the cable retransmission right of audiovisual authors, governed by the 93/83/EEC Satellite and Cable Directive ("SatCab Directive"), is being challenged by Liberty Global who is currently seeking to evade paying authors the royalties due to them in Belgium, the Czech Republic and the Netherlands. Using the arguments of "direct injection" or of an "all rights included" model to presume that authors have transferred their cable retransmission right to producers or broadcasters and that CMOs are not legitimate in claiming it, certain Liberty Global subsidiaries refuse to negotiate and pay CMOs, forcing SAA members to enter into legal proceedings. These legal proceedings are very technical, lengthy (up to 10 years) and expensive. The Court decisions, obtained after years of proceedings, are difficult to implement.

The SAA is looking for the technology-neutral application of the SatCab Directive, to ensure equality of treatment between all operators which carry out distribution of TV programmes. In practice, this is already the case in several Member States such as Austria, Belgium, Hungary, Sweden or the UK, but not everywhere in the EU. In certain Member States, the SatCab Directive principles are applied to traditional cable operators only and other operators are left aside. In some cases, new media operators refuse to turn to CMOs to negotiate contracts for the retransmission of the broadcast programmes.

Threats to private copying compensation

Consumers make more copies than ever before, transferring songs and videos from computers to hard drives to phones to tablets to online lockers and back again in order to save and access their personal libraries whenever and wherever they want. All of these processes are undeniably acts of private copying covered by the Copyright Directive exception on the condition that authors receive fair compensation (Art 5.2b).



However, the collections of such financial compensation have dramatically dropped from €648 million in 2010 to €328 million in Europe for all sectors in 2012¹⁵ (of which €50 million was administered by SAA members for audiovisual authors). Private copying levies are under attack by manufacturers and importers of media and devices (whose products are mainly manufactured outside the EU) who no longer accept to participate in the system and are forcing it into obsolescence. In 2012, they convinced the Spanish government to abolish levies which generated €115 million in 2011 and to replace them by a contribution from the state budget of €5 million. Consumers did not at all benefit from the removal of the private copying levies: it had no effect on the prices of devices and media; manufacturers and retailers just increased their profit margin. The SAA, as well as other rightholders' organisations, lodged complaints with the European Commission against the Spanish Government to denounce the complete inadequacy of its system of private copying compensation via the state budget.

SAA believes that private copying is justly accompanied by compensation for rightholders, and that the most efficient way to collect this is via a levy at the manufacturer/importer level. The system should be consolidated along the principles developed by the Court of Justice of the European Union. In addition, the levy should be clearly visible for consumers and could well apply to some cloud services. The 2014 **European Parliament resolution** on "Private copying levies" supports this position. SAA has produced a detailed easy-to-understand **infographic** explaining our vision of the private copying system.

The new Collective Rights Management Directive

Audiovisual authors' CMOs have been created by and for authors and are run by them. It is the CMO's duty to best serve them. SAA societies are governed and controlled by their general assembly which is acknowledged by the new 2014/26/EU Directive of 26 February 2014 on Collective Rights Management (the CRM Directive).

The CRM Directive establishes very detailed provisions on governance of the CMOs, distribution of royalties to rightholders, transparency for rightholders, as well as disclosure of information to the public.

Organisational and management costs are completely borne by authors through rights revenue deductions. It is therefore the members' and managers' duties to find the appropriate balance in governance, transparency and distribution rules to keep the cost bearable for all members.

SAA CMOs work together to identify the audiovisual authors whose works are used (e.g. by broadcasters, on-demand services, cable operators) under the agreements they administer and to distribute remuneration whatever their country of residence. Through bilateral agreements royalties are transferred between societies and distributed to rightholders¹⁶.

The whole idea behind SAA is to bring European collecting societies together and help them exchange the rights from one country to another.

Volker Schlöndorff
Screenwriter and director, Germany

¹⁵ International Survey on Private Copying – Law and Practice 2013, de ThuisKopie, WIPO.

¹⁶ SAA – Royalty distribution rules and practices (May 2013).

CMOs in the future

The consumption of European audiovisual works is increasingly an online activity. New services provide access to more works in more territories than ever before. For SAA's members to continue to provide valuable services to their screenwriters and directors, they need to be able to work with online services and facilitate cross border flows of remuneration.

A common framework at EU level which would guarantee a right to remuneration for audiovisual authors for all the exploitations of their works would greatly assist this process.

During the discussions on the CRM Directive the SAA explained the specificities of audiovisual authors' CMOs compared to those in the music sector in order for the Directive to be fit for all CMOs, whatever their sector of operation. The Directive establishes a European legal framework for CMOs which secures collective rights management as a future-proof tool. Indeed, the new CRM Directive provides a good basis for the introduction of an unwaivable right to remuneration, compulsorily negotiated and collected on a collective basis from the users.

SAA's mission is to help ensure that CMOs remain fit for the digital age which has presented CMOs with major challenges regarding many aspects of their operations. The analogue world has been replaced by one characterised by mass uses and mass transactions of copyright works, lower values of licences for transactions and much greater flexibility in the type of uses being made and the devices on which uses take place. In such an increasingly complex environment only CMOs are able to facilitate the remuneration of authors. CMOs have adapted to this new environment – and continue to do so – by, inter alia: investing in new technology, software and systems to keep their licensing operations fit for purpose; improving their governance, transparency and accountability to members and users; simplifying their licensing procedures to reduce transaction costs and innovating in the kind of licences being offered. These actions will ensure that audiovisual authors reap the full benefit from the new CRM Directive.

Information and Communication Technologies (ICTs) allow for new systems of remuneration for audiovisual authors based on the exploitation revenues of the works. Audiovisual authors' collective management organisations are, in cooperation with the online operators, developing the necessary ICTs to **guarantee payments to audiovisual authors**. Encouraging Europe-wide use, from the earliest stages of production, of work identifiers such as ISAN would also help Europe's audiovisual sector adapt to a digital environment of multiple exploitation and revenue sources.

An improved system of payments to audiovisual authors for the exploitation of their works should be a **priority** of the European Commission. It will unlock the potential of the European audiovisual sector and develop a sustainable remuneration system for audiovisual authors. It will also provide clarity and certainty for users and audiences about the rights and uses licensed throughout Europe. This is crucial to place creators at the centre of EU copyright policy.

We need to find a new balance. A balance that is fair, that is accepted by citizens, authors, artists and creators alike.

Martin Schulz
President of the European Parliament¹⁷

¹⁷ Forum de Chaillot, Paris, 7th April 2014.

CHANGING TIMES, TIME FOR CHANGE

AUDIOVISUAL INDUSTRY CHALLENGES

The figures speak for themselves: the last 4 years have seen 400% growth in the number of on-demand services and 1000 new TV channels in Europe. At the same time, concentration in the cable market, as well as the domination of the Internet by a few global players complicate the picture. The audiovisual sector worldwide is witnessing a period of significant change.

Impact of the digital revolution

The traditional distribution chain for films (theatrical release, DVD sales/rentals and exploitation by television) now clearly includes online distribution. The worldwide DVD market is in decline, both in terms of volume and profits, and is being replaced by growing but still less profitable video-on-demand platforms. Consumers' expectations of being able to watch audiovisual works anytime, anyplace and on any device put significant pressure on media release windows and exclusivity deals which traditionally secure the financing of audiovisual works.

Digital tools are now the rule in the production and distribution markets, but their use has not significantly reduced the costs. The production and distribution of films and other professional audiovisual works is still an expensive business (the average production budget per film on the main markets was around €3.8 million in 2013) which necessitates high levels of investment. 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.

New delivery systems mean that audiovisual works can be shared in ways unimaginable even a few years ago. For broadcasters the golden age when programmes were made for viewing by a mass audience in a single country on a particular night at a specified time has long gone. Catch-up services and on-demand streaming have, for many, become the default method of viewing. Although this shift, at first sight, appears to offer unheard of benefits to an audience it brings with it new challenges for traditional broadcast funding models.

The European Commission has committed itself to making Europe's audiovisual industry more competitive by building a strong internal market supporting European digital services as well as promoting cultural diversity throughout Europe. Audiovisual works are key to achieving this.

Creativity is the oil of the 21st century. It is the imagination of artists that keeps the creative industry going.

Jochen Greve
Screenwriter, Germany

The economic and cultural value of audiovisual works

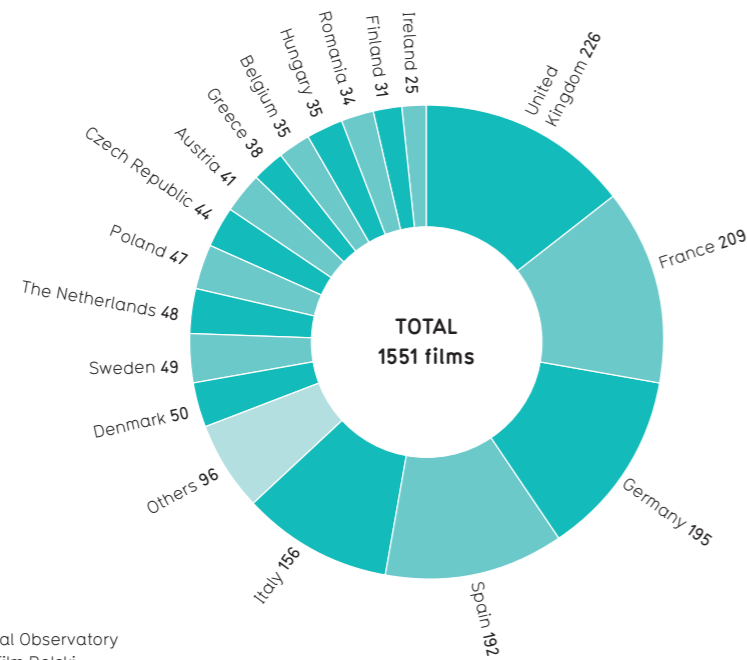
Audiovisual works represent significant economic and cultural value.

Cinema

With 911 million admissions in 2014, cinema going has fluctuated between 900 and 982 million admissions over the last ten years. Gross box office takings in the European Union for 2013, were around €6.29 billion. Production has remained steady in recent years, and in 2013, 1,551 European feature films were produced¹⁸.

Figure 6

Feature films produced in the EU (2013)



Source: European Audiovisual Observatory Yearbook 2014 and Film Polski

The market share of European films of total box office admissions is stable (at around 26% since 2009), as is that of US films (around 68%)¹⁹. The market share of national films tends to fluctuate depending on the success of a few local blockbusters. France's exceptional market share of 44% in 2014 was due to the success of *Qu'est-ce qu'on a fait au Bon Dieu*, *Supercondriaque* and *Lucy*. In Spain, the record breaking *Ocho Apellido Vascos*, as well as *El Niño* and *Torrente*, *Mission Eurovegas* gave Spanish cinema its best year since 1977 with a 25.5% market share. Poland's 27% market share for 2014 was driven by *Gods*, *Warsaw 44* and *Jack Strong* as the top 3 films of the year.

A firm commitment to support and promote European production and distribution at national and Community level is essential. Maintaining and increasing the level and quality of production depend on sustained financial investment, support and incentives for filmmakers (creators, production companies and distributors) through subsidies, preferential tax measures, loan guarantees and financial aid generally. It is only with these support measures that the European film industry can flourish and become a strong and sustainable market force.

¹⁸ European Audiovisual Observatory Yearbook 2014.

¹⁹ European Audiovisual Observatory Yearbook 2014.

Television

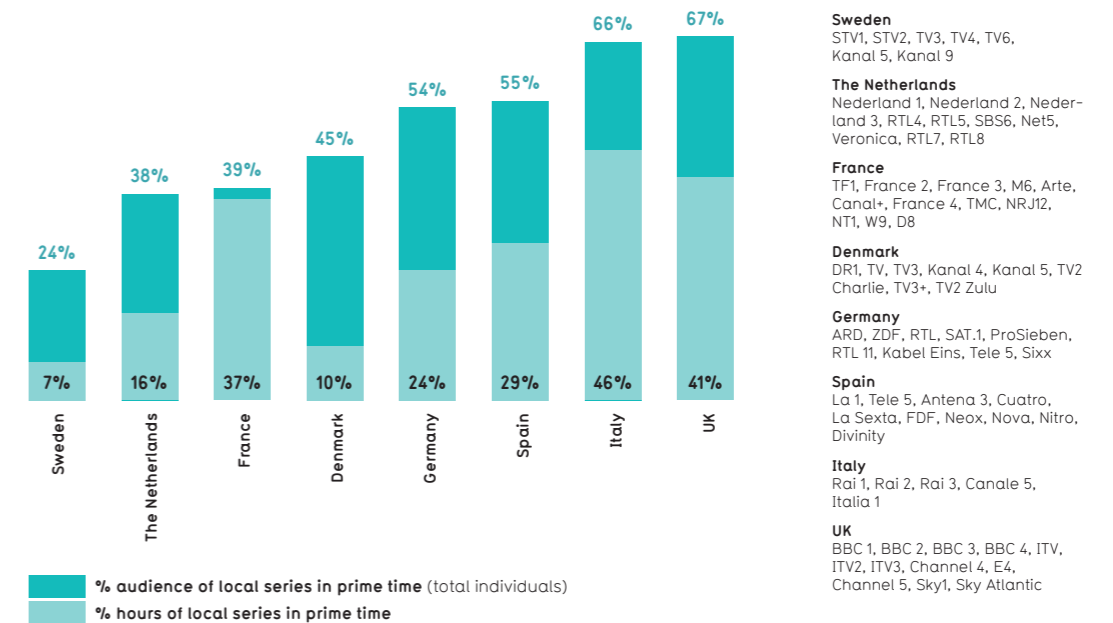
The European television market is worth €90 billion²⁰ (up from €84 billion in 2010) and is growing again after a difficult few years during the economic crisis.

Television remains a dominant medium despite the increasing competition for eyeballs from the internet, social networks and video games as well as changing consumption habits of the younger generations. The average daily viewing time in Europe was 3 hours and 34 minutes per day in 2013, an increase of 4 minutes on 2010²¹. Audiences have never been so high and new technologies are giving viewers even more possibilities to watch their favourite films and programmes.

While US films dominate in cinemas, the picture for television is different. Locally produced fiction dominates prime-time viewing in Germany, Spain, Italy and the UK while representing less than half of the number of broadcast hours. In the UK and Germany, locally produced fiction makes up 100% of the top 15 series. In Germany, the long-running crime series *Tatort* achieves performances of 12.9 million viewers on ARD. *Broadchurch*, first broadcast on ITV, was sold to more than 100 territories and *Les Revenants*, produced for Canal+ in France was sold to more than 70 countries. In Denmark, Danish and European series fill 94% of the top 15 series and the third season of *Borgen* was sold to more than 70 countries²².

Figure 7

Comparison of % hours and audience of local series in prime time



²⁰ EY Study – Creating growth – Measuring cultural and creative markets in the EU (December 2014).

²¹ European Audiovisual Observatory Yearbook 2014.

²² Eurodata TV Worldwide.

Unlicensed availability

Despite these encouraging figures, continued support for the audiovisual industry means that the introduction of effective measures to **counteract the unlicensed availability of audiovisual works** has to continue to be a priority for the European institutions and Member States. The declining income from DVD sales needs to be replaced by increased revenue from video-on-demand (VOD) platforms who currently face unfair competition from unlicensed streaming and download sites. In 2014, a study published by TERA Consultants estimated the impact of piracy on value added destruction from 2008 to 2011 at €27.1 billion.

According to information from the European Observatory on Infringements of Intellectual Property Rights, copyright intensive industries contribute 4.2 % of the EU's GDP and around 9 million jobs²³.

If there's nobody to invest in films because of piracy, there will be no films in the future.

Gérard Krawczyk
Screenwriter and director, France

Digital dominance of global players

The audiovisual sector online in Europe is worryingly dominated by global giants. Apple (through iTunes and Apple TV), Google (Google Play, YouTube, Chromecast), Netflix, Amazon (Prime Instant Video, Fire TV), Sony (Playstation network) and Microsoft (Xbox) are the major online audiovisual services available in multiple territories across the EU. They have all rolled out their services on a territorial basis in order to adapt their marketing to local markets and manage content licensing costs.

The arrival and evolution of these international services in Europe put pressure on European legislation designed to promote Europe's competitiveness in the audiovisual markets both at home and internationally while at the same time supporting our cultural diversity.

²³ Intellectual property rights intensive industries: contribution to economic performance and employment in the European Union, European Patent Office and OHIM.

Audiovisual policy evasion

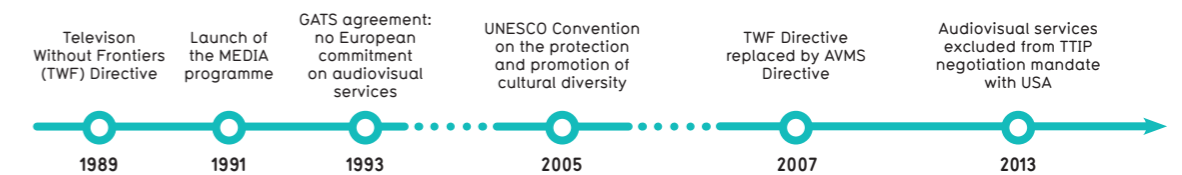
The internal market enables these global services to establish themselves in one European country and deliver services across Europe. Almost all international services that come to Europe establish themselves in Luxembourg, Ireland or the Netherlands. This enabled them to benefit from low VAT rates until January 2015 and continues to provide advantages in terms of reduced corporate income tax. It facilitates aggressive tax planning and the evasion of stricter audiovisual programming and financing commitments required under the legislation of their target countries. Services like YouTube, purchased by Google at the time of the drafting of the Audiovisual Media Services (AVMS) Directive proposal, also fall outside the scope of this Directive despite increasingly resembling a hub for editorialised audiovisual programmes made up of channels and playlists adapted for 'lean back' viewing.

These services are finding the gaps in Europe's audiovisual and taxation policies. Real enforcement, strengthening of the content requirements of the AVMS Directive and reflection on its scope as well as on the applicable law are now necessary. One option to ensure real promotion of European works would be to allow an exception to the country of origin principle so that the enforcement of visibility requirements and investment obligations could be implemented in the country of destination.

Cultural diversity in international trade

The cracks in our audiovisual policy, particularly for online services, are also why Europe needs to be extremely assertive when negotiating international trade agreements. Since the 1993 GATT agreements, the European Union has constantly excluded audiovisual services from international trade negotiations. This exclusion is essential to maintain the possibility of updating and adapting our audiovisual policy to new challenges and to ensure the preservation and promotion of cultural diversity in the audiovisual sector. In 2013, it was more difficult than ever to convince the European Commission to exclude audiovisual services from the Transatlantic Trade and Investment Partnership (TTIP) negotiations with the USA. Such an exclusion should cover traditional services of course, but also online services.

Promoting Cultural Diversity



Cultural diversity is best defended by real national and European cultural policies

Radu Mihaileanu
screenwriter and director, France

THE WAY FORWARD: ENSURING FAIR REMUNERATION

To create an **equitable European internal market** it is essential that current disparities and unfair practices are addressed – and solutions found to ensure that authors of audiovisual works are fairly remunerated whenever and wherever their films and programmes are screened, distributed, transmitted and accessed. It is only by doing this that European creativity will flourish and be sustained.

The need to act at EU level

Since its **2011 Green Paper on the online distribution of audiovisual works in the EU**, the European Commission is seriously considering action on the issue of authors' remuneration for online exploitation. It noticed that *"authors have no economic benefit from the online exploitation of their works if no proportional remuneration is being passed on a per use basis. To remedy this, one option would be the introduction of an unwaivable right to remuneration for their "making available" right managed, compulsorily, on a collective basis. Another option would be to promote authors' ability to undertake negotiations individually or collectively."*²⁴

In the **consultation document on the review of EU copyright rules** of 5 December 2013 which opened a public consultation process, the Commission continues: *"Concerns continue to be raised that authors and performers are not adequately remunerated, in particular but not solely, as regards online exploitation. Many consider that the economic benefit of new forms of exploitation is not being fairly shared along the whole value chain. Another commonly raised issue concerns contractual practices, negotiation mechanisms, presumptions of transfer of rights, buy-out clauses and the lack of possibility to terminate contracts. Some stakeholders are of the opinion that rules at national level do not suffice to improve their situation and that action at EU level is necessary."*

The public consultation explored views on the best mechanisms to ensure that creators receive adequate remuneration for the exploitation of their works, on the possible need to intervene at EU level and on the suggested ways to address the shortcomings of the ineffectiveness of the existing rules. According to the **report on responses to the public consultation**²⁵, the vast majority of end users/consumers, the institutional users and authors and performers consider that there is a need for EU action in this area to ensure adequate remuneration for authors/performers.

²⁴ COM(2011)427/4 of 13 July 2011, p.16.

²⁵ Report on the responses to the public consultation on the review of the EU copyright rules, July 2014.

Redress unfair contractual practices

Among the possible solutions, one suggestion is to improve contractual practices by introducing: "use it or lose it" clauses in legislation (a reversion right allowing authors to regain their rights – and exploit the work – if they are not exploited by the producer); "best-seller" clauses (giving authors the right to renegotiate their contract and increase their part of the proceeds from exploitation under certain circumstances); the obligation to conclude separate contracts for digital uses; a general prohibition of buy-outs, of global transfer of rights for the whole duration of copyright, as well as of transfer of rights for future works and unknown forms of exploitation²⁶.

The SAA supports the improvement of contractual practices, in particular through collective bargaining. We do not believe that this will be enough to ensure fair remuneration to audiovisual authors for the exploitation of their works across Europe. Indeed, the enforcement problems of individual contracts and the lack of transparency, liability and security of the contractual chain between the producer (with whom the initial contract is signed) and the final distributors will remain. A good contract that cannot be enforced does not help authors very much.

The **2014 CRIDS/KEA study for the European Parliament on contractual arrangements applicable to creators** concludes that *"the existing contractual protection of authors, as included in copyright law and, indirectly, in general contract law, appears not to be sufficient or effective to secure a fair remuneration to authors or address some unfair contractual provisions."* Some elements cannot be addressed through the contractual protection of authors: *"Firstly, the increasingly dynamic markets for exploitation, notably digital markets, lead to the quick obsolescence of a contract agreed upon at any point in time. Secondly, due to the multiplicity of forms of exploitation and of undertakings exploiting works in the current environment, the contract between the publisher/producer and the author is only but one element in a web of contractual relationship and revenue streams. (...) A last factor is the cross-border dimension that increasingly characterises the exploitation and use of works (...)"*

This is why SAA proposes the development of a sustainable remuneration system which would secure audiovisual authors' remuneration for their making available right in the digital market, whatever the individual contract. This would be done through the introduction of an unwaivable remuneration right for the online exploitation of works which would be collected from commercial users. The Commission report on responses to the 2014 public consultation has revealed that *"many authors and performers, in particular in the audiovisual sector" believe that "only the creation of an unwaivable remuneration right for the benefit of authors and performers, in particular if it is managed by collective management organisations, would be suitable to ensure adequate and fair remuneration in the case of online exploitation."*

If we can improve the way in which we as artists get rewarded for the work we do, that would help towards making our industry more sustainable.

Roger Michell
Director, United Kingdom

²⁶ Contractual arrangements applicable to creators: law and practices of selected Member States, CRIDS/KEA for the European Parliament, 2014.

An unwaivable right to remuneration

SAA proposed in 2011 the introduction of an **unwaivable right of authors to remuneration for their making available right**, based on revenues generated from online distribution and collected from the final distributor. This entitlement should exist even when exclusive rights have been transferred in individual contracts. It would secure a financial reward for authors proportional to the real exploitation of their works, without hindering or complicating the exploitation of audiovisual works.

SAA further believes that the administration of this remuneration should be entrusted to **collective management organisations** in order to establish a direct revenue stream between the exploitation stage and the audiovisual authors. This is the only way to guarantee that the right to obtain an equitable remuneration will be enforced throughout Europe. Indeed, providing for an unwaivable right to obtain an equitable remuneration without compulsory collective management would leave many European audiovisual authors behind, as they would not be able to enforce it individually.

This proposal would achieve a level playing field in terms of remuneration for all audiovisual authors in Europe, whilst safeguarding optimal exploitation by producers and operators of audiovisual services.

SAA proposal

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 of the author's work(s) cannot be waived.

The administration of this right to obtain an equitable remuneration for the making available of the author's work(s) shall be entrusted to collective management organisations representing audiovisual authors, unless other collective agreements guarantee such remuneration to audiovisual authors for their making available right.

Authors' collective management organisations 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.

Authors' exclusive rights upheld

The introduction of an unwaivable remuneration right would not reduce the value of the authors' exclusive right or weaken their bargaining position. Such a system 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 organisations.

No interference with the producer's role

Even if authors complain about unfair contractual practices (see above), most of them do not question the need for the transfer of their exploitation rights to the producer: it is the producer's role to produce and exploit audiovisual works. SAA's proposal aims at organising the remuneration due to audiovisual 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 therefore means that any on-demand exploitation of an audiovisual work will continue to have to be cleared with the producer or with the making available rightholder appointed by the producer or subsequent contractor.

A European principle implemented by Member States

SAA's proposal for European legislation would not interfere with the competence of Member States under the principle of subsidiarity to implement EU legislation in the best possible way to fit national circumstances. It will be up to each Member State, taking into account the actual panorama of representative organisations for audiovisual authors, to foster negotiations with audiovisual media services on the remuneration of audiovisual authors for the on-demand exploitation of their audiovisual works and/or to designate the organisations in charge.

The harmonisation of the making available remuneration with an enforcement mechanism through collective management would make it possible for audiovisual authors' CMOs to offer pan-European media services a multi-territorial portal. In the absence of such harmonisation, only CMOs entrusted with their members' making available right can develop such a portal, currently an insufficient number for it to be interesting for pan-European audiovisual media services²⁷.

The SAA does not believe that a re-opening of the 2001/29 Copyright Directive is necessary for this proposal to be introduced into EU law. It could for instance be the object or part of a separate legislative instrument. However, should the 2001/29 Copyright Directive be revised in the future, the SAA proposal should be included.

We are too weak as individual artists. A system needs to be established to ensure we receive money for the uses and exploitations of our works online.

Fred Breinersdorfer
Screenwriter, Germany

²⁸ See the SAA FRAME project.

Sources of inspiration

Experience shows that in instances where authors' rights have been recognised at EU level as a result of a harmonisation directive, authors have benefited from greater legal protection and transparency of their rights without disrupting the market.

For example, prior to 1998, German screenwriters and directors, unlike some other European authors, did not receive compensation for the cable retransmission of their works. It was only as a result of the copyright law of 8 May 1998, implementing the **1993 Directive on cable retransmission**, that the situation changed and they started receiving payment. The mandatory collective administration of the cable retransmission right provided by the Directive allowed the negotiation of a network of agreements between audiovisual authors' CMOs and cable operators which produce remuneration for audiovisual authors, sometimes the only remuneration they receive for the foreign exploitation of their works.

The **1992 Rental and Lending Right Directive** provided for an unwaivable right to remuneration for the rental of work but it was left to Member States to decide whether or not the right should be administered by collective management organisations and from whom the remuneration should be claimed. This limited harmonisation has resulted in very few authors ever benefitting directly from the rental of their work. Producers are able to insist that the fee for services includes remuneration for rental, usually with no enhancement of the fee to reflect this. This is why it is of utmost importance that an implementation mechanism such as collective management be provided with the unwaivable right to remuneration.

The legitimacy of collective management as the implementation tool of the unwaivable right to remuneration has been reinforced by the adoption of the **2014 Collective Rights Management Directive** which establishes common principles and rules for the functioning of CMOs across Europe and guarantees high-level standards of governance and transparency.

A solution supported by experts

The situation of audiovisual authors in relation to the online exploitation of their works was explained by the **2010 KEA and Cerna study on multi-territory licensing of audiovisual works in the European Union**, commissioned by the European Commission²⁸. SAA's proposal for an unwaivable and inalienable right to equitable remuneration for the making available right is mentioned as **the solution to ensure that audiovisual authors are rewarded for their creations** when they are exploited on digital platforms: *"This right would enable the effective implementation of authors' exclusive 'making available' rights that have been granted by the Information Society Directive. Such a solution would come as compensation for the transfer of the 'making available right' to the producer, without interfering with his commercial prerogative. Furthermore, it would enable harmonisation of the exercise of 'making available' rights across Europe and therefore avoid disparities in legislation that hinder the emergence of the internal market for creators"*.

SAA's proposal was also described in the **2014 CRIDS/KEA study for the European Parliament on contractual arrangements applicable to creators** as offering "promising solutions" to problems encountered in relation to digital exploitation (e.g. remuneration foreseen in post-internet contracts is rarely specific to digital uses, modes of calculation of remuneration are difficult to determine exactly and fairly in rapidly evolving business models, and "specific contractual terms for digital rights are not in themselves a guarantee that genuine bilateral negotiation takes place"). The study also stated that *"introducing some unwaivable right of remuneration for some exploitations, to be paid by the user undertaking that exploitation, could better protect the authors"* (p.94) and put forward the following recommendations: *"The rights to equitable remuneration or fair compensation should be conceived as unwaivable rights, in line with the recent case law of the Court of Justice of the European Union (e.g. as regards the private copy remuneration in the Luksan²⁹ decision)"; "unwaivable rights to remuneration could be proposed for some forms of exploitation, notably for some kinds of digital exploitations, possibly subject to collective management."*

This would ensure that, whatever the contract signed with the producer, online services would have to negotiate with authors' organisations. That would guarantee remuneration for each exploitation of a work, without relying on the long contractual chain that today deprives most authors of their remuneration for the exploitation of their works, in particular when it takes place outside of the country of production.

A firm stance now to secure an effective remuneration right for audiovisual authors will send a clear message to the industry that the rights of authors will be both valued and protected in a fast changing marketplace.

²⁸ KEA & CERNA study on multi-territory licensing of audiovisual works in the European Union.

²⁹ CJEU ruling C-277/10, Martin Luksan v Petrus van der Let, 9 February 2012.

Call for action by the European Parliament

Audiovisual authors' call for a right to remuneration for the exploitation of their works to be enshrined in European legislation is clearly supported by several **resolutions of the European Parliament**:

"Calls for the bargaining position of authors and performers vis-à-vis producers to be rebalanced by providing authors and performers with an unwaivable right to remuneration for all forms of exploitation of their works, including ongoing remuneration where they have transferred their exclusive 'making available' right to a producer;(...) guarantee authors and performers remuneration that is fair and proportional to all forms of exploitation of their works, especially online exploitation, and therefore calls upon the Member States to ban buyout contracts, which contradict this principle;"

Online Distribution of Audiovisual Works, Sept. 2012

"(...) implementation, at European level, of fair remuneration for audiovisual authors that is proportional to the revenues generated...;"

European Cinema in the Digital Era, Nov. 2011

"(...) legal supply can develop in an environment of healthy competition which effectively tackles the illegal supply of protected works and new ways of remunerating creators can develop which involve them financially in the success of their works;"

Unlocking the potential of Cultural and Creative Industries, May 2011

I will never accept (...) creators being treated like plastic manufacturers.

Jean-Claude Juncker
European Commission President³⁰

³⁰ Hearing before the European Parliament Greens group, 9th July 2014.

CONCLUSION

The digital single market is an opportunity for audiovisual authors. There has already been a phenomenal growth in the online availability of audiovisual works across Europe through multiple channels and digital platforms. Not so long ago, in an analogue world of limited media, European films and TV programmes struggled to cross borders. The MEDIA programme was designed to support the circulation of European works and to help strengthen the competitiveness of the sector. However, with around €100 million a year for the whole continent (compared to the \$200 million production budget of a film like "Skyfall"), the impact of such a programme cannot be revolutionary. The main sources of financing are therefore still at local level.

In spite of its natural fragmentation, the European audiovisual industry has succeeded in turning its diversity into an advantage. With relatively limited investment, Europe's industry still 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 competitive audiovisual sector.

However, the current market is far from perfect as US films and TV programmes continue to dominate in many countries. More has to be done to help the European audiovisual industry to fully seize the digital opportunities and reach new audiences, grow our creative business and showcase the talents of our creators.

This white paper has presented a number of actions that the new European Parliament and Commission should take to design a better regulatory and business environment for European audiovisual works and their authors:

Authors' rights and remuneration – creators need better protection of their rights in their contracts and audiovisual authors in particular should be granted an unwaivable right to remuneration compulsorily negotiated and collected on a collective basis, to guarantee they will be financially associated to the exploitation of their works, whatever the platform.

Retransmission right – a pan-European technology neutral application of the Cable and Satellite Directive to ensure that authors get remunerated for the retransmission of their works.

Private copying – consolidation of the private copying system with common principles for the devices that are levied and the way the tariffs are calculated, as well as a one-stop-shop registration point for importers and manufacturers.

Audiovisual policy – we need a strong European audiovisual policy that puts European works at the forefront of our media. The current Audiovisual Media Services Directive is too weak in the face of new global players. We need to enforce real commitments to European audiovisual production.

Digital taxation – we need consistent reduced VAT rates for audiovisual works irrespective of the way they are watched. A stop should be put to aggressive tax planning and fiscal evasion so that the digital economy can contribute to Europe's post-crisis development.

Cultural diversity in international trade – Europe and its Member States must continue to be able to define their cultural and audiovisual policies. This means full exclusion from trade agreements, including via the back door of online services.

These issues are also part of a joint 7-point manifesto published by FERA, FSE and SAA³¹.

Completing the digital single market must be done in a way that supports and encourages the growth of our European audiovisual sector and must design and enforce better mechanisms to ensure the remuneration of audiovisual authors for the exploitation of their works, not just reducing barriers to global, non-European operators.

The legitimacy of authors' rights and copyright revolves around the creators being economically and morally linked to enjoyment by audiences of their works. Consumers expect to support directors and screenwriters they love by paying to watch their works. However, as consumers have become increasingly convinced that copyright is only supporting media giants and not creators, the legitimacy of the foundation of creators' livelihoods is eroded. It is therefore **time to put authors back at the heart of copyright policy**.

European collective management organisations representing screenwriters and directors are committed to supporting the establishment of a strong European single market for the digital dissemination of audiovisual works, subject to authors receiving fair remuneration for each use of their work. They are the only organisations representing audiovisual authors that can develop the necessary mechanisms to ensure that authors are paid, wherever the exploitation takes place in Europe. They are ready and willing to work with all parties to achieve this.

ANNEX 1 - European Directives on Authors' Rights

The most significant directives for audiovisual authors' rights are:

1992 Rental and Lending Rights (codified by 2006/115/EC Directive)

This is the first time the director is recognised as an author of the audiovisual work, but for the purpose of this Directive only. The Directive provided for a rental and lending exclusive right to authors, with an unwaivable right to equitable remuneration for the rental when the exclusive right is transferred. The Directive addressed collective management as a model for the management of the equitable remuneration right, but did not make it a requirement. As regards the exclusive public lending right, Member States can derogate from it, provided that authors at least obtain remuneration for such lending. The Directive also provided for the harmonisation of certain related rights.

1993 Cable and Satellite (93/83/EEC Directive)

The Directive aimed at facilitating the cross border transmission of audiovisual programmes such as, particularly broadcasting via satellite and retransmission by cable. It set up specific mechanisms to ensure that creators and producers of programmes obtain fair remuneration, in particular the mandatory collective administration of the cable retransmission right.

1993 Term of Protection (codified by 2006/116/EC Directive, amended by 2011/77/EU Directive)

This Directive fully established the authorship of the director as a general principle and provided for a total harmonisation of the period of protection of authors' rights and related rights – 70 years after the death of the author (for audiovisual works, after the death of the director, the author of the screenplay, the author of the dialogue and the composer of the original music, whether or not they are designated as co-authors) and 50 years after the event setting the time running for related rights. The 2011 Directive extended the term of protection for performers and sound recordings to 70 years and provided for accompanying measures to ensure that performers and not only producers benefit from the extension.

2001 Copyright in the Information Society (2001/29/EC Directive)

This Directive is the most comprehensive. It is the result of over three years of thorough discussion. It aimed at adapting legislation on copyright and related rights to reflect technological developments and to transpose into Community law the two 1996 treaties adopted within the framework of the World Intellectual Property Organisation (WIPO). To do so, it harmonised the rights of reproduction, of communication to the public, of distribution and established a closed list of optional exceptions (except one which is mandatory).

2004 Enforcement of Intellectual Property Rights (2004/48/EC Directive)

The Directive required all Member States to apply effective, dissuasive and proportionate remedies and penalties against those engaged in counterfeiting and piracy. It means that all Member States now have a similar set of measures, procedures and remedies available for rightholders to defend their intellectual property rights (be they copyright or related rights, trademarks, patents, designs, etc.) if they are infringed.

2012 Orphan Works (2012/28/EU Directive)

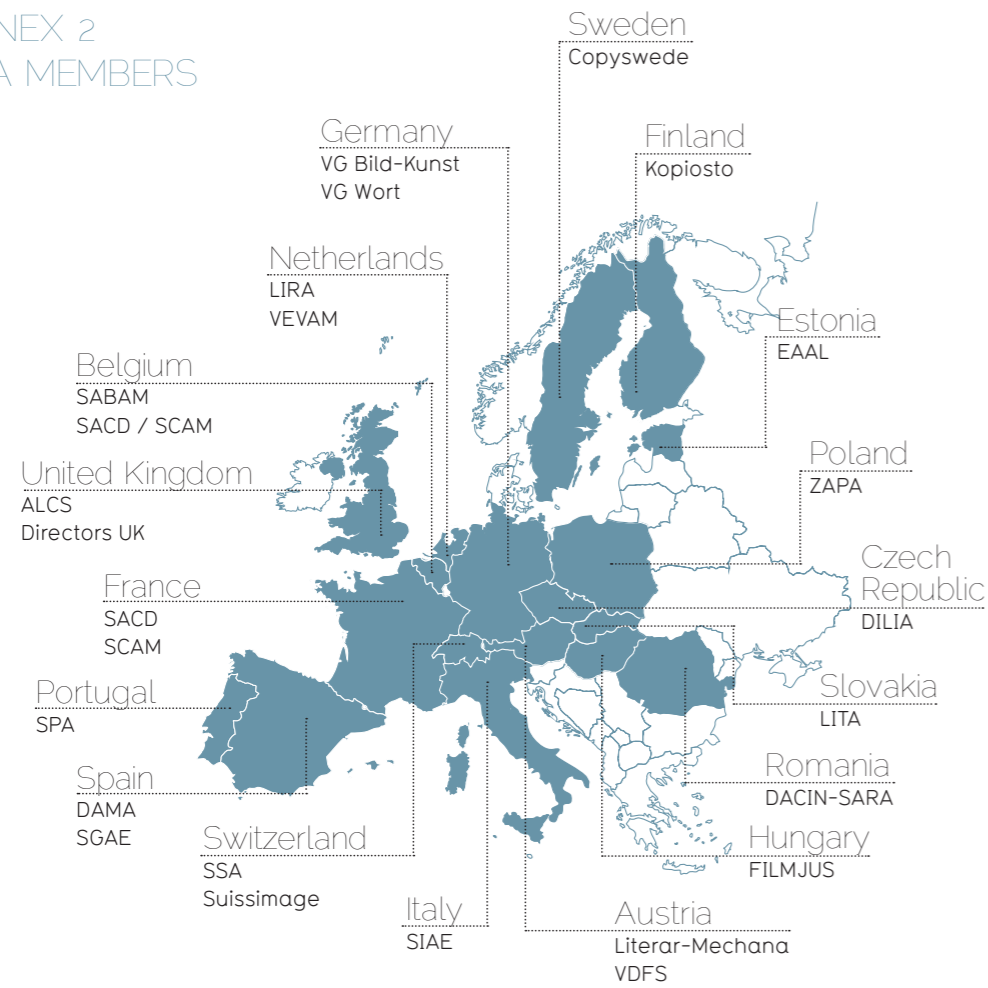
Orphan works are works that are still protected by copyright but whose authors or other rightholders are not known or cannot be located or contacted to obtain copyright permissions. The Directive set out common rules that entitle cultural institutions who hold orphan works (film heritage institutions and public service broadcasters as far as audiovisual works are concerned) to digitize these orphan works and make them publicly available online in all Member States on the basis of an exception to copyright applicable in the whole EU.

2014 Collective Rights Management (2014/26/EU Directive)

This Directive is about collective rights management and multi-territorial licensing of rights in musical works for online uses. As far as collective rights management is concerned, it applies to all CMOs in all sectors. It provides for general principles as well as detailed rules on the establishment, functioning and accountability of CMOs in order to develop high standards for European organisations.

³¹ Putting Authors Back at the Heart of Culture and Copyright, 2014

ANNEX 2
SAA MEMBERS



Austria
Literar-Mechana www.literar.at
VDFS www.vdfs.at

Belgium
SABAM www.sabam.be
SACD/SCAM www.sacd.be

Czech Republic
DILIA www.dilia.cz

Estonia
EAAL www.kinolilit.ee

Finland
Kopiosto www.kopiosto.fi

France
SACD www.sacd.fr
SCAM www.scam.fr

Germany
VG Bild-Kunst www.bildkunst.de
VG Wort www.vgwort.de

Hungary
Filmjus www.filmjus.hu

Italy
SIAE www.siae.it

Netherlands
LIRA www.lira.nl
VEVAM www.vevam.org

Poland
ZAPA www.zapa.org.pl

Portugal
SPA www.spautores.pt

Romania
DACIN-SARA www.dacinsara.ro

Slovakia
LITA www.lita.sk

Spain
DAMA www.damaautor.es
SGAE www.sgae.es

Sweden
Copyswede www.copyswede.se

Switzerland
Suissimage www.suissimage.ch
SSA www.ssa.ch

United Kingdom
ALCS www.alcs.co.uk
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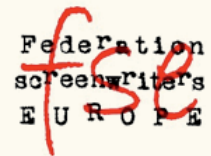
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