EUROCOPYA
European Federation of Joint Management Societies of Producers for Private Audiovisual Copying

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GREEN PAPER
on the online distribution of audiovisual works in the European Union: opportunities and challenges towards a digital single market:

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Contribution by EUROCOPYA

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1. ***What are the main legal and other obstacles – copyright or otherwise - that impede the development of the digital single market for the cross-border distribution of audiovisual works? Which framework conditions should be adapted or be put in place to stimulate a dynamic digital single market for audiovisual content and to facilitate multi-territorial licensing? What should be the key priorities in this regard?***

2. ***What practical problems arise for audiovisual media services providers in the context of acquiring rights in audiovisual works (a) in a single territory; and (b) across multiple territories? What rights are affected? For which uses?***

3. ***Can copyright clearance problems be solved by improving the licensing framework? Is a copyright system based on territoriality in the EU appropriate in the online environment?***

An initial observation needs to be made with regard to the notion of a "single digital market". While not opposed at all to the creation of a "digital market", an expression that is, as it happens, appealing but at the same time deprived of real legal significance, European producers of audiovisual and cinematographic works represented by EUROCOPYA would like to reaffirm their view of the market for cinematographic and audiovisual works.

In relation to cinematographic and audiovisual works, the market is divided in a structured manner into sales territories, which are themselves structured in the form of specific windows corresponding to the different media which, in turn, are organised in a hierarchic way (with theatrical release opening the windows as far as cinematographic works are concerned, and free TV broadcasts generally closing them in a definitive way). As indicated by the Green Paper, this territorial and chronological media management is not only a way of optimizing the audience and revenues for cinematographic and audiovisual works, it is also the counterpart of the exclusivity granted to the various media involved in the financing of these works, and without which these works would not exist (or would not exist anymore).

Therefore, we have to abandon the idea that there would be a parallel "digital single market" that could be the subject of autonomous management and exploitation methods compared to the proven economic model of distribution by segmenting the market into territories and windows[1]. At best, the online economy applied to audiovisual and cinematographic services constitutes a fraction of that economy and is integrated into it.

As it seems necessary to repeat what has already been said on numerous occasions[2], one figure should serve to raise awareness. The revenues generated by Video-On-Demand (VOD) in Europe amounted to € 544 million in 2008. This (definitely rather low) figure has to be seen in relation to the total value of investment in audiovisual and cinematographic production during that year amounting to € 96 billion. Conclusion: an online economy, or rather **the "digital single market", does not at all match the expectations of investors and producers in the audiovisual program industries. The revenues generated are too weak and go against any redefinition of the business models facilitating both the pre-financing and raising of proceeds from the "traditional" exploitation methods for audiovisual and cinematographic works.**

However, in the presence of a pan-European rights market for online exploitation (which producers aspire to in absolute terms but which turns out to be a hypothesis not confirmed yet), nothing would prevent already a copyright holder from granting rights for pan-European exploitation. The example of *iTunes*, where the various distributors of one and the same film may agree to jointly grant a multi-territorial licence to iTunes, which is responsible for remitting the proceeds to each of them, is illuminating from this point of view. Similarly, it is not because of the lack of pan-European license possibility that the audiovisual broadcasting satellite has finally developed mainly on a national or linguistic basis[3].

[1] Practices, it must be remembered, accepted by the Court of Justice: the Premier League (FAPL) judgement recently handed down by the European Court of Justice does not find these practices invalid at all.

[2] See notably EUROCOPYA's contribution to DG INFSO & DG MARKT Reflection Document on Creative Content in a European Digital Single Market, January 5th, 2010, § 2.3 p. 6 and § 5 pp. 11-12.

[3] See our response to Q.5 below, as well as EUROCOPYA's contribution to DG INFSO & DG MARKT Reflection Document on Creative Content in a European Digital Single Market, January 5th, 2010, § 2.1 pp. 4-5.

Technically speaking, it is not necessary (and not even efficient in the light of the precedent of satellite broadcasting) to reform Community law in order to allow the granting of multi-territorial licences. The freedom of contract based on ownership of the IPR for the exploitation of audiovisual and cinematographic works enables already this objective to be achieved, if deemed necessary by all interested parties. Possible barriers to the establishment of a pan-European market for audiovisual works online seem clearly come from other factors than IPRs, notably cultural and linguistic differences between Member States, or the inability of most audiovisual works, beyond their potential availability on digital networks, to gain the minimum notoriety necessary to ensure the profitability of their online exploitation.

4. ***What technological means, for example individual access codes, could be envisaged to enable consumers to access "their" broadcast or other services and "their" content, irrespective of their location? What impact might such approaches have on licensing models?***

This question appears to us to be inspired by some developments related to the music sector (see. Q.8 infra). In essence, audiovisual and cinematographic works do not have for their part the nature of works that circulate equally well on all types of networks. To optimise the resources derived from the exploitation of the cinematographic and audiovisual works, the party granting the rights or the exploiting party (regardless of the type of media considered) should seek to promote the rare nature of the work concerned according to the terms explained above. And, therefore, the small number of complaints made by holidaymakers and business travellers who cannot access their usual pay-TV channels when they are on leave should not justify the shake-up of what is an efficient system.

That being said, systems of individual access codes can be – and already are – implemented for certain online exploitation of audiovisual works modes, coupled with the geographical localization, in order to allow such remote access within the limits of voluntary agreements between rights holders and operators of the services concerned (see for instance some Web TV on PC services).

5. ***What would be the feasibility, and what would be the advantages and disadvantages of, extending the "country of origin" principle, as applied to satellite broadcasting, to online audiovisual media services? What would be the most appropriate way to determine the country of origin" in respect to online transmissions?***

Regarding the idea of extending to online audiovisual media services the principle of "country of origin" provided for satellite broadcasting under the 1993 Cable & Satellite Directive[4], as taken up in particular by some European public broadcasters in order to "clear" the broadcasting rights for their online programs, EUROCOPYA has previously commented on this point[5], and considers that **such an option should be rejected** since it is likely to affect - or challenge - the territorial and chronological management by media on which - even in the online environment - is based the funding and exploitation of audiovisual works. In the best case, such an option would cause similar effects to those seen in satellite broadcasting, where the principle of "country of origin" has finally not resulted in pan-European offers (except for some niche channels or for some information channels, or for some adults channels) but rather mainly national ones (cf. national satellite bouquets – or "satellite packages" – using conditional access systems). As EUROCOPYA stated in its previous contribution[6], it indeed appears that, finally, only a chronological (media by media) and territorial (country by country) rights management is able to provide a rich and diverse online offer of film and audiovisual content that can seamlessly fit into preexisting media chronology (although said territorial and chronological management of rights may change to reflect the arrival of a new media), this being to the benefit of all parties (producers and rights holders, distributors and online platforms operators, consumers).

The Audiovisual Media Services Directive (AVMSD), for its part, applies equally to both linear and non-linear media services, thus permitting the incorporation of services provided in the jurisdiction of one Member States of the European Union for any possible free broadcast or online service within the single market.

So, at the moment, Video-On-Demand services are granted in a territorial way, the reasons for which have already been explained above. However, it is easy to imagine an online service for multi-territorial exploitation. For example, when rights have been exploited in the different territories and the revenues have effectively been collected from such initial exploitation, there is nothing to prevent the

[4] Council Directive 93/83/CEE dated September 27th, 1993.

[5] See EUROCOPYA's contribution to DG INFSO & DG MARKT Reflection Document on Creative Content in a European Digital Single Market, January 5th, 2010, § 2.2 p. 6.

[6] *Ibidem.*

producer from granting a multi-territorial licence to a distributor for secondary exploitation (as long as this does challenge the granting of exclusive rights per territory). In this case of multi-territorial assignment of rights, the contractual agreements between the right holders of the works concerned and the online distributor should also specify the country of incorporation (which is not necessarily the country of origin or the premises of the producer). Although this last question does not appear to us to raise any particular problems, we will be happy to comment more fully on this if necessary.

6. ***What would be the costs and benefits of extending the copyright clearance system for cross-border retransmission of audiovisual media services by cable on a technology-neutral basis? Should such an extension be limited to "closed environments" such as IPTV or should it cover all forms of open retransmissions (simulcasting) over the internet?***

In order to ensure equal treatment between all operators – or, as indicated in the Green Paper, a "technology neutral" approach in full and simultaneous retransmission of audiovisual programs – the "cable" component of the Satellite and Cable Directive[7] could indeed be extended to any full and simultaneous retransmission of TV programs by any third retransmission platform operator, whatever the network concerned. This is evidently justified when this retransmission takes place through a "closed" network, be it IPTV retransmission on set-top boxes or retransmission through digital satellite bouquets/packages. This would ensure equal treatment between these various retransmission platform operators, whatever the network used. A recent ruling by the European Court of Justice in two cases concerning respectively the collecting societies *SABAM* and *AGICOA Belgium* against satellite package operator *Airfield NV* also argues in this direction, by assimilating the satellite bouquet operator to a cable operator within the meaning of the 1993 Cable & Satellite Directive[8].

Extension to all open platforms like the Internet must likewise be considered as far as it concerns "simultaneous, unaltered and unabridged" retransmission cases (as opposed to on-demand services) and as far as it is not likely to affect the territorial exploitation of rights, which is the case for IPTV retransmission on PC – Internet TV on an "open" network – with individual access code and geographical localization of the subscriber.

[7] Council Directive 93/83/CEE dated 27 September 1993.

[8] See ECJ ruling of October 13th, 2011, in cases C-431/09 and C-432/09.

Article 11bis of the Berne Convention on copyright matters provides an adequate – technologically neutral – basis for the legal formulation of such extension [9].

7. Are specific measures needed in light of the fast development of online social networking and social media sites which rely on the creation and upload of online content by end-users (blogs, podcasts, posts, wikis, mash-ups, file and video sharing)?

The question needs to be clarified in more precise terms. Are specific measures needed in relation to copyright?

The copyright holders, by definition, are not affected by the activities of online social networks and social media (as long as they do not infringe the IPR for the works of course!). The exception set out in Article 5,3, k) of Directive 2011/29 provides for a restriction of copyright where it concerns use for the purposes of caricature, parody or imitative work. This exception provides an adequate degree of freedom for the Member States to satisfy the needs of users to design their own content. Moreover, case law and practice are sufficient to prohibit the misuse of pre-existing copyright-protected works. It is therefore not necessary to consider a legislative amendment in this regard.

8. How will further technological developments (e.g. cloud computing) impact upon the distribution of audiovisual content, including the delivery of content to multiple devices and customers' ability to access content regardless of their location?

The importance of cloud computing has grown in recent years. Henceforth, cloud computing allows users themselves to store, distribute or share (at greater of lesser extent) content with other users and this through **storage services outsourced in the cloud and provided by third parties** (including some ISPs).

Dedicated cloud computing services exist for copyright protected content. *Amazon.com* has developed a well-known service that allows to download music content and to listen to it on different applications. Such is also the case of *Apple*'s recent *iCloud* offer. The legality of this application with regard to

[9] Article 11 of the Berne Convention :
« The authors of literary and artistic works enjoy the exclusive right to authorise …
*2. any public communication, **whether via cable or wireless** transmission of the work, where such communication is carried out by **an organisation other than the original one**»,*

copyright protected content is not certain. In the United States, the copying of music tracks for private use would be covered by format shifting, which is tolerated on the basis of the fair use principle. However, such tolerance is not recognized under Community legislation, which does not recognise fair use. Exception to copyright, including the private copy exception, does not legalise either file transfer, including via cloud computing, as far as this one would be beyond the private (family) circle.

The location of this cloud computing is in theory absolutely irrelevant from this point of view as long as the copyright holder enjoys the right to protection in the place where it is requested (it is therefore not the jurisdiction that applies where the computing company is established that is relevant).

It is not necessary to amend or clarify the law protecting copyright in this regard. But in practice, this type of services - in addition to the question of its compatibility with the existing territorial rights management of in the audiovisual field (see Q.4 above) – raises the question of the means of action with respect to service providers established for most of them outside the EU (extra-territorial application of copyright).

It has also to be noted that consumers may find themselves in breach of existing legislation if, through cloud computing services, they commit themselves into activities similar to acts of piracy in relation to IPR. It would, therefore, be necessary to provide for means of informing and educating the public about the use made of computer tools and, in particular, file-sharing established under cloud computing services.

In this respect, **it should be noted also that the issue of strengthening appropriate means to fight against massive counterfeiting, which is still one of the creators' major challenges vis-a-vis the development of new digital networks of distribution of works, is singularly absent from the different themes raised in this Green Paper.**

9. How could technology facilitate the clearing of rights? Would the development of identification systems for audiovisual works and rights ownership databases facilitate the clearance of rights for online distribution of audiovisual works? What role, if any, is there for the European Union?

Currently, it remains extremely difficult to identify audiovisual works (particularly in a context of international broadcasting of works where each language version of the work has a title different from the original title of the work), which is the prerequisite for the identification of the rights holders in these works. Producers' collecting societies EGEDA (Spain), GWFF (Germany) and PROCIREP (France), members of EUROCOPYA, were therefore – among others – at the initiative of implementing the **ISAN standard (International Standard Audiovisual Number)**[10], together with authors' societies and international umbrella organizations such as CISAC and AGICOA. ISAN is the worldwide ISO standard providing a unique and permanent identification number for each audiovisual work and versions thereof. This identifier is actually implemented in some key European countries[11], notably as a producers' & authors' collecting societies' work identifier, but also beyond (North America - United States and Canada - Latin America and Australia, with perspectives of development in India and Asia), under the authority of an ISAN International Agency (ISAN-IA), a non-profit organization under contract with ISO (the International Standard Organization).

ISAN represents a standardization practice initiated by the industry which facilitates the free circulation and free provision of audiovisual and cinematographic works. EUROCOPYA is therefore surprised that the Commission has not expressed interest at this stage with regard to promoting the universalization of the ISAN standard and possibly making it mandatory in the internal market. Providing each European work with an ISAN identifier (that is to say in an open, purely non-profit framework under ISO governance) appears to us to be fundamental in order to improve the identification of works for their marketing and distribution (including online), thereby improving the functioning of the internal market in terms of IPR compliance and commercial practices for the exploitation of audiovisual works in a broad sense.

Therefore, the answer is YES concerning the role that the European Union should play in this regard. Implementation of a worldwide unique identifier such as ISAN remains a rather costly and complex procedure, and it appears that some countries even within the European Union do not have

[10] See www.isan.org

[11] Austria, Belgium, Denmark, Finland, France, Germany, Italy, the Netherlands, Poland, Serbia, Spain, Sweden, Switzerland

sufficient resources to join the ISAN initiative or ensure the use of this common identifier by all actors in the audiovisual distribution chain. To make this mechanism efficient, it is indeed essential for it to be shared by all right holders and a maximum of stakeholders of the audiovisual sector, notably in Europe. We believe that this is a key issue that has to be examined within the European Union.

10. Are the current models of film financing and distribution, based on staggered platform and territorial release options, still relevant in the context of online audiovisual services? What is the best means to facilitate older films which are no longer under an exclusivity agreement being released for online distribution across the EU?

Models for the financing and distribution of audiovisual and cinematographic works, which are based on territorial distribution of the rights within each territory, and on a hierarchy of windows intended to ensure the optimisation of revenues with a view to amortize production costs of the work, remain applicable.

Despite the emphasis placed on the development of online supply and the considerable efforts developed by producers and distributors of European works to support the online supply market, it is not a very profitable market. Consequently, said online market is of lower economic significance, be it in terms of revenue recoupment or as a source of pre-financing of audiovisual and cinematographic works. These facts have already been brought to the knowledge of the Commission.

As the Commission knows, the cinematographic and audiovisual industry wanted to create the conditions for transparency in the economic development of video on demand in Europe. A report is drawn up every year by the European Audiovisual Observatory for the purpose of providing information on the development of the market, the supply of online services, and associated revenues. In this objective assessment, it is clear that the online rights market is progressing but there is an insufficient source of revenues and pre-financing. This leads investors (producers, TV broadcasters, AV rights libraries/catalogues, distributors) to continue to favour in priority the current business models of financing, production and exploitation of audiovisual and cinematographic works.

Concerning the making available of older movies that are not subject to contractual exclusivities, the question is not clear in the eyes of EUROCOPYA, notably as the concept of "older films" expressed in the Green Paper is imprecise. However, it is obvious to anyone interested in film heritage that the “old

movies" still under copyright protection (i.e. which have not entered the public domain) are already subject of restoration, often by companies holding AV rights catalogues, for the purpose of theatrical release and/or DVD release. This latter initiative is all the more remarkable given that the situation is not very favourable for the DVD market in general. EUROCOPYA remains available to the Commission should this reply not have answered all its questions on this point.

11. Should Member States be prohibited from maintaining or introducing legally binding release windows in the context of state funding for film production?

The general principle aimed at determining the terms of exploitation of audiovisual and cinematographic works (media window and chronology) must remain the one established by the Audiovisual Media Services (AVMS) Directive[12] under its article 8*: "The Member States shall ensure that providers of media services under their jurisdiction do not transmit cinematographic works outside the periods agreed with the holders of the rights"*.

The French case specifically referred to in the Green Paper, in which a decree secures certain windows, is not an exception to this principle, as the interested parties have previously themselves decided on the periods to be agreed. The *ex post* regulatory intervention carried out at the request of said interested parties should be seen as a "belt and braces" system (with rights holders setting the contractual windows and requesting the public authorities to secure these by way of decree).

12. What measures should be taken to ensure the share and/or prominence of European works in the catalogue of programmes offered by on-demand audiovisual media service providers?

Article 13 of the Audiovisual Media Services (AVMS) Directive provides for on-demand audiovisual media services to promote the production of European works as well as access to said works. This promotion can find expression, in particular, in the financial contribution made by these services to the production of European works and the acquisition of rights for such works, or the share and/or importance of the place reserved for European works in the catalogue of programmes offered by said

[12] Directive 2010/13/EU dated March 10th, 2010

on-demand audiovisual media services. This provision seems to us a reasonable approach, given that the Member States want to play a proactive role in its implementation process[13].

The future MEDIA programme should also be called on to play a corrective role in the countries with low production and distribution of European works by enabling them to create and access European digital content.

Monitoring via competition law to prevent the forming of monopsonies in providing digital catalogues (especially non-European content) represents a third pillar aimed at guaranteeing that the online content market remains open.

13. What are your views on the possible advantages and disadvantages of harmonizing copyright in the EU via a comprehensive Copyright Code?

Copyright law in all the Member States of the European Union has its source in treaty law, international law established since the 19th Century by the Berne Convention and subsequent conventions.

Community law has harmonised the main concepts of copyright through seven harmonisation directives, and their implementation constitutes a relative homogeneous body of law. Is it necessary at this point to harmonise copyright law further in the European Union by way of a comprehensive European copyright code?

The initiator of such project, Mr. Bernt Hugenholtz, assigns a very specific purpose to it: *"If the European Union seriously hopes to create an internal market for goods and content services, it must tackle the problem of the territoriality of copyright at its very core !.... The establishment of a unified European law relating to copyright would be a real solution…which would remove…the territorial obstacles to creating a single market."*[14]

[13] The implementation of this provision by the Member states is the subject to review conducted by the Information Society Directorate-General.

[14] Bernt Hugenholtz: "The cross-border audiovisual archives, the problem of territorial copyrights" in the online digitization and exploitation of broadcasters' archives, IRIS Special, December 2010, p.59

It is difficult to be clearer. **The objective of such a comprehensive European code would not be intended to codify the best protection of copyright but, rather, to put an end to the so-called (and alleged) "problem of territoriality"** (it should also be noted that Mr. Hugenholtz does not seem to understand the specifics of the film industry described here. He equates musical and audiovisual works to quite a large extent, which can only be a source of misunderstanding).

In the cinematographic and audiovisual industry, creation depends closely on sources of, mostly national, financing. The point of contact for national funding is often linked to a national cultural identity. This specific European characteristic – the birth of the work in a national cultural, linguistic and economic environment – is the current model for creating and producing audiovisual and cinematographic works.

The idea underlying the European copyright code as advocated by Mr. Bernt Hugenholtz (prohibition of territorial rights management) appears to us to run counter to the principle of copyright protection as long as the European Court of Justice itself assumes the practices of territoriality of rights as a means to promote exploitation of the works[15]. And it is noticeable that the "idea" of this European copyright code was born of a study funded by the Commission[16] without any debate being opened with the rights holders. **We feel that the objective assigned to the comprehensive European code is wrong and believe that the authoritarian approach at the source of this initiative is doomed to failure**.

14. What are your views on the introduction of an optional unitary EU Copyright Title? What should be the characteristics of a unitary Title, especially in relation to national rights?

EUROCOPYA is not opposed to reflection on the introduction of an optional unitary copyright title in the European Union. However, with regard to the exploitation of cinematographic and audiovisual works, EUROCOPYA doubts much of the added value that this would represent. The works are the subject of commercial transactions regulated by contractual provisions. The chain of rights is

[15] Again, as said under footnote 1 above, the Premier League (FAPL) judgement recently handed down by the European Court of Justice does not find these practices invalid at all.

[16] The Recasting of Copyright & Related rights for the Knowledge Economy, November 2006.

structured (assignment of copyrights to producers, sale of rights of sales agents/exporters charged with assigning the same to authorised distributors for the different windows in each territory). These transactions are based on classic contractual practice once the economic rights to the work have been assigned to the producer *ab initio*. It is not necessary for the Commission to get sidetracked in a solution providing little added value with regard to the trading of audiovisual and cinematographic rights.

15. Is the harmonisation of the notion of authorship and/or the transfer of rights to audiovisual productions required in order to facilitate the cross border licensing of audiovisual works in the EU?

The harmonisation of ownership has almost been effected: the definition of the producer of the cinematographic or audiovisual work covers in practice the same rights and obligations throughout the European Union.

The rights granted to producers are well known, i.e. the assignment of all means enabling the economic exploitation of the cinematographic and audiovisual works. In consideration for the assignment of such rights, the producer is required to remunerate the author(s) and the performing artists. A written contract precisely defines the rights and obligations of each of the parties to the contract. The producer is also bound to the obligation to exploit the work concerned. In an industry based on talent and success (which is its corollary in principle), the authors, often provided with legal advice and assisted by talent agents, have on their turn the means at their disposal to negotiate balanced contracts with the producers. It is therefore meaningless to caricature an industry based on capitalist principles and resources. We are far away from the “poor author” abandoned to the voracity of the producers.

In the Member States of the European Union, the assignment of copyrights to producers and the granting of performing artists’ rights can take on different forms according to national law, i.e. contractual assignment or legal assignment. The European Court of Justice is currently considering a preliminary ruling (**Luksan** case[17]) for which the Advocate-General has delivered his opinion, which does not lead to an option for harmonising transfer clauses, neither to a challenge of the transfer of

[17] Case no. C-277/10 - Martin Luksan vs. Petrus van der Let.

rights clauses at the expense of the producers. Nonetheless, the Advocate-General does accept, in a perfectly legitimate manner and in accordance with the law as well as practice of the cinematographic and audiovisual industry, that a contractual agreement has to exist between the principal director of the film and the producer, in which the principal director undertakes to provide his services and in consideration for which it has to be guaranteed that the author of the film receives equitable remuneration (see point iv) of the interim conclusion, point 134)[18].

Moreover, unified legislation does not harmonise the concept of the author. It refers to the principal director, though without mentioning the co-authors. In the same way, moral rights are not incorporated into unitary law. But as far as the authors and co-authors find protection by way of treaty law (Berne) and national law, it is not necessary to harmonise this concept, which has not resulted in any distortions or obstacles in the implementation of the freedom to provide services or the free circulation of goods and services protected by copyright.

The minimum harmonisation achieved appears therefore to us to be widely sufficient.

The fundamental issue is to ensure that the producer can, by way of the assignments, hold all the economic exploitation rights allowing him to market the rights vis-à-vis the various distributors, with the contractual remuneration payments received by the authors and performing artists being influenced to a great extent by the proceeds derived from said exploitation of the work after its completion. The Commission must also remember that the producer exclusively bears the financial risk of the production. The granting of transnational licences is therefore not influenced in any way by the harmonisation of ownership and/or the transfer of rights.

16. Is an unwaivable right to remuneration required at European level for audiovisual authors to guarantee proportional remuneration for online uses of their works after they have transferred their right to make such works available? If so, should such a remuneration right be administered in a compulsory manner by collecting societies?

[18] Furthermore, it should be noted that, in the LUKSAN case, Austrian law provides for legal assignment of the rights ab initio for the benefit of the producer of the cinematographic work. This provision appeared to be contested by the defendant. The Advocate-General confirms the Austrian legislation.

It is neither necessary nor desirable to establish an inalienable right to remuneration in order to guarantee "proportional" remuneration for audiovisual authors in relation to the online use of their work after transferring their right to make such works available.

The online exploitation of an audiovisual or cinematographic work should be seen as a mode of exploitation of an **additional window** to be added to existing windows (theatrical release, DVD/BRD edition, broadcasting via pay-TV, via free-to-air channels, etc.). In the French case for instance, under the law and contracts concluded between the producer and the author, a contractual proportional remuneration (which principle is provided for by the law) and even in most cases an additional proportional remuneration ("success bonus") will thus be provided for these online exploitations. But obviously these remunerations will benefit the author only in the case that advances paid by the producers on the author's future royalties (in the case of the compulsory proportional remuneration provided for by law) have been recouped by said producer, and (in case of an additional contractual "success bonus") if the exploitation of the work is indeed successful, i.e. that production costs have at least been paid off by the operating revenues received by the producer.

Furthermore, it should be noted that:

1) the online rights market (essentially as of today Video On Demand - VOD) is still an emerging market which is not very profitable so far, despite the emphasis placed on digital developments. The overall revenues of VOD in Europe, *circa* half a billion euros, remain modest (see Q.1 to 3 above), with the entire chain of rights holders – authors, producers, performing artists – deriving very mediocre benefits from such online exploitation. Therefore, the authors represented by SAA (the supporter of an unwaivable right to remuneration for authors for online uses) are not the only ones to observe that the remuneration derived from video on demand remains low.

2) the Video-On-Demand market, if it matures, will be partially characterised as a market to offset the decrease of the DVD market. Consequently, the development of the VOD market will be welcome to contribute to the amortization of audiovisual and cinematographic works. In this context, it does not, for most of it, concern exploitation that occurs **after amortization** of the work. On the contrary, it is

participating in said amortization. It would appear that the SAA document ignores said economic characteristics of VOD.

Should such a remuneration right, if created, be administered in a mandatory way by a collecting (or "collective management") society?

First, whatever the way it is managed, the unwaivable (i.e. non-assignable) right granted to the author would have the effect of disfiguring the contract (and the free contractual negotiation which is its counterpart), by removing a specific exploitation window (VOD, which contributes to the amortization of the work) from the exercise of contractual freedom.

Second, the emergence of the collecting society would have the effect of substituting a mandatory collective management organisation for the author of the work. **This substitution is not neutral for the author**, who will be deprived of some of his rights to remuneration normally negotiated by way of contract to which he would normally be entitled for online exploitation (possibly even being the object, in contractual terms, of specific provisions for the author to share in the success of online exploitation should it be the case). Indeed, as it is currently the practice, the collecting society will notably seek to redistribute the non-assignable remuneration right not to the author individually but, rather, to all its statutory members. We feel this is likely to disrupt the contractual relations between the producer and the author in favour of a **collective distribution system ignoring the individual creative effort, notably the author's success without which the cinematographic work cannot exist**.

17. What would be the costs and benefits of introducing such a right for all stakeholders in the value chain, including consumers? In particular, what would be the effect on the cross-border licensing of audiovisual works?

The risk of mandatory collective management of an unwaivable remuneration right for authors in the area of online distribution is twofold:

1) double payment, and

2) obstruction of the market.

Double payment:

The producer will, as is currently the case, assign all the rights on a territorial basis to the distributor of the country of destination for any type of exploitation (cinema, television sales, DVD release, video on demand). This sale also covers the rights for video on demand. Subsequently, the distributor for the country of destination where the exploitation of video on demand takes place will be faced with a request from the collecting society (the one of the destination country?) for the granting of an additional remuneration, for which one wonders on what basis it is going to be calculated. Will it be harmonised at European level? Will it be redistributed by the collecting society for the country of destination to the collecting society for the country of origin and, in turn, on what basis? Will there be collecting societies that are capable of managing such rights throughout the European Union, given that the audiovisual "rights" under collective management represent a much reduced base entrusted in some countries to societies managing a large variety of rights (music, audiovisual, and even visual arts' rights such as the right of resale!)?.[19]

Blocking of rights:

In a document drafted by the copyright working group of the European Parliament's legal committee, it was highlighted in a remarkable way how, in the online exploitation of musical works, "competition for jurisdiction" in the exercising of rights between labels, music publishers and authors' collecting societies gives rise to well-known obstacles in the online distribution of musical works. We ask the Commission to refer to this document[20]. *Mutatis mutandis*, **the establishment of mandatory collective management for authors which will come in competition with the producer for the purpose of obtaining royalties from the online exploitation of audiovisual and cinematographic works should lead to the same result.** It is almost predictable that the authorised collecting society (by law in the case of inalienable assignment) will use its **monopoly position** to try to maximise the

[19] This discussion refers to the general questions currently posed by the system of collecting societies in Europe. From this point of view, the criticism voiced by the SAA regarding the incompetence of producers appears to be misplaced given the criticism of these societies by their own rights holders (see: http://www.younison.eu/news)

[20] Committee on Legal Affairs, Working group on Copyright. Working document: Copyright in the music and audiovisual sectors, p.p. 17-18, 29.06.2011 – presented to the EP Legal Committee on 10 October 2011.

income derived from the exploitation of video on demand by setting a higher royalty charge[21]. There is every reason to believe that this practice leads to the **blocking** of the market and, in all respects, this should be a **disincentive** for providers of video-on-demand services with regard to purchasing audiovisual and cinematographic works[22] of European origin[23].

As a conclusion on these issues, EUROCOPYA considers that the implementation of an inalienable right to compensation at European level for the benefit of audiovisual authors would be both (i) **unnecessary** (since it is already provided or can be implemented through contracts concluded with the producer), (ii) **unfair** (to the extent that such compensation would be a double payment of the author, should that right be collected from the first Euro on online operations, while the producer would still have to recover the advances paid to authors and the production cost of the work which have not yet been amortized) and (iii) **counterproductive** (a disincentive to the purchase of European audiovisual content for the online market).

In consideration of the response to Question 20 below, EUROCOPYA rather favors the strengthening of contractual negotiations, whether individual or collective.

18. Is an unwaivable right to remuneration required at European level for audiovisual performers to guarantee proportional remuneration for online uses of their performances after they have transferred their right to make these available ? If so, should such a remuneration right be administered in a mandatory way by collecting societies?

19. What would be the costs and benefits of introducing such a right for all stakeholders in the value chain, including consumers? In particular, what would be the effect on the cross-border licensing of audiovisual works?

[21] Which, logically, would be a different rate depending on the collecting society carrying out the representation of the territorial monopoly, unless the law sets a harmonised tariff at European level.

[22] It is permissible to note that the US studios, whose domination on the European market is well known, would not be subject to this mandatory levy by the collecting societies.

[23] Moreover, the example put forward by the SAA of remuneration derived by an exclusive member of SAA (in this case, SACD in three countries: Belgium, France, Canada) from the TV exploitation of cinematographic and audiovisual works does not appear relevant to us. Apart from this remuneration being far from widespread in Europe, it has led to a blocking of the market, with some broadcasters refusing to negotiate a fee subsequently for pre-purchased programmes. They have therefore decided not to buy works of French origin for their channels.

The answers to questions 16 and 17 above are valid here *mutatis mutandis*. It should be added that the performing artists involved in the production of an audiovisual or cinematographic work can be numerous, hence the vital need to secure *a priori* assignment of the rights to the producer.

20. Are there other means to ensure the adequate remuneration of authors and performers and if so which?

Unified European law can usefully draw on best practices in the implementation of contracts between producer and authors and producers and performing artists in order to promote contractual arrangements balanced in an optimum manner.

It remains to be said that, in countries with high production, the resources available for the cinematographic and audiovisual market cannot be compared with those countries whose production is restricted. This has an impact on the entire chain (difficulty in small countries to finance ambitious works, but also in relation to resources allocated to creative producers and performing artists). In some countries, the functions of producers and directors are sometimes combined. This leads in some countries to extra-contractual solutions being sought in order to improve the situation of performing artists (e.g. in Belgium, where performing artists claim a salary that would in principle be provided by the public authorities).

In the absence of a single market for talent or creative and economic resources, it is extremely difficult to promote a single and exclusive economic model for the allocation of human resources and creative talent.

21. Are legislative changes required in order to help film heritage institutions fulfil their public interest mission? Should exceptions of Article 5(2)(c) (reproduction for preservation in libraries) and of Article 5(3)(n) (in situ consultation for researchers) of Directive 2001/29/EC be adapted in order to provide legal security to the daily practice of European film heritage institutions?

22. What other measures could be considered?

Certain exceptions provided by the Article 5 of Directive 2001/29/EC already allow to secure the reproduction of works by film heritage institutions for conservation purposes, as well as the access to these works by teachers or researchers. By doing so, the legal security of these institutions' practices, with respect to the heart of their mission - that is, to **preserve** heritage - is in principle ensured.

However, these same institutions are often reporting difficulties in the open public **dissemination** of this heritage, especially over the internet, because of so-called "orphan" works (works whose right holders could not be identified or located, in principle after a diligent search of said right holders). These difficulties, however, seem largely overestimated, as **no serious study has up to now really challenged the marginal nature of orphan works in the film and audiovisual sector (provided of course that diligent search has been duly made by these institutions)**. It is also regrettable in this regard that, in the absence of a real impact study specific to audiovisual works, these works have still been included in the scope of the draft directive on orphan works, currently under review by the European Parliament.

As far as the audiovisual sector is concerned, the actual issues seems to be more, firstly, to open access and strengthen efforts in building databases of audiovisual works facilitating right holders identification (such as those mentioned above in Question 9 with the implementation of the ISAN work identifier) and, secondly, to give said institutions the means to enable them to obtain the necessary authorizations/rights clearance for online distribution of their assets under common law conditions.

23. Which practical problems arise for persons with disabilities to have access on an equal basis with others to audiovisual media services in Europe?
24. Does the copyright framework need to be adapted to improve accessibility to audiovisual works for persons with disabilities?
25. What would be the practical benefits of harmonising accessibility requirements to online audiovisual media services in Europe?
26. What other actions should be explored to increase the availability of accessible content across Europe?

EUROCOPYA wishes to recall that for a variety of reasons, including concern on the film industry side - producers, distributors and exhibitors - not to exclude the public undergoing a visual or hearing disability, many methods have been implemented to meet the needs of these categories of public. Article 5, 3 (b) of the Copyright Directive still appears to us as the sufficient basis for the necessary adjustments to meet the needs of people experiencing disability as far as access to audiovisual works is concerned.

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