

Public Consultation on Creative Content Online in the Single Market

EU XXL Resolution 2008

We, the signatories of the EU XXL Resolution 2008, have passed this contribution during the "EU XXL Forum", held from 26th – 27th of February 2008 at the Danube University Krems, in Austria, as a common comment on the Consultation on Creative Content Online.

AAC
Austrian Association
of Cinematographers



BumaStemra
Dutch Collecting Society for
Copyright Holders



e.films



EACTV
European Association of
City Televisions



ECA
European Council of Artists

ECF
European Composers'
Forum



EFCA
European Film
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FERA
Federation of European
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GIART
International Organisation
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IG Autorinnen Autoren

Kulturrat Österreich

ÖKB
Österreichischer
Komponistenbund



SABAM
Belgische Vereniging voor Auteurs,
Componisten en Uitgevers



SPA
Sociedade Portuguesa de Autores



Krems, 27.02.2008

EU XXL RESOLUTION 2008

Preamble

The EU XXL Forum, which took place during “EU XXL film, forum and festival of European film”, gathered representatives and stakeholders of the European audiovisual sector – producers, directors, cinematographers, scriptwriters, composers, actors, film funding institutions and authors’ societies – to discuss EU-policies concerning the audiovisual and music sectors.

This common resolution was elaborated in the course of different panel discussions, working groups and subsequent rounds of plenary discussions under the chair of independent media experts. It serves as a contribution to the ongoing opinion forming and decision making process.

The participants discussed the challenges and chances that the audiovisual and music sectors are facing within a European market, and to consider the competitive situation as well as the demand for maintaining the European cultural heritage and diversity. The participants acknowledge the different but parallel concerns between the audiovisual and the music sector.

Despite differing languages and production capacities, the dominance of major films from the US in the European market and the developing online market, the participating stakeholders of all the European audiovisual sectors are united in seeking increased circulation, accessibility and visibility of European audiovisual works, reflecting the manifold European cultural landscape – promoted through a consistent and coherent European legal framework for media services.

An essential and highly important element of this framework is the UNESCO Convention on the “Protection and Promotion of the Diversity of Cultural Expressions”. This instrument must be fully taken into account by all the European Union’s institutions, since it is a legal act having a binding character not only for the external action, but also in regard to initiatives within the European Union, when formulating internal EU policies, such as authors’ rights and telecommunications.

Specific attention was paid to the following:

- EC Communication on Creative Content Online
- Music Rights and Collective Rights Management Online
- Revision of the electronic Communications Regulatory Framework

1. EC Communication on Creative Content Online

EU XXL Forum welcomes the European Commission's interest in promoting creative content online in a rapidly changing market place.

Commission policy needs to address the decline and fall of existing business models for the creative and content industries. Cultural diversity and creativity should not be undermined and indeed should be promoted in the transition to new business models. In particular, Commission policy needs to address the issue of the contribution by online service providers to the financing of audiovisual creation.

Content online is a new market with great potential for creators and cultural industries. It provides the tools to disseminate works on an international basis, and potentially can remedy the lack of international circulation of European films. However, in order to make the "long tail" a real opportunity for European film makers it is necessary to adopt a new mindset, adapt to new contingencies and be innovative.

1.1. An innovative policy to support rights management processes:

This requires:

- the standardisation of identification systems – such as ISAN – and digital rights management processes that enable the tracking and monitoring of usage in communications networks. Without identification and tracking technology it is impossible to conceive a system for the collection and distribution of royalties. As a result of monitoring technologies the market will become more transparent to right holders (who will know where, when and in what quantity their works have been seen or listened to). Rights Management Information (RMI) systems are one of the key tools to monetise online exploitation for the benefit of authors.

The working group felt that the deployment of identification and monitoring systems should be encouraged by sensitising right holders to use tagging techniques and by requesting legitimate users of authors' rights¹ protected work, to use them to facilitate rights management. Such a development would also benefit consumers.

1.2. The adoption of measures to facilitate the availability of content online:

This requires:

- facilitating the acquisition and delivery of licence to users. Licensing solutions will differ according to the industry sectors. The priority for cinema is to overcome the rights fragmentation which makes the international licensing a costly proposition. The cinema industry in Europe risks further marginalisation if it is not able to respond on a collective basis to the licensing challenge by pooling catalogues with a view to represent a sizeable repertoire of interest to potential licensees at national and international level. The pooling of catalogues will also reinforce the bargaining position with powerful users. Initiatives like Universciné in France, EGEDA in Spain and the VOD company in Denmark should be encouraged with a view to developing a European answer to this international challenge.

- EU XXL forum shares the view expressed by the Commission that the fight against piracy is a major issue. It requires the active cooperation of ISPs and the telecom industries with creators and the cultural industries, for their mutual benefit.

¹ We want to draw the attention of legislators and politicians on the foundations of authors' rights as they have been laid down in the Berne Convention and adopted in the respective laws of all European countries.

1.3. Multi territory licensing

EU XXL Forum notes that multi-territory licensing is crucial in so far as the fragmentation of rights represents an obstacle for the availability of European films on international platforms. The “long tail” will work if European right holders are in a position to work together to make the licensing of European films an easy proposition for service providers. European cinema collectively represents 20 to 25% of the market and is therefore in a position to influence market development to its advantage. EU XXL Forum is satisfied with the Commission’s initiative to launch a consultation with a view to finding ways to make the licensing process easier. The original idea of creating a primary and a secondary territory licensing should be further explored. Fragmentation of rights at European level is a major impediment. Another major bottleneck is the difficulty in identifying the rightholders in films considering the size and resources of film companies, which are essentially SMEs. Those companies lack technological knowledge but they have the ability to be more innovative in the market place. They should be encouraged in making the most of new market opportunities.

The EU XXL Forum believes that the European digital film market will not benefit European creators unless the licensing process is made easier in order to reinforce the bargaining position of European right holders. It also believes that licensing is a matter for contractual negotiation and should not be remedied by way of legislation.

2. Music Rights and Collective Rights Management Online

2.1. The Participants are appreciating the willingness by the EP’s Cultural and Legal Committees to take into consideration more complex aspects of the rights questions than presented by the DG Market in the 2005 Recommendation on online distribution of music – eventually resulting in an overwhelming majority for the Lévai report on March 13 2007 in Strasbourg.

2.2. The participants are highly concerned by initiatives taken by most major publishers concerning the separate administration of their respective Anglo-American repertoires, which were promoted by the Recommendation.

It is obvious that these initiatives – by taking advantage of the new soft law framework established by DG Internal Market – unsettle the delicate balance preserved up to now by the traditional framework of collective management in Europe through the system of reciprocal agreements. This seriously jeopardizes the equal treatment of famous and less known creators and artists, safeguarded by the existing collective rights management system. The Recommendation supports the dominant position of the Majors upon the European internal market. Small and medium size publishers, authors and a vast majority of European authors’ rights societies are increasingly disadvantaged by this development imposed on them by a European institution unwilling to listen to their arguments in time.

The developments within the last year have clearly shown that the Recommendation of the European Commission was even more inadequate than predicted. The obligation towards the UNESCO Convention on Cultural Diversity is not covered by the Commissions proposals.

2.3. The working group pointed out two different possibilities for solutions to the online distribution problem which should be looked more deeply into from a legal perspective:

- The application by analogy of the Simulcast Decision – making sure that it does not initiate a “race to the bottom”.
- Build on the positive aspects of the common intentions of the “Santiago” and “Barcelona” agreements towards a solution adapted to the present day situation.

2.4. As a last resort the participants suggested the possibility of shifting their focus towards DG Information Society and Media – which, in spite of the aim for another soft law approach, seem to be much more open to a democratic consultation process with Parliament as well as Council.

But the participants call upon the Commission to take a more holistic approach to these matters by speaking with one voice, especially the three DGs involved.

3. Revision of the Electronic Communications Framework

3.1. The European Commission tabled, in November 2007, proposals to amend the 2002 Regulatory Framework for electronic communication (networks and services). The participants welcomed that within the framework of suggested amendments, specific clauses have been foreseen that pay particular attention to the challenges posed to the rights of the creators. Requiring service providers to inform their costumers on the potential threat to rights protected content that may result from illegal use of content online has been perceived as an important element for consideration. It is linked to the more general issue of raising awareness among users, for the value of creative works. Increased awareness about the concerns of authors and other rights holders should contribute to the overall objective of enhancing the opportunities for creators to secure fair remuneration for their work and to adapt, in a rapidly changing industry and consumer environment, to new solutions for generating the necessary income.

3.2. Implementing the idea of an active cooperation between providers of electronic communications services (telecom operators and ISPs for instance), on the one hand, and authors and other rights holders, on the other, as a general guiding principle for the entire package of Directives (e.g. in Art. 8 Framework Directive) therefore seems appropriate. With regard to such cooperation, legislators should pay specific attention to considering the need for defining the right balance between privacy and intellectual property. The recent judgement, by the European Court of Justice, has underlined that regulatory instruments should consider the potential obstacle that the protection of personal data can form in respect of the protection of authors and other rights holders.

3.3. Network operators and service providers are searching for high quality and diverse content for license. Some of them are establishing systems to engage in the creation and production of such content to be offered to their consumers. At the same time players in the film industry are trying to define the best-suited business models in order to benefit from the opportunities of the online environment. Both aspects should be taken into account when developing further the regulatory framework at EU level. The Audio-visual Media Services Directive has already defined part of the applicable framework for the online and on-demand provision of content services, including broadcasting. Therein, the existing quota provisions for European and independently produced works have been maintained; additionally providers of media services will have to contribute to the promotion of European works when offering on-demand catalogues. In some countries, provisions are in place which in this respect aim at securing that, for the support of content production, a small part of the income generated from the exploitation of audiovisual works in new media is attributed to relevant subsidy schemes.

3.4. Different approaches have been discussed that could help in securing remuneration for the online use of audiovisual works for authors and rights holders. On the one side, there was a recall of the idea that authors should be remunerated for the actual use of a specific work since this approach would relate to the original and governing objective of the protection of intellectual property rights. On the other side, however, where this model is challenged to a significant extent by technological developments. In addition also more general schemes of remuneration could be advisable to foresee. A 'content flat rate' might be applied, probably in combination with a system that allows the identification of which

works actually have been used – by this, the two supplementary approaches could in their entirety secure the necessary funding for creative activity.

3.5. The participants furthermore voiced their concern as regards proposed modifications of the existing framework that could significantly make it more difficult to take content-related aspects into account, in telecommunication law, in order to contribute to pluralism, cultural and linguistic diversity and freedom of expression. In this respect, inter alia the issue of spectrum policy has formed part of the discussion, pointing to the increased pressure that will be put upon Member States when they are implementing measures at national level, in order to support broadcasting, for instance. The more difficult and expensive it would become for broadcasters to ensure access to the (terrestrial) frequencies needed to transmit their content and reach their audiences, the more difficult it will become for the creators of audiovisual works to maintain a high level of co-production and co-financing by broadcasters and to have access to television as a platform for the distribution of works. In view of the objectives to safeguard a diverse production landscape in Europe and to enhance the promotion of European works, so that the future EU regulatory framework for electronic communications is in line with the AVMSD, specific attention must be paid not to weaken the television broadcasters as this would endanger their essential function for a vital production scene throughout Europe. As regards the policy objectives now contained in the Framework Directive, further problematic points were identified, such as the principle of technological and service neutrality, the reduced reliance on the instrument of individual licences, the tightening of ‘must-carry’ legislation and secondary trading in spectrum rights.

3.6. The legal basis for the Commission’s proposals in the field of spectrum policy was debated. At the moment the existing framework for collaboration at European and International level appears to be fully able to address any questions of international coordination. Concern was raised that the Member States might get into conflict, as regards a proposed EU Spectrum Policy, with their obligations undertaken at the relevant Public International law forum, the ITU. The participants also put into question whether the degree of competences that is suggested by the Commission to be transferred to it, when implementing the future rules, actually coincides with the requirements of the electronic communications sector – and beyond.

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