

## EUROPEAN COMMISSION COMMUNICATION ON CREATIVE CONTENT ONLINE IN THE SINGLE MARKET

### FERA CONTRIBUTION TO THE PUBLIC CONSULTATION

February 2008

#### EXECUTIVE SUMMARY

FERA sees the emergence of online distribution as an exciting new opportunity for directors to reach a wider audience.

European Directors see it as a matter of great urgency that the legal and economic issues surrounding creative content online are resolved in order to give consumers a legal mean of accessing their works.

FERA recommends a cross industry agreement which would take into account the needs of the distributors, producers and authors and which, most importantly, would safeguard the investment in film production. The links between the income from the sale of existing works and the financing of future works must be emphasized in this context.

The technologies used to create online markets are a particularly good conduit for the collection of moneys due to authors based on the revenues generated by the online exploitation of their works.

Film directors have fought hard to have their authors' rights established across all European nations and see the digital online exploitation as an opportunity to harmonise the application of this legislation to develop a fairer European wide system.

FERA recognises both the difficulties of applying existing systems for the collection of rights payments to the online environment and the need for some flexibility while the emerging market finds its feet. However, particularly in light of the imbalance in the economic and lobbying power of the service providers (Information and Communication Technology/Content Distributors) versus the content creators (authors and producers) we believe in the need for a stable and harmonised legal environment which recognises the existing legal rights of European film directors to equitable remuneration.

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## INTRODUCTION

FERA (Federation of European Film Directors) represents the interests of film and television directors in the European motion picture industry. FERA is the European Federation for national associations of television and cinema directors. It now represents 32 associations as full members (and associated members) in 28 European countries.

FERA is dealing with issues of major importance in the creation and promotion of audiovisual works. FERA's mission is to enhance the recognition of the cultural significance of audiovisual works and to defend their integrity in 21st century Europe. FERA represents directors as the primary creators of audiovisual works. The director, as the creative decision maker in a collaborative artistic process, has the final responsibility for the aesthetic cohesion and artistic integrity of the work. FERA regards safeguarding the craft, artistry and the creative and economic rights of the director as essential components to the diversity of the European audiovisual culture.

FERA welcomes the Communication on Creative Content Online in the Single Market adopted by the European Commission on January 3, 2008 and the opportunity to contribute once again to a public consultation on this important topic. FERA particularly appreciated that Commissioner Reding presented the communication to the press with the following words: *"We have to make a choice in Europe: do we want to have a strong music, film and games industry? Then we should give industry legal certainty, content creators a fair remuneration and consumers broad access to a rich diversity of content online."*

In deed, as it will be outlined in this FERA contribution, the lack of fair remuneration of creators for the online distribution of their works is a major problem that needs to be addressed at the European level. As already stated in its 2006 contribution, FERA is convinced that the online delivery of films is a fresh chance for the European audiovisual industry, provided that the opportunities are seized by European operators and that innovation is supported by public authorities.

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

Given the inextricable link between cultural diversity and creative content, FERA was disappointed to see that there were no express reference to culture and cultural diversity in the communication, questionnaire or staff document. Film directors believe that the issue of cultural diversity should not only be included in forthcoming discussions on creative content online – it should also be at the centre of those discussions. These discussions need to recognise that, in an ever changing media landscape where forms of exploitation are becoming increasingly multi-territorial, the issue of cultural diversity is all the more critical.

In response to the Commission's enquiries, FERA has chosen to adopt a thematic-based rather than a question-based approach.

**FERA would be pleased to elaborate on specific areas of detail in subsequent rounds of the consultation process, especially in the experts groups which are going to be designated by the Commission.**

## DIGITAL RIGHTS MANAGEMENT SYSTEMS

According to FERA, DRM systems are a key enabling technology for the distribution of high value digital content, the implementation of business models and the management of rights and payments of rights holders. In the audiovisual sector, producers and distributors feel DRMs necessary to secure the online distribution and to enable the market to develop, while maintaining the value of works. DRMs are value added services which will essentially allow rights information management systems to operate in order to identify works and rights holders and collect and distribute payments.

When a film has been bought legally, it should be allowed and technically possible to view it on different devices, whether a TV screen, a computer screen, or any other screens incorporated in electronic communication mobile devices (play stations, phones, etc.). Any film legally bought online should be easy to handle for the end user. In this context, interoperability of the different DRM systems is a key element for the development of film online services and accessibility to online content would certainly be improved if DRMs interoperability were achieved.

As a matter of fact, the development of new technologies is leading to an increase of the private copying usages and the interoperability of the different electronic systems and devices will induce more private copying, which can not be controlled by DRM systems. Therefore, it is essential that audiovisual authors benefit from a strong legal system that guarantees a secured remuneration for the private copy of their works. In this context, FERA is deeply concerned about the new questionnaire on private copying levies prepared by DG Internal Market and about the influence of the international electronic manufacturers on the European political sphere. The legitimacy of private copying levies and its benefits for the creators and the cultural activity as a whole have been demonstrated. This questionnaire is nothing less than a new direct attack on the creative community, at a time it would need renewed support to face the online developments and its challenges.

Consumer information with regard to interoperability and personal data protection features of DRMs could be improved, in particular in the end-user licence agreements, as soon as the online delivery market develops and identifies common features and models.

On the other hand, we do not see a particular interest of alternative dispute resolution mechanisms in relation to the application and administration of DRMs as we are not aware of the inadequacy of the existing mechanisms.

In conclusion, FERA believes in the future development of DRM technology, provided that it helps to monitor various exploitations of the works and to ensure a fair remuneration for audiovisual authors.

## MULTI-TERRITORY RIGHTS LICENSING

FERA welcomes the European Commission's initiative to enhance the deployment of cross border delivery of films. It is in creators' interests that their works are made easily accessible to consumers, regardless of their country of residence. Works that would not be bought for release in markets other than the original one may find new audience thanks to Video On Demand (VOD) services. Allowing consumers to have better and easier access to cultural goods should broaden creators' opportunities.

As very well understood by the European Commission in the "availability of creative content" chapter of the communication, there may be a lack of active licensing of rights on new platforms for several reasons:

- the value of these new forms of distribution is still unknown, which results in difficulties in setting terms of trade for online exploitation;
- Rights holders fear losing control as illegal copying has proven to be highly damaging;
- There are potential conflicts with rights already granted for main forms of exploitation.

In addition, the European audiovisual market is highly competitive with lots of new films available each week in cinema theatres in the different Member States, which require big investments in marketing and promotion to emerge from the mass. These investments in the communication on the film on the occasion of the first release in theatres benefit the all subsequent modes of exploitations in the territory. That is one of the reasons why the rights are usually sold territory by territory, for all modes of exploitation. It is an incentive for the distributor to exploit the film on all modes of exploitation, according to the media chronology in place in the country or the commercial agreement with the producer.

Film directors usually do not question that the producer is in charge of optimizing the exploitation of the works so that it generates as much revenues as possible, even after recoupment of production costs, and also exposes the works to the audience. Nevertheless, FERA thinks that some incentives, legal and financial, might help small size businesses to reach the digital distribution market in their country of origin and above all abroad.

Those categories of production companies do not have the resources to promote their works towards distributors as they concentrate their efforts on their new productions. European initiatives should promote the development of European content aggregators specialized in reaching out to these small producers (which represent the majority of production companies of features in Europe), and sell their works to VOD platforms. In this context, a voluntary model of a multi-territory online licence for territories where the film has not been distributed after a certain period of time could be interesting to discuss with the professionals concerned.

FERA believes that the European digital market will not benefit European creators and producers unless the licensing process is made easier through collective licensing mechanisms for example, to reinforce the bargaining position of European rights holders. It also believes that licensing is a matter for contractual negotiation and should not be remedied by way of legislation.

Incentives need also to be taken in order to digitize audiovisual works to that purpose. The cost of digitization is very often considered by companies as too expensive in comparison to the revenues a digital exploitation may generate. Incentives should also focus on the availability of multilingual versions of European films in order to help online platforms to target a more European and international audience.

## **REMUNERATION OF THE CREATORS FOR THE ONLINE EXPLOITATION OF THEIR WORKS**

The issue of multi territory licensing in the area of audiovisual works must first and foremost address the fact that film directors hardly receive any remuneration when their works is exploited outside their territory and in particular with video on demand. This is a particularly unfair situation which has to be dealt with at Community level when addressing new business models of online exploitation of audiovisual works.

### **The lack of a harmonised remuneration of the audiovisual authors**

From one member state to another, the discrepancies are such in terms of the basis of remuneration paid to the audiovisual authors, that the situation can hardly be summarized for the purpose of the Commission's questionnaire.

In lots of countries, directors will get a lump sum payment from the producer for the shooting of the film but will never receive any additional remuneration whatever the success of the work turns out to be, except for cable retransmission which has been harmonised by a European directive and private copying in the countries where levies are in place.

A French director of a TV film produced by a French company will be remunerated through the French authors' society SACD for every single broadcast of his film in France. However, if his film is broadcasted in Germany, he will not get remunerated. He may in fact never even be aware that his film was effectively broadcasted in Germany, for there are no authors' societies collecting from broadcasters in Germany. SACD will not remunerate any German or UK director for the broadcast of their works in France, as SACD is enabled to collect the remuneration of its members on a contractual basis, i.e. provided that authors have reserved their rights in their production agreement, which is not the case for UK or German authors.

It has to be stressed that being the weaker economic party, authors can be at a disadvantage when negotiating contracts with producers. This is true not only in Europe but all over the world, including in America. Thanks to their history and structure, the size of their single market and the worldwide market for their works, American writers and directors guilds enjoy a much greater bargaining power than most of audiovisual authors' organisations in Europe. Nevertheless, the struggle of the Directors Guild of America (DGA) and the Writers Guild of America (WGA) to increase their members' remuneration over online exploitation of works has shown how difficult negotiations are with the studios.

Remunerations of authors should not be based on the rule of survival of the fittest. The Commission should ensure that authors can rely on a legal framework which will balance an otherwise unbalanced power of negotiations, between individual authors on one side and companies on the other side.

Commissioner Viviane Reding has declared that she believed audiovisual creators have to receive fair remuneration for the exploitation of their works. FERA greatly appreciates this position and would like to inform the Commission on the existing system of remuneration of audiovisual authors in Europe and suggest how to improve it:

### **The discrepancies in payment systems**

The remuneration of audiovisual authors is subject to a different system to that which applies to music authors. Audiovisual authors' remuneration regimes vary from one country to another and in

some Member States, the author's only remuneration is derived from the initial contractual arrangement with the producer.

In countries such as France, Belgium and Bulgaria, remuneration terms are set on the basis of contract, but collecting societies representing audiovisual authors are contractually entitled to collect on behalf of their members for certain exploitations of the works.

In other countries such as Spain, Italy and Poland, the final distributor, usually the broadcaster is considered by law to be responsible to the author whom he pays through a collecting society. The latter system is more favourable to authors who, in principle, benefit from a stronger payment guarantee. In these countries, the law provides that, notwithstanding the terms of the contract between the director and the producer, it is the final user who is obliged to pay the director for each use of their works through a collective management organisation. These legal regimes have progressively appeared over the last twenty years and, as a result, Spanish, Italian and Polish authors are being rewarded proportionately for the exploitation of their works.

As far as cinema exploitation is concerned, in most countries authors have to rely on the producer to be paid. However, in Spain collecting societies collect directly from cinemas on behalf of their members.

For other types of exploitation of the works, so called secondary exploitations, such as cable retransmission, European law provides that the rights of authors have to be managed collectively.

These disparities are exacerbated in the digital era.

For online rights, the consequences on authors' compensation could worsen with the suppression of territorial restriction in accessing works offered on VOD. In some countries, for example France and Germany, some solutions were found which guarantee authors to be paid for the exploitation of their works. As a result, the exploitation of works online has been facilitated<sup>1</sup>.

In France, SACD, to which members assign their rights, has made a deal with associations of production companies. This agreement provides that, when an individual price is paid by consumer for each film, online operators and production companies may license the film for electronic sell through and streaming, provided that they pay to SACD the authors' remuneration, which is based on a percentage of the price paid by the public to access the content. This specific economic model of pay per view and VOD started nearly 10 years ago in France and was well accepted by all parties. The French government has just passed a law extending this agreement and compensation system to all producers companies. The law will thus apply to any producer company based in France even if it is not affiliated to the producers' associations signatories of the agreement with SACD.

In Germany, the Federal government has passed a new law<sup>2</sup> which makes it possible for authors to transfer their rights for unknown means of exploitation. The authors are then entitled to a reasonable separate remuneration. However, there are some difficulties in the application of this law because the compensation conditions have not been addressed and so far, producers, broadcasters and distributors have been reluctant to address the issue of the remuneration.

So, in most part of Europe, audiovisual authors do not get paid for the online exploitation of their works so far.

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<sup>1</sup> France with 32 services remains the country with the highest level of VOD services. It is followed by the Netherlands (30 services) and Germany (26 services). Together, these three countries account for almost a third of Europe's VOD services (258 at the end of 2007) according to the new survey of VOD services in Europe published by the European Audiovisual Observatory and carried out by NAP Conseil.

<sup>2</sup> Second Statute on the regulation of Copyright Law in the Information Society dated 26 October 2007.

## **How could the payment system be improved?**

Universal application of means to protect audiovisual authors' remuneration is a prerequisite to the introduction of any multi territory licensing contracts. This is not an issue that can be left to Member States and individual contracts to deal with.

Experience shows that when authors' rights have been recognised at EU level as a result of a harmonisation directive, authors have benefited from legal security and better transparency of their rights.

As an example, in Germany, writers and directors did not receive compensation for the cable exploitation of their works unlike other European authors. It was only thanks to the adoption of the copyright law of May 8, 1998 to that effect, implementing the 93/83/EEC Directive on cable retransmission, that they started receiving payment.

Another example is the 1992 Lending and Rental Rights Directive which recognised that film directors are audiovisual authors. As a result, directors based in the UK are now considered as authors and have a right of authorship over their works.

**The payment system could be improved by providing in the Recommendation of the European Parliament and the Council to be proposed an unwaivable right to remuneration for audiovisual authors for their online rights, based on the revenues generated by the online exploitation and paid by the final distributor (the online platform).**

The payment system could also be improved by developing the role of authors' societies for the collection and distribution of this remuneration for the online exploitation of the audiovisual works.

This would indeed be cost effective for the producers who do not always have sufficient means and infrastructure to monitor the works on behalf of the audiovisual authors and to ensure that the latter receive remuneration proportionate to each use of the works.

The management of online rights could be subject to the same rules as those applying to secondary rights. As an example, article 90.4 of the Spanish intellectual property law which provides that the final user is required to pay the authors for each use of their works through an appointed management entity was recently<sup>3</sup> extended to online delivery of content. Such a system has never slowed down the production of feature films and audiovisual works in comparison with countries which do not apply this system. This is a well considered and effective solution which sets a concrete benchmark to follow.

Accordingly, European law could provide that, for the online exploitation of his/her works, payment is made through an appointed collective management society of the author's choice.

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<sup>3</sup> Law 23 /2006 of 7 July 2006.

## LEGAL OFFERS AND PIRACY

FERA has strongly supported the introduction in the Audiovisual Media Services Directive adopted on December 11, 2007 of provisions requesting on-demand audiovisual media services to promote production of and access to European works. Article 3i clarifies that “Such promotion could relate, inter alia, to the financial contribution made by such services to the production and rights acquisition of European works or to the share and/or prominence of European works in the catalogue of programmes offered by the on-demand audiovisual media service.”

As VOD services are now rapidly developing in Europe, there is a need to start to monitor the contribution of these services to the financing and visibility of European production. Not only direct remuneration of audiovisual works for their online exploitation but also investment of online distributors in future production are key elements for the transition of the European audiovisual production to digital platforms. In coordination with Member States, the European Commission should put in place the monitoring tools for such a monitoring.

FERA also shares the Commission’s view that piracy and other unauthorised exploitation of creative content remains a central issue to be addressed within the context of the development of online services.

To be fully effective, any measure improving the legal creative content online services and the fight against online piracy will need the full technological and political support of networks and service providers as well as their cooperation.

In addition, respect for copyright in the online environment would benefit from the cooperation of telecom operators in prevention campaigns and in actions against infringers.

Copyright infringements occur every day on the Web, preventing the development of legal offers and seriously damaging the European creation. While distribution of copyright protected contents widely supports the development of communications and electronic services, telecommunication operators and Internet services providers, when confronted with violations and in order to avoid any action against piracy, still hide behind broad liability exemptions of the electronic commerce directive and the strong personal data protection guaranteed by privacy directives.

The third revision of the “Telecommunications Package” gives an opportunity to correct this flaw within the European framework and to clearly indicate the European political will to fight against piracy of works on the Web. In this fight, everybody’s cooperation is needed and in particular the one of telecommunications operators and Internet services providers, behind which pirates are hiding.

The Memorandum of understanding recently adopted in France is an example to follow both on the method (discussion between all stakeholders, including creators, producers, Internet service providers and telecommunication operators) and on the solutions found. There must be retaliation measures against illegal uploading and downloading, proportionate to the seriousness of the offence and taking into account the extent of the prejudice to intellectual property rights.

United Kingdom is also looking for the best measures to put in place to fight against the online piracy and then help legal offers to develop. If the national level may be the appropriate level for the definition and implementation of concrete measures which require all stakeholders’ cooperation, a strong political signal is needed at European level to encourage this cooperation which will lead to the best remedies.

The European Commission has started the process by including in the legislative proposals to reform the regulatory framework of the electronic communications two provisions requesting

telecommunication operators to comply with the national measures implementing Intellectual property directives and to include in their contracts with subscribers provisions informing them of their obligations to respect copyright. This is a good start but it is not enough to ensure a real European wide respect for copyright online. FERA is currently discussing with the members of the European Parliament the best way to further amend the “Telecommunications Package” and to provide for a general obligation of cooperation which could be monitored by national regulatory authorities.