



Contribution to the Reflection Document

Creative Content in a European Digital Single Market:
Challenges for the Future

FILM DIRECTORS IN THE DIGITAL AGE

“Without tradition, art is a flock of sheep without a shepherd. Without innovation, it is a corpse.”
Winston Churchill

EXECUTIVE SUMMARY

FERA is an international, non-profit federation of national associations of film and television directors. Established in Venice in 1980 by a small group of far-sighted directors, it has grown to include 37 member associations from 29 European countries.

1. Legislation

- FERA is very pleased to see the proposal to create an unwaivable right to remuneration for the online exploitation of audiovisual authors’ works listed among possible EU actions. Directors should have a legal entitlement to receive remuneration for every use of our works.
- There is a strong need to protect audiovisual authors by strengthening our contractual position in order for us to actually receive fair remuneration – for any form of exploitation.
- FERA is positive about a common European copyright Law, *if and only if*, the aim is to harmonise best practices, and not seek the lowest common denominator. If the European Union is serious about putting creativity and innovation at the centre of the agenda for the coming decade, there must be political courage to take targeted legislative action that actually fosters and promotes creation – in the long term.
- There is no need to radically change the legal framework to develop pan-European online services, nor to create or harmonise any more exceptions and limitations. The current legal framework is not an obstacle to the development of these services.
- Directors naturally want best governance and transparency from collective rights’ management organisations, and hold them fully accountable to us, their members, on all matters. FERA endorses any initiative to achieve this.

2. Investment in production

- FERA believes in the well-established principle that all media or platforms, offline and online, that benefit from audiovisual works should contribute to funding new production.
- It is crucial that the Audiovisual Media Services Directive¹, in particular Article 3i regarding the production of and access to European works, is strictly and carefully implemented by all Member States.
- The link between distribution and financing production must be maintained in the digital single market. It would be absurd to allow the new audiovisual media services to profit from European audiovisual works without investing a fair share of their turnover in the production of new works.

3. Licensing

- It is important to distinguish between the commercial life cycle of new films and catalogue films (older than 5 - 10 years) when reflecting on commercial users' access to European audiovisual works online.
- Any online Europe-wide or multi-territory license should not destabilise the current system of financing films, and disrupt related release windows, without providing alternative production funding sources.
- FERA is sceptical about introducing alternative forms of remuneration to replace or to exist alongside traditional copyright. Such compensation would most likely not be proportionate to the true value of the works being used. We find these alternative proposals for remuneration to be confusing and prefer consumer friendly licenses that offer tailor made services linked to specific uses and which fairly remunerate authors.
- Directors naturally want best governance and transparency from collective rights' management organisations, and hold them fully accountable to us, their members, on all matters. FERA endorses any initiative to achieve this.
- Orphan works should be included in a licensing scheme handled by collective management organisations, after a diligent search has confirmed their orphan status.

4. Promotion of European Works

- The presence and visibility of European works on all online platforms is essential to build a culturally diverse European digital market. As provided for in article 3i of the AVMS directive, online catalogues and services should be required to include a significant proportion of European works, and present them prominently.

¹ Directive 2007/65/EC of the European parliament and of the council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member states concerning the pursuit of television broadcasting activities, published in the Official journal of the European Union L 332/27 of 18 December 2007.

INTRODUCTION

FERA would like to thank the European Commission for the opportunity to comment on the Reflection Document, which raises key questions regarding Creative Content Online from two Directorates General, DG Information Society and Media and DG Internal Market and Services.

There have been format and distribution changes in the past that European directors have adapted well to, and we embrace the development of rich and diverse online video on demand (VOD) services that reflect the current creativity, quality and diversity in European audiovisual works. These services must, however, respect the fundamental rights of the creators of those works if European film is to survive and develop.

What is FERA?

FERA is an international, non-profit federation of national associations of film and television directors. Established in Venice in 1980 by a small group of far-sighted directors, it has grown to include 37 member associations from 29 European countries. The current President of FERA is István Szabó (elected in 2008).

The history of film shows that the best films are made when directors are afforded conditions that enable them to pursue their vision to the full. The simple yet ambitious aim of FERA is to take concrete, coordinated and comprehensive action in all areas that are crucial to the success of European film and their creators.

The Directors and our Audience: United We Stand

FERA is troubled by the current rhetoric, which seems to suggest that the interests of creators and consumers are opposed.

Europe's creators bear witness to our time. The works we create hold up a mirror to modern society and are the cultural heritage of tomorrow, conveying meaning and identity locally and globally.

Audiovisual directors are storytellers in the most cost intensive form of art: the moving image. Our chosen form of expression also makes it possible to communicate and share our stories with millions of people. The universal human experience projected on the silver screen, and best shared by an audience in a cinema, transforms the "them and us" into "you and me" and strengthens the European "we".

Freedom of expression is at the core of European values and a fundamental right. But freedom to express must be possible both at the amateur level and at the professional level, and this does not diminish the equal human right to the protection of the moral and material interests resulting from any artistic production of which he or she is the author².

In FERA's view, the respect for the integrity of the work and the authorship (moral rights) are fully in line with public interests, and is not to be trifled with.

Amateur creative content should follow the same rules as professional creative content with respect to copyright: using existing protected works needs the authorisation of the authors, except quotations for criticism or review, incidental use and caricature, parody or pastiche.

² The Universal Declaration of Human Rights

The Communication from the Commission on Copyright in the Knowledge Economy of 19 October 2009 recognizes that, after having consulted the interested parties in 2008, there is no apparent need to regulate user-generated-content for the time being.

FERA believes that the main concern of the Commission should be the major challenges facing the professional creators of Europe. And it is imperative that the Commission address pertinent sector specific challenges. FERA is therefore glad to see that the Reflection Document acknowledges that *the situation in relation to the audiovisual sector is significantly different*³ from other cultural sectors.

1. LEGISLATION

Directors today have huge difficulties in securing fair and equitable revenue streams from all modes of exploitation of our works. These difficulties are exacerbated from online exploitations on one hand and foreign exploitations on the other hand.

The Commission should take bold steps to strengthen the position of creators in order to ensure us the means to live from the product of our labour as a basis for further creative production - a goal surely in the interests of audiences and society as a whole.

1.1 Remuneration

FERA particularly welcomes the Commission objective of *creating a favourable environment in the digital world for creators and rights holders, by ensuring appropriate remuneration for their creative works, as well as for a culturally diverse European market.*⁴

FERA believes that audiovisual authors must have a *legal* entitlement to receive fair ongoing remuneration for every use of their works, and such legal provisions should be enforced in contract practices.

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

The creation at the European level of an unwaivable right to remuneration for the online exploitation of audiovisual authors' works - listed among possible EU actions foreseen by the Reflection Document – is vital to the sustainability and growth of Europe's creative industries, and FERA is pleased to see that the Commission clearly recognises this.

This unwaivable right to remuneration for audiovisual authors for their online rights should be based on the revenues generated by online exploitation and paid by the final commercial user (the online platforms). The remuneration should be administered by collective management societies with best governance and transparency.

1.2 Protection of audiovisual authors

There are in Europe insufficient protective rules for audiovisual authors who, in a hugely unfair economic arrangement, usually assign our rights for a flat fee and are then deprived of

³ Page 7 of the Document.

⁴ Page 3 of the Reflection Document.

any revenue generated by the commercial exploitation and the success of our works. There is a strong need to strengthen the contractual position of directors in order for us to actually receive fair remuneration – for any form of exploitation.

Today the problem is not only that the *scope of rights granted to the producer under the transfer varies from one Member State to the other*⁵, but also that the directors' remuneration regime varies from one country to another. In lots of European countries the director's only remuneration derives from the initial contract with the producer.

The transfer of rights should be reasonably limited in time and each mode of exploitation should be specified in the contract, with a right to an equitable remuneration attached. Nevertheless, because directors are the weaker economic party, European law should provide that, notwithstanding the provisions of the contract with the producer, we as authors are entitled to fair ongoing remuneration from the exploitation of our works.

1.3 A European Copyright Law

FERA is positive about a common European copyright law, *if and only if*, the aim is to harmonise best practices, and not seek a lowest common denominator. If the European Union is serious about putting creativity and innovation at the centre of the agenda for the coming decade, there must be political courage to take targeted legislative action that actually fosters and promotes creation – in the long term.

1.4 Exceptions and limitations

FERA is generally not in favour of the introduction of any additional exception to the long list of exceptions in the 2001 Directive on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, nor is it in favour of further harmonisation of the optional exceptions by making some of them mandatory. The 2001 Directive was discussed at length (1997-2001) to achieve the harmonisation it currently provides and FERA does not think that a better result could be achieved today.

2. INVESTMENT IN PRODUCTION

European directors strongly believe that new forms of distribution will not only give European audiences access to a broader range of audiovisual works, they also represent a unique opportunity to further strengthen the production base and promote the diversity of audiovisual works created in Europe. The online environment is a new form of distribution that needs to be regulated, just as other forms of distribution have in the past.

2.1 The traditional financing system

FERA believes in the well-established principle that all media or platforms, offline and online, that benefit from audiovisual works should contribute to funding the production of new works.

The Reflection Document insists on the fact that the traditional ways of financing film production through box office, television rights and package media (without mentioning the

⁵ Page 12 and 13 in the Document

role of the Member States' public support) *have led rights holders to partition the market for audiovisual content in the EU.*⁶ And the Document merely mentions in passing that *Online platforms do not generally contribute to financing the production of films and other audiovisual works in the same way as "traditional" distributors, in particular upstream investment, e.g. pre-purchase of rights; online platforms do not yet play the important role that cinema exhibitors do in the promotion of films.*⁷

This is still the main way to finance films today, as very few players, especially in the Internet sphere, invest in film production in Europe⁸.

2.2 New financing partners

The link between distribution and financing production must be maintained in the digital single market. It would be absurd to allow the new audiovisual media services to profit from European audiovisual works without investing a fair share of their turnover in the production of new works. We must ask the question: If they don't pay, who will? And what will be the impact on the level and quality of production?

FERA strongly believes, as provided for in article 3i of the AVMS directive, that financial contributions from online services should consist in the obligation to invest a share of the turnover of the service concerned in the production and rights acquisition of European works (the investment rate could increase according to the turnover) and/or by contributing to national film and audiovisual production funds.

3. LICENSING

For European directors, all online distribution opportunities for our works which respect the artistic integrity of the work and our rights as creators (both moral and economic) are valuable to help us reach new audiences.

FERA therefore supports the Commission's objective *of creating in Europe a modern, pro-competitive, and consumer-friendly legal framework for a genuine Single Market for Creative Content Online.*⁹

FERA would nevertheless like to stress the importance of creating a framework that sustains creators in the long term. However tempting, there is no viable quick fix solution. All relevant experience suggests that the ambitious "one-stop-shop" would not remunerate creators fairly.

3.1 Commercial users' access

Release windows are part of the business model of the audiovisual sector and like most decisions related to the exploitation of a film (or any audiovisual work), the periods are decided at national level. In most European countries, there are professional agreements with rights holders or commercial agreements tailored to each particular film to maximise its exploitation, its visibility for the audience and the revenues generated by each form of exploitation. The release windows are also closely related to obligations towards financing

⁶ Page 13 of the Document

⁷ Page 8 of the Document

⁸ With rare exceptions like Orange in France.

⁹ Page 4 of the Document

partners of the film.

Another reason for the release window system is to protect the theatrical release of a film. The big screen offers a unique viewing experience, and a high profile red carpet premiere, which enjoys extensive press coverage, is the starting point of the film's marketing campaign.

Nevertheless, for small films with a limited access to theatres and/or limited means of promotion, waiting to make the film available on video/DVD or online does not make sense when the film is no longer available in the cinema. That is why directors support flexibility and windows release schemes that allow films that are no longer available in the cinema to benefit by release on other modes of exploitation, after a shorter period.

Online platforms will be the first to maximise profits by releasing a film in the best way possible in an ever-changing market.

It is important to distinguish between the commercial life cycle of new films and catalogue films (older than 5 - 10 years) when reflecting on commercial users' access to European audiovisual works online.

3.2 Multi-territory licensing

FERA awaits with interest the publication of the study on multi-territory licensing for the online distribution of audiovisual works in the European Union undertaken by KEA European Affairs and CERNA and commissioned by the European Commission.

For films, licensing and rights clearances are usually in the hands of producers. Nevertheless, for some older films, directors may have recovered their rights on the expiry of the initial contracts if they have not been renewed. In all cases, licensing is generally a negotiation in which the decisive criteria are the scope of the proposed exploitation and the price paid to the rights holders for this exploitation.

To our knowledge, there is no particular problem concerning licensing and rights clearance from the authors' side, as we are keen on larger distribution of our works.

From the director's perspective, the creative industries would benefit from Europe-wide or multi-territory licensing if the services offered at this scale are actively promoted at the equal scale (works available in all languages covered, marketing, advertising). It would not be acceptable to impose on rights holders online Europe-wide or multi-territory licensing if there is no real commercial activity behind it.

Any online Europe-wide or multi-territory license should not destabilise the current system of financing films, and disrupt related release windows, without providing alternative production funding sources.

FERA supports financial incentives for online multi-territory platforms of audiovisual works. The support of the MEDIA Programme to VOD platforms offering multi-territory services is important to develop fair industry practices.

3.3 Alternative forms of remuneration

The Reflection Document asserts that *more collaboration with ISPs and other companies providing access technologies would provide more options for rights holders. New business*

models based on access subscription rather than payment for every single work, together with advertising-supported or feels-like-free services, could become more beneficial for rights holders and ISPs.¹⁰

The only proposal set forth by the Reflection Document is so-called alternative forms of remuneration, and specifically a compensation for unauthorised file sharing and reproductions on the Internet, paid by the ISPs to rights holders alongside the copyright licenses given to operators of legal services.

Such compensation would most likely not be proportionate to the true value of the works being used.

The Reflection Document also mixes this compensation proposal with new business models based on access subscription and “all you can eat” flat fee models, which are of a very different nature.

We find these alternative proposals for remuneration to be confused and duplicitous. We prefer consumer friendly licenses that offer tailor made services linked to specific uses and which fairly remunerate authors.

FERA believes that further reflection and investigation is needed.

3.4 Collective rights management

European film and TV producers usually do not have sufficient means, nor the infrastructure, to monitor the use of an audiovisual work on behalf of the director, in order to ensure that the latter receives remuneration that is proportionate to each use of the work.

New technologies allow more transparency and efficiency in the monitoring of online services and in the collection and distribution of authors’ rights. These opportunities have to be combined in the best interests of the creators.

Collective agreements between authors’ collective management organisations and online operators can also help ensuring the fluidity of rights and securing remuneration for authors as an alternative to a case by case approach based on the initial contracts.

The Reflection Document suggest that EU measures focusing on the governance and transparency of collective rights management organisations would ensure that the interests of creators are administered in the most efficient manner.

Directors naturally want best governance and transparency from collective rights management organisations, and hold them fully accountable to us, their members, on all matters. FERA endorses any initiative to achieve this.

3.5 Orphan works

FERA is pleased to see that the Reflection Document proposes that orphan works should be included in a licensing scheme such as extended collective licensing, after a diligent search has confirmed their orphan status.

¹⁰ Page 20 of the Document

FERA believes that there are very few audiovisual works that are truly orphaned, and underlines the importance of enforcing our moral right to be credited (often disrespected by broadcasters and other distributors) as a preventive measure.

FERA welcomes the impact assessment on orphan works that the Commission announced in its Communication on Copyright in the Knowledge Economy in October 2009. In this communication, the Commission explained that the impact assessment would explore a variety of approaches to facilitate the digitisation and dissemination of orphan works.

FERA considers the handling of orphan works through collective rights management organisations to be the best practical solution, and insists that all models considered must provide for remuneration for all works.

4. PROMOTION OF EUROPEAN WORKS

The interface between the director and his/her audience, online or offline, are of fundamental importance to the director. We are concerned about protecting the artistic integrity of our films and need assurance that films, whatever the format, will be delivered to the audience in their original state, with proper creditation of authors, performers and collaborators.

The audiovisual market like any other cultural sectors is driven by the visibility that is given to the works. Whether online or offline, the audience can hardly even consider wanting to see a film if it has no idea that this film exists.

Access doesn't mean that consumers will find it – the necessity for marketing online must not be underestimated.

As provided for in article 3i of the AVMS directive, visibility and accessibility to European works online must be guaranteed through attractive exposure on the home page and the menus of VOD services and in electronic programme guides. Online catalogues should be required to include a significant proportion of European works.

For more information please contact

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