Response of the Motion Picture Association (MPA) to the European Commission's Reflection Document *"Creative Content in a European Digital Single Market: Challenges for the Future"* (5 January 2010)

Introduction

The Motion Picture Association (MPA) is a trade association representing six major international producers and distributors of films, home entertainment and television programmes[1]. Our Member Companies distribute their own productions as well as those of independent film-makers. They invest in European films (production, co-production and rights acquisition) and also devote substantial efforts and resources to the development of a wide range of entertainment content and services in a variety of formats and platforms (including increasingly via new media platforms) for the benefit and choice of European consumers. The MPA welcomes the opportunity to take part in the public consultation over the European Commission's Reflection Document (hereinafter the "RD").

Executive summary

- The MPA agrees with the assertion that copyright is the basis for creativity. However, copyright is not limited to a mere "remuneration right". Copyright is about the "exclusive right" to license creative works, which is what makes it commercially viable for media companies to conduct their businesses.
- The exclusive right to authorise/prohibit the distribution of creative works through licensing is of paramount importance in the audiovisual sector where substantial upstream production costs have to be recouped down the line, often through pre-sales of exploitation rights.
- The "pan-European clearance of rights" (e.g., a "one-stop shop") should not be amalgamated with "pan-European licensing of works". The first notion may benefit from pragmatic facilitation measures, while the latter should be left to the marketplace to work out since nothing in the current regulatory framework precludes it.
- The European Commission should continue distinguishing between the various sectors that make up the media sector because each of them presents its own characteristics and specific business models.
- On the basis of contractual and commercial freedom, underpinned by strong IPRs, the MPA's member companies are already licensing content in an increasing number of formats and on platforms across the 27 Member States, and are fully committed to further develop new and innovative digital initiatives for the benefit of European consumers.
- The MPA strongly believes in practical and market-driven solutions (rather than legislation) for the clearance of rights. Multi-territorial and/or pan-European licensing

[1] The MPA's members comprise: Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corporation, Universal City Studios LLLP, Walt Disney Studios Motion Pictures, and Warner Bros. Entertainment Inc. The MPA's ID number in the EC Registry of interest representatives is 95201401713-39.

already occurs when it makes sense commercially.

- The application of mandatory collective management (aka compulsory licensing) to rights in the AV sector is justified only under very limited circumstances. Any imposition of mandatory collective management of rights on the Internet would negatively affect the fragile eco-system in which the AV and film industries operate and also raise serious compatibility issues with international treaties and the EU copyright *acquis*.
- MPA calls for robust enforcement of IPRs in the online environment, a prerequisite for digital platforms to flourish for the ultimate benefit of consumers. The RD's assertion that the piracy problem will somehow solve itself solely through the further development of legitimate content delivery platforms is misplaced.
- Any effective solution to online piracy must include a strong enforcement component. Moreover, the piracy problem is not limited to "illegal downloads". It is regrettable that the RD totally ignores the hugely damaging role played by commercially-driven piracy-facilitating platforms online.
- The MPA questions the RD's assertion that a legal basis specifically designed for industrial property purposes (Article 118 of the Lisbon Treaty) could be used as future basis for further EU copyright legislation.
- Regarding a possible future review of the EU's "Cable and Satellite" Directive, the submission discusses the contours of the re-transmission regime which clearly excludes initial transmissions. Re-transmissions covered by the regime must be simultaneous, unaltered and unabridged to potentially qualify. New services deployed over the Internet should continue to be subject to direct licensing.
- On the principle of "Community exhaustion", the case-law of the ECJ, including in particular the *Coditel* cases, is as valid today for the licensing of digital on-demand services as it was in the 80's for traditional broadcasting.
- The MPA opposes any form of expropriation of exclusive rights since doing so would wipe out legal services currently engaged in the e-commerce business of delivering audiovisual content online and also amputate a growing financing source from the tool-box available to European film producers.
- On media chronology ("windows"), our submission stresses the importance of the freedom granted to right holders to set the timing for the release of films in various media. The MPA applauds the recently entered into force AVMS Directive for wisely recognising the importance and legitimacy of this flexibility (Article 3d).

The MPA has set out its comments into two main sections:

- General remarks about the options and priorities identified in the RD;
- Specific comments on policy options and regulatory framework for the online market for audiovisual services.

1. General remarks

The RD is meant to launch a debate and identify possible policy options to make the creative content market more vibrant in the future, both culturally and economically. In this context, we believe that the RD highlights an important point when it indicates that its starting point is the objective of creating in Europe "*a modern, pro-competitive, and consumer-friendly legal framework for a genuine Single Market for Creative Content Online".* We understand that the Commission wishes to "*focus the debate on practical solutions to encourage new business models, promote industry initiatives and innovative solutions, as well as on the possible need to harmonise, update or review legislation".*

In this respect, with regard to distribution of audiovisual works online, the MPA strongly believes that practical solutions and market-driven answers should be paramount in this area. MPA members are already making their content available across multiple formats and platforms across the EU and they are committed to continuing to develop new and innovative digital initiatives.

However, there are certain areas where legislation could play an important role in creating the right regulatory framework that incentivises and assists the development of digital initiatives, e.g., reduction of VAT rates for cultural products, certain aspects of enforcement of IPRs in the online environment.

Copyright, the basis for creativity

The RD opens up with the acknowledgment that *"[c]opyright is the basis for creativity"* and that *"it is the cornerstone of Europe's cultural heritage, and of a culturally diverse and economically vibrant creative content sector"*. The MPA fully supports and agrees with this fundamental starting point.

However, we would like to comment on the RD's assessment of copyright as a "tool" for the encouragement of creativity or as a driver for the take-up of ICT technologies as described in a number of recent speeches by the European Commission. Copyright, particularly in the audiovisual sector, must not and cannot be downgraded to a mere remuneration right for copyright holders. It should be understood that copyright plays a strategic role for the production, financing and exploitation of creative works by means of the exclusive rights to authorise/prohibit granted to right holders pursuant to international and European norms.

Hence, the MPA believes that the public debate would benefit enormously from the acknowledgement of the three main following points:

- Under no circumstances should copyright be equated to a mere right to get paid – i.e., a remuneration right. This is of particular relevance in the AV sector where the exploitation of exclusive rights allows right holders to license their works in a manner best suited to recoup initial investment, extend the audience reach of a work and finance future creativity. Right holders should retain their freedom to license the use of their works to commercial users (e.g. theatrical exhibitors, video distributors, broadcasters, ISPs, online digital platforms, etc.). To treat copyright otherwise would be to downgrade it, potentially in a manner inconsistent with international norms, the copyright *acquis* and national law.
- The production of a film typically involves a combination of financing instruments (e.g., subsidies and/or soft money, equity, etc.) that will most of the time include "payment against sale of rights" as a major component of the coverage of the upstream costs of production.
- The concept of "pan-European clearance of rights" (e.g. one-stop shop to access the rights) should not be amalgamated with, or conflated into, "pan-European licensing of works". The first notion may benefit from pragmatic facilitation measures, while the latter should be left to the marketplace to work out since nothing in the current regulatory framework – including the judicially recognised concept of territorial licensing – precludes it.

The weakening of exclusive rights granted by copyright law or the generalisation of mandatory collective management of rights in the EU's Single Market for the online environment would drastically reduce incentives to produce new and high-quality creative works. It would instantly create an additional non-productive layer of administration through collective management of rights and reduce revenues for right holders in the whole of the audiovisual value chain, including for digital platforms. Direct licensing and the freedom of right holders to engage in arms-length contractual negotiation concerning their own creative rights cannot reasonably be seen as an obstacle to the clearance of rights to audiovisual works when it is in fact a core element of the media business (alongside production).

Finally, we would like to make an important point regarding the problem of online piracy. We understand that this topic was not meant to be addressed in detail in the RD. However, it is regrettable that the RD refers to only part of the issue – i.e., "illegal downloads" – and that it seemingly ignores the scores of "commercially-driven" piracy-facilitating platforms online, many of them based in Europe – in some cases despite condemnation by national courts (e.g., the Stockholm District Court found the operators of The PirateBay website and trackers guilty of contributory copyright infringement. The site and related trackers continue to operate and infringe copyright on a massive scale despite this judgment, which imposed a fine of roughly €3m and one year prison sentence, as well as a number of further related civil actions).[2] It is also worth noting that several Member States (e.g. France, UK, Spain…) are currently devising national schemes to remedy this situation[3].

At the European level, it should be borne in mind that the problem of piracy needs to be addressed, and that robust enforcement of IPRs is much needed in the online environment.

2. The regulatory framework for copyright and the online market for audiovisual services

The RD recognises that *"[d]ifferent trends and considerable challenges arise depending on the type of digital content"* considered. The MPA fully subscribes to that statement and would therefore like to offer some comments on aspects specifically associated with the distribution of audiovisual works online.

The EU's legal framework for copyright is arguably the single biggest subject addressed by the RD. However, some of the options considered in the RD suggest (i) that current copyright rules would be too complex, (ii) that copyright territoriality should be done away with to ensure consumer satisfaction, (iii) that business models pursued in the audiovisual sector might not be sustainable, (iv) that more uses of mandatory collective management of rights are warranted (e.g.., alternative means of remuneration), and (v) that media chronology (so-called "release windows") somehow impedes the development of the market for online content.

Some of the proposed options explored in the RD would, if implemented, translate into a substantial weakening of the current legislated and judicially tested copyright framework in the EU and be detrimental to the economics of an evolving audiovisual sector. Certain of them amount to an abrupt break with the *acquis communautaire* and raise serious questions, from a

[2] Case no. 13301-06, Judgment of the Stockholm District Court (Division 5, Unit 52), 28 March 2008. See also the line of Rapidshare cases from Germany.

[3] Suffice here to mention France's recently adopted "Creativity and Internet" Law, the UK's "Digital Britain" Bill, draft legislation in Spain, discussions in Italy, Germany, Sweden, etc.

legal standpoint, as to their consistency with international norms (Bern Convention, TRIPs and WIPO Treaties notably).

The MPA submits that practical efforts can usefully be devoted to the facilitation of rights clearance where appropriate in the online marketplace, but that it would be misleading and unwise to call into question many of the fundamental principles upon which the copyright framework relies.

i) Are current copyright rules too complex?

Facilitating rights clearance for commercial users

The MPA considers that the EU's copyright framework constitutes a generally modern, reliable and flexible framework stimulating creativity and the commercial distribution of creative works in the Internet age. We agree however that certain practical improvements might be considered to improve further the clearance of rights and facilitate the operation of new services.

In particular, concrete measures could be explored and encouraged to facilitate the process for clearing certain rights, e.g., for new online platforms. In this specific respect, we agree with the RD's suggestion to look at possible measures to improve the bundling of certain rights in the music sector as well as the governance and transparency of collective rights management organisations (CMOs), which is an endeavour potentially beneficial for all right holders.

However, the idea of creating additional specific remuneration rights for authors and performers, which would also be subject to mandatory collective management, would create yet a further level of complexity as recognised by the RD. In most cases, such remuneration is already dealt with directly between the producer and the authors/performers by means of contractual arrangements, including collective bargaining agreements.

Provided such a system remains voluntary and compatible with international copyright law, the MPA understands that a repository of ownership and licence information for certain types of works could in some cases act as useful tool for commercial users of copyrighted works, notably in sectors where – unlike in the film sector – exploitation rights are not centralised in the hands of one right holder, the producer.

Copyright exceptions and limitations

Exceptions and limitations to exclusive rights are discussed in the RD, which notably states that *"[t]he unclear contours of strong "exclusive rights" are neither beneficial for the internal market in knowledge products nor for the development of internet services."* The MPA would like to submit that exclusive rights are actually well-defined in the EU copyright framework. While we recognise that – since exceptions are optional – the scope of these exclusive rights may vary somewhat from Member State to Member State, as we have noted previously, we do not believe that this in and of itself is justification for transforming optional exceptions into mandatory ones. Indeed, our view is that exclusive rights have been the driving force behind the development of "knowledge products" and new internet services. However, the MPA agrees that exceptions and limitations are part of the inherent balance in copyright. As a result, we see merit in examining exceptions individually and clarifying the policy goal behind them. It should be kept in mind that exceptions/limitations must not be turned into "subsidies" for the benefit of one powerful industry to the detriment of the content sector. The Copyright Directive provides

guidance for such an examination (see, e.g., Recital 44[4]). Moreover, the Court of Justice of the European Union ("ECJ") and national courts have repeatedly held that those exclusive rights must be interpreted narrowly.[5]

The MPA is also supportive of the suggestion made by the EU's Communication on Copyright in the Knowledge Economy in favour of further dialogue regarding certain exceptions. As we have noted previously, we believe that stakeholder platforms, which encourage contractual arrangements between right holders and users for the implementation of copyright exceptions, can at times be useful to further concrete solutions between stakeholders. EC law already encourages stakeholders to conclude voluntary agreements regarding the interplay between copyright exceptions and the application of technological measures, such as DRMs (Article 6(4) EUCD). In the film sector, there have been constructive discussions between producers and archives.[6]

The current regime sets forth a long list of exceptions (well beyond those originally proposed by the Commission) and was designed to cope with rapid technological development in the digital environment and to take into account national copyright traditions and related case law. It provides room for Member States to take into account national situations in accordance with the principle of subsidiarity and is best-suited to cope with the specificities of the various uses, interests and needs. With reference to future discussions of the appropriate scope of exceptions, the MPA would also like to stress that current practice, doctrine and case law demonstrate that the so-called "Three-Step Test"[7] remains a flexible and pragmatic legal tool providing legislators and courts with the necessary room of manoeuvre in the setting and interpretation of exceptions and limitations.

A "European Copyright Law"?

The RD also refers to the possibility of adopting a "European Copyright Law" by means, e.g., of a Regulation in order *"to create a more coherent licensing framework at European level"* and it mulls over the possibility to use the new Article 118 of the Lisbon Treaty as a legal basis for this future legal instrument. In the MPA's view, this idea raises two questions:

- Complexity: If a new Regulation were eventually to introduce a "Community copyright title" alongside national titles, one could argue that it would actually add a further layer of complexity. As to the option of simply replacing national titles by a European one, it would probably take decades to achieve. It should be borne in mind that the EU has legislated on copyright in the past (e.g., Directive 2001/29/EC) on the basis of Directives and this instrument remains valid.

[4] "…The provision of such exceptions should, in particular, duly reflect the increased economic impact that such exceptions or limitations may have in the context of the new electronic environment. Therefore, the scope of certain exceptions or limitations may have to be even more limited when it comes to certain new uses of copyright works and other subject-matter".

[5] See e.g., Case C-5/08, Infopaq International A/S v. Danske Dagblades Forening, Judgment of 16 July 2009.

[6] The International Federation of Film Producers Associations (FIAPF) has reached an agreement with the Association of European Film Libraries (ACE) on the voluntary deposit of films in film archives. The discussed agreement touches on the issues of cataloguing, reservation as well as certain uses of deposited works under certain circumstances and subject to the use of an appropriate and personalized security procedure.

[7] The "Three-Step Test" – enshrined in the Bern Convention, the TRIPS agreement and Article 5.5 of the EU Copyright Directive – provides that an exception can only apply (1) in special cases, (2) provided that there is no conflict with a normal exploitation of the work and (3) that it does not unreasonably prejudice the legitimate interests of the right holder.

- Competency: Secondly, from a legal standpoint, it is not clear that Article 118 of the Lisbon Treaty can be extended to include "copyright". We understand that this provision was in fact meant to address issues related to "industrial property rights"[8]. According to the U.K. House of Lords, "*the new Article 118 of the TFEU is a restatement of existing powers. Although the Treaty of Lisbon would not confer additional IP powers on the EU, it marks a statement of political intent and a commitment to achieving the Community patent*"[9]

The exclusive right of making available

When discussing "commercial users' access", the RD refers to the option of aggregating the so-called "digital" copyrights involved in interactive online dissemination of content, namely the "digital right of reproduction" and the "digital performance right". The MPA understands the specific issue the RD is trying to address here (i.e., instances when, for musical works, CMOs seek to collect both "reproduction right" royalties (mechanicals/synch fees) and public performance right royalties).

We would like to point out that the exclusive right involved here is in fact the "making available right".[10] The MPA does not subscribe to this approach (as it affects substantive copyright) and would like to suggest instead that practical mechanisms are discussed with stakeholders to facilitate rights clearance at the European level, especially for music. Any "one-stop shop" system should not affect directly or indirectly substantive copyright laws but be based on practical arrangements. In the film sector, the relevant exploitation rights are centralised in the producer, who is generally in a position to license the necessary rights to the digital platforms. In this respect, the film producer already acts as a kind of one-stop shop that the RD is calling for to facilitate the clearance of rights in the online world.

ii) Is the territorial nature of copyright an obstacle?

The demand for pan-European licenses

The MPA believes it is of immense importance to recall that although international treaties (to which the EU is bound), EU norms and national law recognise the legitimate territorial nature of copyright, the territorial application of copyright does not preclude, from a legal point of view, EU-wide or cross-border licensing models. Besides, a single rights clearance or copyright law may not be a cure-all. For example, laws governing youth protection, data privacy and consumer protection, as well as differing tax regimes, all have an impact on the distribution of copyright content.

The MPA would like to highlight that its member companies are already making their products available in the 27 Member States through numerous licensing deals with local and European commercial digital partners, with due consideration for local demand and sensitivities (cultural preferences, classification regulations, language, etc.). This response by the MPA's member companies to changing market dynamics and consumer demand enables consumers to access films across a variety of platforms. Cross-border and pan-European licensing already occurs for

[8] Article 118 stems from Article III-68 of the now defunct Constitutional treaty.
[9] House of Lords: European Union Committee, 10th Report of the Session, 2007-08, Volume I: Report: The Treaty of Lisbon: an impact assessment, pp 219-220.
[10] The "making available right" was the result of the deliberations leading up to the adoption of the 1996 WIPO copyright treaties (WCT/WPPT). It is sometimes referred to as the "umbrella solution" since it encompasses both so-called copy-related rights and non-copy related rights.

the online delivery of AV content in the market place when it makes sense commercially and content providers have sufficient demand from distribution platforms for such a form of licensing. For example, it is not uncommon to find licenses for Germany, Austria and Switzerland in German language or for Italy, Malta and Switzerland in Italian. Multi-territorial licensing is also prevalent in the Nordic region.

Telecoms companies, mobile phone operators or any other online operator/platform expressing a commercial desire to serve a multi-territory (or even pan-European) audience simply need to acquire the rights on a commercial basis for the specific kind of licence they seek. The process is not necessarily difficult.

Furthermore, from a consumer perspective, it is not clear there is a demand for a single uniform pan-European license for the delivery of AV content online. A "one-size-fits-all" approach seems be contrary to the differing consumer trends observed across the 27 Member States, and would limit flexibility to address the specific needs of each local territory.

Hence, the MPA's view is that Europe-wide or multi-territory licensing of AV content should remain discretionary, thereby allowing right holders to respond flexibly to changing consumer demand. Any mandate would be inappropriate, raise compatibility issues with international treaties and be contrary to the commercial interests of both film producers (who naturally wish to recoup their significant costs, build new audiences and markets for their works, hope to see a reasonable return on investment and look at financing a wide variety of future films) and commercial users (revenue-sharing models, ability to market films simultaneously in 27 members). The freedom to engage in arms-length contractual negotiations, on the basis of the individual needs of commercial users, is what allows a variety of business models for online content delivery to flourish and is a cornerstone of the e-commerce marketplace.

Contractual freedom

In view of the above, we would like to state very clearly that the contractual freedom granted to film producers to license their works (e.g., by territory, by language, by category of rights) does not in itself constitute an obstacle to the launch of innovative online services available on a multi-territorial basis. On the contrary, it appears obvious that no "one-size-fits-all" business model could be effective at meeting the diverse and ever-changing needs of European creators, industry and consumers in the online environment. Hence, should the EU recommend a single model or a restriction on the film industry's freedom to license, it would penalise creators, hugely diminish market-driven incentives to invest in new and diverse content that drives new business models, products and services and, ultimately, have a negative impact on consumer choice.

Licensing as the main financing tool

If anything, this is of existential importance for smaller and medium-sized film producers (many European film companies fall into these categories) whose very activity depends on a precarious mix of funding sources including pre-sales of rights for certain business models or in particular territories and co-productions which may give different parties different rights in different territories. The MPA would therefore like to caution against any attempt to portray the licensing and rights clearance activity as a potential obstacle to delivery of audiovisual works when, on the contrary, it constitutes one of the main drivers behind content production, financing and distribution.

The Cable and Satellite Directive and the notion of "re-transmission"

While recognising that collective management of rights is rather limited in the audiovisual sector, the RD raises the prospect of extending mandatory collective licensing into new areas, such as the online delivery of audiovisual content, based for example on the transposition of the rationale of the 1994 "Cable and Satellite" Directive[11]. Article 9 of the CabSat Directive establishes mandatory collective exercise of the exclusive cable retransmission right. The Directive does preserve some possibility for blackouts in agreements between cable operators and collecting societies and, by virtue of Article 10, producers are in a position to license their retransmissions rights directly to the initial broadcaster.

Any evaluation of the re-transmission regime established by the Directive to determine whether it applies to other forms of retransmission (that might be considered functionally equivalent to cable retransmission such as IPTV services) could only proceed on the basis that initial transmissions (for instance on-demand services as per the making available right) are NOT covered. Moreover, any such evaluation should be based on one of the cornerstones of the CabSat Directive, namely that retransmissions must be simultaneous, unaltered and unabridged. It should be noted that this must also be based on a technical environment that protects the signal against unauthorised access from outside of the retransmission territory. In other words, most cable systems are by their very nature territorial – indeed many are regional. Services deployed over the open internet, which in many cases are inserting advertising in or around the broadcast channels that they are streaming, would by definition not qualify under the terms of the CabSat Directive and would thus be subject to direct licensing.

With regard to the review of the CabSat Directive, the MPA would also like to state that it does not subscribe to an option whereby "*once an online service is licensed in one EU territory, for example the territory with which the service provider is most closely linked, then this license would cover all Community territories*". This appears to be a suggestion that the CabSat Directive's country-of-origin rule for communication to the public by satellite could be extended to the making available right thereby potentially impacting a whole range new on-demand services. It is worth noting that this country-of-origin rule is balanced by the Directive's recognition of the principle of contractual freedom (see Recital 16).

In any event, any limitation on the scope of an exclusive right also requires analysis under the three-step test in particular to determine whether there is a conflict with normal exploitation of the works in question. We deal with the issue of exhaustion immediately below.

The principle of Community exhaustion

Specifically referring to the principle of Community exhaustion, which is applicable to the distribution right (i.e., physical goods such as DVDs), the RD refers to the fact that "community exhaustion" is not applicable to services (online services in particular) – a reality that is both recognised by EU law and by the European Court of Justice (ECJ), including in its *Coditel* case-law. The MPA is of the opinion that the *acquis* reflects common sense and that, if anything, the ECJ's case-law is even more valid in today's online environment than it was already for broadcasting services (another form of electronic communications) in the early 80's.

In the audiovisual sector, the question of exhaustion not only concerns "territoriality" but also addresses being able to license a film more than once. By definition, a tangible good is "gone"

[11] Directive 93/83/EEC

once it is sold. This is not the case for either broadcasting services or online services of content delivery or the programming of content made available by these means, where it is possible to work out – as part of contractual negotiations – the potential audience, the number of showings and thus the value of the rights. As a result, any limitation on the scope of the making available right that might conflict with the normal exploitation of content online raises serious concerns also from the point of view of international copyright norms.

iii) Are business models pursued in the AV sector unsustainable?

Alongside production, it should be understood that licensing and rights clearance lie at the heart of the business of film producers and distributors, large and small. Either as licensees or licensors, media companies deal effectively with this activity on a daily basis across borders, whether geographic or linguistic. This is a normal activity for companies operating in the content sector, be it offline or online. Secondly, financing films is a costly, complex, risky and delicate endeavour and the uninhibited licensing of these completed works is the essence of the business. Without it, professional high-quality creativity would be impeded at the expense of all of those in the value chain – from production right through to all modes of exploitation.

Commercial decisions taken by audiovisual right holders sometimes seem to be referred to somewhat disdainfully by the RD (e.g. *"territorialisation [as] a way to maximise revenue"*). A reality test is thus warranted here since, in economic terms, the distribution of creative content in the online environment amounts to neither more nor less than the provision of e-commerce services, broadly defined as the advertising, sale and distribution of products or services electronically. The fact that market players active in the distribution of online content throughout the EU respond to market signals and rationally seek to allocate resources accordingly should be welcomed, not discounted, by the RD. In the context of online media offerings, it should also be recalled that any new service/delivery outlet requires some time to work out optimal solutions that fully meet consumer demands.

In the film business, the decision to engage in single or multi-territorial licensing is made on the basis of informed commercial decisions aimed at maximizing exposure of the works, on a case-by-case basis, with due consideration for local sensitivities (cultural preferences, classification regulations, language, etc.), local demand and the requirement to ensure full consumer satisfaction. Suffice to mention specific consumer demands for subtitling, and very often dubbing, to understand how film distributors must be, and are, closely responsive to local taste. As an example, specific linguistic preferences and sensitivities often go as far as differing between same-language countries/regions (e.g., Flemish-speaking Flanders and the Netherlands sometimes requiring different subtitling) and commercial players of course need to be responsive to that.

A film producer will always aim to position his film in the best competitive position in order to cover costs, pay everyone involved, secure return on investment, extend the reach of the work and, if possible, generate enough money to create new works. The MPA would like to stress that only a limited number of films generate a positive return on investment. Whether the rights in a given audiovisual work are centralised in the hands of the producer by operation of law and/or contractually, that producer (or the distribution company engaged by the producer) will be the person or entity in charge of exploiting the film in complicated and ever-changing markets. In this respect, the film producer already acts as the kind of "one-stop shop" that the RD is calling for to facilitate the clearance of rights in the online world.

iv) Alternative means of remuneration/ mandatory collective management

The MPA is opposed to any form of expropriation of exclusive rights since doing so would not only risk wiping out legal services currently engaged in the e-commerce business of delivering audiovisual content online – by putting in question current commercial deals and conflicting with normal and legitimate contractual exploitation – but would also amputate a growing financing source from the tool-box available to European film producers (i.e., the exclusive right to license a film to an online platform).

The MPA considers that the basis for financing and remuneration in the film sector should continue to be contractual negotiations freely conducted between the producers and the copyright user. Moreover, any move to mandatory collective licensing of rights involved with Internet delivery of copyright works would not only primarily affect the operators of online services of content delivery (e.g. existing revenue-sharing models) but it would also add extra costs to the operations of Internet Service Providers having to fund a levy system and thus act as a drag on technological development. As to the notion of "extended collective management" (ECL) discussed in the RD, it should be noted that while this concept is not supported by the MPA, it remains in any event subject to the Three-Step Test (see "footnote 3" above).

All in all, it would also discourage future investments in the production of high-value premium content by intrinsically diminishing the value of copyrighted works and flattening out the differences in quality between one work and another. In addition, it would run the risk of deterring economic operators such as digital platforms from innovating and building new business models and ultimately lead to a "commoditisation" of content online. Finally, and that is a major point, extending a system like the one for private copy to the on-line paradigm through mandatory collective licensing of the making available right would violate current European Directives and International Copyright Treaties[12].

v) Media chronology ("release windows")

"Release windows" are an important characteristic of the film industry, (clearly distinct from, e.g., the music industry), whereby films are released in different formats in a sequential order (e.g., theatrical release, DVD/VOD, Pay-TV, free-to-air television). The contractual freedom to set the timing for the release of films in various media is a fundamental feature of the film industry's business model both in terms of exploitation and as a strategic tool of upstream financing of film production through pre-sales in various formats and in various territories. In the different markets, this choice will notably take into account local/cultural factors, such as cinema-going habits, national holidays, consumption patterns, film festivals, etc.

[12] The Bern Convention limits the permissible scope for mandatory collective licensing to certain acts of communication to the public. The making available right, particularly for audiovisual works, does not fall within this list. Under international copyright conventions, mandatory collective management is not allowed except and unless specifically prescribed. The right of "making available to the public" therefore cannot be subject to mandatory collective management (Article 8 WCT and Articles 10 and 14 WPPT). Any limitation on the exclusive right of making available by means of mandatory collective management would also fail the three-step test (Article 9(2) Berne, Article 13 TRIPS, Article 10 WCT & Article 16 WPPT). WIPO Member States are not permitted to in effect give "licenses" for activities outside of their jurisdiction. Any imposition of collective management in this area would be challenged as a breach of the TRIPs Agreement. European norms are subject to international conventions. Moreover, existing EU copyright directives proscribe Member States from adopting mandatory collective management of the making available right.

When decisions on release are made through contractual negotiations between the right holders and the parties involved in the distribution, the parties are in position to take into account the individual merits of each film or package of films. This approach also allows a degree of flexibility needed to adapt to local markets and new modes of distribution. Keeping in mind that most films never recoup their initial investment – and hence that those that do need to finance all the others – the flexibility granted to copyright holders in setting release patterns is crucial for the livelihood of the film industry. For this reason, ECJ case law and European policy in the recently updated AVMS Directive have wisely recognized the importance and legitimacy of this flexibility[13].

With the multiplication of distribution channels in the online environment, the need for flexibility in the choice of release patterns for a film increases even further, with always the same aim of carefully determining the optimal exploitation pattern in any given market. Like home entertainment (VHS/DVD) or pay-per-view TV services before it, Internet and video-on-demand services have opened up very exciting opportunities to explore new and/or shorter release windows that respond quickly and flexibly to consumer demands. Provided it is based on commercial flexibility and contractual negotiations, the MPA considers that the system of release windows will continue to accommodate new technologies and find commercially viable space for additional media outlets. Regulatory intervention should not undermine the potential of these new opportunities – i.e., by hindering the organic development of different business models and distribution platforms.

Concluding remarks

In view of the comments and explanations given above and with specific reference to the online market for cinematographic and audiovisual works, the MPA would like to leave the authors of the RD with the following concluding remarks:

- The fact that right holders involved in the online exploitation of creative works act *"cautiously"* and wish to retain *"their contractual freedom and commercial relations with distributors in order to make the most economically viable decisions"* should be welcomed by the RD. In the e-commerce business of delivering content online, commercial freedom is a fundamental basis to ensure the development and maintenance of a properly functioning and sustainable marketplace for the benefit of industry participants and consumers. This is especially true for "video-on-demand" (VOD) services provided online, which have opened up exciting opportunities for right holders to respond quickly and flexibly to consumer demands while supporting the viability of a multiplicity of new platforms and content delivery systems. The recent VOD statistics published by the European Audiovisual Observatory illustrates the vitality of this new market for VOD[14].
- A second condition to ensure a properly functioning marketplace is certainly the promotion of a level-playing field. Public authorities should take the necessary steps to ensure that rules applicable in the offline world are also properly enforced in the online environment, as a necessary precondition to the success of innovative e-commerce business models. The EU is in fact facing a general and important law enforcement

[13] See Article 3d of the "Audiovisual Media Services Directive" (Directive 2007/65/EC), which provides that *"Member States States shall ensure that media service providers under their jurisdiction do not transmit cinematographic works outside periods agreed with the rights holders."*

[14] http://www.obs.coe.int/about/oea/pr/vod2009.html (press release: "More than 700 on-demand audiovisual services available in Europe".

problem on the Internet. This public-policy challenge clearly needs to be addressed simultaneously as a matter of urgency in the context of the European Digital Agenda.

- Regulating only those market players that are easily "regulatable" – such as traditional media businesses[15] – is simply not good enough anymore in the 21st century if the public-policy objective pursued by the EU is indeed to create a knowledge-based society founded on a level-playing field. The claims of some new distribution market entrants wishing to monetise creative content without investing in production costs, paying any fees or royalties, or taking any editorial responsibility for the dissemination of that same creative content should be met with great circumspection by the European Commission.
- The European Commission should aim at developing a regulatory environment conducive to flourishing e-commerce and a high level of consumer confidence by fostering dialogue amongst stakeholders. In this context, it should be borne in mind that nothing in EU copyright law prevents a right holder to licence his content on a multi-territorial or pan-European basis. In the AV/cinematographic sector, whether these markets are viable economically should be left to right holders and platform operators to decide.
- The MPA calls for the application of a reduced VAT rate for the delivery of online cultural products. The revision of the existing VAT Directive should be part of the European Digital Agenda to be developed by the new European Commission. Indeed, it does not appear warranted to discriminate between cultural goods and services provided offline vs. online in terms of indirect taxation.
- Finally, the MPA would like to stress that its member companies are fully committed to developing the opportunities that new technologies and media platforms bring, thereby improving production and distribution of audiovisual works and allowing consumers a wider choice in terms of content, viewing options and accessibility.

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We thank you for your attention and remain at your disposal should you have any questions.

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[15] Traditional media businesses comply with a multitude of laws and regulations – not only general media regulation, but specific rules such as those on financial reporting as well as the panoply of general laws on privacy, defamation, incitement, obscenity, intellectual property, competition, advertising and taxation. They also operate under extensive self-regulatory rules as well as codes of conduct.