



Society of Audiovisual Authors  
Société des Auteurs Audiovisuels

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

## **SAA Contribution**

**January 2010**

### **EXECUTIVE SUMMARY**

The Society of Audiovisual Authors (SAA), which represents Audiovisual Authors' Collective Management Societies in Europe, welcomes the opportunity to comment on the Reflection Document. Its contribution addresses two main packages of issues: the development of online services for audiovisual works and authors' rights aspects:

#### **I. The Development of Online Services for Audiovisual Works**

- There is no need to radically change the legal framework to develop pan-European online services. The current legal framework is not an obstacle to the development of these services. The main obstacles are economic, due to the lack of revenues from many territories in the absence of linguistic and cultural adaptations and of active marketing campaigns.
- Collective management of authors' rights in the audiovisual sector is not a cause of partitioning of the market. Collective management of authors' rights is needed to guarantee payment to authors.
- It is of an utmost importance that the Audiovisual Media Services Directive, in particular Article 3i dedicated to the promotion of the production of and access to European works, is strictly and carefully implemented by all Member States. The presence and visibility of European works in all VOD platforms is essential to give a chance to European works and to build a culturally diverse European online market.
- SAA is willing to collaborate with ISPs with respect to consumer friendly licences that offer tailored made services linked to specific uses and which fairly remunerate authors. Compensation for authors for online piracy should not be confused with such copyright licensing.

## II. Authors' rights Issues

- SAA is particularly pleased to see its proposal to create at the European level an unwaivable right to remuneration for the online exploitation of audiovisual authors' works listed amongst the possible EU actions. Audiovisual authors should have a legal entitlement to receive a remuneration for every use of their works. The unwaivable right to remuneration for audiovisual authors for their online rights should be based on the revenues generated by the online exploitation and paid by the final commercial user (the online platform). The remuneration would be administered by collective management societies.
- Orphan works should be included in a licensing scheme which includes collective management, after a diligent search has confirmed their orphan status and which provides for remuneration in respect of all works.
- Article 118 of the Lisbon Treaty is not the appropriate legal basis for harmonisation of copyright legislation.
- SAA shares the objective of best governance and transparency as SAA associates recognize they are fully accountable to their members on all matters. SAA associates consider that they aim to conform to best standards on governance and transparency.

\* \*  
\*

## INTRODUCTION

The Society of Audiovisual Authors (SAA) is the grouping of Audiovisual Authors' Collective Management Societies in Europe, which pursues the following objectives:

- To defend and strengthen the economic and moral rights of audiovisual authors (screenwriters and directors);
- To develop, promote and facilitate the management of rights by member societies;
- To secure fair remuneration for audiovisual authors for every use of their works.

The nine founding associates of SAA are SACD ([www.sacd.fr](http://www.sacd.fr)) and SCAM ([www.scam.fr](http://www.scam.fr)) in France, Bild-Kunst ([www.bildkunst.de](http://www.bildkunst.de)) and VG Wort ([www.vgwort.de](http://www.vgwort.de)) in Germany, VEVAM ([www.vevam.org](http://www.vevam.org)) in the Netherlands, ALCS ([www.alcs.co.uk](http://www.alcs.co.uk)) and Directors UK ([www.directors.uk.com](http://www.directors.uk.com)) in the United Kingdom, SSA ([www.ssa.ch](http://www.ssa.ch)) and Suissimage ([www.suissimage.ch](http://www.suissimage.ch)) in Switzerland. SAA currently represents over 60,000 audiovisual authors. However, the founding associates recently decided to open SAA to new members. The response is such that it is anticipated that SAA shall represent all European authors working in film and television by the end of 2010.

SAA would like to thank the European Commission for the opportunity to comment on the Reflection Document, which gathers for the first time the detailed thinking on Creative Content Online of two Directorates General, i.e. DG Information Society and Media and DG Internal Market and Services.

SAA and its members particularly welcome the Commission objective of *Creating a favorable environment in the digital world for creators and rightholders, by ensuring appropriate remuneration for their creative works, as well as for a culturally diverse European market*<sup>1</sup>;

We are pleased to see our proposal to create at the European level an unwaivable right to remuneration for the online exploitation of audiovisual authors' works listed among the possible EU actions foreseen by the Reflection Document. SAA believes that audiovisual authors should have a legal entitlement to receive a remuneration for every use of their works.

The SAA contribution will therefore further develop this proposal in order to secure the support of the Commission and the European Parliament for efficient measures to be taken at the EU level. Firstly, we shall address several issues in the Reflection document which concern the legal and economic framework of the development of online services for creative content and other authors' rights aspects which are of utmost importance for audiovisual authors. While national laws and/or contractual arrangements usually require authors to assign their rights to producers, this does not mean that they should not receive fair remuneration for all uses of their works.

### I. THE DEVELOPMENT OF ONLINE SERVICES FOR AUDIOVISUAL WORKS

SAA is pleased to note that the Reflection Document acknowledges that *the situation in relation to the audiovisual sector is significantly different*<sup>2</sup> to that in music, publishing and

---

<sup>1</sup> Page 3 of the Reflection Document.

<sup>2</sup> Page 7 of the Document.

video games. This means that the position of audiovisual authors should be addressed differently.

However, the Reflection document very often accuses rightholders of being responsible for the fragmentation of the market: *Generally speaking, commercial decisions by rightholders have led to a partitioning of the market, causing some content, services or particular language versions of a work to be inaccessible from some Member States. Pan-European availability of audiovisual content, such as VOD services, is hindered by nationally-determined release windows that prevent simultaneous availability across the EU*<sup>3</sup>.

In this context, SAA would like to strongly assert that collective management of authors' rights in the audiovisual sector is not a cause of partitioning of the market. Collective management of authors' rights is needed to guarantee payment to authors.

## **1. Consumers' Access on a Cross Border Basis**

SAA believes that the Commission over estimates the desire on the part of the consumers for cross-border access to online services.

What do consumers want? They want access to a rich and diverse online offer of films and audiovisual works, wherever the platforms are located. They need assurance that their rights are fully respected and enforced. This includes protection of payment and access to the information in their own language.

It is therefore of an utmost importance that the Audiovisual Media Services Directive<sup>4</sup> adopted on 19 December 2007 is strictly and carefully implemented by all Member States<sup>5</sup>. In Article 3i, the directive provides that Member States shall ensure that on-demand audiovisual media services promote the production of and access to European works. Such a 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.

Apart from the issue of investment in the production addressed later on in this contribution, the presence and visibility of European works in all VOD platforms is essential to give a chance to European works in their own markets and to build a culturally diverse European online market. Audiovisual authors strongly support this provision of the new Directive which mirrors the broadcasting quotas for European works of the Television Without Frontiers Directive. They believe that unless encouraged by financial incentives or regulatory measures, most of the online platforms would only market what is currently available in cinemas and would neglect this incredible opportunity that the online exploitation of European works represents for the circulation, visibility and success of European cinema and audiovisual programmes.

Having said that, SAA shares the policy objective of cross border management of rights for online uses<sup>6</sup> of audiovisual works in order to offer more European works online to a wider audience and to fairly remunerate audiovisual authors.

---

<sup>3</sup> Page 13 of the Document.

<sup>4</sup> 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.

<sup>5</sup> The deadline for implementation is 19 December 2009, but very few Member States have brought into force the laws, regulations and administrative provisions to comply with the Directive so far.

<sup>6</sup> Page 15 of the Document.

## 2. Multi-Territorial Licensing

Even if the Reflection Document insists on the fragmentation of the European market (as if it was originally a single market which has been partitioned by commercial users and rightholders!) and on the drawbacks of the territoriality of copyright regimes, it recognises that *the present legal framework does not in itself prevent rightholders from commercializing their works on a multi-territory basis. The problem lies more on the side of commercial and contractual practice which is based on the existing fragmentation of copyright legislation in the EU*<sup>7</sup>. It should be added that the commercial and contractual practices are also based on economic and cultural realities.

In its objective to develop multi-territorial licensing, the Reflection Document echoes a proposal of public services broadcasters to extend the scope of the satellite provisions of the 1993 Cable and Satellite Directive to online delivery of audiovisual content, so that once an online service is licensed in one EU territory, then the license would cover all Community territories.

SAA questions why the Reflection Document seeks to replicate the satellite provisions of the Cable and Satellite Directive. Whereas the cable provisions are widely adopted in Europe, facilitating the retransmission of programmes in countries equipped with cable technology, the last report of the Commission on the application of the Directive in 2002 acknowledges that the application of the satellite provisions remains unclear.

As already mentioned, SAA is of the opinion that there is no need to radically change the legal framework to develop pan-European online services. Satellite-like provisions or exhaustion of the making available right would only prejudice rightholders without developing creative content online services. Once again, the current legal framework is not an obstacle to the development of these services. The main obstacles are economic, due to the lack of revenues from many territories in the absence of linguistic and cultural adaptations and of active marketing campaigns. Successful pan-European or international services exist (e.g. TV5 Monde, BBC World). These services secured the necessary licences for their international activity within the current legal framework.

SAA 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. We understand it would be available by April 2010.

SAA 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 acceptable industry practices.

## 3. Investment in Digitisation, Production and New Business Models

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 role of the Member States' public support) have led rightholders to partition the market for audiovisual content in the EU. It fails to acknowledge that it is still the main way to finance films today, as very few players, especially in the Internet sphere, invest in film production in Europe<sup>8</sup>. The Reflection Document calls for more collaboration with ISPs and other

---

<sup>7</sup> Page 12 of the document.

<sup>8</sup> With rare exceptions like Orange in France.

companies providing access technologies, but does not propose any measure aiming at fostering this collaboration.

The only proposal mooted by the Reflection Document refers to the so-called alternative means of remuneration in the form of compensation of unauthorised file sharing and reproductions taking place on the Internet, paid by the ISPs to rightholders alongside the copyright licences given to operators of legal services. Compensation to rightholders for illegal use should not be confused with consumer friendly licences that offer tailored made services linked to specific uses and which fairly remunerate authors.

The Reflection Document also mixes a proposal of compensation of online piracy with new business models based on subscription and “all you can eat” models, which are of a very different nature. We believe that further reflection and investigation are required. On the issue of innovative business models, SAA is willing to collaborate with ISPs who respect authors’ rights.

## **II. AUTHORS’ RIGHTS ASPECTS: TO PROVIDE AUDIOVISUAL AUTHORS WITH A FAIR REMUNERATION FOR THE ONLINE EXPLOITATION OF THEIR WORKS**

The Reflection document asserts that *user-generated-content is playing a new and important role, alongside professionally produced content. The co-existence of these two types of content needs a framework designed to guarantee both freedom of expression and an appropriate remuneration for professional creators, who continue to play an essential role for cultural diversity*<sup>9</sup>.

The Communication from the Commission on Copyright in the Knowledge Economy of 19 October 2009 recognises that, after having consulted the interested parties in 2008, it appears that there is no need to regulate user-generated-content for the time being. Amateur creative content has always been existing and should follow the same rules as professional creative content as regards copyright: the use of existing protected works needs the authorisation of the authors, except if quotations for criticism or review, incidental use and caricature, parody or pastiche exceptions can be invoked, which is possible most of the time.

### **1. Orphan Works**

SAA is pleased to see that the Reflection Document proposes that orphan works should be included in a licensing scheme which includes collective management, similar to the extended collective licensing, after a diligent search has confirmed their orphan status.

SAA 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 will explore a variety of approaches to facilitate the digitisation and dissemination of orphan works. This will include a legally binding stand-alone instrument on the clearance and mutual recognition of orphan works, an exception to the 2001 Directive, or guidance on cross-border mutual recognition. Management through collective management societies should be added to this list. All models must provide for remuneration in respect of all works.

Generally speaking, SAA is not in favor 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 favor of further

---

<sup>9</sup> Pages 3 and 4 of the Document.

harmonisation of the optional exceptions by making some of them mandatory. The 2001 Directive was discussed at length during four years (1997-2001) to achieve the harmonisation it provides and SAA does not think that a better result could be achieved today.

## **2. Article 118 of the Lisbon Treaty**

As a remedy to the territoriality of copyright laws, the Reflection Document introduces a new idea of creating a Community copyright which would take precedence over national laws or exist in parallel to them. This idea has been promoted by Ms Reding on the basis of the new article 118 of the Lisbon Treaty, which provides a new legal basis for the creation of European intellectual property rights.

SAA is quite skeptical about this proposal, for two reasons:

- SAA does not see the need for a Community copyright. Harmonisation of legislations on the current legal basis (article 114, former article 95) to include a right to remuneration of audiovisual authors and other authors where appropriate is sufficient.
- Article 118 has obviously been introduced for industrial property purposes and refers to the setting up of centralised Union-wide authorisation, coordination and supervision arrangements, which do not seem relevant to authors' rights.

## **3. Audiovisual Authors' Remuneration Right for the Online Exploitation of their Works**

The Reflection Document refers to the unprecedented opportunity that new media offer to authors for disseminating their works across different platforms and for reaching out to a larger audience. It also recognises that easier access to creative content will have to be combined with adequate protection for authors, in order to furnish a growing and more diverse content market<sup>10</sup>.

In this context, SAA proposes to create an unwaivable right to remuneration for audiovisual authors for their online rights at the European level, based on the revenues generated by the online exploitation and paid by the final commercial user (the online platform). The remuneration would be administered by collective management societies.

SAA is pleased to note that the Reflection Document includes this proposal amongst possible EU actions:

*The introduction of an extended or mandatory collective management system for the administration of the "making available" rights of authors and performers and the provision of an additional unwaivable right to equitable remuneration has been suggested by rightholders. Although these suggestions would seem to add an additional layer of complexity to collective management, they could have the potential to create more effective protection and stronger position for creators in their negotiations with their production companies<sup>11</sup>.*

The European Single Market should not only be built for consumers, especially internet users, but also for creators. Today, the single market does not exist for audiovisual authors: those whose works are disseminated in countries other than where the work originated from,

---

<sup>10</sup> Pages 19 and 20 of the Document.

<sup>11</sup> Page 20 of the Document.

cannot rely on a harmonised and transparent system that ensures that they are fairly remunerated.

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.

SAA proposal is partially inspired by the 1992 Rental and Lending Directive which provides authors with an unwaivable right to equitable remuneration for the rental of their works. This provision came from the fear that in some Member States contractual practices deprive authors from the exercise of the rental right. This is exactly the case for online rights.

However, the Rental and Lending Directive is flawed:

- It leaves the choice to Member States whether to have the right administered by collective management societies,
- the question from whom the remuneration should be claimed is not clear.

For these reasons, the Directive does not provide for full harmonisation, i.e. for full efficiency for the protection of the authors, who in very few countries receive payment for the rental of their works.

As a consequence, SAA proposes to specify that the unwaivable remuneration right should be administered by collective management societies on the basis of the revenue generated by the commercial exploitation of the works and paid by the online service which makes the work available.

We believe that such a system is cost effective for film and TV producers who, especially in Europe, usually do not have sufficient means and infrastructure to monitor the use of the works on behalf of the audiovisual authors and to ensure that the latter receive remuneration that is proportionate to each use of the works.

We refer you to 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. This provision has been extended to online delivery of protected works in 2006.

Audiovisual authors will support the wide dissemination of their works and fully embrace new technologies if fairly remunerated for each use. Unless entitled with an unwaivable right to remuneration, audiovisual authors will continue, in most of the European countries, to be mere spectators, when informed, of the online life of their works. 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.

SAA encourages the European Commission to very seriously consider the legislative options creating an unwaivable remuneration right for the online exploitation of audiovisual authors' works and would welcome the opportunity to participate in any working group or further consultative process aimed at designing such a measure.

#### **4. Collective Management of Audiovisual Authors' Rights**

The Reflection Document suggests 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.



The SAA associates share the objective of best governance and transparency as they recognise they are fully accountable to their members on all matters. SAA associates consider that they aim to conform to best standards on governance and transparency and endorse any initiative to achieve this.

\* \*  
\*