Association Internationale des Auteurs de l'Audiovisuel
International Association of Audiovisual Writers and Directors

"CONTENT ON LINE IN THE SINGLE MARKET" CONTRIBUTION OF AIDAA TO THE EUROPEAN COMMISSION PUBLIC CONSULTATION 13th OCTOBER 2006

EXECUTIVE SUMMARY

• AIDAA members wants to increase the availability of their works and are neutral as regards distribution channels.

• But authors need fair remuneration for the use of their works. Their legal and moral rights need to be protected. This is not simply a question of economic fairness, but also of public policy and cultural diversity.

• DRM offer interesting possibilities but, at this stage:

- they are not entirely effective and;
- rights holders do not have control over them.

• Content distributors as well as the Information and Communication Technology industry are incredibly powerful compared to content providers such as AIDAA members. Accordingly, a stable and harmonised legal environment entrenching author's right to a fair remuneration should be secured at EU level. To be effective, this right should be mandatory. Such mechanism would not only be an act of economic justice, but would also be a lasting contribution to European culture on the upholding of European culture values.

• As a possible solution, AIDAA suggests that consideration be given to extending the scope of the rental and lending right directive of 19th November 1992 to the downloading of audiovisual works .

AIDAA represents 115,000 audiovisual authors worldwide through its member organisations. Its aim is to develop and enhance the moral and property rights of scriptwriters and film directors in cinema, TV productions, series and, documentaries.

Since the questionnaire is aimed at various stakeholder businesses and activities, AIDAA cannot answer all questions but will focus on those questions concerning audiovisual authors.

Question 1:

Do you offer creative content or services online? If so what kind of content or services? Are these content substantially different from creative content and services you offer offline (length, format etc..)

AIDAA represents the creators of audiovisual content. These creators do not offer their works directly to the public either offline or online. This is because in the member countries of the European Union, the exclusive right to exploit the audiovisual author's work is deemed to have been acquired by the producer.

Question 2:

Are there other types of content which you feel should be included in the scope of the future Communication? Please indicate the different types of content/ services you propose to include?

The creative content of AIDAA members is covered by the above mentioned list.

Question 3:

Do you think the present environment, legal, technical business etc.. is conducive to developing trust in take-up of new creative content services online? If not, what are your concerns: Insufficient reliability, security of the network? Insufficient speed

of the networks? Fears for your privacy? Fears of violation of protected content? Unreliable payment systems? Complicated price systems? Lack of interoperability between devices? Insufficient harmonisation in the single market etc..

The key for AIDAA members, regardless of the means of distribution of their works, is that the value of content is fully appreciated and that authors get remunerated for their creativity.

This implies three conditions:

- DRM technology must be trustworthy: breaking DRM security should be forbidden
- Infringement of rightsholders rights should be policed
- DRMs should be used to monitor the use of the works and ensure a fair remuneration to rightsholders.

Question 4:

Do you think that adequate protection of public interest (privacy, access to information etc..) is ensured in the online environment? How are user rights taken into account in the country you live/operate in?

From AIDAA's point of view, moral rights also fall in the category of the protection of the public interest because it is obviously in the public interest to get access to a work in its original integrity and to get information about it's autorship. At this stage, the author's moral right over his works is not sufficiently secure in the online environment. A work can be easily distorted and then disseminated online, such an act being against public interest and causing prejudice to the author.

Question 5:

How important for you is the possibility to access and use all online content on several different devices? What are the advantages and /or risks of such interoperability between content and devices in the online environment? What is your opinion on the current legal framework in that respect?

Authors want to achieve the widest possible availability of their works. Accessibility to online content will certainly be improved if interoperability is achieved. However, interoperability is a regulatory issue which needs to be considered in most details in order to make sure that short term

consumer's benefit are not outweighed by harm to technological innovation.

Question 6:

How far is cultural diversity self sustained online? Or should cultural diversity specifically be further fostered online? How can more people be enabled to share and circulate their own creative works? Is enough done to respect and enhance linguistic diversity?

The online environment clearly has great potential for fostering cultural diversity and availability. Supporting mechanisms for developing creativity at national and community level must be maintained. However cultural diversity can only be achieved if authors' rights are protected and if authors are remunerated for the use of their works online. Considering the huge economic imbalance between European authors and online service providers, European institutions should seek to protect the contractual rights of European authors as the weaker economic party. However if a Commission initiative weakens European copyright holders, European culture and creativity would directly be harmed and be less represented in the on-line environment.

Questions 7, 8 ,9, 10:

No comments.

Question 11:

What kind of difficulties do you encounter in securing a revenue stream? What should, in your view, be the role of the different players to secure a sustainable revenue chain for creation and distribution online?

In the online world, it should be borne in mind that online distributors rely on copyrighted materials as an input. It is therefore entirely in their interests that the price of that input should be as low as possible. If nothing is done, online exploitation may only lead to total devaluation of the works thus causing harm to creativity and cultural diversity

EU law should provide for a stable legal environment where author's rights are protected. Monitoring should be facilitated. Prosecution for infringements should also be sufficiently widespread to act as a credible deterrent.

Question 12 :

What kinds of payment systems are used in your field of activity and in the country or countries you operate in?

The remuneration of audiovisual authors is subject to a different system to that which applies to music authors. Audiovisual authors' remuneration regimes vary from one country to another and in some member states, the author's only remuneration is derived from the initial contractual arrangement.

The payment systems

In some countries, authors have to rely on producers to be paid. In countries such as France, Belgium and Bulgaria, remuneration terms are set on the basis of contract but collecting societies representing audiovisual authors are contractually entitled to collect on behalf of their members.
In other countries such as Spain, Italy and Poland, the final user (usually the broadcaster) is considered by law to be responsible to the author whom he pays through a collecting society. The latter system is more favourable to authors who, in principle, benefit from a stronger payment guarantee. In these countries, the law provides that, notwithstanding the terms of the contract between, on the one hand, the writer and the director and, on the other, the producer, it is the final user who is obliged to pay the writer and the director for each use of their works through a collective management organisation. These legal regimes have progressively appeared over the last twenty years and, as a result, Spanish, Italian and Polish authors are being rewarded proportionately for the exploitation of their works.

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

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

These disparities are exacerbated in the digital era.

For online rights, the rules also vary from one country to another. For video-on-demand, producers usually grant authorisations for the exploitation of the works without informing the authors. However in

France, SACD has entered into a direct contractual agreement with Video on Demand operators whereby the latter pay them directly the remuneration owed to authors as contractually agreed with the producer.

That being said, the online rights are not usually managed collectively and as a result most authors do not get paid for that type of exploitation.

How could the payment system be improved?

As a preliminary measure, wide ranging investigations should be carried out on the different payment systems in all EU member states. The payment system could be improved by generalising the role of collecting management for the online exploitation of the works. The management of online rights should be subject to the same rules as those applying to secondary rights. As an example, article 90.4 of the Spanish intellectual property law which provides that the final user is required to pay the authors for each use of their works through an appointed management entity was recently[1] extended to online delivery of content. This is a well considered and effective solution which sets a concrete benchmark to follow.

Some have expressed concerns about the efficiency of collecting societies and question their role in the digital era.

- Collecting societies are essential for the negotiation of collective agreements on behalf of rightsholders, especially where the economic imbalance is so great between the rightsholders and online service providers.

- Collecting societies fund social and creative activities. These are essential for a sector that does not obey to the classic laws of offer and demand (in that the value of a given output cannot be accurately measured by the immediate price a consumer is willing to pay for it). Authors from countries which have a social and creative funding system have always accepted this system. It is a means to finance cultural diversity and the promotion of European culture in the world. These objectives are set out in the UNESCO Convention on cultural diversity. If a Commission decision led to a suppression of these means of finance, European culture and creativity would directly be harmed.

- Monitoring by collecting societies is the key elements in deterrence and increasing rights holders' total revenues, the effectiveness of which is not accounted for in figures merely relating to revenues and expenses.

[1] 23 /2006 7 july 2006

That being said, AIDAA has always encouraged and supported rules enhancing accountability of collecting societies with respect of any of their activities. However, it does not consider that anyone would be justified in seeking to blame the whole scheme of collective management, all the more as authors have expressed their unconditional support of their collecting societies. Indeed, they are the one to decide how they want their rights to be managed.

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

This rule should be made mandatory so authors being in a weaker contractual position are not forced to opt out by agreement.

Question 13:

What kinds of pricing systems or strategies are used in your field of activity? How could these be improved?

For authors, the price which is negotiated for the use of their works constitutes the author's remuneration.

Co-authors of an audiovisual work are usually remunerated by the producer or through the intermediary of a collecting society. This remuneration can take the form of a global lump sum payment upon entering into the contract. In some cases the contract refers to collectively negotiated agreements between author's representatives and producers. However these agreements do not usually have any mandatory effects.

It has to be stressed that being the weaker economic party, authors can be at a disadvantage when negotiating contracts with producers. Some authors do however succeed in obtaining a contractual right to a proportionate remuneration from the producer's revenues. However, in practice, authors, as individual persons who depend on producers to invest in their next works, have no actual access to producers' accounts and are seldom rewarded in relation to the how successful their work is.

Moreover, it should be borne in mind that online distributors rely on copyrighted materials as an input. It is therefore entirely in their interests that the price of that input should be as low as possible. Their long-term need for inputs may not be a sufficient incentive for them to seek to ensure that the creative process is sufficiently well-protected in the long-term.

It must however be stressed that, as an example of a good solution, Spanish and Italian legislations entitle audiovisual authors to be remunerated for each exploitation of their work notwithstanding the provisions of the contract between the author and the producer through the management of a collective management organisation. Such a system has never slowed down the production of feature films and audiovisual works in comparison with countries which do not apply this system.

Therefore, when negotiating their contractual level of remuneration for the online exploitation of their works, with either producers or online distributors, authors should be able to rely on sound and secure legal rights applicable at Community level. Thus, European law should provide a system whereby when an audiovisual author grants exclusive right to a work:

- she/he is entitled to receive a fair level of remuneration
- such a remuneration should be based on the revenues made by the content provider,
- that the final user e.g., content provider should be legally responsible for making payment
- through a collective management organisation**.**

Article 4 of the rental and lending right directive of 19th November 1992 provides that authors have a right to an equitable remuneration for the lending of their works and that this right cannot be waived. This provision sets a good benchmark to follow for the recognition of a right to remuneration for audiovisual authors.

Therefore, a possible solution we suggests that consideration be given to **extending the scope of the rental and lending right directive of 19th November 1992 to the downloading of audiovisual works.**

Question 14:

Would creative business benefit from Europe wide or multi territory licensing and clearance? If so what would be the appropriate way to deal with this? What economic and legal challenges do you identify in that respect?

We have shown that discrepancies in the regimes across Europe lead authors to receiving hardly any remuneration when their works are

exploited outside their territory and for certain types of exploitation such as video-on-demand. As a result and quite surprisingly authors do not receive any share of the success of a work whose quality has been recognised across frontiers and despite language and cultural barriers.

We have also shown that, for online rights, *inter-alia*, payment systems varies from one country to another. In consequent, collecting societies do not have the right to collect in every country in respect of online exploitation of the works.

In such a context a one stop shop system or pan European licensing system is inconceivable.

On the contrary, considering the absence of harmonisation, it is thanks to territoriality that audiovisual authors are granted a certain level of protection through their respective collecting society.

Let's stress incidentally, that music authors are better protected because there are similar legal systems across Europe and because music authors' collecting societies collect in every country.

If a multi-territory licensing scheme was to be implemented in the audiovisual sector without having first harmonised the payment system for online rights, authors would be likely to suffer terrible drawbacks. Users would be naturally inclined to seek for the society offering them the cheapest deal to the detriment of the remuneration of the rightholders or to distribute works from a EU territory where no audiovisual collective management organisation or where online rights are not administered collectively.

Therefore an initiative on pan European licensing could only be envisaged once, as a minimum, legal provisions establishing the obligation to compensate writers and directors for each on line exploitation of their works, payable by the online broadcaster or service provider, is established at a European level and not left to the bargaining power of each individual author in each of the member states.

Question 15:

Are there any problems concerning licensing and/or effective rights clearance in the sector and in the countries you operate in? How could these problems be solved?

No comments.

Question 16:

How should the distribution of creative content on line be taken into account in the remuneration of the right holders? What should be the consequences of convergence in term of rightholders's remuneration (levy systems, new forms of compensation for authorised: unauthorised private copy).

1) Distribution of private content on line

First and foremost, any EU initiative should respect the decision of domestic copyright law to grant initial ownership to the creator as well as the exclusive and the moral right of the author.

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

A global and indistinct payment system (monthly lump sum payment for example) for the downloading of copyrighted work such as the compulsory licensing system contravenes the author's exclusive right. It is unfair because it is not based on actual consumption. Moreover such a system is likely to lead to disproportionate and increasingly derisory remuneration for authors. Moreover, the criteria for the redistribution of the sums collected would necessarily be empirical. AIDAA would therefore strongly oppose any compulsory licence system.

Therefore it is a contractual solution through the use of DRM which must prevail.

However, as the law stands in Europe, audiovisual authors have no guarantee that they will receive any payment as a result of DRM for the following reasons

- authors do not control DRM. DRM are controlled by producers and on line service providers;
- the imbalance of economic power between authors and service providers is so wide that authors have little or no bargaining power and no means of enforcing their rights.

The EC legislature may, in that respect consider the introduction of European contractual protection of creators in view of solving these problems and the fact that markets sometime disregard initial ownership of the copyright by the creator.

2) Levy systems for private copies

As mentioned earlier, DRM will undoubtedly play a useful role in relation to the protection of the property rights of rights holders. However, AIDAA is sceptical that DRM can ever provide a panacea for the specific problems of private copying and the failure to ensure fair remuneration to rights holders.

Private copy levies are intended to be a simple, low cost and effective means of compensating rightsholders for the private use of their intellectual property. AIDAA believes it is currently the best way for doing this for the following reasons:

1- Relating the levy to storage capacity equals very closely to actual usage and number of copies
2- It is simple and efficient to manage and collect
3- Private copy levies are tailored to usage at Member State level ensuring that, in accordance with subsidiarity principle, they reflect economic and technological developments as well as cultural norms.
4- Dual use is relatively easy to assess and quantify and is already taken into account of, in the level at which private copy levies are or should be set.
5- Private copy levies are overwhelmingly accepted by right holders as the best way of ensuring that all creative output is properly rewarded in accordance with international law.

AIDAA takes this opportunity to remind the Commission that audiovisual authors are very concerned about its initiative to phase out private copy levies in Europe. Such initiative is supported by the ICT industry. However if private copy levies were phased out, this could cause severe harm to the Community as a whole. Quite apart from the self-evident harm to the creative process and the preservation of European culture, there is no evidence that the revenues in respect of which European authors would be deprived would be compensated by increased expenditure in Europe by the ICT industry. In the absence of proven safeguards, the phasing out of the private copy levy system would have the immediate effect of transferring consumer surplus from rightsholders to the ICT industry (and/or to the manufacturers of blank tape levies depending on the private copy rules applicable in various member states).

The compensation audiovisual authors receive for the copying of their work remains marginal in proportion of the harm suffered from the private copying activities of consumers and nobody has given any evidence that, today, there is viable alternative form of compensation.

Question 17, 18 : Legal or regulatory barriers

No comments

Question 19: Release windows

Considering the heavy investments required to create an audiovisual works, authors support any commercial measure likely to increase the return on investment.

Question 20: Networks

No comments

Question 21, 22 and 23:

Piracy and unauthorised uploading and downloading of copyright protected works.

Piracy is the source of great harm for authors, for the creative industry and for society as a whole. Our proposals are based on the following axis:

- Awareness raising campaigns and communication to the public at Community level;

- Retaliation measures against illegal up loading and downloading, proportionate to the seriousness of the offence and taking into account the extent of the prejudice to intellectual property;

- Increase and development of the offer of online content. We regret that member states refuse to consider reducing the VAT rate applicable to internet legal downloading to 5,5%. This rate would be in line with the rate applicable to theatre exploitation in Europe.

The fight against piracy is not only European but global. Therefore solution should also be worked at worldwide level. To that extent, the European Community should also consider effective measures against foreign piracy of Community Intellectual Property rights.

However to be fully efficient, any measure need the full support whether technological or political of content providers as well as their cooperation.

Question 24: Rating and classification

No comments.

Questions 25, 26, 27, 28, 29: Digital Rights Management systems

DRMs will no doubt play a major role for the management of rights and payment. However, various interests have to be taken into account and reconciled:

- Consumers want to be able to transfer their legally acquired content from one device to another;
- Rightsholders want to have some form of control over the use of the content and receive a remuneration for such a use
- DRM manufacturers rely on content to promote their technology.

At this stage, however, DRM are not a panacea. Reliance on technological means in seeking to monitor the exploitation of their works or avoid unauthorised use of copyrighted material, could lead us into a vicious, costly and potentially unsuccessful battle between hackers and software developers with the costs borne by authors. Thus,

- First, DRM is not yet entirely effective and, given the range of skills and interests working against the success of DRM, may never be.
- Second, DRM is not a zero-cost option but may be a highly profitable venture for software developers, particularly if rights holders are forced by Community action (or inaction) to rely on DRM developers to protect their rights.
- Third, the deterrent effect of the competition rules has not always in the past proved sufficient to ensure that software developers behave in a manner commensurate with the Community's best interests.

Having said that, AIDAA will support the development of any new technology provided that it is secured and allows rightsholders to have control over the content and the way they are remunerated.

Question 31: What role for equipment software and manufacturers

No comments

Question 32 and 33: What role for public authorities? What actions policy, support measures research project) could be taken at EU level to address the specific issues you raised? Do you have concrete proposals in this respect?

European law should enshrine a right to a fair remuneration for audiovisual authors at Community level for their online rights. Authors should be able to rely on sound and secured legal frame applicable at Community level, when negotiating their contractual level of remuneration for the online exploitation of their works. Moreover**, European law should provide that, for the online exploitation of his works, payment is made through an appointed collecting society of the author's choice.**

As mentioned earlier, the remuneration mechanisms of audiovisual authors for the lending of their works as provided in **the rental and lending right directive of 19th November 1992** could be extended to the downloading of online audiovisual works. We therefore suggest that consideration be given to **extending the scope of the rental and lending right directive of 19th November 1992 to the downloading of audiovisual works** prior to any other initiative in this sector. The provisions of the directive should be made mandatory so authors being in a weaker contractual position are not forced to opt out by agreement.