



Fédération Européenne des Réalisateur de l'Audiovisuel

Federation of European Film Directors

Representing the Rights of European Directors and
Defending the Cultural Significance of Audiovisual Works

PUBLIC CONSULTATION ON CONTENT ONLINE IN THE SINGLE MARKET

FERA Contribution October 2006

About FERA

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

Executive Summary

Directors support the development of VOD services in order to achieve a sustainable business online for films that is able to offer a credible alternative to piracy for the audience. The condition of the support of directors to this business is that it integrates intellectual property rights as a basis and elaborate revenue sharing mechanisms for all rights holders, especially audiovisual authors.

At the European level, directors would like to see five types of encouragement for creative online content:

1. Protection of the level of investment in the audiovisual production, along with the artistic and cultural integrity of the work, from the new players in the audiovisual online services. Much of the current investment is currently provided by terrestrial broadcasters. Reduced budgets would lead to reduced quality;
2. A guaranty of remuneration for authors when their works are used in order to associate them to the success of these new media;
3. Mechanisms that promote European works on those services through the Audiovisual Media Services Directive (article 3f) in order to guaranty the presence and the continued production of European works online.
4. An enhanced respect for authors' rights through awareness and education campaigns throughout Europe and support for more cooperation between all stakeholders online to fight against piracy.
5. Development of digital standards for embedding rights payments in digital distribution.

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

The majority of directors do not “offer” their films directly to the public. They work with producers and distributors, who are experts in the exploitation, marketing and distribution of films. However, the details of the means of delivery of the films, the interface between the director and his/her audience, online or offline, are of fundamental importance to the director. Directors are concerned to protect the artistic integrity of the films and the intellectual property rights attached. Online commercial investors need regulation; directors need assurance that films, whatever the format, will be delivered to the audience in their original state, credits included and that the director receives a fair share of new revenue streams.

Currently, the core content of audiovisual works online consists of feature films, films made for TV, short films and TV series. In addition, directors are currently creating audiovisual works for new distribution methods or for new devices (mobile phones, play stations) or work with integrated interactive narrative elements. At the end of the 90s, directors had great expectations for these new developments but very little investment was made in these new kinds of works and, with the exception of games which are usually made out of the rules on authors’ rights, the market has not yet taken off.

There have been format and distribution changes in the past that European directors have dealt with. We welcome the advances in technology and the recognition of the moving image as an integral part of many aspects of modern life. We are very much in favour of the development of rich and diverse online video on demand (VOD) services that reflects the current creativity, quality and diversity in European work. These services must respect the hard won rights of the creators of that work if European film is to survive and build on its unique global identity.

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.

FERA does not propose to include more content in the scope of a consultation that is already very large. On the contrary, FERA would like to draw the attention of the European Commission to the risks of such a large scope. The issues at stake for the development of online services can vary hugely from one creative content sector to another. Even if the consultation tries to identify transversal challenges, they can be addressed quite differently according to the specific sector i.e. music, film, visual arts, publishing, educational content, etc. In this context, FERA will only focus on film online and the important characteristics of the audiovisual sector whether regarding copyright rules or business models.

Furthermore, another important and necessary distinction concerns protected works with intellectual property rights attached and other types of content which may raise their own distinct problems (sports, news, etc.). Protected works are “special” because they are linked to the personality of their creator. Without the personality of the creator there is no cultural, artistic or creative work, just a product. This distinction is highly important to maintain the value of creative work in the context of the development of online services and should in our view be the main focus of the consultation.

In the course of the questionnaire, FERA will only answer to questions in the fields of its competence.

3. Do you think that the present environment (legal, technical, business, etc.) is conducive to developing trust in and 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 a violation of

protected content? Unreliable payment systems? Complicated price systems? Lack of interoperability between devices? Insufficient harmonisation in the Single market?

The NPA Conseil study on the development of the Video on Demand in Europe of May 2006¹, has shown that VOD has become a commercial reality during the last year. The number of platforms and films available in the catalogues has grown significantly and rapidly in the course of 2006. For example, in one country like France, there were 12 providers in May 2006 (the biggest figure in the 10 countries of the study). Today in the same country, there are 25 platforms which offer more than 1000 films on a non-exclusive basis. During the first semester of 2006, 2 millions works were downloaded from these 25 platforms.

Directors support the development of VOD services in order to achieve a sustainable business online for films that is able to offer a credible alternative to piracy for the audience. The condition of the support of directors to this business is that it integrates intellectual property rights as a basis and elaborate revenue sharing mechanisms for all rights holders, especially audiovisual authors.

The field is open to lots of different players, including non audiovisual traditional players. The telecom operators and IT companies or consumer electronics manufacturers invested in this new market in an offensive way, often without any knowledge of the rules and practices of the audiovisual sector concerning authors' rights. The discussions on the preparation of the European Charter on Film Online, initiated by Mrs Reding in May 2005 and adopted in May 2006, was a good example of this initial ignorance concerning copyright rules by the telecom operators.

This initial lack of recognition of the value of intellectual property rights worries many of the authors and does little to assure them that VOD will be a positive development for their work. Even today, in most countries (except in France where inter-professional agreements have been signed), directors are not consulted by producers or distributors about discussions to authorise the inclusion of their films in VOD catalogues neither are they informed nor remunerated for that.

Thus, it is difficult for directors to say that the legal and business environment is conducive to developing their trust in online services when there is no revenue or reward generated by these services. FERA considers this consultation and the subsequent communication that will be issued by the EC at the end of the year as a very good opportunity to address this issue and take action in order to fully integrate audiovisual authors into the new commercial reality that is VOD services.

There are in Europe insufficient protective rules for audiovisual authors who in a hugely unfair economic arrangement usually assign their rights for a flat fee and are then deprived of the revenues generated by the commercial exploitation and the success of their works. There is a strong need to strengthen the contractual position of the audiovisual authors in order for them to be entitled to fair remunerations and to organize the efficient collection of these remunerations (See answer to questions 11 and 33).

4. Do you think that adequate protection of public interests (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?

In FERA's view, the respect for the integrity of the work and the authorship (moral rights) pertain totally to the protection of public interests. At this stage of the development of the online environment, the number of pirated sources that are disseminating audiovisual works create an insecure environment in which authors are not guaranteed against distortions of their works. Technologies of watermarking and protection of the integrity of the original work must be developed further and spread more widely.

¹ <http://www.npaconseil.com/data/ENG060619final.pdf>

Another protection of public interest concerns the protection of privacy. FERA deems that the exception to the right of reproduction of authors concerning private copying that associates a fair compensation for rights holders² is totally pertinent in the digital environment and guarantees both adequate protection of privacy and financial compensation of authors.

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?

Directors are in favour of the largest dissemination of their works and therefore support the greatest interoperability possible between works and devices. Interoperability is a legitimate goal that should be pursued by all stakeholders involved especially software companies and online providers. Nevertheless, the circumvention of technical protection measures is not an adequate answer to interoperability. Interoperability should be addressed at the source where the works are made available for the online exploitation and not by the end-user.

6. How far is cultural diversity self-sustaining 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?

FERA is very sceptical that cultural diversity could be more self-sustainable online than offline. In the NPA Conseil study already quoted, first indications on the origin of the content of the VOD services' catalogues already shows the dominance of American films in the absence of regulation on diversity: non European contents represent the majority of the offer on 12 of the 15 platforms that have been studied in depth, US films account for more than 50% on 10 and reach 70% to 90% of contents proposed by 6 providers and non national European films corner between 5% to 15% of the offer on 12 platforms. Those figures clearly demonstrate that there is need, in the new distribution networks, just as in the old, to encourage cross-cultural communication by promoting a healthy flow of works across national borders.

Cultural Diversity is a major objective of public policies because it is a value that is not taken into account by the market itself. The audiovisual market like other cultural sectors is driven by the visibility that is given to the works. Whether online or offline, the audience can hardly even consider wanting to see a film if it has no idea that this film exists. The market is driven by the offer.

In the special context of the European Union where nations decided to unite themselves and have to overcome their cultural differences to work together, it is of up most importance to foster cultural diversity. Accordingly, FERA welcomes the European Commission's proposal for a directive on Audiovisual Media Services (revision of the Television Without Frontiers Directive) that extends the scope of the directive to non linear audiovisual media services and provides for an article 3f that ask Member States to "*ensure that media services providers under their jurisdiction promote, where practicable and by appropriate means, production of and access to European works*".

In the spirit of recital 35 of the EC draft proposal and of the European Parliament resolution of September 2005³, FERA proposed to the Council and to the European Parliament to add to article 3f concrete measures to guarantee investment, visibility and accessibility to European works:

² Article 5.2.b of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

³ European Parliament resolution on the application of articles 4 and 5 of the directive 89/552/EEC (« Television without Frontiers »), as amended by Directive 97/36/EC for the period 2001-2002

- *To maintain adequate levels of investment in audiovisual works*

The quality and level of production of European audiovisual works will always be dependent on the investment by the broadcasters and distributors, be they linear or non-linear. It would be absurd to allow the new audiovisual media services to profit from European audiovisual works without investing a fair share of their turnover in the production of these works.

- *To maintain the flow of works across borders*

As the broadcasting quota of article 4 is not practicable for non linear services, video on demand services should reserve a minimum proportion of their catalogues for the inclusion of European works.

- *Visibility and accessibility to European works*

Visibility and accessibility to European works must be guaranteed through attractive exposure in the home page and the menus of the VOD services and in electronic programme guides.

Linguistic diversity is also a concern online, maybe more than offline because of the potential worldwide audience that lead many providers to offer services only in English, due to the impossibility to address all other languages. Nevertheless, audiovisual media commercial services that seek to develop their audience in a specific country are obliged to offer their services in the language of this country, especially for VOD services that have greater expectations than being solely niche markets.

In the film sector, the Media programme addresses this issue and help distributors to dub or subtitle films outside their country of origin.

7. If you compare the online content industry in Europe with the same industry in other regions of the world, what in your opinion are the strengths and weaknesses of our industry in terms of competitiveness? Please give examples.

Paradoxically, weaknesses in the European audiovisual industry's competitiveness are strengths in creativity. The main competitive weakness of Europe compared to homogeneous regions in the rest of the world is the absence of a European single market. Due to our cultural and linguistic differences, the single market doesn't exist and is not a reachable goal for cultural industries. The European audiovisual sector is made of national markets with lots of SMEs. No economic actor has the power to embrace Europe as a unique market in the absence of uniformity. Even big studios and American companies develop regional or national strategies in Europe. That is the reason why public programmes and policies are needed at the national and European levels to help audiovisual works and economic agents of this sector to develop themselves outside their country of origin.

Nevertheless, competitiveness is not the only objective of the European audiovisual sector. Like other cultural industries, the audiovisual industry supplies cultural goods and services that embody symbolic meaning, artistic dimension and cultural values that originate from or express cultural identities⁴. In this context, the more roots in a cultural identity an audiovisual work has, the more its expression is singular and original and distinguishes itself from products. That is the main strength of the European audiovisual industry: to create and produce original works that reflect the diversity of its components.

8. Where do you see opportunities for new online content creation and distribution in the area of your activity, within your country/ies (This could include streaming, PPV, subscription, VOD, P2P, special offers for groups or communities for instance schools, digital libraries, online communities) and the delivery platforms used. Do you

⁴ Definition taken from the UNESCO convention on the protection and the promotion of the diversity of cultural expressions, October 20, 2005.

intend to offer these new services only at national level, or in whole Europe or beyond? If not, which are the obstacles?

This question has already been partially answered. For European directors, all possible online distribution opportunities for their films, which respect the creative integrity of their films and their intellectual property rights (both moral and economic) are valuable to reach new audiences, especially beyond borders. Under this condition, in their position of creative people, they are totally neutral regarding the business model (as long as aspects such as interruptions for advertising are regulated) or the technical delivery platform used (apart from issues of quality).

If systems that guaranty the creative integrity and remuneration to rights holders across borders could be developed, FERA would be very supportive of VOD pan-European or multi-territorial services on a non exclusive basis that respect the offline release windows.

9. Please supply medium term forecasts on the evolution of demand for online content in your field of activity if available.

No comment.

10. Are there any technological barriers (e.g. download and upload capacity, availability of software and other technological conditions such as interoperability, equipment, skills, other) to a more efficient online content creation and distribution? If so, please identify them.

No comment.

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

Audiovisual authors have huge difficulties in securing revenue streams from all modes of exploitation of their works. These difficulties are exacerbated for online exploitations on one hand and foreign exploitations on the other hand. However, digital distribution actually creates an opportunity for easier collecting of payments to authors, whether directly or through agents like collective management societies, as the rights aspect of the sale price can be encoded into the transaction.

Today the problem is that the directors' remuneration regime varies from one country to another but in lots of European countries the director's only remuneration derives from the initial contract with the producer. Accordingly, directors mostly rely on the producers to be paid, except for the rights that are managed collectively whether by European law (cable retransmission), national law (Spain, Italy and Poland for broadcasting and also theatrical release in Spain) or professional contractual arrangements (France, Belgium and Bulgaria for broadcasting).

In order to secure revenue streams, directors claim for an unwaivable right to equitable remuneration when they transfer or assign their rights to a film producer. In theory, the transfer of rights should be limited in time and each mode of exploitation should be specified in the contract, with a right to an equitable remuneration attached. Nevertheless, because audiovisual authors are the weaker economic party, European law should provide that, notwithstanding the provisions of the contract with the producer, authors are entitled to be remunerated for each exploitation of their works.

Furthermore, the best way to secure these remunerations is to base them on the revenues generated by the service provider that offer the works to the audience, whatever business model is chosen (direct payment, subscription or advertising). This can be technically easily managed by digital online services.

This could be done for example for online rights by the extension of the mechanism of article 4 of the Rental and Lending Rights Directive of 1992⁵. The administration of the authors' online rights could be entrusted to collective management societies that represent audiovisual authors and that are able to negotiate on behalf of authors, to track the actual exploitations of works and to define strict rules on collection and distribution of royalties.

12. What kind of payment systems are used in your field of activity and in your country or countries you operate in? How could payment systems be improved?

No comment.

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

Directors are worried about pricing systems or commercial strategies that use audiovisual works as an attractive product to sell other services or devices, like Apple is doing with the music sold on iTunes for ipods or like some Internet access providers did with music in advertising campaign, or even DVDs sold with newspapers. These strategies are marketing campaigns that in the end lower the economic value of the works that are just seen as ancillary to the product or service sold.

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?

Audiovisual authors usually transfer all of their rights to the producer who finance a part of the film with international sales territory by territory, usually including all modes of exploitation. Accordingly, the foreign buyer is able to organise the exploitation of the audiovisual works on all possible media on the territory and the necessary communication that will benefit all modes of exploitations. In this context, broadcasters usually prefer to buy films that have already been released in theatres and that have benefited from mentions in the press.

Any online Europe-wide or multi-territory license should respect these business practices to finance films and windows releases where applicable or propose alternative production funding sources.

From the director's perspective, the creative business would benefit from Europe-wide or multi-territory licensing if the services offered at this scale are actively promoted at the equal scale (works available in all languages covered, marketing, advertising). It would not be acceptable to impose on rights holders online Europe-wide or multi-territory licensing if there is no real commercial activity behind it. Accordingly, there is no obstacle to Europe-wide licensing. The problem is not licensing but the fact that there is no corresponding business model behind for audiovisual works (no European homogeneity/uniformity, no single market, see answer to question 7).

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

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

⁵ Council Directive 92/100/ECC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property.

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

To our knowledge, there is no particular problem concerning licensing and rights clearance from the authors' side, as they are keen on the larger distribution of their works. Furthermore, the NPA study shows a great development of VOD services in Europe where the number of VOD services and the number of films in the catalogues are constantly growing.

Digital distribution actually creates an opportunity for easier collecting of payments to authors, whether directly or through agents, as the rights aspect of the sale price can be encoded into the transaction.

16. How should distribution of creative content online be taken into account in the remuneration of the rights holders? What should be the consequences of convergence in terms of right holders' remuneration (levy system, new forms of compensation for authorised / unauthorised private copy, etc.)?

The online distribution is a new mode of exploitation of the work (right of making available to the public as provided by the 2001 Information Society Directive) and should accordingly be remunerated. Rights holders should see a part of their income coming from this new mode of exploitation as the services are developing, whether through direct individual contracts with producers and/or distributors or collective arrangements through societies representing them. Recent events have demonstrated that collective arrangements can better negotiate additional revenues for rights holders than individual contracts in which producers usually include online exploitation in a package of rights without any separated remuneration.

To secure some income originating from online exploitation of their works, FERA is convinced that directors need the intervention of the European Union legislator to strengthen their position when they transfer or assign their rights to a film producer in order to entitle them to an unwaivable right to an equitable remuneration for all the exploitations of their works (see answer to question 11 and 33).

On the other hand, private copying is an exception to the right of reproduction, which allows people to make private copies from a legal source without authorisation from the rights holders. To compensate these copies that are out of the control of the rights holders, a fair remuneration is due to rights holders (provided by the 2001 Directive), organised at the member states' level through levies on the equipment and supports that are used for making these copies. This system has a threefold advantage:

- It respects the privacy of music and cinema lovers ;
- It guaranties a fair compensation to rights holders at the source of the creation and rewards the work which finds its audience ;
- It is adaptable to the real uses of private copying and the specificities of copying cultural habits in each Member States as it is organised at national level.

Convergence and the development of the possibilities to make more and more copies in the digital era have justified the extension of the levies to digital recording equipment and blank supports to continue to compensate rights holders. The 2001 Directive provides that this fair compensation should take account of the application or non-application of technological measures. Not only DRMs are not widely spread on digital distribution of works but they are not technically reliable as they are usually cracked very easily. They also, in practice, do not take into account private copying possibilities in their pricing systems and do not distribute private copying remuneration to rights holders.

Accordingly, the justification of the existence of private copying systems in 20 Member States out of 25 is still valid in the digital and online environment as in the analogue and offline one.

Furthermore, in the absence of any credible alternative, authors, artists and producers are fully supportive of this system as demonstrated by their declarations made on October 18, 2006 in Brussels in a press conference organised by Culture First! an alliance of rights holders organisations. Directors Cito Maselli, Bertrand Tavernier, Luc and Jean-Pierre Dardenne denounced the projects of the EC to phase-out private copying remuneration as an attempt to legalise a hold-up on their rights⁶. The creative community is very attached to this compensation that associates them to the life cycle of their works and that in most countries finance also cultural projects. They will oppose any proposal to attempt to reduce their fair compensation for private copies made.

17. Are there any legal or regulatory barriers which hamper the development of creative online content and services, for example fiscal measures, the intellectual property regime, or other controls?

FERA is shocked that intellectual property rights could be considered by the EC as an obstacle to the development of the making available of works online. Intellectual property rights (authors' rights and neighbouring rights) are a condition for any creativity. Without any protection of their rights, authors can't involve themselves in a creative process.

Furthermore, digital distribution actually creates an opportunity for easier collecting of payments to authors, whether directly or through agents like collective management societies, as the rights aspect of the sale price can be encoded into the transaction.

One should bear in mind that IP rights are what make the distinction between creative content and mere products or services. If the EC wants to develop creative online content and services, it should take IP rights as a basis for this development and develop trust in the value of European creativity.

18. How does the country you mainly operate in encourage the development of creative online content and services?

At the European level, directors would like to see five types of encouragement for creative online content:

- Protection of the level of investment in the audiovisual production, along with the artistic and cultural integrity of the work, from the new players in the audiovisual online services. Much of the current investment is currently provided by terrestrial broadcasters. Reduced budgets would lead to reduced quality;
- A guaranty of remuneration for authors when their works are used in order to associate them to the success of these new media;
- Mechanisms that promote European works on those services through the Audiovisual Media Services Directive (article 3f) in order to guaranty the presence and the continued production of European works online.
- An enhanced respect for authors' rights through awareness and education campaigns throughout Europe and support for more cooperation between all stakeholders online to fight against piracy.
- Development of digital standards for embedding rights payments in digital distribution.

19. Are "release windows" applicable to your business model? If so, how do you assess the functioning of the system? Do you have proposals to improve it where necessary? Do you think release windows still make sense in the online environment? Would other models be appropriate?

Release windows are part of the business model of the audiovisual sector and like most of the decisions related to the exploitation of films, the periods are decided at national level. In

⁶ "Culture under threat", declaration of the Culture First! Coalition (AEPO-ARTIS, AIDAA, AFI, BIEM, CISAC, Eurocinema, Eurocopia, EVA, ICMP/CIEM, FERA, EuroFIA, FIM, GESAC, GIART, IMPALA), October 18, 2006 and "Worrying rise in hostility towards copyright", October 13, 2006 in Financial Times.

most European countries, there are professional agreements with rights holders or commercial agreements tailored to each particular film to maximise its exploitation, its visibility for the audience and the revenues generated by each exploitation.

One of the reasons for the release windows system is to protect the theatrical release of a film as a special viewing experience on a big screen and as the starting point of its promotion. Nevertheless, for small films with a limited access to theatres and/or limited means of promotion, waiting to make the film available on video/DVD or online does not make sense when the film is no longer available in the cinema. That is why directors support flexibility and windows release schemes that allow films which are no longer available in the cinema to benefit from release on other modes of exploitation after a shorter period.

20. The Internet is currently based on the principle of “network neutrality”, with all data moving around the system treated equally. One of the ideas being floated is that network operators should be allowed to offer preferential, high-quality services to some services providers instead of providing a neutral service. What is your position on this issue?

As a principle, FERA would support network neutrality.

21. To what extent does your business model suffer from piracy (physical and/or online)? What kinds of action to curb piracy are taken in your sector/field of activity and in the country or countries you operate in? Do you consider unauthorised uploading and downloading to be equally damaging? Should a distinction be made as regards the fight against pirates between “small” and “big” ones?

Piracy is a plague for all rights holders and should be fought online, as it is offline. Not only does piracy rob rights holders but it also harms the value of creative works in the people's mind.

Measures to enforce IPR and prosecute pirates should be available throughout Europe and used by rights holders online with the active support of services' providers. Also, awareness and education campaigns should develop respect for IPR. The increasing availability of works on legal services should also divert the audience from pirated sources.

22. To what extent education and awareness-raising campaigns concerning respect for copyright contribute to limiting piracy in the country or countries you operate in? Do you have specific proposals in this respect?

FERA supports education and awareness-raising campaigns to increase respect for authors' rights and as a consequence to contribute to limit piracy. In the film sector, the European Charter for the development and the take-up of film online, May 23, 2006 has tackled very well the needs and proposals of the film sector in this respect.

23. Could peer-to-peer technologies be used in such a way that the owners of copyrighted material are adequately protected in your field of activity and in the country or countries you operate in? Does peer-to-peer file sharing (also of uncopyrighted material) reveal new business models? If so, please describe them?

No comment.

24. Is rating or classification of content an issue for your business? Do the different national practices concerning classification cause any problem for the free movement of creative services? How is classification ensured in your business (self-regulation, co-regulation)?

No comment.

25. Do you use Digital Rights Management systems (DRMs) or intend to do so? If you do not use any, why not? Do you consider DRMs an appropriate means to manage and secure the distribution of copyrighted material in the online environment?

26. Do you have access to robust DRM systems providing what you consider to be an appropriate level of protection? If not, what is the reason for that? What are the consequences for you of not having access to a robust DRM system?

27. In the sector and in the country or countries you operate in, are DRMs widely used? Are these systems sufficiently transparent to creators and consumers? Are the systems used user-friendly?

28. Do you use copy protection measures? To what extent is such copy protection accepted by others in the sector and in the country or countries you operate in?

29. Are there any other issues concerning DRMs you would like to raise, such as governance, trust models and compliance, interoperability?

DRMs are a tool to secure rights and business models. They are not an alternative to the rights. They only implement a strategy with technical means. There are great expectations on DRMs to offer security and monitoring online. All stakeholders are investing a lot in developing the tools they need. In this context, directors are very supportive of the development of DRMs that are able to track the uses of their works online on digital platforms and that organize their corresponding remuneration.

Nevertheless, it appears that DRMs are not very robust for the moment and suffer from hackers. Accordingly, it would be a mistake to let all the online services architecture rest on DRMs without assessment of their real performances. For instance, attacks against private copying levies on recording equipment and supports to remunerate rights holders are based on the presumption that DRMs deal with private copying, which is totally false. Technically, DRMs authorise or prevent copying but when they authorise copies, they don't remunerate rights holders for the subsequent private copies made after a download.

Copy protection measures that prevent copying should be used with caution in the digital environment where people are used to copy in the framework of the exception for private copying. Some legal platforms decided to sell music without any copy protection (ex. eMusic) and others are thinking of it⁷. In France for example, the law implementing the 2001 Directive on the Information Society has forbidden copy protection measures on digital TV signals in order to guarantee to the audience the benefit of the private copying exception.

Furthermore, DRMs and copy protection measures raise some concerns in terms of interoperability. Interoperability is a policy objective that should be kept in mind to foster user-friendly digital services and content.

30. In which way can non-commercial services, such as opening archives online (public/private partnerships) complement commercial offers to consumers in the sector you operate in?

Non-commercial services are a great complement to commercial offers. By definition, they originate from public initiatives and are financed by public funds. They aim at developing access to culture for all or at making available the cultural heritage administered by public institutions (audiovisual archives for example).

The rationale for non commercial offers is to concentrate on what commercial offers can't provide. In the film sector for example, one could imagine VOD platforms for films that are not available on commercial offers. FERA would very much support such an initiative.

31. How could European equipment and software manufacturers take full advantage of the creation and distribution of creative content and services online (devices, DRMs, etc.)?

⁷ « VirginMega veut vendre de la musique pour tous les baladeurs », Le Figaro, October 18, 2006.

Studies have showed that the existence of levies in most of the European countries has no impact on sales of equipment as the levels of sales are comparable to countries where there are no levies.

The way this question is formulated reveals that despite their already big profit, equipment and software manufacturers have complained to the European Commission about their situation in Europe with private copying levies on equipment to remunerate rights holders.

In FERA's opinion, even with private copying levies, equipment and software manufacturers are taking great advantage of the development of creative content and services online by selling lots of equipment, devices and software indispensable for accessing and copying digital creative content. The market of digital equipment and software is a flourishing one. The price of this equipment for the consumer and the profit of these companies are so huge that their campaign against private copying remuneration of rights holders in Europe is a big shame (see answer to question 16). Furthermore, this campaign raise public interest concerns as it emphasizes the growing fear of the creative community that people could consider technology as more important than the creative content.

32. What could be the role of national governments / regional entities to foster new business models in the online environment (broadband deployment, inclusion, etc.)?

33. What actions (policy, support measures, research projects) could be taken at EU level to address the specific issues you raised? Do you have concrete proposals in this respect?

FERA has tried with its contribution to highlight the positive potentialities of film online and to draw the best environment for European audiovisual works and directors to benefit from it. Accordingly, directors propose the following actions to be taken at EU level to address the issues raised:

1. New legislation to associate audiovisual authors to the revenue generated by their works online

The EU legislator should strengthen the position of audiovisual authors in order for them to benefit from a guaranty of remuneration when their works are used. This could be done according two alternative ways:

- by providing an unwaivable right to an equitable remuneration when audiovisual authors transfer or assign their rights to a film producer or,
- by providing that notwithstanding the provisions of the contract with the producer, authors are entitled to be remunerated for each exploitation of their works, including the online exploitation.

2. Measures to promote European works online in the Audiovisual Media services Directive

The revision of the "Television Without Frontiers" Directive in a new Audiovisual Media services Directive should confirm the principle of promotion of European works on linear and non linear services (article 3f) and enforce this principle on non linear services through specific mechanisms that provide for:

- a minimum investment in proportion of the turnover of the services in European productions,
- a minimum proportion of European works in video on demand catalogues available;
- the attractive presentation of European works in electronic programmes guides.

The aim of these measures is to ensure the presence and the continued production of European works online.

3. European education and awareness campaigns to support the value of creative works and respect for authors' rights

The high level of piracy and the lack of recognition of the value of creative works from some part of the audience but also from some commercial users of works emphasize the need already identified in the European Charter on Film Online for education and awareness campaigns at the European level.

4. Maintaining the private copying remuneration schemes in the absence of any credible alternative to compensate rights holders

FERA is very worried about the attacks against private copying schemes. The deletion of private copying schemes would only benefit the electronic and software manufacturers to the detriment of rights holders and consumers and to the European Culture in general.

One year after the adoption of the UNESCO convention on the protection and the promotion of the diversity of cultural expressions, cutting one source of remuneration for the creative community and cultural projects would be a true contradiction and would send a very bad signal on the real perception of the value of culture and creative content by the European Union.