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COMMISSION STAFF WORKING PAPER

on certain legal aspects relating to cinematographic and other audiovisual works

Certain legal aspects relating to cinematographic and other audiovisual works

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1. INTRODUCTION

1.1. Aims of the initiative

The world today is one of rapid change, accelerated by the advent of new technologies, which will have a far-reaching impact on society. The media are at the heart of these changes because of the central role they play within society, both reflecting and shaping such change. They are the principal vector for the transmission of our European cultural identities. Cinema is a key player in this scenario, reflecting the lives, hopes and fears of Europe's citizens. It represents both a source of entertainment as well as a means of diffusing our respective values.

In terms of economic activity, the 1990s marked the renaissance of cinema in Europe: total cinema admissions in Europe rose from 760.45 million in 1997 to 814 million in 1998¹. This increase would appear to be due at least in part to the growth in the number of cinema screens in Europe (multiplexes) as well as improved facilities at cinemas. There is an upward trend in the circulation of "non-national" films within the Community, reflecting the integration of the provisions of the Television without Frontiers Directive into national legislation, and the success of the MEDIA programme. In addition, recent figures show that TV viewing in Europe has increased by 3 minutes per day in the past year. In parallel the video market in Europe is continuing to grow in value terms, notably thanks to the spectacular penetration of DVD. Furthermore, the market for video games, whether played on a PC or a television monitor, is also undergoing explosive growth.

The aim of the present document is to launch a debate on a number of legal issues related to the European audiovisual sector, and, in particular, to highlight those aspects which could impact on the development of a competitive cinema industry in Europe. This concerns notably barriers to the circulation of European audiovisual works and barriers to the provision between Member States of filmmaking services, which would hinder the promotion of cultural diversity and prevent the sector from taking full advantage of the benefits of the Internal Market. These issues need to be considered in the light of current market and technological developments that are creating both new opportunities and challenges for the different players in this sector, from authors, artists and film producers to cinema operators and television broadcasters.

The impact of new technologies and of the Internet is apparent in this sector, although uncertainties remain as to the scope of the impact. For example, the question of the creation of new "on-line" rights has implications for a number of different actors in the value chain. The changes in the use of digital technologies may also have a positive impact on employment in the sector, requiring new skills and training.

¹ Screen Digest, September 1999. In 1988, total admissions in Europe were down to 592.72 million.

The European audiovisual sector, and in particular broadcasting, has been the subject of specific regulation in the general interest. Regulation has been based on certain principles, which are common to all Member States, such as freedom of expression and the right of reply, political pluralism, protection for authors and their works, promotion of cultural and linguistic diversity, protection of minors and of human dignity, consumer protection. In addition, financial and other support instruments have been implemented to promote the creation, production and distribution of European audiovisual works.

In a fast evolving context, it is widely accepted that there is a need to look more closely at the audiovisual sector and to consult widely with the industry professionals both to deepen the Commission's knowledge of the sector and to ensure that the policies adopted are the best suited to meet Community objectives². In the Communication on the principles and guidelines for the Community's audiovisual policy in the digital age, adopted in December 1999³, the Commission announced its intention to produce a further Communication on Legal Aspects relating to the Cinema Sector. This document is the first step in that process. Its purpose is to give all the interested parties an opportunity to make their views known before the Commission adopts a formal Communication.

The document covers a number of issues such as the definition of a European work, and the various approaches in Europe to the legal registration of films. The aim of the Community's audiovisual policy is to increase the circulation of European works, to strengthen the structure and competitiveness of the European audiovisual sector, and to promote cultural diversity, both within and between the Member States. A wide range of measures could be used to achieve this aim. The issues raised at this stage are not intended to be a complete or exhaustive list but rather reflect different points raised by the industry that they consider to have an impact on the circulation of European audiovisual works. The intention is to launch a debate on these issues to assess their importance and to evaluate the need for action, whether at a regional, Member State, Community or International level.

This initiative does not cover issues of copyright and related rights, where such issues are already covered by Community law. As has been stressed in the Communication on the principles and guidelines for the Community's audiovisual policy in the digital age, in this field appropriate action is already underway. It is now important that the draft Directive on Copyright and Related Rights in the Information Society will be rapidly adopted and implemented by Member States. This Directive updates the protection of authors, performers, broadcasters, film producers and phonogram producers in the digital environment and implements the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty adopted in December 1996, whilst ensuring at the same time the proper functioning of the Internal Market.

² See for example speech of Commissioner Reding to the European cinema forum in Strasbourg on 14 November 2000.

³ 14.12.1999 COM (1999) 657 final.

1.2. Context of the initiative

This initiative needs to be seen in the context of the market structure of the sector. The sector has changed rapidly in recent years, both in terms of technology but also through developments in the market, particularly in respect of distribution.

This initiative responds to the need for a coherent approach to European production, completing the existing picture comprising the "Television without Frontiers" Directive⁴ (TVWF Directive) and the MEDIA Plus programme⁵. The TVWF Directive establishes a legal framework ensuring the freedom to provide television broadcasting services in the Community. This Directive also contains provisions of importance to European audiovisual production such as the definition of a European work. The MEDIA Plus⁶ programme of support measures at European level, which follows the Media I and Media II programmes complements and builds on actions by Member States by supporting training, project development and the distribution of European works.

In addition, at the end of last year, the European Commission, together with the European Investment Bank and the European Investment Fund, launched a new strand of activity to the European audio-visual industry so as to reinforce its financial basis and to accelerate its adaptation to digital technologies. The i2i-audio-visual initiative supplements the Media plus programme for 2001-2005 and focuses on the improvement of the industry's competitiveness and the promotion of the development of European audio-visual content. The volume of the financial programme totals 500 million Euro⁷.

At a pan-European level, actions have been taken in the context of the Council of Europe, in particular the Council of Europe Convention on Cinematographic coproduction⁸, designed to promote the development of European multilateral cinematographic co-production, to safeguard creation and freedom of expression, and defend the cultural diversity of the various European countries. The convention tries to simplify procedures and production on the basis of criteria established by the Eurimages fund. A new draft Convention for the protection of the Audiovisual Heritage should be adopted and open for signature shortly.

EURIMAGES⁹ is the Council of Europe fund for the co-production, distribution and exhibition of European cinematographic works. Set up in 1989 as a Partial Agreement, it currently has 26 member States. Its aim is to promote the European film industry by encouraging the production and distribution of films and fostering co-operation between professionals.

⁴ Directive 89/552/EEC on the co-ordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, as amended by Directive 97/36/EC of the European Parliament and of the Council; OJ EC L202/60 of 30.7.1997.

⁵ Adopted by the Culture Council 23.11.2000.

⁶ http://europa.eu.int/comm/avpolicy/media/index_en.html

⁷ <http://www.eib.org/pub/press/2000/sp021.htm>

⁸ <http://conventions.coe.int/treaty/en/Treaties/Word/147.doc>. This Convention was adopted in 1992 and entered into force in 1994.

⁹ <http://culture.coe.fr/Eurimages/>

This document will be followed by a three month consultation period to enable all interested parties to comment on the issues raised in the form of written contributions, and public hearings will be organised to facilitate debate on the various subjects. All comments will be posted on the website of DG Education and Culture¹⁰. Once the consultation has been completed, the Commission will adopt a Communication¹¹, which will set out the conclusions of the public hearings and contributions, together with the Commission's policy orientations and any proposals resulting from the consultation exercise.

2. THE SCOPE OF THE CONSULTATION

The consequences of the convergence phenomenon are being felt throughout the different media markets. The development and application of digital technologies is impacting on the production, transmission and distribution of content. For example, the development of digital technology has an influence on the cost structure of film production, in particular the relative share of post-production; it also facilitates the creation of different language versions of productions.

In the context of the Information Society and the creation of "content" for multiple platforms it becomes more and more difficult to distinguish between cinematographic and other audiovisual works. A coherent approach for all type of audiovisual content is also consistent with the results of the consultation on convergence and in particular with the principle of technological neutrality¹².

The scope of the consultation launched in this document is therefore all audiovisual content production, for all means of distribution. In this respect, the question arises as to whether it is possible to distinguish between cinematographic works and other categories of audiovisual works, in particular in the light of technological convergence, and if this is the case, what would these categories be?. It is clear, however, that certain of the issues raised will be of more significance to certain types of "content". The document therefore differentiates between different categories for the different issues in accordance with the following chart:

¹⁰ Unless a specific request is made for confidentiality.

¹¹ Announced in the Commission Communication on principles and guidelines for the Community's audiovisual policy in the digital age COMM(1999) 657 final.

¹² This is also logical in view of the definitions of cinema/TV production that differ at Member State level.

Cinematographic works	Other audiovisual works¹³
<i>Theatrical exhibition</i>	
<i>Videos (cassettes and DVDs)</i>	
<i>Pay per view TV</i>	
<i>Pay per channel TV</i>	
<i>Free to air TV</i>	
<i>On line services, including Pay per view</i>	

3. ECONOMIC DIMENSION

The European audiovisual sector is not only of major importance with respect to its cultural objectives, i.e. the safeguarding of the European cultural values and our cultural diversity, but also in economic terms. In 1998, the European audiovisual market was estimated at 64.6 billion € (+ 10.6% vs. 1997) or 0.92% of the GDP and employed around 485.000 people¹⁴. Germany and the UK remain the largest national markets (25% each) followed by France (19%) and Italy (10%)¹⁵.

As regards the different subsectors, the **theatrical exhibition of films** (gross box-office) only ranks fourth in value, with a total market of 4.2 billion € (+13.8% vs. 1997). However, this does not reflect the importance of theatrical exhibition in shaping further forms of exploitations (additional turnover via Pay-TV, DVD/videocassettes and Free-TV). The most important subsector is **radio and television broadcasting**, representing roughly three quarter of the overall value of the EU audiovisual market with 48.0 billion € in 1998 (+9.1% vs. 1997) at consumer level. The second subsector is **video retail**, totalling 7 billion € (+ 4.5% vs. 1997), followed by **entertainment software** (5.4 billion €, + 35% vs. 1997)¹⁶.

The number of cinema films produced in the EU has been constantly progressing since 1995 when around 460 works were produced (of which around 140 EU coproductions). In 1999 the number of film produced was estimated at about 630 units. France was the largest producer with 148 films (national and majority co-productions) followed by Italy (108) the UK (80) and Spain (around 70)¹⁷.

The production of TV fiction has also progressively increased in the recent years: for the 5 largest markets the volume of national fiction grew from 4118 hours in 1996 to 5193 hours in 1999, with Germany and the UK as the largest producers (1828 and

¹³ For example, the draft Council of Europe Convention for the protection of audiovisual heritage distinguishes between “moving image material” and “cinematographic work”.

¹⁴ Source: European Audiovisual Observatory

¹⁵ Source: European Audiovisual Observatory

¹⁶ Source: European Audiovisual Observatory

¹⁷ Source: European Audiovisual Observatory

1324 hours of programmes in 1999, respectively¹⁸). In these two countries independent productions (around 46% and 38% respectively) remain a minority in value terms vis à vis the productions carried out by TV stations. In the other major EU markets – Spain France and Italy – independent productions cover more than 80% of the market¹⁹. At EU level, TV broadcasters are the main players while a large number of small film production/distribution companies are involved in the shooting of a small number of works.

Despite considerable efforts of the European industry, the Commission and the Member States, films from the United States are still predominant with a market share (gross box-office) of 69.9 % in 1999 (a first estimate for 2000 based on 5 important markets show even a market share of 71.5%) vs. 71.6% in 1996. The market share of national films was estimated at 17.8% in 1999 (vs. 17.1% in 1996), while that of EU non-national films represented 11.3 % of the market (vs. 9% in 1996)²⁰.

The marketing of broadcasting rights (pre-sales and post-production sales) has a growing importance in the economy of film productions. However, good performances during the theatrical release period remain highly important since they strongly influence the value of a film with respect to the various “windows” of the exploitation chain. Some sources estimate that between 40% and 50% of the gross receipts of the box-office (4.2 billion € in 1998) is paid to the distributors, who in turn pay a proportion of this to the producers²¹.

In the case of video (tapes and DVD), distributor revenues represented on average about 51% of the EU market at consumer level (6.3 billion € in 1999)²². Given the relatively high costs of editing audiovisual content on cassettes and DVD, particularly taking into account the fragmented nature of the European market, the share of revenues for the producers only represents a small proportion of this amount.

Finally public support and TV broadcasting paid an important role in securing funding for domestic productions in addition to commercial sources.

While the European audiovisual sector constitutes an attractive market with good business opportunities, it appears that despite the industry's, the Community's and the Member States' efforts, EU operators are still not able fully to benefit from these opportunities. Also, despite of the growth rates of DVD sales, the European film industry seems not yet fully to benefit from the business opportunities of this new media. An increase in intra-community trade is likely to improve the profitability of European film production.

¹⁸ Source: Eurofiction

¹⁹ Source: INA, Economie de la fiction télévisuelle en Europe

²⁰ Source: European Audiovisual Observatory, LUMIERE database

²¹ Source: Mediasalles

²² Source: IVF, Screendigest

4. ISSUES TO BE CONSIDERED

The issues that are raised in this section of the document have been identified as important by the industry, and are considered to impact on the Community's audiovisual policy objectives (as set out above in section 2). The issues raised should not be considered to be an exhaustive list of issues that impact on the European audiovisual sector. Similarly, their inclusion in the document does not signify that action is envisaged in these areas. The aim of the document is to focus debate on certain relevant issues to assess the needs of the sector and to enable conclusions to be drawn concerning any possible need for action at a Community level.

4.1. The definition of a European work;

4.1.1. Definitions

The definition of a European work has been identified as an important issue for all types of production. Different definitions exist at international, Community and national levels. A clear issue in this respect is whether there is a need for an agreed definition at European level, what the level of detail of that definition should be, and whether it should be binding for the various uses envisaged. Current definitions include for example:

- Council of Europe Convention on cinematographic co-productions²³
- EURIMAGES²⁴
- The Television without frontiers Directive²⁵
- MEDIA programme²⁶

The Council of Europe Convention on Cinematographic coproduction sets out in Annex II the criteria for determining whether a cinematographic work is "European".

In order to obtain co-production status, the work must involve at least three co-producers, established in three different Parties to the Convention. The participation of one or more co-producers who are not established in such Parties is possible, provided that their total contribution does not exceed 30% of the total cost of the production.

The Television without frontiers Directive sets out a definition, which is the reference act for the guidelines of the MEDIA programme. This definition has been implemented at Member State level as required by the TVWF Directive. The European Union has chosen an approach based on the concept of a producer or a production company. This signifies that where the producer does not finance the

²³ <http://conventions.coe.int/treaty/en/Treaties/Word/147.doc>

This Convention was adopted in 1992 and entered into force in 1994.

²⁴ <http://culture.coe.fr/Eurimages/>

²⁵ Directive 89/552/EEC on the co-ordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, as amended by Directive 97/36/EC of the European Parliament and of the Council; OJ EC L202/60 of 30.7.1997.

²⁶ http://europa.eu.int/comm/avpolicy/media/index_en.html

production, no account is taken of the source of the financing. In particular, the notion of co-producer share of the total cost does not imply that the actual financing of this share is supplied by the producer. It should be noted that the source of financing may not be apparent from a production budget but will have implications for the control of productions. There is a clear difference between co-financing and co-production; co-producers are responsible for the production whereas co-financiers invest but their objective is to profit from their investment. A further aspect of this approach is that these criteria are basically economic in nature.

The Eurimages programme uses similar criteria in terms of assessing the European character of a production but adds further criteria related to the financing and the control of rights

At Member State level a number of different definitions exist for “European works”. It has been argued that the differences could create barriers to the circulation of European productions. These definitions have been adopted at Member State level both to implement the provisions of the TVWF Directive and for the application of national support schemes for audiovisual works.

Useful input for this discussion has come from a number of sources including FERA²⁷. FERA is an organisation representing European film directors, which recently submitted a draft proposal for a Cinema Directive to the Commission²⁸. This draft covers a number of issues, including the definition of a European work. The proposal draws on the definitions laid down in Eurimages and in the Council of Europe Convention on Cinematographic coproductions.

4.1.2. *Application of these different definitions*

The definition in the TVWF Directive is used for the transmission time obligations under the TVWF Directive and provides the legal basis for the guidelines under the MEDIA programme. Other systems such as those described above co-exist with these instruments and a number of definitions are used or have been proposed to simplify the situation for operators. These definitions are applied to decide on the granting of financial support in the Member States and also to the handling of co-production agreements.

Questions to be considered in relation to the definitions/guidelines in existence:

- **Do the differences between the different definitions for “European works” adopted at Member State level create barriers to the transfrontier production of European audiovisual works and to their circulation?**
- **Do the criteria in the Television without frontiers Directive and the guidelines under the MEDIA programme, as applied at national level provide sufficient legal certainty for operators?**
- **Would there be an added value in the adoption of a more detailed definition in Community law?**

²⁷

<http://www.fera-matin.org/fera/default.html>

²⁸

This draft was presented at the European cinema forum in Strasbourg on 14 November 2000.

- **In the affirmative, which criteria should be adopted (e.g. "cultural" aspects or other elements such as the sources of financing and/or control of rights)?**
- **Should such a definition of a European work be used in contexts other than that of the Television without frontier Directive and the MEDIA programme? (e.g., application of Community competition rules)**

4.2. The definition of an independent producer

A number of different definitions of an “independent producer” exist across Europe. The issue raised concerns the question of “independence” and the criteria that could be used to establish whether a producer is independent: Should this be assessed by reference to broadcasters or in a more general way? Should account be taken of dependency in respect of other entities (e.g. operators of electronic communications transmission and access services such as telecom or Internet portal operators)?

At Member State level a number of different definitions exist for “independent production”. For example, France is the only Member State that establishes a time limit for the retention of rights by broadcasters to independent productions. It has been argued that the differences could create serious barriers to the circulation of European productions.

Many Member States use the notion of independent producer to delimit the beneficiaries of National State aid schemes. National definitions of independent producers that do not reflect the technical development in the sector (digitalisation, increased competition between different means of distribution (cable, satellite, Internet, etc.) might give rise to undue distortion of competition if the independence criteria is not neutral with respect to all potential competitors in any given relevant market.

The Television without frontiers Directive also includes an obligation relating to independent production, or more specifically “for European works created by producers who are independent of broadcasters”. No definition is given within the Directive²⁹.

Questions to be considered:

- **Do the differences between the different definitions for “Independent production” adopted at Member State level create barriers to the transfrontier production of European audiovisual works and to their circulation.**
- **Would there be an added value for a definition at a European level?**
- **If so, which criteria should be used?**
- **Should such a definition of an independent producer at a European level be used in the context of the application of Community competition rules, in particular in connection with the granting of State aid?**

²⁹

Recital 31 provides only that, in defining the notion of “independent producers”, Member States should take appropriate account of criteria such as the ownership of the production company, the amount of programmes supplied to the same broadcaster and the ownership of secondary rights.

4.3. Protection of heritage and exploitation of audiovisual works

A number of different issues have been raised concerning the need to safeguard Europe's audiovisual heritage as well as to promote public access to it, taking advantage of the new digital technologies.

This section looks at three different issues which have been identified by the industry as potential areas of added value for action at European level in terms of rights protection, transparency, and effective exploitation: the legal deposit of audiovisual works, the possibility of creating a European register (perhaps by linking national registers) and other possible forms and use of databases with a commercial aim.

4.3.1. *The legal deposit of audiovisual works*

The Council of the European Union adopted a Resolution on conservation and enhancement of European cinema heritage in May 2000³⁰. In this Resolution the Council called on the Commission to take account of the specific needs of this particular form of cultural legacy, and to support and encourage a transnational study on the situation facing European cinema archives. The Commission has hosted meetings on this subject to bring together the relevant parties to discuss the issue.

At a pan-European level, the Council of Europe has prepared a draft European Convention for the protection of the Audiovisual Heritage, which should be adopted shortly. This Convention will provide for a compulsory legal deposit of "moving image material forming part of its audiovisual heritage and having been produced or co-produced in the territory of the Party concerned".

It should be noted that the FIAPF³¹ supports a "voluntary" deposit for cinematographic works³².

The establishment of a scheme in the context of the European Union would also aim to safeguard European cultural heritage in a more effective way because of the legal certainty resulting from Community law. It would signify the depositing of a "physical" copy of audiovisual works. This would ensure that all audiovisual works were preserved for future use.

Questions:

- **Is there a need for regulatory intervention, or the promotion of self-regulation (or co-regulation³³) in order to improve the preservation of audiovisual heritage in the European Union?**
- **Would there be an added value in a European approach as opposed to a national or an International approach (e.g. in terms of feasibility and/or legal certainty)?**

³⁰ 2261 Council Meeting (16 May 2000) Press 154 – Nr 8394/00

³¹ International Federation of cinema producers associations.

³² General regulations concerning trust deposit of motion picture prints with film archives (1971)

³³ COM (2001) 130 final

- **Should this be a compulsory requirement, or a voluntary requirement possibly linked to certain incentives (e.g. support mechanisms, authentication of rights, etc.)?**
- **Which types of audiovisual works should be covered by this requirement and for what reasons (e.g. cinematographic works only, audiovisual fictions only, etc.)?**

4.3.2. *The creation of a registration scheme*

Differing opinions exist as to the value of a registration scheme for films and other audiovisual works. At the moment, only a minority of Member States has put in place such a register. An initiative to create an international register in the context of the World Intellectual Property Organisation (WIPO) has only met with limited success.

A European initiative in this domain could include the creation of a European Register or the obligation to create and interconnect national registers, as well as the harmonisation of the information contained in such registers. This could be seen as having a similar function to a land registry scheme, in terms of identification of different European audiovisual works. It could be argued that such a scheme encourages transparency and, in this way, helps protect rightholders and facilitate the circulation of European productions. This might be particularly important in view of the complexity of the industry and the value of productions.

The establishment of such a scheme would not impact on questions relating to different rules on authorship or on the use of rights in line with copyright rules, but could aim to provide certain information relating to the audiovisual works registered.

Questions:

- **Does the current state of play of registration obligations in Europe hinder the exploitation and circulation of European productions?**
- **Would there be an added value in a European approach as opposed to a national or an International approach (e.g. in terms of feasibility and/or legal certainty, transparency, and protection of rightholders)?**
- **What type of information would have to be included in the national/European Register, for which type of audio-visual works and for what reason?**
- **Should certain standardisation systems (e.g. ISAN³⁴) be recommended/made compulsory?**
- **What would be the advantages/disadvantages of creating a European Register or a Network of interconnected national registers?**
- **Who should be responsible for registration (e.g. producer/distributor etc.)?**

³⁴

<http://www.nlc-bnc.ca/iso/tc46sc9/isan.htm>

- How would such a European Register/Network of national registers be financed and how could the information be updated/accessed?**

4.3.3. *Rightholders database*

The market for European audio-visual works is still fragmented despite the Television without frontiers Directive and other instruments. Rights are still most often sold by territory, and the information available varies from Member State to Member State as to who holds the rights for the various territories and type of exploitation. Community wide availability of relevant data might fulfil an expressed need for information in a fragmented market where such information may be difficult to obtain.

This database would have a different purpose to the registry proposed above, enabling the identification of “rights” or “licensing” agreements across the European Union. The purpose of this database would be to create a "commercial" scheme whereby rightholders or those holding licences or other authorisations for the use of productions would be able to market those rights across Europe.

Questions:

- Is there a lack of transparency regarding rights ownership, which contributes to the fragmentation of the European market? Does this affect the competitiveness of the European audiovisual sector and the development of cultural diversity in the European Union and its promotion in other regions of the world?**
- Would there be an added value of a European approach as opposed to national or an international approach (e.g. in terms of feasibility and/or legal certainty)?**
- Would the creation of a database of rightholders, with the possibility to market rights (a type of "brokerage house") contribute to the exploitation and circulation of audiovisual works in Europe?**

4.3.4. *The exploitation of rights*

The issue of the exploitation of rights has been raised by a number of interested parties, notably within the framework of the development of new services and the need to provide content for them. As a principle, the exploitation of protected works requires the authorisation from their rightholders and generates remuneration for them. The legal framework for the transfer of rights permitting such exploitation differs across Europe, as do the modalities of such remuneration.

In order to acquire the rights of the works and to remunerate their rightholders, the identification of such rightholders is essential to the system, especially for those works which precede the establishment of registration obligations. An important issue is whether difficulties in identifying rightholders in certain cases could create obstacles to the exploitation of audiovisual works and therefore, whether a mechanism should be put in place to address this concern.

This section raises questions about the opportunity and possibility of a specific mechanism to identify rightholders with regard to older audiovisual works and the setting up of systems allowing for the exploitation of content whose rightholders cannot be identified. This might include mandatory negotiation framework with collecting societies or setting up a fund allowing for adequate remuneration should rightholders become known.

Questions to be considered in respect of the identification of rightholders:

- **Are there difficulties in identifying rightholders in certain cases which create obstacles to the exploitation of audiovisual works?**
- **What would be the added value of a European approach (as opposed to a national or an International approach)?**
- **What would be the most efficient ways of reaching these objectives (taking into account the advantages/disadvantages of the different options, e.g. negotiation with collecting societies, creation of a fund, etc.)?**
- **How would the assessment of remuneration be carried out and by whom?**

4.4. Questions related to the different modes of exploitation of audiovisual content including on-line rights.

This issue concerns the chronology of windows for the economic exploitation of films in Member States of the European Union, which is based on agreements between the relevant economic actors³⁵. Taking the theatrical release as starting point, in most cases videotapes/DVDs are released after a 6 months period, pay-per-view broadcasting after 12 months, pay-TV broadcasting after 18 months and free to air TV after 2 years. However, especially for broadcasting by pay and free TV, substantial differences exist between the Member States³⁶. With the development of specialised film channels, a second pay-TV window is growing in importance.

The distribution of European production on-line is creating new issues in terms of defining on-line and new media rights. This has implications for different actors in the value chain (bundling of rights etc). Certain players consider that there is a need for new action regarding the negotiation of such rights to enable all players equitably to benefit from the new media environment.

The only obligation in Community law is that Member States shall ensure that broadcasters under their jurisdiction do not broadcast cinematographic works outside periods agreed with the rightholders³⁷.

³⁵ Supplemented by legislation in Germany, France and Portugal.

³⁶ According to Screen Digest European Video Yearbook 2000-2001, broadcasting on Free-to-air television normally takes place between 12 months (Finland) and 36 months (France) after initial release.

³⁷ Article 7 of the amended Television without frontiers Directive; the original text of the Directive took as the "first" window, the first showing of a film in any Member State. This meant that Member States had no flexibility as regards films created for video or other media platforms

The time limit fixed by legislation in certain Member States for the exploitation of rights by broadcasters of independent productions might reinforce the adverse effects on competition of State aid schemes in which the definition of an independent producer does not reflect independence from all potential competitors on the audiovisual market. This might notably be the case when broadcasters financing aid schemes by parafiscal levies or compulsory investments are obliged to cede the rights of works they have financed to "so-called" independent producers that, because of a national definition of independence, are controlled by competitors.

Questions to be considered in relation to media windows and rights include:

- **Does the lack of harmonisation in terms of media chronology create impediments to the exploitation and circulation of European audiovisual works, taking into account the economic and technological changes in the sector (e.g. opportunities for pan-European distribution offered by on-line exploitation or DVDs)?**
- **What would be the added value of regulatory intervention or the promotion of self-regulation (or co-regulation) at European level?**
- **What would be the most appropriate instrument (e.g. Community law, guidelines, etc.)?**
- **Is there a need to consider rights by “categories” (for example – by categories related to the type of work or the type of distribution – TV, Internet etc.)?**
- **Is there a need for regulation on time limit for exploitation of rights by broadcasters?**

4.5. E-cinema

E-cinema signifies electronic delivery to a cinema screen. Technical elements to constitute an entire value chain for e-cinema are either available or will become available in the foreseeable future (i.e. from the camera via electronic delivery to cinema screens). High definition video will play an increasing role in feature film origination; standard definition video is already being used, often with 16:9 wide-screen aspect ratio. Certain elements such as the transmission of films to cinemas are not standardised. The standardisation aspect of e-cinema is currently being considered by the Commission's services.

This issue also impacts on the cost/benefit analysis for film distributors and cinema owners. What are the implications of digitalisation for the main players in the value chain, both in terms of production and distribution?

Questions in relation with e-cinema:

- **Is there a need for European action, for example in respect of standardisation or other public policy issues?**
- **If so, what sort of action should be envisaged?**

4.6. Other regulatory measures to improve the circulation of films

4.6.1. Tax issues

This issue has been raised in the context of differences that exist between different cultural “goods” within the Member States. For example, books are subject to a reduced rate of VAT, whereas audiovisual works (such as videocassettes and DVDs) are subject to VAT at the normal rate.

Another point that has emerged is the effect of the different financial incentive schemes that exist within the Member States, and their positive impact on production. There is a wide range of financial measures in favour of the cinema industry in the Member States, be it via grants or subsidized loans, or fiscal advantages such as tax reductions.

Questions in connection with such initiatives include:

- **Is there a need for action at European level in respect of the fiscal measures (concerning both direct and indirect taxation) in force in the Member States support the production and circulation of audiovisual works, and films in particular ?**
- **In the affirmative, what modification of the present fiscal measures could more efficiently and effectively improve the production and circulation of audiovisual works, and films in particular?**

4.6.2. Rating

Audiovisual works are generally subject to rating of their content, indicating for which age ranges they are considered suitable. The different rating systems applied both between Member States and within Member States for different types of exploitation of audiovisual works can constitute an impediment to the circulation of audiovisual works. In a number of Member States, even where films have been previously released and classified, the import of video is subject to further rating which create additional expenses (need to go through a separate administrative procedure per country and often need to manufacture specific packaging and sometimes specific versions of the work). This must be contrasted with the principle of regulation by the country of origin adopted in the Television without frontier directive, with a limited possibility of exception for certain seriously harmful content.

In its Report on the Recommendation on the protection of minors and human dignity³⁸, the Commission has stressed the need to have a coherent approach across all media.

³⁸ Evaluation report from the Commission to the European Parliament and the Council on the application of Council Recommendation of 24 September 1998 concerning the protection of minors and human dignity, COM(2001)106, 20/2/2001, http://europa.eu.int/comm/avpolicy/regul/new_srv/pmhd_en.htm

Questions in connection with rating:

- **Does the coexistence of uncoordinated rating systems both between Member States and in relation to different types of exploitation of audiovisual content negatively affect the production and circulation of European audiovisual works?**
- **Is there a need to take action at European level in this area, taking into account the economic and technological changes in the sector (e.g. opportunities for pan-European mastering and/or distribution offered by on-line exploitation or DVDs)?**
- **What would be the added value of regulatory intervention, or the promotion of self-regulation (co-regulation) at European level, and what would be the most appropriate instrument?**

4.7. Other questions

Contributions are invited on any other issues that are considered to be important but that have not been raised specifically in this document.

5. THE GENERAL ORIENTATION OF THE COMMISSION WITH REGARD TO STATE AIDS TO CINEMA SECTOR.

The Commission has recognised the importance of European cinema, and the need to encourage European production. In respect of national support systems, the Commission's role is to verify that these schemes are in line with Community law, whilst taking account of the cultural objective.

The Commission laid down certain criteria in its decision on part of the French national support scheme in June 1998 (N 3/98). These criteria are to be applied in the light of the specificities of individual Member State and European audiovisual markets. In particular, there is a need to take account of Member States with a limited cultural or linguistic area.

Aid for cinematographic production has a purely cultural aspect and an industrial aspect. In respect of the industrial aspect, it is noted that this aid for a product (a film) has for effect that the audiovisual sector will benefit from support necessary to achieve the cultural objective, namely that of audiovisual creation. With regard to this aid to industry, it can be argued that the necessary operational structure has to exist within the country to make cultural creation possible.

Nevertheless, a territorialisation level going beyond what is strictly necessary to ensure cultural creation in a Member State unduly fragments the Internal Market, thereby preventing the sector from taking full advantage of the benefits that increased competition could bring to technical filmmaking activities, where at present there is competition between Member States. In addition, territorialisation conditions may also raise concern under other Articles of the EC Treaty.

The Commission position on those issues will be clarified in the Communication to be adopted during the second half of 2001.

6. NEXT STEPS

All interested parties are invited to participate in the debate by responding to these questions and by sending written contributions on the subject. The period of such consultation is set for three months from the date of publication of this Consultation document. A public hearing will be held in June to enable parties to contribute fully to the debate. The Commission intends to adopt a Communication following the consultation in July of this year.

Contributions may be sent via E-mail, fax or post to:

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All submissions received electronically will be made available at the conclusion of the consultation, unless a request for confidentiality is received. This Consultation document and the contributions received will be posted on the DG Education and Culture website. The web address is:

http://europa.eu.int/comm/avpolicy/index_en.htm