



European Coordination of Independent Producers
Co-ordination Européenne des Producteurs Indépendants

The European Coordination of Independent TV Producers’ contribution to the Commission Consultation on the Future “EU 2020 Strategy”

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Introduction

The European Coordination of Independent Producers (CEPI) was founded in 1989, to organise and represent the interests of independent television producers in Europe.

Today the Coordination represents approximately 8000 independent production companies in Europe, equivalent to 95% of the entire European audiovisual production industry. All together, our members supply over 16000 hours of new programming each year to broadcasters in Europe, ranging from single documentaries and special event programming, to game shows, light entertainment and high-cost drama serials.

As the producers form the basic support of the audiovisual industry, it is necessary to articulate the interests of those producers within a unique European organisation.

For more information visit www.cepi.tv

CEPI is registered in the Interest Representative Register: 59052572261-62

Part 1 – Executive Summary

Independents, with their natural focus on creating and developing programme ideas, have provided some of the most creative, innovative, popular and challenging programmes on television. They add to the range and diversity of programmes available to viewers and have enabled new talented professionals to enter the television industry on or behind the screen. Price and creative competition acted as a spur to increased efficiency by broadcasters, thereby leveraging the quality of the content offered to viewers.

We welcome the Commission consultation on a wide-ranging strategy which will replace the Lisbon Agenda for growth and jobs. In the EU 2020 Strategy paper, CEPI is particularly interested in how to fully exploit the (online) single market, how to set up a well-functioning system of intellectual property rights online, and how to set up the EU 2020 in a global context, specifically with regards to international trade.

The Commission has set out clear policy objectives which we share to widen availability of creative content throughout the EU; yet we fear that some of the suggested policies do not properly consider the consequences they can have on the independent production industry.

There are currently four core issues posing real threats to the livelihood of European producers:

- ❑ Firstly, producers in many European countries are unable to control the extension of the availability of their audiovisual content on an individual or collective basis beyond the first exploitation by the commissioning broadcasters since they often demand the complete **transfer of all rights**. Due to their dominant position in contract negotiations, broadcasters are able to exert exclusive control over first the transfers of the rights and thereafter all secondary exploitation of such rights. For example, since the exploitation of rights across multiple platforms and for secondary uses is mostly controlled by the broadcaster, producers are unable to license them to competitors on the market for re-transmission, re-use or for download via internet or mobile. This makes it difficult for other platforms, whether terrestrial, digital, pay, free to air or internet based to obtain quality content and build a business model that meets ever growing consumer demand as well as, importantly, supporting local production. Moreover, in an era of multiple platform and download opportunities, this puts producers at competitive disadvantage in Europe as they cannot build a library of rights under their own control, and depend heavily on the commissioning broadcasters.
- ❑ Secondly, the central issue of **piracy** needs to be addressed in order to create a symbiotic relationship of consumer and business interests. In order to meet the increasing demands of consumers for digital formats, the needs and interests of rights holders need to be addressed in order to maintain high levels of investment in production of original content. Currently there is too lenient a regime towards those who ignore copyrights and many people in the audiovisual sector are losing their jobs as a result of lower levels of investment in new productions across the creative industries.
- ❑ Thirdly, the Commission is currently focusing on moving towards **multi-territorial licensing**, the case for which, through regulation, has not in our view yet been made. Moreover, a statutory regime is a disproportionate response and will interfere with rights holders' ability to maximise revenues.
- ❑ Fourthly, we are concerned that recent Free Trade Agreements and **Protocols on Cultural Cooperation**, which enable Third Countries and EU co-productions to qualify as European works, risk undermining the position of European producers and crowding out genuine European productions.

Part 2 - In more detail we now set out our position on these three Core Issues:

1. Unbundling of Rights and Redressing an Unbalanced Market

- 1.1. Revenue of independent producers comes from the exploitation of their programmes; by building revenues that can be reinvested in original content and specifically in the development of new projects. The higher the demand for content, the more the content producers can provide. More than anyone else in the market chain of audiovisual content, independent producers would like to avail themselves of all services and platforms for online content distribution in order to disseminate their content to as large an audience as possible.
- 1.2. In Europe, independent producers have not been able to mirror the popular viewer success of their creations with economic success mainly due to the particularities of a market ruled by abuses of dominant positions. Due to acquisition of rights in bundles by the broadcasters in the initial negotiations, the current regime to negotiate new media rights means that the rights for the exploitation of independent TV content on new media platforms are the exclusive property of the commissioning terrestrial broadcasters, who occupy a very strong bargaining position in the commercial relationship. Most of them have pursued practices aimed at the protection of their in-house production departments and frustrate competition from independent production companies. New technologies have brought new opportunities for content producers to develop their product, but have also brought with them new incidences of unfair practices employed by broadcasters when acquiring the rights of independently produced works. Broadcasters have tried to acquire online and other new media rights without providing independent producers with a fair compensation for the acquisition of these rights. This practice endangers the future competitiveness of the industry, hence jeopardising the future creation of quality content for TV and other media in Europe. Therefore, in addition to losing control and opportunities, independent producers are not compensated for the exploitation of such rights. This system is not beneficial to the maintenance of a sound content supply market and, ultimately, to consumers.
- 1.3. Unbundling of rights, which has been successfully implemented in areas such as sport media rights, can be achieved in a variety of ways, such as through more equitable Terms of Trade (UK), or through legal framework (France). When necessary, regulatory intervention can also assist in finding a solution.
- 1.4. Since 2003, the UK has addressed the market imbalance between broadcasters and suppliers through the introduction of Codes of Practice/Terms of Trade, which unbundled rights and enabled the supplying producer to exploit certain secondary and international rights. The effect has been to stimulate competition in rights exploitation, with for example a 39% increase over the period in UK television exports. At the same time, the UK has witnessed a growth in the ability of the production sector to use its rights ownership to leverage investment for UK and European content. The UK production sector now invests up to £190m per year in UK content and international co-productions, having invested only negligible amounts before 2003, according to UK trade association Pact. Nor has there been any discernable negative impact on broadcasters. Indeed, the newfound ability of producers to raise investment has provided broadcasters with greater price flexibility in the level of funding they provide for programming. Whereas a broadcaster would previously have had to cover all or most of the production costs, it can now pay only for those rights that it requires. This year the UK Government conducted an extensive review of the impact of the Codes of Practice/Terms of Trade as part of its Digital Britain Review, and concluded that “there is broad agreement...that the Terms of Trade (governing the release or programming into the secondary market and new media rights) are working well.” (Digital Britain, final report, Section 83). The Government found that not only did the Terms of Trade provide price flexibility

for broadcasters, the legislative and regulatory framework provided for flexibility in the digital age, enabling broadcasters and producer to renegotiate the precise terms in light of developments in technology.

- 1.5. Independent production is increasingly dependent on the broadcasting sector for financing: The different methods of financing independent productions are increasingly dominated by a model in which the broadcaster commissions the full-cost of the programme and acquires all the rights of the independent production. This generates a spiral; meaning that the producer will become increasingly dependent upon the broadcaster, since the production company will never be able to retain any assets – i.e. the rights for their productions. The problem is not in the full-commissioning model itself, but in the acquisition of all rights by the broadcaster which impedes any future growth of the independent production company. Second on the list of financing models for independent productions is “direct funding” by national authorities.
- 1.6. No retention of rights: The discretion of Member States nationally to define “independence” is legitimate in its entirety and should be preserved. However the European Commission has issued in June 1999 a set of “Suggested Guidelines for the monitoring of the implementation of Articles 4 & 5” which are not respected by Member States. Although it is included in the guidelines, the criteria about “who holds the secondary rights” should be included in all national definitions of independent production / producer. The fact that the independent production company does not retain the rights on its productions means that it will not be able to attract any investment / funding from other sources (such as product placement or sponsoring, for instance); therefore becoming increasingly dependent on the commissioning broadcaster and increasingly unable to negotiate rights with the broadcaster.
- 1.7. European and National funds to aid new production: The existing funds across Europe are well below the necessary to sustain a healthy and competitive audiovisual production industry that competes in international markets. When compared with some of the most important audiovisual production markets outside the European Union, the MEDIA programmes of the EU appear to fall short of the minimum investment necessary to maintain a competitive industry. National production schemes are therefore an important source to bring new economic vigour to the national audiovisual industries. Moreover, at EU level, funding and indirect support other than for fiction, animation and documentary are not available. Entertainment genres such as quiz, news and games for instance are not supported by EU-funded schemes, despite being very popular. While such programmes are not high-brow entertainment, they do nevertheless form part of European cultural identity and are often substituted by non-European programmes. In the current financial climate and due to budget restrictions, local entertainment is suffering especially as it has no support to rely on.
- 1.8. The problematic relationship between a dominant broadcasting sector and a dependent independent production sector in urgent need of fresh financing models is broadly recognised by the different sectors in the industry. To a great extent, it has been recognised by the European Union with the implementation of support mechanisms to independent production (MEDIA Programmes), and with the inclusion of an independent production quota in the Directive (Articles 4 and 5 / Quotas for European Works and Independent Production). It has also been recognised by most Member States of the European Union that have effectively transposed the TVWF Directive with a definition of independent production and in some cases have created national funding schemes to audiovisual production (although it remains mostly Cinema-exclusive). The MEDIA programmes have the fundamental objective of fostering co-production and pan-European distribution of audiovisual works; whereas the national schemes should be mainly aimed at production support. Independents also need production support for pilot programmes, so to be in a better position when negotiating with different broadcasters. In addition to the economic benefits in

terms of growth and jobs of maintaining high levels of investment in the independent production sector, consumers benefit greatly. Research constantly reinforces the fact that consumers enjoy locally produced content and support the cycle of reinvestment at local levels. Consumer demand will continue to be an important factor as producers develop new programme formats which are enjoyed not only through broadcast media but online and via mobile.

- 1.9. Within the framework of Europe's investment in the audiovisual sector, the independent production sector benefits from a fraction of what is invested in public service broadcasting. In view of this discrepancy, a growing number of Member States of the European Union have created specific rules which oblige broadcasters to invest in independent production. This has appeared as a means to bring a new vitality to many national audiovisual industries.
- 1.10. The goal is to allow independent producers to create their own library of rights, something that is currently not possible, since broadcasters impose the permanent transfer of all rights covering all broadcasting platforms. The sector would receive a considerable boost in terms of the real opening up of new audiovisual broadcasting markets to free competition.
- 1.11. While European independent producers struggle to develop new forms of financing for the creation of content and creation of assets; digital platforms are developing TV services, interactive services, e-mail, gaming, and a whole new range of new services that diversify the offer and increase subscriber earnings. Similarly, cable operators are also developing telephony and high-speed internet access services, generating complimentary revenues. Independent production companies need direct access to these markets if Europeans are to have a creative and healthy content on their TVs and computer screens.

2. Piracy and Copyright

- 2.1. The development of a healthy and dynamic content production industry that can provide a range of diverse quality products should be at the heart of European policy for the ICT industry. The digital world has increased the amount of content available to consumers. Producers want consumers to enjoy whichever content they want, when they want and on whichever platform they choose. Independent producers must have maximum possible access to different delivery platforms: as long as there is a demand for content, producers will continue to produce. However, they must also have adequate protection for their IPRs. Piracy effectively makes it impossible for content providers to compete legitimately, with their own content offered for free and without their consent.
- 2.2. Copyright is not an obstacle to innovation, but rather it is a vital incentive for the creative industries. Content providers need a strong system that guarantees them secure and fair remuneration for their works. The Commission should reinforce the acquis on copyright and related rights and adapt its management and enforcement to the recent developments in technology.
- 2.3. We welcome DG Trade's Communication on enhancing the enforcement of IPRs (14 September 2009). We appreciate the fact that it aims at greater coordination through practical initiatives against piracy (such as setting up an Observatory on Counterfeiting and Piracy, calling on the 27 EU member states to designate national coordinators, creating an electronic network for information sharing, and calling for coalitions between stakeholders in collaborative voluntary arrangements); but we are disappointed that it lacks new legislative measures. Maintaining copyright legislation supports continued investment in creative industries.
- 2.4. In order to fight piracy CEPI favours:
 - Joint efforts amongst all stakeholders, especially cooperation with ISPs (technical measures by ISPs against persistent offenders).
 - Developing legal offers and encouraging the use of technological tools for rights management (e.g., content recognition tools)
 - Educational initiatives as part of Media Literacy (particularly aimed at young people) in order to raise awareness of the fundamental importance of copyright in the creative process
 - Enforcement of legal rights through effective administrative, legal and judicial mechanisms.
- 2.5. The new era of convergence driven by technological development is rapidly challenging traditional production, transmission and distribution of content. High speed internet access and penetration of networks allow streaming content to be longer, richer and of better quality. A dynamic and competitive Information Society will not be created by hardware technology and distribution networks alone. Online content supports the development of the ICT sector as new (and old) media need content to broadcast. Independent producers contribute to growth and employment by creating a huge array of content that educates, informs and entertains Europe's citizens.
- 2.6. Given the business opportunities that the new media space offers to right holders, CEPI encourages the Commission to take action against piracy, so that new platforms can stimulate the growth of the European creative industry instead of being an obstacle. CEPI supports the activities of the Commission to tackle piracy in all forms and highlights that it is vital that the producers' rights are recognised and that producers will be compensated for the exploitation of new media rights.

3. Multi-territorial licensing

- 3.1. The rights holders' right to decide how to best license their IP locally in the EU should be regarded as a business choice; the rights holders' entitlement to manage their rights for their work is legitimate and by no means should the EU affect it. The sale of territorial rights for producers enables them to optimise the exploitation of their works, so that it generates as much revenue as possible. If companies cannot offer broadcasters territorial exclusivity, this could potentially undermine what they can charge broadcasters; we are not convinced that companies could charge for a pan-European licence what they could earn by selling each territory individually. Contractual freedom should be respected so that parties can negotiate and choose the most appropriate arrangements.
- 3.2. We have serious reservations on proposals to move towards a community-wide licensing system; public intervention should be as limited as possible. The Commission should encourage market-led and voluntary means. Market forces can develop this concept further if and when the market justifies it. Multi-territory rights licensing and clearance should be decided by producers; as it is a commercial matter between right holders and content distributors. Content creators must be able to monetise the distribution of their works so as to be able to reinvest in creating further content. The multi-territorial blanket will undermine the ability of rights-owners to generate revenues for their content. The Commission should remove obstacles that prevent content creators from exploiting their work, unbundling their rights and being able to keep a share of the rights that are exploited.
- 3.3. The Commission should refrain from taking measures that threaten the current contractual freedom that allows right holders to license their content as they see fit from a commercial point of view. Multiterritorial (regional or pan-European) licensing is not desirable for audiovisual content rights. A pan-EU licence would hinder revenue maximisation and thus sources of investment in creative content. Content licensing should remain at the discretion of right holders, based on informed negotiations and business decisions between right holders and distributors. The right holders' choice on the management of rights and territorial scope of licensing of content is vital for future investment in the creative sector, and the content sector is key in the digital economy.
- 3.4. CEPI wishes to maintain a copyright legislation to support continued investment in creative industries. Copyright provides financial reward for all players in the creative and distribution chain. New exceptions such as extended collective licensing (through legislation and not by market) muddy the water and create doubt, at the very moment when industry is most vulnerable.
- 3.5. In our view a pan-European approach is likely to reduce competition for rights as it may restrict the ability of companies to acquire rights. While the concept may appear attractive to those seeking to make content more available across the EU, the reality is that the opposite may well be achieved. In practice, certain companies will acquire pan-European licences but may not wish or have the ability to distribute content across the entire market. At the same time, companies in individual countries that would otherwise have acquired rights for their particular market, but have no wish or ability to purchase rights for the entire content, will be prevented from doing so as those rights will be either have additional costs or will be effectively warehoused by companies that have acquired pan-European rights but do not wish to make them available in certain markets because they are not set up as intermediaries. We favour allowing the market to make pan-European arrangements if it wishes, but are opposed to any requirement on companies to do so.

4. International competitiveness

- 4.1. With regards to bilateral trade relations which lead to Free Trade Agreements and Protocols on Cultural Cooperation, we are concerned that recent moves towards enabling Third Countries and EU co-productions to qualify as European works risk undermining the ability of European animation producers to compete to be a part of international co-productions. South Korea is a major producer of animation and we are concerned that enabling Korean works to qualify as European risks crowding out genuine European productions. We ask the Commission to monitor the impact of this development closely and not to introduce similar concessions for other markets outside the EU (Andean, ASEAN, Canadian, etc.) until the effect is clear.

Conclusion

Europe needs to create a quality driven content production industry that can respond to the growing needs of the distribution sectors and importantly, of consumers who are moving towards an on-demand environment on multiple platforms. Therefore, CEPI urges the Commission to ensure fair access to new channels and platforms for content producers. This means effectively protecting their IPRs, ensuring the contractual separation of rights and striving towards transparent negotiations with broadcasters.