



Mr Frans Timmermans  
First Vice President for Better Regulation, Inter-Institutional Relations, the Rule of Law and the Charter of Fundamental Rights  
European Commission  
Rue de la Loi / Wetstraat 200  
B-1049 Brussels, Belgium

Concerning: Making the Digital Single Market Work:  
Key Principles for the Audiovisual Sector

Amsterdam, March 18th 2015

Dear Vice President Timmermans,

As the European Commission is engaged in defining its priorities for the Digital Single Market in order to foster economic growth and job creation in Europe, the undersigned organisations (Film Producers Netherlands FPN, Documentary Producers Netherlands DPN, Dutch Animation Film Producers VNAP and trade association of the Dutch entertainment industry NVPI, all active in the European audiovisual landscape) are ready to contribute further to achieving those fundamental objectives, in full respect for the diversity of European cultures.

To do so, we need a regulatory framework that encourages creativity, promotes investment in the production and distribution of creative content across Europe and guarantees a fair and adequate reward to all relevant right holders and parties involved. We must consolidate the strength and success of the EU copyright system, a cornerstone of the European digital economy that generates 7 million jobs, contributes approximately EUR 509 billion to EU GDP<sup>1</sup>, and forms the basis of more than 3,600 audiovisual online services across Europe<sup>2</sup>.

One of the foundations of this success is the commercial freedom to “go local” and to choose from territorial, multi-territorial or pan European options for the production, financing and dissemination of audiovisual works across Europe. The freedom to licence works with a mix of different licensing models and to partner with platforms of different sizes and scope, depending on diverse consumer tastes and preferences, enables a virtuous circle of investment in jobs and cultural diversity. One proof of the indispensable value of that freedom is the unparalleled success of European films in various festivals and competitions around the globe. Most of those films were at least partially financed through territorial pre-sales agreements with a wide diversity of local players.

Bearing in mind the goal of promoting jobs and growth, any changes to this successful model must be backed by evidence that they will add jobs and growth in Europe rather than taking them away. Mandating cross-border access by law would just do the opposite

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<sup>1</sup> Intellectual property rights intensive industries: contribution to economic performance and employment in the European Union ([http://ec.europa.eu/internal\\_market/intellectual-property/docs/joint-report-epo-ohim-final-version\\_en.pdf](http://ec.europa.eu/internal_market/intellectual-property/docs/joint-report-epo-ohim-final-version_en.pdf)).

<sup>2</sup> European Audiovisual Observatory: Press release - More than 3,000 on-demand services in Europe, The Observatory will present an expanded version of the MAVISE database in Cannes, 16/05/2013  
<http://www.obs.coe.int/>

and would transfer value from European creators and their business partners to big global Internet platforms.

We fully share the objective to promote the circulation and distribution of European works to a wider audience, but we would be deeply concerned about any proposals that would endanger the financing of film and television productions.

We have expressed some concerns and suggestions which we hope you could consider in your approach to the Digital Single Market.

### **Keys to the Digital Single Market**

- **Provide Clear Rights.** With such high inherent financial and creative risks in the audiovisual sector – every product is essentially a prototype – generating jobs and growth heavily depends on having very clear rights in our works. Mandatory cross-border access or imprecise exceptions would undermine the value of our works and interfere with the optimal promotion and distribution efforts in individual territories.
- **Enable Financing and Cost Recovery.** Digital technology evolves, but the fundamental costs of developing, producing, marketing and distributing films are rarely affected, and are often very high. The same number of people are required for the fundamental tasks involved in film-making and although costs shift as a result of new technologies, they rarely decrease.
- **Preserve Flexibility and Freedom to Develop Innovative Licensing Models.** To make the most of our rights, the audiovisual sector needs the freedom to sell (or more precisely, license) creative works in ways that are tailored to meet ever-changing consumer demand. It is crucial that the necessary flexibility is present both in terms of policy and legislation. This flexibility is helping the entire film and audiovisual sector to champion emerging technologies, driving change and innovative solutions so users can access and watch film and audiovisual content in the widest possible range of options in terms of viewing experience and price points.
- **Facilitate Platform Experimentation and Diversity.** Many different varieties of online distribution models, content and delivery modes are being explored by market operators, and it remains to be seen which modes of consumption will be favored by consumers going forward (streaming, digital downloads, subscription models, permanent access models, etc.). It is critical that the EU does not intervene in this market to mandate or favour certain business models or larger international players at the expense of experimentation, and the rich diversity of national and/or regional distribution platforms.
- **Focus on the Real Barriers.** The current copyright system provides no legal barriers to offering content or services covering several territories. But many elements other than copyright play a role in the degree of development of online audiovisual services and their availability in different Member States: relevant hardware penetration, broadband infrastructure and speed, taxation, micro-payment facilities, and rules on the protection of consumers and minors. The degree of availability of illegal content and services also plays an important role in the development of a strong, sustainable audiovisual online offer.
- **Listen to the Market.** Successful online licensing and distribution of audiovisual works depends on offering a wide range of attractive content in a manner which is linguistically relevant and culturally attractive to local audiences. **The market is capable of - and is already - developing solutions to meet sustained, demonstrable consumer demand for specific services.**

## **Commercial Freedom to Decide the Optimal Financing Structure and Distribution Model for Each Individual Film**

- **The commercial freedom to organize the financing and future distribution of each film in accordance with its specific business model makes it possible to finance European films and ensure their best possible promotion and distribution to the potential audience in each individual market. There is currently no other way in which the required level of financing can be raised in the marketplace.** The Charles River Associates study “Economic Analysis of the Territoriality of the Making Available Right in the EU” commissioned by the European Commission demonstrated that licensing on a territory-by-territory basis is essential to raising financing for audiovisual productions.
- Films are expensive to produce – even at the most moderate level of budget<sup>3</sup>. The production of film and audiovisual content requires substantial upfront investment and involves significant financial risk – more so than other forms of content. Given the level of financial investment required in film and audiovisual production, marketing and distribution, most European audiovisual producers seek to share, or outsource, the financial risk involved in film production and distribution. This is often done by pre-selling distribution rights by platform, language and/or territory to entities specialised in marketing and distributing audiovisual content in the various exploitation channels and countries. This system serves as an elaborate form of “peer-review”, and investment partners are attracted by the sheer creative force and commercial potential of the audiovisual project. Indeed, in many cases this process takes place even before the actual production/shooting of the film and also ensures the optimal promotion and distribution of the finished film in foreign territories<sup>4</sup>.
- Pre-sales of exclusive distribution rights for films yet to be produced play an indispensable role in the financing of European films (see also the evidence submitted to the Licences for Europe Stakeholder Dialogue, Working Group 1<sup>5</sup> where case studies presented by FIAPF/IFTA/IVF illustrated a contribution to the total film production budget from pre-sales ranges from 31 to 66 %<sup>6</sup>).
- Producers, distributors and publishers of film and television programming seek to ensure that their works are made available to consumers in a way that is most responsive to local market needs and capacities. The ability of online services to penetrate particular markets is dictated by the overall economics and infrastructure of those markets. **These dynamics cannot be altered simply by imposing certain licensing structures or otherwise limiting the freedom to license.**
- As evidenced by the EU MEDIA/Creative Europe programme, European films often find it difficult to find an audience beyond their national market and therefore

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<sup>3</sup> See the examples of the four film case studies from Licences for Europe – their budgets range from EUR 6M to EUR 18M - <https://ec.europa.eu/licences-for-europe-dialogue/sites/licences-for-europe-dialogue/files/Audiovisual-FIAPF-IVF-IFTA-film-industry.ppt>.

<sup>4</sup> In the case of the case study on *A Royal Affair* (see footnote 2), the share of pre-sales (national and foreign) of the production budget was 37%. The film’s budget was raised from 20 different financing sources, including 8 foreign pre-sales (before the film was shot) for the Scandinavian countries, Poland, Germany, Switzerland, UK, Spain, Benelux and the US.

<sup>5</sup> See presentation from Licences for Europe WG1 AV subgroup, ‘Financing and Distributing European Films in the Digital Era: Challenges and Opportunities’, <https://ec.europa.eu/licences-for-europe-dialogue/sites/licences-for-europe-dialogue/files/Audiovisual-FIAPF-IVF-IFTA-film-industry.ppt>.

<sup>6</sup> <http://ec.europa.eu/licences-for-europe-dialogue/en/content/wg1-presentations-3rd-round-meetings-1719-april>.

require local, specialized marketing and distribution efforts tailored to the specific distribution channel and targeted foreign audience in order to attract attention.

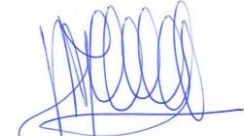
- We do not consider online distribution of audiovisual works to be merely a potential revenue stream or as a way to amortise investments. We are increasingly looking to new online distribution channels to contribute to the financing of films and programming in a manner similar to that already provided by the pre-sale of exclusive distribution rights to theatrical, home entertainment and television channels. In other words, we are looking to online distribution platforms and services to share in the financial risk of production, marketing and distribution in the same manner as other distribution partners. This is a strategic necessity in order to ensure that the widest possible choice in terms of platforms, titles and price points is offered to consumers.

### **Conclusion**

The European Commission needs to take an evidence-based approach, making sure there is relevant evidence for the need for change and of economic growth and increased employment resulting from the changes to copyright law under consideration. **In the absence of evidence of market failure, there should be no legislative or policy intervention in the film and audiovisual industry's commercial and commercial freedom with regard to territoriality and exclusivity provisions.** The industry is adapting – without legislative intervention – to changing commercial and market conditions. Where there is demonstrable and sustainable consumer demand, the market is responding appropriately and positively for all involved. **We therefore urge the European Union to maintain a legal framework under which the European audiovisual sector can continue to be a driver for innovation, growth, jobs and cultural diversity across Europe.**

Thank you for your consideration of our views.

Yours sincerely,



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Director of Film Producers Netherlands FPN



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Chairman of Documentary Producers Netherlands DPN



Ton Crone  
Chairman of Dutch Animation Film Producers VNAP



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