EuroFIA response to the EC Communication on Creative Content Online

The European Group of the International Federation of Actors welcomes the opportunity to contribute to the consultation on creative content online and appreciates the European Commission's commitment for a wider dissemination of the work of creators in the Internal Market.

Performers are key contributors to the economic success of most of the audiovisual content that is made available to the public, either physically or electronically and according to very diverse business models. The quality of their work is an essential driver in consumer choice, which should be acknowledged by a remuneration that is consistent with, and proportionate to, actual use.

Indeed, this is a principle that should be recognised at European level. Without it sweeping presumptions of transfer of the rights of performers to producers in several EU member States prevent effective licensing of content – including in traditional media – rewarding performers for use. Exploiting the creative contributions of performers should not be allowed under buy-outs that bear no relationship whatsoever to the revenue that is generated by subsequent uses. Where they exist, most of these presumptions do not even contemplate the right of performers to be paid an equitable remuneration as their work is being exploited, which is even more intolerable.

Our experience is that performers can license their work for it to be used in a variety of ways, without hindering the exploitation chain of the final product and actually encouraging the rollout of new business models. This can be achieved efficiently in a variety of ways, from collective agreements and a negotiated transfer of exclusive rights to collective management, extended licenses and equitable remuneration schemes. All these different systems work well and can coexist, as demonstrated by the growing availability of premium content on-line, not only at a national level but increasingly also at European level.

The digitisation of audiovisual works; the development of ever more effective compression techniques; the spread of broadband connection in the EU; the affordability of more and more powerful hardware to consume extensive audiovisual content; the expansion of a "VoD" culture, are leading to new consumption mechanisms supported by brand new business models. Indeed, many of these are still in trial mode, like the recent on-line streaming of premium audiovisual content in the US, exclusively advertising supported. SVOD rental, progressive download to own and streaming to view are becoming increasingly popular and are likely to become the most established distribution channels for creative audiovisual content on-line, with different price tags to reflect a variety of criteria (e.g. premium/archive content, flexibility of use, individual consumption volumes, etc) or even at no direct cost for the final consumer (because the costs of providing a service are recouped from other revenues).

Performers have a clear interest in these developments and also in any discussions that relate to how their work may be licensed and generate revenue. This is even more important that, in the mid and long term, some of these delivery models may ultimately replace existing ones in the physical world and radically change their income streams for producers and contributors alike. For this reason, we welcome the plan to set up a "Content Online Platform" and stress the need to ensure that audiovisual performers are fully represented.

The International Federation of Actors (FIA) represents hundreds of thousands of professional performers working in theatre, variety, television, film, radio, advertising, new media and many other areas of the entertainment sector. We believe that our presence would enable a more balanced discussion within such platform and look forward to paying a constructive contribution to this debate in the near future.

Do you agree that fostering the adoption of interoperable DRM systems should support the development of online creative content services in the Internal Market? What are the main obstacles to fully interoperable DRM systems? Which commendable practices do you identify as regards DRM interoperability?

Online creative services are already booming on-line. Catch-up TV for instance, either for download or streaming, is an increasingly popular choice for viewers. Generally, this is provided by operators free of charge to consumers within a week of initial broadcast and on a pay-per-view basis for archive material. Mainly geo-locked, this service usually requires using dedicated software to view the content.

Digital rental and download-to-burn have also now become a reality, with the spread of broadband. VoD streaming of feature films is still hampered by the technical limitations of unicast distribution but alternative solutions, including some based on P2P technology, are beginning to solve this hurdle.

All these distribution systems have a different business models behind them and need TPMs to roll out properly. Whether provided without direct charge to consumers or not, the cost of making programmes available and of providing the service still have to be recouped. TPM's and other Rights Management Information systems allow service providers to meet the flexible expectations of the users and offer a greater degree of flexibility in terms of prices, use options and choice of content. To the extent that they can secure revenue from different distribution models and enhance royalty distribution, they are also very important to performers and should be legally protected.

Given however that no TPM is tamper free and that anti-copying devices can only limit – but not entirely eliminate – unauthorised use of audiovisual work, compensation models like private copying levies will continue to remain relevant to performers. They should be extended to new copy enabling media and also encouraged in the few EU countries that have still not introduced this compensation in their legal system.

The interoperability of TPMs certainly is a very strong concern for the music sector. When a user downloads a song, he/she does so in order to play it on a variety of different gadgets, from MP3 players to car stereos or home HiFi systems. When consumers have been "surprised" by

TPM's that prevent them from undertaking such copying, this has generated much hostility against the industry. As a result, the latter is now increasingly selling TPM-free content.

In the film and audiovisual industry, most consumers will be attracted to business models mainly allowing them to view the work once on a given player (e.g. either a PC, a portable console, a TV set, etc). While TPMs will continue to play an important role to enable those business models to fully meet customer's demand and allow for maximum customisation, interoperability is likely to be a less imperative issue here.

To the extent however that interoperability does become an issue, we believe that the industry could be encouraged to embrace it as it might further strengthen the rollout of legal distribution models, but that this should not be imposed authoritatively. Ultimately, the market, consumer demand and expectations will make it inevitable.

Do you agree that consumer information with regard to interoperability and personal data protection features of DRM systems should be improved? What could be, in your opinion, the most appropriate means and procedures to improve consumers' information in respect of DRM systems? Which commendable practices would you identify as regards labelling of digital products and services?

Do you agree that reducing the complexity and enhancing the legibility of end-user licence agreements (EULAs) would support the development of online creative content services in the Internal Market? Which recommendable practices do you identify as regards EULAs? Do you identify any particular issue related to EULAs that needs to be addressed?

Consumers should always be able to know what they can or cannot do with a given work that they have legally acquired before they actually use it. This especially true for any TPM that may limit their ability to dispose of a work they have legally paid to own or view, other than for the specifically agreed use(s). Licenses should always include a clear list of what they enable the consumer to do with a given work. Unfortunately, at the moment this is not always the case. The terms of these licenses are sometimes fully discovered by the consumer at a later stage, which does not go a long way toward generating trust. In our experience, consumers are ready to accept use limitations, provided they are fully aware of them from the beginning and the flexibility of the financial conditions also reflect what they are allowed or not to do.

Rights Management Information (RMI), indeed also falling within the wider category of DRMs, provides essential data about, among other things, rights owners and actual use. RMI can contribute to a more precise and effective remuneration of all the identified right holders in a given audiovisual work and their use should be properly protected throughout the EU. They can also contribute to further moulding the cost for the final user to reflect the level of consumption. Consumers should not necessarily have a detailed explanation of all these additional measures, but they could be asked to acknowledge that some degree of personal data may be shared to enable proper monitoring of use. The taking up of voluntary numbering systems (like the ISAN, the International Standard Audiovisual Number) should also be encouraged to enable data to be shared and compared more easily throughout the Internal Market.

Do you agree that alternative dispute resolution mechanisms in relation to the application and administration of DRM systems would enhance consumers' confidence in new products and services? Which commendable practices do you identify in that respect?

Dispute settlement mechanisms (ADRM) like arbitration or mediation often offer a quicker, cheaper and more satisfactory way than to solve litigation than traditional court cases. To the extent that they are more affordable to the average consumer, they may also encourage a higher degree of trust in the rollout of non linear distribution models and willingness of consumers to make the best of these new products and services. However, it is important to clarify what exactly would be the focus of these ADRM: as we said, better information about DRMs is important to win consumer confidence. And ADRM could help decide situations where that confidence was wrongfully deceived. However, these alternative litigation systems should not become a way for consumers to challenge the very need and effectiveness of DRMs.

Do you agree that the issue of multi-territory rights licensing must be addressed by means of a Recommendation of the European Parliament and the Council?

Audiovisual works have strongly rooted national consumption pattern. Language barriers, content sensibility, complex financing schemes make most of them unsuitable as such to pan-European licensing. National territories, including for VoD distribution, will continue to make sense, also considering that VoD is ultimately going to replace a number of more traditional exploitation windows (like physical sales or rental, pay-per-view and, to a certain extent, also pay-TV – at least as far as premium drama content is concerned) that contribute a great deal to the financing of production.

Television broadcasts, either supported by national TV licenses or by locally intended advertisements or by both, continue to target (and to be enjoyed mainly by) a local audience. For this reason, catch-up TV, which is meeting a strong consumer demand as back up to traditional broadcast services, is generally geo-locked and cannot be accessed in foreign countries. This is made possible by modern technologies that identify IP addresses and deny access to those located beyond the scope of the intended geographical reception. VoD streaming or downloading of TV programs under a multi-territory EU-wide license could seriously undermine the funding of television production.

Film production heavily relies on maximising revenue through a complex window release model, which is not harmonised in the EU. Although VoD is likely to change it extensively, old and new release windows will certainly coexist for a long time. VoD will increasingly become a key contributor to film production but free to air television – mainly national – will remain

Right holders must be allowed to continue to make the most of territorial boundaries for the licensing of rights, not as a means of putting up barriers to access but in order to ensure the viability of their industry and to work with and serve cultural diversity. We remain to be convinced that a multi-territory EU-wide licensing scheme may be in the interest of the audiovisual industry (or indeed the consumers that it serves) and question how it will serve to maximise revenue for what remains a strong hit-based, high fix cost and low marginal cost industry.

In the absence of a US-like “blockbuster” system, few feature films in the EU would really benefit from a simultaneous on-line “time and date” release. Most of them still heavily rely on the snow-ball effect from one national territory to the other. This clearly gives national licensing schemes a good reason to be preserved.

In addition to this, performers are concerned that any multi-territory licensing scheme, especially when dictated from above, may jeopardise their ability to license their work on the basis of exclusive rights. As we have already explained, the exploitation of the work of performers is authorised in a variety of ways. In the UK, indeed one key European country in terms of audiovisual production, this is done by individual agreement, incorporating the terms and conditions established by the actors’ union with the producers’ association. All new collective agreements in the UK also provide for use on new media (or at least for negotiation of terms) and enable minimum revenue for performers. These rights give all parties enough flexibility to custom license on-line use, with different business models according to the type of use.

Similar satisfactory approaches also exist in Nordic countries, with the additional benefit of extended licensing, which greatly facilitates the exploitation of audiovisual content on new media.

On-line exploitation does not necessarily have to mean “global” or pan-EU exploitation. Forcing this may ultimately not be in the interest of the industry or even of consumers. In audiovisual production, there may be sufficient reasons to safeguard national territories even for on-line, VoD exploitation.

Even when it comes to archives, a multi-territory EU licensing system should be considered very carefully: as windows of exploitation are not harmonised – and probably never will for technical reasons. A given audiovisual work may be considered “archive material” at different times in its overall commercial lifetime and so committing an programme as “archive” to a multi-territory licensing system might potentially undermine the ability to fully exploit it commercially in areas where it is still being considered (or reconsidered) as premium content. Ultimately, it is up to the right owners to decide when a given work should be considered archive material and made available on demand on a pan-European basis.

We therefore believe that multi-territory licensing should not be addressed by means of a Recommendation of the European Parliament and the Council. Maximum flexibility must be preserved for the industry players to decide/agree on what is best for their interest, that of consumers and, ultimately, for the long term viability of the audiovisual industry.

Licensing content beyond national borders is already a reality. Through a combination of exclusive rights, equitable remuneration for secondary uses and collective management, performers can already authorise the exploitation of their work in other EU countries. What would be useful is rather a further harmonisation of their neighbouring rights, with appropriate guarantees enabling them to truly benefit from the exploitation of their work in all media and territories.

In too many European countries, in fact, performers do not properly benefit from their making available right, which is presumed to be transferred to the producer at point of contract, with no additional royalties or even equitable remuneration paid to them after that, regardless of the revenue generated by the exploitation of their work in other European countries.

From an audiovisual performers' point of view, the real issue is not how to make on-line licensing easier but rather how to make it more equitable and fair.

What is in your view the most efficient way of fostering multi-territory rights licensing in the area of audiovisual works? Do you agree that a model of online licenses based on the distinction between a primary and a secondary multi-territory market can facilitate EU-wide or multi-territory licensing for the creative content you deal with?

We believe that the industry players in the 27 Member States should be left to agree whether, how and at what conditions national audiovisual production should be licensed for exploitation on-line, including at EU level. The setting up of a Creative Content Platform may facilitate that dialogue and we look forward to that.

Windows of exploitation, including VoD services, must continue to be preserved in order to sustain audiovisual production. And those windows remain – perhaps inevitably – national-based.

What constitutes a primary and a secondary multi-territory market is somewhat flexible, and content owners must retain the ability to decide what can best accommodate market opportunities and demand. As audience is becoming more and more dispersed, what could be considered a secondary use may very well turn out to be a primary way of consumption, at any given point in time or in a particular geographical context.

Do you agree that business models based on the idea of selling less of more, as illustrated by the so-called "Long tail" theory, benefit from multi-territory rights licenses for back-catalogue works (for instance works more than two years old)?

It seems difficult to decide at European level what should constitute a back-catalogue work, subject to a multi-territory licence, and what shouldn't. Once again, this decision should mainly be vested in the content owners. While, for instance, news and current TV programming older that one week will often be regarded as "archive" for catch-up purposes and made available under a specific business model, the same obviously does not apply to a feature film – at least until is has exhausted all the different exploitation windows that go from theatrical release to free to air television.

The "long tail" theory is certainly appropriate in absolute terms at global level, where physical distribution was predominantly in the hands of a few US studios. In this context, on-line distribution will mean more catalogue works available for a still sizeable demand. The same theory may be less relevant if taken only within a European context, where productions have and will continue to face an extremely fragmented market. In other terms, the fact that more becomes available does not necessarily mean that there will be more consumption.

How can increased, effective stakeholder cooperation improve respect of copyright in the online environment?

We believe that more efforts must be made to educate consumers and make them understand that, just because the property is "intellectual", it does not mean it has to be treated any different from its physical counterpart. Education should especially focus on adolescents and young people – as they are most likely to be attracted by gratuity. School programs should also include basic copyright information - perhaps also in cooperation with performers, authors and other stake holders that can help put a face on abstract concepts.

Performers should also be able to fully benefit from their intellectual property rights. Very often this is regrettably not the case, as producers successfully lobbied for the introduction of sweeping presumptions of transfer of the rights of performers in their favour in much national legislation. For this reason, and because they get no practical benefits from these rights, performers in many EU countries are reticent to take a very active role to promote respect of copyright in the online world. Indeed, for many of them, "respect of copyright" essentially means more acceptable and equitable contractual conditions, with the ability to benefit from the ongoing exploitation of the work in any media.

The legal on-line offer of audiovisual works, with customised and flexible conditions for the final users, also has a role to play in reducing unauthorised use. However, for the reasons explained above, this does not necessarily mean that everything that's made available on-line must be so at a pan-European level. There are important reasons to continue to allow distribution on a territorial basis, including on-line.

Do you consider the Memorandum of Understanding, recently adopted in France, as an example to followed?

It certainly looks encouraging to see ISPs cooperate more with the right owners to tackle unauthorised use on-line. ISPs have greatly benefited from the unauthorised distribution of audiovisual works – including on P2P illegal file exchange sites – and have all too easily hidden their responsibility behind "mere conduit" safe harbours.

Whether this particular system in France will work or not is something that still needs to be assessed. It may be efficient to tackle the heaviest infringers but will be pretty useless to prevent "small bail" from infringing on an occasional basis – something that arguably make most of the infringing online content.

Do you consider that applying filtering measures would be an effective way to prevent online copyright infringements?

Filtering measures, like AudibleMagic and others, may certainly help in some cases, for instance in relation to video exchange files. Service providers should be encouraged to use similar systems and also to harmonise their databases. However, filtering systems will not be the panacea and may ultimately prove totally unable to deal with scrambled content, illegally

distributed online. Preventing on-line infringements will never be possible 100% and it will require a combination of strategies, from educational measures, to ISP cooperation, additional legal online offers and ultimately also enforcement measures for big, recurring infringers.

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