

**"CREATIVE CONTENT ON LINE IN THE SINGLE MARKET"
CONTRIBUTION OF VG BILD-KUNST TO THE EUROPEAN
COMMISSION PUBLIC CONSULTATION
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EXECUTIVE SUMMARY

- **Writers and directors of audiovisual works would like to increase the availability of their works to consumers.**
- **The whole of the exercise of introducing a multi territorial licensing system is based on the hypothesis that content owners will agree. It would not be lawful for the EU to impose multi-territorial licensing systems without the consent of rights holders. Progress on this issue would be welcome by audiovisual authors but can only be achieved on the basis of fair and equitable remuneration and of systems to ensure payment.**
- **Therefore, problems of discrepancies in the remuneration system for audiovisual authors in Europe must be resolved, so that users are not tempted to obtain a multi-territorial licence from the territory with the least protective law for audiovisual authors. This would only lead to a destructive downward spiral in rates.**
- **New business models and harmonisation must ensure that audiovisual authors are fairly remunerated for the use of their works. Their legal and moral rights need to be protected. This is not simply a question of economic fairness, but also of public policy and cultural diversity.**
- **Content distributors as well as the Information and Communication Technology industry are incredibly powerful compared to content providers such as writers and directors. Accordingly, a stable and harmonised legal environment ensuring an author's right to fair remuneration should be secured at EU level. To be effective, this right should be mandatory.**
- **For the online exploitation of audiovisual works, European law should provide that remuneration is based on the revenues generated by the online exploitation of the work, that the online opera-**

tor is legally responsible for making payment through an authors' society of the author's choice.

• Such mechanisms would not only be an act of economic justice, but would also make a lasting contribution to European culture and the upholding of European culture values.

VG BILD-KUNST represents 41,149 members (plastic arts, photography, film creators). Its role is to help develop and enhance the moral and property rights of film directors in cinema, TV productions, series and documentaries.

Since the Commission's questionnaire is aimed at various stakeholder businesses and activities, VG BILD-KUNST cannot answer all questions but will focus on those questions concerning audiovisual authors.

Digital rights Management

Writers and directors of audiovisual works want to achieve the widest possible availability of their works to consumers.

Accessibility to online content will certainly be improved if DRM interoperability is achieved. Moreover DRM will undoubtedly play a useful role in relation to the protection of the property rights of rights holders.

VG BILD-KUNST believes in the future development of DRM technology, provided that it helps to monitor various exploitations of the works and to ensure a fair remuneration for authors.

We also support the development of interoperability of copying devices. However, interoperability facilitates and enhances the private copying of works. Therefore, it is essential that audiovisual authors benefit from a strong legal system that guarantees a secured remuneration for the private copy of their works. At this stage, the remuneration audiovisual authors receive for the copying of their work remains marginal in proportion to the harm suffered from the private copy activities of consumers and no one has given any evidence that today, there is viable alternative form of compensation. VG BILD-KUNST takes this opportunity to remind the Commission that audiovisual authors are very concerned about the Commission's initiative on private copy levies. This initiative which is strongly supported by the ICT industry must not lead to drawbacks in the system of compensation of audiovisual authors which would harm the creative process and the preservation of European culture.

Multi territory rights licensing

VG BILD-KUNST welcomes the European Commission's initiative to enhance the deployment of cross border delivery of films. It is in writers and directors' interests that their works are made easily accessible to consumers regardless of their country of residence. Works that would not be bought for release in markets other than the original one may find new audience, thanks to Video On Demand "VOD" or the internet. Allowing consumers to have better and easier access to cultural goods should broaden writers' and directors' opportunities for creativity and cultural exchanges.

However, multi licensing systems requires the consent of the owner. Multi licensing systems will never take place unless the EU would unlawfully, in contravention of the Treaty, seek to limit the right of content holders to license their works to whom and in respect in which territory they choose.

The issue of multi territory licensing in the area of audiovisual works must first and foremost address the fact that directors hardly receive any remuneration when their works are exploited outside their territory and in particular with video on demand. This is a particularly unfair situation which has to be dealt with at Community level prior to regulating new business models of online exploitation of works. In the online world, distributors rely on copyrighted materials as an input. It is therefore entirely in their interests that the price of that input should be as low as possible. Their long-term need for inputs may not be a sufficient incentive for them to seek to ensure that the creative process is sufficiently well-protected in the short term.

From one member state to another, the discrepancies are such in terms of the basis of remuneration paid to writers or directors of audiovisual works, that the situation can hardly be summarized for the purpose of the Commission's questionnaire.

For example, in Germany writers usually receive a lump sum payment for their scripts, but rarely receive any additional remuneration however successful the work turns out to be, except for private copy levies and cable retransmission.

A French director of a TV film produced by a French company will be remunerated through the French authors' society SACD for every single broadcast of his film in France. However, if his film is broadcasted in Germany, he will not get remunerated. He may in fact never even be aware that his film was broadcasted in Germany, for there are no authors' societies collecting from broadcasters in Germany. Moreover, SACD will not be able to remunerate any foreign author who has not reserved his rights in his production agreements because SACD is bound by the terms of the contract. As a result German and UK authors who do not reserve

their rights in their production agreements will not be remunerated by SACD for the broadcasting of their works in France.

It has to be stressed that being the weaker economic party, authors can be at a disadvantage when negotiating contracts with producers. This is true not only in Europe but everywhere, America included. Thanks to their history and structure, the size of their single market, and the worldwide market for their works the American writers and directors guilds enjoy a much greater bargaining power than most audiovisual authors societies in Europe. Nevertheless, the struggle for the Directors Guild of America (DGA) and the Writers Guild of America East and West (WGAE - WGAW) to increase their members' remuneration over online exploitation of works have shown how difficult negotiations can be with the studios.

Remunerations of authors should not be based on the rule of survival of the fittest. The Commission should ensure that authors can rely on a legal framework which will balance an otherwise unbalanced power of negotiations, between individual authors on one side and companies that hire them on the other side.

Commissioner Viviane Reding has declared that she believes audiovisual creators have to receive fair remuneration for the exploitation of their works. VG BILD-KUNST greatly appreciates this position and would like to inform the Commission on the existing system of remuneration of audiovisual authors in Europe and suggest how to improve it.

The payment systems

The remuneration of audiovisual authors is subject to a different system to that which applies to music authors. Audiovisual authors' remuneration regimes vary from one country to another and in some member states, the author's sole remuneration is derived from the initial contractual arrangement.

Attached is an explanatory chart showing the discrepancies in the legal system of remuneration of audiovisual authors in Europe.

In some countries, authors have to rely on producers to be paid. In countries such as France, Belgium and Bulgaria, remuneration terms are set on the basis of contracts, but collecting societies representing audiovisual authors are contractually entitled to collect on behalf of their members.

In other countries such as Spain, Italy and Poland, the final distributor, usually the broadcaster, is considered by law to be responsible to the

author whom he pays through a collecting society. The latter system is more favourable to authors who, in principle, benefit from a stronger payment guarantee. In these countries, the law provides that, notwithstanding the terms of the contract between, on the one hand, the writer and the director and, on the other, the producer, it is the final user who is obliged to pay the writer and the director for each use of their works through a collective management organisation. These legal regimes have progressively appeared over the last twenty years and, as a result, Spanish, Italian and Polish authors are being rewarded proportionately for the exploitation of their works.

As far as cinema exploitation is concerned, in most countries authors have to rely on the producer to be paid. However, in Spain collecting societies collect directly from cinemas on behalf of their members.

For other types of exploitation of the works, so called secondary exploitations, such as cable retransmission, European law provides that the rights of authors have to be managed collectively.

These disparities are exacerbated in the digital era.

For online rights, the consequences on authors' compensation could worsen with the suppression of territorial restriction in accessing works offered on VOD. In some countries such as France, some solutions were found which guarantee payment to authors for the exploitation of their works. As a result, the exploitation of works online has been facilitated in these countries.

In France, writers' and directors' society SACD, to which members assign their rights, has made a deal with associations of production companies. This agreement provides that when an individual price is paid by consumers for each film, online operators and production companies may license the film for electronic sell through and streaming. In return, SACD receives compensation which is a percentage of the price paid by the public. This specific economic model of pay per view and VOD started 10 years ago in France and was well accepted by all parties. The French government has just passed a law extending this agreement and compensation system to all producer companies. The law will thus apply to any producer company based in France even if it is not affiliated to producers association signatories of the agreement with SACD.

In Germany, the Federal government has passed a new law¹ which makes it possible for authors to transfer their rights for unknown means of exploitation. However, some difficulties remain as the compensation conditions have not been addressed. In turn, authors are entitled to a reasonable separate remuneration that can not be administered by an

¹ Second Statute on the regulation of Copyright Law in the Information society of 26th October 2007.

authors' collecting society except for archive works (§ 137 I UrhG).

That being said, for the rest of Europe, the online rights are not usually managed collectively and as a result most authors do not get paid for that type of exploitation.

How could the payment system be improved?

Universal application of means to protect audiovisual authors' remuneration is a prerequisite to the introduction of multi territory licensing contracts. This is not an issue that can be left to member states and individual contracts to deal with.

Experience shows that when authors' rights have been recognised at EU level as a result of a harmonisation directive, authors have benefited from legal security and better transparency of their rights – and the Community interest has reaped the rewards in terms of excellence and cultural diversity.

For example, in Germany, writers and directors did not receive compensation for the cable exploitation of their works unlike other European authors. It was only thanks to the adoption of the copyright law of May 8, 1998 to that effect implementing the 93/83/EEC directive on cable re-transmission that they started receiving payment.

Another example is the 1992 Lending and Renting directive which recognised that directors are authors. As a result, directors based in the UK are now considered as authors and have a right of authorship over their works.

Increasing the role of authors' societies

The payment system could be improved by developing the role of author's societies for the online exploitation of the works. This would be cost effective for the producers who do not always have sufficient means and infrastructure to monitor the works on behalf of the audiovisual authors and to ensure that the latter receive remuneration proportionate to each use of the works.

Moreover, authors' societies monitor legal as well as illegal uses of the works. Monitoring by collecting societies is the key elements in deterrence and increasing rights holders' total revenues.

The management of online rights should be subject to the same rules as those applying to secondary rights. As an example, article 90.4 of the Spanish intellectual property law which provides that the final user is required to pay the authors for each use of their works through an appointed management entity was recently² extended to online delivery of content. Such a system has never slowed down the production of feature films and audiovisual works in comparison with countries which do not apply this system. This is a well considered and effective solution which sets a concrete benchmark to follow.

Accordingly, European law should provide that, for the online exploitation of his/her works, payment is made through an appointed collecting society of the author's choice.

This rule should be made mandatory so authors being in a weaker contractual position are not forced to opt out by agreement.

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We have shown that discrepancies in the regimes across Europe lead authors to receiving hardly any remuneration when their works are exploited outside their territory and for certain types of exploitation such as video-on-demand. As a result and quite surprisingly authors do not receive any share of the success of a work whose quality has been recognised across frontiers and despite language and cultural barriers.

We have also shown that, for online rights, *inter-alia*, payment systems vary from one country to another. In consequence, authors' societies, when they exist, do not have the right to collect in every country in respect of online exploitation of the works.

In such a context a one stop shop system or multi territory rights system is inconceivable.

On the contrary, considering the absence of harmonisation, it is thanks to territoriality that audiovisual authors are granted a certain level of protection through their respective authors' society.

It should also be stressed that music authors are better protected, because there are similar legal systems across Europe and because music authors' collecting societies exist and collect in every country.

In the audiovisual sector, if a multi-territory licensing scheme were to be implemented without having first fixed remuneration system for online rights, audiovisual authors would be likely to suffer terrible drawbacks.

² 23 /2006 7 july 2006

Users would be naturally inclined to seek a multi territorial licence contract governed by the law which would be the least protective for audiovisual authors rights and where no audiovisual collective management organisation exists or where online rights are not administered collectively.

An initiative on multi territory rights licensing system could only be envisaged once, as a minimum, legal provisions establishing the obligation to compensate writers and directors for each online exploitation of their works, payable by the online broadcaster or service provider, is established at a European level and not left to the bargaining power of each individual author in each of the member states.

Therefore, when negotiating their contractual level of remuneration for the online exploitation of their works, with either producers or online distributors, audiovisual authors should be able to rely on sound and secure legal rights applicable at Community level. Thus, European law should provide a system whereby when an audiovisual author grants exclusive right to a work:

- she/he is entitled to receive a fair level of remuneration
- such a remuneration should be based on the revenues generated by the online exploitation of the work (for example publicity, subscription etc....)
- that the online operator e.g., end-user or online platform should be legally responsible for making payment
- through an author's society of the author's choice.

Article 4 of the rental and lending right directive of 19th November 1992 provides that authors have a right to an equitable remuneration for the lending of their works and that this right cannot be waived. This provision sets a good benchmark to follow for the recognition of a right to remuneration for audiovisual authors, provided that this right is administered by an authors' society.

Finally, it must be stressed that the link between creativity, cultural diversity and remuneration is undeniable. Thus, economic fairness will allow cultural diversity and the development of European Culture in the world. These objectives are set out in the UNESCO Convention on cultural diversity and it would be perverse, if the Commission was to disregard this critical element to the debate.

Legal offers and piracy

To be fully effective, any measure improving the lawful availability of works and the fight against online piracy will need the full technological and political support of content and service providers as well as their cooperation.

Managing rights in a digital world requires the development of a sophisticated internet based "Rights Management Information" (RMI) system to deal with the way works are identified and licensed as well as how royalties and payments are collected and distributed.

Active cooperation of telecom providers in implementing prevention campaigns and actions against infringers is necessary. Telecommunication operators and internet services providers have to act against copyright violation and must not hide themselves behind broad liability exemptions such as the electronic commerce directive provisions and strong personal data protection guaranteed by privacy directives to justify their inaction. The third revision of the "Telecommunication package" gives an opportunity to remedy this flaw and to show clearly the political will to fight against internet piracy.

The Memorandum of understanding recently adopted in France is an example to follow both on the method (discussion between all stakeholders including creators, producers, ISP and telecom operators) and on the solutions adopted. There must be retaliation measures against illegal uploading and downloading, proportionate to the seriousness of the offence and taking into account the extent of the prejudice to intellectual property.

Other countries such as the UK and Sweden are also trying to find measures to fight against piracy and boost the lawful availability of works. However a strong political signal is needed at European level to encourage stakeholders cooperation whether at European or national level.

Moreover, the fight against piracy is not only European but global. Therefore solutions should also be found at worldwide level. To that extent, the European Community should also consider effective measures against foreign piracy of Community Intellectual Property rights.

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European law should enshrine a right to a fair remuneration for audiovisual authors at Community level for their online rights.

Authors should be able to rely on sound and secure legal frameworks applicable at Community level, when negotiating their contractual level of remuneration for the online exploitation of their works. Moreover,

European law should provide that, for the online exploitation of his works, payment is made through an appointed author society of the author's choice.

**GENERAL PRINCIPLES GOVERNING THE REMUNERATION OF AUDIOVISUAL
AUTHORS
(OTHER THAN RENTAL AND PRIVATE COPYING)**

COUNTRIES	Mere right to remuneration	Specific right to a proportional remuneration	Right to a remuneration distinct per use	No provision	Possible transfer of rights for unknown uses
AT					
BE					
BG					
CY					
CZ					
DE	Equitable remuneration				
DK					
EE	Equitable remuneration				
EL		Statutory exceptions			
ES		Statutory exceptions			
FI					
FR		Statutory exceptions			
HU		Contractual exceptions			
IE					
IT	Equitable remuneration				
LU					
LT					

LV					
MT	Equitable remuneration				
NL	Equitable remuneration				
PL					
PT					
RO		Contractual exceptions			
SE					
SI					
SK					
UK					

COLLECTIVE ADMINISTRATION

COUNTRIES	Collecting societies for AV repertoire					Public perform. (cinema)	TV Broad.
	None	AV authors society	Multi repertoire soc. (inc. music)	Society for AV authors + producers / performers	Separate society for script. and directors		
AT							
BE							
BG							
CY							
CZ							
DE							
DK							
EE							
EL							
ES							
FI							
FR							
HU							

COMPULSORY COLLECTIVE ADMINISTRATION

COUNTRIES	Public performance	TV Broadcasting	Retransmission	Private copying	Rental/Lending
AT					
BE					
BG					
CY					
CZ					
DE					
DK					
EE					
EL					
ES					
FI					
FR					
HU					
IE					
IT					
LU					
LT					
LV					
MT					
NL					
PL					
PT					
RO					
SE					
SI					
SK					
UK					