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# CREATIVE CONTENT IN A EUROPEAN DIGITAL SINGLE MARKET:

# CHALLENGES FOR THE FUTURE

## Contribution by the International Federation of Actors (FIA)

The International Federation of Actors (FIA) represents hundreds of thousands of professional performers working in the live and recorded audiovisual sector, including theatre, variety shows, television, film, new media and radio. The European group (EuroFIA) brings together performers' unions from almost all EU member states, the accession countries, the European Economic area and Switzerland. It participates in two European sectoral social dialogue committees (in the Live Performance and Audiovisual sectors).

FIA welcomes the EU Commission consultation on Creative content in a European Digital Single Market and the analysis of the opportunities, needs and challenges that right holders and consumers face in the post-analogue global environment. We wish to strongly stress the importance of a transparent, participatory and open dialogue for the follow-up to this consultation, gathering all stakeholders in the industry and including performers, equally represented by trade unions and collecting societies. FIA has been dismayed at the exclusion of performers' unions from past and ongoing groupings such as the Content Online Platform and the Commission working group on Illegal Up and Downloading. As recognised industry social partners and a key part of the creative chain, the performers' unions believe that they are key stakeholders in such discussions.

### Rewarding creators

We welcome the opening acknowledgement that "copyright is the basis for creativity" as well as the reference to the fact that a balanced system should not only enable wide commercial access to protected content to the benefit of consumers, but, equally significantly, reward right holders for their contribution to cultural diversity and the making available of high quality creative content. Regretfully, to date, performers rank among those who benefit least from the intellectual property rights that have been granted to them. This is due to a variety of reasons, often – but not always – combined.

The intellectual property rights of performers are not yet fully harmonised at European level. This is especially the case for their moral right as well as the right to receive financial compensation when their work is broadcast or otherwise communicated to the public. If in a small number of countries this compensation is achieved through collective bargaining, in a great majority of EU member States performers get little more than a performance fee, regardless of the fact that their work is widely broadcast, rebroadcast and further syndicated to other linear distribution channels.

Several EU countries have introduced in their legal systems presumptions of transfer of the IP rights of audiovisual performers to producers. This has in fact deprived many performers of the ability to derive tangible benefits from their intellectual property rights. Regrettably, EU legislation has been reluctant to impose safety mechanisms to limit the damaging effect of these provisions – deeming contract law to be beyond its remit. However, in one rather unfortunate case, the EU has introduced a provision[1] that clearly deals with the contractual freedom of the parties. This clearly proves that measures can be taken to guide those parties. The Commission should therefore strengthen the protection of creators by clearly limiting this precedent to the analogue world - and to rental in particular - while introducing appropriate mechanisms to make sure that performers in the EU can derive the security of ongoing payments for all other uses, contractually or statutorily, to the extent that their work continues to be protected and commercially exploited and despite any national statutory transfer provisions.

Although there is scope for improving the *acquis* in this field, we do not favour a single regulation (i.e. a "European Copyright Law") equalising IP systems in all the 27 member States. Such system would deprive the different legal systems of the level of flexibility they need to respond to different sensitivities and levels of perception concerning creativity and its position in society. Furthermore, such regulation would inevitably entail profound changes in the legal traditions of the member States and quite likely also a much weaker level of protection for creators.

## The internal market, the audiovisual sector and access to audiovisual works

The European audiovisual market, as rightly mentioned in the Commission document, does not face the same licensing fragmentation that is otherwise experienced in the music and publishing sectors. Rights of all content contributors are transferred or licensed to the producer, who can further exploit a feature film or an audiovisual production according to what is deemed best to maximise revenue and return on investment.

This is not to say that there are no territorial and time shifts in the exploitation of audiovisual works when one considers the whole EU. However, far from being the result of an inextricable hurdle of underlying rights and conflicting licensing schemes, this is mainly due to due to sound commercial reasons. The way a film is released and made available on the European market will depend, for instance, on the nature of the movie, whether dubbing and subtitling costs will be deemed necessary in light of its success in a given set of countries, whether other windows of exploitation will be deemed to have maximised their potential in each territory under the excusive licenses, etc.

Exploitation windows are an organic component of the audiovisual industry. They are key to maximise revenue. Film and audiovisual production are very expensive to produce and it is important to prevent subsequent forms of exploitation from cannibalising the revenue that each can generate on its own count. As new forms of exploitation gain momentum, the industry reacts by readjusting those windows to make content more readily available through legal offers after theatrical release.

This should remain a prerogative of the different operators that interact with one another in the chain of exploitation, rather than something to harmonise EU-wide. We seriously question what benefit European consumers would get from a methodical, compulsory EU-wide release of films and other audiovisual works before all national windows of exploitation have been given a chance to maximise income, much of which is reinvested in new production.

The VOD market is growing quickly and there is an increasing variety of legal offers in place, through rental, streaming on a pay-per-view, subscription or even advertising-based model. Business models are growing exponentially to meet consumer demand and are already providing legal entertainment to millions of European viewers on demand. The pricing model is also quickly responding to competition and consumers are already

[1] Article 2, Council Directive 92/100/EC

benefiting from a wide catalogue of audiovisual works with very flexible pricing tags to reflect the specific use they wish to make of these works.

However, much more remains to be achieved at European level to fight against content theft and unauthorised use of protected content. As a direct delivery system to end users or a conduit for content further distributed through hard copies, online piracy has a devastating effect on the investment that is needed to keep the industry sustainable and the jobs it can afford to generate. These concerns were behind the recent joint opinion produced by the European Sectoral Social Dialogue Committee on Audiovisual "Joint opinion on protecting creativity, innovation and jobs" which highlighted the urgent need to combat online piracy and ensure that "models of digital online distribution should provide for proper remuneration with respect to all parties concerned." The EU ought to take a coordinated approach to this phenomenon and a much stronger approach to illegal use, also seeking the cooperation of ISPs, until recently very reluctant to cooperate.

On the other hand, we do not believe that the internal audiovisual market would be in any way enhanced by a harmonised approach to limitations and exceptions – except for private copying, an exception that ought to be introduced in all EU countries, compensated by levies and industry-approved guidelines as to how these could be further extended to new copying devices and media. All other limitations and exceptions should remain optional and retain a degree of flexibility to reflect cultural differences linked to the "public interest". In this regard, we view the three-step test as a key tool to provide for and preserve such flexibility.

Orphan works seem to be a smaller concern in the audiovisual industry compared to other sectors. The Commission should perhaps consider a sectoral approach to this problem. In any event, extended collective licensing in this field could be considered further, with clear and transparent principles guiding "diligent search" and appropriate mechanisms to preserve the interest of right holders eventually identified.

## The exhaustion principle and other considerations

We strongly believe that the absolute imperative of an "internal market" should not lead to the introduction of an "exhaustion principle" for the communication to the public of cultural works online, and audiovisual productions in particular. This principle is only justified when it comes to tangible goods and would seriously undermine any business model in the digital delivery of films and audiovisual works. Indeed, it would be very damaging to right owners. The market must be allowed to provide for remuneration for the exercise of the making available right, during its term of existence and to the extent that a given work continues to be exploited in accordance with different business models.

The Commission consultation document also suggests the fact that the "reproduction" right and the separate "making available" right could be merged for the purpose of online distribution in the future. This is something that we radically oppose. Whilst the two rights might be sensibly licensed together, any formal merger of these two rights in copyright terms would reduce opportunities to tag a different value to different types of online services and of user interest/expectation, further weakening the industry's chance to continue to be profitable and sustainable.

We believe that stronger rules should apply to online platforms and content distributors with respect to their contribution to the financing and the distribution of European audiovisual works. The current, rather mild, encouragements as introduced by the Media Services Directive should be further enhanced in favour of a bolder contribution of these operators to the sustainability of the European creative industry and its distribution in the internal market.

Finally, we remain opposed to the introduction of any exception to copyright to the benefit of user-generated content. To the extent that users exploit protected work in their creations, they need to clear the rights in those works. Clearly, they should have access to simple information as to what they can or cannot do and about the identity of the right holders. Specific agreements can easily be negotiated with all major social network platforms to allow exploitation while determining the conditions and the extent to which a protected work can be used.