HARMONIZATION OF COPYRIGHT IN EUROPE
FROM THE PERSPECTIVE OF EUROPEAN FILM DIRECTORS

INTRODUCTION

If one asks what kinds of harmonization of copyright we as film directors would find acceptable, the first question we must ask in return is: Harmonization - in order to achieve what goal?

In relation to the ongoing discussion about online distribution and consumer access the short answer is that the problem is not national copyright legislation, but licensing practices and the way films are financed in Europe today.

The more ambitious answer to the question of harmonization would be: In order to make European cinema and television thrive, we must adopt harmonized policy and legislative measures that are not only consumer friendly but also creator friendly and in the long sustainable term there is no contradiction between the two.

Competition vs Competitiveness

Audiovisual policy debates often seem to get bogged down in ideological dogma or populism instead of focusing on finding pragmatic solutions that fit the specific needs of our sector. Surely it is meaningless to dispatch the anti-competition police on collective rights’ management societies, if the result is that European film and television is less competitive on the global arena.

The artistic merit, the technical quality, and the diversity of the films and television programmes we make in Europe are the pre-conditional criteria for success. Therefore, if there is not a genuine European ambition to systematically strengthen the entire creative “ecosystem”, starting with the creators, all the distribution aid and marketing efforts might only temporarily cure the symptoms, not the “disease”.

There are three main elements that affect the climate in this creative ecosystem: Legislation, Financing, and Licensing.

This document presents our position regarding legislation. We will elaborate on the issues of financing and licensing in separate position papers.

LEGISLATION

In line with our European tradition we all know that, although we use the word copyright for short, what we are talking about are authors’ rights. Authors’ rights reflect the fact that people, rather than corporations, create works, and are premised on the principle that the fruits of intellectual labours are the property of their creators. Authors’ rights legislation is the
tool that secures the fundamental conditions for rich and diverse creative output by a multitude of individual creators throughout Europe. In his 2004 report *Creators and Copyright in Canada*¹ journalist John Lorinc sums up the important conceptual difference between the two: “Droit d’auteur makes each creator an entrepreneur of the mind, while copyright makes each creator a labourer”.

1. AUTHORS’ RIGHTS

The question of balance between creators and consumers

“Balance” is a concept that dominates deliberations on how to “modernize” authors’ rights legislation today. The overarching objective is to “balance the legitimate interests of creators to be paid for the use of their works and the needs of users to have access to those works.”

Film and television directors express themselves in a mass medium, the very nature of which is the communication between the director – the storyteller - telling a story to someone - the audience. Access is the fundamental condition for this communication to take place. The question is therefore: Access, yes of course - but on what terms?

The pursuit of balance within a law intended specifically to protect authors’ creative and economical rights, is rarely questioned. Yet this balance always seems to mean economical arrangements to the disadvantage of individual creators.

Exemptions and limitations

Exemptions and limitations guarantee the crucial right to quote a copyrighted work for the purpose of critique or parody/satire, but they also have the stated goal to provide support for activities deemed to be valuable to society. These are laudable ends, but as John Lorinc points out: The assumption that remains unexplored is why the onus is on individual creators to subsidize public policy?

If the EU institutions decided that there is a cultural benefit for all European school children to have unlimited access to European films to be screened in class rooms or school auditoriums – which would be great – shouldn’t funding be allocated to pay reasonable royalties to the creators for this use? Should a European film director be held personally financially responsible for ensuring that European school children have access to his/her works?

In those European countries where in fact a “compensation” for public use is being paid by the government, the amount is a tiny fraction of the value of the actual use, an unfair trade-off at the expense of the individual creators who actually make the works deemed to be of value to society.

Some public institutions that benefit from current exemptions, are meanwhile under increasing pressures to commercialise their activity, so the bizarre end result might in fact reduce creators to labourers of the state rather than fairly-rewarded entrepreneurs of the mind – in the name of public interest.

Such a development would surely not be compatible with EU objectives, and we trust that European legislators will not give in to the push for further exemptions and limitations, but stay committed to the core purpose of authors’ rights: To ensure that Europe’s creators are

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¹ Commissioned by Creators’ Copyright Coalition. Canadian legislation is a hybrid between the two.
justly remunerated for all use of our works as a basis for further creative work.

As U.K. law professor William Cornish asks with respect to copyright laws that derive their legal and moral force from an individual’s creative act, “[i]f we are not prepared to provide legal buttresses for the interest of the author, why are they there at all?”

Moral rights

The 2002 Study on the Conditions Applicable to Contracts Relating to Intellectual Property in the European Union states: “It is hard, if not impossible, to imagine harmonisation of copyright contract law without prior, or simultaneous, approximation of rules on moral rights and ownership, which have not been harmonised at the European level, with the exception of the rules of ownership in audiovisual works.”

While the EU has devised regulations on commercial breaks and product placement - which are blatantly disrespected by member countries - no EU Directive aims to harmonize moral rights more than what the Berne Convention has already done. The regulation of moral rights is explicitly left to the member states.

Council Directive 93/98/EEC (Harmonizing the Term of Protection of Copyright) states that “…the harmonization brought about by this Directive does not apply to moral rights”.

Information Society Directive Preamble (19) states that “The moral rights of right holders should be exercised according to the legislation of the Member States and the provisions of the Berne Convention... Such moral rights remain outside the scope of this Directive”.

Yet, any ambition to harmonize European legislation must surely encompass the full scope of what authors’ rights are designed to protect.

It is becoming a habit to deny the artists who work in the audiovisual industry their moral rights. Today economic pressure also results in ever more intrusive commercial breaks and product placement. On TV, station logos are superimposed ruining the carefully composed framing of each picture in the film, aspect ratios are distorted, and the credits are often cut off, or made to run faster, or they are reduced on a split screen while the channel trailers next week’s film, or the following program.

These practices violate directors’ moral rights, alienate audiences and destroy the film experience. FERA believes that the respect for the integrity of the work and its author is also fully in line with public interests, and needs to be more vigorously defended. We would like to see harmonization and strong enforcement of moral rights at the European level.

2. CONTRACT LAW

The question of balance between creators and producers

Producers and others arguing for greater copyright protection often place creators front and centre and sentimentalize us as poor starving artists, yet the fact that many creators are economically ghettoized, is - at least in part - a result of the way in which our rights are

2 Guibault & Hugenholtz, Institute for Information Law, University of Amsterdam 2002
3 Yet, contrary to the requirements of the Directive, some countries still have diverging practises, such as Austria where the Copyright Act nowhere expressly designates the principle director as the author or as one of the co-authors of an audiovisual work.
acquired by producers. Which again – to their defense - is also a result of the excessive rights that television stations and other commercial players demand to acquire from the producers.

Simply granting more and more protection rights to authors in the field of traditional or ‘substantive’ copyright law is far from a sufficient answer to the actual and professional protection needs. Under the sole conditions of the free market and freedom of contract, in the large majority of cases, an increasing extent of ‘substantive’ protection leads to the paradox result that what is given to the author or performer by the right hand (or the legislators) is often taken from him at a ridiculous consideration by the left hand (or his contractual partner).

The 2002 amendment to the German Copyright Act for the purpose of “strengthening the contractual positions of authors and performers” was a bold move by legislators who recognised that “freedom of contract” is illusory when the parties to an agreement have grossly disproportionate economic strength. Although the effect of this legislation has yet to be documented, this is an example to be promoted – and enforced – at the European level.

Legislation does not need to provide complete solutions to address the power imbalance between creators and producers and cannot be expected to do so, but it is our view that the EU legislators should define a set of compulsory conditions pertaining to authors’ rights contracts to be harmonized in European contract law.

These harmonized conditions could be to:

- Presume the author’s first ownership of copyright even where a work is created in the course of employment or on commission, unless expressly agreed otherwise;
- Require that any transfers or assignments of rights only be valid if put down in writing, with a clear reference to the legal basis for the transfer/assignment and including the terms/conditions agreed between the parties;
- Require mention of each specific right granted by license or assignment;
- Require the exercise of any right to be specific as to extent, purpose, place and duration;
- Allow authors to revert rights that are never or no longer used;
- Prohibit the granting of rights that cover exploitation by means not known or reasonably foreseeable;
- Allow transfer of rights in future works only under certain conditions
- Prohibit assignment of rights without the creator’s consent
- Require any waiver of moral rights to be delineated explicitly in writing;
- Require any rights of equitable remuneration to be inalienable, and to be unwaivable, not only unassignable;
- Provide an accounting to the creator and revert rights in instances where a producer fails to provide an accounting.

It is important to stress that we remain somewhat skeptical with regards to the purpose and justification for harmonizing European copyright legislation. A best practice approach that aims to strengthen the position of individual creators must be adopted, in order to enlist the support of European film and television directors.

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4 German law professor Adolf Dietz in the 2006 report Towards A Fair Deal: Contracts and Canadian Creators’ Rights by Marian Hebb and Warren Sheffer for the Creators' Copyright Coalition