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ONLINE DISTRIBUTION OF AUDIOVISUAL WORKS

'A GAME OF MUSICAL CHAIRS'

FERA

The Federation of European Film Directors, FERA, is an international, non-profit organisation of national directors' guilds, established in Venice, Italy in 1980. Today there are 39 member associations from 31 European countries.

INTRODUCTION

These days it seems like the consequences of the digital revolution cannot be overstated, but while many things have changed and will change, what does not is the fact that films are made by filmmakers.

Although we use the word copyright for short, what we are talking about in the European tradition 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. 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".

In a time when our works are circulated in an intangible format, it is even more important to underline that what is being paid for by the consumer is not the piece of plastic that the film is stored on, but the creative effort of the filmmakers and the costs of promoting and distributing that work as widely as possible.

Despite the best lobby efforts by some stakeholders, as long as there are filmmakers and other creators, authors' rights can never be dismissed as being outdated.

Audiovisual policy debates often seem to get bogged down in ideological dogma, populism, or vicarious economic agendas, instead of focusing on finding pragmatic solutions that fit the specific needs of our sector.

¹ Commissioned by Creators' Copyright Coalition. Canadian legislation is a hybrid between the two.

In relation to online distribution and consumer access, FERA believes that the problem **is not** national copyright legislation. The problem has four main causes: The way films are financed in Europe today, online copyright infringement (piracy), variations in national contract law, and inadequate licensing practices.

FUNDING OF PRODUCTION

Just as the audiovisual industry finds itself in a state of transition from old business models to new ones, the global financial crisis has caused member states to cut state aid to production of new films, broadcasters to pay less for screening rights, corporate sponsorship to decrease sharply, and private investors to invest more conservatively - if at all.

Economic pressure also results in ever more intrusive commercial breaks on TV and crude product placement, violating directors' moral rights, alienating audiences and destroying the film experience. Yet our cinema audiences seem to be stable and even growing in several European countries.

The link between distribution and risk-sharing in financing production must be maintained in the digital single market. The new audiovisual media services are currently beginning to profit from European audiovisual works.

FERA believes in the principle that all who benefit from audiovisual works should contribute financially to the development and production of new works. This must include Internet service providers (ISPs) and online platforms and services for audiovisual content (as provided for in Article 3i of the Audiovisual Media Services Directive).

And any online Europe-wide or multi-territory license must not destabilize the very sector specific system of financing films and television programmes, without providing alternative production funding sources.

One week ago Google made the leap from digital librarian to merchant, and according to reports, stands to get 20%-30% of the price of eBooks. Audiovisual content is surely next in line. As Google steps directly into the value chain it would only be reasonable that they make a contribution to production funding.

ENFORCEMENT – TACKLING PIRACY

All directors naturally want the largest possible audience for their films and welcome the possibilities that the digital shift offers in making their work available to new audiences. But authors also need to earn a living, to support themselves, and to develop new creative work.

Online copyright infringement (piracy) is more rampant than ever and has taken on massive commercial dimensions. This severely affects the return on investments by the players in the value chain, and hampers the further development of attractive legal offers. Such violations must be dealt with urgently and decisively by law enforcement and at the political level, nationally and internationally.

And while plenty can be said about creators not getting a fair share of the revenue from their work, those who justify ripping off the "copyright industry" because the artists and filmmakers

aren't getting the money anyway, are missing the point that 10% of something is a whole lot better than 100% of nothing.

INTERMEDIARIES

In her speech "A digital world of opportunities" at the Avignon forum in November Commissioner Kroes stated: "Like it or not, content gatekeepers risk being sidelined if they do not adapt to the needs of both creators and consumers of cultural goods.

So who will win the heart of the creators and of the public?"

The film directors' answer to this is very simple: Those who finance our work, distribute our films as widely as possible, and pay us fair remuneration.

Right now those are the traditional players. Online distribution currently produces little revenue, but we are open to new partnerships if they offer a better strategy – but it has to be one that actually works. In the online environment the threat to the director is not only piracy, but also obscurity in the massive information flow sifted by search engines based on commercial interests.

The current system is rather like a reverse game of musical chairs, where a new chair is added to the revenue split each time the music stops. If the digital age is to be truly revolutionary to us, the filmmakers, it must result in "fewer chairs", and a direct access to our audiences.

FERA invites the European Commission to also consider adopting standards for a unified European micropayment infrastructure, as an urgently needed alternative to advertisement-based business models.

REMUNERATION

The creation at the European level of an unwaivable right to remuneration for the online exploitation of audiovisual authors' works was listed among possible EU actions foreseen by last year's Reflection Document. FERA was pleased to see that the Commission clearly recognizes that this is vital to the sustainability and growth of Europe's creative industries.

The unwaivable right to remuneration should be based on the revenues generated by online exploitation and paid by the final commercial user (the online platforms), and administered by collective management societies with the highest levels of governance and transparency.

CONTRACT LAW & LICENSING

Granting new and improved rights to directors on a Europe wide basis is essential but it is not enough. These rights must be inalienable. And they must be achievable. If directors are to receive 'fair remuneration' – for all forms of exploitation of their works - there is a growing need to strengthen their contractual position.

Frequently when a director comes to the point of signing the contract, the power of the producer and the current demands of the market players, paradoxically deprives him or her

of the benefit of well-intentioned laws. The German revised Copyright law from 2002 is a dramatic example of this.

The scope of rights granted to the producer varies from one Member State to the other, and so do directors' fees. In many European countries the director's only remuneration derives from the initial contract with the producer, with no payments being made for subsequent use of a profitable release. This cannot be allowed to continue.

This year FERA started the process of establishing European film directors' Contract Guidelines, to be followed by a system of FERA Approval of acceptable contracts.

One crucial feature of any contract is clarity in the transfer of rights.

Together with our Legal Advisory Board, we are currently working on a standard form that gives an exhaustive checklist of all rights with "yes" or "no" boxes to tick. For each right that is transferred the duration must be specified, as well as the form of remuneration. Only known rights can be transferred at the time of signing the initial contract, new rights must be negotiated if and when they emerge. Unused rights shall revert to the author after a defined time period.

FERA wants this form to be a compulsory annex to all directors' contracts when receiving public and/or EU funding. This could even be a "birth certificate" or a "Rights Passport" that followed the film, and any selling or transfer of rights from the producer to a third party should be entered into a separate section of the form and be regularly updated. This information could serve as the basis for a public database such as the "whois" of domain names.

When films cross borders, or circulate online, the title is often changed. To ensure that authors and rightsholders can be easily identified, both for licensing and remuneration purposes, FERA emphasizes the importance of ISAN – International Standard Audiovisual Number, and believes that it should be required for all films.

We believe that these measures would greatly facilitate the licensing of our works.

ARCHIVES

It is important to distinguish between the commercial life cycle of new films and catalogue films (older than 5 - 10 years) when reflecting on access to European audiovisual works online.

In the digitization of archives (whether by public institutions or broadcasters) FERA insists that they must negotiate reasonable remuneration for authors, as has been done in Denmark under the system of extended collective licensing, and in the Dutch Filmotech/Ximon initiative created in partnership with Dutch filmmakers.

If the EU institutions decided that there was a cultural benefit for all European school children to have unlimited access to European films online – which would be great – shouldn't funding be allocated to pay reasonable royalties to the creators for this use? Should a European film director personally be economically disadvantaged because his work is of great value to public policy? What other entrepreneur would accept being punished, rather than rewarded, for the value of his/her work?

Some public institutions that benefit from current exceptions to copyright, are meanwhile under increasing pressure 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.

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 exceptions and limitations, but stay committed to the core purpose of authors' rights: To ensure that Europe's creators are justly remunerated for all use of our works as a basis for further creative endeavours.

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