

Opinion of the European Economic and Social Committee on the 'Green Paper on the online distribution of audiovisual works in the European Union: opportunities and challenges towards a digital single market'

COM(2011) 427 final

(2012/C 143/13)

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On 13 July 2011, the Commission decided to consult the European Economic and Social Committee, under Article 304 of the Treaty on the Functioning of the European Union, on the

Green Paper on the online distribution of audiovisual works in the European Union: opportunities and challenges towards a single digital market

COM(2011) 427 final.

The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 1 February 2012.

At its 478th plenary session, held on 22 and 23 February 2012 (meeting of 22 February), the European Economic and Social Committee adopted the following opinion by 226 votes with 10 abstentions.

1. Conclusions and recommendations

1.1 The Committee draws attention to case law in which the EU Court of Justice calls for a balance to be maintained between a number of fundamental rights in relation to file-sharing on the internet where copyright obtains ⁽¹⁾. Copyright is not an absolute right, and respect for copyright cannot be enforced through general filtering of the internet by service providers (ISPs, see *Scarlet v SABAM*). The levies charged on digital media in several Member States may not be applied to media used for a purpose other than making digital audiovisual copies, such as digital hardware used in management applications (*Padawan* case). Some excessively restrictive national rules should be revised so as not to impede the development of online distribution of audiovisual works, taking account of the evolving case law of the EU Court of Justice.

1.2 Another factor behind the growth of the market in such works is the introduction of attractive and affordable commercial models, where digital audiovisual content can be distributed much more cheaply than CDs and DVDs. This substantial saving in distribution costs should benefit consumers as well as guaranteeing an income to authors that is sufficient to allow them to continue their artistic and literary creative work. Copyright should also be managed in a way that serves the general, or public, interest, e.g. by setting requirements on accessibility for disabled people without punitive costs. Options for extending exceptions and limitations to improve access for very disadvantaged groups, libraries and public cultural institutions should also be considered, as recommended by the Committee in an opinion adopted in 2012 ⁽²⁾.

1.3 The internet has become a universal medium for online content; certain technical and legal requirements should be

introduced through restrictive legal standards to ensure that content distributors respect people's privacy and to guarantee net neutrality: the internet must not be subject to general filtering ⁽³⁾ unless an explicit order has been addressed to a named party by a judge on the basis of sufficient evidence of illicit copying, further to a specific complaint of the holder of the copyright and related rights.

1.4 By the same token, the Committee considers that libraries and bodies responsible for managing audiovisual works should not be encumbered by excessive tightening of legislation to protect copyright. Their role is to preserve and transmit works with the cultural aim of promoting and protecting artists and authors in the long term, and to ensure access for the wider public, in particular schoolchildren and students, to the works in question, for reasons serving the general interest such as the success of the Europe 2020 strategy, the Digital Agenda and the cultural strategy ⁽⁴⁾. The proposal for a Directive on orphan works, which the Committee supports ⁽⁵⁾, should also be integral to the success of the EU and national strategies for promoting culture.

1.5 The cross-border market for online distribution of works does not pose major issues of access for the three main cross-border distributors which control three quarters of the markets and have adequate financial and technological means to make their catalogues available to the general public in Europe and worldwide.

⁽¹⁾ Recent cases: *Padawan* and *SABAM*.

⁽²⁾ OJ C 228, 22.9.2009, p. 52.

⁽³⁾ See *Scarlet v SABAM*.

⁽⁴⁾ COM(2007) 242 final.

⁽⁵⁾ OJ C 376, 22.12.2011, p. 66.

1.5.1 The Committee asks the Commission more specifically to make detailed proposals for the multitude of SMEs and SMIs, which represent Europe's real cultural and artistic resource in all its diversity of languages and literary and film works, so that they can participate actively in the single market for online distribution of audiovisual content.

1.6 The Committee draws attention to certain proposals made in the KEA-Cema study of October 2010, such as pooling of catalogues and one-stop shops for distributing content to the general public in Europe⁽⁶⁾. The study's analysis of market trends is also detailed and pertinent. Distribution strategies and new business models are designed to favour legal distribution of works in a way that maximises revenues for each distribution window and makes best use of the works. Products are typically promoted through social media (to create "buzz") alongside traditional marketing methods.

1.7 The Committee believes that drawing up a comprehensive, unitary European Copyright Code, as proposed by the Commission, could help to consolidate the harmonisation between Member States' legislation in the form of a directive, which is a necessary step. This directive would replace the multiple existing EU directives on copyright and would entail regular reports on the effectiveness of implementation by the Member States. The Europe 2020 strategy⁽⁷⁾ should also be incorporated into the European Copyright Code.

1.7.1 Such a code could put the country of origin issue into perspective in terms of the legislation that should apply with a view to effective harmonisation. Where a Member State provides public funding for cinematographic works, that country should generally be regarded as the country of origin for the purpose of determining which law applies. The Commission should consider the possibility of "European origin" with respect to determining the law that applies⁽⁸⁾.

1.7.2 The possibility should be considered of avoiding unfair terms in contracts where the actual copyright holder (or holders) cedes their rights to producers/distributors. It happens all too often that rights are ceded by the author to producers for all existing and future technologies without a clause giving them a share in future revenues generated by the use of new media and distribution channels (Blue-ray, IPTV⁽⁹⁾, etc.).

1.7.3 Content must not always be regarded as a commodity. It is important to bear this in mind when discussing online distribution, which is a cultural service that disseminates meaning.

1.7.4 The Committee reiterates the need to facilitate access to broadband connections so that internet users can enjoy high-quality, rapid reception of audiovisual works by cable TV, IPTV and VOD⁽¹⁰⁾.

1.8 The relevant Commission departments should look at options for developing data management systems to track the ownership of rights to audiovisual works⁽¹¹⁾, focusing on the particular characteristics and needs of SMEs and SMIs. The same goes for developing multi-territorial licensing with a single title valid for the whole EU market. Small European producers should be encouraged and helped⁽¹²⁾ to "Europeanise" their catalogues in an identification system with a (voluntary) section containing information on holders of copyright and related rights recorded in a multi-territorial document.

1.9 The copyright clearance system should ensure transparent and fair distribution of the portion of revenues due to copyright holders⁽¹³⁾. It is essential that the management of collecting societies should be subject to annual independent inspections whose findings are accessible to authors and the general public, so as to ensure democratic control of their activities and their contributions to cultural development⁽¹⁴⁾.

1.10 The Committee believes that on the basis of reactions to the Green Paper from interested parties the Commission should consider drawing up a White Paper in the second half of 2012, after consulting stakeholders (including public bodies⁽¹⁵⁾, the EESC via the formal procedure, and trade unions and associations representing authors and distributors at EU level) during the first half of the year, with more detailed proposals on possible further steps to establish a single European market in audiovisual works across linguistic barriers. The Committee is aware of the legal and technical difficulties that will have to be overcome in order to make progress on this key dossier, but it does not see these as insurmountable.

⁽¹⁰⁾ Video-on-demand.

⁽¹¹⁾ Producer-led development of an international system for identifying works (International Standard Audiovisual Number, or ISAN). However, the ISAN does not contain rights ownership information and participation is on a voluntary basis. Certain big American studios use a similar system (the Entertainment Identifier Registry, or EIDR) (<http://eidr.org/how-eidr-works/>), which consists of a code that developers receive from APIs but which contains no mention of copyright on works.

⁽¹²⁾ For example through the MEDIA programme, which runs until 2013 and could then be replaced by a new support programme.

⁽¹³⁾ OJ C 68, 6.3.2012, p. 28

⁽¹⁴⁾ Id.

⁽¹⁵⁾ National film financing bodies, libraries and cultural organisations.

⁽⁶⁾ "Multi-Territory Licensing of Audiovisual Works in the European Union": independent study carried out for the European Commission (Society and Media DG) in October 2010. See also the Commission Communication *Creative Content Online in the Single Market*, COM(2007) 836 final.

⁽⁷⁾ OJ C 68, 6.3.2012, p. 28.

⁽⁸⁾ The "28th regime", already proposed by the Committee in relation to European contract law. OJ C 21, 21.1.2011, p. 26.

⁽⁹⁾ Internet protocol television.

2. Gist of the Commission communication

2.1 This communication is directly relevant to the Europe 2020 strategy, complementing the Commission communication *A Single Market for Intellectual Property Rights*, the so-called IPR Strategy ⁽¹⁶⁾.

2.2 The culture industry is a big sector, employing six million people in the EU and with an annual turnover of EUR 500 billion, or 3% of European GDP. Technological developments have driven a radical change in the way audiovisual works are distributed. Traditional distribution networks are being completely transformed through digital technology, high-speed and ultra high-speed internet access, cloud computing, and the possibility of downloading audiovisual works to personal computers and mobile phones.

2.3 The Green Paper describes a number of policy approaches, but advocates a single model for managing copyright based on cross-border and pan-European licences.

2.4 The Commission believes that rights clearance for online transmission of audiovisual works outside the territory of origin must be simplified. The same applies to distribution of programmes on demand, where other rights have to be obtained than those cleared for the initial distribution.

2.5 The Green Paper states that simultaneous transmission of a broadcast requires a separate authorisation from right holders.

2.6 The Satellite and Cable Directive ⁽¹⁷⁾ requires management of rights by a collecting society for simultaneous retransmission from other Member States. The rights are additional to those cleared directly by broadcasters.

2.7 The Commission notes that rights representative organisations are not always entitled by law to grant licences for retransmission by cable.

2.8 Finally, for several years now, DSL (Digital Subscriber Line), IPTV (Internet Protocol Television) and TNT (Digital Terrestrial Television), as well as new digital platforms, have been using retransmission services, making it even more difficult to ensure compliance with current legislation.

2.9 In economic terms, EU production was close to 1 200 films in 2009, which represented barely 25% of cinema admissions in the EU, compared with 68% for American films. However, the EU has only a 7% stake in the US market. To promote a film in the EU, producers and distributors stagger the release of works. Generally, films are released for

cinema, then for video products, then for video-on-demand, then distributed to pay-TV networks and finally to free-to-air TV. Developing video-on-demand services for sale outside the country of production increases the number of partners and hence the number of contracts.

To reduce all these steps, the Commission advocates collective management of works and introduction of a one-stop shop for collective licensing of rights.

2.10 *The other part of the Green Paper concerns authors' remuneration*

In most EU countries, this is managed by producers through lump-sum or "buy-out" payments for the contribution to an audiovisual work. In these countries, authors therefore do not systematically receive an additional remuneration when their work is distributed online. In some Member States, collective management societies representing authors collect remuneration on a per-use basis, while in others it is the final distributor who is responsible for paying for these services.

2.11 *Remuneration of performers*

This is now generally based on a contract and paid in a lump sum, as for authors. The Commission proposes introducing a more equitable system of remuneration, a right that would be collected by collective management societies. However, the Green Paper notes that these new rights would create economic, and therefore legal, uncertainty for producers and would impede online distribution of works.

3. General comments

3.1 The Commission's intention with this Green Paper is to further the completion of the single European market through harmonisation of national rules.

The sector in question relates to culture and its digital distribution channels. This is a very particular and sensitive sphere because it involves the communication of a country's history, language, traditions and aspirations. It cannot be treated in the same way as a traditional economic sector, or even a traditional sector of general economic interest. The Commission's approach in the Green Paper might seem too consumer-oriented. However, its analysis of the various mechanisms involved is detailed, not to say exhaustive.

3.2 The text is very dense and addresses a number of very different issues, but the main objective of the Commission is to build a single market in the sector.

3.3 *The Commission bases its appraisal of audiovisual distribution and related rights on several observations.*

⁽¹⁶⁾ COM(2011) 287 final.

⁽¹⁷⁾ Directive 93/83/EEC (OJ L 248, 6.10.1993, p. 15).

The first is that the current system is not working: it is complex and costly for the end user. The second is that aggregating national production could help to increase the commercial viability of the overall market. It is difficult for a video-on-demand company that is independent of major access providers or iTunes to obtain exclusive territorial or European rights, since rights to works are often concentrated with producers, who seek to maximise their revenues by other means (DVD sales, in particular).

3.4 Towards centralised licensing (pooling means and sources of information to develop the sector)

The Green Paper thus proposes online copyright licensing of multi-territorial services and advocates establishing a single licensing model that would allow multi-territorial licensing.

The EESC believes that this could provide a good solution for a given language region.

3.5 The multiplicity of distribution channels and interactive receivers, and mobility of customers, place a lot of pressure on economic models and distribution networks.

3.6 Authorisations and licences are at the moment issued mainly on a national basis, with contracts being negotiated between the producer of the work and the online distributor. The European Economic and Social Committee admits that the system proposed by the Commission has undeniable advantages, for instance in giving rapid and easy access to data provided by producers. It could leverage the distribution of national works that would otherwise remain local.

3.7 It should nevertheless be noted that implementation of the directive on satellite broadcasting 15 years ago has not produced pan-European satellite broadcasting services.

3.8 Setting up a European register of works could entail risks that are difficult to evaluate

The EESC believes that such a database should be for information purposes only.

Above all, access to copyright protection should not be conditional on being on the register.

3.9 This European system would have the advantage of uniting EU production and distribution operators to compete with the Hollywood majors that are mobilising in Europe.

It is also interesting to note that certain big US studios (e.g. Warner Brothers and Disney) are working on devising an international numbering system for identifying audiovisual works (Entertainment Identifier Registry).

3.10 Since 2004, French producers have been developing their own such system, the ISAN (International Standard Audio-visual Number). The above-cited statistics on European and American film production are worrying. It should be noted that under the current system, US production accounts for 75% of cinema admissions in Europe. The way the system is managed is therefore of key importance.

3.11 The EESC points out that it is producers who, during their negotiations with distributors, fix on a contractual and lump-sum basis the amount of rights paid to authors and right holders, and who stand guarantor for the payment. The issue with remuneration of right holders can be addressed partly through centralised licensing. The idea of introducing a remuneration process based on the size of an audience measured over many years may be attractive, but it is problematic.

3.12 There is a real conflict of interest between film producers, distributors and contributors. Producers on the one hand want an initial release for cinema to ensure optimum promotion of their works, while distributors on the other demand that those works be made available sooner so that they can market them for video, pay-TV networks and on-demand media.

3.13 The EESC thinks that negotiation to adjust these deadlines is needed, given the increased influence of IPTV, ADSL and digital platforms. A very interesting idea would be to introduce a system including a database of right holders for identifying and listing older works which are no longer covered by an exclusivity agreement.

3.14 The Commission is thus counting on collective licensing of works (a database) to stimulate the sector. **Will the EU be able to compete against the powerful American multinationals? An abrupt discontinuation of the current national systems poses real risks.**

3.15 The EESC believes that serious assessments should be carried out before taking any decision to abandon or dilute current national systems. As we noted above, the lobby groups defending the interests of US companies are powerful and such groups are obviously pushing for liberalisation in this very profitable sector.

3.16 The purpose of this proposal for the Commission is to increase and regulate the circulation of EU works. The technical and regulatory signals it is sending out are therefore important because they could accelerate a liberalisation process already initiated by others.

3.17 The EESC unreservedly endorses every step taken by the Commission to facilitate access to online works for the general public. Access should be possible across EU territory, and at an affordable cost. This would allow the culture of each Member State to be more effectively disseminated and would facilitate the education of young Europeans. The Committee also believes that certain forms of versioning - such as inserting commercial advertising in works originally designed without commercial breaks - could undermine the cultural objectives of online distribution, even if these lower-quality, cut-up versions could be distributed for free or at very low cost. This could be taken into account in a voluntary quality code for distributors of content via internet, cable or terrestrial transmission who committed themselves to have more consideration for original works.

3.18 In an opinion on the Commission communication *A Single Market for Intellectual Property Rights* ⁽¹⁸⁾, the EESC draws attention to the diversity of national models and contradictory approaches to management of authors' rights in the sphere of culture. **Bearing in mind that the discussion is not fully concluded, the EESC therefore thinks that the first step would be to define the principles of a European copyright code.** For an initial period, this code - based on respect for the specific cultural features of each country - should be limited to laying down simple but necessary principles that each country would observe when clearing licences.

3.19 In the EESC's view, it is not a good idea to extend the country of origin principle, because this otherwise appropriate

criterion can be circumvented through the service provider's choice of country of establishment. The Commission has also launched projects and consultation exercises to encourage data transmission operators to invest in new networks that can handle this traffic efficiently and affordably.

3.20 In this Green Paper, the Commission claims that pooling rights will stimulate the growth of digital networks. It must still be ensured that network operators have the financial means to modernise and increase their distribution capacity. The EESC's opinion on *The open internet and net neutrality in Europe* ⁽¹⁹⁾ thus provides a useful contribution on certain points raised in the Green Paper.

3.21 The Satellite and Cable Directive requires management of rights by a collecting society for simultaneous retransmission from other Member States. The rights are additional to those cleared directly by broadcasters. This double procedure might seem ponderous, but it is necessary in order to avoid black-outs during programming (use of media already occupied by other broadcasts).

3.22 The Commission believes that national funding is essential for development of the sector and supports the MEDIA programme developed to stimulate the distribution of works across several territories. The EESC agrees, but notes that their number has declined while there is massive consolidation among funders to finance a given film.

Brussels, 22 February 2012.

The President
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⁽¹⁸⁾ OJ C 68, 6.3.2012, p. 28.

⁽¹⁹⁾ OJ C 24, 28.1.2012, p. 139.