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GREEN PAPER

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

TABLE OF CONTENTS

1.	Introduction	3
1.1.	The opportunities offered by technology developments.....	3
1.2.	The purpose and scope of the Green Paper	4
2.	The Digital Single Market for Audiovisual Media Services.....	5
2.1.	Rights clearance for online transmission of audiovisual media services.....	8
2.2.	Rights clearance for retransmission of audiovisual media services	8
2.3.	Rights clearance for transactional Video on Demand services	9
2.4.	European film production and distribution	10
3.	Policy approaches	12
3.1.	Questions.....	13
4.	Rights holders' remuneration for online exploitation of audiovisual works	15
4.1.	Authors' remuneration for online exploitation	16
4.2.	Performers' remuneration for online exploitation.....	16
4.3.	Questions.....	17
5.	Special uses and beneficiaries	18
5.1.	Film heritage institutions.....	18
5.2.	Questions	18
5.3.	Accessibility of online audiovisual works in the European Union.....	18
5.4.	Questions.....	19
6.	Next Steps	19

1. INTRODUCTION

1.1. The opportunities offered by technology developments

This Green Paper is published within the context of the Europe 2020 Strategy, which aims to boost smart, sustainable and inclusive growth in Europe, of the Digital Agenda for Europe¹ and of the Commission Communication "A Single Market for Intellectual Property Rights" (the "IPR Strategy").² As identified in the IPR Strategy, while the internet is borderless, online markets in the EU are still fragmented by multiple barriers and a Single Market has still not been achieved. This Green Paper is intended to contribute to the development of a digital single market by launching a debate specifically on the opportunities and challenges of the online distribution of audiovisual works.

The cultural industries in Europe, including the audiovisual sector, make a significant contribution to the EU economy, creating about 3% EU GDP corresponding to an annual market value of 500 billion EUR and employing about 6 million employees.³ The EU records the second highest TV viewing figures globally, produces more films than any other region in the world, and is home to more than five hundred online video-on-demand services. The sector also makes an invaluable contribution to Europe's cultural diversity, unlocking its tremendous creative potential.

Traditional distribution networks for audiovisual content are national in scope: broadcast and cable networks cater primarily to national audiences or particular linguistic areas. Audiovisual content, in particular film, is often regarded as much as a cultural as an economic product, bound to national contexts and cultural preferences. European audiovisual policy recognises this as well as the vital importance of maintaining cultural diversity in a Single Market.

At the same time, digital technology and the internet are rapidly changing the way in which content is produced, marketed, and distributed to consumers. With converging technologies, the same content may be transmitted over different networks, whether via traditional broadcasting (terrestrial, cable and satellite) or via the internet and may be delivered to any one of a number of devices: TV, PC, games console, mobile media device. Converged networks and devices are increasingly common in the market, including the delivery of TV and internet via cable; and the emergence of internet-enabled TVs. Further possibilities emerging with the deployment of web-based services, including "cloud computing", are likely to accelerate this trend. Consumers increasingly expect to be able to watch anything, anywhere, anytime, and over any device. These developments are putting pressure on the traditional distribution networks for audiovisual media services on the one hand; and on the traditional release sequences for film on the other, as feature films may equally be made available to consumers in more flexible ways than has been the case hitherto. The traditional

¹ A Digital Agenda for Europe: COM (2010) 245 of 19.05.2010.

² A Single Market for Intellectual Property Rights - Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe: COM(2011) 287 final of 24.05.2011.

³ Study: The Economy of Culture in Europe < <http://www.keanet.eu/en/ecoculturepage.html>. In the UK alone, the audiovisual sector generates about 4 billion GBP direct production investment per year and about 132,000 direct jobs in the UK (2011 Study Creative UK, The Audiovisual Sector& Economic Success, p. 7).

value chains are in flux and business models are evolving to meet consumer expectations, including making services available cross-border.

The internet offers the audiovisual sector opportunities to develop its potential further, and to reach wider audiences both within Europe and beyond. Indeed, from a cultural and creative perspective, boosting the single market makes sense: while national markets may not be large enough for niche productions, aggregation could increase the commercial viability of the overall market. Furthermore, attractive offers of new audiovisual media services, including across borders, should increase revenues for rights holders, and, alongside appropriate measures to address infringing behaviour including enforcement and cooperation by intermediaries, could help to address the significant levels of piracy observed in the audiovisual sector. Such developments should also stimulate demand for higher speed and network capacity, which creates the business case for investments in faster networks.

1.2. The purpose and scope of the Green Paper

This paper reflects on the effect of technological developments on the distribution of, and access to, audiovisual and cinematographic works, and looks to start a debate on the policy options to develop a framework within which European industry and European consumers can benefit from the economies of scale offered by the digital single market. It is grounded in the view that an in-depth analysis is required in order to identify the existence and range of obstacles to the development of a digital single market.

In the case of audiovisual content, a number of reasons for the fragmentation of the online market have been cited, including technological barriers, complexity of copyright licensing processes, statutory and contractual provisions relating to release windows, lack of legal certainty for service providers, payment methods, consumer confidence and the prevalence of deep-seated cultural and linguistic differences.

The Single Market Act⁴ has already underlined that, in the internet age, collective management must be able to evolve towards European models which facilitate licences covering several territories. In addition, and as set out in the Digital Agenda for Europe, the Commission will report by 2012 on the need for additional measures, beyond the facilitation of collective rights management, allowing EU citizens, online content services providers and right-holders to benefit from the full potential of the digital single market, including measures to promote cross-border and pan-European licences.⁵

The first part of this Green Paper (Sections 2 and 3) focuses on rights clearance for the online distribution of audiovisual media services. An assessment is needed of the extent to which there are problems in this area, and the precise nature of such problems. Analysis is further required of possible options at EU level, including whether and to what extent the legal and regulatory framework needs to be modernised to provide European businesses the incentives to develop new business models and to offer content to consumers throughout Europe.

The second part (Section 4) deals with audiovisual rights holders' remuneration for the online use of their works and asks, essentially, whether additional measures should be taken at EU

⁴ "Single Market Act - Twelve levers to boost growth and strengthen confidence; Working together to create new growth", COM/2011/0206 final, 13 April 2011.

⁵ A Digital Agenda for Europe: COM (2010) 245 of 19.05.2010, p. 10.

level to ensure the adequate remuneration of authors and performers in relation to online uses of works and performances in which they hold rights.

The third part (Section 5) deals with certain special uses of audiovisual works and beneficiaries of exceptions. On the one hand it asks whether legislative changes are required to increase legal certainty for film heritage institutions; and on the other poses questions in relation to access by persons with disabilities to cultural materials.

Each section is followed by a non-exhaustive list of questions to guide stakeholders' contributions.

2. THE DIGITAL SINGLE MARKET FOR AUDIOVISUAL MEDIA SERVICES⁶

The European TV market is the second largest regional market in the world, after the US. It grew by 12% between 2006 and 2010, with over half of that growth occurring between 2009 and 2010 to reach an annual turnover of €84.4 billion in 2010. The European share of the global market remained stable at around 29% in 2010.⁷

TV broadcast distribution is increasingly diversified. In 2009, satellite broadcast accounted for 31% of the EU TV market, cable for 30%, digital terrestrial TV for 25% and IPTV⁸ for 5%.⁹ Western Europe is the largest IPTV market, accounting for 40% of global subscribers in 2010. France is the leading country in the world for IPTV (23% of the global total), followed by China (16%) and the US (16%).¹⁰ EU TV viewing is higher than the global average, and also showed the greatest increase globally over 2009-2010.¹¹

As the opportunities proffered by technological developments multiply, so the entire audiovisual value chain is in a state of flux. With the development of over the top Video,¹² IPTV and connected TV,¹³ the online video space will increasingly be shared not only between television channels, cable network and broadband operators but also with new entrant service providers.¹⁴ The landscape is further characterised by the fast development of

⁶ As defined in the Audiovisual Media Services Directive (2010/13/EU): "a service as defined by Articles 56 and 57 of the Treaty on the Functioning of the European Union which is under the editorial responsibility of a media service provider and the principal purpose of which is the provision of programmes, in order to inform, entertain or educate, to the general public by electronic communications networks within the meaning of point (a) of Article 2 of Directive 2002/21/EC. Such an audiovisual media service is either a television broadcast as defined in point (e) of this paragraph or an on-demand audiovisual media service as defined in point (g) of this paragraph."

⁷ Idate News 541, 12 January 2011.

⁸ IPTV is the delivery of a video feed channeled over a dedicated part of the telephone network. The feed is separate from the internet stream, and the content channeled onto the TV via a set-top box dedicated both to linear TV and on-demand services. The service is increasingly offered by telecommunications operators. (European Audiovisual Observatory, "Video on Demand and catch-up TV in Europe", p. 22)

⁹ In terms of primary TV sets per household, data provided by Screen Digest.

¹⁰ <http://www.telegeography.com/products/commsupdate/articles/2011/03/17/iptv-subs-reach-45-million-as-telcos-achieve-10-penetration-rate/>

¹¹ Eurodata Press Release, 24 March 2011.

¹² Usually refers to video services delivered through devices outside the traditional video delivery structure such as internet-connected set top boxes, tablets or games consoles.

¹³ Describes the integration of the internet into television sets (internet enabled TVs).

¹⁴ At the end of 2008, 33% of VoD services in Europe were originally TV service providers; 17% telecom operators; 14% content aggregators; 9% subsidiaries of US majors. Other providers of VoD services

social networking and social media sites which rely on the creation and upload of online content by end-users (user-generated content), and the advent of "cloud-based" services.¹⁵

Transactional Video-on-Demand (VoD) services include the online retail and rental of "stock catalogue" audiovisual works, primarily feature films, but also including audiovisual fiction, documentaries, educational programmes, cartoons etc. The emerging market for VoD services in Europe is dynamic, diverse and growing rapidly, though nevertheless currently lagging behind the US. All in all, more than 500 on-demand audiovisual services were available in Europe in 2008 on a range of different business models,¹⁶ and VoD generated turnover of €544 million. It is predicted that VoD turnover in Europe will increase dramatically over the next few years and thus will represent a more significant aspect of the audiovisual markets.¹⁷ There is a well-established framework for the cross-border transmission and reception of broadcasting services across the EU. On the one hand, the Audiovisual Media Services Directive underpins the principle of the freedom to transmit and receive TV programmes in the EU. On the other hand, the Satellite and Cable Directive¹⁸ complements this framework, its purpose being the facilitation of the clearing of copyright and related rights for cross-border satellite broadcasting and cable retransmission services. There is currently no legal instrument specifically addressing the clearing of copyright and related rights for cross-border on-line audiovisual media services.

It must be borne in mind that all agreements between private parties must respect competition law.

As highlighted in the introduction, the majority of audiovisual media services focus on a national audience or a particular linguistic area.¹⁹ Multi-territory broadcast services have largely not emerged, and broadcasters often refrain from clearing rights on a pan-European basis because the consumer demand abroad and the potential for advertising generated revenue does not currently justify the additional costs related to the setting up of services and the licensing of content.²⁰ To date it has been thematic services, focusing on cinema,

included cable and satellite operators, film companies, retailers, multimedia publishers and equipment manufacturers - European Audiovisual Observatory, 'Video on demand and catch-up TV in Europe', October 2009, p.116.

¹⁵ Cloud computing refers to the use of multiple server-based computing resources via a digital network. Contrary to classic computing, the user of a cloud-based service no longer stores data and applications on the user's computer but on the service operator's servers which may be located in another country. The user can then access his data through a network, usually the internet, from any place.

¹⁶ European Audiovisual Observatory, 'Video on demand and catch-up TV in Europe', October 2009, p.113.

¹⁷ Source: KEA Study "Multi-territory Licensing of Audiovisual Works in the European Union", pp. 108 and 109. In the UK, VoD accounted for €139 million or 3% of filmed entertainment revenues in 2009, and 8% of the retail/rental market (UK Competition Commission 'Movies on Pay TV Market Investigation', Background paper "Pay TV and movies on pay TV"). VoD climbed 33% on a year-on-year basis to account for 13% of retail/rental spend on filmed entertainment in the US in 2010. (Digital Entertainment Group, "Year End 2010 Home Entertainment Report").

¹⁸ Council Directive 93/83/EC of 27 September 1993 "on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission".

¹⁹ See application report of the Satellite and Cable Directive of 2002, COM/2002/0430 final, in this respect see also Bernt Hugenholtz, "Nouvelle lecture de la directive Satellite Câble: passé, présent et avenir".

²⁰ Indeed, the geographical scope of broadcasters' services is also driven by factors such as the geographical scope of interest for advertisers (in the case of broadcasters which rely upon advertising funding), and whether the cost of rights is sustainable in relation to the business of the core market. In

children's programmes, sports, travel etc. with a strong brand identity that have been able to extend their activities abroad.

A range of platforms offering transactional on-demand services span multiple territories.²¹ These tend to continue the practice of addressing customers "in their own language", and tailoring content to local preferences such as language, film classification, dubbing or subtitling requirements, advertising, holiday periods, and general consumer tastes. This is consistent with the experience of producers and distributors whether large or small scale, who have indicated that although they license content on a multi-territorial basis where there is a business case to do so, targeted and local investments in distribution and marketing are nevertheless required in order to promote and sell films in each country.²²

Where multi-territory services are emerging, they tend to be tested first in high income and technologically sophisticated markets. As a result, smaller markets or Member States with lower average incomes risk falling behind in terms of access to innovative audiovisual offers. Moreover, the fact that high-quality content is available only to consumers in some Member States is difficult to explain to European citizens who believe they should have the possibility to access content offers irrespective of their Member State of residence.²³

The issue of territorial licensing practices has recently come to the fore in the Premier League case.²⁴ This case concerns the practice of territorially restricting access by means of conditional access technology to sports broadcasts which are transmitted via satellite to various Member States.²⁵ The judgment of the Court is awaited. In earlier rulings, the CJEU has held that the freedom to provide services does not prohibit the imposition of geographical limits on broadcasting licences.²⁶

the EU, TV subscriptions accounted for 38% of the sector's revenues, advertising for 32% and public funding for 30% in 2009 (Screen Digest). Put quite simply, the pay-tv model requires content that the customer is willing to pay for.

²¹ E.g. Acetrax, Chello, Headweb, iTunes, Playstation Network Live, Vodder, Xbox Live.

²² E.g. New Paramount releases are available in 21 EU Member States in the VoD window, whether online or through digital cable, satellite or IPTV networks.

²³ In this respect, account should be taken of Article 20 Services Directive (Directive 2006/123/EC of 12 December 2006 on services in the internal market) which provides that Member States shall ensure that recipients of services are not made subject to discriminatory requirements based on their nationality or place of residence.

²⁴ Cases C-403/08, Football Association Premier League Ltd, v QC Leisure and C-429/08, Karen Murphy v Media Protection Services Limited.

²⁵ A UK publican showed Premier League matches using a decoder card imported from Greece. The Greek satellite broadcaster had bought the broadcasting rights only for Greece and the Greek decoder cards were considerably cheaper than those being sold for the UK by the UK broadcaster. According to the Advocate General's opinion of 3 February 2011, the freedom to provide services precludes provisions that prohibit the use of conditional access devices for encrypted satellite television in a Member State, if they have already been placed on the market in another Member State with the consent of the rightholder. Furthermore, according to the Advocate General a contractual obligation requiring a broadcaster to prevent its satellite decoder cards from being used outside the licensed territory is incompatible with the rules on competition.

²⁶ Coditel vs Ciné Vog Films, ECJ, 19 March 1980, Case 62/79; and Coditel vs Ciné Vog Films (Coditel II), ECJ, 6 Oct 1982, Case 262/81.

2.1. Rights clearance for online transmission of audiovisual media services

Until recently, broadcasters' activities consisted mainly of linear broadcasting (whether over the air, satellite or cable) and broadcasters only needed to clear the reproduction and broadcasting/communication to the public rights, of authors, performers and producers, for the use of audiovisual works. Increasingly, however, broadcasters make at least a portion of their programming available on an on-demand basis after the initial broadcast (catch-up TV services, downloads). Indeed most of the major European television channels provide a catch-up TV service.²⁷ Programmes available include news, magazines, series and feature films. In order to provide such online (on-demand) services, broadcasters need to clear a different set of rights than those required for the initial broadcast, namely the reproduction right and the making available right.²⁸

Where broadcasters distribute their online services beyond the territory of the initial broadcast, they need to clear the rights for each additional territory. Ordinarily, the economic rights in an audiovisual work are transferred from the contributors (authors, performers) to the producer in exchange for an upfront payment, by law or by contract.²⁹ This enables the producer to licence the majority of forms of exploitation of the audiovisual work, including on-demand uses, on an individual basis. On the other hand, clearing the on-line exploitation rights for works and other subject matter incorporated in the audiovisual fixation (notably in relation to background music) for online uses and across multiple territories appears in some cases and for some rights holders to involve significant administrative effort and transaction costs.

2.2. Rights clearance for retransmission of audiovisual media services

Retransmission of broadcast programmes – generally understood as the simultaneous transmission of a broadcast by a different entity such as a cable operator - is a separate copyright act, also requiring authorisation from right holders.

The Satellite and Cable Directive provides a twin-track copyright clearing process for the simultaneous retransmission, by cable, of programmes broadcast from other Member States. On the one hand, broadcasters may licence their own rights as well as the rights that have been transferred to them by contract on an individual basis to cable operators.³⁰ On the other hand, the Directive requires that all other rights necessary for the retransmission of a specific programme by cable may only be managed by a collecting society. This was deemed necessary in the case of simultaneous cable retransmission because of the difficulty, otherwise, for cable operators to ensure that they had cleared all rights in the programmes transmitted to them by broadcasters in time and therefore to prevent the risk of black-outs

²⁷ European Audiovisual Observatory, 'Video on demand and catch-up TV in Europe', October 2009, p. 220.

²⁸ It is noted that these rights are technology neutral. The need to clear the making available right arises from the service provided (the making available of a work "on demand") regardless of delivery platform or protocol used (e.g. cable network, internet protocol or other). These rights are provided by the international treaties of which the EU and its Member States are members (the WIPO Copyright Treaty and the WIPO performances and phonograms Treaty) and in the EU acquis (Directive 2001/29/EC of 22 May 2001, the "Information Society Directive").

²⁹ See section 4 below for more detail.

³⁰ Satellite and Cable Directive, Art. 10.

during programming.³¹ The provisions of the Directive apply exclusively to "the simultaneous, unaltered and unabridged retransmission by a cable or microwave system of an initial transmission from another Member State".³²

New digital platforms have enabled programmes to be retransmitted simultaneously across different networks. Operators of DSL,³³ IPTV, mobile networks and other digital platforms such as DTT³⁴ also operate broadcast retransmission services. The act of retransmission by internet of a broadcast is normally referred to as "simulcasting". The question arises as to whether the technology-specific provisions of the Satellite and Cable Directive need to be reviewed to develop a framework for cross-border retransmission of audiovisual media services that is technology neutral with regard to the delivery platform. It could be argued that in practice this seems to be already applied in part, as broadband operators providing an analogous service – "simultaneous, unaltered and unabridged" retransmission - are included in global arrangements for cable redistribution. On-demand services and web originating streaming services (normally referred to as "webcasting") are excluded.

Claims have also been made that rights clearance, under the current rules for cable retransmission in the Satellite and Cable Directive may require multiple transactions with different rights representative organisations, and that there could be a lack of clarity and certainty as to who has the mandate to licence which rights. In this context there has also been some debate around the need to maintain mandatory collective licensing for cable retransmission as opposed to giving freedom to rights owners to license on an individual basis.

2.3. Rights clearance for transactional Video on Demand services

Audiovisual markets across the world are predicated upon exclusive release arrangements, with theatrical release playing a crucial element in the creation of a "brand identity" of a film in each country in which it is released. Producers and distributors maximize revenues by staggering the media platform through which a film is marketed ("media windows").³⁵ Such windows or "chronologies" differ across Member States, but the standard sequence for a feature film, for example, would be cinema release, video/DVD/Blu Ray, VoD, pay-TV and finally free-to-air TV. In the vast majority of Member States, the chronology as well as the length of each release window is a matter of contract between rightholders and distributors. Two Member States, however, maintain national regulatory measures with regard to release windows,³⁶ while some others link the grant of film subsidies to respect for agreed theatrical release windows.³⁷

Marketing for exploitation on future versions (in future windows) is based on the initial, theatrical release, which is considered to play a major role in determining the overall return on

³¹ Cable operators therefore do not have to obtain licences from all the individual rightholders in broadcast programmes, but rather negotiate a licence with a collecting society (for rights held by third parties) and the relevant broadcaster (for rights directly held by the broadcaster).

³² Satellite and Cable Directive, Art. 1(3).

³³ DSL (Digital Subscriber Line) provides digital data transmission over a telephone network.

³⁴ DTT (Digital Terrestrial Television) is the transmission of broadcasts in digital form on radio frequencies. As analogue terrestrial television, DTT is received by an aerial antenna.

³⁵ See KEA study "Multi-territory Licensing of Audiovisual Works in the European Union", p. 56 for a description of media windows post theatrical release.

³⁶ France and Portugal. See Media Windows in Flux by Martin Kuhr, IRIS plus, pp. 4 and 5.

³⁷ E.g. Germany, Austria, *ibid*.

any given film. Film producers and distributors have begun to realign the traditional release windows to include VoD windows, including, for example, making films available to transactional VoD services at the same time as in the cinema or on DVD.³⁸ This development has partly been triggered by the fact that marketing momentum can be lost if the period between the first release of a work and its subsequent exploitation through other channels is too long. At the same time, the current system of staggered platform distribution and territorial release is seriously challenged by the growing consumer interest in having access to audiovisual and cinematographic works almost immediately after their first release, irrespective of where they reside. Pirated copies of a film are increasingly made available online even before its initial distribution in cinemas or on television, imposing further pressure to shorten release windows.³⁹

European film producers consider theatrical release to be particularly important for European films in light of their relatively modest promotion budgets.⁴⁰ It appears that any approach that removed from producers and distributors the opportunity to recoup investments through contractual distribution and marketing arrangements, would be likely to lead to a significant loss of incentive to invest in film production.

As explained above, the economic rights in audiovisual works (including the making available right) are normally transferred from authors and performers to the producer (by law or by contract). This enables the producer to licence most of the required rights for VoD services directly. It appears that rights clearance may nevertheless be laborious and expensive for some VoD operators. Firstly, as part of pre-financing arrangements, producers may have split the exploitation rights across territories, with a different distribution partner having been appointed to manage marketing and distribution in each territory. Secondly, lack of clarity with respect to the relevant rights which need to be cleared for works and other subject matter incorporated in the audiovisual fixation is sometimes seen as an issue.

2.4. European film production and distribution

The EU has become one of the largest producers of films in the world: 1,168 feature films were produced in the EU in 2009 (compared to 677 produced in the US)⁴¹ European films represent an estimated 25% of cinema admissions in the EU with US films having a 68% market share.⁴² Conversely, US films enjoyed a 93% share of the US market, while EU films had a 7% market share in 2009. There is no publicly available data on online market shares.

³⁸ E.g. Warner Bros' "Day and Date" initiative whereby VOD is released on the same date as the DVD. Date and Date titles are released in the majority of EU Member States. European operators have also started to experiment such alternative distribution models. Curzon Artificial notably released Fatih Akin's *The Edge of Heaven*. The film was released in cinemas at the beginning of 2008 and was offered general release for a limited period (14 days) on Sky's VOD service at a premium price (more or less the same as the cinema ticket). Curzon believes that this VOD trial has boosted admissions at cinemas for this film and has since then renewed this experience with several films.

³⁹ European Audiovisual Observatory, *Video on demand and catch-up television in Europe*, October 2009, p. 75

⁴⁰ This is even more crucial for co-productions since co-producer(s) in other territories (producer distributors) expect in return to their investment to enjoy the exclusive rights in their territory. It is also true for other productions. Distributors in other Member States are granted exclusive rights in their territory by the sales agent.

⁴¹ For comparison, India Japan and China produced respectively 819, 456, and 445 films in 2009. European Audiovisual Observatory, "Focus 2010".

⁴² Including films produced in Europe with incoming investment from the US.

These figures reflect the fact that the European cinematographic industry is confronted with some unique structural characteristics including the language and cultural specificities and preferences of national markets and the limited availability of financial sources. The European audiovisual sector is deeply fragmented, consisting of a large number of small- and medium-sized enterprises (SME's).⁴³ Europe has not been in a position to develop a studio system of the nature developed by the Hollywood majors. It suffers from underinvestment in comparison with other countries⁴⁴ and the average film budget is a fraction of that of the major studios.⁴⁵ European films often enjoy success in their home territory, but, as the figures above demonstrate, tend to have limited distribution and appeal outside the territory of their production.

Given the structural challenges for European cinema, the development of this sector has not been left solely to market forces. Pluralism, cultural and linguistic diversity and protection of minors are some of the objectives of general interest safeguarded by EU legislation, notably the Audiovisual Media Services (AVMS) Directive. In the same vein, the AVMS Directive and the MEDIA programme⁴⁶ promote the production and distribution of European works in both linear and non linear services. The MEDIA programme aims notably to increase the circulation and viewership of European audiovisual works inside and outside the EU. The Communication on state aid to the cinema sector,⁴⁷ currently under review, provides an appropriate framework allowing Member States to provide financial support for the distribution and production of films whilst maintaining a level playing field in the internal market.

The European Commission recognizes that national funding systems are vital to maintain investment in local productions and the close linkages across multiple platforms, as traditional broadcasters are major commissioners and distributors of audiovisual and cinematographic production.⁴⁸ They are also, in some instances, required by law to invest a certain percentage of turnover in local productions.

The MEDIA programme, which has developed in response to the fragmented nature of European cultural markets, provides a successful support mechanism both to multi-territory availability of European films, and to emerging VoD platforms. Among 16 projects supported

⁴³ In 2007, there were over 600 film production companies in France, 400 in the UK and 200 in Germany.
⁴⁴ Investment per capita amounts to \$41 per capita in the US, \$20 in Japan and \$13 in Europe (Screen Digest, 2011)

⁴⁵ The average budget of a French initiative film in 2010 was 5.48M€, CNC "La production cinématographique en 2010" p. 10

⁴⁶ http://ec.europa.eu/culture/media/index_en.htm

⁴⁷ Commission Communication "on certain legal aspects relating to cinematographic and other audiovisual works" COM(2001)534 of 26.09.2001.

⁴⁸ In the UK, for example, TV channels accounted for 31% of filmed entertainment revenues in 2009 (UK Competition Commission 'Movies on Pay TV Market Investigation', Background paper "Pay TV and movies on pay TV"). In France, co-production and pre-sale of rights to broadcasters together with distribution arrangements financed some 55% of films produced on a budget higher than €7M in 2010 (CNC "La production cinématographique en 2010" p. 17).

in 2010 only 4 are of a purely national coverage.⁴⁹ The other 12 projects have an international reach as not necessarily limited to the borders of the European Union.⁵⁰

3. POLICY APPROACHES

The European Commission has expressed its commitment to help to close gaps in the availability of online services for consumers by creating a European framework for online copyright licensing of multi-territorial and pan-European services.⁵¹ As announced in the IPR Strategy, the Commission will present a legislative proposal in early 2012 to improve the collective management of copyright including by increased transparency and better governance of collecting societies, and thus to ensure that collective management evolves and responds to the needs of multi-territorial licensing. As regards audiovisual works where licensing directly through a one stop shop (the producer) is often possible, this framework to facilitate the collective licensing of rights may be particularly important for certain aspects such as the clearing of rights for music incorporated in the audiovisual work.

Other options have been put forward. One is to extend the "country of origin" principle that underpins acts of broadcasting by satellite (as set out in the Satellite and Cable Directive) to the delivery of programming online, in particular for the delivery of services made available on demand that are ancillary to broadcast activities (e.g. catch up TV). Under this scenario, the applicable law would be that of the country where the online transmission originates, though parties would also be able to ensure that the licence fee took account of all aspects of the transmission, including the actual and potential audience as well as the language version.⁵² In addition, the application of this "country of origin" approach would not affect the contractual freedom of the parties i.e. when setting the licence terms, rightholders and commercial users would be able to agree by contract the territorial scope of the licence.⁵³

Questions arise as to how the "country of origin" would be determined in respect of on line transmissions.⁵⁴ This is particularly relevant in relation to transactional on-demand services where the introduction of the "country of origin" approach could easily entail regulatory arbitrage with regard to the choice of country of establishment of the service provider.

⁴⁹ These platforms must have a "minimum European dimension" (they should include works from at least five eligible countries representing five official languages of the EU). Among the award criteria a special bonus is accorded to platforms offering cross border and language distribution.

⁵⁰ VOD platforms such as MUBI, UNIVERSCINE, EUROVOD are supported by the MEDIA programme, e.g. EUROVOD and MUBI (<http://mubi.com>) have acquired brand recognition and through their deal with Sony Playstation have a reasonable prospect of establishing themselves; they offer a European wide offer of films for a limited part of their catalogue and, in addition, offer various catalogues on a territory basis; MEDICI (www.Medici.TV) has become internationally well-known in a specific area (classical music) and offers streaming services of live music performances on the Internet; Mobile projects benefiting from the MEDIA programme such as Shortz (www.shortz-tv.com) also have a pan-European reach.

⁵¹ See Communication of the European Commission on "A Single Market for Intellectual Property Rights", COM (2011) 287, p. 11.

⁵² Recital 17 of Directive 93/83/EC.

⁵³ Satellite and Cable Directive, Recital 16.

⁵⁴ In respect of satellite broadcasts, the act of communication occurs solely in the Member State where, under the control and responsibility of the broadcasting organization, the programme-carrying signals are introduced into an uninterrupted chain of command leading to the satellite and down towards the earth. See Satellite and Cable Directive, Art. 1(2)b.

Audiovisual works are language-specific in value and most audiovisual media services focus primarily on a national audience, or, at their broadest, on common language groups. The precise extent of the problem, and the added value of an extension of a country of origin principle, need to be assessed. Other questions relating to the level of protection of rightholders and the need for further harmonisation should also be examined. Reasons for the fact that, more than fifteen years after the application of the relevant Directive, this approach does not seem to have led to a broad emergence of pan-European satellite broadcasting services also need to be considered.⁵⁵

The Commission undertook in the "IPR Strategy" to examine the more far-reaching approach of the creation of a comprehensive unitary European Copyright Code. Such a unitary European Copyright Code could be based on a codification of the existing EU copyright directives where the need to go beyond the current harmonisation will be examined.

It could also provide the opportunity to examine whether the exceptions and limitations to copyright allowed under the Information Society Directive⁵⁶ need to be updated. In addition to such a Code, the feasibility of creating an optional unitary copyright title on the basis of Article 118 TFEU could be examined.⁵⁷ An optional title could be made available on a voluntary basis and co-exist with national titles. Future authors or producers of audiovisual works would have the option to register their works and then obtain a single title that would be valid throughout the EU. The feasibility, actual demand for, and the tangible advantages of, such a title, together with the consequences of its application alongside existing territorial protection must be thoroughly examined.

Finally, concerns have been raised in this area, as in others, about the accuracy of rights ownership information. There seems therefore to be merit in examining the options for developing data management systems for the ownership of rights in audiovisual works.⁵⁸ Furthermore, in light of the need for rights clearance for pre-existing works and subject matters incorporated in the audiovisual work there seems to be merit in exploring the ways in which sources of rights ownership information could be shared across sectors.

3.1. Questions

1. What are the main legal and other obstacles – copyright or otherwise - that impede the development of the digital single market for the cross-border distribution of audiovisual works? Which framework conditions should be adapted or be put in place to stimulate a dynamic digital single market for audiovisual content and to facilitate multi-territorial licensing? What should be the key priorities?

⁵⁵ In many cases, the geographical scope of satellite broadcasts remains limited, and few pan-European services have emerged. One study has found that under half of the EU satellite channels are international, these being primarily information channels, adult-content and minority-language channels (see KEA Study "Multi-territory Licensing of Audiovisual Works in the European Union", p 146).

⁵⁶ Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, 22 May 2001.

⁵⁷ See Communication of the European Commission on "A Single Market for Intellectual Property Rights", COM (2011) 287, p. 11.

⁵⁸ Audiovisual producers are working on an international identification numbering system for audiovisual works (ISAN, International Standard Audiovisual Number). To date ISAN does not contain rights ownership information and participation is on a voluntary basis. Some of the major US film studios are working on a similar system (EIDR, Entertainment Identifier Registry).

2. What practical problems arise for audiovisual media services providers in the context of clearing rights in audiovisual works (a) in a single territory; and (b) across multiple territories? What rights are affected? For which uses?
3. Can copyright clearance problems be solved by improving the licensing framework? Is a copyright system based on territoriality in the EU appropriate in the online environment?
4. What technological means, for example individual access codes, could be envisaged to enable consumers to access "their" broadcast or other services and "their" content, irrespective of their location? What impact might such approaches have on licensing models?
5. What would be the feasibility, and what would be the advantages and disadvantages of, extending the "country of origin" principle, as applied to satellite broadcasting, to online audiovisual media services? What would be the most appropriate way to determine the "country of origin" in respect to online transmissions?
6. What would be the costs and benefits of extending the copyright clearance system for cross-border retransmission of audiovisual media services by cable on a technology-neutral basis? Should such an extension be limited to "closed environments" such as IPTV or should it cover all forms of open retransmissions (Simulcasting) over the internet?
7. Are specific measures needed in light of the fast development of social networking and social media sites which rely on the creation and upload of online content by end-users (blogs, podcasts, posts, wikis, mash-ups, file and video sharing)?
8. How will further technological developments (e.g. cloud computing) impact upon the distribution of audiovisual content, including the delivery of content to multiple devices and customers' ability to access content regardless of their location?
9. How could technology facilitate the clearing of rights? Would the development of identification systems for audiovisual works and rights ownership databases facilitate the clearance of rights for online distribution of audiovisual works? What role, if any, is there for the European Union?
10. Are the current models of film financing and distribution, based on staggered platform and territorial release options, still relevant in the context of online audiovisual services? What is the best means to facilitate older films which are no longer under an exclusivity agreement being released for online distribution across the EU?
11. Should Member States be prohibited from maintaining or introducing legally binding release windows in the context of state funding for film production?
12. What measures should be taken to ensure the share and/or prominence of European works in the catalogue of programmes offered by on-demand audiovisual media service providers?
13. What are your views on the possible advantages and disadvantages of harmonizing copyright in the EU via a comprehensive Copyright Code?

14. What are your views on the introduction of an optional unitary EU Copyright Title? What should be the characteristics of a unitary Title, including in relation to national rights?

4. RIGHTS HOLDERS' REMUNERATION FOR ONLINE EXPLOITATION OF AUDIOVISUAL WORKS

The European Commission considers that an appropriate remuneration for rightholders should be ensured. In parallel, it is essential for the development of cross-border services in the digital single market that the ownership and rights for cross-border services are transparent and that the costs of launching new services are predictable. Ultimately, the facilitation of successful cross-border services will lead to more remuneration for creators.

While there has been extensive harmonization in the EU as regards exclusive economic rights and the term of protection,⁵⁹ rules on authorship and first ownership in the EU have only partially been harmonised. As identified by the Commission in its report on the question of authorship of cinematographic or audiovisual works in the Community:⁶⁰

"As a result of this harmonisation, all Member States consider the principal director of the film as one of its authors now. However, Community legislation has not resulted in complete harmonisation of the notion of authorship in cinematographic and audiovisual works. Differences in detail still exist with respect to the question of who, among the group of persons involved in the making of the film, are to be considered as co-authors besides the principal director".⁶¹

Furthermore, national rules on transfers and assignments of rights diverge, as do those on legal succession. The scope of the transfer of rights also differs in Member States.⁶² The patchwork of approaches across the EU is considered by some to pose a challenge to the licensing of audiovisual works within the European Union, making it complex and time-consuming.

⁵⁹ Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission; Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, Directive 2006/115/EC on rental right and lending right and on certain rights related to copyright in the field of intellectual property and Directive 2006/116/EC on the term of protection of copyright and certain related rights.

⁶⁰ COM/2002/0691 final, 6 December 2002.

⁶¹ For example, French law considers several contributors to an audiovisual work as authors: the author of the scenario, the author of the film adaptation, the author of the dialogue, the author of musical compositions specifically composed for the film, the director and the composer of the author of the work which has been cinematographically adapted. In Germany, anyone making a certain creative contribution may be regarded as co-author; German courts have to date deemed the director, the cameraman and the editor to be authors. In the UK, Ireland and Luxembourg the film producer is also a co-author of the audiovisual work.

⁶² For example, the French law on audiovisual productions is based on the assumption that all economic rights in a film have been transferred to the producer, while in Austria or Italy, the producer is the original owner of all cinematographic exploitation rights. In the UK, the principal director is presumed to be the film's original author and the rights are transferred to the producer under the "works for hire" doctrine, which presupposes that the director is employed by the producer. Other Member States such as Belgium, Denmark, Finland, Greece, Portugal, Sweden or the Netherlands also provide for presumptions of various scope.

4.1. Authors' remuneration for online exploitation

For the most part, authors transfer their exclusive economic rights to the producer in return for a lump sum or "buy out" payment for their contribution to an audiovisual work (writing and/or directing etc). It is not the norm for authors to receive a per use remuneration for primary uses of their work such as cinema exhibition or the sale of DVDs.⁶³ Equally, the majority of Member States do not provide a framework for audiovisual authors to receive a "per-use" payment for the online exploitation of their works.⁶⁴

In some Member States (France, Belgium, and Bulgaria) collective management societies representing audiovisual authors are contractually entitled to collect remuneration on a per use basis on behalf of their members for the TV broadcasting of their works. In some other countries (Spain, Italy, Poland) the final distributor, usually the broadcaster, is considered by law to be responsible for per use payments to the author. The producer nevertheless is vested with the economic rights that need to be cleared for exploitation.

It could be argued that authors have no economic benefit from the online exploitation of their works if no proportional remuneration is being passed on a per use basis. To remedy this, one option would be the introduction of an unwaivable right to remuneration for their "making available" right managed, compulsorily, on a collective basis. Another option would be to promote authors' ability to undertake negotiations individually or collectively. This could be seen as the best way to maximize the value of authors' exclusive rights, especially as the making available right could prove to be one of their most valuable negotiating assets in the future.

4.2. Performers' remuneration for online exploitation

As with audiovisual authors, in most EU countries the exclusive economic rights of audiovisual performers, including the "making available" right for interactive online use, are usually transferred to the producer by law or by contract upfront, in exchange for a lump sum. Only a few Member States, such as Spain, provide for an equitable remuneration for audiovisual performers, in order to ensure that they receive a proportionate share in the proceeds of the exploitation of their performances.

It could be argued that performers should equally be entitled, on a harmonised basis, to an unwaivable right to remuneration from which they would benefit even after they have transferred their exclusive right of making available. This right could also be compulsorily collected by collective management societies. Again, other means to ensure that performers can individually or collectively negotiate adequate remuneration should be considered.

With regard to authors' and performers' remuneration, it could be argued that the creation of another layer of remuneration rights might increase uncertainties as to where and from whom licences need to be cleared (particularly in the absence of harmonised rules on authorship in the EU) and require users to administer and reconcile multiple remuneration claims for each audiovisual work. This option could therefore be seen as detrimental to the development of

⁶³ The Rental and Lending Directive provides for authors and performers an unwaivable right to equitable remuneration which would be applicable in the case of DVD rental. The remuneration is not subject to compulsory collective management.

⁶⁴ The "making available" right granted under the 2001 Information Society Directive is in most cases transferred to the producer upfront.

online distribution platforms for audiovisual works by increasing transaction costs and legal and economic uncertainty.

It is important to assess whether the creation of new remuneration rights to be collectively managed is the only means to ensure adequate remuneration, or whether alternative mechanisms could be established to ensure that authors' and performers' remuneration adequately reflects the success of a work.⁶⁵

4.3. Questions

15. Is the harmonisation of the notion of authorship and/or the transfer of rights in audiovisual productions required in order to facilitate the cross border licensing of audiovisual works in the EU?
16. Is an unwaivable right to remuneration required at European level for audiovisual *authors* to guarantee proportional remuneration for online uses of their works after they transferred their making available right? If so, should such a remuneration right be compulsorily administered by collecting societies?
17. What would be the costs and benefits of introducing such a right for all stakeholders in the value chain, including consumers? In particular, what would be the effect on the cross-border licensing of audiovisual works?
18. Is an unwaivable right to remuneration required at European level for audiovisual *performers* to guarantee proportional remuneration for online uses of their performances after they transferred their making available right? If so, should such a remuneration right be compulsorily be administered by collecting societies?
19. What would be the costs and benefits of introducing such a right for all stakeholders in the value chain, including consumers? In particular, what would be the effect on the cross-border licensing of audiovisual works?
20. Are there other means to ensure the adequate remuneration of authors and performers and if so which ones?

⁶⁵ For example, one approach to ensuring that authors' and performers' remuneration adequately reflects the success of a work could be the introduction of legally binding provisions on transparency and remuneration in contracts.

5. SPECIAL USES AND BENEFICIARIES

5.1. Film heritage institutions

Film heritage institutions⁶⁶ have, in line with their public interest missions such as preservation, restoration and the provision of cultural and educational access to works in their collections, a strong interest in digitising their archives, making them available online and projecting them in digital format in their cinémathèques. These institutions do not own the rights in the audiovisual works in their possession, but merely hold such works as a function of their role as cultural depositories. Such institutions have expressed the concern that clearing the rights for the works they hold is time-consuming and costly. They are concerned that the current EU framework does not provide them with sufficient legal certainty to carry out all the necessary processes for the fulfilment of their responsibilities, which might include media and format migration, and the transmission of works to one or more remote locations for preservation purposes, etc.

The Green Paper on "Copyright in the knowledge economy"⁶⁷ followed by the Commission Communication on "Copyright in the knowledge economy",⁶⁸ opened discussion on the non-mandatory exceptions of Article 5(2)(c) (reproduction for preservation in libraries) and of Article 5(3)(n) (in situ consultation for researchers) of Directive 2001/29/EC on copyright in the information society. In order to provide them with legal certainty to carry out their tasks, European film archives have expressed the view that these exceptions should become mandatory and their application harmonised among Member States.

5.2. Questions

21. Are legislative changes required in order to help film heritage institutions fulfil their public interest mission? Should exceptions of Article 5(2)(c) (reproduction for preservation in libraries) and of Article 5(3)(n) (in situ consultation for researchers) of Directive 2001/29/EC be adapted in order to provide legal security to the daily practice of European film heritage institutions?

22. What other measures could be considered?

5.3. Accessibility of online audiovisual works in the European Union

The European Disability Strategy 2010-2020 refers to accessibility problems that person with disability experience. In particular it mentions that many television broadcasters still provide few subtitles and audio-described programmes.

⁶⁶ Film heritage institutions or archives refer to those public bodies which Member States have designated to systematically collect, catalogue, preserve, restore and make accessible for educational, cultural, research or other non-commercial uses cinematographic and other audiovisual works (see point 2 of Recommendation 2005/865/EC of the European Parliament and of the Council of 16 November 2005 on film heritage and the competitiveness of related industrial activities, OJ L.323, 9.12.2005, pp. 57-61). A system of legal deposit of cinematographic works exists in the majority of Member States, either through legal deposit or through the compulsory deposit of cinematographic works that have received public funding.

⁶⁷ COM(2008) 466 of 16.07.2008.

⁶⁸ COM(2009) 532 of 19.10.2009.

The strategy proposes to optimise accessibility in line with the Digital Agenda and includes among the list of actions for 2010-2015 the intention to systematically evaluate accessibility in the revision of legislation undertaken under the Digital Agenda following the UN Convention on the Rights of Persons with Disabilities (UNCRPD).⁶⁹

5.4. Questions

23. Which practical problems arise for persons with disabilities to have access on an equal basis with others to audiovisual media services in Europe?
24. Does the copyright framework need to be adapted to improve accessibility to audiovisual works for persons with disabilities?
25. What would be the practical benefits of harmonising accessibility requirements to online audiovisual media services in Europe?
26. What other actions should be explored to increase the availability of accessible content across Europe?

6. NEXT STEPS

All interested parties are invited to comment on the ideas raised in this Green Paper, including by responding to the specific questions listed, to the following address:

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Please submit your comments by **18 November 2011** in electronic format. Received contributions will be published on the on the DG Internal Market and Services website unless a contributor requests otherwise. It is important to read the specific privacy statement attached to this consultation for information on how your personal data and contribution will be dealt with.

⁶⁹ This Convention stipulates in its Article 30 on Participation in cultural, recreation, leisure and sport that State Parties shall recognise the right of persons with disabilities to take part on an equal basis with others in cultural life, and shall take appropriate measures to ensure that persons with disabilities inter alia enjoy access to television programmes, films, theatre and other cultural activities in accessible formats. Furthermore it mentions that State Parties shall take appropriate steps, in accordance with international law, to ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials.