

The logo for FIAD (International Federation of Film Distributors Associations) consists of the letters 'FIAD' in a stylized, serif font.The logo for IFTA (Independent Film & Television Alliance) includes the text 'Independent Film & Television Alliance' with three blue squares to the right of the word 'Alliance'.

**FIAD - FIAPF – IFTA - IVF Submission in response to the  
Commission’s Reflection Document on Creative Content in a Digital Single Market:  
Challenges for the Future**

January 4, 2010

**Introduction**

The International Federation of Film Distributors Associations (FIAD) gathers the national organisations of film distribution companies. Film distributors are the intermediates between film producers and cinema exhibitors and cover the entire range of companies: small and medium-sized companies specialized in art house films as well as larger companies specialized in mainstream films. FIAD's members operate in 16 European countries where they achieve from 90% to 100% of the theatrical market.

The International Federation of Film Producers Associations (FIAPF) is a trade organisation dedicated to the defence and promotion of the legal, economic and creative interests of film and audiovisual producers throughout the world. FIAPF's members are 26 national producers' organisations from 23 countries across the globe from Europe, Asia, Pacific, North America, and Latin America.

Independent Film & Television Alliance (IFTA) is a non-profit trade association whose mission is to provide the independent film and television industry with high-quality marketplace-oriented services and worldwide representation. IFTA's Membership includes 160 companies engaged in entertainment production, distribution and finance from 22 countries worldwide, of which nearly half are headquartered in Europe. The membership includes among others Studio Canal, Handmade Pictures, Telepool, Svensk Filmindustri AB, and Adriana Chiesa Enterprises SRL.

The members of the International Video Federation (IVF - ID 7013477846-25) comprise companies, which are involved in all areas of the film industry (development, production, distribution, etc.) as well as entities dedicated to, and specialized in, distribution of audiovisual content on physical carriers and/or over digital networks, including the Internet.

More and more our members are pursuing the offer of cinematographic and audiovisual works online, either directly to end-users or working in cooperation with service providers or content aggregators pursuing different business models (e.g. time-limited viewing, streaming or digital delivery of permanent copies). Such new services bring wider choice to consumers as they involve an increasing variety of content, both on the Internet, but also through other types of networks.

FIAD, FIAPF, IFTA and the IVF (collectively, “we” or “us”) appreciate the opportunity offered to take part in the public consultation on the Commission’s Reflection Document on Creative Content in a Digital Single Market. We and our representative organizations have participated actively in the public hearings and consultations on content online organized by the European Commission over the past couple of years.

There are many issues raised by the Reflection Document, and we anticipate that the Commission’s dialogue on this topic will continue for a while. At this stage, there are three areas in respect of which we offer comment:

First, on the role of copyright: We believe that the copyright system and the exclusive rights granted to the creators are fundamental to encouraging creation in the audiovisual sector and to ensuring that the financial means are available to develop creative content irrespective of the means of distribution. However, we do not share the view which appears to be supporting the thinking expressed in the Reflection Document, i.e. that copyright is merely a remuneration tool for copyright holders. On the contrary, copyright is a crucial strategic tool for securing financing and exploitation of creative works by means of the exclusive rights granted to right holders to license their works in the first place to commercial users (e.g. to film and video distributors, broadcasters, online platforms, etc.).

Second, on the need to address both online and hard goods piracy through enforcement of intellectual property rights: We understand that piracy is not meant to be addressed in detail in the Reflection Document. Indeed, the Reflection Document refers only to one part of the problem of unauthorized use of copyrighted works in the off-line and online worlds, i.e. “illegal downloads”. However, the film industry is exposed to many other types of piracy and illegal use of copyrighted content, for example in the form of commercially-driven piracy-facilitating platforms online, many of which are based in Europe – in some cases despite condemnation by national courts. The industry is committed to increasing the availability of compelling, user-friendly legal offerings online and raising public awareness, both of which are key elements in addressing online copyright infringements. However, we do not share the view that increasing legal offer on its own will single-handedly solve the issue of online copyright infringements. A focussed enforcement policy is an essential element of developing the legal online market for creative content so as to create a level playing field for the legal online services. Due to the unique financing and distribution model of the film industry, piracy has damaging effects beyond the lost revenues: piracy damages the value of films by lowering the license fees that may be obtained from local distributors (who cannot compete with “free” sources), thus removing the incentive and in many cases the ability to finance and produce future films.

Third, on the significance of the national distribution infrastructure in financing audiovisual content and in enabling the wide availability of non-national programming throughout the European Union: Outside the major Hollywood studios, films in particular are financed in part through reliance on local distributors’ royalty guarantees, without which production funds would not be available. In addition, these distributors distinguish which films will meet local audiences’ expectations and take on the task of marketing the films to attract that audience. The Internet and online distribution make physical distribution across borders possible but they do not create the financing or, indeed, the audience for audiovisual content

created for another audience. A full understanding of these relationships is critical to the Commission's development of future policies in this area.

### **Copyright in the Information Society**

The EU's legal framework for copyright in the Information Society is the subject of several comments and suggestions in the Reflection Document. Some of these comments and/or suggestions are worded in terms which could suggest that copyright rules are too complex and/or rigid, that European media companies' current business models are perhaps not sustainable, that copyright territoriality could be an obstacle to consumer satisfaction, etc. We take issue with such suggestions. It is our view and experience that the copyright system and the distribution models that it supports are the most effective at increasing consumer awareness of what is on offer and providing that audiovisual content to consumers in formats for which there is a demand, while still maintaining the producers' ability to secure financing and distribution for future projects.

We wish to emphasize the importance of maintaining the supremacy of exclusive rights as provided for in international copyright treaties and the mirroring *acquis communautaire*. Exclusive rights are essential to the copyright system in the audiovisual industry, including the right holder's entitlement to choose whether to manage the rights concerned individually or collectively through a collective management entity. As many right holders collaborate to create a film, the producer will almost always be responsible for securing the initial investment and funding for the film project and for ensuring that specialized entities take over the subsequent distribution of the finished film. The producer exercises this role either by direct ownership of copyright or by obtaining the transfer of rights from other right holders by law or contract. Depending on the national system, these right holders comprise directors, scriptwriters, actors, music score composers, and other relevant parties whose creative contribution to the collective work creates individual rights under national copyright law. This system has evolved over the years to ensure the optimal exploitation of the audiovisual work as well as legal certainty for down-stream licensees. Centralization of rights gives the producer the flexibility needed to efficiently exploit the film on behalf of all the right holders involved in the creative process and to take into account the specificities of particular films, markets, consumer tastes, etc.

### ***Copyright Exceptions and Limitations***

The Reflection Document states that “[t]he unclear contours of strong “exclusive rights” are neither beneficial for the internal market in knowledge products nor for the development of internet services.” Exceptions and limitations are part of the balance of interests which the legislators sought to safeguard at the adoption of the EU Copyright Directive. We acknowledge that the current copyright system is not a static one and see value in examining exceptions individually and clarifying the policy goal behind them. We support the suggestion made in the Commission's Communication on Copyright in the Knowledge Economy in favour of further dialogue regarding certain exceptions. An examination of the current system of non-mandatory exceptions could help determine whether the differences between various national regimes have a negative effect on the internal market. The current regime was designed to cope with rapid technological development in the digital environment and to take into account national copyright traditions and related case law. If it is

demonstrated that the current system is creating insurmountable problems then those issues need to be addressed in a manner that carefully balances the interests of all the stakeholders concerned. The Commission could consider undertaking an in-depth study to determine the extent of such problems if indeed these are identified. With reference to future discussions of the appropriate scope of exceptions, current practice and case law demonstrate that the so-called “Three-Step Test”<sup>1</sup> remains a flexible and pragmatic legal tool providing legislators and courts with the necessary room of manoeuvre in the framing and interpretation of exceptions and limitations.

### *Orphan Works*

We wish to stress the importance of the Commission properly quantifying the issue of orphan works for individual types of works in an impact assessment so that possible proposed solutions can be tailored to the size of the problem and the particular type of content and/or work.

Any new EU legislative and/or policy initiatives in this field should:

- be proportional to the size of the problem identified as regards specific types of content;
- take into consideration that orphan works may be a temporary issue as the sectors concerned implement more and more content identification mechanisms; and
- be compatible with current EU and international law, including the Three-Step test

### *A “European Copyright Law”?*

The Reflection Document also refers to the possibility of adopting a “European Copyright Law”, for example by means of a Regulation in order “*to create a more coherent licensing framework at European level*” and it discusses the possibility of using the new Article 118 of the Lisbon Treaty as the legal basis for such a future legal instrument.

However, in our view it is not clear that the Lisbon Treaty confers specific competence to the EU in this regard as Article 118 was drafted with a view to legislating in the field of industrial property<sup>2</sup>. To this date, the EU has adopted legislation in the field of intellectual property

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<sup>1</sup> The “Three-Step Test” – enshrined in the Berne Convention, the TRIPS agreement and Article 5.5 of the EU Copyright Directive – provides that an exception can only apply (1) in special cases, (2) provided that there is no conflict with a normal exploitation of the work and (3) that it does not unreasonably prejudice the legitimate interests of the right holder.

<sup>2</sup> Article 118 stems from Article III-68 of the now defunct Constitutional treaty. The preparatory work carried out within Working Group V of the European Convention ([http://european-convention.eu.int/doc\\_register.asp?lang=EN&Content=WGV](http://european-convention.eu.int/doc_register.asp?lang=EN&Content=WGV)) clearly indicates that the objectives pursued by the new provision had no bearing on copyright but related to the European patent, its linguistic regime, IPRs linked to R&D as well as the desire to avoid systematic use of Article 308 of the EC Treaty. This is also clear from, for example, the French, German and Danish language versions which refer to “titres”, “Rechtstitel” and “beskyttelsesbeviser” (translates as “proof of protection”), all of which are terms exclusively used in the context of trademark and patent protection as there are no registration requirements for copyright protection.

with the legal basis in the general internal market provisions which remain the appropriate legal basis for intellectual property legislation today.

We also believe that introducing a new Regulation on a “Community copyright title” alongside national titles would add an unnecessary layer of complexity. Simply replacing current national systems with a European Copyright title would appear premature and too complex given the strength of national preoccupations expressed at the adoption of the EU Copyright Directive.

### *Distinction between Different Types of Content*

The Reflection Paper devotes some thought to the different licensing practices and business models of the various content sectors. We believe that several of the suggestions and options for possible future action would benefit from a more developed examination of their appropriateness for individual content sectors. It would appear that some options are aimed at dealing with specific issues relevant to specific sectors. For example, we consider that the option of bundling rights is most relevant in the music industry due to the different parties licensing the separate rights, but not to the audiovisual industry where the rights are generally licensed by the producer on a centralized basis on behalf of all right holders in the audiovisual work.

### *Copyright as a Mere Remuneration System and Alternative Types of Compensation*

We wish to address what we consider a fundamental misunderstanding in the Reflection Document, i.e. that copyright is a mere remuneration model for which alternatives may be found at a European-wide level. In fact, copyright establishes the financial model through which audiovisual content is produced. The copyright system offers the film industry the possibility to reach the aim of generating surplus over and above the basic compensation of its creative participants. Film making is a very R&D intensive business – developing scripts, acquiring underlying rights, casting, location scouting, production designs, etc., are all part of the film development and pre-production essential activities which carry huge costs before a single frame of film is even shot. In the majority of cases, the film does not progress to principal photography due to lack of the necessary financing, the project is shelved and the producer must absorb the loss. Audiovisual production cannot function unless it returns strong working capital to the producer so he can finance future projects. The type of flat rate “compensation” which an EU-wide compulsory licensing or collective management structure would offer fails to take into account the substantial financial investment necessary to produce a film or the difficulty of ever reaching a profit after all the costs of production and distribution are paid.

### **Territoriality of Copyright**

Right holders’ contractual freedom and exclusive right to choose the terms of distribution of the copyright work, including the territorial scope of the rights licensed is crucial to maximising revenues from audiovisual content. This regime remains vital in many cases of European film-making in order to secure financing prior to the shooting of the actual film as the various exclusive exploitation rights are basically sold off/licensed to national distributors prior to, or during, the principal photography of the film. New distribution channels such as

online delivery of film should contribute to the advance financing of films in a manner similar to that already provided by the pre-sale of rights to theatrical, video and television distributors, but the models under which this will occur have not been developed in the marketplace<sup>3</sup>.

The members of FIAD, FIAPF, IFTA and the IVF are involved in rights clearance both as licensors and licensees on a daily basis across many borders, whether geographic or linguistic. Although defining and agreeing on a specific licensing contract involves detailed contractual negotiations, definition and clearance of specific rights and exploitation windows are the essence of the film industry's financing and distribution model – this is how the production, creative and distribution communities attempt to meet the production costs, pay back production loans, support local marketing and distribution costs and make a return on the investments in producing and distributing the film.

The sale of exclusive distribution rights on the basis of territories and distribution channels with staggered time releases holds together the architecture of the non-subsidy based financing for independent film-making in Europe and worldwide. In addition, private sector companies providing equity and debt finance the “gap”, i.e. the difference between the amount of money the producer has already raised through pre-sale of distribution rights and public sector funding and the budget necessary to complete the film (typically 10 to 15% depending on the film and broader macro-economic conditions). The debt-financier will agree to cover this gap, thus enabling the film to move into production. However, the condition is inevitably that a reputable international distributor (or sales agent) offers a guarantee that it can comfortably cover more than 100% of this gap through exclusive territorial pre-sales and sales of distribution channels yet to be realised. In other words, it is the reliance on future territorial licensing contracts and revenues which unlocks access to the rest of the equity and debt financing package necessary to make the film happen. The territorial pre-sale should therefore not be regarded in isolation: without it, other financing will likely be withdrawn or not offered at all and many film projects will simply not proceed to actual production.

Both the international sales agent and the national distributor must consider the value of the proposed project to specific national markets. The decision to engage in single or multi-territorial licensing is made on the basis of informed decisions aimed at maximizing exposure of the works, on a case-by-case basis, with due consideration for local sensitivities (cultural preferences, classification regulations, language, etc.), local demand and the requirement to ensure full consumer satisfaction. Suffice to mention specific consumer demands for subtitling and very often dubbing to understand how film distributors must be closely responsive to local taste.

The reasons why national audiences are difficult to attract to European cinema from other Member States are based on complex cultural, historical and linguistic factors which cannot be addressed through abolishing the territorial nature of copyright and related rights.

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<sup>3</sup> Online rights are increasingly sought (and in many cases granted) to existing national “all rights” distributors, broadcasters (whether for ‘catch-up’ online viewing of programmes or otherwise), or on a worldwide basis as a condition for distribution in another territory; in most cases, these grants are without upfront guarantees or advance payments.

Generally, a film will travel if it has been co-produced by entities from several countries and/or if it has performed well in its home territory.

Mandating a single clearance framework for the whole of Europe will not create a pan-European market or audience for European films: the audience must be attracted to films by topic, language, timing and mode of distribution, all items which are the subject of the special expertise of the producer and the various distributors. For example, the French film export agency Unifrance disburses a large share of its € million annual budget to support the marketing effort to maintain a presence for French cinema outside France. By the same token, certain UK films may do well in the rest of Europe but largely through high-budget “event” films which consumers experience as Hollywood films, not European. For all their other films, made by local *auteurs*, the British have to contend with a very modest level of market penetration.

### *The Principle of Community Exhaustion*

Specifically referring to the principle of Community exhaustion, which is applicable to the distribution right (i.e. relevant to the distribution of physical goods such as DVDs), the Reflection Document refers to the fact that “community exhaustion” is not applicable to services (online services in particular) as also recognized by EU law and by the European Court of Justice, including in its *Coditel* case-law.

We wish to emphasize that the question of exhaustion is not only relevant to “territoriality” of copyright but also to the ability of the producer to license a film more than once and in many different formats thus increasing the flow of financing for the production of the film.

It is our view that *Coditel* remains good case law and that the legal doctrine developed therein is appropriate also in the online environment.

### **Conclusion**

The contractual freedom granted to right holders to license their content the way they choose does not constitute an obstacle to the launch of innovative services available across borders. So far, right holders have seen limited consumer and commercial demand for such services. Online service providers and platforms are focusing their efforts on breaking through in national markets, often in challenging conditions. The market performance and expected immediate growth of new online services remains modest<sup>4</sup>. As to the licensing models that are actually being pursued in the market-place, these reflect, and correctly so, the diverse needs and demands of the European creative community, their financing needs and the needs and demands of their customers. All parties are best served by arms-length commercial negotiations based on the principle of contractual freedom and the exclusive rights established and protected by copyright law.

As mentioned in our introduction, we believe that any follow-up to the Reflection Document would benefit profoundly from acknowledging that:

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<sup>4</sup> See e.g. extract of French national film institute CNC’s presentation “Commission de suivi du compte de soutien” of December 10, 2009, attached hereto as Annex I.

- the copyright model is not merely about remuneration – copyright provides the legal framework and structure for creating joint collaborative works such as films and at the same time enables financing and optimal distribution to the ultimate benefit of the user (be it a commercial user or a private consumer); and
- increasing legal offer will not single-handedly solve the issue of copyright infringements. A focussed IPR enforcement policy is an essential element of developing the legal online market for creative content so as to create a level playing field for the legal online services.

Finally, we urge the Commission to develop thoughts on how to ensure a sustainable European film industry in the emerging digital future. In economic terms, Europe's film industry is not integrating at EU level; it is integrating at a global level, as attested, for instance, by the multiplicity and reach of bilateral co-production agreements extending outside of Europe, and by the presence throughout Europe of sales agents and packagers who work with European talent as well as talent from the rest of the world.

It is creative boldness, innovation and excellent marketing skills that help film and audiovisual content cross EU national boundaries and gradually build up trans-national consumer demand within the EU and on the world-wide market. The future sustainability of the European film industry will depend on individual creativity, innovation and entrepreneurial vision backed by a supportive European legal regime which ensures a level playing field on all distribution platforms and which recognizes the specificities of the film industry and its crucial financing and distribution requirements.

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We remain at the Commission's disposal for further information where necessary.

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