

The impact of intellectual property regimes on the right to science and culture

SAA Contribution to the public consultation by the Special Rapporteur in the field of cultural rights of the UNCHR

The Society of Audiovisual Authors (SAA) is the grouping of European collective management organisations representing the interests of their audiovisual author members, in particular screenwriters and directors. The member organisations of SAA (25 societies in 18 countries) manage the authors' rights of over 120,000 film, television and multimedia screenwriters and directors.

SAA welcomes the public consultation organized by the UNCHR Special Rapporteur in the field of cultural rights on the impact of intellectual property regimes on the enjoyment of the right to science and culture. SAA would like to take the opportunity to contribute to the report by submitting its view based on practical experience and valuable insight from European audiovisual authors and their collective management organisations.

Putting authors back at the heart of culture and copyright is at the forefront of the intentions and efforts of Europe's screenwriters' and director's organizations. Therefore SAA supports the intention of the Special Rapporteur who '*wishes to address the challenges regarding the implementation of the right of everyone to benefit from the protection of the moral and material interests resulting from any [...] production of author.*' and all the more that the Rapporteur seems to be '*interested in learning more about the concrete obstacles met by authors, creators and inventors, such as scientists and artists, to enjoy this right.*'

However, we regret that the impact of intellectual property regimes on the right to science and culture is addressed in general and does not distinguish between the different regimes of intellectual property rights. Indeed, trademarks, patents and copyright have very different features and objectives. Copyright is closely linked to culture whereas patents have more to do with science. In this regard, SAA's contribution will focus on copyright only, from a European perspective, and will emphasize the importance of properly addressing the specific challenges of audiovisual authors.

Balanced approach

Article 27 of the Universal Declaration of Human Rights (UDHR)

(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

(2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Article 27 of the UDHR contains the necessary balance between the right to access culture and the right to protection of authors. Intellectual property rights flow from the second branch and aim at ensuring a continued cultural production.

The *UNESCO convention on the protection and promotion of the diversity of cultural expressions* also recognizes in its preamble the importance of intellectual property rights in sustaining those involved in cultural creativity.

In Europe, intellectual property rights are protected as fundamental rights by the *Charter of Fundamental Rights of the European Union* (Art 17.2). As far as culture is concerned, it is not a primary competence of the EU, therefore the *Charter of Fundamental Rights of the European Union* provides for respect to cultural, religious and linguistic diversity (Art 22), while Art 167 of the *EU Treaty* says that “The Union shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore”.

Copyright and related rights are sometimes presented as obstacles to the access to culture. This opinion has increased with the advent of the internet. As if authors’ moral and economic rights were an obstacle to the availability of cultural content, to the development of the internet and to the growth of the digital economy. This hostile environment towards creators and the cultural and creative sectors forced rightholders and their organisations to reiterate and repeatedly demonstrate the benefits of a system that rewards both creativity and risky investments. Creators, like screenwriters and directors, are at the source of cultural production. The cultural industries rely on their talent and imagination to deliver good stories to the audience. SAA is therefore convinced that the legitimacy of any copyright regime depends on how much it is connected to its authors.

European copyright harmonisation

Since 1991, the European Union has adopted ten Directives harmonising certain aspects of authors’ rights and related rights, to establish the *acquis communautaire*. The most significant directives for audiovisual authors’ rights are:

1992 Rental and Lending Rights (codified by 2006/115/EC Directive)

This is the first time the director is recognised as an author of the audiovisual work, but for the purpose of this Directive only. The Directive provided an exclusive right to authors for rental and lending, with an unwaivable right to equitable remuneration for the rental when the exclusive right is transferred. The Directive addressed collective management as a model for the management of the equitable remuneration right, but did not make it a requirement. As regards the exclusive public lending right, Member States can derogate from it, provided that authors at least obtain remuneration for such lending. The Directive also provided for the harmonisation of certain related rights.

1993 Cable and Satellite (93/83/EEC Directive)

The Directive aimed at facilitating the cross border transmission of audiovisual programmes such as, particularly broadcasting via satellite and retransmission by cable. It set up specific mechanisms to ensure that creators and producers of programmes obtain a fair remuneration, in particular the mandatory collective administration of the cable retransmission right.

1993 Term of Protection (codified by 2006/116/EC Directive, amended by 2011/77/EU Directive)

This Directive fully established the authorship of the director as a general principle and provided for a total harmonisation of the period of protection of authors’ rights and related rights – 70 years after the death of the author (for audiovisual works, after the death of the director, the author of the screenplay, the author of the dialogue and the composer of the original music, whether or not they are designated as co-authors) and 50 years after the event setting the time running for related rights. The 2011 Directive extended the term of protection for performers and sound recordings to 70 years and provided for accompanying measures to ensure that performers and not only producers benefit from the extension.

2001 Copyright in the Information Society (2001/29/EC Directive)

This Directive is the most comprehensive one. It is the result of over three years of thorough discussion. It aimed at adapting legislation on copyright and related rights to reflect technological developments and to transpose into Community law the two 1996 treaties

adopted within the framework of the World Intellectual Property Organisation (WIPO). To do so, it harmonised the rights of reproduction, of communication to the public, of distribution and established a closed list of optional exceptions (except one which is mandatory).

2004 Enforcement of Intellectual Property Rights (2004/48/EC Directive)

The Directive required all Member States to apply effective, dissuasive and proportionate remedies and penalties against those engaged in counterfeiting and piracy. It means that all Member States now have a similar set of measures, procedures and remedies available for rightholders to defend their intellectual property rights (be they copyright or related rights, trademarks, patents, designs, etc.) if they are infringed.

2012 Orphan Works (2012/28/EU Directive)

Orphan works are works that are still protected by copyright but whose authors or other rightholders are not known or cannot be located or contacted to obtain copyright permissions. The Directive set out common rules that entitle cultural organisations who hold orphan works (film heritage institutions and public service broadcasters as far as audiovisual works are concerned) to digitize these orphan works and make them publicly available on-line in all Member States on the basis of an exception to copyright applicable in the whole EU.

2014 Collective Rights Management (2014/26/EU Directive)

This Directive is about collective rights management and multi-territorial licensing of rights in musical works for online uses. As far as collective rights management is concerned, it applies to all Collective management organisations (CMOs) in all sectors. It provides for general principles as well as detailed rules on the establishment, functioning and accountability of CMOs in order to develop high standards for European organisations.

There is a lively debate on copyright in Europe with numerous consultations organized by the institutions, studies and stakeholders' dialogues to address the different issues that emerge and the constant need to review the rules to check they are fit for purpose. In parallel, WIPO has also adopted important international agreements to ensure the balance between authors' rights and access to protected works. Therefore SAA would like to encourage the Special Rapporteur to duly consider making reference in the report to the efforts made and the particular developments achieved both in Europe and internationally with regards to ensure this balance.

Practical approach - Reality of authors' rights in the European audiovisual sector

With 1,524 feature films produced in 2013, Europe is a leading film producer. It is the second market in the world for television with 8,828 television channels and more than 3,000 on-demand platforms offering access to audiovisual programmes. In spite of limited investment in this industry (compared to the US), the European audiovisual sector punches above its weight and produces screenwriters and directors whose works are loved the world over. It has never been easier to watch films and TV programmes than today. Audiovisual works are more available than ever before. But this success is not necessarily being translated into increased remuneration for screenwriters and directors.

Authors' rights and copyright play a crucial role in authors' lives. They directly shape an individual's economic and social situation and have vital influence on their living standards. The livelihood of creators directly depends on the strength and enforcement capacities of their authors' rights.

In the audiovisual sector, in spite of the European harmonisation, considerable discrepancies persist in terms of the rights of audiovisual authors that are effectively recognised, as well as the level and basis of their remuneration. This is partly due to the fact that contractual freedom can deprive authors of their rights in the individual negotiation with producers.

In most European countries audiovisual authors transfer their economic rights to the producer. Fees are individually negotiated in the contract between the author and the producer resulting in many audiovisual authors receiving a lump sum payment for the writing and/or directing of the film. In some countries they receive no further payment from the producer no matter how

commercially successful the film. This situation reflects the weakness of individual authors and/or their representative bodies and the dominant position of powerful producers and broadcasters in the individual contractual negotiation.

Although in some countries standard contracts exist, in practice most contracts are individually negotiated. Even when authors sign contracts which respect their economic interests and provide for additional remuneration after the recoupment of costs, they rarely receive any payment automatically from the producer, whatever the success of the film. They may, however, in some instances be entitled to payment through their collective management organisation but, as will be shown, the level and nature of payment varies widely from one country to another.

In January 2014 a [study](#) for the European Parliament confirmed that contractual practices in the vast majority of European countries deprive audiovisual authors of the effective exercise of their rights and prevent them from receiving fair remuneration for the exploitation of their works. Unfair contractual terms imposed by producers or broadcasters in the individual negotiation of contracts were listed by the experts. These include: excessive transfer of rights in terms of scope and duration, without remuneration other than the initial production fee; waiver of rights to remuneration; clauses forcing the author to indemnify the producer against any and all claims from CMOs regarding remuneration for the exploitation of the work, etc.

The European Parliament study also demonstrated the inefficiency of some legal rules to protect authors. It sets out a number of examples of “the difficulty to secure fair remuneration in digital exploitations, of the practice of buy-out contracts, of the invocation of the presumption of transfer, of the refusal to pay CMOs remuneration of authors of audiovisual works”, which “are illustrative of the shifting of power among stakeholders to the detriment of creators” and increase the situation of imbalance and lack of protection.

Most of the time, secondary payments come from collectively managed intellectual property rights. The two major rights that are collectively managed which result in payments for audiovisual authors in Europe are cable retransmission (as a result of harmonisation of rights in Directive 93/83/EEC) and private copying in the countries where levies exist. On a country by country basis, other secondary rights like the rental and public lending rights are collectively administered and result in additional payments for audiovisual authors.

In addition, in a few European countries (eg. France, Belgium, Bulgaria) collective management organisations representing audiovisual authors are contractually entitled to collect on behalf of their members for the TV broadcasting of their works. In some other countries (eg. Spain, Italy, Poland) the final distributor, usually the broadcaster, is considered by law to be responsible for payments to the author. These are also paid through a collective management organisation.

The latter system is more favourable to authors who, in principle, benefit from a payment guarantee as the law provides that, notwithstanding the terms of the contract between the author and the producer, it is the final user who is obliged to pay the author for each use of the works through a collective management organisation. In these countries, audiovisual authors benefit from a non-transferable and inalienable remuneration right.

These legal regimes have progressively appeared over the last twenty years. As a result, in these countries, audiovisual authors are being rewarded proportionately for the exploitation of their works.

Challenges

It is essential that current disparities and unfair practices are addressed and solutions found to ensure that authors of audiovisual works are fairly remunerated whenever and wherever their films and programmes are screened, distributed, transmitted and accessed. The SAA believes that this objective can be achieved by:

- Securing an unwaivable right of authors to remuneration for their online rights, based on revenues generated from online distribution and collected from the final distributor. This entitlement should exist even when exclusive rights have been transferred and

would secure a financial reward for authors proportional to the actual exploitation of the works.

- Ensuring that the administration of this remuneration is negotiated and administered collectively. This will guarantee that audiovisual authors are paid and establish a direct revenue stream between the market place and audiovisual authors.

SAA therefore proposed in 2011¹ the introduction of an unwaivable right of authors to remuneration for their making available right, based on revenues generated from online distribution and collected from the final distributor. This entitlement should exist even when exclusive rights have been transferred in individual contracts. It would secure a financial reward for authors proportional to the real exploitation of their works, without hindering or complicating the actual exploitation of audiovisual works.

SAA further believes that the administration of this remuneration should be entrusted to collective management organisations in order to establish a direct revenue stream between the exploitation stage and the audiovisual authors. This is the only way to guarantee that the right to obtain an equitable remuneration will be enforced throughout Europe. Indeed, providing for an unwaivable right to obtain an equitable remuneration without compulsory collective management would leave many European audiovisual authors behind, as they would not be able to enforce it individually in many countries.

This proposal would achieve a level playing field in terms of remuneration for all audiovisual authors in Europe, whilst safeguarding optimal exploitation by producers and operators of audiovisual services.

Conclusion

The legitimacy of authors' rights and copyright revolves around the creators being economically and morally linked to enjoyment by audiences of their works. Consumers expect to support directors and screenwriters they love by paying to watch their works. However, as consumers have become increasingly convinced that copyright is only supporting media giants and not creators, the legitimacy of the foundation of creators' livelihoods is eroded. It is therefore time to put authors back at the heart of copyright policy. Copyright policy therefore needs to be rebalanced in favour of authors as original rightholders. This should be done at European level by further harmonisation of the economic rights of audiovisual authors – the creators on whose shoulders the future success of the European audiovisual sector rests. After years of distrust and attacks against copyright, this is the way to **give legitimacy back to a system that promotes creativity, freedom of expression and dissemination of culture.**

¹ [SAA White Paper on Audiovisual Authors Rights and Remuneration in Europe.](#)