



## Position Paper on the European Commission Proposal on the Copyright in the Digital Single Market Directive

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*The International Federation of Film Distributors' Associations (FIAD) represents national organisations of film distribution companies whose main activity is the release of cinematographic works in cinemas. Film distributors are the lynchpin of the film value chain, helping to connect filmmakers with finance and finished films with wide-ranging audiences; effective distribution is vital to Europe's diverse film culture and film industry in an era of abundant media supply. FIAD's members operate in 15 countries where they cover 90 to 100 percent of the theatrical market.*

### Introduction

FIAD welcomes the European Commission's proposal on Copyright in the Digital Single Market published on 14 September 2016. Nevertheless, it is our belief that the proposal should be carefully crafted in order to find the right balance between the sensitive interests of the different stakeholders involved. According to the latest official EU figures, copyright intensive industries generate 11 million jobs, contribute approximately EUR 509 billion to EU GDP and produce a trade surplus.

Copyright protection and rights are vital for the operation of film distributors and without proper protection they cannot continue their activities, providing European citizens with the right content on their favourite screens. In this paper, FIAD will only address five issues, namely the negotiation mechanism (Article 10), the Value Gap (Article 13), the teaching exception (Article 4), the Out of commerce works (Article 7) and the transparency obligations (Articles 14 and 15).

### 1. Negotiation mechanism

FIAD whole heartedly supports EU attempt to improve the circulation of European films, taking advantage of the online opportunities. In this respect, the European Commission proposes in Article 10 a voluntary mechanism helping distributors and right holders to reach an agreement to overcome obstacles to the availability of AV works on VOD. We also share the view that VOD should eventually become an important market for European films. Yet, any measures introduced should remain voluntary as proposed and

not undermine the principle of territoriality which is the cornerstone of financing in the audiovisual sector. Restraining those that invest most into film and cinemas cannot be the answer to overcoming the challenges of the sector. In an age when we're bombarded with digital media choices, the cinema presents films with a vital shop window. The profile raised on a theatrical launch can endure and reap dividends throughout a film's release cycle, influencing the commercial value the film subsequently commands.

It is because of the work of the local distributor that films are acquired and distributed in the cinemas and eventually are also made available online. It should not be forgotten that distributors are commercial organisations and sometimes it is simply not commercially viable to exploit a film online or no suitable partner can be found. The latter is usually the result of "cherry picking" by the platforms, or sometimes because of the high costs associated to put a movie on a VoD platform (change of formatting etc) that restrain the distributor from offering it online.

Furthermore, revenues only from online are relatively low as consumers pay very little for films offered as pay-per-view (TVOD). The films that fail to gain theatrical release earn virtually nothing on their own.

FIAD would also like to highlight the lack of data provided by SVOD platforms to rights holders on film performance and revenues. Without this data we are unable to accurately assess the risk of creating new online business models. More cross-border circulation of and access to content is only possible if this data is available. Under these conditions it makes little sense to invest in the marketing of the films to an online audience if the costs of delivery outweigh profit expectations.

## 2. Value gap

FIAD members consider the protection of intellectual property rights as crucial to their businesses and agree with the Commission's view that "effective means of enforcing intellectual property rights are essential for promoting innovation and creativity". The proposal on the Value Gap is a step in the right direction as it clarifies the responsibilities of certain online platforms and provides a valuable tool to reduce piracy. The current digital age creates unprecedented opportunities for intellectual property owners and other stakeholders, including consumers. However, it also establishes an easy channel for the illegal use of copyright protected content which undermines the potential of the industry. Proper enforcement does not only support cultural diversity and innovation, it also creates jobs and economic growth. The online environment is now mature and platforms with large amounts of copyright protected content can and should take more responsibility and participate in the creation of value.

Article 13 sets an obligation on service providers to cooperate with rightholders to ensure the functioning of agreements they will have concluded for the use of their works or other subject-matter. In order to achieve this result, according to Recital 38, providers must 'take appropriate and proportionate measures to ensure protection of works or other subject-matter, such as implementing effective technologies. Set in proper context, the cost of having effective recognition technology to keep a business on the legal side of copyright laws is not excessive. For example, it is far smaller than the cost of storing unwanted content or the vast effort involved in taking down content.

Recital 48 of the E-Commerce Directive already allows Member States to impose duties of care on host service providers in order to detect and prevent unauthorized content. Moreover, the Commission's proposal does not establish a general monitoring obligation for service providers. The Directive's obligation to apply effective measures is in relation to specific content, identified and notified by rights holders. Specific monitoring, notification and taking down of online content is permissible for all types of illegal content including copyright, defamation, racism, child protection, hate speech etc. Checking future uploads against a database of digital fingerprints is not "filtering", it is a specific, targeted act to remove identified illegal content and thus indeed consistent with Article 15 of the e-Commerce Directive.

The European Commission's proposal is the basic minimum that we need to deal with regards to the transfer of value. For film distributors, piracy drastically impacts revenues and investments in both physical and online distribution as well as investment in content creation and production, having the negative effects in the whole audiovisual value chain.

### 3. Teaching Exception

FIAD supports the use of films in education as they are an important cultural medium which should be explored in the same way as literature. There is a strong awareness of the importance of film literacy and the role it must play to generate interest in European films among young audiences. The proposed Directive on Copyright proposes an exception for illustration whilst teaching in Article 4(1). The exception clarifies the application of the existing exception to digital uses and distance learning and seeks to mitigate its fragmented application in the Member States by making it mandatory. The exception covers all types of works or other protected subject-matter, including under certain conditions, the use of audio-visual works and films in schools as well as works produced specifically for education. The exact implementation of the exception is thereby left up to the Member States and could extend to full films (opposed to only extracts) to be shown in the classroom.

FIAD believes that allowing an exception for an entire film to be shown threatens the entire foundations of educational production. Some films are produced specifically for

educational use and film distributor's revenues are reliant solely upon the agreement reached with the institution. There is no film literacy without film and audio-visual content to be shown. It should thus be made clear that the exception can never be extended to full works.

Hence such a mandatory exception creates problems in countries with successful licensing systems in place between distributors and educational establishments as it would severely undermine these licensing schemes. It could create a dangerous ethos that cultural goods should be given for free.

Licensing should always be the preferable option. If it does not work properly only then an exception should be enacted. Rightsholders have the right to know where and when their work is being used and licensing is a way to guarantee this. Please note that a license can also be at no cost.

According to Article 4(4) Member States also have the option to provide for fair compensation to rightholders for uses made under the exception. We believe this shouldn't be an option but a necessity in order to incentivise the creation of such content suitable for education.

#### 4. Out of commerce works

Article 7 of the proposed Copyright Directive suggests new mechanisms to facilitate licensing of "out of commerce works" through extended collective licensing deals without the need to get approval from every author. This means that a collective management organization will have to conclude a non-exclusive license for non-commercial purposes with a cultural heritage institution for the digitisation, distribution, communication to the public or making available of out-of-commerce works or other subject-matter permanently in the collection of the institution provided that all rightholders may at any time object to their works or other subject-matter being deemed to be out of commerce.

The Directive defines that a work or other subject-matter shall be deemed to be out of commerce when the whole work or other subject-matter, in all its translations, versions and manifestations, is not available to the public through customary channels of commerce and cannot be reasonably expected to become so. However, there are situations when film distributors still have the rights for the work which is not available to the public and could be deemed to be out of commerce. Facilitating licensing through a collective management organisation would remove the possibility for rightholders to individually exercise their exclusive rights and would impose limitations on their contractual freedom. In its judgement in the *Doke & Soulier* case (C 301/15) the CJEU takes the view that the French law which allows French publishers to publish digital editions of out-of-print books, does not sufficiently respect the author's exclusive

rights as granted in Articles 2 lit. a) and 3(1) of the InfoSoc Directive 2001/29. In the light of the Doke&Soulie ruling, FIAD believes that the Commission's proposal needs to be improved in order to make sure that it does not unreasonably prejudice the legitimate interests of the right holder and conflicts with the normal exploitation of a work by the rights holder.

## 5. Transparency obligations

Article 14 establishes a right for the authors and performers to ask for data on film performance and audiences from those to whom they have licensed or transferred their rights. This creates an obligation for producers to ask for this data in their contracts which means it will also be included in the contracts with distributors.

We agree that transparency on data in the online environment is a legitimate concern. However, this obligation falls on the wrong players. Neither the producer nor the distributor has the data necessary for the proper enforcement of this Article. This could be the SVoD platforms, broadcasters, cinemas and those who provide content directly to customers.

Article 15 introduces a contract adjustment mechanism allowing authors and performers to ask for additional remuneration when the original remuneration agreed is "*disproportionally low compared to the subsequent revenues derived from the exploitation of the works or performances*". Producers make sure that authors receive their due remuneration via the contractual relationship or by national collective bargaining agreement as stipulated by national law. The recoupment of the costs needed for the production of the film need to take place across all exploitation channels, including online. This new distribution channel must not be addressed in isolation from the other distribution channels. Therefore, we do not see the need of this proposal and ask for its deletion.

## Conclusions

FIAD supports the EU objective of creating a fairer marketplace for online content. However this should be made in a carefully balanced way, given the fragility of the audiovisual value chain and the particularity of the works.

Overall, FIAD believes that:

- Market driven initiatives are usually more successful than mandatory legislation;
- It is important to clarify and attribute responsibilities to those making available online content services;
- Losing the ability to buy out content creators and installing mandatory revenue sharing for all will be damaging, impractical and costly;
- More need to be done to properly inform the public on the risks of illegal digital streaming and download. Piracy is theft after all.

We are looking forward to constructively work with the European Institutions in order to find the best possible solution for both the European audiovisual industry and the European citizens.