



Society of Audiovisual Authors  
Société des Auteurs Audiovisuels

## **SAA public consultation and REFIT contributions to the AVMS Directive**

### **October 2015**

#### **Summary**

Any revision of the AVMS Directive has to focus on the following actions:

#### **Effective promotion of European works on all services targeting EU markets**

- Meaningful, enforced implementation of Article 13 in all EU Member States.
- Refining the country of origin requirements for on-demand services to eliminate forum shopping and unfair competition from services avoiding a target market's regulations.

#### **Refining the scope of services covered by the Directive**

- Editorial responsibility of services, whether human or algorithmic, is a key element of the AVMS Directive and needs to be actively applied to all audiovisual services.
- Extra-European services targeting EU markets may need to be brought into the scope of the AVMS Directive.

#### **Protect authors' moral rights and the integrity of their works**

- Maintain strict commercial communication requirements for linear services.
- Update regulations for non-linear services to respect the integrity of audiovisual works.

#### **Promoting European works - reinforce the existing rules**

##### **Meaningful, enforced implementation of Article 13 in all EU Member States**

The Directive's requirements on the promotion of European works on linear services guarantee space for such works in a competitive market dominated by American productions. This **encourages production and work for European screenwriters and directors**. The increased availability and visibility of both national and non-national European works has societal benefits, enabling European citizens to learn about their culture and that of their European neighbours.

However, Article 13 of the Directive does not provide for clear, measurable obligations for Member States to implement and monitor for on-demand services. A lack of reporting on the amount of European works in the catalogues of on-demand services and their consumption makes it difficult to really assess the situation.

Furthermore, the **provisions of Article 13 are weak and have been poorly implemented** in many Member States. The existing rules for on-demand services are therefore too flexible and can lead to no implementation at all. The 3 methods of promotion of European works currently proposed by Article 13 (financial contribution to the production and rights acquisition, share of European works in catalogues, prominence of European works on the service) should be made compulsory, along with efficient monitoring.

**Financial contributions** from both on-demand and broadcasting services should be applied at European level and not as an option at national level for countries who want to have stricter rules. This is an essential part of maintaining the production and existence of a European audiovisual voice. It

should consist of the obligation to invest a share of the turnover of the service concerned in the production and rights acquisition of European works (the investment rate could increase according to the turnover) and/or by contributing to national film and audiovisual production funds.

The investment and financing of European production is complementary to the remuneration of authors and should not be perceived as limiting the involvement of new distributors and services in the remuneration of authors. Audiovisual authors should be remunerated for every exploitation of their work.

The **definition of a European work** is also too broad and should be narrowed to cover programmes of quality such as films, TV drama, series and documentaries only. A sharper definition, applied to both broadcasting and on-demand services would benefit European screenwriters and directors working on European productions and be better aligned with the objectives of the Directive.

### **Refining the country of origin requirements for on-demand services**

The country of origin requirements are still relevant for broadcasters, but are neither effective nor fair for on-demand services. The poor implementation of Article 13 described above, combined with the country of origin principle has encouraged **forum shopping for non-European services** who have established themselves in countries with less obligations towards European works. This has led to unfair competition and a limited realisation of one of the main policy objectives of the Directive.

While Article 4 of the AVMS Directive allows Member States to develop **stricter rules for all media service providers under their jurisdiction**, the inter-Member State consultation mechanism only applies to broadcasters targeting a different territory to the one where they are established. No such mechanism exists for on-demand services abusing the country of origin principle.

Our priority is to strengthen Article 13 on the promotion of European works on on-demand services in order to achieve a level playing field for all service providers. However, if our proposals in this respect cannot reach a consensus, we believe that Member States who have developed stricter rules in terms of promotion of European works should be able to apply these rules to all the media service providers operating in their country, whether by being established in their country or by **targeting their audience** (several possible criteria: language, advertising, sales of subscriptions, etc.). This would pursue the same objective of maintaining and strengthening cultural diversity through the promotion of European works and ensure fair competition among the services who target the same consumer base.

## **A question of scope - which services, from where?**

### **Which services should be covered?**

There are clearly services, such as YouTube or Dailymotion, that in an increasingly converged world are **used by consumers as a video-on-demand service or a TV channel**. Beyond the vocabulary of 'channels' and 'networks', subscriptions, playlist functions enabling 'lean back' viewing, and traditional media company investment in YouTube 'networks' suggest a clear parallel to traditional services that are subject to the AVMS Directive. Third party websites that editorialise licensed YouTube content may also need to be considered.

While the key question of 'editorialisation' (human or algorithmic) remains, the changes mentioned above represent part of a steady shift of these services towards a **level of editorialisation and reliance on professional content** organised in channels that will also see them (or at least distinct parts of their service) shift from being outside of the AVMS Directive to inside it. The recognition of such a shift would have an impact on the application of certain elements of the E-Commerce Directive to these services, notably regarding liability for and respect of authors' rights.

The content uploaded by users on UGC platforms can be a third party's protected works, in particular TV programmes. These platforms also contain professional, subscription based channels. The application of the AVMS Directive to such platforms and channels remains unclear.

Clarification that the **AVMS Directive applies to most services offering audiovisual works**, including when uploaded by users, is necessary to achieve a level playing field and a stable and readable legal environment for all. Improved articulation between the AVMS Directive and the E-Commerce Directive is also essential.

### **What should the geographical reach of the Directive be?**

The application of the AVMS Directive should be considered for **services based outside the EU which target the European market**. European Audiovisual Observatory figures from December 2014 show 236 services based in the USA, 15 in Switzerland and 2 in Canada that target Europe. There is a risk that these services benefit from a competitive advantage due to their non-application of the AVMS rules.

### **Protecting consumers as well as authors' moral rights**

#### **Maintain strict commercial communication requirements for linear services**

Quantitative and qualitative rules for commercial communications, applicable to broadcasting services, are still needed as an important consumer protection tool in a mass media context. The rules for linear media have been built over a number of years and are appropriate. There should not be a reduction in the regulations regarding commercial communications in order to align them with the (weaker) requirements for non-linear services.

#### **Update regulation for non-linear services to respect the integrity of audiovisual works**

The lighter regulatory requirements for on-demand services raise concerns with the development of more **pervasive and invasive forms of advertising** than in the linear environment. New advertising techniques on online services challenge the AVMSD principles. Examples include advertising being inserted automatically into videos (both before and during videos) and the appearance of overlays as well as the advertising length being disproportionate to the duration of the content. There must continue to be a **clear distinction between creative works and any advertising** in a converged media environment. Strict commercial communication rules for on-demand services may need to be considered further as penetration of connected devices increases.