Society of Audiovisual Authors
Société des Auteurs Audiovisuels

# Summary: SAA contribution to the public consultation on the regulatory environment for platforms and online intermediaries

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## Headlines

SAA supports the development of a thriving, culturally diverse, European online market for audiovisual works which will give European citizens broader access to works from across our continent and reward the creativity of Europe's screenwriters and directors. This consultation demonstrates the challenges ahead in terms of regulating platforms active in the audiovisual sector.

- **Definition and impact** – Defining platforms and regulating very different kinds of service is a significant challenge. For the audiovisual sector alone SAA identifies 3 distinct categories of platform which can be addressed from several policy angles.
- **Transparency** – Platforms' lack of transparency complicates licensing negotiations and limits the ability of authors to be fairly remunerated for the exploitation of their works.
- **Remuneration** – Audiovisual authors should be fairly remunerated for every exploitation of their work, including online. An unwaivable right to remuneration for online exploitation, paid by platforms and that would be collectively managed would guarantee this.
- **Regulatory forum shopping** - A fair, competitive and culturally diverse market depends upon forum shopping around requirements for audiovisual media services or taxation being tackled.
- **Visibility of European works** - SAA is concerned that commercial practices (e.g. using prominence of blockbusters to attract customers) combined with automated recommendation algorithms will reduce the visibility and profitability of Europe's culturally diverse range of audiovisual production.
- **Unlicensed platforms and piracy** - Piracy through unlicensed platforms restricts the development of a vibrant audiovisual market online. SAA supports the 'follow the money' approach to interrupt pirates' revenue streams, efficient 'notice & stay down' mechanisms, as well as a review of the IPRED Directive.
- **Abuse of liability exemption** - Alongside piracy, some platforms abuse Art 14 of the E-Commerce Directive and claim no liability for the copyright protected works on their services. Liability exemptions are for pure technical passive intermediaries only and not online platforms who benefit commercially from the communication of works to the public.

### What is a platform?

The Commission definition refers to a number of services with very different features. Their only common point is that they operate online. For those dealing with audiovisual (AV) works, based on current but constantly evolving market developments, 3 platform categories present challenges to our members:

1) "Traditional" services covered by the Audiovisual Media Services Directive (AVMS): online broadcasting services, their catch-up services, VoD services (OTT or network operated);
2) Content and service aggregators (including connected TVs);
3) UGC & video sharing platforms, including social media.

### What sort of policy areas are challenged by platforms?

Just for the platforms which deal with audiovisual works, we see that they challenge the legal framework and regulations in the fields of copyright, audiovisual media services, enforcement of intellectual property rights, competition, e-Commerce, transparency, personal data, taxation and international trade.

### What specific problems does the audiovisual sector face?

Producers and distributors have the most direct contact with platforms. They face issues with format compatibility, take it or leave it contracts, lack of transparency on exploitation and under-valued licences.

Some audiovisual authors' CMOs also license online audiovisual platforms. These are usually traditional operators whose services have expanded online (e.g. broadcasters), but also extend to content or service aggregators whose status is similar to cable operators as well as OTT services such as iTunes, Netflix or YouTube for its professional channels. These CMOs have concerns over: the low value attributed to the use of audiovisual works, lack of transparency on exploitation of the works and revenues, no timely reporting in an appropriate format, no or poor use of international identifiers of works and use of non-disclosure agreements (NDAs) impacting CMOs' abilities to be transparent with their members.

The remuneration of screenwriters and directors for the online exploitation of their works is currently very poor. Based on the findings of the SAA White Paper on Audiovisual Authors Rights and Remuneration in Europe, we believe that exploitation-related remuneration due to audiovisual authors for the online use of their works by all platforms should be handled on a collective basis through an unwaivable right to remuneration for the authors to be paid by the platforms. A legal framework which clarifies the necessary remuneration of authors for the use of their works online is necessary (see SAA white paper on audiovisual authors' rights and remuneration in Europe).

On a larger scale, the absence of a sufficient level of harmonisation leads to forum shopping by online platforms, particularly non-European services, establishing themselves in countries with less obligations in terms of promotion of European works and financial contribution to audiovisual production and also carrying out aggressive tax planning. Read SAA's contribution to the AVMS Directive consultation for our position on this.

### Transparency for consumers, suppliers and authors

SAA calls for improved transparency towards rightholders. Connected TVs and devices act as vehicles for app-based OTT services. There is little transparency on whether manufacturers/services generate revenue from such 3rd party applications. Reports also suggest that services such as Netflix provide little transparency on the exploitation of works on their services, making it difficult for rightholders to fairly renegotiate deals.

### Use of information by online platforms

It is generally very difficult to ascertain what personal and non-personal data is collected by platforms and how this information is used, transferred and commercialised. SAA is concerned by automated filtering and algorithmic editorialisation based on data collected from user-habits and its impact on the visibility and accessibility of European works in the absence of transparent data on the objective consumption of works.

Recommendation mechanisms mean that all cultural works are not equally visible to all service users, thus challenging the visibility of a diverse range of works. Alternatives to blockbusters risk being intentionally and then automatically filtered out by the commercially-driven desire of services to highlight blockbusters, with subsequent automated filtering and commercial arrangements guaranteeing prominence. This would not just reproduce but amplify the market concentration of the audiovisual sector's "analogue" markets.

## Relations between platforms and suppliers/rightholders in digital content

SAA is aware of online platforms that use audiovisual works without rightholder permission, that refuse to negotiate licensing terms (or does so on unfair terms), or that claim hosting provider liability exemption (under the e-Commerce Directive) to refuse to negotiate or negotiate only on their own terms.

It is important to note that although cultural works are considered an important driver of the digital economy, the revenues of audiovisual authors generated by online exploitation are limited or non-existent. Rightholders and authors in particular, face 3 main problems:

1) **Piracy**: This discourages new businesses based on the exploitation of protected works – something essential to the development of the European online content market. Efficient action against piracy requires strong political, legislative and judicial messages for pirates and a renewed, multifaceted effort at EU level: 'follow the money' mechanisms to interrupt pirates' revenue streams, as well as a review of the IPRED Directive. "Notice and action" requirements also need to evolve to "notice and stay down" (see SAA's response to the 2012 consultation) with services required to actively prevent unlicensed material re-appearing. Ultimately, given that such actions have proved insufficient to eradicate the presence of illegal content on video sharing platforms, the liability exemption regime needs to be limited to reduce the importance of notice-and-action procedures.

2) **E-Commerce Directive safe harbour abuse**: Some platforms, in particular UGC platforms, supported by court decisions in several Member States, abuse Art 14 of the E-Commerce Directive and claim no liability for the protected works on their services. It should be clarified in the copyright framework that these liability exemptions are reserved for pure technical passive intermediaries and not for online platforms who benefit commercially from the communication of works to the public. Art 14 was designed before such services existed. There is no need to expand the list of derogations. Pure technical intermediaries who rightly benefit from liability exemptions should be subject to duty of care requirements for copyright protected works and neither promote nor profit from unlicensed content. However, services that monetize uploaded audiovisual works and editorialise this content (in person or through an algorithm) should be considered responsible for this activity. The abusive application of the liability exemption regime to these platforms has given them a competitive advantage and undermined the ability of legal services to develop in a fair market. These platforms should therefore be required to obtain licences to operate their business in relation to protected works. As far as audiovisual works are concerned, collective licensing is the best solution for these services. Audiovisual authors' CMOs are ready and willing to help them build robust licensing frameworks that bring them legal certainty adapted to their business model and generate revenue for audiovisual authors whose works are enjoyed by internet users on their platforms.

3) **The lack of a mechanism to ensure audiovisual authors get a share of the revenue**: there is no uniform mechanism in the audiovisual sector to ensure authors are remunerated for the use of their works online. Unlike the music sector where CMOs license music platforms, collective management for audiovisual authors' online rights is limited. Audiovisual works are licensed by producers or distributors, as well as by some audiovisual authors' CMOs in a few countries. Very often authors have transferred their exclusive making available right to the producer in a bundle of rights at the production stage and cannot claim anything afterwards, except if the law provides otherwise. SAA's proposed solution (see SAA white paper) is to clarify at EU level that when an author transfers his exclusive making available right to the producer, they shall retain an unwaivable right to remuneration, exercised collectively towards platforms who make works available to the public.

Addressing these three issues simultaneously is essential to develop the online market for European audiovisual works in general and improve the situation of audiovisual authors in particular.