Contribution to the consultation of the European Commission on Article 17: Supporting licensing agreements between CMOs and OCSSPs

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About the SAA

The Society of Audiovisual Authors (SAA) is the association of European collective management organisations representing audiovisual authors. Its 33 members in 25 countries manage rights for over 140,000 film, television and multimedia European screenwriters and directors. The organisation's objectives are: 1) to defend and strengthen the economic and moral rights of audiovisual authors; 2) to secure fair remuneration for audiovisual authors for every use of their works; 3) to develop, promote and facilitate the management of rights by member societies.

Introduction

While the negotiators and media attention were very much focusing on Article 17 during the negotiation of the Directive on Copyright in the Digital Single Market (Directive 2019/790/EU, the 'DSM Directive'), the SAA has been advocating for the introduction of an additional provision in the Commission's draft proposal: a remuneration right for audiovisual authors for the exploitation of their works, in particular online. With the support of the European Parliament, a compromise on Article 18 and its principle of appropriate and proportionate remuneration for authors and performers was reached with the Council.

At the Directive implementation stage, the SAA is continuing advocating for a **meaningful implementation of Article 18 which will guarantee authors a remuneration paid by the operators who exploit their works, whatever the means of exploitation and in particular online**. The COVID-19 crisis which stopped the production of audiovisual works for several months has shown how crucial it is for audiovisual authors to be able to rely on remuneration mechanisms for the ongoing use of their works, which are not limited to one-time buy-out payments at production stage but include royalty payments for the actual use of their works.

In most European countries, these royalty payments to audiovisual authors are organised through their collective management organisations (CMOs). Not only is the retransmission right collectively managed throughout Europe based on Directive 93/83/EC *on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission* ('SatCab Directive') and the new Directive 2019/798 *laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, and amending Council Directive 93/83/EC*, but TV broadcasting rights are also collectively managed by 62% of the SAA members. However, when it comes to the exploitation of audiovisual works by on-demand services, royalty payments are organised in only six EU countries (Belgium, France, Estonia, Italy, Spain, Sweden) and Switzerland, whether by law or voluntary agreements. The SAA therefore called the EU Ministers to amend the

long-outdated remuneration structure of audiovisual authors and introduce an unwaivable right to remuneration for the on-demand exploitation of their works.

The same logic of ensuring that audiovisual authors receive royalties for the use of their works should dominate the Commission's guidance on the implementation of Article 17. Indeed, Article 17 promises to tackle the well-known "value gap" by sharing the benefits - which are so far captured by platforms – with all actors of the value chain, and Article 18 then promises to bring a due share of this value in the hands of creators. This link between Articles 17 and 18 enables a fairer sharing of digital revenues by extending it to the heart of creation: the authors.

The Commission cannot anymore hide behind the principle of contractual freedom now that it has been demonstrated that authors and performers are in a weak contractual position when they grant a licence or transfer their rights (recital 72). It is therefore no longer possible to leave the remuneration of audiovisual authors to buy-out contracts which prevent their capacity to receive additional remuneration for the exploitation of their works. **The law must be clear that whatever the contract signed with a producer, audiovisual authors are entitled to remuneration for the exploitation of their works.** For most European countries the best way to accomplish this goal is to introduce in their national law a statutory and unwaivable right to remuneration collectively managed by authors' CMOs.

As far as online content sharing service providers (OCSSPs) are concerned, while the focus has been on music at the negotiation stage of the DSM Directive, most of the platforms at stake also provide videos to the audience. Audiovisual works are being exploited on an enormous scale on online content sharing platforms without prior authorisation, while authors in most cases do not receive any payment. In May 2020, the SAA conducted a survey among its members to assess the presence of audiovisual works on YouTube. In all participant countries, feature films and TV programmes were found, either in full length or partly. The most common uploaders were YouTube users and the works sometimes had advertisement attached to the content. As an example, the SACD in France makes a quarterly search on YouTube to identify full length and extracts of works. The last search in September 2019 identified over 4700 videos related to their fiction film repertoire and over 12 000 videos related to their TV films/series repertoire.

Consequently, **the audiovisual repertoire is an important one on OCSSPs platforms and must therefore be fully considered when providing guidance to the Member States on the implementation of Article 17. The Commission guidance should also remind Member States of other relevant provisions of the directive which shall be taken into account, in particular Article 18. Hence, the SAA's comments focus on ensuring that audiovisual authors receive fair and proportionate remuneration for the use of their works by OCSSPs, whether or not these authors have transferred their rights to a producer or to their CMO.**

Recommendation: Supporting licensing agreements between audiovisual authors' CMOs and OCSSPs

Collective licensing is the most appropriate authorisation model

The aim of Article 17 is to encourage and incentivise licensing to achieve the objective of availability of the widest possible content while appropriately remunerating authors. In this context, taking into account the large amount of copyright-protected works uploaded on OCSSPs, collective licensing is the most appropriate authorisation model and should be recommended by the Commission's guidance to the Member States.

Collective management is very much developed in the EU and regulated by Directive 2014/26/EU *on Collective Management on Copyright and Related Rights which provides for European standards on the governance, transparency and accountability of CMOs* ('CRM Directive'). CMOs are easy to find

(pursuant to Article 39 of Directive 2014/26/EU, Member States have to provide the Commission with the list of CMOs established in their territories), flexible, willing to provide licences to all users and represent a broad spectrum of the repertoires in their field. CMOs are also essential partners for the expression of cultural diversity on these platforms. All expressions are represented in CMOs, whether mainstream or confidential, classic or contemporary and by young or experienced authors. The CRM Directive thus acknowledges CMOs' "*important role as promoters of the diversity of cultural expression*" (Recital 3).

The audiovisual sector should not be excluded from this model. It is a common misconception that individual licensing is the rule in the audiovisual sector. Collective management is mandatory for the retransmission right thanks to the 1993 SatCab Directive and the new Directive 2019/798 to ensure legal certainty to retransmission operators and remuneration to rightholders. As mentioned above, 62% of SAA members also manage the TV broadcasting rights of their members, whether by law or voluntary agreements. **The value-added of collective management for mass uses should also apply to OCSSPs to ensure the availability of content and the remuneration of the authors and other rightholders.** CMOs are the obvious intermediaries of OCSSPs to clear the rights. This is also beneficial for consumers, who will have easier access to the broad repertoires represented by CMOs, while ensuring that these authors receive remuneration for the use of their works.

In this context it is worth mentioning that SAA members have already signed licensing agreements with OCSSPs in France, Belgium, Italy and Spain.

Consequently, **the guidance should expressively support cooperation and licensing agreements between audiovisual authors' CMOs and OCSSPs. It should also refer to extended licensing agreements as an option to be considered**.

Best efforts to obtain an authorisation

Contacting audiovisual authors' CMOs is an essential step to any OCSSPs' effort to obtain an authorisation. As already mentioned, CMOs are easy to find and able to adapt to the size and business model of the different OCSSPs. The Commission's guidance should expressly refer to OCSSPs engaging proactively with the audiovisual authors' CMOs as a minimum.

For many works both in the music and audiovisual sectors, several rightholders are involved. Nowadays, audiovisual authors usually transfer their exploitation rights contractually to the producer under certain conditions so that producers can offer licences, unless the law or voluntary agreements provide otherwise. However, when it comes to the use of audiovisual works by OCSSPs, this mode of exploitation has not been foreseen in most authors' contracts. In addition, the contractual chain of older works, which are very common on OCSSPs' platforms, is often unclear if not completely broken. As a result, **there is legal uncertainty on who owns the rights for many old films and TV programmes. In these circumstances, the obvious ab initio rightholders are the authors who should receive a fair and proportionate remuneration for the use of their works regardless of their contractual arrangements with producers.** As authors are massively members of CMOs, securing licences from audiovisual authors' CMOs would bring the most basic and best legal certainty to platforms when they exploit audiovisual works.

Apart from this, when certain individual rightholders of audiovisual works like producers, broadcasters or distributors are not available to license OCSSPs, for example because they have ceased to exist or are not commercially interested, it should not relieve OCSSPs from their obligation to pursue their contacts and negotiations with audiovisual authors' CMOs. The licence delivered by audiovisual authors' CMOs are necessary and will play a crucial role in remunerating the authors for the works available on the OCSSPs, in line with recital 61 ("Rightholders should receive appropriate remuneration for the use of their works").

Indeed, until some rightholders have actively notified the OCSSPs with the relevant and necessary information on the works for ensuring their unavailability, disable access or remove them from their websites, many audiovisual works, in full length or partly, will continue to be available on OCSSPs platforms. This is the situation acknowledged by the SAA survey on the presence of audiovisual works on YouTube: there are many old feature films and TV programmes available on OCSSPs for which there is no explicit licence delivered by rightholders and no action taken to remove them**. It is crucial that audiovisual authors are not deprived of remuneration when their works are available even in the absence of action from other rightholders.** The agreements between audiovisual authors' CMOs and OCSSPs should play this role of remunerating authors whenever their works are available.

If an OCSSP refuses to obtain this licence while a collective licence is available under fair conditions through a CMO in a certain territory, that OCSSP obviously fails to meet its best effort obligation to obtain authorisation, especially when the CMO represents a large group of rightsholders and certainly more when an Extended Collective License (ECL) is in place. In that event, the OCSSP should be held directly liable for the all works within the repertoire of that CMO that are shared on its platform in the absence of the required authorisation. Indeed, it should not be able to hide behind the best effort obligations of Article 17(4) (b) or (c), since the conditions of Article 17(4) are considered to be cumulative.

A statutory right to remuneration for authors

To better secure that audiovisual authors do receive an equitable remuneration for the on-going exploitation of their works by OCSSPs and avoid complicated (and costly) discussions relating to the whereabouts of the rights involved, **the Commission should recommend that Member States establish an unwaivable and untransferable right to remuneration collectively managed by their CMOs, which would enable them to claim the payment of appropriate and proportionate remuneration to OCSSPs**. Such a mandatory collective management scheme was already established for the retransmission right by the Satcab Directive and was recently extended to all types of retransmission by Directive 2019/789.

This is also the approach adopted by the German proposal published on 12 June 2020 aiming at implementing Article 17. Article 7 of the German proposal provides that OCSSPs must pay to authors an appropriate remuneration collectively managed for uses carried out under a licence in accordance with Article 20b of the German Copyright Act (mandatory collective management for the retransmission right).

Such a statutory right to remuneration for authors paid by OCSSPs and collectively managed would be a major progress for securing equitable remuneration to authors for all online exploitations and thereby for achieving a fair and culture-friendly digital environment.

The remuneration of audiovisual authors for such a use by OCSSPs should be mandatory, unwaivable and collectively managed, and it should be implemented either under Article 18 as a general rule for all on-demand/ online exploitations, or a minima as a specific rule under Article 17. In addition to the recent German proposal, some Member States have paved the way to the statutory right to remuneration although only a few have implemented it for online uses. For instance, it exists for all forms of communication to the public in Italy and Spain, which includes uses on platforms.

The Commission's guidance should therefore reiterate the principle of appropriate and fair remuneration of authors and recommend a general statutory right to remuneration for authors in relation to Article 18 or a specific one for the uses under Article 17 as proposed by the German draft.

Transparency of OCSSPs and information-sharing with CMOs under Article 17(8)

The lack of transparency of OCSSPs is one of the most important topics for authors and their CMOs regarding the online exploitation of audiovisual works. The lack of transparency obligations and the market dominance of OCSSPs makes it difficult for CMOs to first, enter in contractual negotiations and define the appropriate terms to propose for an agreement with OCSSPs and second, monitor the functioning of agreements to ensure the collection and distribution of royalties to the authors.

There is a striking imbalance between the obligations established for users and for CMOs regarding transparency. While the DSM Directive aims to establish certain general principles of transparency, it is essential that practical measures are required from Member States to achieve real transparency on the exploitation of works.

In line with Article 17 of the CRM Directive, **the Commission guidance should strongly reiterate the obligation of OCSSPs to provide CMOs with adequate and clear information on the use of the works and the functioning of their content recognition tools in order to facilitate the collection and distribution of revenues to authors.**

In this context, the mention of Recital 68 that OCSSPs" *should not be required to provide rightholders with detailed and individualised information for each work identified*" should not be overstated. In their relationship with CMOs, the obligations of Article 17 of the CRM Directive should prevail. This is reminded by the last sentence of Recital 68: "*That should be without prejudice to contractual arrangements, which could contain more specific provisions on the information to be provided where agreements are concluded between service providers and rightholders*."