



FERA

Fédération Européenne des Réalisateur·s de l'Audiovisuel
Federation of European Film Directors

FERA Position Paper

May 2015

TO BUILD A DIGITAL SINGLE MARKET, INVEST IN DIRECTORS

Directors for a fair and consistent audiovisual landscape in Europe in the 21st century

Europe's audiovisual content, generating revenues estimated at EUR 133 billion in 2013, is at the heart of a future Digital Single Market.

To grow and develop this market, and see our works reach the widest possible audience, it is vital to recognise the central role of Europe's film and television directors as content creators, whose work is the very foundation of the value chain.

For the Digital Single Market to grow and flourish, Europe must act to increase the economic and authorial rights of its film and television directors.

FERA is calling for:

- Contractual terms that protect directors' authorial rights throughout the value chain, allowing for fair contracts and fees.
- Restoring balance to the employment of freelance directors by allowing freelancers to organise and represent themselves collectively, bringing an end to unfair employment contracts.
- Fair remuneration for secondary use of our works.
- A funding environment that promotes sustainable incomes and careers for directors.
- Securing the range of voices and works across European film and television, with specific targets to end the under-representation of female directors.

Authors' rights, linking economic and moral rights to the individual creator, are essential to directors as they foster creativity and allow appropriate reward for the use of their work¹. FERA supports the European authors' rights system: the creative work is not a mere commodity, and must remain effectively linked to its creator.

Individual directors are most of the time in a weak bargaining position in licensing their commercial rights to their producers, who exploit those rights in order to organise the funding, production and commercialisation of their work. This initial legal act remains the building block of the exploitation of the works, offline and online, and will determine the remuneration of directors throughout their work's production and distribution process. FERA believes this imbalance between directors and producers needs to be addressed.

Meanwhile, the European audiovisual landscape is changing fast, like other cultural and creative sectors going through the digital shift. As the European Commission sets a challenging agenda for the audiovisual sector in placing reform of the European copyright legal framework at the heart of its Digital Single Market strategy, it is essential to point out that audiovisual content is created by authors and directors.

For the Digital Single Market to grow with flourishing European audiovisual content, Europe must act to increase the economic and authorial rights of its film and television directors.

FERA's case :

1. Contractual terms that protect directors' authorial rights throughout the value chain, allowing for fair contracts and fees.

Directors' ownership of their work, building block of creativity

The director is the primary author of an audiovisual work, which must be reflected in his/her legal ownership of the work, as the foundation of his/her bargaining position vis-à-vis producers. The economic rights and moral rights of directors, which give them creative control over their work, must be upheld and harmonized to a high standard throughout the EU Member States.

A dramatic widening of the scope of exceptions to copyright at EU level would weaken this ownership to such an extent that the authors' rights would be made ineffective, with dire consequences on directors' livelihoods.

Proper enforcement of authors' rights in improved Directors' contracts

The initial legal act between a director and a producer, triggering the production and exploitation of the audiovisual works, is key. Improving contractual practices for directors should take into account the following :

¹ Under European law, film and TV directors have either authorial rights or copyright in their work, often shared with the producer or financier.

- To properly execute the directing role, the director needs his/her creative rights to be properly defined and preserved in the best interests of the production. Moral rights legally belong to the director as a private person and cannot be transferred.
- General prohibition of the global transfer of rights for the whole duration of copyright, as well as of the transfer of rights for future works and unknown forms of exploitation.
- Any right not specifically transferred in the contract is thereby retained.
- Each right to use, reproduce, perform, present, copy, distribute, publish, exhibit, sell, rent, promote, advertise, license and/or otherwise exploit the audiovisual work must be subject to payment (see 3 below).
- Each right or group of rights, its method of transfer, term and payment should be specified by contract.
- Introduction of a « best seller » clause (right for authors to renegotiate their contract and increase their share of revenue recoupment when work has been unusually successful and profitable).
- Introduction of a « use it or lose it » clause (reversion right for authors to regain their rights and exploit the work if they are not exploited by producers).

It is past time to reinforce the crucial acquis of the **Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society** :

« (10) If authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work, as must producers in order to be able to finance this work. The investment required to produce products such as phonograms, films or multimedia products, and services such as "on-demand" services, is considerable. Adequate legal protection of intellectual property rights is necessary in order to guarantee the availability of such a reward and provide the opportunity for satisfactory returns on this investment. »

FERA considers the thorough recommendations of the **2014 CRIDS/KEA study for the European Parliament on contractual arrangements applicable to creators** to be credible options to build upon in order to ensure fair contracts for directors, among other authors.

2. Restoring balance to the employment of freelance directors by allowing freelancers to organise and represent themselves collectively, bringing an end to unfair employment contracts.

European directors are mostly freelancers, who are hired by producers in a work for hire logic.

Despite the essential role of the director in the creation and production process, most of them live hand-to-mouth on a daily basis, due to abusive contractual practices and the difficulty of setting up collective bargaining schemes for freelancers, to negotiate fair fees and working conditions.

To bring an end to unfair employment contracts, we demand the right for freelance directors to bargain collectively. This has been prevented in several EU countries by competition authorities, notwithstanding the specific situation of creators among other categories of freelancers. Without

this necessary readjustment of European competition laws, the inequities of the current contractual system will only grow worse, endangering the creative ecology of filmmaking across Europe.

FERA considers the directing fee must be set at a reasonable percentage of the budget². The fee is for the work of directing the film only, and does not include payment for rights of use of the audiovisual work. Proper working conditions including social security, integration into pension schemes, legal status, management of rights and taxation regimes must also be set out.

As recommended in the **2014 CRIDS/KEA study for the European Parliament on contractual arrangements applicable to creators**, further research should be launched at EU level to study the impact of competition law on the admissibility of collective measures to secure fair remuneration for creators.

| 3. Fair remuneration for secondary use of our works.

Fair remuneration, an essential principle

The contractual relationship between directors and producers is based on a reciprocal bargain : transfer of copyright against fair remuneration. Directors must be entitled to partake in the determination of the scope and forms of exploitation of their work, and receive a fair remuneration each time the economic value of their work is exploited. Directors' working activity is irregular ; this secondary income is critical to sustain their livelihood when developing their next project.

As recommended in the **2014 CRIDS/KEA study for the European Parliament on contractual arrangements applicable to creators**, requiring by contract that the director's remuneration for each mode of exploitation is specified, together with its mode of calculation, would be an important first legal protection. We subscribe to the definition of fairness developed in this study :

« Remuneration should not be solely based on the number of copies sold but based on the actual revenue generated by the exploitation (including subscription-based or advertising-based models). It should not necessarily be proportional as some works or exploitations could be fairly remunerated by lump sums – in such a case, however, it is advisable to consider complementary solutions such as the one prescribed in the Term of Protection Directive (Art. 3.2b and 3.2c as introduced by Directive 2011/77) where a supplementary royalty should be paid after a defined period of time. »

Imposing obligations of transparency and reporting of financial revenues is therefore also necessary.

Unwaivable right to remuneration proposal

The **Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society** « making available right » implementation in audiovisual authors' contracts remains difficult. On-demand exploitation of their works rarely results in additional remuneration for

² Depending on the director contract's type and length, and the production type (cinema, TV, fiction, etc)

directors. Even in jurisdictions such as Germany and Italy, where ‘equitable remuneration’ is legally required in return for the ‘making available right’, strong contracts are needed to ensure that payments are actually fair and proportionate.

We therefore support, as a practical solution, the SAA proposal of an unwaivable right to remuneration to secure fair remuneration for the digital exploitation of audiovisual works³ :

- When an audiovisual author has transferred or assigned his making available right to a producer, that author shall retain the right to obtain an equitable remuneration. This right to obtain an equitable remuneration for the making available of the author’s work(s) cannot be waived.
- The administration of this right to obtain an equitable remuneration for the making available of the author’s work(s) shall be managed collectively (either by collective management organisations representing audiovisual authors, or through collective agreements guaranteeing such remuneration to audiovisual authors for their making available right).

FERA additionally calls on the European Commission to monitor the proper implementation of the **Directive 2014/26/EU on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market** to guarantee a necessary transparency in the management of all European audiovisual authors’ collective management organisations.

4. A funding environment that promotes sustainable incomes and careers for directors.

European directors want to make films

A flourishing Digital Single Market requires the production and distribution of high quality European audiovisual content: the EU must foster the development of consistent audiovisual policies at national level, both through public funding and by providing proper incentives to private investment.

It must also take into account the specificities of the European audiovisual sector and the importance of a territory-by-territory approach in fundraising and distribution:

- as an example, consider the success of European films and TV drama in various festivals and competitions around the globe, often partially financed through territorial pre-sales ;
- the audience’s access to European audiovisual works is intertwined with proper promotion of said works: local distributors play a key role in this, as the intermediaries in touch with the reality of local markets and audiences ;
- the impact of the Digital Single Market strategy on smaller cultural and linguistic areas’ competitiveness must be carefully assessed, to prevent any damage to European cultural diversity.

European directors want their films to be seen

³ SAA White Paper Second edition, March 2015

We believe it is essential to promote a diversified offer of national, European, and worldwide audiovisual works Europe-wide, and we share the concern of our EU institutions regarding the availability of our work for the European audience.

To truly advance the circulation of European films, one must consider both offline and online means of distribution of audiovisual works : because of the strong relationship between distribution and financing of said works, and because our films must be seen on the screens we conceived them for.

FERA welcomes the structured dialogue suggested by the European Commission in its **May 2014 Communication European Film in the Digital Era Bridging Cultural Diversity and Competitiveness**, as well as the **April 2015 European Parliament report on European film in the digital era**.

Any sustainable approach of the Digital Single Market must aim at securing a stronger economic commitment from the new online distribution channels to ensure a level-playing field between all audiovisual sector stakeholders. Copyright infringement, fiscal evasion by global Internet players, misuse of the E-Commerce Directive by certain online platforms must be addressed.

FERA particularly urges the European Commission to proceed with the review **Audiovisual Media Services (AVMS) Directive**.

Its limited implementation in many countries has prevented it from producing visible effects, while its core objectives of improving investment, availability and promotion of European audiovisual works remain essential to the development of a culturally diverse and internationally competitive European audiovisual sector.

5. Securing the range of voices and works across European film and television, with specific targets to end the under-representation of female directors.

Creative freedom should operate with no boundaries or gender. FERA considers it necessary to cinema's welfare to allow the diversity of talent to fully express themselves.

The EU must allow for balanced and consistent national audiovisual policies in order to secure diversity in film production ranging from arthouse to entertainment, in its use of the **2013 Communication on State aid for films and other audiovisual works**.

Calling for change for female filmmakers

The audiovisual industry seems to be at a standstill on the issue⁴: distance of the financial decision makers from the creative process leads to risk-averse decisions and safe choices, which in turn leads to a shortage of women directors being hired. Audiences in Europe are subsequently being denied the full range of voices in the films they are being offered.

⁴ European Audiovisual Observatory (EAO) 2014 study on women directors, requested by FERA, confirms the under-representation of women filmmakers across Europe : only 16% of European films, from 2003 to 2011, were directed by female directors

The case of Sweden is an outstanding example of best practice: thanks to advanced equality policies, the numbers of female feature film directors has risen from 30 to 50% over the past five years, the highest in Europe.

FERA calls for a system of targets in which the percentage of female directors in the workforce is directly reflected in the number of films being funded and made by women directors, with the ambition to reach a goal of 50 percent of all productions to be directed by women.

The ongoing effort to tackle the lack of data through studies both at national and EU level should allow proper evaluation of the female workforce so that efficient measures can be implemented. Best practices must be identified by policymakers, so that regional, national film funds and Creative Europe can start implementing them widely.

BACKGROUND INFORMATION

| Directors: Who we are and What we do

A director is both an author and a skilled independent professional technician, at the heart of the creative process and responsible for overseeing its realization. To build a sustainable professional career, these key individuals whose creativity is at the heart of the audiovisual production process must be properly rewarded.

It is the director who, as creative leader, brings a singular vision to a film, a vision that begins from the original idea and continues right through the production process, from the first stage of writing the script to the editing stage, adapting to the requirements of a process that can last over significant periods of time – on some films, several years.

We conceive stories for the screen. Working alongside our co-authors, screenwriters, composers, we develop the script into a visual story, directing the camera and actors to visualise the screenplay, commissioning music and supervising the edit and sound design to create the finished work or film.

Making those stories captivating for the audience in front of the screen, whatever their subject and form, is a craft and requires a very specific skillset. In our audiovisual industry, it also takes significant amounts of time and money. **This is our authorship as filmmakers, a decisive part of the creative process that is appropriately recognized in the law of copyright.**

Directors are already at the forefront of changes brought about by digital technology – and in many cases leading those changes. They have embraced the changes to camera technology, to editing, and the possibilities of new distribution through internet platforms. They have used new digital technology to operate in ways that are leaner and faster, often taking the camera to places it hasn't been seen before, telling new kinds of stories in different ways. And their creative leadership has been decisive in the digital effects (CGI) revolution, with all the possibilities for integrating live action and computer-generated imagery.

| What is FERA

The Federation of European Film Directors (FERA), founded in 1980, is the only organisation representing film directors at the European level. With 35 directors associations as members from 29 countries, we speak for more than 20,000 European screen directors, representing their cultural, creative and economic interests at the national and European level. FERA works to promote policies that maximize the creative, social and commercial potential of the audiovisual industry.

| For further information

Pauline Durand-Vialle, CEO – pdv@filmdirectors.eu – +32 25 44 03 33

FERA

Federation of European Film Directors
Fédération Européenne des Réalisateur de l'Audiovisuel
AISBL

Avenue de la Toison d'Or 60C
1060 Brussels, Belgium
+32 25 44 03 33
office@filmdirectors.eu

www.filmdirectors.eu