

~~UNFAIR~~ BETTER ~~BETTER~~ CONTRACTS ~~CONTRACTS~~

**If the culture industries
are so successful, why
are so many artists poor?**

A PUBLICATION OF THE FEDERATION
OF SCREENWRITERS IN EUROPE (FSE)
AND THE FEDERATION OF EUROPEAN
FILM DIRECTORS (FERA)



FERA

Federation of European Film Directors

CREATORS' REMUNERATION : A PROBLEM AT THE HEART OF COPYRIGHT

Summary

This document is prepared by the Federation of European Film Directors (FERA) and the Federation of Screenwriters in Europe (FSE).

In preparing the document we had considerable input from a number of legal and other experts from many member states and we would like to thank each of them for their contribution.

The value of the European Culture industries is €535.9 billion. They employ more than 7 million Europeans. Within that figure the audiovisual industries account for €107.3 billion and employ 1.2 million people.

Yet the majority of individuals who make art have lives which are financially extremely unstable with incomes that are usually very modest.

For example screenwriters median income in Europe from screenwriting in 2012, after tax, was €22,000.

Creators who cannot earn a consistent and reliable income cannot invest the time and energy necessary to create.

This problem has been acknowledged by the European Commission and Parliament many times, including in recent publications.

In this short report we summarise the problem from the perspective of screenwriters and directors – a situation similar in many respects to those of other creators and performers – and discuss some possible responses.

Defining what exactly is fair remuneration, insisting that rights and their associated payments are listed separately in contracts and facilitating collective bargaining would considerably strengthen screenwriters' and directors' capacity to negotiate better contracts.

Introduction

The value of the European culture industries is €535.9 billion and they employ more than 7 million Europeans. Within that the audiovisual industries account for €107.3 billion and employ 1.2 million people.¹ The culture industries have argued effectively that they are economically powerful, making a major contribution to the European economy.

Paintings and sculpture; songs and musical compositions; books, articles, poems; films and television programmes; architecture; circus and so on are the product of the basic human instinct for transformative imagination, for extraordinary vision and for engrossing story-telling.

But where do the creative works being bought and sold with such enormous economic success come from? They are the product of creative minds; the work of our creators, enthusiastically taken up, argued about and debated, rejected and accepted by Europe's citizens – those many people that we call the audience and business calls consumers.

Creators who produce the copyright goods on which the culture industries are built are poorly paid with very unstable incomes (see below and page 29 of this booklet). A more proportionate share of the income generated by the culture industries must go to the creators.

This document is put together by the Federation of Screenwriters in Europe (FSE) and the Federation of European Directors (FERA) to affirm the many assertions by the Parliament and the Commission that creators' remuneration needs to be guaranteed and to make specific proposals for changes that would be of real practical benefit to Europe's creators, in particular, in this document, its audiovisual authors – screenwriters and directors.

¹) EY – *Creating Growth – Measuring Cultural and Creative Markets in the EU*, December 2014

Creators' income, far from fairness

Not since the late 19th and early 20th centuries have we believed that poverty enhances creativity. Creators who cannot earn a consistent and reliable income cannot invest the time and energy necessary to create.

The facts about creators' incomes are well known to the European Commission, which has commented on them many times. The belief that creators should be remunerated fairly is consistently supported by the European Union institutions.

For example, the European Commission has said, in its plans to facilitate the online distribution of audiovisual works in Europe, that it "considers that an appropriate remuneration for rightholders should be ensured"² and, more recently in its Digital Single Market Strategy for Europe, that "measures to safeguard fair remuneration of creators also need to be considered in order to encourage the future generation of content".³

The European Parliament resolution of 9 July 2015 says that it "deems it indispensable to strengthen the position of authors and creators and improve their remuneration with regard to the digital distribution and exploitation of their works".⁴

Most recently a report on authors and performers remuneration, prepared for DG Connect, states that "there is a lack of transparency of the remuneration arrangements in the contracts of authors and performers in relation to the rights transferred... [which] has an adverse effect on the functioning of the Internal Market".⁵

Most creators, working in Europe, have **two main forms of income** – firstly, the initial payment from the producer for the work that they do, including the first licensing of the work (often individually negotiated, sometimes based on collectively bargained minimum standards); and, secondly, the ongoing income that they receive from the exploitation of the work in various markets over the years (sometimes from the producer, often from collective management organisations when secondary rights are collectively managed).

The balance between these two forms of income varies from one art form to another. Visual artists, for example, have the bulk of their income from initial sales and only a modest flow of income (resale rights, exhibition rights, etc.) from further use of their work. Composers, however, are relatively modestly paid for the initial work and receive the bulk of their income from ongoing exploitation usually managed by CMOs.

Screenwriters and directors have roughly 80% of their income from their initial contracts and 20% or less from payment made from the ongoing exploitation of their work.

Findings of FSE study⁶

- Screenwriters' median income in Europe, after tax, from screenwriting in 2012 was €22,000.
- Collective management organisations provide 61% of respondents with less than 10% of their total screenwriting income.

Findings of SAA white paper⁷

- SAA members' audiovisual collections only represent 0.37% of the audiovisual sector revenues.

²) *Green Paper on the Online Distribution of Audiovisual Works Online*, European Commission, 2011, p.15

³) *Digital Single Market Strategy for Europe*, European Commission, 2015, p.7

⁴) *European Parliament Resolution Evaluating the 2001 Copyright Directive*, paragraph 24

⁵) *Remuneration of Authors and Performers for the Use of their Works and the Fixations of their Performances* IVIR for EC, July 2015

⁶) *European Screenwriters' Income 2012: An Overview*. See p.29 of this publication

⁷) *SAA White Paper on Audiovisual Authors' Rights and Remuneration in Europe*, 2nd Edition, 2015

What can be done ?

Like the dual nature of creators' income itself – from ongoing distribution of the work but mostly from the initial contract – the solution to the issue of creators' income has two elements.

- 1 We need certainty that creators share in the economic success of their work online.
- 2 We need a rebalancing of contract terms.

1 AN UNWAIVABLE RIGHT TO REMUNERATION FOR ONLINE USE

Increasing creators' capacity to share in the economic life of what they create is important, not just because it is fair, but because at a very practical level this kind of payment helps to even out and make more stable the working lives of creators.

Commission study on creators and performers remuneration recommends "Policy 5 : Facilitate the exercise of the right of making available".⁸

The Society of Audiovisual Authors, the grouping of collective management organisations in the audiovisual industries, has a proposal, endorsed by both FSE and FERA, for an unwaivable right to equitable remuneration for the online exploitation of audiovisual works, managed collectively. This already exists in some Member States and would be extended at EU level as a European copyright law principle.

This proposal published in the SAA second edition White Paper, would uniformly develop collective management for the online uses of audiovisual works throughout Europe. In addition to the existing collective streams of income, for example cable retransmission and private copying payment for online uses would be ensured and could significantly help to even out creators incomes.

This makes practical sense to screenwriters and directors. It is clear and straightforward; can apply across the European Union; is based on existing processes and procedures that are well understood and well managed by the collective management organisations.

Proposal of the Society of Audiovisual Authors (SAA)

- 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 entrusted to collective management organisations representing audiovisual authors, unless other collective agreements guarantee such remuneration to audiovisual authors for their making available right.
- Authors' collective management organisations shall collect the equitable remuneration from audiovisual media services making audiovisual works available to the public in such a way that members of the public may access them from a place and at a time individually chosen by them.

2 IMPROVE CONTRACTUAL PROTECTION OF AUTHORS

An analysis of creators contract law commissioned by the European Parliament says : "The existing contractual protection of authors, as included in copyright law and, indirectly, in general contract law, appears not to be sufficient or effective to secure a fair remuneration to authors or address some unfair contractual provisions".⁹

The many problems of authors' contracts can be grouped in to four categories :

- a) the capacity to bargain fairly,
- b) ensuring the right to share in the economic life of what authors create,
- c) avoiding buyout contracts, and
- d) ensuring that contracts are honoured.

⁸) SAA White Paper on Audiovisual Authors' Rights and Remuneration in Europe, 2nd Edition, 2015

⁹) Dusollier et al., 2014, p. 13

A) Strengthening the bargaining position of the authors

The **unequal negotiating relationship** between the producer and the screenwriter or director is usually noted by analysis of creators' contracts.

The situation is made more difficult by decisions in a number of Member States (Ireland, Netherlands and Spain, for example) that the negotiation of standard minimum contract terms by collective bargaining is contrary to competition law. By contrast, German copyright law requires negotiation between representative organisations of creators and producers or publishers as the means of establishing what level of remuneration is fair.

The application of the principle of contractual freedom produces contracts which consistently benefit only one side of the negotiation.

Minimum standards arrived at by collective bargaining done by representative organisations provides basic standards and protection.

The European Parliament "calls for improvements to the contractual position of authors and performers in relation to other rightholders and intermediaries".¹⁰

Some more detailed proposals on authors negotiating power

- Collective bargaining and collective rights management are crucial to strengthen the bargaining power of screenwriters and directors in contract negotiations, renegotiations, and in the event of litigation.
- Collective bargaining agreements should provide the basic minimum standards on which contracts should be based.
- Screenwriters and directors' organisations should benefit from an exemption to the application of competition (anti-trust) law in order to facilitate collective bargaining.
- Contracts, including rights' transfer clauses, should comply with national and European laws and should be void if they do not.

B) Fair remuneration is proportionate remuneration

Much of the discussion of creators' incomes revolves around the concept of fair or equitable remuneration.

What is fair remuneration? One key and obvious principle is that remuneration which is fair has to be proportionate to the income generated by the work done.

The **best seller** clause system first used in German copyright law and recently introduced in Dutch law works well and would act an important matrix for a European approach.

Some more detailed proposals on fair remuneration

- Screenwriters and directors should be paid proportionately to the work they have done and to the income each type of exploitation of their work generates.
- This rate of remuneration is the rate which would be agreed by organisations collectively representing creators and producers were they to negotiate together.
- Screenwriters and directors should be paid for each form of exploitation of their work.
- A contract which does not provide proportionate remuneration to screenwriters and directors should be considered null and void.

¹⁰⁾ European Parliament resolution of 9 July 2015, paragraph 25

C) Balance the transfer of rights from the individual creator to the producer of the work

Another issue often noted is so-called “buy-out” contracts. This is where the producer purchases all rights for the life of copyright from the author for a fixed and usually low price.

The European Parliament “ maintains that it is essential to guarantee authors remuneration that is fair and proportional to all forms of exploitation of their works, especially online exploitation, and therefore calls upon Member States to ban buyout contracts, which contradict this principle ”. ¹¹

Commission study on creators and performers remuneration recommends :
“Policy 1 : Specify remuneration for individual modes of exploitation in the contracts of authors and performers”. ¹²
“Policy 3 : Limit the scope for transferring rights for future works and performances and future modes of exploitation”. ¹³

Commission study on authors and performers remuneration states “The absence of information on which to base an estimate of likely earnings in different Member States undermines the ability of authors and performers to effectively exercise their freedom of movement across jurisdictions (non-tariff trade barrier) and has an adverse effect on the functioning of the Internal Market”. ¹⁴

The most effective way to ban buyout contracts is to provide for the separation of rights and to remunerate them separately. The effect of this is to increase transparency in the contract to the advantage of all.

D) ENFORCE THE PROPER APPLICATION OF CONTRACTUAL TERMS

A topic not often discussed in respect of contracts is their enforcement. Individual creators who are highly dependent on subjective assessments of their talents are not motivated to complain when contract terms are abused or broken. Contracts should include procedures to ensure respect for the terms.

Some more detailed proposals on contract enforcement

- Contracts should provide for mediation as the preferred means for dispute resolution.
- Screenwriters and directors should receive damages in addition to remuneration where payments have not been made.
- Provision should be made in the contract to prevent unfair termination of contract, dismissal and deduction of fees/wages.
- Transparency and good governance in respect of the financial exploitation of works should be expressly provided for in the contract and penalties should apply to producers who fail to provide information to those for whom they hold the rights.

Some more detailed proposal on transfer of rights

There are three ways the transfer of rights need to be balanced.

SEPARATION OF RIGHTS

All rights transferred to a producer or other user by contract should be separately identified in the contract and remunerated. Only those rights separately identified, and no others, are transferred.

Unknown uses at the time the contract is signed cannot automatically be transferred and must be negotiated as and when they arise.

PRINCIPLES IN RESPECT OF PAYMENT TO AUTHORS

- Transfer of rights to producers and other users should not occur until payment has been made.
- Screenwriters and directors should have the right to utilise the services of CMOs to manage their rights and the producer should have the responsibility to inform those to whom the rights are transferred that the screenwriter and/or director has done so.
- The right to remuneration and the right to transfer rights to a CMO should be expressly excluded from any provision of presumption of transfer of rights.
- In the event that exploitation of the work is significantly greater and generates significantly more revenue than anticipated when rates of payment were first agreed, the screenwriter and director should have the capacity to seek additional payment (so-called “best seller” clause).

EXTENT OF TRANSFER OF RIGHTS

- Transfer of rights should be for a limited period specified in the contract.
- In the event that a producer fails to bring a project into production within an agreed time not exceeding three years, then any rights transferred, or options to acquire rights agreed, would fall and the rights would revert back to the audiovisual authors.
- Where a project has been produced and the producer fails to properly/adequately exploit it, the rights transferred should revert (so called “use it or lose it” clause) back to the audiovisual authors.

¹¹) European Parliament resolution of 11 September 2012, paragraph 46

¹²) *Remuneration of Authors and Performers for the Use of their Works and the Fixations of their Performances*. IVIR for EC July 2015

¹³) Ibid

¹⁴) Ibid p.8



Conclusion

Europe is its diverse and extraordinarily rich culture. Culture is not just undifferentiated “content” to be measured in petabytes. It is made of the vast number, richness and complexity of the stories and pictures that reflect our contested, linguistically varied, joyous and permanently inconclusive debate as to who we are and where we are going.

In the rest of the world Europe is known primarily through its history and its culture – a culture largely defined by the struggles and achievements of individual creators. The worldwide market place for cultural production from Europe relies on the reputation of our creators, whose ownership of their work – moral, legal and financial – enables them to create their unique stories. These stories and all the others – musical, visual and verbal – are created by Europe’s authors.

We should take better care of them.

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