IMAGO
The European Federation of Cinematographers

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Public Consultation

On the review of the EU copyright rules

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IMAGO
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I. - INTRODUCTION

IMAGO is the voice for over 3000 professional cinematographers around the world, working mainly in the film and television industry. It is a federation of currently 47 national associations in 32 European countries and 15 non-European countries. IMAGO was founded in Rome in 1992 on the initiative of the Italian Luciano Tovoli AIC/ASC, as a non-profit, non-union Federation.

Together with directors, cinematographers are the prime creators of audio-visual works. Cinematographers have the artistic responsibility for the lighting of the image and are creating stories with light, composition contrast, depth of focus, camera movements, perspectives, etc. Cinematographers perform a major role in the visual interpretation of a script. Without their work there are no images and without images there is no film.

IMAGO is a vital protector of the economic, moral and creative rights of cinematographers and influential promoter of better working conditions and stronger contractual position of cinematographers. IMAGO's work is committed to safeguarding the longstanding technical and artistic quality of the European Cinema especially in this digital age. Audio-visual works are crucial for European identity, traditions and cultures. The preservation of European film heritage is important to unite Europe in a way that transcends language. It also creates appreciative audiences for European films around the world.

IMAGO welcomes the opportunity to submit comments to this public consultation thereby giving the Federation the opportunity to engage in the moulding of the future of audio-visual authors' rights.

At the same time IMAGO would like to express its concern about the fact that some of the questions within the consultation have been recently discussed by the European Court of Justice (ECJ) or are still pending. The European legislator should avoid by all means any conflict with the Judgements of the ECJ or, more clearly, to give too much power to the interests of some economically potential stakeholders. IMAGO is confident that the European Commission will develop a neutral position for the review of the EU copyright rules. Therefore it is vital that the Commission appreciates the economic (and moral) interests of the co-authors of the audio-visual works. IMAGO wishes to increase the remuneration for its members but needs to achieve that with the whole audio-visual sector.

IMAGO will take a position only on some selected questions of the public consultation.

II. - Rights and functioning of the Single Market

A) 1. Why is it not possible to access many online content services from anywhere in Europe?
2. What about further measures (legislative or non-legislative, including market-led solutions) needed at EU level to increase the cross-border availability of content services in the Single Market, while ensuring an adequate level of protection for right holders?

Firstly it should be stated that as regards audio-visual works, the majority of consumers still demand local or national content linked to their traditions, culture and language. In this sense the Commission might overvalue consumer's demand for cross-border access to online services. For the moment, it seems unlikely that consumers will pay "any extra" for something they will hardly need and use.

Many Digital Service Providers have stated the main obstacle that impedes the access of many online content services is not only legal but also economic: the revenues are still far smaller in comparison with the "traditional" exploitation of theatrical distribution, broadcasting and DVD, while the costs of investment associated with translation, advertising and marketing campaigns are very high. Additionally there are important differences in tax regulations in the member states.

The Commission should realize that cross-border and multi-territorial European licensing already exists in the audio-visual sector; for example the distribution platforms in the Nordic region, or in the German language for Germany, Austria and Switzerland. This form of licensing is a direct result of a sufficient commercial demand from consumers. So, when consumer demand exists, multi-territorial European licensing is possible without any EU-regulation or intervention, primarily by contractual negotiation and reciprocal representation of Collecting Societies.

Notwithstanding, it is clear that the audio-visual sector can and will benefit from multi-territory licensing, because it provides a new exploitation window. All audio-visual works are made to be seen by the widest possible audience. This possible added income to European films depends firstly as mentioned previously on consumer demand. Therefore the **financing of cultural and linguistic versioning and marketing is essential**. Secondly, the move towards more multi-territorial licenses has to be supported by an **efficient European database**, which identifies rights holders and delivers all necessary information for licensing. This database has to be built up and controlled by the Collecting Society in order to protect the interests of its members. Some Collecting Societies had been reluctant until today to commit themselves to the sharing of data.

Before imposing multi-territorial licences the EU Commission together with the major stakeholders in the sector and national governments have to design **an alternative system of production funding sources**, given the fact that any multi-territorial license will destabilise the current system of financing films and eliminate essential release windows. Until now online platforms, operating at multi territorial European level do not contribute to financing the production of film as "traditional" distributors and at the same

time, European producers feel handicapped at the prospect of initiating cross-border strategies because they have previously sold rights to territories to finance the production.

However, the most important problem to solve is to find a solution regarding the procedure of fixing or setting tariffs for multi-territorial European licenses with the obligatory respect regarding EU competition law provisions. It needs an in-depth study to determine the extent of that problem. **Co-authors of audio-visual works need to get fair remuneration.** It cannot be stressed enough that fair remuneration is the essential guarantee for future authors' creation (this contributes to old-age assurance and economic "survival" during the period of non-commission of work) and contributes to cultural diversity. This fair remuneration has to be based upon free negotiations between equal partners and not be imposed by industry and consumers.

SAA's (proposal for European legislation establishing a remuneration right for the audio-visual authors, thus making available rights that are collectively managed and paid by the on-demand services providers has been a big step in the right direction.

In addition, an obligation of exploiting the rights transferred to the operators would be an important measure, not only to make the audio-visual works available to all the European public, but also to guarantee the remuneration of the authors of audio-visual works. Obligation should be balanced with the automatic reversion of rights to the rightsholder if not exploited during 5 years, through a special formal request of rightholders or its legal successors.

IMAGO insists on the need to prevent the danger presented by imposing a multi-territorial European licence and the competition between the different Collecting Societies will lead to the elimination of small Collecting Societies and the control of only a few Collecting Societies over the market-place. The Collecting Societies have a strong cultural dedication, are safeguarding cultural diversity and are vital for protecting members' author's rights. From the point of view of the authors/members, the national Collecting Society is the one that understands his/her problems (not only for language) and defends his/her interest.

At the same time IMAGO considers that harmonisation of the notion of authorship and/or transfer of rights in audio-visual productions as an utmost need in order to facilitate the cross border licensing of audio-visual works in the EU.

Currently EU has a very limited harmonisation of authorship in audio-visual works: due to the Directive 2006/115 EC on the Rental and Lending Right and Directive 2006/116/EC on terms of protection **only** the principal Director of the Film is recognised as being an author.

The two mentioned Directives expressly state that Member States are free to designate other co-authors. In 17 Member States cinematographers are recognized as co-authors. Our contribution is not a technical one, but a creative one (quoting VACANO, "*Technique by itself cannot create anything"*.)

Cinematographers have the artistic responsibility for the lighting of the image. Without the image there is no film and light design using composition is vital for the image. Our challenge is how to use the light to reflect the emotions which we are attempting to

create alongside the director in the visual interpretation of the script. Cinematographers are creating stories with light, composition contrast, depth of focus, camera movement, perspectives, etc. Without cinematographers there are no images and without images there is no film. This is why cinematographers are recognized in most Member States as co-authors of the film, as should be recognized all other creatives involved in the production of audio-visual works whose personal creative input leaves a mark in the audio-visual work (screenwriter, principal director, music composer, editor, costume designer).

A successful film requires a small team of creative craftsmen and women collaborating in their artistry to make movie magic. These creators need to be protected against economic exploitation of the work by providing fair remuneration.

Legally cinematographers have a double position regarding the other co-authors of the audio-visual work. Film are images in movement. In our position of sole responsible for lighting and cinematographic design, we are authors of the individual images or photographic works fixed(included may be a better word than fixed?) in the film. It is commonly accepted in the European IP laws, that a part of an original work can be protected as an individual original work. Opponents could argue that we are creating a variety of identical photographic works, and this is why the consideration as "individual works" does not fit in with the legal system. Of course, we make a variety of identical photographical works during the shooting, or similar photographic works, if the elements are identical, but compared with fine arts and painting this argument is not convincing: every copy of a sculpture, every lithographic series and every individual artist of one reproducing paintings by another artist enjoys individual legal protection. **To sum up, the cinematographer is not only co-author of the audio-visual work but also author of the photographic works fixed in the audio-visual work itself.**

In 2002 the European Commission, in a Conclusion of a special Report on the question of authorship of cinematographic or audio-visual works in the Community, stated the "continuing disparity" of regulation of the author or first owner of rights. It declared that no harmonisation is required in the area of film copyright, because in practice the differences were overcome by contractual solutions and the functioning of the internal markets was not affected.

This denial of need of harmonization by the European Commission has been criticized by many experts in Member States. IMAGO disagrees strongly with the European Commission's conclusion. There is a significant need for harmonization in order to avoid disruption in the audio-visual sector of the internal market. Currently the lack of harmonization produces great legal uncertainty. The negative consequences of divergent copyright systems are not eliminated by contract practice in the "droit d'auteur" jurisdiction. For example, if the creative involved in audio-visual production had signed a contract, transferring all rights to the producer, but national IP contract law prohibits granting of a license for an unknown method of exploitation, his or her condition as co-author has to be cleared in case technology brings up a new method of exploitation. Why should one Member State pay high costs for legal research and compensation of the most varied co-authors, whereas other Member States have not those obligations? Cross-border licensing is affected substantially by the lack of harmonization in authorship rights.

IMAGO emphasizes that the denial of recognition of co-authorship to cinematographers in Member States of "droit d'auteur" system constitutes a flagrant infringement of art. 27 Universal Declaration of Human Rights (1948) and of art. 17.2. Charter of Fundamental Rights of European Union.

IMAGO could suggest more measures, but fundamentally supports a harmonizing of the European tax law in the audio-visuals sector in order to prevent double taxation in cross-border availability of content services in the Single Market.

B) Is there a need for more clarity as regards the scope of what needs to be authorised (or not) in digital transmissions?

Firstly, some comments regarding the current situation of co-authors of audio-visual works.

Regarding audio-visual works, the current system of licensing and rights clearance does not offer particular problems. This is result of the fact that normally co-authors of the audio-visual work are forced to transmit their rights to the producer by "buy-out contracts." Consequently licensing and rights clearances correspond to the Producer.

The reality that audio-visual authors are obliged to give away their economic rights to the producer, receiving a lump sum payment, without further economic participation despite the commercial success of the audio-visual work, has been denounced by IMAGO and a lot of other Institutions and Associations in Europe on previous occasions. It is important to emphasize that a common framework at EU level which would guarantee a right for remuneration for audio-visual authors for all the exploitation of the works would never lead to any complication regarding rights-acquisition for online/on demand distribution.

Now, concerning the concrete questions/doubts of the Commission in the present questionnaire:

Regarding the "making available right", the scope seems to be sufficiently clear, even in cross-border situations. Nevertheless, this right should be clarified in the sense that, even when the co-authors of the audio-visual work have transferred their exclusive exploitation rights to the producer (which is a reality, as already mentioned) they should always preserve a non-waivable right for remuneration for the transfer of this right. The management of the transference should be entrusted exclusively to the Collecting Right Societies.

IMAGO pledges the Commission not to apply to the "country of origin approach" to the online audio-visual media services regarding the "making available right." It is not appropriate and can only lead to "forum shopping" in the sense of finding the most favourable regimes. The 2001 InfoSoc Directive did not transpose the "exhaustion principle" applicable to satellite broadcasting to the "making available right." Authors had been granted with and recognised as having an exclusive, not limited exploitation right.

Regarding the "reproduction right" the separate application from the "making available right" should never create any problem from the practical point of view. The international Conventions have always been recognised as in favour of/ a promoter of (a fan of) independent exclusive economic rights, which could overlap (for example reproduction and distribution). Nevertheless, the obvious problem for audio-visual media services providers (excluding broadcasters) is the lack of experience.

Broadcasters, for example, have many years' experience in rights clearances and in many countries they have signed contracts with Collecting Societies.

For Audio-visual media services the clearing of rights requires a greater effort. Given the fact that Collecting Societies normally do not administer primary exploitation rights of audio-visual works, they have to search for the rights-holders, which is complicated, time consuming and expensive.

In this sense the introduction of a non-waivable remuneration right for the audio-visual author's making-available-right makesright-clearance much easier for audio-visual media services. It would be of major significance to prohibit any kind of use of the audio-visual work without fair participation or remuneration of the audio-visual author.

Regarding hyperlinking and browsing, the Commission should distinguish between the different forms of hyperlinking. In case of "embedded" or "framed" links, authorisation and licence (and remuneration) should always be needed. The decisions of the European Court which have been made regarding this problem and which will be made in the future in pending cases, have to be respected by Commission, as pointed out above.

Regarding the viewing of a webpage where this implies the temporary reproduction of a work, IMAGO defends(is "submits" better?) that no authorizing or payment of a licence is needed. But of course, if the viewing means the temporary reproduction comes from a work offered on an illegal platform, every legal means to fight piracy have to be applied.

C. Registration of works and other subject matter

In the digital environment it is essential to use inexpensive means to clear rights. Identification systems have become an absolute necessity to guarantee collective management of rights. CISAC (International Confederation of Societies of Authors and Composers) has developed in the past different standards: IDA (International Documentation on Audio-visual Works), IPI (Interested Party Information) and ISAN (International Standard Audio-visual Number). Although the "professional rules" and "binding resolutions" of CISAC consider the implementation of this identification and administration systems as compulsory for its members, some Collecting Rights Societies show certain reluctance to comply.

IMAGO recommends that the Commission makes ISAN mandatory as a European standard for audio-visual works. ISAN is demonstrably most useful. This about-turn will be worthwhile: Beside rights-clearance, ISAN can track piracy and in the future will help to decrease the negative impact of "orphan works". Producers and Broadcasters should be obliged to collaborate in this task by facilitating their information/data base.

Therefore, IMAGO insists, there is no need to develop any new identification system. IMAGO also opposes any system that could be interpreted as an infringement of the mandatory "formality prohibition" of the Berne Convention. .

E. Term of protection

IMAGO's believes any form of restriction of the term of protection will harm the economic and social situation of co-authors of the audio-visual works. It has to be ensured that future growth of consumers and exploitation goes hand in hand with additional income to the audio-visual sector (authors and producers) and not with declining revenues and economical participation and limitation of the term of protection. The Commission should not forget that the prolongation of the term of protection of author's rights to 50 years after the death as established in the Berne Convention, due to the extension of the average lifespan in Europe.

III.- Limitations and exceptions in the Single Market

21. Should some/all of the exceptions be made mandatory and, if so, is there a need for a higher level of harmonization of such exceptions?

23. Should any new limitations and exceptions be added?

IMAGO generally does not support any new exception or wish to make the existing exceptions under the Info-Soc Directive mandatory. Imago however supports a mandatory regulation of the Private Copy Regulation. The reason for this is graphically illustrated by the misinterpretation of CJEU decisions which is directly harming Spanish culture. There are important differences between the member states. At the same time, it is not fair that rightsholders do not receive any compensation for private copying in Great Britain, but British rights holders are participating in the private copy tax levies in European member states. In the case of clarifying the regulation of private copying, the EU legislator has to follow the necessary interpretation and guidelines which has been given by the CJEU and which are pending in the near future.

IV. - Private copying and reprography

A. Access to content in archives/preservation

4. Mass digitisation

Concerning film heritage institutions the 2001/29/CE Copyright Directive had introduced a balanced exception addressing the needs of publicly accessible museums, archives, etc. Nevertheless Collecting Societies should answer this question in a more detailed and qualified way.

IMAGO is fully committed to find a way to undertake mass digitisation and clearance for online uses for historic or older audio-visual works in the film heritage institutions. "The Statement of Principles and Procedures for facilitating the digitisation of, access to and increased interest of European citizens in European cinematographic heritage works heritage films online" concluded between ACE, SAA, FIAP and FERA is a first important step to enable film heritage institutions to free up European films. IMAGO will give all possible support in order to preserve the artistic quality of the digitised film heritage.

The Commission should encourage a better collaboration between the different institutions (Film archives, Collecting Rights Societies, Film Museums, etc.) and encourage the careful release of original negative for archiving purposes to ensure the highest quality for the preservation and digital restoration of the European Film Heritage. IMAGO emphasises the benefit of collaboration and participation (where possible) by creatives involved in the production/creation of the work to be restored.

66. How would changes in levies with respect to the application to online services (e.g. based on cloud computing) impact on the development and functioning of new business models on the one hand and rightholders lder'revenue on the other?

Those technological developments will have a great impact upon the distribution of audio-visual content in the near future; accordingly this development will not pose, in Imago's opinion, a special challenge to IP law, although it appears that the traditional concept of private copying is being overlooked.

A most important issue is to guarantee the author's economic and moral rights and in achieving this goal that the multiple access/exploitation of audio-visual works results in more revenue for audio-visual authors.

Because there are different forms of cloud computing services, each form has its own problems and has to be examined individually. For example, in the case that one copy is stored for all users "in the cloud", a rights holder's licence is necessary, because the copy does not cover private use. In the case that users copy their own documents, files, etc. to a locker and do not share it with third parties, they do not need authorisation of rights holders, because this use is absorbed under the "private copying exception limit".

This does not mean there is an exception for remuneration in such a case. According to the Information Society Directive 2001/29/EC, any Member State could permit the reproduction of a work on any medium made by any natural person for private use and for non´-commercial purposes, on condition that the author receives a fair compensation. The responsibility for payment is not the end-consumer, but the service-provider. There is a massive lack of regulation in the sector of service-providers.

IMAGO strongly recommends the Commission to impose within all EU-member States the obligation to pay private copy levies and to harmonize the list of blank-media, for which levies have to be paid. The memory of the computer should be included in this list, in order to regularize the "cloud computing", where copies are stored on the (national or foreign) server. Imago urges the Commission not to harmonize the proper tariff base for levies. It is important that the Commission clarifies that levies are not a compensation for illegal exploitation (piracy), but compensation for **copies in the private sphere - legally allowed in most of the European jurisdictions.**

IMAGO proposes that websites and networks should obligatory have to offer to their end-users the possibility to clear the rights of the works they are using, assisting them in the diligent search for rights-holders. This measure favours right-holders, because they don't have to negotiate with the end-user. IMAGO supports any initiative to enforce economic and moral rights of authors in the social media sites. Nevertheless IMAGO is conscious of the difficulties of prosecuting infringements and to enforce the rights of the audio-visual authors.

IV. Fair remuneration of authors and performers

72. What is the best mechanism (or combination of mechanism) to ensure that you receive an adequate remuneration for the exploitation of your works and performances?

IMAGO supports the introduction of a non-waivable adequate remuneration for audio-visual authors. The contractual practice in most of the Member States has shown that co-authors of the audio-visual works are deprived of their exclusive exploitation rights and by "Buy-Out-Contracts" deprived of fair remuneration, in particular for the online distribution of their works (exclusive right of making available).

- The SAA's proposal, based on the Rental and Lending Directive 2006/115: provides an unwaivable right to obtain an equitable remuneration if the audio-visual author has transferred his/her making available right to the Producer. But the SAA's proposal introduces two important specific items: The audio-visual media services are responsible of payment of the equitable remuneration. Administration of those rights has to be recommended in mandatory form to Collecting Rights Societies. IMAGO has fully supported this initiative from the beginning. .

The introduction of such an unwaivable right of equitable remuneration would neither have any negative effects on Producer's production budget nor on his/her autonomy of decision regarding commercial exploitation. As mentioned above, the making -available right is currently transferred to the Producer without any specific payment or compensation. The remuneration right only becomes effective in case the Producer or any other natural or legal person appointed by the Producer decides to make the audio-visual work available online. It is not the Producer, but the audio-visual media service provider, who is obliged to pay to the Collecting Rights Societies.

A clear European legislation would directly increase the efficiency and transparency between the Collecting Societies within Europe. As the system of Collecting Societies is already established throughout Europe there are very small costs to implement

stronger cooperation and to build up a database for cross boarder licensing. The benefits for the producers and artists will go hand in hand with easier access to the market offers for the consumers. It follows that uncomplicated rights clearance and less a higher level of legal safety will support the trade (and the fair trade!) with audio-visual media.

73, Is there a need to act at the EU level (for instance to prohibit certain clauses in contracts?
74. If you consider that the current rules are not effective, what would you suggest to address the shortcomings you identify?

The introduction of the adequate remuneration right as exposed before, should be combined with an improvement of contractual IP law on European level.

IMAGO supports a harmonization of national contract law in the area of film copyright. This will make administration of film rights easier and the demands from consumers easier to satisfy. One of the goals of harmonization has to be to strengthen authors positions *vis a vis* producers. The establishment of a system of sanctions imposed by law in the case of non-compliance by exploiter of IP Contract Law is vital as well. EU legislation should prohibit clearly *cessio legis* regulations for all co-authors of audio-visual works, especially cinematographers, following the recent interpretation of the sentence of the ECJ. No author should be obliged to forfeit his or her intellectual property, regardless whether he or she is self-employed or has a regular employee's contract.

In addition, producers who wish to apply for public funds for the production of cinematographic or audio-visual works should be obliged to accompany the contracts signed with audio-visual authors. If Producer use clear buyout contracts, they should be excluded from public funding.

VI. Respect for rights

75. Should the civil enforcement system in the EU be rendered more efficient for infringements of copyright committed with a commercial purpose? In particular, is the current legal framework clear enough to allow for sufficient involvement of intermediaries (such as Internet service providers,…) in inhibiting online copyright infringements with a commercial purpose?

First of all, IMAGO has to make clear, that the civil (and criminal) enforcement system should never be restricted to infringements made with a commercial purpose. Only sanctions should be more severe for commercial infringements. Any exclusion of infringement with no direct commercial purpose of the civil (and even criminal)

protection constitutes a clear infringement of the exclusive exploitations rights provided by international and European copyright law to authors and rights holders.

Regarding the concrete question: providers, payment service providers, etc. have to assume the responsibility that the users of their services have access to licensed works. Recent national court decisions have clarified that intermediaries have to assume a more active role. The exemption of responsibility as provided by the Directive of Telecommunication is nowadays no longer sustainable.

VII. A single EU copyright title

76, Should the EU pursue the establishment of a single EU Copyright Title, as a means of establishing a consistent framework for rights and exceptions to copyright across the EU, as well as a single framework for enforcement?

IMAGO rejects this initiative because the differences between UK copyright and continental author's rights are too great, so it cannot be guaranteed that a single EU Copyright Title will offer a high level of protection of economic and moral author's rights.

Any step towards harmonization has to protect or to increase the economic and moral rights of the creators/authors of the audio-visual content. As the powers in the market are not in balance the authors side is never as strong as the producers/TV-stations. The creative authors need special protection against the pure turnover or profit expectations of the producer's side.

77. Should this be the next step in the development of copyright in the EU? Does the current level of difference among the Member State legislation mean that this is a longer term project?

IMAGO rejects such a project because it infringes the Berne Convention prohibition of any formality as *conditio sine qua non* for the exercise of author's rights. Author's rights are not industrial property rights. Author's Rights need protection and legal registration for the enjoyment and exercise of such rights. The EU legislator must acknowledge that author's rights have a moral dimension. Only because author's rights do not need registration for enjoyment and exercise of rights, but also because author's rights have a moral dimension, which should never be forgotten by the EU legislator.

VIII. Other issues

IMAGO would like to take this opportunity to draw the attention of the Commission to the conditions of employment of the crew and other workers in the production of audio-visual works that benefit from state aid and national/regional funding bodies. There must be much stronger control of the working and social conditions in the audio-visual sector. This is why the implementation of effective sanctions in order to prevent undermining national law (for example: redemption claim for the funding institutions in the event of infringement against the national legislation on labour, social and health protection) is required. A comprehensive policy by the European Union and its Member States in favour of national and European productions should promote or even ensure that agreed minimum standards are respected. The dumping of working conditions and social standards results in a dysfunctional market within Europe. It should not be tolerated to receive any funding from public institutions or bodies while showing a disregard for national or European standards.

Is this an opportunity to point out to the Commission the anomalies created by tax concessions encouraging the audio-visual industry. These tax concessions are often of a short term duration and leads to disruption in the long-term growth of a healthy industry as cheap labour is chased across frontiers to new pastures leaving behind a skilled workforce without employment? The UK industry is flourishing at the moment largely due to American productions working on buy-out deals with workers.

IMAGO is looking forward to elaborating on our position and remains available for further questions.