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EU XXL RESOLUTION 2010

We, the signatories of the EU XXL Resolution 2010, have passed this joint resolution during the “EU XXL Forum”, held from 4th to 8th of May in Austria, to present our common point of view on recent European legislative developments and policies relevant to the European audiovisual sector.

The EU XXL Forum comprised representatives and stakeholders of the European audiovisual sector – directors, cinematographers, scriptwriters, composers, actors and authors’ societies – to discuss EU policies concerning the audiovisual sectors.

This joint resolution was formulated on the basis of different panel discussions and working groups under the chair of independent media experts. It serves as a contribution to the ongoing opinion-forming and decision-making process.

One focus of EU XXL Forum 2010 was dedicated to the profession of cinematographers in order to discuss their concerns together with stakeholders of other professions aiming at the identification of common needs and enhancing solidarity of all professions involved in film-making.

Specific attention was paid to the rights’ situation of authors or, more broadly, those creators involved in the production process, and the development of content online as well as the Social Dialogue at European level focusing on working conditions in the media sector (i. a. film and TV).

Executive Summary

At European Union level, a number of important political and legislative developments are taking place which have a major bearing on the cultural sector. Most prominently, the Digital Agenda, the Green Book on Culture, the revision of the Satellite and Cable Directive and of the so-called Information Society Directive, reflections on instruments concerning collecting societies, the situation with regard to so-called “orphan works”, digitalisation and availability of archives (European and national cultural heritage), can be named as examples in the broader field of author’s rights and related rights. When it comes to the working conditions in the creative industries, besides the ongoing Social Dialogue, at EU level there is also a process of discussions about the necessary protection of workers etc. This entails the perpetuation of the legislative process with a view to working hours provisions, but should also be understood as covering fiscal and/or tax-related measures, social security and mobility of workers and/or companies.

Particularly with regard to the abovementioned initiatives the present resolution addresses several issues that are deemed of paramount importance for the successful and sustainable future development of the sector as a whole, but also specifically for the creators as the basis of the cultural sector. The submitted proposals aim at both fostering the economic as well as social fundamentals of authors and holders of related rights and, thereby, allowing the Digital Internal Market to flourish and enhance cultural exchange throughout Europe.

The following items have been discussed in greater detail and led to suggestions/calls for:

- Harmonisation at the European Union level of several important issues of the regulatory framework regarding (co-)author’s rights and related rights, such as the definition of authors of an audiovisual work, the scope of rights transferral vis-à-vis users, the enhancing of the fair remuneration principle – also with regard to exceptions and free-use provisions –, the role, tasks, management of collecting societies, etc.;
- Setting of standards as regards working conditions which allow for measures, taken at national level – and preferably by social partners, i.e. employers associations and workers unions –, to agree upon higher standards while taking into account the conditions in the given Member State;
- Introducing adaptations to the national social security and tax regimes that better fitted to take into account the specific situation of persons active in the cultural sector, and to provide incentives to improve the implementation of existing EU legislation by national authorities.

1. Increased Coherence of Substantive Author's Rights and Related Rights Regulation for the Digital Single Market

- 1.1 Content Online offers for the Single Market new possibilities of access to culture and information, at the same time it has multiplied the possibilities for distribution and dissemination of audiovisual works. EU XXL Forum supports the claim of the European institutions to facilitate, and make more attractive, legal access to cultural content, especially for young audiences.

EU XXL Forum welcomes the efforts to establish workable anti-piracy measures. At the same time the (social as well as individual) value of the concept of legal private copying existing in most Member States is part of our information society and has relevance for cultural progress.

- 1.2 In the digital environment easy-to-use and inexpensive clearance of rights is key. New technical (digital) possibilities, in principle, are apt to facilitate the clearing of rights. Therefore, the implementation of harmonised standards of identification is required at an international level; for instance, in the book-publishing sector (ISBN) and also in the music sector (ISWC) such instruments have existed for decades. For audiovisual works, the International Standard Audiovisual Number (ISAN) system has already been established in some markets.

At the moment, ISAN is recommended as a unique international audiovisual content identifier of choice for production companies, broadcasters and Internet media service providers. Only in some countries ISAN has been made mandatory. ISAN is an important tool for rights clearance in the context of distribution, it can support tracking piracy and, in future, may significantly decrease the negative impact of "orphan works" (works whose right holders can not be found anymore or even not be identified), at least with regard to the identification of right holders. EU XXL Forum recommends implementing legal measures in order to set up ISAN as a European standard for audiovisual works.

- 1.3 Culture Online can only flourish with authors' creativity and their works. Creativity and authors' works therefore not only need protection against piracy and infringement of moral rights, but also direct incentives and new (business) models for distribution, which

respect the consumers' interest as well. Furthermore, the recent massive use of creative content in our society makes necessary to open a broad discussion with all stakeholders to find a solution for a new balance of interests involved in order to guarantee a fair, equitable remuneration for authors and related right holders.

EU XXL Forum discussed alternative forms of remuneration¹ and new solutions in the field of contractual law, as applied especially in the audiovisual sector.

- 1.4 As alluded to in the decision of the EP and the Council establishing the MEDIA programme 2007–2013 in the case of public (co-)funded production of audiovisual works, a legal framework should govern the question of a re-attribution of transferred rights (fall-back or turnaround clauses) from broadcasters. This is advisable to be extended to comparable initiatives at the national level. EU XXL Forum sees such an approach as, on the one side, contributing to mitigate against negative effects of “buy out” contracts in the audiovisual sector, and, on the other side, to strengthen the position of independent producers – which should in the end benefit also the creators through a more extensive exploitation of their works. Additionally, whenever such approaches are taken, in their actual formulation account should be also taken to the interests of concerned right holders in cases of more extensive exploitation.
- 1.5 Given the differences in Member States regulations on levies aimed at compensating for private copying, EU XXL Forum proposes the inclusion of private copying as an exception to the exclusive right of reproduction in all Member States and calls for harmonisation of affected devices and carriage media, on which such levies should be applied.
- 1.6 EU XXL Forum stresses the need to adapt regulations to the special characteristics of audiovisual works and to the special needs of the (persons active in the) audiovisual sector, which are different from those in the music and publishers market, as has already been stated in the Reflection Document issued jointly 2009 by DG INFSO and DG MARKT.

Audiovisual works are a product of joint creative collaboration. Since 1993 all efforts in order to harmonise the question of (co-)authorship in a broader manner have failed. Only

¹ Please refer to the annex for further information.

the principal director is considered as author of the audiovisual work at European level by relevant Directives. Most of the Member States currently recognise, amongst others, beside the director, the cinematographer, editor, set designer, composer and script-writer as (co-)authors of the audiovisual work.

Given the fact that EU XXL Forum focused this year on cinematographers, EU XXL Forum urges harmonisation of authorship as regards cinematographers in audiovisual works. Cinematographers are responsible for important creative elements of the audiovisual work, as e.g. the visual design and the lighting design, both elemental tools to transmit the special atmosphere of the film as reflected by the script. This is why, most Member States already recognise cinematographers as co-authors of the audiovisual works.

Nevertheless, the current lack of harmonisation is affecting the Internal Market and the resulting negative effects cannot always be overcome by contractual solutions. For example, cinematographers of one Member State, in which (co-)authorship of cinematographer is not recognised in national law, are barred from becoming member of a collecting society. At the same time, some foreign collecting societies, which work in a country where cinematographers are recognised as co-authors of the audiovisual work, are collecting remunerations, even for those foreign cinematographers, for whom – according to national regulation – (co-)authorship is not established.

- 1.7 EU XXL Forum again pointed out the importance of the existing system of collecting societies and their trans-national cooperation. The experience of collecting societies in distribution of levies and royalties and the existing network with right holders and distributors will be of outstanding importance for remuneration models in the digital and/or other future environment. In order to prepare collecting societies for the future tasks the legal framework (including governance, transparency, information on repertoire, deductions, equitable distribution of royalties, representation in the decision-making process and accountability, e.g.) should be harmonised. The 2005 Commission Recommendation, the existing case-law and the professional rules adopted as minimum quality standards by some associations of collecting societies are considered by EU XXL Forum as inadequate to achieve efficient and transparent functioning of their work.

1.8 EU XXL Forum raised the prospect of a streamlined pan-European licensing system. EU XXL Forum recommends encouraging the establishment of a pan-European licensing as directly beneficial to consumers, right holders and authors. There should be a thorough analysis of possible risks for the current system of financing films and for the functioning of collecting societies. Nevertheless, EU XXL Forum stresses the need that such licences will protect in a satisfactory way the interests of creators.

2. Social Dialogue/Working Conditions

- 2.1 Not least in recent years, for all working in the cultural fields the working conditions have continued to deteriorate. A significant number of people are actually being forced to act as self-employed persons. Such circumstances contribute on a large scale to a constant thread of dumping tariffs and social standards as well as to economical disparity.

In principle, as in many other sectors, the creators should be vested with a free choice; they should be able to decide for themselves on an informed basis and with due respect to their sovereign decision whether they prefer, in accordance with applicable legislation, to be employed or to act as a self-employed person. Nevertheless, the principle of equal treatment must be safeguarded.

In order to cater for the requirement of equal treatment, but also, in broader terms, for the purpose of ensuring the establishment of, and due respect for, adequate legal protection of creative persons in their working conditions, effective safeguards should be introduced. With a view to possible options in this respect, in the discussion several models were dealt with, which should be decided upon by the national legislator:

- (a) so-called free-lancers or “forced” self-employed persons could actually be treated as workers;
- (b) for self-employed persons the same minimum protection standards as for workers could be applied, expanded by a “plus” covering the overhead of labour and business costs (e.g. insurances) typically covered by the employer in the case of employees. Such surplus – depending on the actual circumstances – would normally need to range between 25 to 35 percent;
- (c) those persons who work on an irregular basis could be afforded a quasi-salary and social security as if they were employed permanently – provided via State funding (France);
- (d) free-lancers could benefit from entirely State-funded social security systems (Slovenia, Croatia).

It should be duly noted that the request for treatment as workers is only related and limited to the working conditions, i.e. it does not hold true for the situation in respect of author's rights and related rights.

- 2.2 Generally, collective agreements will offer the necessary level of protection that is tailored to the needs of a given sector and, most frequently, will go beyond the minimum standards foreseen by legislation, where applicable. Free-lancers should be entitled to negotiate collective agreements.

The possibility to come under the umbrella of unions collective agreements' protection schemes also could be opened up for so-called free-lancers. Workers' unions should be entitled and encouraged to have them included. This may also lead to the strengthening of unions. Besides, a close contact between professional associations and the unions, particularly by fostering exchange of views and, potentially, mutual representation in e.g. advisory boards, seems desirable.

- 2.3 Existing means of protection of working conditions must be faithfully implemented. The European Union should encourage Member States to intensify monitoring of the actual implementation and, where necessary, have recourse to effective sanctioning in case existing anomalies in this regard persist. Furthermore, harmonisation measures at European level aimed at safeguarding workers' interests (e.g. on maximum working hours) should be finalised to the best possible extent, while leaving room for progressing beyond common minimum standards by way of collective agreement (and for having recourse to more detailed regulation with respect to the peculiarities in a given sector).

- 2.4 In the same vein, the application of tax law and social security schemes can show to be disproportionate to the specific situation in the cultural sector. Even if double taxation eventually should be avoided, not least by way of bilateral double taxation agreements between Member States (and beyond), the delay which has to be taken into account before final settlement of respective cases again leads to endangering the economic viability of creators.

2.5 EU XXL Forum and IMAGO (European Federation of Cinematographers), FERA (Federation of European Film Directors), ECA (European Council of Artists), FSE (Federation of Scriptwriters in Europe) and FFACE (Federation of Film and Audiovisual Composers of Europe)

- (1) Call on EURO-MEI to recommend to their Member Unions
 - to represent, if they so wish, free-lancers and the so-called "self-employed" as soon as possible in their relevant unions;
 - to report on implementation of this proposal;
 - to have close contact with the existing professional associations at national and European level.

- (2) Ask the European Institutions
 - to ensure equal treatment among cultural workers;
 - to promote a minimum standard of social protection and working conditions, which shall be collectively negotiated, including free-lancers and the so-called "self-employed";
 - to motivate the Member States to have a better controlling of existing national working and social conditions, especially with regard to artistic work (part-)financed through State aid and via national/regional funding bodies. There must be sanctions in place to react on/prevent undermining of national law (redemption claim for the funding institutions in the event of infringement against the national legislation on labour, social and health protection);
 - to examine whether there are legislative provisions in force at national level which would contradict EU legislation in connection with working conditions and, if so, to remedy that situation;
 - vice-versa, to encourage Member States to examine if there are national laws not being in conformity with the relevant Directives or other measures at EU level and accordingly change that situation;
 - finally, to have a specific regard, together with the Member States, on the situation of people working in the cultural field; all Directives, regulations and any other measures shall take into account the nature of culture and cultural workers, especially when finalisation of the Gruny Report and the Working Time Directive is at hand.

- (3) Emphasises that double taxation constitutes a major financial disincentive to the mobility of cultural workers.
- (4) Are of the opinion that the "Model Contract" developed by IMAGO shall help to identify solutions for many workers in the audiovisual field.

ANNEX

As regards the challenges brought about by illegal uses of protected works in the Internet, a significant number of participants emphasised the valuable positive impact of the following proposal:

Despite of several attempts to effectively fight (online) piracy, in particular illegal file-sharing is still a reality in today's societies. Actually, there seems to be only one specific "business model" linked to the attempts to eliminate these trends, i.e. enforcement against file-sharers acting in the private sphere; however, any possible moneys derived from those activities in the majority of cases are not recouped to the benefit of authors.

In the past, private copy regimes have been introduced, accompanied – in the spirit of preserving the principle of equitable remuneration – by levies on recording/storage devices as well as blank carriage media, only because the need was seen to compensate right holders in such circumstances. Currently, it is being discussed how similar regimes could be modelled for the online environment. For example, stakeholders who generate turnover directly from the mass distribution of creative content (e.g. ISPs, Telcos, etc) should pay a contribution to collecting societies according to the amount of measured data traffic, conveyed via their networks, to consumers on a monthly basis.