

Krems, 06.03.2009

EU XXL RESOLUTION 2009

We, the signatories of the EU XXL Resolution 2009, have passed this common resolution during the “EU XXL Forum”, held from 3rd – 6th of March 2009 at the Danube University Krems, in Austria, to emphasise our common point of view on recent European legislative developments and policies relevant to the European audiovisual sector.

The EU XXL Forum, which took place during “EU XXL film, forum and festival of European film”, gathered representatives and stakeholders of the European audiovisual sector – producers, directors, cinematographers, scriptwriters, composers, actors, broadcasters, telecom service providers, film funding institutions and authors’ societies - to discuss EU-policies concerning the audiovisual and music sectors.

This common resolution was elaborated 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 2009 was dedicated to the profession of scriptwriters in order to discuss their concerns also together with stakeholders of other professions aiming at the identification of common needs and enhance solidarity of all film making professions.

Because of its paramount importance for the European audiovisual industry another focus was laid on the future role of Public Service Content and the legal framework for Public Service Broadcast.

Specific attention was paid to the rights situation of authors and performers.

1. Artist Rights

1.1 According to the European Social Charter, the goal of fair remuneration applies in an equal manner to all branches of the industry including the audiovisual sector. In the area of artists rights as a basic principle the requirement to ensure appropriate reward for the use of authors' and performers' contributions to works is stipulated. A focus of EU XXL Film 2009 was dedicated to the specific legal circumstances and economic situation of screenwriters for their inevitable contribution to filmmaking. Besides, the situation of performers in music works and other creative works was discussed.

1.2 While, from a legal point of view, the acknowledgment of authorship for screenwriting as such (as a work pre-existing to the making of a film) does not seem to pose problems, not all European countries recognize scriptwriters as co-authors of a film work. Apart from that concerns were being raised as regards the factual acknowledgement of screenwriters' contribution to an audiovisual work, more concretely: being named as creators of a story.

1.3 More generally, as regards the acceptance of (co-)authorship to a film or audiovisual work (e.g. of directors of photography), little harmonisation throughout Europe has been achieved; even more, a current assessment of the situation is overdue. As a first step, a compilation on several European Member States and third countries has been made, showing huge discrepancy in the legal and economic situation of those contributing in a creative manner to such works. Therefore and given the importance of the fundamental freedoms in the internal market, the adoption of harmonising measures in this respect is an important mechanism, not least in order to facilitate co-operation of artists from different countries and trans border co-production.

1.4 While mainly sector-specific harmonisation directives have been enacted, and the Directive on harmonisation of certain aspects of copyright and related rights in the information society (2001/29/EC) is representing a more horizontal approach being not only acceptable to the online environment, still there exists no Community acquis on contractual provisions in the context of artistic activity. There is an urgent need to address this issue, because also for those enjoying copyright protection for audiovisual works, the economic situation is not viable, demonstrating a clear lack of level-playing field in negotiations. To achieve this, also efforts to establish best practise model contracts and tariffs providing for minimum standards should be

intensified, and this needs to be backed up by legal frameworks.

1.5 The currently debated proposal from the European Commission to extend the term of protection of holders of neighbouring rights to music works was welcomed insofar as it signals a will by the European institutions to improve the situation of those artists. Beyond this, however, no consensus could be found among participants when it came to evaluating the possible positive results of the initiative. Others pointed out, that in the legislative process little attention is being paid to the audiovisual sector, despite strong statements from performer's organisations to that effect. This was seen as representing an unjustified discrimination between the music and the audiovisual sector. In any event, such instruments would not be designed to address the existing imbalance in the economic situation of artists, which is a result of the accumulated sums from remuneration and compensation; those instruments are not intended either to function as a remedy for social security issues. The same holds true, *mutatis mutandis*, for the distribution of revenue streams between phonographic industries and artists. Apart from that, scepticism was raised as far as the viability of such approaches is concerned in the middle to long term perspective, given the relevance of changing consumption patterns in the music sector.

1.6. Collecting societies traditionally act as the middlemen between rights holders and users of audiovisual works. The participants agreed that only the strengthening of the role of collecting societies and legally binding minimum rights, would improve significantly their situation on an European market.

1.7. For the European policy to be well prepared to meet these future challenges and to be more responsive to the needs of the creative sector the responsibility for Culture in the European Commission, particularly for the creative sector, on the one hand, and the legal framework protecting and supporting their activities, on the other hand, should be concentrated in one hand. This even more is needed to underline the importance of the sector as a whole for European economies. In order to improve the overall situation in the sector and its competitiveness, policy makers should enhance the possibilities also for new stakeholders to have access at an early stage to decision makers.

2. Creative Content Online

2.1. EU XXL Forum welcomes the European Commission's interest in promoting creative content. Therefore cultural diversity and creativity should not be undermined and indeed should be promoted in the transition to new business models. Nevertheless there is a common interest of internet service providers, telcos and artists to reach audience, which corresponds with the consumer interests to access cultural goods. Network operators and service providers are searching for high quality and diverse content to license. Some of them are establishing systems to engage in the creation and production of such content to be offered to their consumers. At the same time players in the cultural industry are trying to define the best-suited business models in order to benefit from the opportunities of the online environment. Both aspects should be taken into account when developing further the regulatory framework at EU level. The Audio-visual Media Services Directive has already defined part of the applicable framework for the online and on-demand provision of content services, including broadcasting.

2.2. There is a broad support for the establishment of new business models, however, the existing European legal framework must be reassessed in order to facilitate adequate solutions for the online exploitation of works securing fair remuneration and, where applicable compensation schemes. Especially in the current situation which is characterized by a significant level of uncertainty as regards future revenue streams, there is not only room for maintaining existing compensation instruments but also for including internet service providers / users into such financing means for creative works.

2.3. Therefore, a Commission policy needs to address the issue of the contribution by online service providers and / or internet users to the financing of audiovisual creation. Different approaches have been discussed, especially more general schemes of remuneration could be advisable to foresee in this first phase. Therefore 'content levy' was proposed and broadly discussed, a levy, which could be collected and distributed by collecting societies, probably in combination with a system that allows the identification of what works actually have been used.

2.4. The participants also stressed again the importance of adopting measures to facilitate the availability of content online. Therefore multi-territory licensing is crucial in so far as the fragmentation of rights represents an obstacle for the availability of European audiovisual works and music on international platforms. Participants in this context emphasised the importance of collecting societies, not only for rights holders but also for users and new business models in the online environment.

3. Public Service Content

3.1 Broadcasting systems in Europe, *grosso modo*, have been based, for quite some decades now, on the co-existence of public service broadcasters (PSB) and commercial broadcasting organisations, the latter for their part being either financed by advertising or via subscription fees. Specific rights and obligations traditionally have been attached to PSB, reflecting on their remit and their means of financing. At a European level, the Council of Europe has been very active in dealing with PSB, not least in view of the tasks attributed to it, but also in view of its independence from State influence, on the one hand, and the safeguard of adequate funding, on the other. The European Union, given the competencies foreseen in the treaties, in particular provisions on competition policy in the EC, has been focussing on the compatibility of PSB's funding with rules on State aid and services of general economic interest. Nevertheless, a number of EU legal and policy instruments emphasize the importance of PSB and public service content for the needs of societies in terms of cultural, social and democratic issues, as well as for media pluralism.

3.2 It is widely accepted that also commercial broadcasters (or: media service providers) play their role in the accomplishment of societal interests attached to broadcasting. However, media consumption patterns are changing, bringing about more "players" into the (electronic) media systems, particularly content providers on "the Internet". While obviously the situation in member states will differ, current research done in Germany shows that younger children and adolescents are getting more and more experienced with the "new media" which they use specifically for communication, questioning the predominant role of broadcasting. PSBs were positioned to provide a wide range of information and other media content, thereby informing debate and integrating people. While the younger acknowledge the competence of PSB in providing high quality news, for instance, they tend to watch mainly commercial channels and, generally, give preference to entertainment offerings, mainly also on these channels. There is a challenge for many PSBs to have a significant reach among younger audiences, except for programming specifically dedicated or of appeal to them, and probably also for major sports events and blockbuster films. However, these findings may be explained by the fact that for the youngsters "hard news or information programmes" do not have actually such importance, e.g. given their involvement, at this age, in elections or their limited economic power. Interestingly, television overall is used by the youth on the traditional way, via the TV set – there is thus no significant substitution yet by "TV over the Internet".

3.3 In the end, both PSBs and commercial broadcasters have to find adequate solutions to also reach younger audiences. They both face competition for audiences from different players, like the press engaging in online activities as well as the social networks. For the PSM (public service media), it is mainly accepted that their remit can be extended to the “new media”; however, the question is being raised to which extent (what kind of content, for what period of time) this should be allowed, taking into consideration both the legitimate interests of society and those of other players. However, arguments were put forward to the effect that the definition of PSM is not depending on the activities of commercial providers.

3.4 Quality of programming, in particular independent, comprehensive and reliable information provision as well as culture programmes, is requested mainly from the PSBs to be delivered. Still, commercial broadcasters, too, may be vested with public services obligations - though this is decreasingly the case - or positive programming requirements and/or may have an interest themselves in delivering such content which is valuable for society.

3.5 It should be kept in mind that PSMs contribution to the media system as a whole, as it is the case with commercial providers in many MS too, is significant. This holds true for e.g. new formats, new technologies, new means of integrating the audience and new topics. Besides, forming and remaining part of a multi-faceted support scheme for creative contributions, specifically for film and audiovisual works, is of paramount importance. However, as regards the last point, decreasing use by (parts of) the audience of audiovisual works and other programmes on publicly accessible platforms will be an issue requiring attention.

3.6 From a different angle, the new media, and the way younger people communicate over these, are not only a challenge for broadcasters, but also an opportunity because it allows including the public into a discussion on what should be programmed. Legislators at a national level will remain cautious when it comes to concrete content requirements being formulated for the provision of public service content. It is mainly for the broadcasters or media service providers to decide on the genres and forms as well as contents they want to provide. Still, some control ex-post can take place in order to verify whether the public service remit has been fulfilled, and this is where viewers’ and listeners’ engagement in the debate could tie in. In any event, “freeing” PSM from the “burden of quota” (ratings of audience share) and assessing the value/quality of their output by different means can be important; evolving into concepts of reach,

not share. Here, the specific role played for social cohesion, cultural diversity and democratic opinion-forming must be emphasized.

3.7 The debate on public service content should therefore take place at a national level, allowing taking into account the specificities in the respective country. Foreseeing that in view of public service media providers using the new media, there should be an ex-ante assessment on whether this (1) reflects on their remit, (2) that the market impact is considered, and (3) that there is clarity on the costs involved, may be a solution, but can show to have its limits, particularly when the “experimental” character of such activities in a rapidly and ever changing environment is being considered. For the near future, at least, there will be a need for PSM and for public service content, and the public value of providing stable financing for this is paramount.

3.8 All this should be taken into account when it comes to discussing the pros and cons of a revised EC Broadcasting Communication, leaving intact the competencies of the Member States. In particular, when referring to the recent judgement of the CFI in the TV2 Danmark case and the ECJ judgment in UTECA, the role to be played by national authorities and the public must be stressed.