

# European Film Agency Directors (EFADs) position on the European Commission Proposal for a Directive on Copyright in the Digital Single Market



## Film education, audiovisual heritage, and a fair, diverse and transparent online marketplace in the 21<sup>st</sup> century

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The European Film Agency Directors (EFADs) share the European Commission's ambitions outlined in its proposal for a Directive on Copyright in the Digital Single Market.<sup>1</sup> **The promotion of film education, cultural heritage, and a fair, diverse and transparent online marketplace are important objectives, especially in the context of the growth of new digital technologies.** They are also fundamental to the promotion of European cultural diversity and cultural exchange which are the backbone of the European Union and are important in these times of significant social and political change. As government and government-associated bodies with a mandate in the public interest, the EFADs have been working towards these objectives for many years.

**The EFADs support the proposed revisions to the framework governing the exceptions on illustration for teaching purposes and the preservation of cultural heritage in the proposed Directive.** Alongside existing initiatives, these proposals will develop critical understanding, media literacy skills, and help build the young audiences of the future for European works, as well as ensuring Europe's cultural legacy is protected for future generations.

Moreover, **we support measures which will create a transparent, diverse and fair online marketplace.** The availability of European works should be promoted and we support a general principle of transparency to ensure the fair remuneration for all participants across the contractual chain. This will facilitate the development of new business models, creation, and promote more circulation and access to Europe's cultural diversity to the benefit of European audiences.

At the same time, it is important that these proposals are shaped carefully to find a balance between the interests of the different stakeholders involved. Technical Protection Measures (TPMs) must be included and more clarity is needed on the negotiation mechanism in Article 10. The EFADs look forward to working with the European Commission, Parliament and Council on these proposals.

### A teaching exception for 21<sup>st</sup> century education

- There is huge potential in the education sector for promoting diversity and the long-term use of audiovisual works. The use of audiovisual works in education can create long lasting interest in these works as a platform for critical understanding, reflection and creativity. Educators that use such works as a means of teaching, help with their promotion and are therefore allies of the audiovisual industry.

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<sup>1</sup> European Commission. September 2016. "Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market." COM(2016)593

- Promoting film education is a core activity of the EFADs. EFADs members are actively involved in projects and initiatives which range from bringing young people to theatres, developing teaching materials and support documents, supporting film clubs in schools, cinematheques, libraries and cultural centres, and offering online platforms which provide schools and cultural institutions with access to audiovisual works and teaching materials.
- Conversely, film literacy activities place audiovisual works at the heart of education. **Moving images represent a very significant part of the 20<sup>th</sup> century's cultural legacy and are the 21<sup>st</sup> century's main form of communication via the Internet and social media.** Exploring the richness of our film heritage and understanding the “alphabet of film” – the narrative, the shooting, the editing – is key for children and young people to engage with digital media. To that end, film literacy is a core element in media and digital literacy, giving educators and their students the opportunity to work with film as a means for expression and storytelling.
- The current situation regarding **access to and use of film for education and research is sub-optimal.** In Europe, the legal framework for these activities diverges from country to country. Moreover, teachers trying to understand their right to use film for teaching purposes face many uncertainties.<sup>2</sup> In addition, film heritage institutions find that the more access to films becomes digital, the more constrains these institutions face.<sup>3</sup>
- The proposed revision to the framework governing the exceptions on illustration for teaching purposes is a useful step to **empower learners and teachers to use audiovisual works** on secure and restricted platforms including across borders. In addition to existing policies at European and national levels, this exception will **integrate film and film literacy into a 21<sup>st</sup> century education agenda** while **striking a balance between stakeholders' interests.**
- Effective film education requires teachers to have **clarity regarding the possibilities they have to show audiovisual material.** The combination of copyright exceptions and adequate remuneration, through, for example, educational licensing schemes in each Member State, should create a framework in which teachers and learners do not have to worry about seeking permission every time they want to use a copyright work for educational purposes, and rights holders are fairly remunerated for the use of their work.
- The exception will give teachers the ability to access collections of films or audiovisual works and to screen them **partially or in their entirety** on digital devices used in education. It is also crucial that learners, teachers and pupils are able to **lawfully access films and other audiovisual works at home, including across borders via a dedicated secured and closed network** in order to study them.
- The mandatory nature of the exception will help Member States adopt **a harmonised approach** in relation to the use of copyright-protected works within educational settings. Together with existing programmes and platforms and the existing voluntary exception in Directive 2001/29,<sup>4</sup> this will broaden access to copyright protected content by teachers and pupils.
- At the same time, when it comes to access, availability and the use of audiovisual works as learning materials, it is important to consider the following additional features:
  1. The scope of the exception should be extended to cover formal education establishments and **film heritage institutions** which are engaged in **non-commercial film education initiatives.** Film heritage institutions would include film agencies and cinematheques.
  2. **Rights holders should be fairly remunerated** when their audiovisual works are used in educational settings by educational establishments and cultural heritage institutions.
  3. Member States should be encouraged to define the **“digital use of works and other subject-matter for the sole purpose of illustration for teaching”** in a way that enables the film

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<sup>2</sup> Universitat Autònoma de Barcelona et. Al., a study prepared for the European Union 2015: “Showing films and other audiovisual works in European Schools, obstacles and best practices”

<sup>3</sup> European Audiovisual Observatory, May 2017. “The access to works in the collections of Film Heritage Institutions in the context of education and research”

<sup>4</sup> European Union. 22 May 2001. “Directive on the harmonisation of certain aspects of copyright and related rights in the information society” 2001/29/EC

education activities outlined above, including the **digital screening of extracts or entire audiovisual works**.

4. To ensure audiovisual works are protected, it is important that any access outside of the premises of official educational establishments and film heritage institutions is **provided through a secure network under the supervision of the establishment or institution**. Solid technical protection measures must be introduced when it comes to the online use of films in education.
5. The educational sector should access audiovisual works under the provisions of Article 5.5 of Directive 2001/29<sup>5</sup>. Through **adequate holdback mechanisms**, rights holders should be given a fair chance to exploit the commercial potential of their audiovisual works before they enter into the educational circuit.
6. Equivalent licensing arrangements should be **transparent, simple and straightforward**. Framework agreements should be made simpler to increase efficiency and tackle fragmentation.
7. We encourage the European Commission to:
  - a. Make film education a strategic policy objective and take an active part in the development of future film education policies as part of a 21<sup>st</sup> century educational agenda.
  - b. Set up a platform in partnership with the EFADs to facilitate the exchange of best practices in Member States' film education policies.
  - c. Support awareness-raising campaigns to inform relevant authorities, teachers and learners about the use of audiovisual materials.

## Preserving Europe's cultural legacy for future generations

- Cultural heritage institutions play a crucial **role in the preservation, restoration and the provision of access to cultural works**. Many film agencies fall under this scope because they have archives containing important cultural and historic collections of audiovisual works.<sup>6</sup> They hold these works as part of their **public service mission** to digitise, restore and, sometimes, make these works available for cultural and educational use to the benefit of European citizens.
- The growth of digital technologies has introduced new ways for preservation, restoration and making available. The objective should be to ensure the **long-term conservation of Europe's audiovisual heritage in this new context**.
- The proposed mandatory exception for the preservation of Europe's cultural heritage in Article 5 is therefore welcomed. This exception will **provide archives across Europe with legal certainty and reduce the burden of clearing the rights for preservation**, ensuring they can preserve audiovisual works permanently and make copies for the purpose of preservation.
- At the same time, this is **balanced with the interests of rights holders** because the exception is **"for the sole purpose of the preservation of such works or other subject-matter and to the extent necessary for such preservation"** and it is only applied in certain special cases **"which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rights holder."**<sup>7</sup>
- However, small adjustments may be necessary such as:
  1. The definition of "cultural heritage institution" should **exclude cultural heritage institutions which are managed by commercial companies**.
  2. The exception should be limited to **only works within "permanent collections"** which are owned by the cultural heritage institutions and not works licensed by the institution.

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<sup>5</sup> "The exceptions and limitations provided for in paragraph 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder."

<sup>6</sup> Examples include the BFI National Archive, CNC Archive Francaises du Film, and the DFI Film Archive

<sup>7</sup> European Union. 22 May 2001. "Directive on the harmonisation of certain aspects of copyright and related rights in the information society." 2001/29, Article 5.5

## Technical protection measures

- On-demand services which distribute audiovisual works are subject to technical protection measures (TPMs). These are digital technologies which **enable the on-demand service to grant access to authorised users and prevent unauthorised copying, transmission and use** and they are unique to the type of service such as transactional or subscription models.
- Undermining the ability of right holders to demand the use of these TPMs would **weaken their ability to protect their works and enforcement**. In Article 6 of the proposal on Copyright in the Digital Single Market the Commission excludes **Article 6.4(4) of the 2001/29 Copyright Directive**. The three exceptions in the new Directive would not be subject to Article 6.4(4) whilst the exceptions in the 2001 Copyright Directive would be. This could generate complexity in implementation and we would encourage policymakers to maintain consistency across overlapping legislation.

## Clear and effective tools to facilitate the circulation of diverse works online

- We share the ambitions of the European Commission outlined in the Digital Single Market Strategy to support the audiovisual sector's adaptation to new digital technologies and improve the availability of European audiovisual works. **Fostering the circulation and access to our works is fundamental to the promotion of cultural diversity in Europe and pivotal in bringing our communities together in this period where European values are under threat.**
- The Commission has stated that the negotiation mechanism in Article 10 is designed to improve the availability of works. The EFADs **welcome the objective of this voluntary measure**. However, **the purpose of this mechanism is unclear** and we encourage the European Commission to provide clarity on the following:
  1. What problems is this mechanism trying to resolve and how would this mechanism address these problems?
  2. Would the body designated by the Member State perform a commercial or general interest service?
  3. If each Member State has a specific body, which body would be responsible in cross-border negotiations and how would legal and linguistic differences be overcome?
- We would also highlight that **the main obstacles to the availability of works online are not due to copyright**. We encourage policymakers to take into account:
  1. The lack of European works taken up by online platforms and the importance of introducing quotas and financial obligations to support European cultural diversity.
  2. The low commercial viability of providing content across borders with low demand and high costs such as for dubbing and subtitling.
  3. The limited resources available to European SMEs which make up the audiovisual sector.
  4. The huge impact of piracy online which raises the risks of production and of making available works online.
  5. The lack of transparent data from online platforms on how European works perform which hinders the development of new business models.
  6. Consumer's insufficient knowledge of the legal offers available to them.

## A fairer online marketplace in the 21<sup>st</sup> century

- The unauthorised use of copyright protected audiovisual works represents **a significant threat to the sustainability of the independent European film industry**. Infringement has a **negative impact on innovation, investment, circulation and access to legal offers, and cultural diversity**. The EFADs therefore urge the European institutions to **support the so called "value gap" proposal** set out in Article 13 and recitals 37, 38 and 39 which will help to strengthen enforcement.
- **Copyright infringement has grown exponentially over recent years**. European citizens are regularly accessing illegal content online, particularly young people, as illustrated in a recent study published by the European Intellectual Property Office (EUIPO) in April 2016.<sup>8</sup> The digital age has facilitated

<sup>8</sup> EUIPO. April 2016. "Intellectual Property and Youth – Scoreboard 2016"

the illegal distribution of content leading to the **rapid growth of illegal, highly organised and profit-driven platforms**. These platforms host or facilitate the distribution of illegal content, setting up commercial scale structures making a profit out of advertisements, paid subscriptions and donations among other things. They often do not respect other legal requirements, sometimes have links to organised crime, and pose serious risks to consumers.

- **Intermediaries are essential in the battle against unauthorised use.** Their services are often used for illegal activities and therefore they have a **responsibility to prevent such activities**. Nevertheless, intermediaries often refuse to take significant, active measures to tackle commercial-scale infringement. They invoke safe harbour privileges to deny responsibility for the transmission of illegal content on their services and therefore do little to remove this content.
- Article 13 goes some way to **addressing this issue by ensuring that certain information society services actively enforce copyright law** through measures such as content recognition technologies. These technologies exist already for music and audiovisual content and are employed by some platforms such as YouTube. However, it is necessary to **ensure all platforms introduce these technologies and that these technologies are highly effective in identifying and permanently removing illegal content in order to ensure fair remunerations for rights holders**. The specific measures to be taken must be determined by stakeholders through contractual agreements.
- Recital 38 may help clarify the liability exemption in Article 14 of the E-Commerce Directive. The recital states that an online platform can be held liable if they are considered to be taking an “active role”. This role includes cases where the platform is optimising the presentation of uploaded works and promoting them. This clarification may help determine which platforms are liable and which are not, and ensure they take an active role in preventing the illegal use of audiovisual works. However, for the sake of clarity, those stipulations should preferably be directly included into the text of the directive.
- At the same time, it is necessary for the European institutions to **take further steps to ensure the European copyright enforcement framework works in the digital age**. This proposal is limited to specific platforms which host, store and provide access to content which is uploaded by users of their service. There should be a **clear legal framework in which communication to the public is addressed and updated for all platforms that make copyright protected content available**. These platforms should not be able to hide behind the liability exemption and they should have a “**duty of care**” to enforce copyright.
- The Intellectual Property Rights Enforcement Directive (IPRED) and the E-Commerce Directive represent very important planks of the Commission’s policies for the enforcement of rights. Nonetheless, it must be recognised that there have been significant developments in technology since the Directives were adopted in 2004 and 2000 respectively. **We look forward to the Commission’s proposals on IPRED and encourage them to be ambitious.**

## **A transparent ecosystem with fair remuneration for authors and performers**

- **The EFADs share the European Commission’s ambitions to provide a fairer online environment for the remuneration of authors and performers in its proposal for a [Directive on Copyright in the Digital Single Market \(Articles 14 to 16\)](#).** The EFADs welcome proposals that have been put forward by the Commission, the Council, and in the European Parliament, that also incentivise solutions based on collective bargaining agreements. We believe this helps reflect different situations across the EU while ensuring that the objectives of fair remuneration for authors and performers are met.
- **As agencies spending public money, the EFADs are absolutely committed to the principle of fair remuneration for all and ensuring that, in an increasingly diverse Europe, people from all backgrounds have the opportunity to work in film and receive fair payment for their work.** Indeed, audiovisual works are collaborative works involving many people all of whom, have a fundamental right to fair remuneration and freedom from any kind of exploitation whatsoever.

- The EFADs recognise the specific situation of authors and performers which Articles 14-16 seek to address. Authors and performers are often in a weak negotiating position when they license their rights in their contributions to audiovisual works and it is important to ensure they receive a fair share of the value from the use of their works and performances.
- **The EFADs therefore strongly support the principle of fair remuneration for authors and performers, and all other people working across the contractual chain.** This should be based on a **general principle of transparency across that contractual chain**, enabling authors and performers to receive information about the exploitation of the works to which they have contributed.
- In particular, in some parts of the video-in-demand world, information and data about how audiovisual works perform is very scarce. Authors, performers and rights holders are often paid a one-off fee for the licensed use of the works by online audiovisual services and they receive little, if any, information and data in return.
- **The availability of this information and data is essential for the audiovisual sector to develop and grow to the benefit of the public, European film culture and the business.**
- Authors and performers, producers, distributors and sales agents should be generally encouraged to conclude collective agreements establishing standard reporting statements and procedures, as well as setting norms for equitable and proportionate remuneration of authors and performers for the use of their works and performances, taking into account the specificities of the audiovisual sector as well as the significance of their contribution to the overall work or performance.
- **In this regard, the EFADs welcome proposals that have been put forward by the Commission, the Council, and in the European Parliament, that also incentivise solutions based on collective bargaining agreements. We believe this helps reflect different situations in Member States, both small and large, across the EU while ensuring that the objectives of Articles 14-16 are met.**

## About the EFADs

The EFADs brings together the Directors of European Film Agencies in 31 countries in Europe (EU, Iceland, Norway and Switzerland). We represent government or government associated public bodies, in charge of national funding for the audiovisual sector and with the responsibility to advise or regulate on all aspects of audiovisual policies. In total, the EFADs members and their governments fund around three billion Euros every year through subsidies and tax reliefs with a view to fostering the creation, production, promotion, distribution, and exhibition of European audiovisual and cinematographic works.