

Multi-Territory Licensing of Audiovisual Works in the European Union

**Final Report
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The opinions expressed in this study are those of the authors and do not necessarily reflect the views of the European Commission.

EXECUTIVE SUMMARY

Europe is recognised for its cultural diversity and its vibrant creativity. Its audiovisual sector, valued at € 96 billion and producing more than 1100 films per year, possibly best embodies these unique assets. However, only a fraction of Europe's audiovisual works are enjoyed outside the countries where they are produced. The European Commission (EC) wishes to assist European creators and audiovisual enterprises to develop new markets through the use of digital technology, and asks how policymaking can best help to achieve this.

Promoting a competitive and diverse single market for audiovisual works is a top European Union (EU) policy priority. Policy makers acknowledge that our future depends on Europe's creative capacity to innovate, and that a competitive audiovisual sector has important economic spill-over effects on other industries. As a core element of Europe's creative industries the sector will be shaped by several important recent policy strategies – notably EU 2020, the Digital Agenda for Europe and the Cultural Agenda.

The economics of the audiovisual industry and current trends in digital distribution

Audiovisual content markets are undergoing significant transformations due to digital technology. VOD is on the rise and close to 700 on-demand and catch-up services exist in Europe. VOD turnover in Europe is expected to grow to approximately € 2.2 billion in 2013.

Moreover, digital technology has a wider impact on the sector: social media applications and personalised recommendation and search technologies influence how users discover and select audiovisual works, so providing an opportunity to develop new audiences. As audiovisual services and systems converge (more than 8% of US-sold televisions were internet-enabled in 2008) these online trends increasingly matter to the entire industry.

Furthermore, the emergence of VOD (as well as the continued severe impact of online copyright infringements) continues to put pressure on more established version markets, such as pay-TV and DVD (global DVD sales declined by 13% in 2009). Consequently, the audiovisual industry has put digital distribution – and VOD in particular – at the top of its strategic agenda.

An understanding of the economic basis of audiovisual content distribution is vital to project how the sector might develop in the future:

Firstly, the industry depends on copyright, and neighbouring rights, which foster content creation. Copyright grants rights holders an exploitation monopoly that enables them to decide how to roll out new services to address the needs of consumers and their financial interests. For example, the film industry has in the past continuously expanded the exploitation of its works on multiple distribution channels — theatrical, DVD, VOD (various pricing models), pay-per-view, pay-TV, free-TV — with the goal of maximising the global exploitation revenue for each title. New technical versions have been inserted in the exploitation schedule on the basis of the benefits they would bring to the consolidated revenue across all version markets – a calculation of the revenue each version individually brings in as well as of the impact on revenue one version will have upon another. This means that sophisticated distribution techniques are used to efficiently distinguish between consumers' preferences and to capture their willingness to pay. Financing audiovisual creation and promoting cultural diversity crucially relies on the efficiency of this process.

Secondly, the audiovisual sector is a high-risk sector because media products are 'experience' goods, which are valued differently by each consumer as well as by different cultural communities. Because of the linguistic and cultural specificities across borders, the European audiovisual industry is structurally fragmented. Cultural and linguistic versioning is therefore essential to create consumer demand for each film or television programme. The investment associated with linguistic versioning, and more generally with the marketing of each audiovisual work, is specific to each territory. Each licensing contract requires negotiation on the size of the investment and on how the risks will be shared between distributors and rights holders. There are no economies of scope and scale, and no risk mutualisation in marketing one single technical version of several products in several linguistic markets. Conversely, there are economies of scope and scale in selling audiovisual rights of several content versions to the same distributor, who can handle the discrimination of the work for a given cultural/linguistic market. Marketing efforts made in this market may then benefit exploitation in all release windows.

Finally, the pre-financing of audiovisual works requires significant involvement from stakeholders from the territory they are designed for, especially when this linguistic market is restricted. As a consequence, rights holders will always give priority to exploitation in their own financing territory, and will subordinate foreign distribution to the needs of these investors. As distribution in foreign territories requires specific investment (advertising, labelling, subtitling, dubbing, etc.) to make the product attractive to the local viewer, the selection of a distributor for each territory will rely on the efforts this distributor is ready to make to sell the product, as well as its willingness to pay the highest acquisition fees. This report confirms the direct correlation between such investments in distribution and the success of titles in theatres and on VOD.

The EU audiovisual sector is mainly characterised by its fragmentation, which is at the same time both cultural and industrial. This fragmentation goes a long way to explaining why European audiovisual content is licensed primarily on a territorial basis.

How does digital technology impact on the dynamics of audiovisual content distribution?

VOD decreases distribution and storage costs. It enables various players to enter the distribution market and creates more competition in the entire audiovisual value chain. Established players (e.g. broadcasters, distributors, exhibitors, etc.) seek to retain their position while new entrants, such as telecommunications providers, internet service providers, cable operators or hardware manufacturers, set up new distribution platforms (also with the goal to further finance the take up of their equipment).

At the consumer level, audiovisual consumption patterns need to be increasingly considered in the context of a proliferation of digital communications and social media. The fact that an increasing number of open European VOD platforms are directly linked to social networks illustrates that social media tools and other interactive applications enable the audiovisual industry to target more fine-grained audience demographics, and can be utilised by rights holders and media service providers to promote culturally-diverse European content. In this context, this report contains a number of case studies that illustrate that the industry is considering the opportunities of the digital shift to develop its market share.

Changes to the position, duration and chronology of different release windows show that the entire industry is dealing with these transformations. However, there are also important factors that inhibit a rapid roll out of VOD which are primarily connected to limited market demand (see further below) and related gaps in finance:

- Distributors and broadcasters, traditionally important pre-financiers of audiovisual production, have little incentive to enter the VOD market given that the returns in VOD are still far smaller than in theatrical distribution, broadcasting and DVD.
- Independent production companies and talent require pre-finance from distributors and broadcasters to create audiovisual products. If these players are primarily interested in other version markets independents stand little chance of benefiting from VOD.
- So far most new operators of digital distribution platforms have not entered into production finance, and are unlikely to do so as long as their returns remain marginal compared to those of other version markets. An exception to this is the company Orange. The great majority, however, does not provide minimum guarantees, nor do they buy exclusive rights to exploit new works on VOD. As a result, VOD offers primarily contain older works that have already been exploited in other windows.
- Private investors so far are reluctant to bridge this financing gap, and few public funders have invested strategically in VOD to enable rights holders to enter VOD at an early stage.

Further integration between these trends, which currently characterise digital distribution (i.e. non-exclusive licensing), and the economic processes of the entire industry (i.e. the importance of pre-sales) has yet to occur.

Market demand is forcing stakeholders to adapt their business strategies. It is shaping licensing practices in the sector. Rights for VOD exploitation are currently licensed on a non-exclusive and short-term basis (two to three years). Territorial licensing continues to prevail. Technology allows access to be restricted on a geographical basis according to licensing terms.

The report argues that, as VOD markets across Europe grow and more players enter digital distribution, the requirements of commercial users and rights holders will also evolve:

- VOD service providers stress the need to make rights licensing more efficient by streamlining licensing processes, and by establishing more ‘one stop shops’ particularly because they are often interested in buying catalogues of rights rather than individual titles.
- Digital distribution of catalogue titles (older works, vintage titles, titles that have not been sold in certain territories) require laborious and costly rights clearance which service providers cannot afford. This penalises European rights holders, which are often small entities and favours large catalogue owners such as the Hollywood studios.
- European rights holders also find it hard to retain rights for digital exploitation as they are often acquired by distributors and broadcasters who do not enter VOD exploitation until revenues from other windows are secured. The dominant position of commercial users vis-à-vis small and medium-sized rights holders prevents the latter from acting strategically and building up a catalogue of rights for later exploitation.

Most individual European audiovisual companies may in the future be in a weak negotiating position when they wish to access VOD platforms on beneficial terms, and would therefore benefit from collective approaches to facilitating rights licensing. In this context, this report identifies a number of innovative market-driven and voluntary initiatives across Europe that seek to facilitate easier rights licensing, to the benefit of commercial users and rights holders.

The audiovisual sector is in an important phase of transition. This phase is an opportunity to develop new audiences both nationally and internationally.

Economic analysis of the trade of audiovisual works in the European Union

The current state of the market can be summarised as follows:

- On the supply side, the number of VOD services and service providers in the EU is growing. It depends significantly on socio-economic features (e.g. there are five times as many VOD services in the Netherlands as there are in Bulgaria).
- Rental business models are chosen by the majority of VOD services in Europe (e.g. 22 in France; 2 in Poland – indicating the different stages of development of local markets). However, on the demand side, subscription-based business models have recently become more successful than rental and electronic sell-through (in Europe in 2008: € 283 million vs. € 261 million).
- On the demand side, the EU VOD market represented a total turnover of € 644 million in 2008 and had increased by 250% in two years. Significant differences exist across EU Member States. The performance of France, Italy, Spain and the UK outrank other Member States.
- Compared to other audiovisual version markets VOD revenues remain marginal. The share of VOD turnover in relation to total audiovisual turnover is estimated to be between 0.2% (Finland) and 1.79% (Belgium).
- This relevance of the VOD market is confirmed when analysing the distribution of revenues of a sample of films examined. It is also reflected by other research. For example, VOD represented 1% of the overall film audience in the UK in 2008.

Data concerning the diversity of consumption at EU level is difficult to obtain. In France, VOD does not lead to more diverse consumption than in theatres. In the UK, total gross value of EU works on VOD was lower than in other version markets. However, this picture is more varied when it comes to analysing the origin of films available on VOD and comparing it to, for example, theatrical distribution. In theatrical distribution the share of non-national EU films is 8%. On VOD, this share varies from country to country (e.g. 9% in Germany; 20% in Spain).

Finally, this report shows that dematerialised distribution of audiovisual works allows some cost reductions, which might favour circulation of unexploited titles in certain territories. This includes EU films.

The economic analysis projects future VOD market developments over the coming 5 – 10 years based on a number of future scenarios.

Some predicted trends in relation to technological, economic and regulatory (territorial vs. multi-territorial) factors concern all Member States:

- VOD turnover will increase significantly in the next five to ten years. A more rapid development of the macro-economic factors that shape the audiovisual industry, as well as faster roll out of digital infrastructure, would further accelerate the growth of VOD turnover.
- The number of VOD services will increase in every market, although generally at a slower pace than VOD turnover. International licensing and/or a rapid development of macro-economic and communication facilities would lead to a greater increase in the number of VOD services.
- EU films' circulation would increase as VOD markets expand. This circulation would be greater in an environment based on international licensing.

- International licensing would lead to greater concentration of the VOD market, i.e. fewer service providers will control most of the market. A successful VOD market would place competitive pressure on other audiovisual version markets, notably video and pay-TV.
- Telecommunications operators would benefit from a rapid development of macro-economic and communication facilities. From an economic standpoint, these operators have an interest in bundling VOD services together with access when it helps them to win new clients. When their market is saturated, however, they have no competitive advantage over broadcasters in selling only one content version.

Other predicted developments vary considerably according to Member States. This is notably the case for the growth of VOD turnover. For example, countries with lower revenue per capita for audiovisual markets (i.e. Portugal, Romania, Slovenia) will experience much faster growth of VOD turnover than countries with higher revenue per capita (France, Germany, Italy, Spain, UK). Furthermore, a regulatory environment that favours international licensing would lead to varying levels of exports and imports of audiovisual works across the EU.

Greater circulation of audiovisual works does not necessarily imply greater levels of consumption. Investment in marketing is required to allow digitised works to be consumed on a larger scale across borders, as they will be competing against works which have been marketed locally in other version markets (notably those that received a theatrical release) as well as being made available on VOD. Some rights holders – especially those that will implement sophisticated cross-border digital marketing campaigns – will benefit from greater cross-border demand for their works. Nevertheless, due to the economies of scope and of scale described, it will be challenging to compete against audiovisual works for which several technical versions have been sold on a territorial basis. Furthermore, the long-term impact of international licensing on audiovisual production funding is unclear, as it remains to be seen whether internationally-operating VOD providers will be able to meet the levels of finance that broadcasters and local distributors currently invest in the ecosystem of audiovisual finance.

Consequently, a favoured policy option is to promote cross-border demand for digitised European audiovisual works, to invest more in marketing to give European programmes visibility and to ease existing copyright licensing processes notably by decrease transaction costs (see further below).

Towards a single market for audiovisual content: the legal environment

How should EU policy-making promote a single market for digitised European audiovisual works and thereby strengthen the competitiveness and the cultural and social contributions of Europe's creative industries?

The main justifications and the legal basis for EU intervention in the audiovisual sector are based on EU Treaties and the Union's international obligations:

- The promotion of the internal market.
- The implementation of competition rules.
- The promotion of cultural diversity and support for cultural and creative industries.
- The representation of consumers' interests.
- The implementation of international treaty obligations.

Furthermore, the “acquis communautaire” is built around four principles which are important features of the seven directives harmonising copyright and neighbouring rights legislation in the EU. They largely implement international norms which are notably enshrined in the WIPO Treaties:

- Contractual freedom – the right of authors to freely decide about the terms and conditions under which they wish to exploit their works.
- Exclusivity – the right to grant exclusive exploitation rights (a right linked to contractual freedom).
- Territoriality – the right of the rights holder to decide on the geographic scope of a licence (a right linked to contractual freedom).
- Enforcement – the right to prevent by law unauthorised exploitation of copyright-protected works.

Each of these principles is essential to the functioning of the audiovisual industry. Each of them safeguards rights holders’ abilities to exploit films and television programmes in a commercial fashion and enables them to invest in the creation of new audiovisual works.

The European Court of Justice (ECJ) has recognised the characteristics of audiovisual content exploitation which are directly linked to contractual freedom and exclusivity in the Coditel II case. The territoriality principle has been enshrined in international law in Article 5(2) of the Berne Convention, and in all EC directives dealing with copyright and related rights. The ECJ has confirmed this principle when considering the compatibility of territorial exclusivity with internal market and competition rules. On the basis of international law, ECJ jurisprudence as well as EU legislation, the territorial nature of copyright can be described as “quasi-acquis communautaire”.

EU harmonisation of intellectual property has achieved much in removing national disparities in standards of protection in order to promote intra-community trade. Nevertheless there are conflicts between the territorial exercise of intellectual property rights and the principles of the free movement of goods and services across the EU. The EU institutions have therefore taken different steps to try to reconcile internal market objectives with copyright principles. Hence, secondary EU legislation has established the country of origin principle and mandatory collective licensing in relation to cable retransmission. The ECJ has developed the principle of exhaustion of rights to promote parallel imports for physical goods protected by intellectual property.

However, these measures have so far not significantly remedied audiovisual market fragmentation in the EU, which is primarily the result of market constraints.

Are there other challenges in relation to promoting a single market for digitised audiovisual works?

Both rights holders as well as audiovisual media service providers would benefit from more ‘one stop shops’ and a more seamless and internationally-connected digital licensing infrastructure. This would lead to more efficient licensing and decrease transaction costs in the acquisition process. It would enable VOD service providers to buy more diverse European content at lower costs, and at the same time enable rights holders to access distribution platforms and to negotiate favourable deals with them.

The EC has clearly identified the need to facilitate rights acquisition in order to promote a digital single market, and recognises that one-stop shops are a solution to the issue. In music, EU authorities promote an evolution from domestic one-stop shops towards a European one. Furthermore, it should be highlighted that the key issue in relation to making available international offers in music is not copyright territoriality, but rather the rights licensing process underlying pan-European exploitation. Potential

providers are first and foremost interested in greater transparency with regard to the availability of rights at international level, as well as in one-stop shopping opportunities for rights acquisitions.

Concentration in rights management is unlikely to happen in the audiovisual sector, as large European AV companies and Hollywood majors (the stakeholders who control the most economically-valuable rights) will most likely continue to license on an individual basis. Nevertheless, small and medium-sized European film companies that produce two to three films per year (and constitute the vast majority of Europe's industry) would benefit from stronger cooperation and collective initiatives. In Europe European films achieved an estimated theatrical market share of 27% in 2008) whereas US films have a market share of 67%. The ability of EU rights holders to act collectively to offer a catalogue of rights to VOD service providers will determine to a large extent the availability of these titles on international VOD platforms.

In this context, collective management structures might play an important role in the future digital distribution of European audiovisual works. Requests by commercial users and rights holders to optimise the rules regarding transparency and governance of collective rights management organisations in music may, in this context, also benefit rights licensing in other creative content sectors.

Finally, while policy debates concerning the challenges to developing a digital single market for audiovisual content in Europe primarily focus on copyright and its territorial exercise, they often do not take sufficient notice of other obstacles. Many regulations and policies at national level either raise additional transaction costs for cross-border trade of audiovisual works, or contribute to establishing an imbalance in the environment for pan-European VOD services:

First, insufficient harmonisation regarding copyright enforcement leads to legal uncertainties. One important bottleneck to the development of a single digital market is the increasingly disparate solutions for tackling online copyright infringements across the EU at consumer level. If investments into audiovisual creation are to continue at their current level, copyright enforcement has to become more effective. Copyright is a key economic institution designed to stimulate creativity, knowledge production, the arts, culture and entertainment.

Second, important legal uncertainties continue to exist regarding the licensing of audiovisual works for digital distribution, notably with regard to orphan works or the implementation of authors' exclusive rights. Furthermore, VAT rules differ across the EU and distort competition between audiovisual service providers. They penalise audiovisual consumption online compared to other forms of access.

Third, regulations and public policies relating to content production and distribution also influence the development of a digital single market (public funding guidelines, rating systems, etc.). Despite significant regulatory and judicial efforts to mitigate the exercise of copyright, the structure of the sector, which is essentially linked to audiovisual economics and to linguistic and cultural consumer preferences, remains fragmented.

The regulatory focus should therefore shift from any notion to review copyright standards (for example by considering a European copyright) to promoting more efficient and less costly licensing processes.

Conclusions and policy recommendations

More than 1.7 billion people worldwide are now online and broadband connects 56% of European households. The audiovisual sector – a vital part of Europe’s increasingly important and recognised creative industries – is considering the digital shift as an opportunity to access new markets.

Copyright, related rights and their exercise are essential to the success of Europe’s audiovisual sector. They provide rights holders with a mechanism for content versioning, bundling and price discrimination; all three are important business practices that help rights holders to maximise their returns on investment in a high-risk industry, an industry in which audiovisual works are valued differently by each consumer and in each market, due to the fact that they are ‘experience’ goods.

Copyright standards are therefore not a bottleneck to the emergence of a single market – the real issue is the rights licensing process. To ease licensing practices the EU should promote the establishment of internationally-connected digital rights-licensing infrastructures. It should also support the multitude of small and medium-sized European audiovisual companies to collaborate, on a voluntary basis, to jointly formulate strategies that enable them to monetise their digital rights on national and international VOD platforms.

However, increased international availability of audiovisual works will by itself not lead to a significant increase in cross-border demand for such works. In cultural markets, consumer demand needs to be stimulated. Consequently, public policy should also help audiovisual SMEs to implement digital marketing strategies to reach wider audiences.

There are two sets of policy recommendations. One relates to efforts to further promote the emergence of an internal market, and the other to measures that promote cultural and industrial policy objectives.

I. Recommendations to support the establishment of a single market for digitised European audiovisual works

Decrease transaction costs

Two sets of measures are considered to contribute to the establishment of a licensing infrastructure in Europe that would be more conducive to cross-border trading of audiovisual works and better access for European audiovisual works to digital platforms:

- > The EC should give support to European rights holders to establish voluntary collective licensing initiatives and mechanisms to access VOD platforms on fair terms and offer easier and cheaper licensing solutions to operators.
- > The EC should also promote ‘one stop shop’ solutions developed by the market, inter-operability between existing services and tools, as well as stronger co-operation between rights holders, users and technology stakeholders. This would eventually contribute to the establishment of more seamless and internationally-connected licensing infrastructures.

Further legal harmonisation

Further legal harmonisation – or at least an examination of the potential impact of such harmonisation – is further suggested to promote the digital single market:

- > As regards copyright enforcement, the EC should take the lead in promoting more effective practices across the European Union. This includes, among other suggestions, a proposal to introduce new legislation to harmonise criminal sanctions, as well as an impact assessment concerning the appropriateness and effects of the graduated response mechanisms in Member States.
- > Considering the predicted growing importance of collective rights management, it is proposed to introduce a framework directive that promotes greater transparency and governance requirements for collective rights management bodies.

Other recommendations to promote the single market suggest:

- > That the EC enables authors' societies to collect remuneration on behalf of authors when their works are exploited abroad: An unwaivable equitable right to remuneration for the "making available right" should be introduced.
- > A reduced VAT rate for VOD transactions, similar to those that apply to the sale of theatrical tickets, should be introduced.
- > The commissioning of an impact assessment concerning the application of the country of origin principle for the distribution of audiovisual content on digital networks, coupled with a mandatory collective licensing regime in relation to the simultaneous and unabridged digital distribution of TV programmes.
- > As regards easier licensing mechanisms for orphan works, the current impact assessment by DG Internal Market in relation to orphan works should encourage the EC to consider audiovisual in the scope of the future draft directive that is announced for the end of 2010.

Coordination with Member States

Further co-ordination efforts with governments and public sector agencies in Member States and regions should be undertaken:

- > Encourage national agencies in developing common descriptive criteria for national ratings. It should promote the use of signalling techniques and standardisation of ratings through different media (not necessarily across borders).
- > Network national and regional audiovisual policy makers, public funding agencies and industry associations to help establish a range of support projects that promote a European dimension in VOD development.

II Recommendations to promote cultural diversity and a competitive European creative sector

Creating demand for European audiovisual works

The EC should support the European audiovisual sector in developing and implementing innovative marketing and branding strategies to reach new audiences.

- > Marketing support should be given to films that win awards at A-list festivals or European prizes, to further encourage international VOD releases and promote European cinema and its image.
- > EU support programmes should give more support to rights holders who wish to further fine-tune and implement their digital marketing strategies in order to access video-on-demand markets. Funds should be available to develop and adapt digital applications that help to understand

consumer behaviour, facilitate closer engagement with target audiences through social media, and test new business models.

- > The MEDIA Programme should continue to encourage subtitling and dubbing to enable cross-border access to foreign language content.

Support risk taking and innovation

Public policy should encourage EU rights holders to experiment with new forms of digital distribution and test new business models in order to understand the new market place and its requirements.

- > The EC should promote the idea that a share of public support given to producers in the EU should allow those that wish to do so to retain some rights for digital exploitation, rather than selling them in bundles with other exploitation rights. This would allow them to build up a catalogue of rights to experiment and make the most of digital distribution.
- > Film-funding bodies across Europe should consider the establishment of audiovisual innovation funds linked to existing technology innovation funds.
- > Broadcasters and digital operators should be encouraged to return digital distribution rights to independent producers after a certain period of time and/or if these rights remained unexploited.
- > More flexible or shorter release windows should be considered, in particular with theatre owners in relation to European titles that were given no or limited theatrical release..
- > Better co-operation efforts within the sector must be reflected by the public sector. EU programmes and projects that could be to the benefit of VOD (MEDIA, CIP ICT PSP (Digital Libraries), Europeana, FP7/8, Lifelong Learning, Culture, etc.) need to be more in sync.

Finally, the sector must develop its skills relevant to the new digital market place, its general awareness of new information technology trends and its understanding of new consumption behavior. Training programmes to develop these capacities, as well as an innovation voucher scheme specifically tailored for the needs of the European film industry, are suggested in this respect.

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FOREWORD

This study has been prepared for the European Commission (Directorate General Information Society and Media) and deals with the question of how best to promote a Digital Single Market for audiovisual content in the European Union (EU). It investigates how copyright licensing relates to this endeavour and examines further factors that influence the development of an internal market for creative content.

The assignment has been carried out between January 2009 and July 2010. The research consortium was managed by KEA European Affairs (KEA), a Brussels-based consultancy specialising in culture and the creative, media, sport and entertainment industries. KEA closely collaborated with Cerna, the Lab for Industrial Economics of Mines ParisTech, which specialises in digital economy issues. For part of the review of national legislation and policies KEA relied on a network of local experts who made contributions to the study.

Much of the analysis and the policy recommendations have been developed in collaboration. KEA had overall responsibility for the final draft of this report and has had the principal role in writing the introduction, Section 2.2 and Chapter IV. KEA also carried out most of the interviews conducted during the assignment. Cerna had principal responsibility for the economics analysis (Sections 3.1 and 3.2) and the presentation of the specificity of the European audiovisual sector (Section 2.1). It also gave important input into the content of Section 2.2.

The adopted definition of multi-territory licensing for the purpose of this report is “the licensing of intellectual property rights for a content version for more than one jurisdictional territory at a time.”¹ Video on Demand (VOD) is a non-linear intangible audiovisual content version. It includes all digital linear systems coupled with digital video recorders. This definition is in accordance with official European definitions, provided in the appendices. A complete glossary of terms is also provided in the Appendices.

The team applied a two-pronged research strategy, consisting of desk research and primary data gathering to prepare this final report. In total, consultations and interviews with 105 stakeholders and experts have been conducted. A consultation list and a bibliography are included in the appendices. All chapters substantially draw on the insights that surfaced during these conversations.

To complete the economic analysis and project the development of VOD markets across the EU a typology of audiovisual markets has been developed (see Section 2.1). Furthermore, data concerning the performance of specific titles in different version markets was collected to analyse the circulation of audiovisual works across borders. More detailed information concerning the economic data used, the development of the sample of films and the development of the typologies can be found in the appendices.

For the overview of legal and policy issues in Member States and the analysis of certain business practices a questionnaire was sent out to our contacts in all Member States and either completed by these contacts in writing or on the basis of telephone consultations. The legal profiles of the Member

¹ Own working definition.

States are included in the appendices and results from the questionnaire are widely used in the analysis of legal and policy issues in Chapter IV.

To gather feedback and input from stakeholders, a workshop was held at the European Commission's premises on 2 June 2010.

CHAPTER I

TURNING THE DIGITAL SHIFT INTO AN OPPORTUNITY FOR CONSUMERS AND THE AUDIOVISUAL INDUSTRY

Digital technology transforms the audiovisual consumer experience and enables the audiovisual industry to produce, distribute and exploit audiovisual works in novel ways. Consumers can now enjoy a variety of films and television programmes by a simple click on a mouse or remote control. VOD is one of several industry attempts to benefit from digital distribution². It has the potential to provide new revenue streams for audiovisual companies and may unleash the economic and cultural potential of creative content, both nationally and internationally.

This report specifically deals with the relationship between digital distribution and the ambition to create an internal market for European audiovisual content. The European audiovisual industry is at the moment highly fragmented³. VOD may offer the sector the opportunity to become more sustainable, expand the international reach of European creators and generally increase cultural output in Europe. The European Commission wishes to assist the sector in creating greater cross-border demand for digital content and asks what can be done to achieve this objective.

1.1 About the assignment

A competitive and culturally diverse single market for digital audiovisual content is one of the key objectives of the EU 2020 strategy⁴ and the EC's Digital Agenda for Europe⁵ and the European agenda for culture⁶. The European Commission (EC) has outlined suggestions and proposals of how to best promote the development of this market, most recently in its Reflection Document on creative content in a digital single market⁷ and the previous Communication on creative content online⁸.

In her most recent comment on the launch of the Reflection Document, Commissioner Reding outlined the EC's plans as follows⁹:

2 Together with DBS, DTB, higher definition (HD, Blu-ray), 3D, etc.

3 Theatrical admissions illustrate the continuing weakness of the internal market for European audiovisual content: the share of admissions of non-national European films in EU cinemas has remained around 8% for the past decade. See: EAO press release (2004), Better results are seen for European films on their home markets, but circulation abroad disappoints (www.obs.coe.int/about/oea/pr/mif2004.html).

4 Communication from the European Commission. Europe 2020 - A European strategy for smart, sustainable and inclusive growth, Brussels 3 March 2010, COM(2010) 2020 and Conclusions from the European Council adopted on 17 June 2010.

5 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Digital Agenda for Europe, Brussels 19 May 2010, Com (2010) 245 adopted on 31 May 2010 by the 3017th Transport, Telecommunications and Energy Council Brussels, 31 May 2010

6 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a European agenda for culture in a globalizing world, COM(2007) 242 final, Brussels 10 May 2007.

7 European Commission Reflection Document on Content online in a European Digital Single Market, 22 October 2009.

8 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Creative Content Online in the Single Market, COM(2007) 836 final, 3 January 2008. Naturally, many further Communications and Directives are relevant in this context – these will be introduced and analysed throughout this study but shall not all be listed here.

9 Speech by Viviane Reding, EU Commissioner for Telecommunications and Media, at Digital Europe – Europe's Fast Track to Economic Recovery, The Ludwig Erhard Lecture 2009, Brussels, 9 July 2009.

"Copyright and the internet are two powerful engines for driving creativity and innovation for the benefit of all Europeans. They should be combined in the new project of a competitive and prosperous Digital Single Market. Such a Digital Single Market can only be built with content creators on board; and with the generation of digital natives as interested users and innovative consumers... It will be my key priority over the next years to work, in cooperation with other Commissioners, on a simple, consumer-friendly legal framework for making digital content available across borders in the EU, while ensuring at the same time a robust protection of copyright and a fair remuneration of creators."

The Digital Agenda for Europe reconfirms the reciprocal ambitions to create a digital single market for creative content and to ensure robust protection of copyright¹⁰. The EC's overall objectives can therefore be summarised as follows:

- to build an internal market for creative content
- to support the emergence of digital audiovisual services in Europe
- to make Europe's audiovisual industry more competitive
- to promote cultural diversity throughout Europe
- to increase citizens' and consumers' ability to access a wide range of cultural content on legitimate terms

Some take the view that copyright and neighbouring rights, and the way such rights are exercised, are an impediment to achieving these objectives. The issue of rights licensing has therefore been subject to intense policy scrutiny from EC competition and internal market regulators. This study analyses the economic and legal consequences of digital distribution for the audiovisual sector, and examines whether and how policy measures could help the sector to benefit from the digital shift and new consumption patterns.

The Commission has set the following general objectives for the assignment:

- Analysis of the legal framework and prevailing practices for the licensing of audiovisual works for online distribution in Member States
- Detailed description of the structure of the online distribution sector, and its related market, in the EU Member States
- Assessment of the present and future main challenges for the development of a multi-territory business model in the different Member States, and possibly the Union as a whole
- Analysis of economic and cultural consequences that could be the result of the development of a multi-territory distribution business model
- Description of policy options that could foster the development of multi-territory distribution mechanisms and business models for online distribution of audiovisual works

1.2. Some preliminary remarks on the state of the VOD market

There are many signs that content distribution is undergoing important transformations across different media sectors (publishing, music, film, video games, broadcasting). European rights holders and policy

¹⁰ A Digital Agenda for Europe, p. 8

makers cannot ignore those changes if they wish to foster a sustainable audiovisual industry. At the same time the development of the VOD market presents many uncertainties which explain the reluctance to embrace its potential by some players.

One of these is the limited value of the market. For example, in France, VOD represents 3.6% of household expenditure on DVD and home video (i.e. only 0.7% of household expenditure on audiovisual programmes). Hence, while the offer of VOD in Europe has generally increased – the European Audiovisual Observatory counts close to 700 on-demand services (including catch-up services) throughout Europe¹¹ – the demand for VOD still remains marginal.

However, the following developments indicate that there is a fundamental shift in how consumers and the industry value VOD:

- Consumers are spending more and more time on the internet. They like the interactivity of the medium and the choice and freedom it offers. It competes for audiences' limited time attention with other media, including broadcasting and theatrical exhibition. The digital shift therefore cannot be ignored. Latest figures show how niche outlets of audiovisual content are increasingly challenging the market share of large networks¹². In addition online advertising revenues in Europe grew by 4,5% last year, whereas television advertising returns dropped¹³. Furthermore consumers play a vital role in promoting films among their peer groups through comments on blogs, their Twitter posts and video sharing accounts, thereby challenging established audiovisual distribution and exploitation processes and creating new marketing opportunities for audiovisual companies that are not vertically integrated.
- Technology is bringing internet-based VOD closer to the television set, which continues to dominate home entertainment. Approximately 8% of all flatscreen televisions sold in the US in 2009 were internet-enabled and game consoles are also increasingly VOD enabled¹⁴. TV manufacturers such as Sony, Philips and Samsung, main game console manufacturers (Sony, Microsoft, Nintendo), Apple (Apple TV) and more recently Google (Google TV) are aggressively trying to tap into the market for so-called over-the-top TV. Broadcasters such as TF1, M6 and Canal+ in France or Project Canvas in the UK are working together with technology companies to deliver new services to their audiences.
- Moreover, as the take up of broadband across the EU continues – approximately 56% of all European households have broadband access at home today – more and more consumers are able to access internet-based VOD services¹⁵. Regarding consumer choice and mobility, time and place-shifting devices such as TiVo and Slingbox increasingly allow viewers to decide when and where they wish to watch a television programme. While it does not replace or substitute the need to promote audiovisual works or bundle attractive content, search mechanisms for audiovisual content may increasingly resemble search on the internet (including the use of recommendation systems). This may offer rights holders the opportunity to access new audiences and experiment with new models of monetisation.
- New entrants in film distribution such as internet companies (Google/YouTube, Apple/iTunes, Microsoft/xBox, Netflix and others) are entering into content acquisition with major catalogue

11 European Audiovisual Observatory, DDM & NPA Conseil, Video on demand and catch-up television in Europe, October 2009.

12 See Karbasfrooshan, Ashkan, Context is King: How Videos are Found and Consumed Online, TechCrunch, 30 January 2010.

13 IAB Europe, Europe's online ad market continues to grow despite recession, 2 June 2010

14 McBride, Sarah, Studios make bigger push for digital sales, Wall Street Journal, 29 December 2009.

15 Eurostat. Data in Focus: Internet usage in 2009 – Households and individuals, December 2009, p. 1.

owners¹⁶. For the moment, these platforms rarely acquire rights from European content owners, a fact which may start to threaten the European audiovisual industry. Reasons for this are multi-faceted (they include market demand but also complicated licensing mechanisms in the EU) and will be examined throughout this report.

- YouTube has concluded agreements with Warner Bros and Disney and entered into talks with Lionsgate and MGM¹⁷. More recently it announced the launch of a film rental service that will offer independent content in the near future¹⁸. This will complement its current number of two billion free video streams per day which is “nearly double the prime-time audience of all three major U.S. television networks combined”¹⁹ and is inciting more and more platforms to develop cross-border VOD offerings. Netflix, the online DVD sales provider, has established its own on demand platform. Hulu, an advertising-based VOD service, already reached revenues of \$ 70 million and a 15% profit margin in its first operating year (2008). In 2009, Hulu entered into first negotiations with European content providers²⁰ and is now also looking to establish a subscription-based version in the near future, thereby reflecting a trend towards paid digital content business models²¹. At the same time in the book industry, Amazon announced that ebooks on its Kindle outsold paper versions on Christmas Day of 2009²².
- Major telecommunication operators and cable companies are building and expanding their VOD offers to offset investments into technological infrastructure (see Chapter II). They are also closely following the “buy once, watch anywhere” services currently being developed by US cable companies under the name *TV Everywhere*²³. At the end of 2009 the largest US cable company, ComCast, bought a 51% stake in NBC Universal (which includes Universal Pictures) in a deal worth \$ 13.75 billion, in their pursuit to “become a leader in the development and distribution of multiplatform 'anytime, anywhere' media that American consumers are demanding”²⁴. In Europe, the potential market for VOD via these operators is rapidly increasing. Digital television households in Western Europe alone grew from 99 million during 2009 to more than 119 million, or 69% of total television households²⁵. If not already, these consumers may soon have access to VOD services, indicating a major shift in how Europeans can consume content.
- Hollywood has started taking VOD very seriously due to reduced revenues from the industry’s main revenue source, DVD. DVD sales in the US tumbled from 37 billion units during their peak in 2004, to 25 billion units at the end of 2008²⁶. Worldwide DVD revenues declined 12.7% during this period, still generating 43% of total revenues, but saw an even sharper drop of 13% during 2009²⁷. Warner is at the forefront of an aggressive VOD strategy aiming to make as many legal offers available as

16 All major studios licence their titles to iTunes, the majority also to Xbox. Screen Digest stated that in the US iTunes already has a 52% market share of VOD rentals, followed by Microsoft’s Xbox with 31% (Conf. presentation of Arash Amel at the Digital Media Pipeline conference, 15 Sep 2009). For insight into Netflix’ strategy see PaidContent (22 October 2009) Netflix To Take Its Streaming Business International Next Year, and PaidContent (6 January 2010) Netflix Agrees To Warner’s New Release Delay In Exchange For More Streaming Rights.

17 Ostrow, Adam, YouTube Debuts Movie Rentals, Mashable, 20 January 2010.

18 Kramer, Staci, YouTube Will Use Sundance Film Festival To Test Rentals, PaidContent, 20 January 2010.

19 Hurley, Chad, At five years, two billion views per day and counting, The Official YouTube Blog, 16 May 2010.

20 Barnett, Emma, Hulu UK launch delayed until 2010, Telegraph UK, 24 August 2009.

21 See for instance Triumph of the Monthly Bill, The Economist, 10 October 2009.

22 Amazon, On Christmas Day, for the First Time Ever, Customers Purchased More Kindle Books Than Physical Books, Press Release, 26 December 2009.

23 Time Warner, Time Warner Inc. Announces Widespread Distribution of Cable TV Content Online, Press Release, 24 June 2009.

24 Comcast and NBC form media giant, BBC News, 3 December 2009.

25 E-Media Institute, Digital TV forecasts for Western Europe (19 countries), December 2009.

26 Stone, Brad, Trying to Add Portability to Movie Files, The New York Times, 4 January 2010.

27 Tom Adams, Adams Media Research, as quoted by Ayuso, Rocio, Pelicula de terror en Hollywood, El Pais, 18 Oct 2009 and Sandoval Greg, Time for Apple to get serious about video, CNet, 25 Feb 2010, http://news.cnet.com/8301-31001_3-10459494-261.html

possible to exploit its 6000 title catalogue online on a non-exclusive basis²⁸. Together with most other majors and large hardware manufacturers (excluding Apple) it has started addressing interoperability issues and access to different content versions last year through the Digital Entertainment Content Ecosystem²⁹. In 2010, Disney introduced a comparable system called KeyChest. Meanwhile, its CEO Robert Iger has reorganised the company and announced plans to shrink windows between releases and push for various home video options³⁰.

- Broadcasters continue to create an attractive VOD offer to compete with new entrants. The BBC iPlayer is one example offering a successful catch-up service (which since 2010 also provides links to other broadcasters) with over 500 million views since December 2007³¹. A total number of 240 catch-up services had emerged across Europe by the end of 2008³². Canal+ has extended its VOD catalogues to 6000 films³³.
- In the music industry digital sales grew 940% between 2004 and 2009 (while the total market for recorded music decreased by 30% in the same period)³⁴.

These trends indicate that the audiovisual industry is increasingly interested in digital distribution and betting on VOD. According to Screen Digest, VOD turnover in Europe is expected to grow to approximately € 2.2 billion in 2013 (see economic analysis). US majors, telecommunication and cable companies as well as internet businesses are positioning themselves to broaden their audiovisual services internationally. In Europe, audiovisual investments are primarily made by existing industry players. Broadcasters like Canal+, or distributors such as Wild Bunch, share a major part of the costs and risks involved in audiovisual creation and distribution. Despite the above trends, players are also cautious to make risky large investments into the roll out of a new version market that may cannibalise the overall value of all audiovisual markets. Moreover, investments in the European sector are made on a national basis. The question is therefore how Europe's audiovisual companies can influence these trends in order to access more international markets and develop legitimate and profitable VOD offers.

28 Interview with Marc Gareton, Warner, Senior VP Digital Distribution Europe, January 2009.

29 Netherby, Jennifer, Digital Cloud's Dark Lining: Fears of Apple entry loom over buy-once plans, Variety Magazine.

30 Goldstein, Patrick, Is there a master plan behind Disney's house cleaning?, LA Times, 12 January 2010.

31 EBU, Factbook Innovation, 3 December 2009

32 Audiovisual Observatory (2009) Video on Demand and Catch-up TV in Europe

33 Number of titles on Canalplay.com

34 IFPI Digital Music Report 2010

1.3. Why is this relevant for the EU?

There are several reasons why these developments and challenges matter to EU policymaking:

First, the development of the European audiovisual industry has for the past 20 years been an important policy priority for the EU. However cross-border circulation remains relatively modest and European films only play a marginal role in third countries' film markets. The EU will have spent approximately € 755 million on promoting audiovisual distribution between 2007 and 2013 (through MEDIA 2007). The European Commission has put digital on the top of its policy agenda³⁵. Importantly, once EU providers and creators of content have access to a larger well-functioning EU market, the global market would become more easily accessible for these European providers as well, with all its positive consequences for EU culture and economic growth. But for audiovisual a European single market today primarily exists for Hollywood content. Developing a sound strategy for VOD would help to change this situation and at the same time promote cultural exchange throughout Europe as well as beyond its borders.

Second, EU policymakers have in recent years increasingly realised that the cultural and creative industries are an important driver of European competitiveness and innovation. This has been recognised by the European agenda for culture³⁶ and promoted by the European Year on Creativity and Innovation. The cultural and creative industries are one of the fastest-growing sectors in the economy and audiovisual content is a key driver of growth for the sector. 5.8 million people work in the creative industries and generate more than € 654 billion in turnover annually³⁷. Over one million people are employed in the audiovisual sector alone in the European Union. This makes audiovisual not only important in terms of employment and growth, but also positions the sector as a strategic industry that has important impacts on other sectors, such as the ICT and consumer electronics industries. As noted in KEA's study on the Economy of Culture in Europe, creative content drives the uptake of broadband, consumer electronics and internet services. As such, audiovisual is an important driver of innovation throughout Europe's knowledge economy.

Finally, the European Commission perceives digital technology to be an opportunity to overcome some of the structural challenges that have hampered the development of the European audiovisual industry in the past (lack of vertical integration, limited marketing strength to reach international audiences, feeble valuation of copyright in trading terms with users). European legislation in diverse fields including copyright, e-commerce, broadcasting and non-linear services has sought to address this issue (see Chapter IV). In addition to this, EU policy and support also play an important role in shaping European audiovisual support systems to better prepare the industry for digital distribution.

1.4 Presentation of the Study

The study is divided into four further Chapters in addition to this Introduction:

Chapter II: The European audiovisual sector and digital distribution

This Chapter includes an introduction to the specifics of the European audiovisual industry, and examines how digital technology impacts on audiovisual content distribution. It outlines how the high-

35 The development of a digital single market for content services has been mentioned as a priority in the European Commission's Communication on Europe 2020

36 Communication on a European agenda for culture in a globalising world, op.cit.

37 KEA European Affairs, The Economy of Culture in Europe, study prepared for the European Commission, DG Education and Culture, 2006, available on www.keanet.eu.

risk business of European audiovisual content distribution and exploitation is shaped by the experiential character of media content, as well as by diverging consumer demand across Europe. Consequently, rights holders use content bundling, versioning and price discrimination to maximise returns on investment in different markets. The Chapter then outlines how a range of technological and market developments influence consumer behaviour and challenge the traditional dynamics of the audiovisual ecosystem, thereby offering rights holders the chance to access new markets.

Chapter III: Economic analysis and assessment of the development of digital trade of audiovisual works in the European Union

Chapter III presents the economic analysis requested in the tender specification, and projects the development of digital distribution over the coming years based on scenarios provided by the client. First, an analysis of the current state of VOD markets in Europe shows that the VOD offer is experiencing significant growth across the EU. However, it also shows that, from the demand side and despite important growth, VOD revenues still remain marginal compared to other version markets. Subsequently, the Chapter analyses the circulation of European audiovisual works on VOD in relation to circulation in other version markets. It then projects the development of VOD markets and the potential for more cross-border trade over the coming five to ten years depending on a number of regulatory, technical and macro-economic scenarios.

Chapter IV: Towards a digital single market: the legal environment

This Chapter contains a detailed review of legal frameworks and public policies – both at European and at Member State level – in relation to the digital single market for audiovisual content. After a short update on recent EU policy developments, the European legal framework applicable to international audiovisual content distribution is assessed, and important principles underlying regulatory interventions regarding the exercise of copyright are identified. Challenges regarding copyright enforcement that have emerged due to digital technology are examined in detail. Finally, the Chapter assesses other circumstances, mostly relating to national laws and policies, that might eventually influence rights holders' abilities to fully benefit from cross-border trade in Europe.

Chapter V: Conclusions and policy recommendations

The conclusions and policy recommendations summarise the key findings of the assignment, establish policy objectives and subsequently suggest a range of recommendations for the European Commission to support the development of a digital single market for EU audiovisual content.

The **Appendices** include a list of interviewees, further information concerning the data collected for the economic and the legal strands of this assignment, a more detailed methodology, several case studies and the bibliography.

CHAPTER II

THE EUROPEAN AUDIOVISUAL SECTOR AND DIGITAL DISTRIBUTION

In 2008 the European audiovisual market was valued at € 96 billion (€ 17 billion for filmed entertainment, € 48 billion for television subscriptions and license fees, € 31 billion for television advertising) and is expected to grow to € 115 billion by 2013³⁸. It is a key branch of the creative industries and enjoys a high degree of policy consideration due to its cultural and economic importance.

The sector is distinctive in several ways. Firstly, it depends on the institution of copyright to reward content creation, while facing a high-risk market in which the audiovisual experience is valued differently by each consumer. Marketing audiovisual works to create specific target markets is therefore an important exercise in the industry. Secondly, rights holders depend on a complex process of content versioning and bundling to maximise returns on investment, in an economic environment that is characterised by significant sunk costs.

Finally, the European audiovisual industry is highly fragmented along linguistic and cultural borders. The single market for films and television programmes of most EU rights holders is – so far – a distant dream. The patchwork of different audiovisual markets in Europe is a result of diverging consumer preferences and varying technological, economic and regulatory circumstances across the EU.

Section 2.1 will examine these issues and then propose a typology for audiovisual content markets on which the report's further economic assessment is based.

Section 2.2 will then look at how digital technology impacts on audiovisual content distribution, outlining how a range of technological and market developments might influence consumer behaviour and challenge the traditional dynamics of the audiovisual ecosystem. Changing industry practices regarding rights licensing, exploitation, production finance and marketing are outlined. Finally, 2.2 will explore how these shifts may provide European rights holders with the opportunity to reach new international markets in the medium to long term.

2.1 The specificity of the European audiovisual sector

The audiovisual sector's key characteristics are:

- the importance of externalities of media and their resulting regulation through copyright;
- the fact that media carry meaning;
- the role of price discrimination in rights holders' strategies to earn revenues

Versioning is a crucial issue for the audiovisual industry, with a clear distinction between technical and cultural versioning. Versioning strategies are fundamental in complex competitive games in the audiovisual sector.

Section 2.1 concludes with a proposal of a typology of audiovisual markets in the EU to inform our future economic analysis concerning the development of an internal market for digital content.

38 PWC Global Entertainment and Media Outlook 2009-2013, June 2009, p. 193, 255 and 318.

2.1.1 Audiovisual distribution economics

The goal of Section 2.1.1 is to provide a common vocabulary and references to explain the microeconomic rules of the media sector. It briefly describes:

- the economic role of copyright in a digital environment
- the vertical relationships deriving from these
- media marketing rules, and
- competition patterns in the audiovisual distribution market.

Digitisation not only generates new means of content distribution, but also transforms the very definition of 'information' itself. In the analogue world, 'information' meant meaningful material which was formatted for specific media. In other words, information was associated with the existence of physical support and therefore meaningful content was formatted and conveyed to specific markets. Key activities of the media industry included creating, editing, selecting, adjusting, copying and signalling this meaningful material to target markets. As a consequence, information was quite often a synonym of knowledge.

Today, due to digitisation, 'information' is anything that can be encoded as a stream of bits, whatever the format³⁹. A private conversation, a signal transmitted between two machines, a piece of software, an opera or a painting can equally be called information. Digital information systems such as mobile networks or the internet carry unformatted information. This situation is confusing as it is often forgotten that the valuable utility of the media did not consist in the support by itself, but in the operations of creating, selecting, formatting and signalling meaningful material⁴⁰. Such a radical change in the definition and the utility of the word 'information' requires an associated change in the language used to describe the economics of media industries.

2.1.1.1 Media economic patterns

Media are specific information goods and services that have particular characteristics, which will be briefly outlined in the following.

The economic principles of copyright

First of all, media create strong externalities which often cause idiosyncratic regulations. These regulations might include anything from incentives for producing valuable media content, to censorship rules to prevent disinformation and social disorder. These regulations are a result of the historical roll-

39 See Varian, Hal, and Shapiro, Carl, *Information Rules*, 1999. Harvard Business School Press.

40 If those operations are not explicitly considered and internalised into the economy, then any bit emitter can be called a media producer.

Such confusion exists in the very expression 'Information Society' which, according to the digital definition of information, means Society of the Bit. However, an Information Society does not yet make a Knowledge Society. The wording 'European digital market' also carries this confusion: the bit as the elementary piece of a code cannot be considered as a product or service designating a market. It is not the atom of a commodity comparable to coal, iron or oil.

This is also true for media: meaningful content is not a commodity, because the way in which its meaning is created and valued is not comparable with the economics of physical commodities, the value of which is proportional to the mass or to the fuel content. This is especially irrelevant to media when the meaning issued from one culture must address 23 different languages.

out of different media in each country, and are deeply rooted into every national institutional framework. National and international regulations are, in turn, very important in shaping media's industrial organisation and local media markets⁴¹. In particular, rules governing intellectual property play an essential role in media economics. This historical dimension to copyright and '*droit d'auteur*' regulations has led to particular economic approaches in looking at the rationale behind these institutions⁴².

Copyright regulations differ from one country to another, but they all share a property rule granting the rights holder a temporary exploitation monopoly. This property right operates both as an incentive to create media content with a market value, and as a tool to enable transactions between the rights holder and agents operating in other parts of the value chain, such as distribution networks⁴³.

Media economics are therefore based on a monopolistic competition between intellectual property (IP) rights holders. The organisation of this competition is specific to the national regulation of each EU Member State⁴⁴, but is now being challenged by the roll out of new media markets.

Experience and diversity

Media deliver 'meaning', which addresses the widest possible range of individual preferences. In other words, they deliver unpredictable and very heterogeneous utilities generating a high failure rate. Furthermore, they are experience goods whose value is known only after they have been consumed, giving them a significant production and distribution risk.

41 While the United States have built up their political institutions alongside the development of a widespread printed media industry, the old European monarchies — countries in which political institutions pre-existed the outbreak of mass media — had to adjust their media regulation to their existing political institutions. In the context of global media competition, Europe is disadvantaged by the existence of its twenty three separate linguistic markets and by the wide diversity of national regulations applying to each territory.

42 While the '*droit d'auteur*' always carried the scope of an individual right comparable to the Anglo-Saxon right to free speech, copyright laws have been created as a means of controlling the right to copy original works for the purpose of public dispersal.

All these approaches now converge towards what economists call intellectual property (IP) which covers a broad range of instruments aiming at coordinating the production and the exploitation of information. IP is an economic category that dates from the 1980s and embraces the legal institutions of patents, trademarks and copyright. (See Mark Blaug "Why did Schumpeter neglect about Intellectual Property" Review of Economic Research on Copyright Issues, 2005, vol. 2(1), pp. 69-74).

The development of the media over several hundred years has continuously increased the range of copyrighted material and services. However this development has speeded up during the past fifty years. At its outset, the copyright regime offered monopoly rights to authors (writers), composers and publishers of artistic and literary works. The same kind of protection (although on a different scale) was then provided to performers and to those investing in creation: producers of phonograms and films as well as broadcasting organisations. Creativity and not media economics is the basis of the copyright regime, even though some marked differences exist between the Anglo-Saxon copyright tradition and the continental '*droit d'auteur*' regime. This explains why some categories of valuable media goods, such as sports events, do not enjoy copyright protection per se, but only when associated to their transmission through broadcast do they adopt that value.

43 The basic economic rule is that the copyright holder gets an exclusive right to licence his/her product to various industrial agents who will repay him/her according to a specific contractual agreement. In some cases where copyright exploitation would generate high transaction costs, a derogatory licence may be set up. Such licences take the form of levies based upon the turnover of specific markets.

Following the Coase theorem, it is generally agreed that if property rights are clearly defined and the agents in a position to freely negotiate, exclusive rights prove to be more efficient than levies or compulsory licence mechanisms. See Landes and Posner Economic Structure of Intellectual Property Law, Cambridge: Belknap, 2003, page 14.

44 The European media landscape is characterised by a set of national regulations resulting from five centuries of public information internalisation policies. The disparities in copyright rules or in the vertical relations between rights holders and distributors, resulting from the deregulation of the television sector, illustrate this phenomenon. While the number and the regulations of private television channels differ in each country, the obligations imposed on television operators to purchase programmes from domestic independent producers have introduced specific rules in production financing and in the remuneration of IP rights. These rules (which are supplemented by various subsidy mechanisms) shape the competition among audiovisual media.

Signalling of the experience to be expected from a particular media product – in other words, its advertising and marketing – requires significant investment, which for international films can surpass production expenses. Without this investment, however, the works will remain unknown and unconsumed. Advertising and marketing investments are usually calibrated and target specific cultural audiences to reflect local sensitivities and peculiarities.

A paradox of the digital economy is that communication systems and media content share neither the same economic patterns nor the same externality profiles. While it should be possible for everyone to be able to communicate through digital networks, media goods should at the same time be maximally valued so that re-investment in new product can be made, to serve the widest range of preferences. The internalisation mechanisms therefore cannot be the same in the two industries. While communication systems are commonly priced on a cost basis with non discriminatory rules, media content is usually driven by better price discrimination⁴⁵. In this case pricing for each individual product is set with the aim of maximising the revenue associated with the product and, if proper incentives exist, to reinvest that revenue in new creation and signalling. In other words, communication systems are usually priced at cost, but media content (whose marginal reproduction costs are nil) are priced on the marginal value they bring.

Price discrimination: versioning and bundling

Price discrimination of content is achieved through versioning and bundling. Monopolistic competition enables content owners to apply price differentiation. The discrimination strategy is called quality pricing, or versioning. It consists of offering different qualities of the product at different prices, encouraging consumers themselves to select from among these versions according to their differing degrees of willingness to pay. Content owners can therefore take advantage of these various demand segments and maximise overall profit. The high quality or the first-released versions will be picked by consumers with a high willingness to pay, while the cheaper versions will be chosen by consumers expecting a lower marginal utility.

Versioning is a core concept of media marketing. It covers not only the quality differentiation, but also the means of access, the bundle of products gathered in the offer, and the level of liberalities⁴⁶ (of use) granted to the consumer⁴⁷. It depends on the utility patterns of each type of content. Content which is

45 Because each product addresses unknown preferences, media markets rely on sophisticated pricing mechanisms aimed at extracting the maximum willingness-to-pay from the consumer. Conversely to many functional goods, media pricing mechanisms are highly discriminatory (this also applies to trademarks whose investment in 'meaning' has to be recovered through price discrimination; luxury goods carrying heavy trademark investment show the same economic patterns as media content and should be considered as the combination of a material good and a media). This means that the same product can be sold to different consumers at different prices under different access and quality conditions. Such pricing mechanisms — quite common in airline or train transportation services — are based on the principle that the good or service cannot be resold by a consumer. See Luis M.B. Cabral, *Introduction to Industrial Organization*, MIT, 2000. Chapter 10, page 166-187.

46 The expression "liberalities of use" designates the scope of the usages granted to the consumer by a given version of the media. See Paul Belleflamme, « Versioning information goods », MIT, 2006, "...using DRM, the producer of a digital music file has the possibility to create different versions by attaching different liberalities of use to the file (in terms of, for example, number of access, number of copies on different devices, number of people one can share the file with, rights to modify or excerpt, or even time of possession)."

47 Two-sided markets are a common versioning practice. This consists of inserting commercial information (advertisements) within a media product in order to make the advertiser subsidise the content. However, advertisement can often undermine the quality of content. This pricing mechanism attracts consumers by offering free content, which is then paid for by the advertiser in proportion to the audiences reached. Public television, largely financed by licence fees and public subsidies, provides quality programmes but not 'premium' content which is more profitably distributed through pay-TV. Fully ad-subsidised and public-based versions are free for the consumer (known as free-to-air, FTA). FTA versions removes the consumer's risk of buying a product which

usually only consumed once — a book, a film, a soccer match — will not be versioned in the same way as music or video games, which often lead to repeat consumption⁴⁸.

In addition to versioning, the most efficient way to accommodate consumers' preferences is bundled sales. A CD is a music bundle, a newspaper is a bundle of news articles. The buyer of a newspaper will make his own selection of the columns or articles he might find interesting. By bundling together products addressing multiple preferences with no additional distribution costs, a content provider can maximise the value of each individual piece of content.

Bundled sales of premium content such as subscriptions to newspapers, pay-models for online news, unlimited packages in movie theatres or pay-TV packages, combine versioning and bundling techniques. These models are subject to economies of scale and economies of scope which may deter competition: subscribers to a wide-content bundle will have little interest in subscribing to a narrower bundle, or in purchasing by the unit⁴⁹. The distributor addressing the largest subscriber base will aim to invest in the widest range of content to be resold in packages.

For example, a well-established pay-TV operator will have interest in purchasing VOD rights to be added to its bundle, thereby gaining a competitive advantage on pure VOD players. In fact, VOD rights are often bundled together with television rights rather than being exploited separately by pure VOD players. If television rights are bought to be exploited on a territorial basis, this logic may extend to VOD rights.

Finally, digital technologies allow the continuous surge of new media and new versions. This stimulates competition between content distribution channels, with each one trying to increase the utilities associated with its versions. Thanks to their IP rights granting them an exploitation monopoly, content owners (especially those controlling large catalogues), can wield real power by effectively deciding which utilities enabled by new technologies will be rolled out.

For example, the film industry has continuously expanded the exploitation of its products on multiple distribution channels — theatrical, DVD, VOD (various pricing models), pay-per-view, pay-TV, free-TV — with the goal of maximising the global exploitation revenue of each product. The insertion of each new technical version in the exploitation schedule has been decided according to the benefits it would bring to the consolidated revenue of the content.

The ability to exercise such control is important in order to share financing responsibilities, as well as risks, in relation to audiovisual production. In other words if distributors can equally sell linear and non-linear versions, the VOD rights will tend to be purchased at a higher price by those already bringing value to linear versions: they will then optimise the combined value of the linear and non-linear version.

2.1.1.2 Audiovisual versioning

The versioning of content depends on its utility patterns. In the case of audiovisual content, discrimination relies on time, quality of product and pricing. Content is then distributed through a wide

would not match his expected utility. However, because they appeal to consumers with the lowest willingness-to-pay, FTA versions need to be strongly differentiated from high quality or premium versions.

48 A consequence is that music is purchased in a limited number of versions (CDs, MP3, digitally-encrypted streams) to be stored in libraries and then played-back many times on demand. Nevertheless, one can find some versioning over time in music too, e.g. see the fact that Apple has introduced temporary exclusivity in relation to major new releases.

49 See Nalebuff B. Bundling as an Entry Barrier, Yale Working paper nb.99-14, Nov. 1999.

spectrum of versions, allowing the consumer to get it within different time windows, under different formats and at different prices. Pay versions are usually released in windows preceding free to air (FTA) broadcasts and are therefore more valued by consumers than ad-subsidised models.

This means that pay-TV operators have a competitive advantage in becoming VOD distributors. FTA broadcasters can also efficiently purchase VOD rights for the products they consider to be of value; however, being less exclusive and mass-market orientated, the range of products commercial FTA broadcasters might access should be narrower than that of pay-TV operators.

In this way the system of intellectual property rights enables the creation of different content markets and content distribution systems. Audiovisual content is marketed across distinct territories through different versions addressing specific market segments with adapted pricing models. The content owners' goal is to maximise the value corresponding to the utility of their products for each type of consumer. This utility is attached to the technical parameters associated with the delivery mechanism, as well as to the 'meaning' of the content for the consumer. The latter strongly varies with linguistic and cultural patterns within and across countries.

Technical versioning

The audiovisual industry and markets started in the early 20th century with the roll-out of cinema theatres where large audiences could access motion pictures and news documentaries. Until the 1950s these theatres were the only market for audiovisual products. With the advent of television, however, a new route to market had appeared⁵⁰, resulting in local regulations in each EU country to encourage the establishment of new television operators, as well as the new technical content versions, in the domestic media landscape. Each country then acted according to its own traditions in evaluating media externalities and setting up internal regulatory tools. Countries wanting to protect their domestic media sector have established specific rules regarding ownership concentration, diffusion quotas, incentives for local production and vertical relationships⁵¹.

The FTA models did not require any access control, except for territorial reasons, but started degrading the comfort of watching broadcasts with more and more advertising. The roll-out of VHS and the development of conditional access technology allowed the marketing of new versions based on pay-services. Thanks to the equipment available in the consumer's home, broadcasters have been able to offer new ways to consume audiovisual products with restricted access⁵². However, being sold at a higher price, these versions had to be inserted in time windows preceding FTA. Depending on its

50 The development of television established a market for new formats as well as a new version market for films. The FTA model has provided the consumer with an incentive to invest in a television set. In all European countries, television was initiated as a public service financed through a special tax. Since the first generation of television sets, more channels and colour services were progressively offered. Television then became a commercial service based on a two-sided market platform able to resell audiences to advertisers. In the late 1970s, complementary facilities, such as pay-TV services or video recorders, have been established. The video recorder installed base was the basis for the expansion of a packaged content market using the VHS standard. By the end of the 1990s, these products were upgraded to DVDs allowing the creation of an additional video version market.

51 These rules have led to a territorial monitoring of media competition through a versioning regulation including the ad density in FTA programmes and the release windows for motion pictures. According to the NPA VOD study (NPA Conseil, Video On Demand in Europe, a study sponsored by the EAO and the French Direction du Développement des Médias, May 2007), the modalities and the schedule of the theatrical release windows are quite different among the – then – 25 EU Member States. The relative position of the window release granted to pay-TV determines its differentiation with the other media and then its ability to discriminate subscribers.

52 Premium content — exclusives, first broadcasts — and thematic bundles (including adult material) gathering specific programmes are better valued by the consumer than the FTA channels.

audiovisual industrial organisation, each country has had to find a way — regulated or not — to facilitate this process.

Not only does the competition between FTA and pay-TV versions rely on quality, but additionally on the pricing mechanism of each version market⁵³. While FTA relies on spontaneous audiences corresponding to separate programmes, the pay-TV operators sell bundles. In economic theory, bundling is a better discrimination tool than separate retail. This means that if pay-TV operators reach a critical mass of audience, they should be in a position to extract better value from their programmes and will increase their competitive advantage in purchasing them. The fragmentation of the FTA audiences due to the surge of new digitally-broadcasted channels amplifies this phenomenon. The high concentration in each national pay-TV market illustrates this fundamental advantage.

As regards non-linear systems, digital technologies allow the development of on-demand versions which can be priced according to different models: FTA, rental, download to burn, subscription, catch-up, bundled with television packages, etc. These models each have various means of access and terminal equipment. The more technical means of access exist, the more combinations of offers can be created to improve discrimination efficiency in distribution. As a consequence, rights holders can select from a number of distribution options in order to identify those that provide the best discrimination — the best consolidated returns — for their products.

This economic rationale underlies the competitive environment for VOD. As we have mentioned before, it explains why large audiovisual rights purchasers, such as television operators, have been so eager to develop catch-up and other VOD offers. In other words, the development of VOD markets is not driven by technology, but by the economic value to be extracted from content.

⁵³ Pay-content versions then have to be designed so as to bring maximum differentiation from free-to-air versions. The economics of pay-TV rely on its differentiation with all other media, but primarily with FTA.

Cultural Versioning

Media goods provide a meaningful experience which can be socially shared. As a result they generate cultural paths which affect their relative value within the different cultural communities. The utility of new content also depends on those which have previously shaped the tastes of the targeted audiences. Therefore, versioning is highly sensitive to linguistic and cultural parameters.

The example of Luciano Visconti's *La Caduta degli Dei* shows how subtle the differences are for marketing content in different territories⁵⁴. It shows that a film that is subtitled or dubbed and promoted by a local marketing campaign to appeal to a specific linguistic or cultural audience can be given a new dimension. Every geographic content version therefore carries an added value as a result of adaptation and marketing. In economic terms, each version is individual and valuable and cannot be simply substituted⁵⁵.

In particular cases audiovisual content can successfully be broadcast in one form all over Europe, if suitably packaged. But even in these cases it is difficult to assert the existence of a pan-European internal market, since licences are rarely granted on a pan-European basis.

In effect, the investment associated with the linguistic versioning, and more generally with the marketing, of each content is specific for each territory. Consequently each licensing contract requires negotiation on the size of the investment and how the risks will be shared between distributor and rights holder. There are few economies of scale in negotiating such contracts for multiple territories. Moreover, the distributor's risk is better hedged by distributing several contents in the same territory than by distributing the same one in different territories. The same issues can be seen in the sale of rights to the UEFA Champions League. These are sold by UEFA through multiple individual licences to national broadcasters, largely because viewers want to watch football matches commentated in their own language.

Some Hollywood, and even a few European, blockbusters may appear as an exception that proves the rule: designed for global audiences, the theatrical versions are increasingly often released on a 'day and date' basis, across multiple countries and languages (subtitled/dubbed), so as to minimise the impact of piracy. However, the marketing investments continue to vary from one country to the other and shape different distribution contracts. This is also the case for the later marketed versions such as home video and television broadcasts. This is further substantiated in chapter 3.

Versioning helps to package and release content in order to discriminate between different consumers according to their utility. While the premium high-quality versions will target consumers showing the highest willingness-to-pay, the subsequent releases will progressively reach consumers with a lower willingness-to-pay.

54 The movie has been distributed in the UK and in Germany under titles equally referring to the Wagner Opera *Götterdämmerung*. The French title *Les Damnés* did not carry such a reference. However, another Visconti movie happened then to be issued in France under the title *Le Crépuscule des Dieux*, referring also to the Wagner Opera. Because of the confusion with the former movie in neighbouring countries, it had then to be renamed and re-advertised as *Ludwig* ou *Le Crépuscule des Dieux*.

55 The assertion is exemplified by the strategies adopted by MTV or YouTube, which underline how critical idiosyncrasy is in audiovisual content distribution. See the box in Appendix.

*Focus: Audiovisual sports rights licensing practices*⁵⁶

Sport is a premium audiovisual content in both economic and cultural terms, and is often affected by audiovisual regulation and policy. It differs from other audiovisual content in a number of ways, including the fact that the value of sport events lies almost exclusively in the commercialisation of live audiovisual rights (unlike other content such as films or music).

Sports media rights are traditionally sold on a country-by-country basis. It is generally easy to acquire the rights and if there was cross-border demand, sports rights holders say they would respond to it.

Sports rights holders are increasingly developing the opportunities offered by new media distribution channels. Some of them already provide cross-border licensing solutions when it fits the organisation of the market. For instance, the rights of the International Cricket Council (ICC) World Twenty 2009 were sold to Eurosport for Europe (except the UK and the Netherlands where the rights were acquired by local broadcasters). More and more sports rights holders – such as World Marathons, the International Tennis Federation and the Rugby Football League – offer online access to their events (especially in territories where there is no terrestrial broadcasting for a given event).

Sports rights holders take the view that the development of any international licensing scheme – especially if any kind of obligation to offer such licences would exist – should be examined with caution, as it might have adverse economic and cultural consequences for the sport sector. It could create market concentration that might endanger cultural diversity and favour the domination of major sport competitions. In addition to this, sports rights holders expect a decrease in revenues if international licensing was to become the status quo, as rights could not be efficiently sold. This would impact on the health of sport, as well as its cultural and social dimension, since a share of media revenues is directly redistributed to grassroots sport.

These issues are discussed further in the Appendix in a case study on the audiovisual rights licensing of sport content. It describes licensing practices in this sector and the issues at stake regarding international licensing.

National or territorial versioning has a major impact on the industrial organisation and the trans-national circulation of media content in the EU. In fact, unlike the oil, steel, automobile or beverages industries, there is currently no trans-national media company in Europe that proposes to release and market content across Europe in the same way⁵⁷. As observed in the MTV example⁵⁸, distributing media content across Europe requires customisation investments to adjust to every local market. Consequently, there are few economies of scale to be expected from a concentration of European media.

Such economies would exist if there were no fixed costs and no financial risks attached to marketing to a wider territory. However, because of the linguistic segmentation of Europe's market, this is not the case. This implies that European content industries carry high discrimination costs: the investments

⁵⁶ This focus is based on an interview that was conducted with representatives of SROC's (Sports Rights Owners Coalition), members as well as written contributions from SROC members.

⁵⁷ Bertelsmann's RTL Group is Europe's leading entertainment company and runs television and radio channels in 11 EU Member States. According to our interviews, it sees little value in releasing its audiovisual content on an international basis.

⁵⁸ See case study in Appendix.

required to shape consumers' utility (or appetite) for a product or service are comparably higher and riskier than in larger linguistic markets.

Compared to monolingual markets such as the United States, and to some extent India or China⁵⁹, Europe therefore suffers a competitive handicap at the marketing and distribution level: the multiplicity of languages and cultures creates a wide distribution of individual preferences that requires expensive versioning and creates high discrimination costs (see also section 3.1). Each linguistic version adds some costs and addresses smaller markets. The work's cultural specificity (humour, local stories, historical figures or facts) contributes further to fragmentation. Moreover, as discussed below, the national regulations resulting from long-established local or national policies in the media sector amplify this segmentation. To some extent, these factors challenge EU policy's single market objectives.

However, cross-border trade is more common when linguistic/cultural areas do not correspond to national boundaries. For instance, many German channels are broadcasted to Austria, the Netherlands and Belgium (another example of this would be Scandinavia). The same can be said for British television channels which are received in Ireland. Hosting three different linguistic communities, Belgium has established different channels addressing their segmented communities and has largely opened its boundaries to foreign channels. Belgium is therefore the only country in the EU with no public nationwide broadcaster. These particular cases do not question the national organisation of audiovisual content distribution, since private contracts enable them to manage cross-border markets⁶⁰.

Finally, audiovisual content is amongst the most capital-intensive media both for producing and marketing. This means that large linguistic markets, such as the United States, have a huge competitive advantage in producing and exploiting them. The pre-financing of audiovisual media requires a strong involvement from the territory they are designed for, especially when the linguistic market is restricted. As a consequence, rights holders will always give priority to exploitation in their own financing territory, and will subordinate foreign distribution to the needs of these investors. As distribution in foreign territories requires specific investment (advertising, labelling, subtitling, dubbing, etc.) to make the product attractive to the local viewer, the selection of a distributor for each territory will rely on the efforts this distributor is ready to make to sell the product, as well as its willingness to pay the highest acquisition fees.

In conclusion, there is one important economic reason to licence media content on a territorial basis: each linguistic market requires and deserves a specific marketing investment. As a consequence, there are few economies of scale in marketing a product across several territories. Moreover, by marketing a content version to two different linguistic territories, distributors increase both their investment and their risks. On the contrary, by distributing the same content as different content versions to the same territory, distributors keep the same investment and reduce their risks. This fact undermines the rationales for international licensing and provides a strong competitive advantage to broadcasters distributing VOD content.

59 Although these subcontinents host many local dialects, they share at least a unified common language allowing domestic productions as well as movie stars to be acknowledged and celebrated continent-wide.

60 As shown in the Conditional Access evaluation study (KEA, Cerna, December 2007), pay-TV 'grey markets' are associated with these versioning patterns. Grey markets occur when the cultural preferences of some viewers strongly differ from the dominant preferences of a territory. The opportunity is then informally offered to those viewers to buy access services from a neighbouring country, rather than content providers having to invest in a specific versioning for the whole territory.

2.1.2 Structure of the sector

The European audiovisual market is not unified yet. The market continues to remain organised at national level – with some exceptions such as the theatrical market in Scandinavian countries. This Chapter shows that national markets are also very different one from another from an economic point of view.

Typologies are proposed later in this report to classify these national markets. The typologies are important as they inform the projections for the development of VOD in the next five to ten years (see Section 3.2).

2.1.2.1 Audiovisual content markets in the EU and the US

A brief comparison between the EU and US audiovisual markets is useful as the latter operates as a single market. This analysis illustrates the differences between the markets in terms of their historical development, their structure and their size.

Taken as a whole, the European Union has a comparable total GDP to the US. However the performance of audiovisual markets is much stronger in the US than the EU⁶¹. While the FTA markets are less developed in the US than in the EU, the US pay-TV market is at least three times larger than the EU's. The reasons for this are deeply rooted in America's history. Since the 1830s, American media was developed on a commercial basis, funded through advertisements and consumers' payment. For television, the early roll-out of the cable infrastructure has been impacted by tough competition among commercial FTA channels. The importance of advertisement on FTA gave an earlier and wider opportunity to pay-TV services.

Conversely, European countries have developed television as a public service. It can be argued that the social and political impact of television has naturally reflected the European tradition of public service. Television in this case is primarily seen as a universal service, progressively diversified and upgraded by new channels. As a consequence, FTA television has been the first to be regulated in order to ensure quality programming with little advertising. The willingness-to-pay for pay-TV channels is in general lower in the EU as a whole⁶².

Another important difference concerns the main market players' nature and size in both territories. In 2007 the 20 most important audiovisual companies worldwide included 11 US companies and only 5 EU companies⁶³. The largest EU company was Vivendi Universal from France with a turnover of \$ 15,007 million⁶⁴, compared to Disney with \$ 24,884 million.

The US audiovisual market is highly vertically integrated and concentrated. In 2004, six companies⁶⁵ represented a market share of 96% of US film distribution and between 75% and 98% of US ad revenues⁶⁶. In the EU, most players, even the major ones, are not significantly present all along the value chain and/or in all EU markets. For example, there is no European vertically integrated film

61 See the graph in the Appendix.

62 There can be huge differences between EU countries, as illustrated in the Appendix.

63 The remaining companies are Japanese (source: EAO). Moreover, segments other than audiovisual are not included.

64 It has to be noted that Vivendi Universal has sold its remaining 20% stake in NBC Universal, which may reduce its turnover and furthermore its importance when compared to US conglomerates.

65 Viacom, Fox, NBC Universal, Time Warner, Sony, Disney.

66 Epstein, Edward Jay, *The Big Picture*, 2005.

company capable of controlling distribution throughout main territories. Firms like Pathé and Wild Bunch are the closest to this model, but only operate in three to four territories. All this makes it difficult to identify the major players in audiovisual markets at EU level.

Finally, the diversity of the economic features of national audiovisual industries clearly relies on cultural differences. The difference that causes the most problems, in terms of unifying the markets, is language. There are 23 official languages in the EU⁶⁷, which does not include all '*minority languages*'⁶⁸ and languages spoken by immigrants from outside the EU. All this paints a very different picture than in the US, where one can find numerous minority languages (including those spoken by Native Americans as well as migrant languages) but only one official language: (American) English.

It therefore appears that the US and the EU audiovisual markets are in fact very different one from another. The US market is unified, the EU market is not. While US audiovisual players are competing all across the US (e.g. the 'Big Four' television networks) there are no EU audiovisual firms active across the whole of the EU.

It remains to be seen whether these distinctions will still hold as far as VOD is concerned.

2.1.2.2 Audiovisual content markets and consumers' spending in the EU

The EU audiovisual market is briefly described below. The aims of the description are:

- to complete the economic description of the audiovisual market with quantitative data, and
- to provide typologies of the audiovisual markets, which will be used to assess the evolution of VOD markets in the next five to ten years (see Section 3.2).

Audiovisual version markets across the EU

To assess the total size of every national audiovisual market, data on revenues from theatres, from DVD retails and rentals, and from television broadcasting companies were combined and analysed⁶⁹. The conclusions from this analysis were that:

- there are significant differences among EU countries (notably in terms of total size)
- observed differences can be explained to a large extent by the economic size of the country as a whole (with of course some exceptions, e.g. the UK audiovisual market which is particularly developed). Thus, it is easy to observe a correlation between the size of the economic system as a whole and the size of the audiovisual market as a whole, and of every outlet. The wealthier the country, the more important the audiovisual market⁷⁰
- not only do markets differ in terms of the amount spent by consumers but also in the way this amount is spent, notably between the diverse outlets⁷¹

67 See Appendix for the list of languages and their date of entry in the EU.

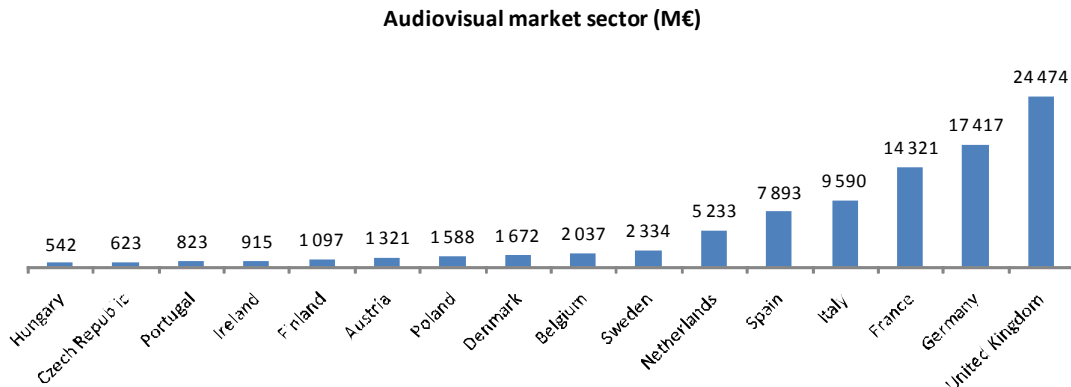
68 See http://ec.europa.eu/education/languages/archive/languages/langmin/euromosaic/index_en.html.

69 Unfortunately a few countries are missing as data was not available.

70 See Appendix for complementary graphs illustrating this correlation.

71 See Appendix for detailed data.

- the only common point between EU countries may be the fact that television accounts for the predominant part of gross revenues in every EU country



Source: EAO. Data is for 2007.

Consumers spending across the EU

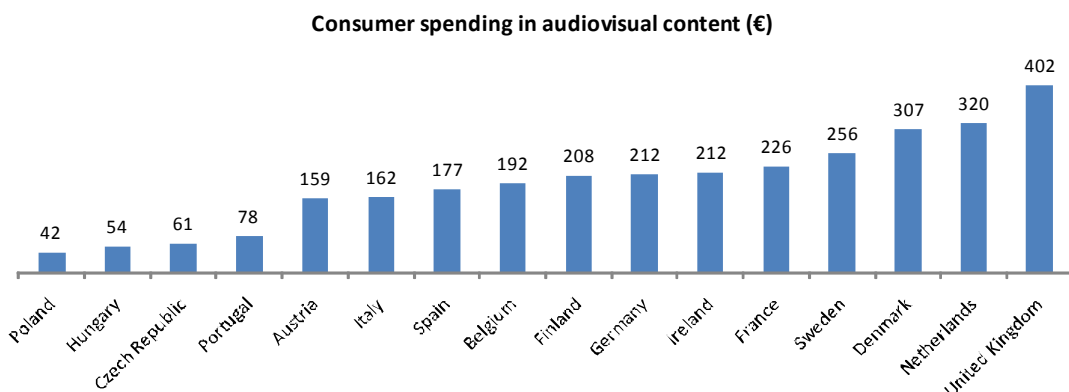
Analysis of the amount spent by every consumer for audiovisual products provides a slightly different picture, so that:

- differences are smaller than for revenues. In the biggest market (the UK) spending is 40 times higher than in the smallest (Czech Republic)⁷², with the difference only 10 times of consumer spending between the highest (still the UK) and the lowest (Poland);
- the highest level of consumer spending corresponds to the highest level of GDP per capita, with some exceptions such as the very high level of the UK, or the lower level of Ireland. More generally there is a correlation between spending per consumer and income per capita: the wealthier the average consumer, the higher the spending on audiovisual content⁷³
- Spending per capita is predominantly directed towards television, although the this is a slightly less so for Ireland; theatres account for a more significant share in France, Spain and Denmark⁷⁴

⁷² The ratio would probably have been higher if data on some small countries like Luxembourg or the Baltic countries had been available.

⁷³ See Appendix for complementary graphs illustrating this correlation.

⁷⁴ See Appendix for detailed data.



Source: EAO. Data are for 2007 (in €).

Towards a typology of the EU audiovisual markets

To conclude this Section, two typologies of national audiovisual markets are proposed, distinguishing the structure and the performance of these markets. The typologies were created using clustering methods⁷⁵.

The structure of the audiovisual markets includes the supply-side, e.g. the number of screens and of television channels, and the origin of movies available in theatres⁷⁶. The statistical approach identifies three groups of countries:

- Group 1 includes the largest EU countries by population. On average there are more screens per capita and more television channels in these countries, and the most significant difference with other countries is the higher share of domestic movies available on screens;
- Countries that belong to Group 2 mainly distinguish themselves by having a higher share of non-European movies among the total number of movies available;
- Finally countries that belong to Group 3 mainly distinguish themselves by having a higher share of movies coming from other EU countries.

This first typology helps to explain why VOD may have different impacts on the circulation of audiovisual contents in the EU, since the countries differ substantially in the way they are importing films for consumption in theatres. This does not necessarily mean that consumption of audiovisual content on VOD should follow the same path as in theatres. However, there may be an impact from the current theatrical circulation of films on the circulation of VOD content. This issue is further discussed in Chapter 3.

⁷⁵ See a description of the methodology in the Appendix.

⁷⁶ See the detailed list of variables in the Appendix.

Table: A typology of EU audiovisual markets according to their structure

Group	Countries			Characteristics
1	France Italy	Germany Spain	Ireland United Kingdom	In average more screens per capita, more television channels available in the country, significantly higher share of domestic movies in all movies available
2	Bulgaria Finland Lithuania Romania	Cyprus Greece Malta Slovenia	Estonia Latvia Portugal Sweden	Significantly higher share of non-European movies in all movies available
3	Austria Denmark Netherlands	Belgium Hungary Poland	Czech Republic Luxembourg Slovakia	Significantly higher share of movies from other European countries in all movies available

The performance of the audiovisual markets includes the revenues per capita derived from the main segments of the audiovisual markets, as well as the market shares of the different origins for films in theatres⁷⁷. The statistical approach distinguishes between two groups of countries, based on the revenues per capita for every segment of the audiovisual markets (theatres, DVD and television). Countries in Group 1 are the wealthiest EU countries per capita, and countries in Group 2 the most deprived⁷⁸.

Table: A typology of EU audiovisual markets according to their performance⁷⁹

In conclusion, the EU audiovisual sector is mainly characterised by its fragmentation, which is at the same time cultural and industrial. The markets are organised mainly on cultural grounds. While the main audiovisual market players are present in several EU countries they do not reach the same level of integration in all these markets. This was explained and described using data provided by the EAO.

This fragmentation also explains why audiovisual content is licensed on a territorial basis, namely that

Group	Countries			Characteristics
1	Austria Finland <i>Ireland</i> Spain	Belgium France Italy Sweden	Denmark Germany Netherlands United Kingdom	Significantly higher revenue per capita of theatres & DVD & television companies
2	<i>Bulgaria</i> <i>Estonia</i> <i>Lithuania</i> <i>Romania</i>	<i>Cyprus</i> Hungary Poland <i>Slovakia</i>	Czech Republic <i>Latvia</i> Portugal <i>Slovenia</i>	Significantly lower revenue per capita of theatres & DVD & television companies

77 See the detailed list of variables in the Appendix.

78 This is confirmed by an analysis of the correlation between demand conditions (including GDP per capita) and audiovisual performance, see Appendix for the corresponding Spearman matrix.

79 Due to a lack of data, we were not able to use the clustering method for all the EU countries. Some were therefore added to one of the groups by looking at existing incomplete data on revenues. These added countries are italicised.

every linguistic market deserves a specific marketing investment. As a result, the practice of holding the rights on several versions for one territory appears to be less risky than the practice of holding the rights on one version for several territories. The issue of whether this is also the case for digital distribution is further discussed in the following Sections of this report.

2.2 The impact of digital technology on content distribution in the EU

Section 2.2 examines the impact of VOD on audiovisual content distribution (in particular how VOD can affect European rights holders' ambitions to expand their market share in foreign territories) and briefly assesses the resulting implications for policy making. Specifically this Section will:

- examine how VOD and digital communications influence consumer behaviour
- illustrate how this changes the competitive dynamics of the audiovisual ecosystem in general
- review changing industry practice regarding rights licensing, exploitation, production finance and marketing to outline the implications that digital distribution has for rights holders
- analyse the prospects of increased international licensing

These trends relate to this assignment and the potential development of an internal market for audiovisual content in several ways. Firstly, the ability to distribute content across borders at lower cost may lead to the establishment of internationally-operating VOD providers that could challenge the system of territorial content distribution which prevails in Europe. European rights holders, used to exploiting rights territorially, may have to devise licensing strategies to use these platforms on favourable terms.

Secondly, as digital technology and social networking provide the European industry and European talent with opportunities to develop new international audiences, some of them may have to rethink their marketing strategies and their strategic alliances to best benefit from this transformation.

Finally, if consumer demand for non-national European works grows, there may be an opportunity for rights holders to sell international licences to make rights acquisition easier for commercial users, and to potentially reach larger markets with one content version. Such practice has not occurred in cable and satellite broadcasting (where it is also technically feasible); nevertheless the potential for international licensing of VOD is examined at the end of the Chapter.

2.2.1 Context – the digital shift and the emergence of VOD

Digital technology has an impact on production, circulation and consumption of audiovisual content. Section 2.2.1 will briefly describe some of the main developments in this technology before investigating how the emergence of VOD enables rights holders to exploit their content in additional version markets.

In summary, digital technology affects the audiovisual industry on several levels:

- Audiovisual content is increasingly created with the use of digital equipment and therefore exists in immaterial, electronic form. It can be transferred to digital hard drives for post-production and editing and saved on several physical storage devices. Storage costs are generally declining.
- At the distribution level, audiovisual content can be disseminated electronically via different digital transmission networks. Distribution has become more efficient and less costly, making it possible to distribute several digital content versions to different end-devices (internet-enabled television, computer, handheld, etc.) and to distribute content digitally across borders at lower costs. The main effect of this on markets is the increase of individuated consumption.

- However, content-protection devices such as set-top boxes represent a costly component of dematerialised content distribution.
- The proliferation of diverse broadband services and a growing variety of electronic end devices is appealing to many consumers, and creates new markets for the audiovisual industry.
- Marketing and communication is increasingly done online and it is becoming more interactive across industries through the use of digital media. Social networking, micro-blogging and virtual communities – in general the uptake of social media and digital communications – can provide detailed information about final users, and even impact on how products and services are being developed. However, in the audiovisual industry ‘offline’ marketing budgets remain a dominating cost factor (see Chapter III).
- Finally, the global nature of the internet and the ability of users to easily copy and share content pose challenges to copyright enforcement, and specifically undermine the rewards for creative talent and rights holders. This may limit rights holders’ willingness to grant licences to certain players or territories. Copyright enforcement influences competition between different distribution systems.

Digital technology has fuelled the development of different VOD models that can be roughly categorised according to their terms of distribution: Open internet; ADSL (IPTV); Cable; Digital Terrestrial Television; Satellite or mobile networks. The success of VOD services depends to a great extent on the dominance of certain networks (such as IPTV in France) as well as on users’ purchasing power in each country and on their acquaintance with pay-TV models among others.

VOD can also be categorised according to the terms of use. It can allow permanent use (in the case of Electronic Sell Through/download-to-own), but can also be based on payment per viewing, subscription fees (SVOD) or advertising-based models (known as AVOD or FreeVOD).

A more thorough analysis of VOD markets will be provided in Chapter III, where the value of different VOD markets across Europe will be analysed.

2.2.2 Impact on consumer behaviour

How does digital technology impact on consumer behaviour and what might this imply for the evolution of VOD? Section 2.2.2 illustrates when, where and how some consumers wish to watch content, and examines how they benefit from increased interactivity and choice. It also argues that through the possible increase of social networking across borders, the audiovisual sector may be able to address some cross-border audiences for specific titles.

2.2.2.1 When and where consumers want to access content

In digital environments, access to content and its portability become increasingly important. Providers of digital distribution services try to satisfy an increased demand for services by allowing consumers to make use of multiple electronic devices in multiple locations. At the same time, users increasingly expect access to content wherever they are and whenever they want.

To illustrate this, Morgan Stanley recently published a report from a 15-year old summer intern on young people's consumption habits⁸⁰. This report describes clearly how young consumers have already become used to the idea that they can decide what kind of content they watch, how they watch it, when they watch it and where they watch it.

Technological solutions that answer to the increasingly-flexible consumption patterns of consumers have been developed, as illustrated below:

Focus: time and place shifting

Time- and place-shifting devices are not new – essentially the VHS recorder already allowed time shifting long before digital arrived. With digital technology, however, new value propositions have been developed to attract consumers.

Around 2000, the first Digital Video Recorders (DVRs) such as TiVo entered the market, allowing users to record broadcasts, similar to VHS but in better quality. TiVo also introduced the possibility of downloading content from Amazon VOD, Netflix, Disney, Jaman and YouTube among others, and to watch it on a television set. Today, companies such as Roku, HP (MediaSmart) and Apple (AppleTV) have developed similar value propositions and DVRs are often offered for free with cable, IPTV or satellite subscriptions.

Around 2005, digital place-shifting services made their first appearance. Place-shifting allows users to enjoy content regardless of where they are and thus offer a new value proposition. Slingbox is one of the most well-known products that allow place-shifting. Slingbox connects to a television and home network, allowing users to watch and control their television on any Internet-connected computer, on their iPhone, Blackberry or mobile phone, wherever they are.

Similar services, all centred on the concept of 'pay once, watch anywhere', are currently being developed by several (mostly US) cable providers. As originally announced by Time Warner at the end of 2009, *TV Everywhere* allows its subscribers to login and access its content via the internet as well. Some of the interviewed European cable companies would be interested in developing similar value propositions, although they said many technological and economical hurdles exist in Europe.

The majority of consumers using such services primarily access content originated in their own countries. However, in the event that rights holders intensify their efforts to access foreign European markets there is a potential that greater cross-border demand for international European content would emerge on the basis of these services (see below).

2.2.2.2 How consumers access digital content and engage with new services

Digital technology has opened new opportunities for searching and selecting audiovisual content. It provides media service providers with the opportunity to engage with specific audiences in new ways. Particularly on the open internet this results in specific communities of interests, which present an opportunity for EU media service providers to target specific audiences across borders.

80 Wood, Edward H., Wellington, Patrick and Rossi Julien, How Teenagers Consume Media, Morgan Stanley Research, 10 July 2009.

Trends concerning search and selection

Search and selection of audiovisual content – whatever the content version may be – is increasingly influenced by the internet. If content repositories offer more digitised non-national content, or if different national content repositories become interconnected with the help of the internet, users will be able to conduct place-sensitive as well as global search enquiries in ever-growing databases of audiovisual works. The recent announcement of GoogleTV, which aims to create a search engine to browse through catalogues from broadcasters, taps into this development.

This, together with personalised recommendation technologies and more sophisticated international metadata standards, may make it easier to search for appealing content, and could increase choice as well as cultural diversity.

The need to capture audience interest and work with the consumer's willingness to pay is potentially the most important (and difficult) challenge that VOD service providers face. A favourable ranking of titles on electronic programming guides or online recommendation systems (such as Apple Genius⁸¹) becomes an essential factor for attracting an audience. Sophisticated search, recommendation and selection tools, which offer personalisation features that are based on a complex algorithmic analysis of consumers' consumption patterns, might become important gatekeepers (and value drivers) in an increasingly digital and convergent audiovisual media landscape. Netflix, a US-based DVD-rental service, already realised this and introduced the Netflix Prize worth \$1,000,000 in 2009 – an open competition for independent software engineers and companies to develop the best collaborative filtering algorithm in order to predict user ratings for films⁸².

Rights holders will increasingly need to take recommendation models into account and make sure that their works are well promoted on internet-based VOD portals or on the search panels that 'closed' VOD services offer to consumers to search and select content.

In this context, the potential of European audiovisual search engines online can also be an important factor. The number of visitors to the UK-based and UK Film Council-backed FindAnyFilm has grown to 3.7 million between its launch in January 2009 and October 2009⁸³, thanks to the search and alert functions offered through the website. The website aims to promote legal VOD films available on UK services to British film audiences.

Over time, search patterns for audiovisual content in digital repositories may therefore resemble today's search on the internet. In fact, already YouTube constitutes the second-largest search engine on the internet⁸⁴. Film fans will be able to conduct territory/language-sensitive search enquiries or enquiries covering multiple territories and content repositories. Should European consumers desire to watch more diverse non-national European content, these technological developments could eventually encourage consumption of non-national European films, as it may be easier to search specific genres across borders.

81 See <http://myapplegenius.com/> (accessed January 2010).

82 The competition was held by Netflix, an online DVD-rental service, and was open to anyone not connected with Netflix (current and former employees, agents, close relatives of Netflix employees, etc.) or a resident of Cuba, Iran, Syria, North Korea, Myanmar, or Sudan. On 21 September 2009, the grand prize of US\$1,000,000 was given to the BellKor's Pragmatic Chaos team which bested Netflix's own algorithm for predicting ratings by 10% (<http://www.netflixprize.com/rules>) (accessed in January 2010).

83 Presentation by Peter Buckingham (UK Film Council) on FindAnyFilm, European Commission, Brussels, October 2009.

84 Hill, Joshua, YouTube surpasses Yahoo as world's #2 search engine, www.tgdaily.com, 16 Oct 2008.

However, the increasingly important role played by search engines does not imply that marketing audiovisual content to target audiences becomes redundant. In an increasingly competitive and crowded entertainment industry, marketing campaigns remain essential to capturing the consumers' interest. Nowadays, a bulk of marketing spend is dedicated to promoting the theatrical release of a film, which in turn stimulates consumers' interest in other content versions.

Peer-recommendation mechanisms and social media

Audiovisual consumption is also influenced by peer recommendations ('word of mouth') that occur in an increasingly international sphere of social media (social networks, video-sharing sites, micro-blogs, etc) which could further accelerate international demand for audiovisual content. Because individuals are today more connected than ever through social media, companies need to be aware that consumption trends can be stimulated or slowed down through social media.

The rise of social networking and micro blogging applications such as Facebook or Twitter has transformed the way we communicate, maintain relationships and obtain or promote information and creative content that is available on the internet and elsewhere. A key driver of online communities such as YouTube, Dailymotion or Myspace is professionally-produced audiovisual content, which drives uptake and usage of these communities and can be used to promote releases⁸⁵.

By circulating entertainment news, film trailers and (unfortunately) guidance towards illegal services, users increasingly become trusted film critics for their peers. The ability of social networks to make or break a release is therefore very important to film companies (the "digital" equivalent to "word of mouth").

To reiterate, the tendency of social media users to maintain personal relationships across borders may eventually contribute to an increase in users' interest in non-national audiovisual content. For example, a Facebook user in Germany who continuously receives posts from friends in Spain about the latest Almodovar film may be inclined to watch this title on an international VOD portal.

On the other hand, this argument that internet users are more likely to be internationally oriented is difficult to substantiate. Moreover, consumer trends on the open internet do not necessarily translate into consumer trends on closed VOD platforms. As will be seen in the economic analysis (Chapter III), the majority of VOD revenues are today realised by services that are available on closed networks (IPTV, cable, etc.). The kinds of user engagement associated with accessing content on the open internet which we describe in this Section are not often facilitated on 'walled garden' services.

⁸⁵ Similarly, the uptake and success of Hulu is largely attributed to its syndication model, i.e. the possibility of embedding videos in other sites and social networks (See for instance presentation by Guy Bisson, Screen Digest, on www.obs.coe.int/online_publication/expert/conf03112009_bisson.pdf).

Focus: VOD operators that experiment with promoting content on social networks

TheAuteurs⁸⁶ focuses on developing a state-of-the-art line-up of European films, and tries to differentiate itself through social networking applications offered on the site. People can watch films, discuss them on Facebook and Twitter, and meet others who share their taste in film. Through a seamless integration of Facebook they can create a user profile with one simple click.

Another innovative example is Babelgum⁸⁷. Babelgum uses a team of 'curators' to attract consumers and build communities. Moreover, it has developed two contests attracting emerging filmmakers and music artists: the Babelgum Online Film Festival, chaired by Spike Lee and the Music Video Awards, chaired by Michel Gondry.

It remains questionable whether social media currently benefit the audiovisual industry by increasing legitimate viewing figures, or whether it harms the sector by encouraging illegal consumption. What is clear, however, is that consumers value new types of digital networking and collaborative applications. The challenge for rights holders lies in transforming this value into returns on investment. This has also been recognised by the European industry - a recent film industry think tank paper⁸⁸ stated that "*it is in the relationship with the audience that new revenue models are beginning to emerge*". The same paper argues that content producers should know their audience, collaborate with those end-consumers who wish to engage beyond merely watching a film, and ideally create viable business models on the basis of this new kind of engagement. Similar recommendations can be found in a recent report developed for regional film funds which calls for a complete rethink of business models (and government support systems) to engage with an increasingly 'active' audience⁸⁹.

It should be noted in this context that it remains a challenging task to develop business models in an economic environment where audiovisual content is considered a commodity that users can freely share between themselves, and internet ventures primarily utilise as a free incentive to attract user communities.

Free content?

For some, film – like music or pictures – is becoming a commodity in a 'sharing economy'. The sharing economy is an economy where trade takes place for no monetary gains. It is best illustrated by Wikipedia where people contribute to the building of an encyclopaedia without asking for monetary rewards.

This dynamic needs to be apprehended by the film industry. Sharing en masse (through BitTorrent or LimeWire) drives the take up of web services and applications ('context – not content – is nowadays considered 'king'⁹⁰). This development also gives creators an opportunity to get their works distributed. It may limit the industry's overall returns on investment, and limit the revenues of some intermediaries,

86 www.theauteurs.com

87 www.babelgum.com

88 Power to the Pixel Think Tank Report, 24 Nov 2009, available on <http://www.powertothepixel.com/>

89 Gubbins, Michael, Digital Revolution: The Active Audience, February 2010

90 Karbasfrooshan, Ashkan, Context is King: How Videos are Found and Consumed Online, TechCrunch, 30 January 2010, op.cit.

but it also provides new marketing opportunities to stakeholders that wish to experiment with new forms of content exploitation (in particular for smaller films by making 'word of mouth' possible again).

Chris Anderson, in his latest book, anticipates a digital economy where prices fall towards zero⁹¹. Eric Schmidt, the CEO of Google, expressed scepticism regarding the willingness of consumers to pay to access news⁹². Reputation, measured against traffic, would become the main currency – which would be monetised essentially through advertising. As a result, distribution gatekeepers would be stripped of their power⁹³. Some business intermediaries may be less relevant and films could be made available for free as part of a marketing strategy to attract recognition with a view to selling DVDs or merchandise related to the film.

Importantly, professionally-created content that is available for 'free' still serves commercial interests such as sales of DVDs, merchandise, portable devices (e.g. iPOD), advertising space (e.g. YouTube) or cross-subsidises internet subscriptions (e.g. telecommunication companies). However, particularly regarding the roll out of digital equipment and infrastructure, this practice may have to come to a halt⁹⁴.

Will the 'free' concept revolutionise audiovisual finance? This, for the moment, seems unlikely. According to a recent analysis in the UK, direct consumer spending on audiovisual content (subscription, DVD rental, box office returns, etc.) in 2008 was still the single most important source of funding for the content industries, generating 75% of net industry revenues⁹⁵. In this context, overestimation of the economic potential of 'free' content – fuelled by the availability of unauthorised services on the internet – potentially threatens 75% of audiovisual finance. Despite a lot of attention for legal free models⁹⁶, it seems that only Hulu has so far been able to build a sustainable model on advertising (and even Hulu is now considering launching a payment-based model⁹⁷). Other popular video services including YouTube have not yet been able to do the same, and many recent developments indicate that subscription-based content models are on the rise^{98, 99}.

The actual costs for production, selection and distribution are borne by the respective players who will calculate them into the price of other products (i.e. the products being advertised) or services (i.e. telecommunication subscriptions). 'Free' implies a re-allocation rather than an absence of costs and benefits. Production, selection and distribution roles remain and are simply allocated to different players, most of which experiment with free business models as well as with paid models. These different revenue models will most likely prevail in the future.

91 Anderson, Chris, *Free – The Future of a Radical Price*, Hyperion New York, 2009.

92 Speech on 7th April to US news agencies and papers – reported in *Le Monde* 8 April 2009.

93 Pesce, Mark, *The Human Network – Unevenly Distributed: production model for the 21st Century*, 31 January 2008.

94 See Olivier Bomsel's introduction to his new book "L'économie immatérielle" on Daily Motion:

http://www.dailymotion.com/video/xcm3s3_xerfi-e-changes-olivier-bomsel-1603_news

95 Analysys Mason, *Fostering Creative Ambition in the UK Digital Economy*, May 2009, London, p.3.

96 See e.g. Anderson, Chris, *Free*, op.cit., and Doctorow, Cory, *Chris Anderson's Free adds much to the Long Tail, but falls short*, *The Guardian*, 28 July 2009.

97 Ross, Chuck, *Hulu to Charge Users in 2010*, *TVBizWire*, October 2009.

98 In April 2009, *Crédit Suisse* estimated YouTube's losses for 2009 at \$ 470.6 million, although this was called "inaccurate" by a Google spokesman.

99 *The Triumph of the Monthly Bill* (op.cit. *The Economist*, 8 Oct 2009) warns that although subscription fees so far were able to balance dwindling television advertising revenues, it is hard "to charge for content that has been commoditised".

Focus: Experiences to keep in mind from the music industry

The music sector was the first creative content industry to really experience the impact of digitisation on its business model. There are many reasons why the sector's experience cannot easily be compared to that of the audiovisual sector (i.e. there is much less sequential versioning in music¹⁰⁰ and the experience of consuming a song is different as one listens to it repeatedly, etc.). However, digital technology has undoubtedly turned the music business upside down, a fact which bears relevance when considering ways forward for the audiovisual sector¹⁰¹:

- Between 1997 and 2007, physical sales of music declined by 46%. The turnover of the music industry went from \$ 40 to \$ 27 billion. Digital music sales are predicted to surpass CD sales by 2012¹⁰².
- While in 2003 only 1 million music tracks were licensed on the internet, consumers could in 2007 legally access more than 6 million tracks¹⁰³ (or 10 million according to Apple).
- Since its inception, the iTunes store has sold 6 billion songs¹⁰⁴; today over 10 million different tracks are available on iTunes. This not only illustrates the enormous potential of online distribution but also the dominant position of Apple in music. Today, it accounts for around 70% of digital music sales worldwide. Record companies lost control of distribution.

Consumer engagement in product and service development

In an increasingly networked economy, innovation and economic growth are dependent on integrating diverse stakeholders, including consumers, into product development and marketing and communications processes¹⁰⁵. ICTs enable more collaborative ways of 'ideation' and creation, e.g. working jointly on developing ideas for film scripts, or nurturing the computing power of several servers to work on heavy resource-dependent animation projects. As end-consumers become more ICT literate, some believe that it becomes possible to involve a greater diversity of professional and non-professional users into audiovisual development, creation, distribution and exploitation¹⁰⁶. In the following box we illustrate how this innovative practice emerges on the fringes of the audiovisual industry¹⁰⁷.

100 Although Apple iTunes recently introduced short periods of exclusivity.

101 According to some commentators, film studios are in danger of repeating the behaviour of the music industry, by making access to content for users too burdensome. See: Wilkerson, David, Studios Hurt as DVD Sales Fall, MarketWatch, 22 September 2009.

102 Forrester Research, The End Of The Music Industry As We Know It.

103 IFPI, Digital Music Report 2008 – Revolution Innovation responsibility, January 2008.

104 Schonfeld, Erick, iTunes Sells 6 Billion Songs, And Other Fun Stats From The Philnote, 6 Jan 2009

105 Hippel, Eric Von, Democratizing Innovation, The MIT Press, Cambridge 2006.

106 Again, this is an idea discussed in the conference report of Power to the Pixel: "The driving force behind such developments will be the engagement with audiences. This new creativity is much more customer driven with customers deciding when, where and how they engage with cross-media products. Most excitingly, the ability to manipulate moving images and interact with content allows customers to drive content. This isn't just a matter of personalisation but of customer engagement as communities. Where is content being driven and how will this change the role of storytellers and producers?". Power to the Pixel Think Tank Report, 24 Nov 2009, available on <http://www.powertothepixel.com/>

107 Design ideation can be seen as a matter of generating, developing and communicating ideas, where 'idea' is understood as a basic element of thought that can be either visual, concrete or abstract (Jonson, 2005:613). As such, it is an essential part of the design process, both in education and practice (Broadbent, in Fowles, 1979:15).

Focus: collaborative filmmaking and funding

A good example of collaborative filmmaking is *Wreck a Movie*. The project is based on the success of the crowd-sourced science fiction cult hit *Star Wreck: In the Pirkinning* which was downloaded over 8 million times before it was picked up for DVD distribution by Universal. The film's director, Timo Vuorensola, has developed a site to assist others to crowd-source their own films. The audience can become part of the process by submitting ideas and comments to the filmmaker, demonstrating the ultimate level of end-user involvement. This model may not work with all films, but the concept can also be applied to a film's website and to promotion material.

Focus: crowd-funding of audiovisual content

Crowd-funding supports collaborative filmmaking, and a good example is VODO. VODO offers free content from creators who want to share over BitTorrent, while asking consumers to participate through voluntary donations. The VODO project has been built on experiences with *Steal This Film 1&2*, films which gathered substantial amounts of money from their fans. Numerous projects have developed similar models, including the *Peach Open Movie Project*, *Age of Stupid*, *A Swarm of Angels* and many others, all of which build on fans' input and appreciation as the main reasons to buy. More recently, the Rotterdam Film Festival introduced its own crowd-funding experiment called *Cinema Reloaded* with a view to realise a short film for € 30.000.

User involvement in product development may be more applicable to some forms of entertainment than to others, however. While, for example, consumers are already today significantly involved in the creation of some television content (e.g. talk shows, casting shows, etc.) their involvement in feature film creation remains so far relatively marginal.

2.2.3 Impact on the audiovisual ecosystem

Section 2.2.3 assesses the potential impact that VOD may have on the audiovisual value chain¹⁰⁸, on the competitive interests of different stakeholders (old and new) as well as on audiovisual finance.

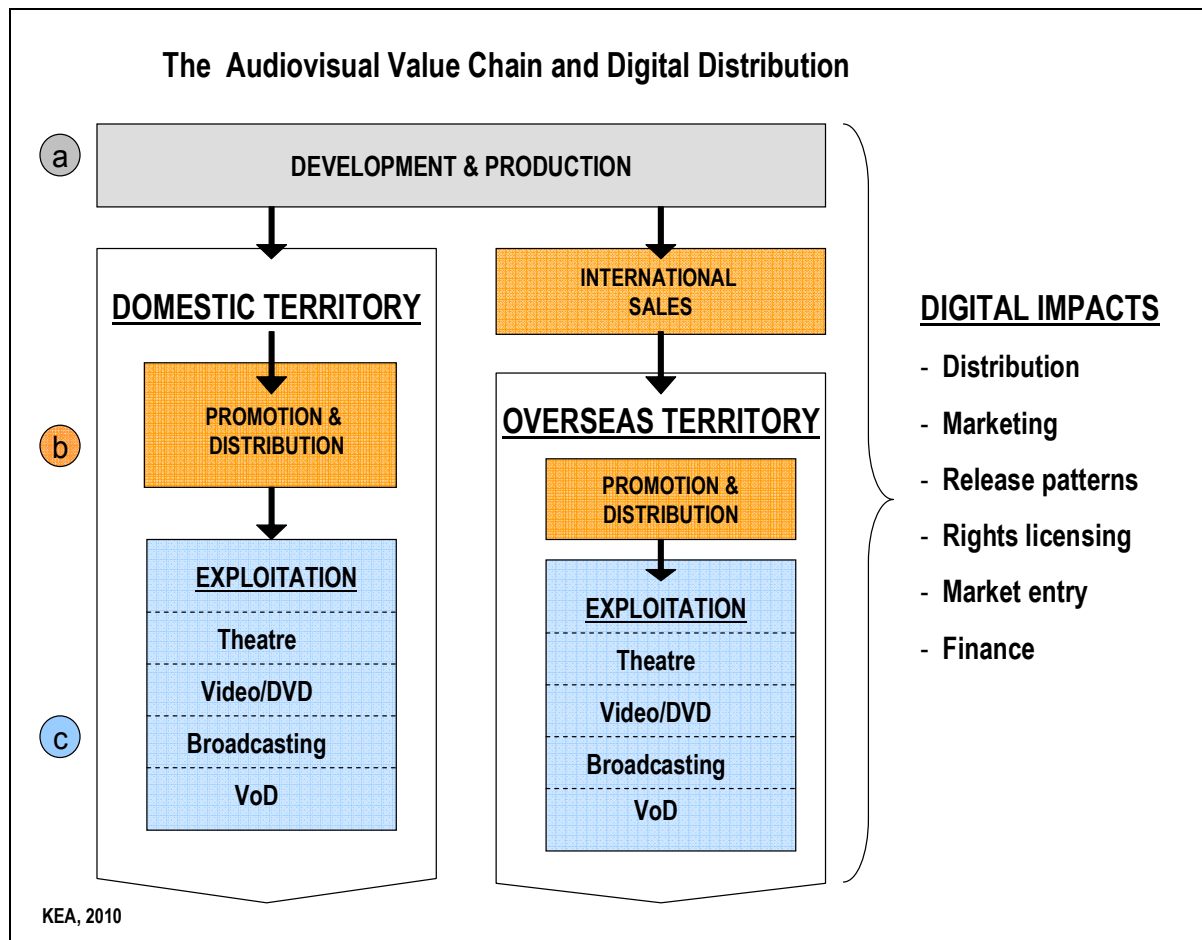
The graph below illustrates the essential activities that make up the value chain of the industry:

- audiovisual development and production (a)
- sales, promotion and distribution (b), and
- exploitation (c).

Several large companies, like Dell or Best Buy, have opened up this process to their consumers, inviting anyone to raise new ideas for possible company products using a dedicated idea management software open on the internet. See: Jonson, B (2005) Design Ideation: the conceptual sketch in the digital age. Design Studies Vol. 26-6 pp 613-624.

¹⁰⁸ A value chain is a chain of economic activities. With each activity an audiovisual good or service gains in value. An assessment of the audiovisual value chain therefore shows how different players and activities contribute to the overall value the end-consumer attributes to audiovisual content, starting from its creation and ending at the point of sale/its consumption. See Porter, M. E. (1996). What is strategy? Harvard Business Review, Nov-Dec, 61-78.

It also shows how the value chain encompasses multiple geographic markets and exploitation windows (i.e. theatrical, video/DVD, broadcasting, VOD):



The impacts that digital distribution has on the value chain, which will be detailed below, can be summarised as follows:

- VOD decreases distribution and storage costs. To some extent it promises to solve the problem of scarcity in relation to shelf space and physical distribution. Consumers may eventually consume a more varied range of digital goods and services. This could be in favour of niche content which includes many European films (the Long Tail theory¹⁰⁹). At the same time, it is often argued that digital distribution favours large content aggregators as much as creators of niche products¹¹⁰.

109 Anderson, Chris, *The Long Tail*, Hyperion New York, 2006.

110 The long tail has implications for the audiovisual industry. Digital distribution can reduce distribution costs and therefore increase rights holders' margins. It takes \$ 10,000 to make a DVD master and only a couple of hundred to make a digital file. VOD enables the exploitation of back catalogues and films that had limited release or are no longer to be found in shops and theatres. A good example is the film *Credo* (orig. *Sekten*) by Susanne Bier from 1997, which is the third-best selling film on Jaman (the film is no longer available on any other traditional distribution channel). Lovefilm, Netflix (the rental DVD shops) and Amazon are confirming that a large proportion of revenues come from non-hit titles. The CEO of Netflix reported that 80% of rentals related to films that are over than 3 months old – Netflix stores 70,000 titles (Dow Jones Newswire on 04 March 2009). This is mainly related to the large amount of back catalogue that is available on Netflix (and its VOD site) but it is unknown whether this example may apply to the entire market. By analogy, a recent study by Nielsen on the Australian book market pointed out that, although the number of titles bought each year has risen sharply, the market share for niche titles fell in favour of bestsellers (*A World of Hits*, *The Economist*, 26 November 2009). In the long run, the real winners are likely to be the aggregators, i.e. the firms that group together hits with niche content. For audiovisual content, these include for example YouTube, iTunes, Xbox or Amazon, each of which has the ability to bundle content. Such aggregators, Anderson argues, can appeal to a lot of customers by providing usual best-sellers as well as more marginal products, and by helping consumers to choose among the diversity of content offered.

- Social media and other interactive tools enable the audiovisual industry to target more fine-grained audience demographics, and can be utilised by independent rights holders and media service providers to promote culturally-diverse European content.
- VOD enables new players to enter audiovisual distribution and creates competition. Established players (e.g. broadcasters, distributors, etc.) seek to retain their position while new entrants, such as telecommunication or hardware manufacturers, set up new distribution platforms (also with the goal to further finance the roll-out of their equipment).
- As the number of content versions increases, the duration and chronology of release windows are changing (further explained below). This implies increased competition between players in certain windows (i.e. pay-TV operators, cinemas, and VOD service providers). It also touches upon the interests of original rights holders, who wish to maximise total revenues.
- To maximise returns on investment, VOD rights are often bundled with other exploitation rights (e.g. broadcasting).
- As VOD is not creating significant returns for the moment, and copyright infringements continue to threaten digital distribution, film financiers refuse to make significant investments in this new market. A lack of finance inhibits experimentation with new business models.
- The borderless nature of the internet allows for the possibility of international content exploitation, and may increase the role of international licensing in the future if demand for non-national content develops.

Examining the performance of a recent EU production in EU markets illustrates the challenges and opportunities ahead. The award-winning *White Ribbon* from Michael Hanneke has been released on only 22 screens in the US market – the largest market in the world¹¹¹ – and subsequently grossed a meagre \$ 600 000 in the US compared to global box office revenues of € 16 million. This represents only as many screens as a market comparable to Belgium and illustrates that traditional distribution can be a bottleneck to the international exploitation of independent film.

2.2.3.1 Effects on the competitive dynamics of the industry

A systemic perspective that takes into account the current market position of different players, their involvement in audiovisual production and distribution as well as their interests in the roll-out of technical infrastructure is needed to assess the potential future developments of the market.

Examining the case of the independent European film industry helps to illustrate this.

Cinema operators¹¹², who are currently withstanding the global economic downturn¹¹³, have long benefited from their exclusive exploitation window at the top of the release schedule (which they of course pay for in licensing fees). They risk reduced revenues should day-and-date releases become more common, or should their windows continue to be shortened due to an increased popularity of VOD and a resulting earlier scheduling of VOD exploitation. Cinema operators are therefore seldom outspoken proponents of digital distribution (or, for that matter, other exploitation windows)¹¹⁴. However,

111 Cut off date of research with submission of draft report. Data taken from Variety, February 8-14, 2010.

112 Examples of EU exhibitors are Pathé, UGC, Gaumont and Svensk Filmindustri/Bonnier.

113 View, for example, the EU country reports on box-office intake on www.cineuropa.org.

114 Most recently, this increasing pressure on theatrical exhibition has been illustrated by exhibitors in Europe seeking to protest against Disney's earlier DVD release strategy for the film *Alice in Wonderland*. Protest occurred across the EU, including Belgium, the Netherlands and the UK, to boycott a shortening of the exclusive theatrical release window.

cinemas can to some extent also benefit from VOD. For example, some small outfits experiment with 'reverse windowing' – making available a work on VOD shortly before it is released in cinemas – to build a fan base before the title is shown in theatres^{115, 116}.

Similarly, **national distributors** are interested in maintaining their overall revenues from theatres, broadcasting and DVD/BluRay, and seem reluctant to support a new version (VOD) that could cannibalise existing revenues while creating few returns. An important drawback for them is that once committed to a VOD premiere, the opportunity to schedule a wide theatrical release will be curtailed. Moreover, our interviews suggest that distributors generally receive smaller revenue shares from VOD (5-10%) than from DVD (25-30%)¹¹⁷. They are also threatened with the prospect that producers may manage their own VOD rights in the future. As a result, they may eventually be significantly less prepared to finance audiovisual works. On the other side, some distributors are now venturing into VOD within their traditional territories¹¹⁸, closely following successful VOD strategies from independent distributors in the US¹¹⁹.

Sales agents' current business models are dependent on minimum guarantees from distributors but these are so far uncommon in the digital market place. Some have dramatically changed their business models to adapt to VOD. Like producers, sales agents may attempt to retain VOD rights and partner with VOD providers or undertake promotion and distribution roles themselves. Examples in Europe include Celluloid Dreams with TheAuteurs (direct & via VOD partners), Wild Bunch with FilmoTV (idem), Svensk Filmindustri with SFanytime (direct) and TrustNordisk (via VOD partners).

In general, the majority of **European audiovisual producers** have not become very active in VOD so far. One reason for this is that the market is as yet not very profitable compared to other release windows (see Chapter III). However, as is the case with Hollywood majors, European producers are seeing DVD revenues decline and wish to prepare for a future when VOD returns may be more significant. Their reliance on pre-finance makes them dependent on contributions from established players (such as distributors or broadcasters). This, to some extent, limits their ability to experiment with new distribution models.

Some producers, however, see VOD as an opportunity to bypass intermediary players and increase their revenue share in the long term. For example, through VOD they can potentially exploit their content in territories where they have not been bought by distributors and/or broadcasters. This can be done by partnering with VOD platforms or by setting up platforms (collectively or, in the case of the few larger production companies in Europe, individually). Some examples of collective strategies are UniversCine from France, EGEDA/Filmotech from Spain and FIDD/Movieurope from Denmark (see further below). Those producers that exploit their VOD rights directly face the challenge to of making clever use of promotion and distribution techniques to make up for the lack of investment in marketing.

Another interesting role is played by **European broadcasters** (public and private) which primarily operate at national level (even those that run multiple television stations across the EU). On They are interested in protecting the value of broadcasting windows (pay-TV and FTA). However, they are also

115 Ward, Audrey, Delivering the Goods, Screen Daily, 12 June 2009.

116 In addition, cinema-on-demand models (including MEDIA-supported Digital Alfie) can to some extent help exhibitors explore what types of content their local audiences would most prefer to experience theatrically, help them build a loyal fan base.

117 Also see WSJ (2009) Studios hurt as DVD sales fall, rental grows.

118 A summary of distributors' practical interests in VOD is provided by Philippe Leconte in a presentation prepared for Europa Distribution 2009 (2009) A practical insight into VOD, retrieved from <http://www.europa-distribution.org/files/Paris%202009/A%20practical%20VOD%20insight.pps>.

119 McNary, Dave, Speciality Biz Scores with Home Run – Indies see hopeful signs in day-and-date video-on-demand debuts, Variety Magazine, 8 June 2009, page 9.

keen to promote their brands via catch-up services, and do not want to miss out on the future opportunities of digital distribution¹²⁰. VOD rights are therefore often bundled with broadcasting rights to show programmes (or parts of them) on catch-up services immediately after their broadcasts, or to withhold them for a certain period of time to protect the broadcasting window¹²¹. In other cases, broadcasters may negotiate freezing the VOD window for a certain period of time during and after a specific broadcast¹²².

Commercial broadcasters are keen to retain the ability to exploit VOD rights on a territorial basis whereas public service broadcasters could imagine making available their commissioned content on a pan-European basis (this is further examined in Chapter IV). In any case, broadcasters are likely to be powerful players in the emerging VOD market as they play an important role in financing content production in several countries.

There are several market entrants who only impact the VOD market and have no stakes in other exploitation windows, such as **equipment manufacturers** (Apple, Microsoft Xbox, etc.¹²³) and **infrastructure providers** (telecommunications and cable operators)¹²⁴. A major difference between these and the players is that these new entrants often have an additional commercial interest – the roll-out of their technological products and services. Content services are therefore also used to increase the usage of specific distribution systems or end-devices. Moreover, most of these new players have so far not participated in financing audiovisual creation and therefore do not share all of the risks associated with content production.

A more detailed overview of these stakeholders' interests, as well as those of other players such as Hollywood majors and internet companies, and further examples of interesting VOD initiatives are provided in the appendices. A summary is included in the following table.

120 In France, private broadcasters TF1, M6 and Canal+ have recently joined forces to counter potential competition from Hulu. See Audiovisual Observatory (2009) Video on Demand and Catch-up TV in Europe, page 183.

121 Most catch-up services are offered on the open internet as well as via third parties' platforms. They are often limited to national borders, particularly if the rights for foreign markets can still be commercialised.

122 During an interview a French distributor who engages actively in exploiting its VOD rights in France also indicated that the company often has to renegotiate VOD "freezes" with VOD platforms for a certain period of time after a programme has unexpectedly been sold to a broadcaster who requires exclusivity. Such requirement could of course cause further issues if a rights holder was to make available international licences.

123 Set-top box manufacturers such as Tivo, Roku, Slingbox and ZillionTV are also trying to tap into the market for VOD via television (also known as over-the-top VOD).

124 Some of the most prominent European telecommunication operators are Orange, Telefonica, Belgacom, Deutsche Telekom (DT), BT and Telecom Italia. Orange, DT, BT and Telenor are some of the (few) players that operate across borders. Among cable operators, Liberty Global is the largest and most international player, followed by Kabel Deutschland, Virgin and Numericable (source: www.e-mediainstitute.com).

Summary mapping of competitive interests

Industry	Digital Distribution-Interests	Digital Distribution-Threats
<p>Hollywood majors (Sony, Warner, Viacom, Universal, MGM, etc.) – market reach: global</p> <p><u>Selection of VOD initiatives:</u> Hulu, Crackle, Qriocity, Epix</p>	<p>- As DVD revenues decline, Hollywood majors are increasingly investing in VOD despite the modest size of the current market</p> <p>- They are interested in turning VOD into a significant revenue stream and in experimenting with different business models (advertising, paid content, partnerships, etc.)</p> <p>- Majors emphasise the need for copyright protection while searching for a balanced approach to net neutrality¹²⁵</p>	<p>- Cannibalisation of DVD revenues and television, still a very important revenue stream</p> <p>- Loss of a share of their revenues to new distribution and search providers (ISPs, Google, etc.)</p> <p>- Consumer demand to access content anywhere at any time as well as copyright infringements may reduce ability for versioning</p>
<p>European Producers (mostly SMEs, larger ones include Nordisk, Pathé, Svensk Filmindustrie etc.) – market reach: primarily national, in some cases pan European or even global</p>	<p>- Exploit their rights in this new version market to make up for declines in other markets</p> <p>- Free themselves of marginalisation in analogue distribution channels</p> <p>- Act collectively to gain fair deals on global VOD platforms</p> <p>- Offer their product directly to end-consumers</p> <p>- Target niche audiences and develop audiences across borders due to reduced distribution costs and new marketing techniques</p> <p>- Small producers may follow different (sometimes collective) VOD strategies while large producers can try to exploit their catalogues individually</p>	<p>- Increased marginalisation through Hollywood films on global platforms due to lack of prominence on services/limited marketing spend</p> <p>- Reduced ability for versioning, which may have an impact on overall turnover (see above)</p> <p>- Lack of production finance in current environment of uncertainty</p>
<p>Broadcasters (public and private, free to air/ pay-TV) – market reach: in Europe mostly national – some run television stations in multiple territories: RTL,</p>		

¹²⁵ see e.g. Johnson, Ted, Stemming the Tide, Variety, 11 January 2010

Sky, etc.)	<p><u>Selection of VOD initiatives:</u></p> <p>BBC iPlayer Project Canvas Maxdome TF1/M6/Canal+ BSkyB</p>	<ul style="list-style-type: none"> - Expand their broadcasting services to VOD (using the power of their brand to make VOD services succeed) - Use catch-up or before-TV services to promote digital offers - Bundle VOD rights with broadcasting rights to maintain control over multiple version markets where feasible 	<ul style="list-style-type: none"> - Increased competition through new players entering the market place (ISPs, Google, etc.) - Broadcasting revenues may get cannibalised by VOD - Loss of exclusivity in pay-TV window - Loss of control of national markets with the emergence of over-the-top TV
International sales agents (such as Celluloid Dreams, Svensk Filmindustri, Wild Bunch, TrustNordisk) – market reach: global			
<p><u>Selection of VOD initiatives:</u></p> <p>The Auteurs SFanytime</p>	<ul style="list-style-type: none"> - Turn into brokers and content aggregators of digital rights in an increasingly atomised audiovisual landscape - Act as digital service providers to localise and promote content subject to linguistic and cultural preferences of audiences 	<ul style="list-style-type: none"> - Fewer minimum guarantees are paid in VOD - Possible cannibalisation of traditional windows (and BluRay) through VOD 	

2.2.3.2 Implications for financing and further take up of VOD

Further roll-out of VOD is therefore not an inevitable consequence of digitisation, but the result of rights holders' abilities to earn revenues in this version market. Moreover, the VOD strategies of companies that have a stake in other version markets will be influenced by whether their overall returns increase or not. Should VOD revenues remain marginal and those of competing version markets remain stable or only reduce slowly, there may be reluctance among audiovisual stakeholders to bet on VOD.

As will be shown in Chapter III, VOD for the moment represents a comparably small share of the audiovisual market¹²⁶:

- VOD represents approximately 1 % of the overall film audience in the UK
- Our sample of films shows that, in France, VOD represents less than 3% of turnover generated through television, box-office intake and VOD
- Data collected for a French film distributed in Sweden, France and Denmark shows that DVD revenues – despite the current decline of this version market – are still far higher than those for VOD.

This creates a situation where several factors inhibit the fast development of VOD (especially for new audiovisual works), namely that:

- distributors and broadcasters, traditionally important pre-financiers of audiovisual production, have little incentive to enter the VOD market given that the returns in VOD are far smaller than in theatrical distribution, broadcasting and DVD. If VOD remains a small market and if these players remain the key financiers of production, they will continue to place little value on VOD rights
- independent production companies and talent require pre-finance from distributors and broadcasters to create audiovisual products. This dependency will make it difficult for them to retain VOD rights if their financiers wish to acquire them (if only to withhold them for a period)¹²⁷
- new operators of digital distribution platforms cannot significantly enter into production finance as long as their returns remain marginal. They do not provide minimum guarantees and do not buy exclusive rights to exploit new works on VOD. As a result, VOD offers primarily contain older works that have already been exploited in other windows. Private investors are so far reluctant to bridge this financing gap, and few public funders have invested strategically in VOD to enable rights holders to enter VOD at an early stage.

It could be argued that the industry initially requires extra finance to bridge this gap and create demand for VOD. The question would be whether such intervention should be left to market forces or whether it should be facilitated by the public sector. Public sector support could arguably be given to content creators to retain VOD rights and experiment with new forms of digital exploitation.

126 Sources and further details for these figures are provided in Chapter III.

127 The European Coordination of Independent television Producers (CEPI) states in its contribution to the European Commission's Reflection Paper on creative content in a digital single market that the dominant negotiation position of broadcasters, and their ability to buy rights bundles for all modes of exploitation, is the single most pressing issue for independent television producers. It limits their ability to build up valuable rights libraries and benefit from VOD. See: http://ec.europa.eu/avpolicy/docs/other_actions/col_2009/assoc/cepi_en.pdf (accessed January 2010).

2.2.4 Impact of digital distribution on industry practices

Section 2.2.3 outlined general industry trends. Section 2.2.4 will show that VOD already influences business practices in the audiovisual industry. This influence relates to the implementation of release windows, to marketing techniques and to licensing practices. It illustrates that many European audiovisual companies are already today taking steps to adapt their business models to this new reality.

2.2.4.1 Changing release window patterns

The position, duration and chronology of different release windows differs across territories due to local audience preferences, different technological infrastructures, consumer spending on different content versions and the historical development of audiovisual regulation in each country. The duration of each of the exploitation windows is in most countries regulated through internal industry agreements between different stakeholders¹²⁸. Our national review (see appendices) shows that government intervention to regulate windows is rather rare and takes place usually in coordination with industry stakeholders¹²⁹.

Changing release window patterns illustrate that the entire value chain is affected by current transformations:

- Theatre operators want to keep the theatrical window as long as possible
- Pay-TV operators are cautious of competition from VOD (especially SVOD) services
- Distributors would like to benefit from shorter windows in order to benefit from theatrical promotional campaigns
- Some new entrants argue that in order to fight unauthorised downloading windows should disappear altogether¹³⁰

128 Our analysis of the legal frameworks concerning VOD in the EU Member States will identify some cases in which state regulation concerning the duration of some windows exists (for example in France and Germany).

129 Chapter III includes a longer analysis of the public policies that shape certain release window characteristics in some Member States.

130 In its contribution to the Reflection Paper Ericsson argues that release windows for VOD act as a barrier to the availability of digital content, and that pricing mechanisms can be appropriately equipped to maximize investment interest and at the same time make attractive content available in alternative channels. Fastweb additionally points out that VOD revenues increase due to same date/day releases on home video and VOD. See http://ec.europa.eu/avpolicy/other_actions/content_online/consultation_2009/index_en.htm (accessed January 2010).

A recent IVF survey, summarised below, examines how release windows for films are changing in several countries and how the VOD window is integrated into existing arrangements¹³¹:

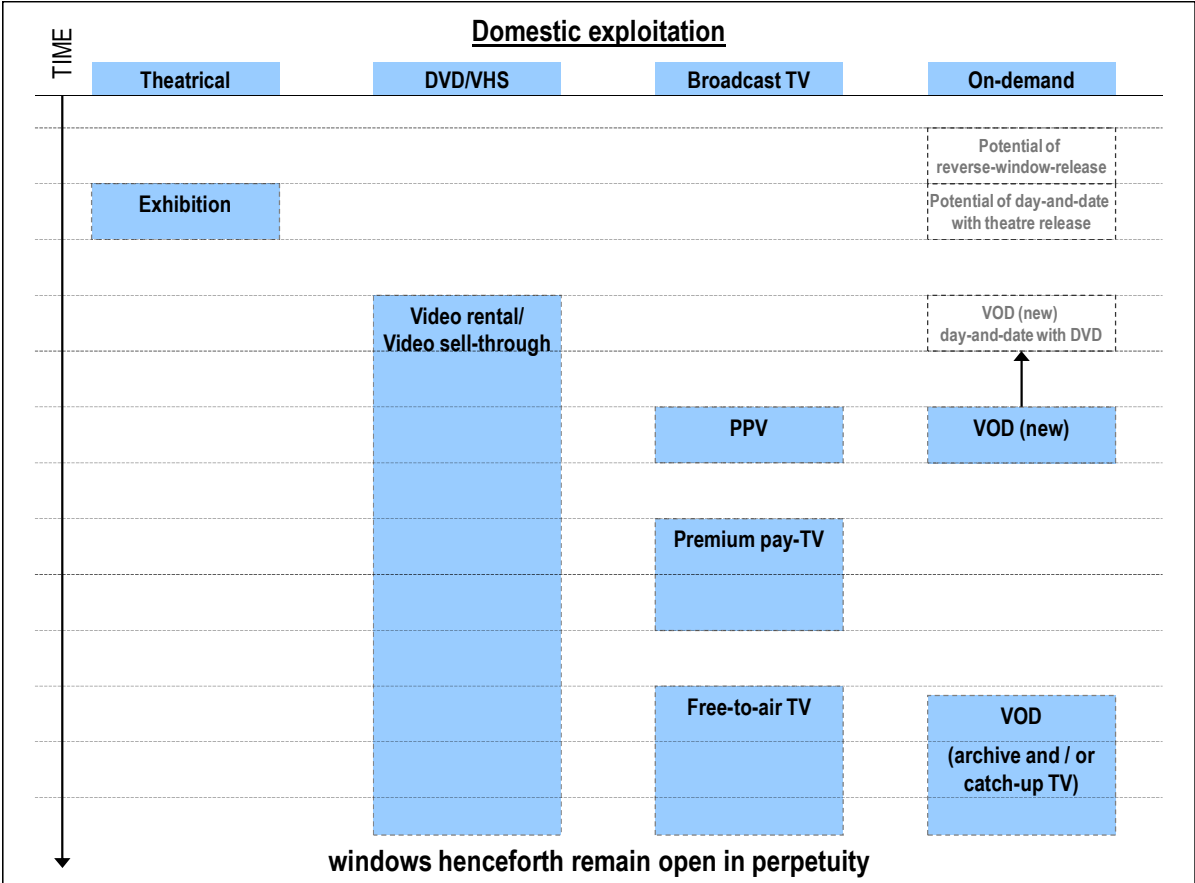
Window	Months after theatre release
DVD	The DVD window has generally moved from 6 to 4 months after theatrical release. In some countries the DVD window can open slightly sooner (Portugal 2 to 4 months; UK 3 to 4 months) while in other countries distributors choose to open it slightly later (Denmark 4½ to 6 months; Croatia, Hungary, Poland 6 months; Germany and Spain 4 months but 6 for films that received public subsidies; Austria 6 but 18 months for films that received public subsidies). There is a move towards more flexibility.
Online Distribution (Streaming/EST)	The VOD window currently opens approximately 4 months after theatrical release. Although in some countries (e.g. Austria) the VOD window still opens simultaneously with Pay-per-View, there is a clear trend towards earlier windows. Notably in France, the industry agreed in 2005 to open it slightly earlier (33 weeks compared to 9 months for Pay-per-View) and agreed in 2009 to change this to 4 months, day-and-date with DVD. Subscription-based VOD and free VOD are still scheduled later. Also in Germany, Italy, Norway, Sweden, Spain and the UK the VOD window is often opened day-and-date with DVD. In many countries (notably Italy and the UK) an additional distinction is made between rental VOD and electronic sell-through.
Pay-per-View Window	Differs per country. While in many countries the Pay-per-View window does not open until 9 to 12 months after theatrical release, it already opens in Switzerland after 6 and in the UK after 4½ to 6 months after theatrical.
Pay-TV Window	Between 9 and 15 months after theatrical release. Pay-TV is traditionally scheduled after approximately 18 months (Austria, Belgium, Sweden) but has moved to 15 months (Denmark, Spain), 12 months (Croatia, Hungary, Italy), 9 to 12 months in the UK, and as early as 6 months in Switzerland. Under the 2009 agreement, French Pay-TV distinguishes between a first window (10 months if investments are made in the local industry, 12 months if not) and a second window (22 months if investments are made in the local industry, 24 months if not).
Free-TV Window	Between 12 and 24 months after theatrical release. Again countries differ substantially. In most countries (Austria, Denmark, Germany, Hungary, Italy, Norway, Poland, Spain, Sweden, UK) the Free-TV window opens after at least 18 months, although some countries (e.g. Croatia, Switzerland and in some cases Belgium, Finland) it may open as early as 12 months after theatrical release. In France, it opens after 22 months if at least 3.2% of turnover is invested in co-production or 30 months if there is no co-production involvement.

Overall, one can observe that DVD, VOD and Pay-TV windows are scheduled earlier across Europe than they used to be. The balance is delicate: the value of any window (especially theatrical) is reduced if the following window (i.e. DVD sell-through, pay-TV or VOD) is scheduled earlier as this limits the exclusivity of the former. This has been illustrated by the most recent example of the film *Alice in Wonderland*, for which Disney implemented an accelerated release window pattern to increase DVD revenues. European exhibitors in several countries tried to boycott the strategy but in the end had to give in, which resulted in a shortening of the theatrical release window. Contrarily, attempts by UK film maker Ken Loach to release some of his old films on Youtube on an international basis led to a blocking

¹³¹ A detailed version of the summary provided can be found in the appendices.

of one of his films in certain countries where distribution rights had already been licensed (such as France).¹³² As regards VOD, the survey and our interviews suggest that in many countries the VOD distribution window is gradually shifting to approximately 4 months after theatrical release, day-and-date with DVD releases.

In the following graph we illustrate the VOD window in the context of other release windows and explain the associated challenges in more detail.



(KEA graph, extending BSAC (2005) New Business Models for Audiovisual Content, p.10)

There is no general rule as to how a release window pattern could best benefit the European film industry. Optimal durations of windows differ per title, and more and more flexible exploitation strategies are currently tested. New entrants as well as incumbents have started experimenting with alternative durations and sequences (within the limits of their respective legal frameworks). Especially for European titles that are increasingly under pressure to quickly succeed in ever-shortening theatrical windows, such flexibility may be beneficial. Films that did not create significant returns in theatres could be more quickly released on VOD (rather than being blocked for an agreed time period) which, in turn, might promote their popularity among certain audiences.

In the US, Steven Soderbergh already tested the idea of day-and-date releases in 2005 (releasing a film on the same day and date in theatres, on DVD and VOD) with his film *Bubble*. However, this resulted in fierce resistance and a boycott from theatres. A third alternative is currently being developed: some

132 Loach's other seven released films can be seen here: <http://www.youtube.com/user/KenLoachFilms>

rights holders are experimenting with 'reverse windows' in which films (or parts of films) are released on VOD at an early stage, after which they close down to protect the other windows. Good examples include Europacorp's *Home* (2009), Memento's *Amerrika* (2009) offering free VOD before theatrical release respectively during a limited period, and up to a limited number of downloads. More recently the Sundance festival offered three feature films in rental format on YouTube at the day of their premiere, which is an even further-reaching example of reverse windowing, and potentially also an appropriate windowing strategy for specific European films.

Finally, it is important to understand that many of today's policy debates concerning international licensing (and related questions of exclusivity) primarily, if not always consciously, refer to the second VOD window described above, which is ranked at the end of the exploitation schedule. As the first window for VOD exploitation is moving up, scheduled simultaneously or even before the DVD release, it could become a more important part of rights holders' exploitation strategies. This means that with time, rights holders who want to exploit their content in this window may increasingly choose to license their content on an exclusive and/or territorial basis, so as to maximise revenues. Of course, this practice of applying VOD windows is contested by some players in the industry¹³³, who argue that price discrimination can today be facilitated by DRMs rather than by blocking an entire release window. Rights holders, on the contrary, believe that by adhering to such versioning mechanisms the value of other exploitation windows can be increased.

2.2.4.2 New marketing practices

The audiovisual industry is increasingly making use of social media, micro-blogging and content sharing sites to promote audiovisual content to audiences. These can be particularly useful to European distributors and other players who lack the marketing spend of Hollywood studios to promote works via traditional media channels. However it is also relevant to large Hollywood players seeking to capture the attention of a new generation of media consumers¹³⁴ more prone to social networking and content sharing.

Film companies therefore need to acquire technological expertise and learn how to address audiences that may no longer be confined to a geographical or linguistic market. The ability to interact directly with consumers, bypassing traditional intermediaries such as distributors or broadcasters, is a key change introduced by the digital shift. This can empower original rights holders, provided they understand how to build up relationships with end-consumers by engaging with them in new ways. Making sophisticated use of consumer data, as well as promoting talents via social networks, can help to achieve this.

Internet-based VOD platforms try to benefit from integrating social networking strategies into their business models (see box below) in order to accelerate word of mouth. Many of our interviewees pointed out that most consumers are likely to only use a limited number of platforms which they trust (for payments, etc.) or feel acquainted with. If a new relationship is to be built strategic skills to partner with brands, aggregators and search engines and to reach significant audiences are required.

133 See Ericsson's submission to the recent consultation on the Commission's reflection paper on creative content in a European digital single market, p.6.

http://ec.europa.eu/avpolicy/docs/other_actions/col_2009/comp/ericsson_en.pdf (accessed January 2010).

134 An interesting case study on the use of social media to promote the film Avatar is available on Mashable: <http://mashable.com/2010/01/08/avatar-social-media-web/> (accessed January 2010).

Focus: Using social networking for film promotion

Filmmakers are increasingly using social networks within their marketing campaigns to create a buzz among potential audiences. Unlike traditional marketing, digital marketing requires promotion of the film over longer lead times to grow networks and to create appetite for the final product. It also requires persistence in terms of feeding the network, to keep people interested (and to eventually persuade them to download or stream the audiovisual work). This can be done by posting part of a film (e.g. *Four Eyed Monsters*), by posting similar content or previous content from the same creators, or by posting behind-the-scenes material in advance.

Often-quoted successful examples such as *Paranormal Activity* have used social networking to generate a significant fan-base before the film is picked up in the professional circuit¹³⁵, and some, such as *Sita Sings the Blues*, even generate reasonable revenues by social networks alone, inciting people to donate and/or to buy the film's merchandise¹³⁶. Finally, social networks may even expand to promotion of theatrical exhibition. In Brazil, Rain Networks has created the MovieMobz network, on which users indicate films they would like to see, after which they can arrange and promote a (digital) screening in a nearby theatre as soon as there are sufficient users in their region wishing to see the same film.

2.2.4.3 Licensing audiovisual rights for digital distribution

Both the emergence of new exploitation opportunities and the uncertainties caused by shifting release windows, changing revenue structures and unpaid downloading of copyright-protected content, have shaped the new licensing practices in the industry. In the following, current VOD licensing practices will be reviewed before examining potential future trends.

Review of current VOD licensing practices

Territorial demand continues to shape VOD licensing

Commercial users' demand for VOD rights shapes licensing practices for digital distribution. Rights holders licence the usage of rights in exchange for up-front investments into audiovisual production. For the moment, the most important investors through pre-sales are distributors and broadcasters and – in the case of VOD – sometimes (but rarely) telecommunication operators¹³⁷. These players are primarily interested in serving linguistic markets and therefore buy rights for certain territories. This may limit the

135 The creators of *Paranormal Activity* convinced Paramount Pictures by first gathering viewers on Eventful.com, after which the film was promoted and eventually reached #2 in US box office.

136 *Sita Sings the Blues* (www.sitasingstheblues.com) was produced with a budget of approximately \$ 80,000 excluding personnel and legal costs. After 7 months, aggregated revenues approximated \$ 55, 000 (\$ 23,000 direct donations, \$ 19,000 from merchandise and approximately \$ 3,000 per theatre, distributor and broadcaster). Source: Presentation by Nina Paley (author) at <http://www.blip.tv/file/2830689>.

137 Some European telecommunication operators have in the past paid minimum guarantees to Hollywood to obtain rights bundles covering multiple titles for their new platforms. Minimum guarantees for European VOD rights are so far very rare.

prospect of international distribution as well as the desire of original rights holders to reach new audiences across borders. However, those are the terms of the market for the moment. As a result, VOD rights are currently primarily licensed on a territorial basis¹³⁸.

Non-exclusive licensing is so far a common practice as regards digital distribution

Distributors and broadcasters are usually the largest investors into production. Given the little returns of VOD so far, they have an interest in maintaining high revenues from theatrical, broadcasting and DVD exploitation. Exclusive rights are primarily licensed for exploitation in these release windows¹³⁹. As has been illustrated, distributors and broadcasters sometimes acquire VOD in addition to these exclusive rights for little additional payment, to either exploit them at some point or to hold on to them with a view to increasing the value of other windows^{140, 141}. This practice has been criticised by some VOD service providers as a barrier to market entry¹⁴².

In the case of catalogue rights, or rights that have so far not been sold in certain territories, rights holders tend to licence them on a non-exclusive basis. Reasons for this are two-fold: First, VOD operators most of the time cannot afford to buy exclusive rights due to their limited VOD returns. Second, rights holders are cautious to sign exclusive deals at a time when the development of VOD is uncertain in order to ensure that the market remains competitive. They prefer to spread their non-exclusive rights over a large variety of platforms for a comparably short period of time, so as to ensure that they retain control over their IP. As a result, most individual VOD rights deals in Europe are currently made on a non-exclusive basis for short periods of two to three years. As indicated before, this may change if the value of the VOD window increases and VOD operators wish to compete with other exclusive exploitation windows¹⁴³.

138 Interviews with iTunes, a platform that offers content across multiple territories in the EU, indicated that the service would most likely make audiovisual content available on a territorial basis. As will be explained in Chapter III, iTunes maintains territorial licensing of creative content for commercial reasons (in the case of music).

139 As outlined earlier, the main motivation for exclusivity is to control versioning across different platforms, to gain an advantage over competitors by excluding them from distributing the same content in other versioning markets and, as a result, to increase returns on investment. Exclusivity can pertain to a specific territory, specific terms of use, a specific technology or for a specific duration. Traditionally, the distributor holds the exclusive rights for a certain territory across windows in return for its (territorial) investments in marketing and promotion. It will then try to sell specific forms of exclusivity within the theatre, DVD and broadcasting window.

140 The Independent Film and Television Alliance recommends that rights holders negotiate rights for digital distribution separately from traditional rights. However such a recommendation is difficult to follow under current conditions, unless VOD operators are able to provide similar amounts of minimum guarantees as offered by traditional distributors and broadcasters (IFTA, New Media Guide 2009).

141 Many studios have also started to offer free digital copies with the purchase of Blu-ray disks. Such copies are either available on a separate disk or on a website for download against a secret code (Wilkerson, David, Studios make bigger push for digital sales, Wall Street Journal, 29 December 2009, op.cit.).

142 As part of its submission to the European Commission's Reflection Paper on creative content in a digital single market, the Italian ISP Fastweb, which also provides VOD services, states: "Currently, the new media offers are hindered, inter alia, by the content providers' commercial practice to sell their works based on multiplatform exclusive rights or holdbacks clauses, granted in favour of specific players (often in dominant position on old media), thereby preventing the circulation of contents on new platforms. As a consequence, all involved players (new platforms, ISPs and aggregators of content for new media) have serious problems in accessing audiovisual works and therefore satisfying consumers' demand. The system in place ultimately results in great barriers to entry for the above companies, and an increase of illegal means such as piracy, on the side of consumers". http://ec.europa.eu/avpolicy/other_actions/content_online/consultation_2009/index_en.htm (accessed January 2010).

143 In some cases, iTunes has negotiated short windows of exclusivity for some of the films shown in the initial two to three weeks.

In some cases, large European VOD service providers (primarily those run by telecommunication operators) have secured exclusive VOD rights from Hollywood majors against paying minimum guarantees. However, these cases are rare and almost never happen in relation to European audiovisual works. This indicates that European rights holders face the danger of marginalisation if they do not succeed in closing similar deals in the future.

From individual to collective licensing?

Finally, given the fact that previous policy debates about media licensing practices have not often distinguished between licensing practices in different creative content sectors, some differences need to be highlighted.

The licensing process in audiovisual is different and less complex than in music¹⁴⁴. This is the case because commercial users of audiovisual works usually have to negotiate with only one party which concentrates all the commercial exploitation rights of a film: the producer¹⁴⁵. In most cases, audiovisual producers can therefore decide whether – for example – to license on a territorial or an international basis. This allows them to maximise revenues on behalf of the entire creative value chain (film directors, screen writers, actors, etc.).

Audiovisual producers have little history of mandating collective management bodies with the management of their rights. This is explained by the fact that film producers usually negotiate fewer transactions (with a national distributor, a sale agent and a broadcaster). Collective rights management is so far mainly used to administer certain remuneration rights such as private copying, rental and certain forms of communication to the public (e.g. cable retransmission as promoted by the SATCAB Directive¹⁴⁶), to ease licensing processes.

Reflecting on film business licensing practices, the Commission staff working document on a Community Initiative on the Cross-Border Management of Copyright, issued in 2005¹⁴⁷, acknowledged that a successful transition to the emerging online market for the distribution of films would most likely continue to be based on direct licensing, thus acknowledging the importance of contractual freedom. Rights holders should be able to decide how and where to license their rights – individually or collectively. However, as will be explained in a following section, voluntary collective licensing may play a more important role in future digital audiovisual markets.

144 We refer to music as the latter has been subject to intense regulatory scrutiny (examined in Chapter III) because of its complex licensing rules.

145 For clarity a description of how copyright protection for authors of audiovisual works has evolved in Europe is provided here. Authors are the owners of copyright for works. While in civil law countries the authors' rights system is used to grant the initial creators (director, screenwriters, editors, etc.) authorship or co-authorship of a film, in common law countries the copyright system is used to protect the role of the producer as the sole author of the film (Ireland and the UK). However, since the entry into force of the EC Copyright Directives (especially the Rental and Term Directive) the director of a film is designated the author of the audiovisual work in all EU countries. Ireland and the UK had to include the director as the author of an audiovisual work into their legal framework. In most countries with a tradition of author's rights, producers are entitled to exploit the economic rights for films: in some countries the economic rights are initially vested in the producers, while moral rights stay with the creator (Austria and Italy), while in others the economic rights are initially vested in the co-authors but granted to the producer through presumptions of assignment (France, Germany, Denmark, Netherlands, Portugal, Spain, and Sweden).

146 Op. Cit. Directive 93/83/EEC.

147 Commission Staff Working Document Study on a Community Initiative on the Cross-Border Collective Management of Copyright (7 July 2005), pages 23-24.

VOD licensing practices may evolve further

As VOD markets across Europe grow and more players enter digital distribution, VOD licensing across the EU continues to evolve. VOD operators are asking for different licensing practices that fit the needs of their digital distribution business models. At the same time original rights holders want to ensure long-term access to VOD markets on good terms. Finally, the licensing requirements of rights holders are influenced by their size and market reach, so that European rights holders (primarily small and medium-sized companies) have different licensing requirements than large EU film companies, Hollywood studios or global VOD operators. Factors influencing emerging licensing trends are the following:

- Providers of VOD services stress the high transactions costs they face in order to identify and acquire VOD rights from the myriad of existing rights holders across the EU (and often refer to their experience in the licensing of musical works in this respect). To counter inefficiencies, most of them ask for greater transparency of rights catalogues or for the establishment of centralised rights databanks to ease the identification of rights holders and streamline rights clearing and remuneration processes¹⁴⁸.
- Scale is important for VOD platform operators who want to attract users with a sizable offer of titles. Therefore, they often prefer to buy rights catalogues rather than acquiring individual titles (except for big hits). This can be a disadvantage for European small and medium-sized rights holders who lack the bargaining power to negotiate favourable deals in such large transactions.
- Digital distribution of catalogue titles (older works, vintage titles, titles that have not been sold in certain territories) can require laborious rights clearance which individual European rights holders often cannot afford.
- European rights holders also find it hard to retain rights for digital exploitation as they are often acquired by distributors and broadcasters who do not enter VOD exploitation until revenues from other windows are secured. Again, the dominant position of commercial users vis-à-vis small and medium-sized rights holders prevents the latter from acting strategically and building up a catalogue of rights for later exploitation.

Both VOD platform operators' needs for new licensing practices, and the requirements of European rights holders to increase their negotiating power, could arguably be met by collective strategies. Small and medium-sized companies could collaborate and thereby offer VOD providers one-stop shops for buying rights catalogues. They could also act collectively to negotiate favourable terms of trades with other commercial users, such as broadcasters, in order to potentially retain rights for digital distribution. Furthermore, by acting together, the laborious rights clearing processes for orphan works and older titles could be shared, and metadata standards established to make identification and transactions easier. Together, European films make up for 27% of the European theatrical admissions¹⁴⁹. They could use economies of scale to reduce transaction costs in licensing.

148 Apple already called for "central repositories for data about who owns what" in its contribution to the Online Commerce Round Table; Ericsson/DIGITALEUROPE called for an "online database" in their contributions to the European Commission's public consultation on Content Online.

149 EAO, Focus 2010, World Film Market Trends p.14

As shown in the case study below, there are several initiatives across the EU that take such a collective approach. They tend to be market driven and are developed from the bottom up. This allows rights holders to retain the opportunity to opt out from collective action, as may be required in certain cases. For example, a rights holder may prefer to coordinate the digital exploitation of a big hit individually rather than collectively. Hollywood and large owners of rights catalogues are also likely to prefer individual licensing as they already possess the business structures to facilitate licensing processes.

Focus: Individual vs. collective management of audiovisual rights for digital distribution

In general, VOD rights are negotiated on an individual basis. However, with the low revenues derived from VOD European audiovisual companies need to negotiate more beneficial deals to access digital platforms. Some European rights holders have joined forces to act collectively in order to achieve better future terms of trade on the basis of offering a greater scope of content to platform operators. One initiative is located in Denmark, where fifteen producers decided to join forces with a view to holding on to their video-on-demand rights and negotiating collectively with the telecom operators and the broadcasters in Denmark. As will be seen in the legal section (see Chapter IV), this initiative is also linked to the commercial ability of Danish producers to retain their VOD rights, as manifested in the Danish inter-industry agreement between the national film funding institute, broadcasters and the producers' association.

A second example of a sustainable collective strategy exists in Spain. It was developed by the collecting society representing film producers and television producers, called *Entidad de Gestión de Derechos de los Productores Audiovisuales* (EGEDA). EGEDA received a mandate from the audiovisual producers in Spain to set up a VOD platform and serve consumers through a reliable and lawful system. The VOD platform was launched in April 2007 and is called Filmotech.com. In addition, EGEDA is mandated to negotiate licensing contracts with telecommunications companies, broadcasters or ISPs looking for films for their digital delivery services. This is again a complete collective-process approach, whereby EGEDA, which essentially collects money from private copying in Spain, has used private copying royalties to develop a service that could become the best vehicle to monetise digital delivery to the benefit of film production.

A third example is Universcine, which gathers together approximately 50 independent French producers and distributors to compete against the large VOD offers by French telecommunication operators (such as Orange) and pay-TV channel Canal+. The VOD offer of UniversCine on the open internet offers more than 1000 French titles. Additionally, UniversCine negotiates on behalf of its members to gain favourable deals for exploiting their works on other VOD platforms.

There are also several individual companies and organisations that seek to facilitate innovative licensing solutions to enable easier identification and acquisition of VOD rights.

Content Republic¹⁵⁰

Content Republic is a new commercial outfit that aims to create a one-stop shop for international platforms, by acquiring digital rights from rights holders in different countries and by negotiating VOD deals selling bundles of audiovisual content. It is one of approximately seven 'digital content aggregators' that currently exist next to Diva, Cinetic and others.

The firm – which has been set up by a music industry executive who believes that the film industry faces similar challenges as the music industry did five years ago – acquires VOD rights from national distributors who normally have the rights for distribution across all platforms. If not already done, the company will digitise the audiovisual work and/or provide additional marketing before offering it to large platforms such as iTunes, Netflix, Babelgum or others. For countries where the audiovisual work has not yet been rolled out, it may approach producers or sales agents to acquire rights for these countries, thus offering them access to additional territories. Content is often bundled in packages of 20 to 30 audiovisual works, similar to the strategies of most major American distributors.

¹⁵⁰ This case study is based on an interview with Content Republic and information provided on www.contentrepublic.com

The prospect of international licensing

Digital technologies may help European audiovisual rights holders to overcome bottlenecks that existed in physical distribution (scarcity of shelf space in retail, limited number of film reels for theatrical exploitation, comparably high dissemination costs, etc.). However, it is still debatable whether digital distribution will encourage further international circulation of European works.

The fragmentation of Europe's audiovisual industry along national, cultural and linguistic borders, which ultimately reflects the diverging tastes of a majority of end-consumers in different European territories, poses the greatest challenge to the development of the internal market. Consumer demand in local European content has, for a long time, shaped audiovisual licensing practices across the EU. European films or television programmes are usually made for local audiences and have the largest reception in their country of origin. European distribution companies therefore mainly operate nationally, buy rights for individual territories and then cover significant promotion expenses in each market¹⁵¹. As a result, VOD rights for international exploitation may be handled by different distributors or broadcasters in various territories. To add to this complexity, the same holds for rights for different language versions.

VOD services and rights holders that want to make available the same digital content version to multiple territories may find this to be a laborious undertaking, as this rights fragmentation requires considerable clearing and negotiation efforts which lead to high transaction costs. Obstacles to the establishment of international services include: legal uncertainties regarding the licensing of VOD rights; the complexity of licensing processes; disparities in VAT rules; and other national regulations and policies (these issues will be examined in depth in Chapter IV).

These inefficiencies need to be addressed if international licensing is to grow. Otherwise there is a real danger that established global distribution platforms for digital content, i.e. those run by Apple (iTunes), Microsoft (Xbox Live Marketplace), Google (YouTube) and other international players, eventually decide not to buy licences for European catalogues. This could reduce Europe's opportunity to benefit from VOD.

As already indicated, and as further demonstrated in the economic analysis (Chapter III), the majority of European VOD platforms today focus on individual linguistic territories and therefore do not request international licences from rights holders. Nevertheless, consultations showed that some VOD providers expressed interest in acquiring international audiovisual licences in the future. These include Fastweb, TheAuteurs and Deutsche Telekom¹⁵². However, importantly with regard to this assignment, the current legal framework does not prevent any of these proposed international licensing deals (this will be further explored in Chapter IV).

Submissions by stakeholders from the audiovisual field (industry representatives, authors, public bodies) regarding the EC's recent Reflection Document on creative content in the digital single market argue that the main obstacles to a single European digital market are more economic and cultural than

151 Therefore, economies of scale and scope may exist between different technical version markets (theatrical, Pay-TV, DVD, VOD, free-TV etc.) in a given territory, but rarely exist between different territories.

152 Expressed during interviews conducted as part of this assignment. One platform that wishes to remain anonymous was interested in acquiring multi-territory licences for multiple niche markets across Europe. It wants to circumvent negotiations with different partners by approaching sales agents directly for unexploited dubbed versions, to then exploit these versions across Europe. However, for the moment, these examples remain rather isolated. While they do not represent the overall trends in VOD rights licensing they indicate that there may be an opportunity for more international licensing in the future.

legal¹⁵³. Indeed it seems that, for the moment, it is the lack of demand and therefore the lack of revenues from international licensing that is preventing cross-border services from developing (see economic analysis in Chapter III). According to the Association of Commercial Television (ACT) “*transfrontier distribution of content does take place – but only where there is a market for it*”¹⁵⁴. The British Screen Advisory Council (BSAC) does not believe “*that there is [...] an instant EU-wide demand for much audiovisual content. Demand often needs to be created and encouraged over time, and with regard to the nature of the target audience. Requiring all content online services to be accessible from all Member States would therefore make it much more difficult for those offering content online to maximise their revenues by matching services to audiences.*”¹⁵⁵.

Both Apple and Google have expressed the wish to have the opportunity to buy both territorial as well as pan-European licences in their responses to the issues paper of the EC, published as part of the EC Round Table on online commerce¹⁵⁶. However their comments primarily relate to music content and they did not submit comments on the Reflection Paper. As part of the consultation on the Reflection Paper their industry trade body, EDIMA, recognises that “*licences must reflect the need of the given business model and licensing terms must be commercial and market driven*”¹⁵⁷. In its contribution to the Round Table issues paper, EDIMA also supports a light-touch approach to regulation and recognises that the territorial exercise of copyright may sometimes yield the best results for the industry: “*...if a valid commercial reason does exist, such as monetization options which may exist in one Member State but not in others... it may be worth not undermining that opportunity*”¹⁵⁸.

This light-touch approach seems to be shared by Apple¹⁵⁹. To the authors of this study it therefore appears that when it comes to acquiring audiovisual rights, digital media companies are primarily concerned with ways to ease existing licensing and remuneration processes. Putting into question copyright territoriality is not their main concern and international licensing should – if at all – develop based on market needs.

This perspective is not shared by the Consumers Association BEUC which encourages the European Commission to take further action to enable the development of EU-wide licensing (not only in music but also in audiovisual). BEUC believes that the EU should seek to facilitate multi-territory licensing of online content, with the aim of enabling consumers across the EU to access content of their choice irrespective of their country of residence¹⁶⁰. However BEUC is short on propositions to achieve this.

The EBU, representing essentially public broadcasters, is the only organisation to make concrete proposals to ease the licensing process, essentially by proposing to adopt the country of origin principle in relation to certain forms of digital transmission. This proposal, as well as how and whether international licensing and the development of a digital single market could and should be further promoted by policy making, will be further examined in Chapter IV.

153 See for instance submissions by SAA, FERA, EUROKINEMA, ACT, BSAC, UK Film Council, Canal+.

154 See ACT submission on the Reflection Paper p. 2.

155 See BSAC submission on the Reflection Paper p. 10.

156 Google and Apple/iTunes statements to EC “issues paper” as part of the EC Round table on online commerce of DG Competition, 2009.

157 See EDIMA submission on the Reflection Paper p. 4.

158 EDIMA response to Round Table paper, available on http://ec.europa.eu/competition/consultations/2008_online_commerce/edima_contribution.pdf

159 Apple indicated during an interview that it did not ask for government intervention in audiovisual rights licensing for the moment.

160 See BEUC statement to the Reflection Paper. http://ec.europa.eu/avpolicy/docs/other_actions/col_2009/assoc/beuc_en.pdf (accessed February 2010).

Conclusions

There are many signs that the audiovisual industry is undergoing important changes due to the digital shift. The results of this development regarding the competitive position of different stakeholders remains to be seen.

Furthermore, it appears that the following VOD licensing trends currently characterise the European audiovisual sector:

- Territorial licensing prevails but international licensing may be requested by some – if few – VOD platforms in the future
- Rights are so far primarily sold on a non-exclusive basis (for older titles or titles that have not yet been exploited on VOD) or bundled with other exclusive distribution rights
- Short licensing terms (two to three years) prevail to enable rights holders to review their exploitation strategy in the future
- Both VOD platforms as well as original European rights holders would potentially benefit from more efficient audiovisual rights licensing practices – nationally and internationally
- Individual as well as collective solutions to facilitate easier rights identification and acquisition across borders are already emerging in the market.

The ability of the sector to flexibly and efficiently answer different licensing requirements is therefore important if it is to extract value from emerging digital content markets. In this context, rights management becomes increasingly important to enable the sector to successfully exploit creative content¹⁶¹. The industry is adapting its business practices to new market requirements.

Case Study on a European VOD platform: TheAuteurs¹⁶²

An example of an original European VOD platform that targets multiple territories is TheAuteurs.com. This platform relies on a partnership between a software company in Palo Alto and the French independent production, finance and sales company Celluloid Dreams, bridging the gap between EU rights holders and digital technology experts.

Their marketing is based on the mechanisms of social community websites such as Facebook and Twitter. The service involves virtual communities that allow users to share impressions, to comment on films and to recommend them to friends in order to create a network of users and drive the platform.

The company ideally wishes to make VOD titles available at a global level, without any territorial restrictions for consumers. For the moment, all the contracts are concluded on a non-exclusive basis, limited to one year running time, and based on a 50/50 split of revenues. Their rights acquisition strategy concentrates on purchasing territories and niche films that are not exploited on VOD. They

¹⁶¹ In this context, the audiovisual sector may be a model for how other knowledge-intensive markets in Europe's economy may evolve in the future.

¹⁶² Case study based on an interview held in April 2009 and the website <http://www.theauteurs.com/>

either buy rights directly from distributors on a territory-by-territory basis, or from sales companies or rights holders directly for unsold territories. The former allows them to acquire films in relevant language versions, while the latter requires them to finance the film's subtitling.

The constantly-changing catalogue comprises about 500 films at a time. Since the launch of the platform in November 2008, the subscribed membership has reached 58,000 in March 2009 and more than 220,000 in March 2010. In May 2010, the company announced a partnership with Sony to put its catalogue on Sony PlayStations in Europe, Scandinavia, Australia and New Zealand, under its new international brand 'Mubi.com'.

Case study: How the MEDIA Programme helps European film companies to adapt to the digital shift

The most important EU scheme in support of the audiovisual sector is MEDIA 2007 which aims to enhance European cultural diversity, increase the circulation of EU works and strengthen the sector's competitiveness¹⁶³. It combines € 755 million of funds for Europe's film industry over the years 2007 – 2013. The main priority of MEDIA is to support distribution related activities – slightly more than half of the programme's funds are allocated to this domain. For reasons outlined throughout this study, the box-office share of non-national films across the EU has remained relatively low despite this effort (approximately 8%).

MEDIA sees an opportunity to further promote the circulation of EU works by helping rights holders to make smart use of digital distribution. MEDIA 2007 includes a scheme that supports business-to-consumer VOD platforms as well as Digital Cinema Distribution (DCD) projects. Over the last three years, 22 VOD platforms and 2 DCD projects received a total amount of approximately € 18 million in co-financing. The scheme has in the past primarily benefited platforms that distribute content nationally. Its aim has been to promote the availability of European content on national VOD platforms rather than to get the national VOD platforms to work together to address international distribution. As most projects are still in an early stage of development it is too early to evaluate whether MEDIA's selection and support will have a real impact on each project's ability to expand beyond its home country. Only some platforms such as TheAuteurs, UniversCine and FIDD/Movieurope have recently started attempts to make available films across Europe.

However, MEDIA has already started to support collaboration between different platforms to address the challenge of a fragmented VOD market. The recently established EuroVOD network, which gathers UniversCiné (Belgium and France), Good!Movies (Germany), Volta (Ireland), Filmin (Spain), Blind Spot Pictures (Finland) and Bord Cadre Films (Switzerland), tries to address the challenge of networking existing initiatives. The project wants to pool costs, create a common catalogue and promote technical standardisation.

The separate MEDIA scheme for Pilot Projects (€ 2 million annual funding and up to 50% co-financing) has furthermore funded some projects (Pro2film and Glitner in particular) that aimed to foster

163 Decision No 1718/2006/EC of the European Parliament and of the Council of 15 November 2006 concerning the implementation of a programme of support for the European audiovisual sector (MEDIA 2007)

collaboration in the industry¹⁶⁴. The programme's new call for proposals (2010) may further fund similar projects (Distribution and Junction Media Portal).

Overall, one should note that the total level of funding made available for VOD, DCD and Pilot Projects is small in relation to the challenge at stake (on average € 6 million for VOD and DCD and € 2 million for Pilot Projects) – especially compared to MEDIA's total budget devoted to supporting international distribution (on average approximately € 60 million per year). Some recommendations concerning MEDIA's focus are included in the conclusions.

¹⁶⁴ See http://ec.europa.eu/information_society/media/newtech/pilot/list/index_en.htm for a complete list of supported projects

CHAPTER III

DEVELOPMENT OF DIGITAL TRADE OF AUDIOVISUAL WORKS IN THE EUROPEAN UNION: ECONOMIC ANALYSIS

The digital shift changes the dynamics of audiovisual content distribution, unsettles established market structures by allowing new players to enter the market, and potentially offers the European audiovisual industry the opportunity to access new markets. As was the case with satellite television, some believe that the emergence of VOD may contribute to unifying EU audiovisual content markets. This chapter examines whether market developments reflect this promise.

The VOD market is still in its infancy and as such is somewhat unstable, making it difficult to predict its future development. Many of the underlying business models of new services are not yet in sync with the economic fundamentals of the audiovisual sector described in Chapter II.

The aim of Chapter III is therefore to describe how VOD services are emerging across Europe and how high the level of demand for these services is. It will illustrate that the main obstacles preventing the full establishment of a European market for audiovisual content are above all economic and cultural.

Chapter III is structured around two questions:

- First, does available market data reflect the previously outlined promises of digital distribution in terms of VOD revenues and cross-border circulation of European works? (Section 3.1)
- Second, how would local as well as European VOD markets develop depending on a set of future scenarios (technological, economic and regulatory)? (Section 3.2)

3.1 Economic assessment of the potential development of digital trade of audiovisual works in the EU

If digital distribution is to really unlock the potential of the European internal market for audiovisual works, the value of the VOD market itself, as well as cross-border circulation of titles, needs to increase.

Section 3.1 will:

- systematically and quantitatively analyse the current state of the VOD market in the EU
- review the distribution and circulation of audiovisual works across the Union in order to assess the potential development of cross-border trade, bearing in mind the distinction between availability of VOD services and actual demand for these services

3.1.1 Analysing the emergence of VOD

The EU audiovisual market is not yet unified, a fact demonstrated by the economic structure of the sector and by the legislations and policies that shape audiovisual markets, and VOD is no exception, with markets differing significantly from one country to another.

National VOD markets and their developments are here described from both the supply and demand sides, and two typologies of VOD markets (according to their structure and their performance) are suggested. These typologies are important for this report because they provide foundations to further project the development of VOD over the next five to ten years (see Section 3.2).

3.1.1.1 Supply

Collected data describes an accurate picture of the supply side of VOD and related technical infrastructure roll-out in Europe. The proliferation of digital technology and equipment across the EU is briefly described, followed by an analysis of the relationship between the development of VOD offers and other national factors, including number of inhabitants per country and digital technology penetration per country. Finally, availability concerning the type of content (archive material, feature film, etc.) in relation to the service operators (internet, IPTV, cable, etc.) are briefly examined.

An uneven level of digital equipment across the EU

Roll-out and take up of digital infrastructure and technology is an important condition for the development of VOD, but on its own is not sufficient. A market that is too small (i.e. too few consumers are technically equipped to use VOD services) is not profitable enough to attract VOD service providers. The absence of a lively supply side, in turn, prevents consumers from trying out VOD services. However, if a critical mass of consumers can technically access VOD services, VOD service providers may be encouraged to enter the market which in turn raises consumers' interest for VOD services.

One of the few common characteristics of Europe's audiovisual industries is the high level of television sets, at over 95% of all households in every country¹⁶⁵. On the other hand, there are significant disparities concerning the number of channels available in each country¹⁶⁶. The size of the country has a big influence on this factor: the largest countries have the highest number of channels, while the smallest countries have the fewest channels available.

However, the language spoken in a given country (and culture more generally) also plays an important role in this context. For example, there are comparatively more channels available in Belgium due to the fact that several linguistic communities exist in the country¹⁶⁷. Moreover, Ireland tends to benefit from channels located in the United Kingdom, illustrating that a smaller country can receive a high number of television channels if it shares a common language with another country¹⁶⁸.

Significant differences remain concerning the penetration of digital television¹⁶⁹, which plays an important role in the success of IPTV as a delivery platform for VOD. A small number of countries have an equipment rate of over 70%: France, Spain, the United Kingdom and Finland. A second group includes Malta, Austria, Ireland and Sweden. An intermediate group includes the Netherlands,

165 See Appendices for detailed data.

166 See Appendices for detailed data.

167 In the same way there are several linguistic communities in Spain, which may have a positive impact on the number of TV channels.

168 According to data from the European Audiovisual Observatory more than 90% of channels available in Ireland are not located in the country itself.

169 See Appendices for detailed data.

Germany, Denmark and Italy. A further group that has less than 30% of digital television penetration rate includes Portugal, Poland, Latvia, Belgium, Romania and the Czech Republic. The lowest rate is reached in remaining Central and Eastern European countries, from Hungary to Lithuania.

The differences are less significant when it comes to personal computers¹⁷⁰. Bulgaria has a penetration rate of only 24% but all other countries are far above 30%. Western and Northern European countries are in advance with the notable exceptions of Estonia and Slovenia.

Penetration of broadband internet in 2009 reached an average of 56% (of households) at the European level¹⁷¹ to be compared with 63.5% in the US¹⁷². Northern and Western European countries perform better than the US, from Germany (65%) to Sweden (80%) and, in decreasing order, the Netherlands, Denmark, Finland, Sweden, Luxembourg, United Kingdom¹⁷³. The next group of countries has penetration rates ranging from 49% (Czech Republic) to 63% (Malta and Belgium), which includes Estonia, Austria, France, Slovenia, Ireland, Poland, Spain, Lithuania, Latvia. Remaining countries are Eastern and Southern European countries, including, again in decreasing order, Cyprus (47%), Portugal, Slovak Republic, Italy, Greece, Bulgaria, and Romania (24%).

Finally, regarding mobile communications, in 2008 more than 95% of the population in every EU country was covered, with an average of 99.4% at EU level to be compared with 99.8% in the US¹⁷⁴. However, there are greater disparities as far as mobile broadband subscription (GSM) is concerned¹⁷⁵. At European level 21.5% of all inhabitants subscribed to mobile broadband, compared to 26.5% in the US. The top group of countries outranks the US, from the United Kingdom (33.9%) to Luxembourg (82.6%), including Sweden, Spain, Portugal, Austria and Italy. Other countries above the European level include in decreasing order Cyprus (25.6%), the Netherlands, Finland, France, Slovenia and Germany (21.8%). Remaining countries include Denmark (18.9%), Estonia, Malta, Slovak Republic, Greece, Ireland, Latvia, Poland, Lithuania, Romania, Belgium, Hungary, Czech Republic and Bulgaria (2.4%). Finally 10.2% of the EU population were subscribers of 3G technology at the end of 2006, and the percentage of subscribers is positively correlated with the percentage for GSM¹⁷⁶.

Overall, Northern and Western European countries are more advanced in terms of digital equipment take up, with Central and Eastern European countries lagging behind. As will be illustrated, this has a crucial influence on the current shape of VOD markets in these countries.

Overall increase of the numbers of VOD service providers and services

VOD service providers

170 See Appendices for detailed data.

171 EUROSTAT (2009). Data in Focus: Internet usage in 2009 – Households and individuals, p.1

172 Digital Nation: 21st Century America's Progress Toward Universal Broadband Internet Access, An NTIA research Preview, U.S. Department of Commerce, February 2010,

173 See Appendices for detailed data.

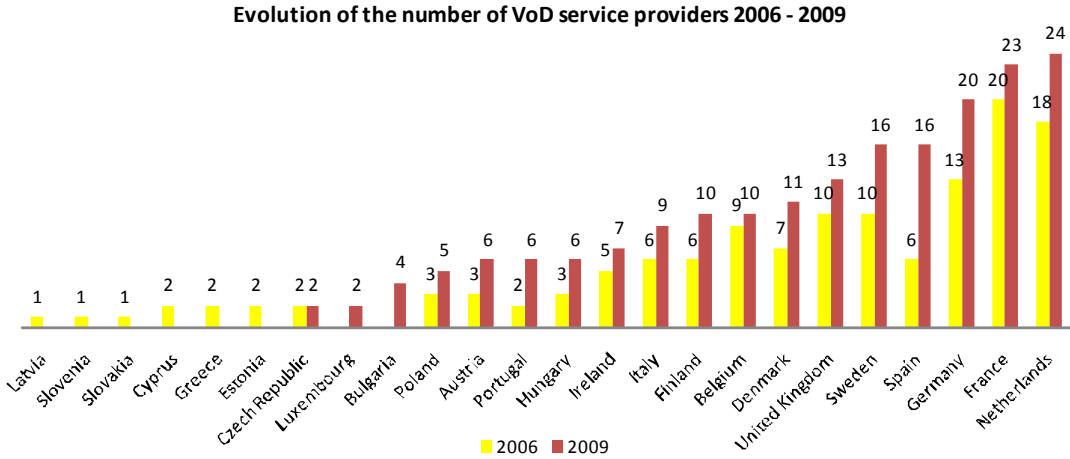
174 Source: IDATE.

175 Source: IDATE.

176 IDATE, Broadband Coverage in Europe. Final Report 2007 Survey, Data as of 31 December 2006, DG Info, October 2007.

The total number of VOD service providers in every EU country from 2006 to 2009 increased from 132 to 188¹⁷⁷. This rapid expansion shows that the VOD market is still in its development stage. Market entrants trying to sell telecommunications and internet services and to acquire subscribers are testing new technical solutions and business models. Economies of scale and scope may well later lead to a phase of market consolidation as was for example the case in the US cable industry¹⁷⁸.

There are substantial differences between countries in terms of the number of VOD providers. Countries with the greatest numbers of players either have a large population (e.g. France) or a high income per capita (e.g. the Netherlands). The number of VOD service providers also reflects the proliferation of digital technologies in a Member State. The markets with the greatest number of VOD service providers also have the highest penetration of broadband internet, with the exceptions of Spain (medium penetration but great number of providers) and Luxembourg (high penetration but low number of providers). Similarly, the countries that have the highest penetration of digital television also have the greatest number of providers.



Sources: NPA, IFTA.

The nature of VOD service providers differs according to a country’s profile. Emerging VOD markets are generally dominated by firms that own or manage physical infrastructures, i.e. by telecommunications,

177 Sources: NPA for 2006 and IFTA for 2009. These numbers are, however, not directly comparable because of differing methodologies used by NPA and IFTA. The same problem exists for the number of VOD services. Another option was to compare 2006 data provided by the NPA with December 2008 data provided by the European Audiovisual Observatory. However the EAO changed its methodology for the 2008 data, making it also not comparable with NPA data.

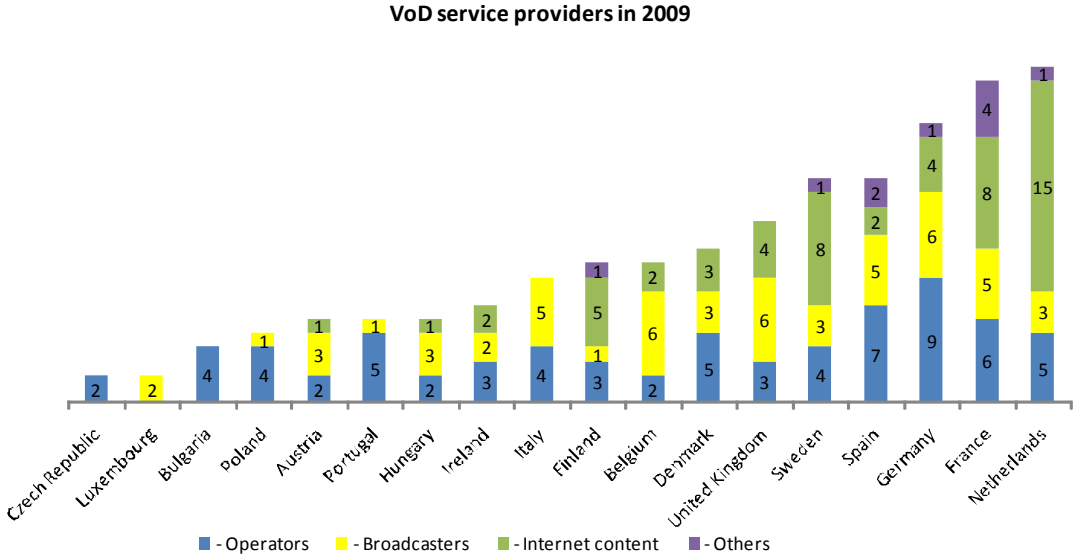
In fact IFTA data was found to be more consistent with data from previous years. For example the number of VOD services increased from 132 in 2006 (NPA); to 172 at the end of 2007 (NPA, without the catch-up services); to 196 in 2009 (IFTA). This should be compared with the total number of services according to the EAO (643 in 2008 for EU countries), corresponding to an increase of around 400% in two years.

The significant difference in number of VOD services according to IFTA (196) against the figure given by the EAO (696) requires explanation. Mainly it is because the EAO includes more kinds of services, notably pure catch-up television services and paid services offering access on demand to live or time-shifted transmissions of sports events. The EAO report also surveys more countries, including non-EU countries (e.g. Switzerland, Russia). When all non-EU countries are removed the EAO counts 643 VOD services. Finally the EAO report describes the number of services available in each country, which “leads to the double counting of some services available in the same language version in several countries” (EAO, 2009, p.111).

178 Mariet, François (1990), La Télévision Américaine. Médias, Marketing et Publicité, Economica

cable and satellite operators. This is the case in the Czech Republic (e.g. the international cable operator Liberty Global) or Bulgaria (e.g. the telecommunications company Vestitel BG). In intermediate markets the broadcasters play a greater role, such as in Hungary (e.g. the commercial television channel RTL Klub) or Austria (e.g. the public-service German television channel ZDF).

In those cases the broadcasters rely on their existing reputation and skills in exploiting audiovisual content to provide their own VOD services. In the most developed markets, however, more pure VOD players¹⁷⁹ are present, such as in France (e.g. Glowria – now Video Futur). In some cases pure VOD players can even be the most numerous in the market, such as in the Netherlands.



Source: IFTA

Crucially, different kinds of service providers tend to provide different kinds of content. A recent study¹⁸⁰ shows that pure VOD players are more likely to offer archive content and feature films, since it is hard for them to access more recent titles¹⁸¹. On the other hand, broadcasters' VOD services are more likely to offer catch-up and live programmes as well as sport and news. This shows that the market is still in its infancy: on the one hand new entrants have no access to content, on the other hand broadcasters are recycling their rights.

Furthermore, rights holders are waiting for the VOD market to provide them with reliable and more substantial additional revenues before becoming really active in the market. VOD revenues so far remain marginal and are seen as a supplemental, rather than core, source of income. For ISPs VOD enlarges the set of services they can offer to their customers. For broadcasters it adds new audiences for content which they already own the rights to.

179 The notion of 'pure VOD players' here includes also equipment manufacturers (e.g. Apple). It corresponds to what IFTA names 'Internet content aggregators' (or providers).

180 Study on the application of measures concerning the promotion of the distribution and production of European works in audiovisual media services, Study for the European Commission, May 2009

181 Archives and feature films in turn represent a significant share of consumption.

Catalogue of titles by VOD service: a few examples

Spanish Filmotech.com offered 215 Spanish feature films in 2007. Since its creation, its catalogue has steadily grown and includes more and more European and Latino-American content. Some 1,190 films were accessible in February 2010 in Spain, and some 670 in other countries.

Apple's i-Tunes, the biggest online platform for music, launched its digital movie platform in 2005, offering today over 40,000 television episodes, and over 5,000 movies on demand. It has not launched its services on a pan-European scale so far.

The international platform Jaman, launched in 2007, offers more than 4,500 films and series from independent producers on a platform that operates internationally.

Amazon.com also offers a VOD service including thousands of titles. The service is offered in the US only. There are around 43,000 titles on offer available for the US (sale and rent). The offer includes essentially back catalogue titles – DRM encoded.

CanalPlay (a service provided by the French pay television channel Canal Plus) offers 6,000 titles, half of which are feature films, the rest are adult content, series and children programmes.

The broadcaster Arte has the ambition to develop a European VOD offer (although somewhat limited to German/French titles). Today it offers around 1,700 titles on its French online service on the open internet (including 680 feature films and 980 documentaries). This service has been launched in 2006 with 350 titles in France. 54% of these are documentaries, 26% are films, 17% are magazine titles and 3% are recordings of performing arts events. The German VOD website (launched early 2008) currently offers 200 programmes in German. 83% of its catalogue is made up of French works. Arte makes available around 400 titles on several closed-circuit VOD platforms (Virgin Media, Imineo, i-Tunes, Numericable, Alice), a market which it considers to be crucial for the development of VOD in the coming years.

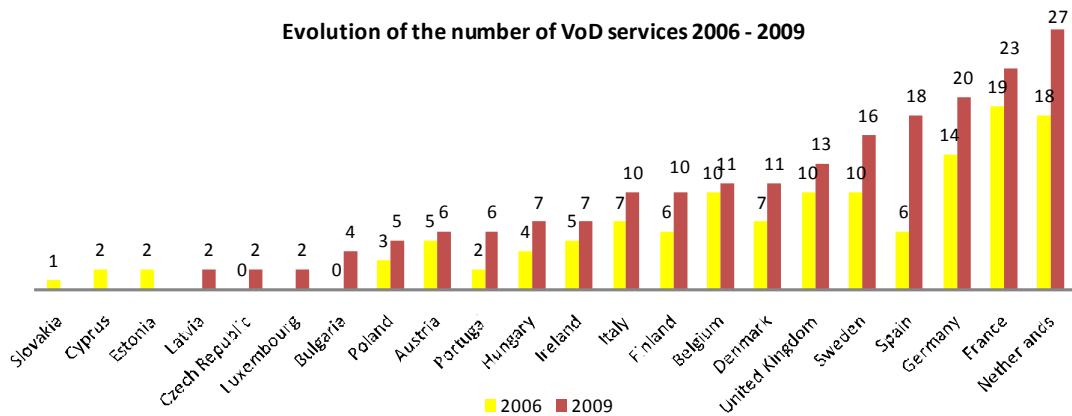
Recent research commissioned by the CNC analysing the VOD offer of eight selected platforms in France showed that these platforms together made available 4800 feature films. This compared with 748 films one year before and indicates a growth of 18,2% for the selected platforms. Interestingly, the availability of French films increased at a higher rate than that of US films¹⁸².

VOD services

The evolution of the number of VOD services reflects that of the number of VOD service providers, i.e. there has been an overall increase in the number of VOD services¹⁸³. The factors in favour of a higher number of VOD services are the same: the population of the country; the level of income per capita; and the level of development of digital technological infrastructure.

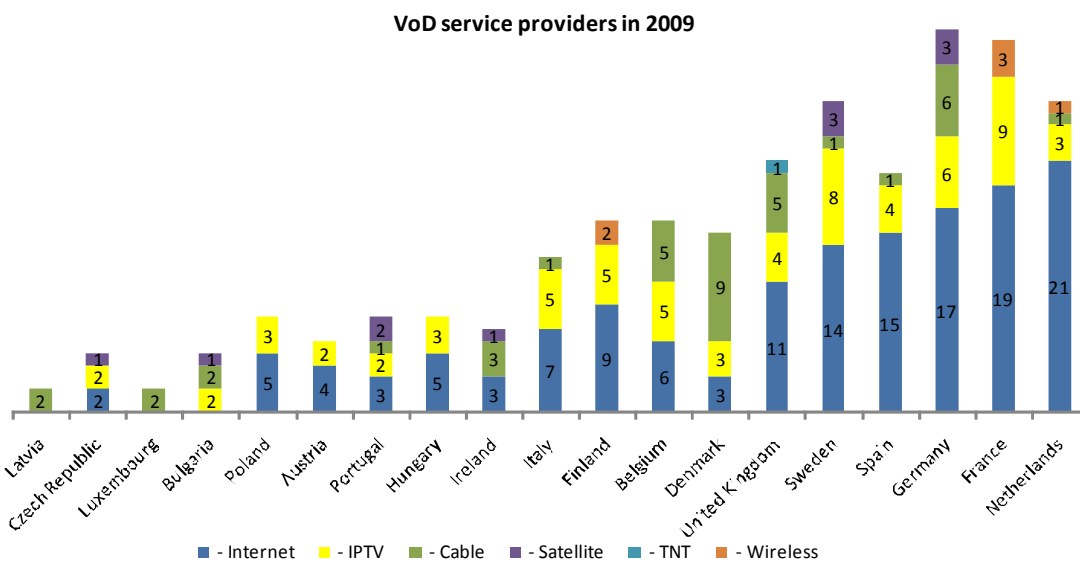
182 See : NPA. Enjeux strategiques de marche VOD. Study for the CNC. Edition 2010

183 As confirmed by the EAO study. The numbers may differ slightly since some VOD service providers may provide two or more different services.



Sources: NPA, IFTA.

In most countries, the internet is the VOD delivery platform that is used by the greatest number of VOD service providers. This is particularly the case in countries with the most VOD service providers in general¹⁸⁴. Conversely, only a limited number of VOD service providers rely on TNT, wireless and satellite for VOD. One reason for this may be that market entrance on the internet is far easier than on any other platform. On the other hand, and as will be illustrated further below, VOD services on the internet do not create as much revenue as services delivered via IPTV.

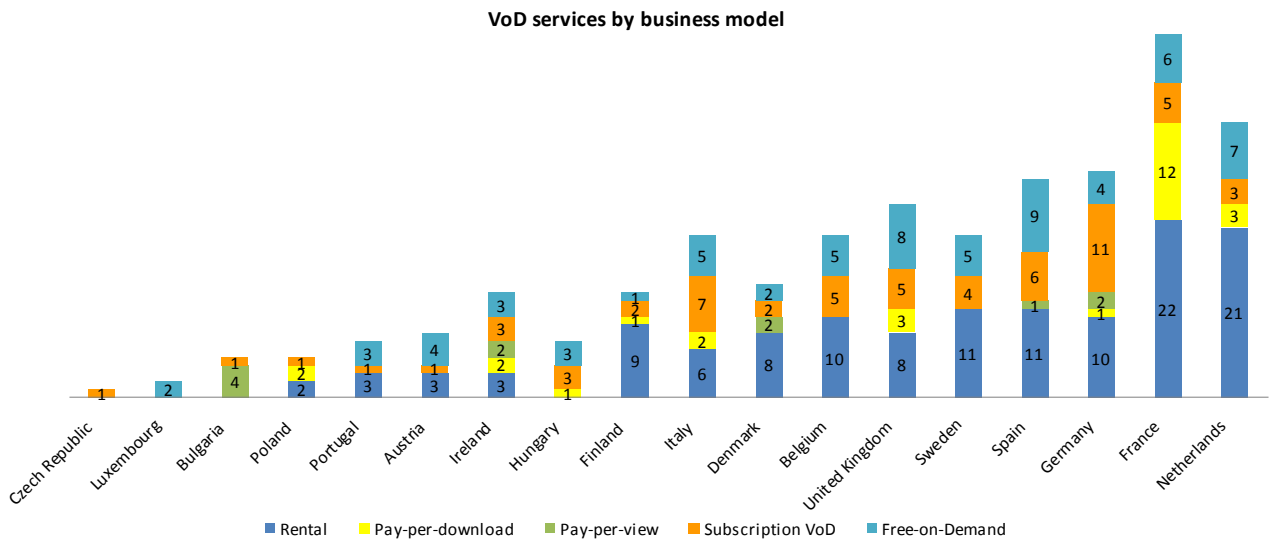


Source: IFTA

The business models that are used by these players and more precisely the kind of services they offer are also key factors¹⁸⁵. Rental is the business model that is chosen by most VOD services, with these services resembling dematerialised video stores. However, this is far from being the only possible model – Free-on-Demand is also present, as well as Subscription VOD to a lesser extent. This is contrasted with an increasing importance of SVOD in revenues (see Section 3.1.1.2).

184 There can be more delivery platforms than services because some services are available through various delivery platforms.

185 There can be more business models than services because some services rely on various business models. See Appendices for additional data on the spreading of content among various business models.



Source: IFTA (data is for 2009)

Summary Findings

In conclusion, national VOD markets are at different stages of VOD deployment. The following dynamics can be observed:

- The first actors to enter VOD markets are those that own or manage physical distribution infrastructure, i.e. telecommunication, cable and satellite operators.
- The second actors to enter are broadcasters. They build on their experience concerning publishing and marketing content, and most of all on the power of their brand. Broadcasters export their brands' reputation to digital markets. Moreover, they benefit from economies of scale since they already own rights for the content they broadcast.
- The market needs to be more developed for new actors (either pure VOD players or equipment manufacturers, or others) to emerge, which may include more entrants in the audiovisual industry (e.g. Apple with iTunes). Only when the market has reached a critical size does it become attractive for these actors to make the investments needed to enter the market. The issue for these new players is that they usually have to invest in creating a local brand, unlike broadcasters and telecommunications operators.

3.1.1.2 Demand

Given that the offer of VOD services across the European Union has significantly increased, Section 3.1.1.2 examines whether this is also the case for levels of consumption. The analysis relies on data provided by Screen Digest¹⁸⁶. This data draws a distinction between, on the one hand Rental & EST

¹⁸⁶ The data however seem to be focused on television and neglect the internet, possibly due to difficulties in collecting data. On the other hand, data provided by other sources (including EAO, CNC, UK Film Council) show that there may not be such a significant difference in terms of VOD turnover when one includes revenues derived from the internet. In France the share of IPTV among all pay VOD transactions increased from 85.2% (23.8M€) in

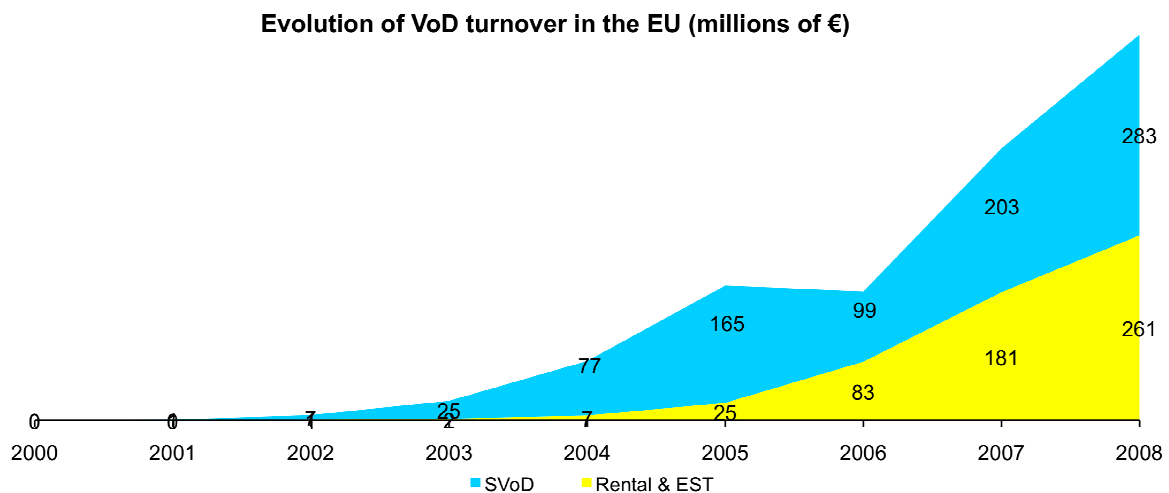
and on the other hand SVOD¹⁸⁷.. This is done by analysing the development of VOD turnover in different Member States.

In spite of an overall increase of VOD markets, VOD still remains marginal in terms of generated revenues.

The growing importance of VOD

The data shows a strong increase of VOD in the EU since its emergence around 2000. In 2008 the EU VOD market represented a total turnover of € 644 million, and had increased by 250% in two years.

Rental & EST on the one hand, and SVOD on the other hand, have similar sizes at EU level. There can, however, be significant differences between countries in their relative importance¹⁸⁸.



The trends in this graph are confirmed and reinforced by data provided by other sources, notably data provided by the EAO¹⁸⁹ shows that from 2007 to 2008:

- VOD’s turnover increased by 33% in the US
- Household expenditure on VOD increased by 82.8% in France – according to the CNC the number of transactions increased from 8.4 million in 2007 to 13.9 million in 2008
- nVOD and VOD revenues increased by 30.4% in the UK

2007 to 90.7% (46.7M€) in 2008 (Source: CNC). In the UK the online VOD market represented in 2008 6.2M€, to be compared with 114M€ for television-based VOD and nVOD (source: UK Film Council – this concerns only films and not all audiovisual content). In the US VOD on the internet represented 11.8% of all VOD revenues (source: EAO).

187 SVOD includes what Screen Digest names as “other on-demand”, i.e. all on-demand monthly access fees; monthly fees for subscription on-demand services, PVR monthly access fees and on-demand season ticket subscriptions. Please note that this definition of SVOD is relevant only for data provided by Screen Digest.

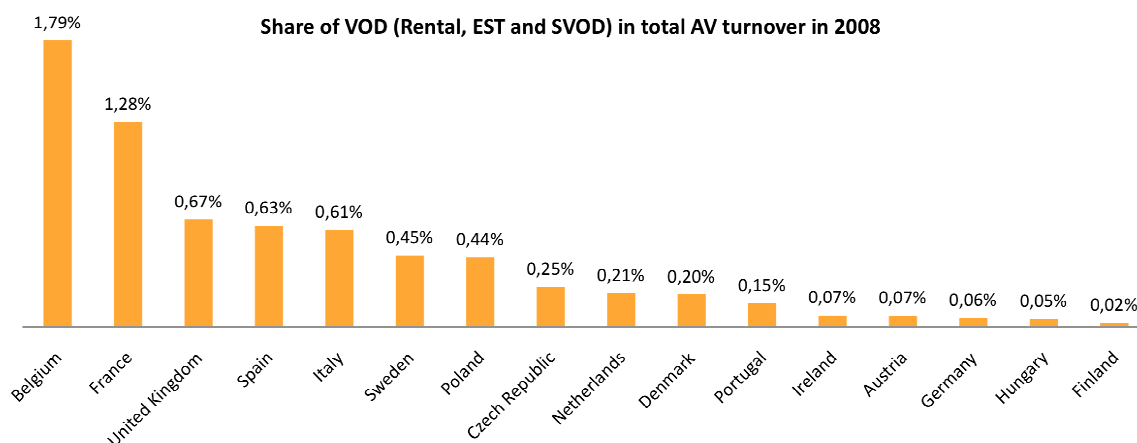
188 See Appendices for a comparison of nVOD, Rental & EST, and SVOD turnovers by country.

189 EAO, Video on demand and catch-up television in Europe, 2009. Op.cit.

- Pay-per-view and VOD revenues increased by 7.1% in Spain

VOD revenues remain marginal

Despite this growth in turnover in the VOD markets, VOD remains very small when compared to audiovisual markets in general, as shown by the following data provided by Screen Digest. This again confirms that the VOD market is still in its infancy.



Source: Screen Digest

The fact that VOD remains marginal in terms of total turnover is also confirmed by data provided by other sources, notably by the EAO¹⁹⁰, which shows that in 2008:

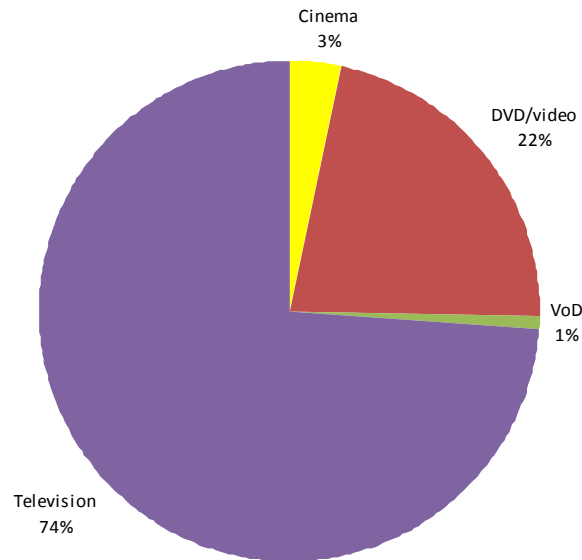
- VOD represented 8.7% of video's turnover in the US
- VOD represented 3.6% of household expenditure on video in France, i.e. 0.7% of household expenditure on audiovisual programmes
- nVOD and VOD represented 6.7% of the film industry revenues derived from video in the UK, i.e. 3.2% of the film industry revenues
- Pay-per-view and VOD represented 33.6% of the video revenues in Spain, i.e. 3.6% of the revenues of the audiovisual industry
- VOD represented 0.5% of all video expenditures in Italy
- VOD represented less than 0.55% of television revenues in the EU in 2008¹⁹¹

This still limited importance of VOD in turnover is also reflected in terms of audience share. As shown in the next graph, VOD represented only 1% of overall film audience in the UK in 2008.

190 EAO, Video on demand and catch-up television in Europe, 2009. Op.cit.

191 Study on the application of measures concerning the promotion of the distribution and production of European works in audiovisual media services, Study for the European Commission, May 2009, Op.cit.

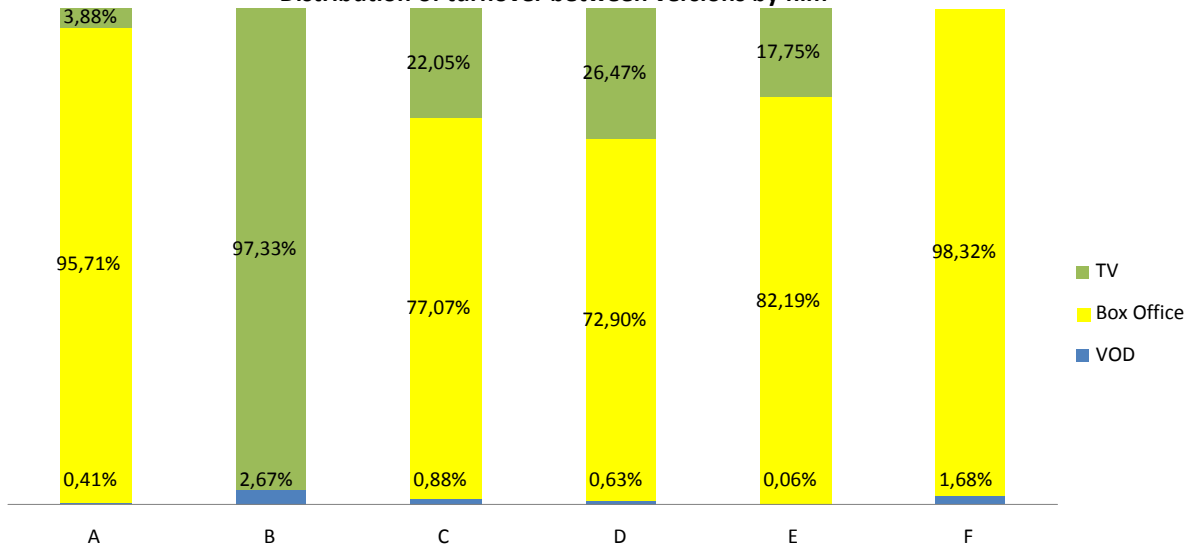
Distribution of film audience in the UK in 2008



Source: UK Film Council.

Data on our sample of films, collected from audiovisual distributors to analyse each work's turnover in different technical and geographical version markets, confirms the relevance of the macro-data¹⁹². Thus for films A to F, VOD represented less than 3% of turnover resulting from their exploitation in France¹⁹³.

Distribution of turnover between versions by film

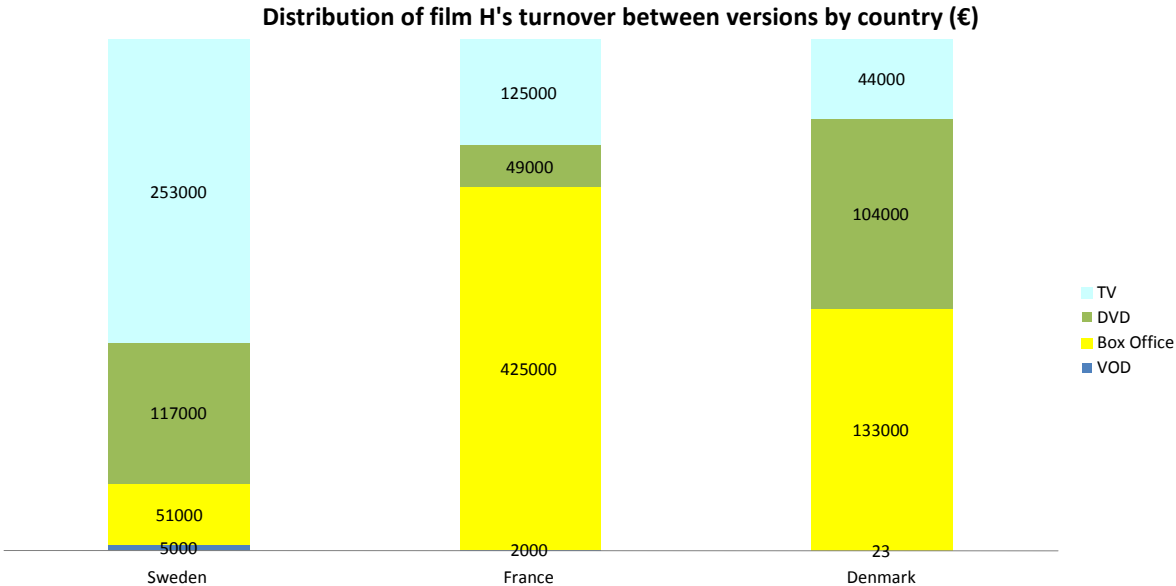


Sources: film distributors

192 See appendices for a detailed methodology concerning the collection of this data

193 These findings exclude video since no data on video could be found.

Similar results can be found for the exploitation of film H in three different EU countries (France, Denmark, and Sweden). The data illustrates that the VOD market is far from being sufficient to recoup production or even distribution costs¹⁹⁴.



Sources: film distributors

3.1.1.3 A typology of EU VOD markets

In Section 3.1.1.3 two typologies of national VOD markets are proposed, to allow comparison between different VOD markets and an analysis of the basis for similarities and differences¹⁹⁵. The typologies also provide a description of the level of development reached by each market.

The typologies described here have informed the projections made later in this report regarding the development of VOD in the next five to ten years (see Section 3.2). These typologies rely on the current state of VOD markets, and reflect the structure of the VOD markets on the one hand, and the performance of the VOD markets on the other. They were developed using clustering methods¹⁹⁶. Clustering is used in various fields, including data mining. The aim of this statistical method is to find systematic similarities between different elements of a system.

The first typology classifies countries according to their structure, e.g. the nature of VOD services and VOD service providers¹⁹⁷. Our statistical approach provides a distinction between two groups of countries based on:

- the number of broadcasters that provide VOD services and,

194 See Appendices.
 195 Here the number of broadcasters (among VOD service providers) is found to be significantly different in the first typology according to the group of countries while a ‘human’ observation could not provide such a result.
 196 See a description of the methodology and the detailed list of variables in the Appendices.
 197 See the detailed list of variables in the Appendices.

– the number of rental services among all VOD services

The manner in which the audiovisual markets are shaped influences the way the VOD markets are shaped, so that countries that have similar audiovisual market structures and performances also tend to have VOD market structures in common¹⁹⁸.

Table: A typology of EU VOD markets according to their structure¹⁹⁹

Group	Countries	Characteristics
1	<i>Belgium</i> <i>France</i> Germany Italy Spain <i>Sweden</i> United Kingdom	Significantly higher number of broadcasters among VOD service providers, and a high number of rental services among VOD services
2	<i>Austria</i> Bulgaria Czech Republic Hungary Ireland Luxembourg Poland Portugal	Significantly lower number of broadcasters among VOD service providers, and a low number of rental services among VOD services

The second typology distinguishes between two groups of countries according to their performance, e.g. the turnover and Average Revenue Per User (ARPU), according to the business model or the delivery platform²⁰⁰. Unlike the previous typology, there is little correlation between VOD performance and the structure or performance of audiovisual markets. This means that countries that have similar audiovisual market structures and performances do not necessarily tend to have similar VOD market performances²⁰¹. One reason for this may be that these markets are still emerging and are relatively unstable, making it difficult to predict the impacts of these early trends on the future organisation of a more consolidated audiovisual market.

198 This is confirmed by an analysis of audiovisual performance and the VOD market against audiovisual structure and the VOD market, see Appendices for the corresponding Spearman matrix.

199 Due to a lack of data we were not able to use the clustering method for all EU countries. Instead some countries were added to either one of the groups by looking at existing incomplete data on the number of broadcasters and of rental services. Those added countries are italicised.

200 See the detailed list of variables in the Appendices.

201 This is confirmed by an analysis of audiovisual performance and the VOD market against audiovisual structure and the VOD market, see Appendices for the corresponding Spearman matrixAppendices

Table: A typology of EU VOD markets according to their performance²⁰²

Group	Countries			Characteristics
1	France United Kingdom	Italy	Spain	Significantly higher turnover for distribution through satellite; significantly higher ARPU for SVOD
2	Austria Denmark Germany Ireland Poland <i>Slovakia</i>	Belgium <i>Estonia</i> <i>Greece</i> Luxembourg Portugal <i>Slovenia</i>	Czech Republic Finland Hungary Netherlands <i>Romania</i> Sweden	Significantly lower turnover for distribution through satellite; significantly lower ARPU for SVOD

3.1.2 The circulation of audiovisual works in the EU and potential implications for the digital circulation of audiovisual works

Section 3.1.2 examines the level of cross-border circulation of European works in the internal market. Promoting such circulation is one of the key objectives of European audiovisual policy. The European Commission assumes that digital distribution can enable the development of the internal market for audiovisual works, which – so far – has not fully emerged. It also believes that more international licensing can accelerate this development. The tender specifications for the present report consequently ask for a projection of how the internal market for digital audiovisual content will develop according to a number of given technical and regulatory scenarios.

Section 3.1.2 will look at the circulation of audiovisual works in the EU, firstly in terms of the development of offline markets (i.e. theatrical distribution, DVD), then with a focus on VOD²⁰³. Subsequently, two issues that would be directly impacted by increased international licensing, i.e. local distribution and reduction of distribution costs, are further analysed.

3.1.2.1 The circulation of audiovisual works in theatres and on video

Every national audiovisual market in the EU has grown depending on a number of factors inherent to each market. The industry's infrastructure in terms of production and distribution is a reflection of each market's size, its regulation, its technological infrastructure and – importantly – the linguistic and cultural preferences of its audience (see Section 2.1).

In Europe, local films are essentially made for a local audience, and the way these films are financed does not always favour their exploitation at the international level. This is because most EU films are publicly funded, supported by local or national stakeholders and public funds, which are primarily

²⁰² Due to a lack of data it was not possible to use the clustering method for all EU countries. Instead some countries were added to either one of the groups by looking at existing incomplete data on the number of broadcasters and of rental services. Those added countries are italicised.

²⁰³ It was not possible to analyse the circulation of EU audiovisual works which takes place without the authorisation of their rights holders, e.g. on peer-to-peer networks. This is mainly due to a lack of data. More generally while such data might have provided information on a potential and unsatisfied demand for AV works from other EU countries, it is hard to estimate what proportion of such a potential demand would be ready to consume content through more legal means.

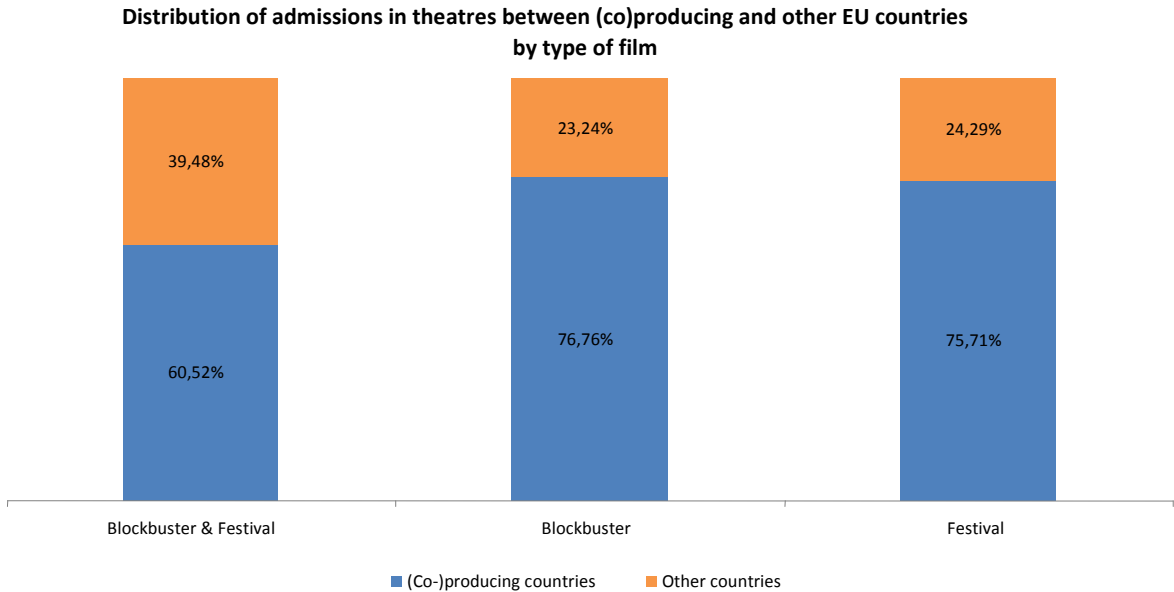
interested in growing domestic markets (see Chapters II and IV). This has implications for the circulation of works across borders. Some countries resemble each other more than others in terms of their ability to access international audiovisual markets. This is illustrated by analysing the circulation patterns across the EU of the previously-mentioned sample of films.

The circulation of films in theatres – individual data

The analysis starts with the sample of EU films produced between 2004 and 2006 and looks at how films circulate in other EU countries²⁰⁴. Are there differences between the films as far as consumption in other EU countries is concerned?

The most obvious result is that EU films succeed above all in their country of origin. On average the country of origin represents more than 70% of all admissions. Furthermore, it is possible to draw a distinction between films according to, on the one hand, the type of film (i.e. blockbuster, festival or both) and, on the other hand, the country of origin (i.e. France, The UK, Hungary, Spain, Denmark or co-productions involving several countries of origin)²⁰⁵.

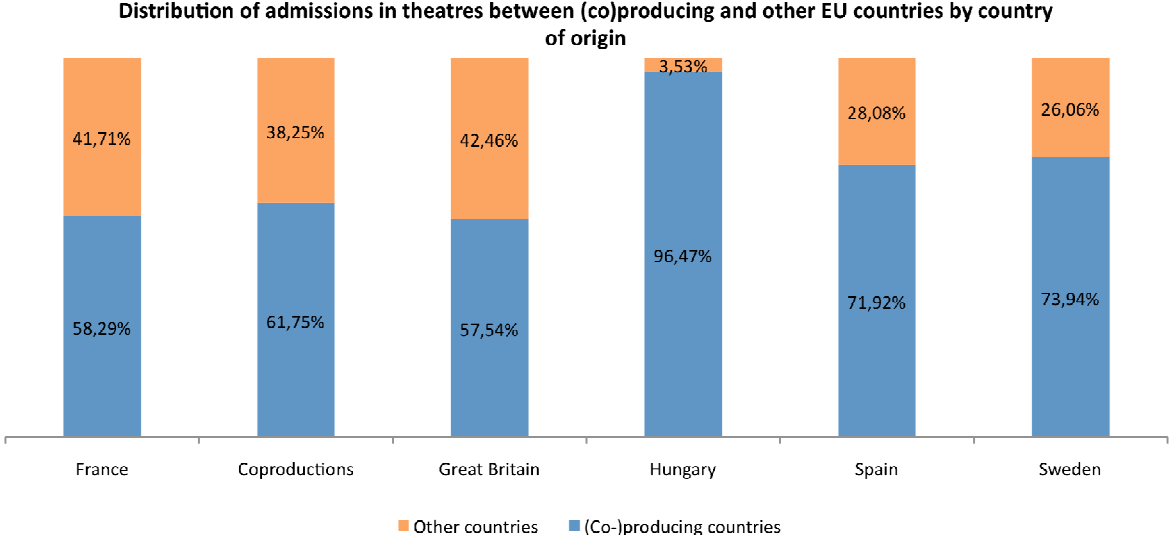
Films that are classified as both blockbusters and festival films are more likely to be consumed outside their country (or countries) of origin, compared to those considered to be either blockbusters or festival films. For the former, admissions in the country of origin represent around 60% of all admissions in the EU on average (against around 77% for blockbusters and 76% for festival films).



Source: film distributors, EAO

204 A distinction is made in this subsection between (co-)producing countries and other countries. It was unfortunately impossible to get consistent data on the consumption in other markets (e.g. the US market).
 205 Danish films here are in fact always co-productions between Denmark and Sweden.

The analysis by country shows significant differences according to the country of origin. Films made in France, in the UK, or co-productions between several EU countries (e.g. the UK, France and Italy; France and Switzerland) circulate more than films made in Spain or co-productions between Denmark and Sweden. Hungarian films are the least consumed outside their country of origin.



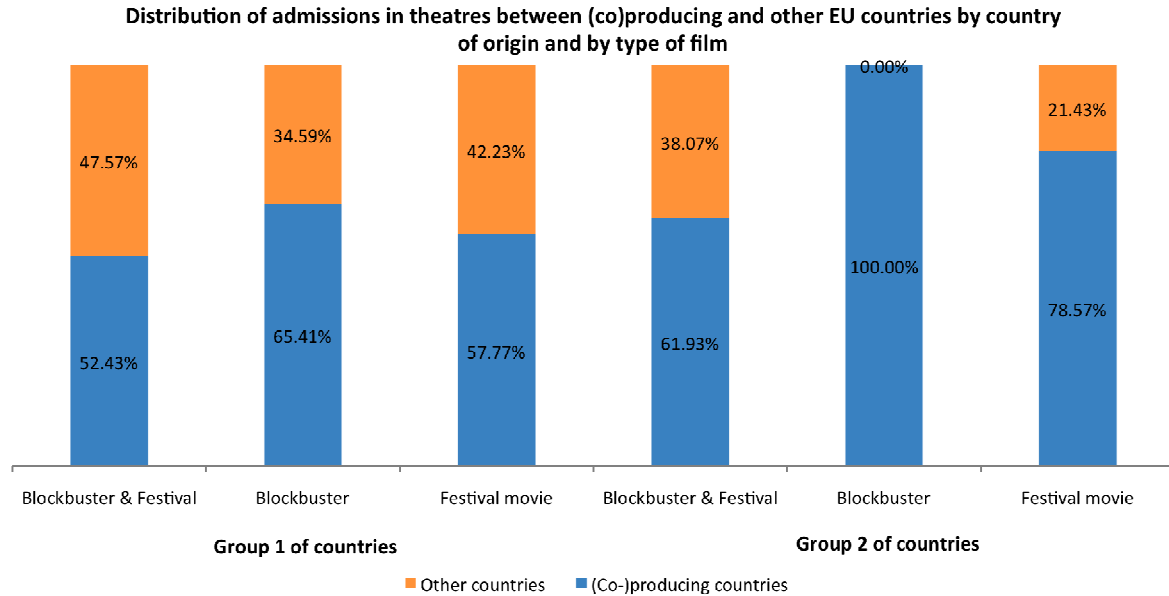
Source: film distributors, EAO²⁰⁶

A final analysis crosses both views and brings more refined results. First, previous results are confirmed regarding the kinds of films most likely to succeed in international markets (blockbusters and festival films), as well as the countries of origin most likely to produce internationally successful films.

Furthermore, festival films are more likely to be consumed outside of their country of origin than local blockbusters, whatever the group of countries. This, moreover, is confirmed by a study made by the FIAD, which showed that EU films that were awarded at one of the major film festivals were often co-productions and were – also because of this award – more likely to be screened and seen all across the EU. Overall, however, exploitation beyond national boundaries remains limited, so that, on average, the country (or countries) of origin represent more than half of admissions²⁰⁷.

206 'Co-productions' stands for co-productions between more than one EU country (except for co-productions between Denmark and Sweden). For example one film in this category was produced through a collaboration between German, Spanish and French producers. Films produced by Sweden are generally co-productions between Sweden and Denmark.

207 There is a lack of data on whether such outside exploitation is profitable, and for which actor of the value chain, and such an analysis falls outside of the scope of the current assignment.



Source: film distributors, EAO²⁰⁸

The circulation of films in theatres – macro-data

The production and consumption of films at the national level is now considered using data provided by the EAO²⁰⁹. For every country the origin of the films made available in theatres, and the resulting market shares of films according to their origin, was considered. EAO data distinguishes between four origins: national, US, European (which excludes national) and other. This distinction is kept when possible throughout the rest of the analysis of the circulation of audiovisual works.

The first finding is that more populated countries tend to have higher production levels or output, whereas small countries do not. France, Germany, Spain, Italy and the UK produce significantly more films than any other European country, while every other EU country produced fewer than 50 films in 2007. The most successful national film industries (in terms of domestic market shares) do not necessarily correspond to the largest countries²¹⁰. In any case, the market share of national films was always far below 40% in 2007.

The number of European first-time release feature films also greatly differs between countries²¹¹. Two factors can be identified: the size of the country (large countries import more films in absolute terms) and language.

208 Group 1 includes France, the UK and productions which have several co-producing countries. Group 2 includes Spain and co-productions between Denmark and Sweden. Hungarian films were not included because in every case they are viewed mainly in Hungary without distinction between the various types of films identified here. In Hungary local market share equals in average 96.47%.

209 See Appendices for detailed data.

210 Source: European Audiovisual Observatory. See Appendices for detailed data.

211 See Appendices for detailed data.

EAO data shows that the greatest consumers of films produced in other EU countries are the countries that share their official language(s) with bigger countries (e.g. Belgium, Austria)²¹², while the market share of films from other EU countries is the lowest in the largest countries (e.g. in the UK).

For example, Belgium imports far more European films (315 films in 2007), probably as a result of the fact that its official languages are Dutch, French and German and so it will import films from France, Germany and the Netherlands. Belgium is also the EU country where the greatest number of films are released (716 films in 2007) despite the low number of local films released. Similarly, a high number of films are imported from the rest of Europe by Austria and Luxemburg.

According to EAO data, Belgium is also the highest importer of first-time release feature films from outside Europe, followed by the large countries (the UK, Spain, France and Germany).²¹³ In the end this corresponds to a high share of non-European films among all films released in every EU country – predominantly US films. Moreover, the market share of US films is even greater than the proportion of US films among all released films. This market share is over 40% in every EU country and exceeds 60% in a significant majority of them²¹⁴.

The circulation of films on video

Data on the circulation of video is available for France only and is provided by the CNC.

US films represent slightly less than half of all available titles, but around 63% of sales in value. EU films (excluding French) represent 13% of all available titles but only 10% of sales²¹⁵. This data will be compared with theatrical distribution and VOD data in Section 3.1.2.2.

The distribution of market shares for films on video by origin is more or less the same for all kinds of retail outlets²¹⁶. This is all the more surprising as one might have expected a different profile for internet sales, where outlets have lower fixed costs.

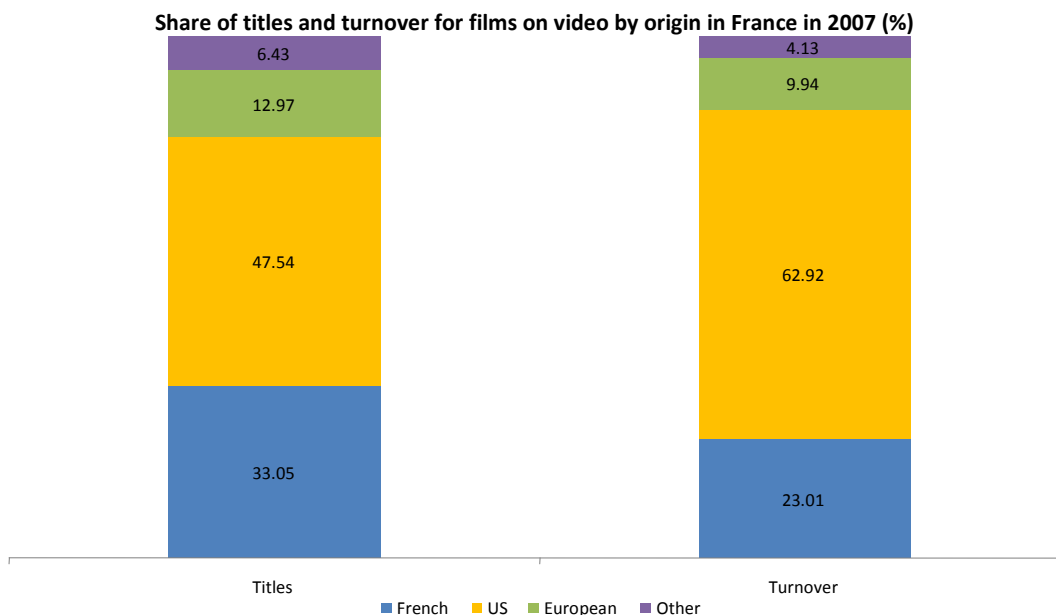
212 See Appendices for detailed data.

213 See Appendices for detailed data.

214 See Appendices for detailed data.

215 These figures have remained stable since 2004, see Appendices for detailed data.

216 See Appendices for detailed data.



Source: CNC.

In conclusion, analysis of the circulation of audiovisual works in theatres and on video shows significant disparities between EU countries in terms of:

- the share of titles (among all films available) and market shares of national films;
- the share of titles (among all films available) and market shares of EU (excluding national) films; and
- the ability of countries' films to circulate in other EU countries

US films continue to dominate the market in most EU countries, not only in share of titles but even more in terms of consumption. This is the case for theatrical distribution and for video (in the French case). Section 3.1.2.2 examines the same issue with regard to VOD.

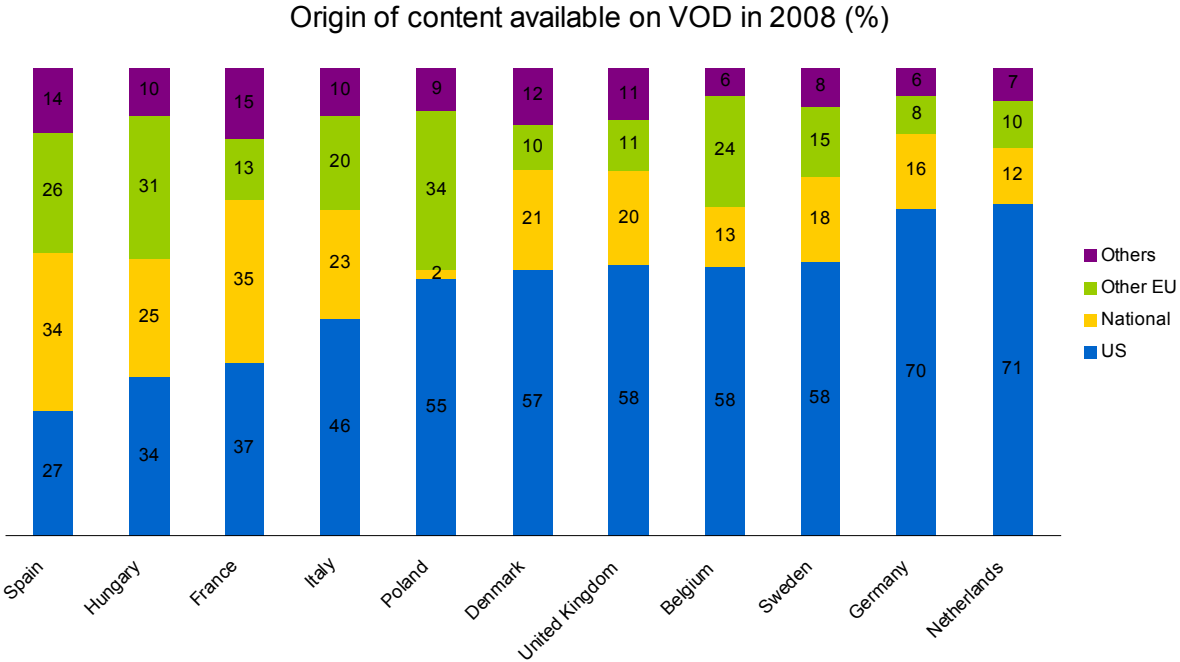
3.1.2.2 The circulation of audiovisual works on VOD

Section 3.1.2.2 examines the circulation of audiovisual works on VOD. Limited data is available on the cross-border circulation of VOD titles at European or national levels. The data which does exist is analysed in detail by distinguishing supply (i.e. what is made available) and demand (i.e. what is actually consumed).

The origin of content that is available in theatres or on video differs significantly from what is made available on VOD services. In the same way, the origin of content that is consumed differs according to the version. However, so far, the existence of VOD services has not resulted in an increase in EU content (relative to other content) being made available or consumed than other versions.

The availability of national and EU titles on VOD services

Data provided by the NPA shows that US audiovisual content represents between 27% (Spain) to 71% (Netherlands) of content available on VOD services in European countries. The share of local content varies from 2% (Poland) to 35% (France), while the share of other EU content from 8% (Germany) to 34% (Poland). The significant differences between countries, in terms of the origin of audiovisual content, also exist at the VOD service level (see following Box).

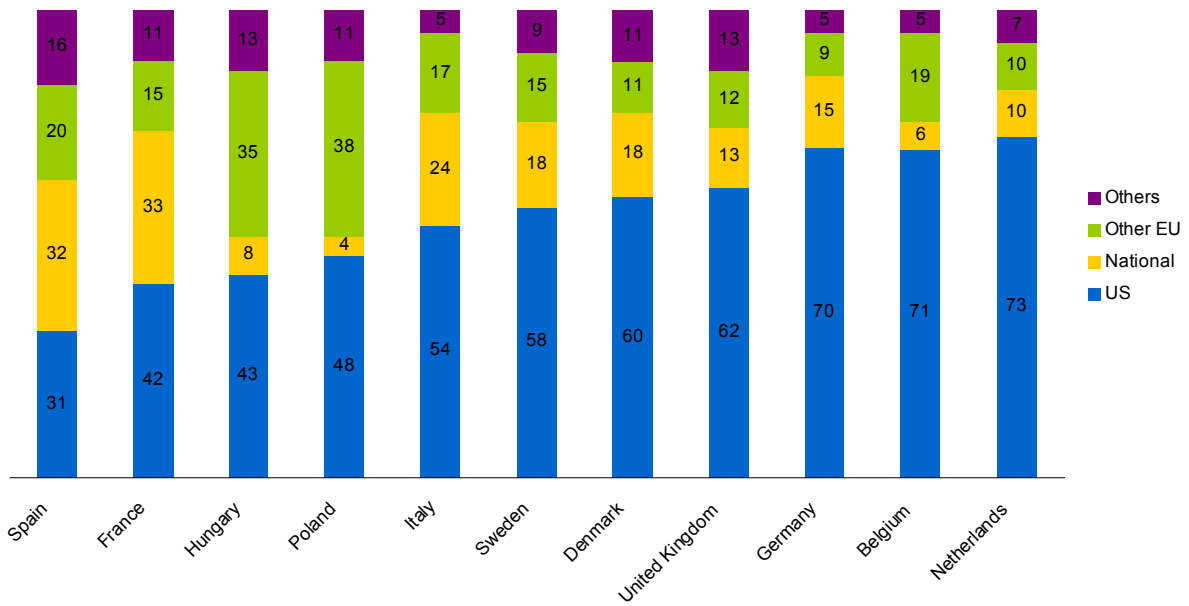


Source: NPA (2008)²¹⁷

The results are largely comparable for films, except that the share of US films is generally higher than the share of US content, whereas the share of national films is generally lower than the share of national content – in other words, it is very much US film as opposed to other media which dominates the statistics, and equally European national films represent an area of weakness amongst other forms of content.

217 Provided by NPA, this data is for VOD but may not be completely representative since it relates to only one or a few VOD sites. Source: NPA Conseil, L'origine des contenus proposés sur les services de VOD dans l'UE, étude pour le Parlement européen, Novembre 2008.

Origin of films available on VOD in 2008 (%)



Source: NPA (2008)²¹⁸

Finally, there are some differences between availability on VOD services and availability in theatres for different countries. For example, in Belgium US films represented around one third of films available in theatres (in 2007) while they represented around 70% of films available on VOD services (in 2008). However, in the Netherlands national films represented 7% of films available in theatres (in 2007) while they represented 10% of films available on VOD services (in 2008).

Diversity of content by origin at VOD service level²¹⁹

There are significant differences between EU countries regarding the origin of audiovisual content available on individual VOD services:

- All services in certain countries offer the same distribution of audiovisual content by origin, with over 50% of content on offer originating in the US. This includes the Netherlands²²⁰, Sweden²²¹, and Denmark²²².

²¹⁸ Provided by NPA, this data is for VOD but may not be completely representative since they are related to only one or a few VOD sites. Source: NPA Conseil, L'origine des contenus proposés sur les services de VOD dans l'UE, étude pour le Parlement européen, Novembre 2008.

²¹⁹ All graphs in Appendices.

²²⁰ The share of US content varies from 54% (RTL video) to 80% (Filmclub). Consistently the share of national content is under 26%; the share of other EU content is under 19%.

²²¹ The share of US content varies from 51% (Telia) to 74% (Via Sat On Demand). However there is some diversity for the other origins. The share of national content varies from 1% (Cinema One) to 26% (SF Anytime); and for other EU content from 12% (SF Anytime) to 34% (Telia).

²²² The share of US content varies from 50% (Film2home) to 98% (Via Sat On Demand). The share of national content is under 25%.

- However, services in some other countries offer varying distribution of audiovisual content by origin. Content of other origins (national / other EU / others) are more easily available. This includes France²²³, Germany²²⁴, the UK²²⁵, Spain²²⁶, Italy²²⁷, Belgium²²⁸, Hungary²²⁹, and Poland²³⁰.

In general the second case corresponds to more diversity in consumer choice: every consumer can choose between sites with different offers. To increase the circulation of European audiovisual content a policy could favour the emergence of services that distinguish themselves from existing services in terms of offered audiovisual content.

A recent study partially contradicts the above data on the proportion of European titles of every VOD service's catalogue²³¹. In this study, over half of interviewed representatives of VOD services²³² said that more than 75% of their catalogue is made up of EU titles. Such data is, however, declarative, and includes in the same category national and other European titles.

The study also gives some estimates on the proportion of budget spent on particular sources of programming. National content represents a significant part (around 90%) of broadcasters' budget devoted to their VOD services, the rest being allocated towards European non-national content. As for so-called 'pure VOD' players, they devote a little over 20% to European non-national content, over 30% to national content and slightly less than 50% to non-European acquisitions. This comparably moderate level of spending for non-national European VOD licences possibly partly explains why non-national content on VOD sites is not performing as well as it does in theatres or on video.

Finally, French data provided by the CNC on the origin of films available on various versions allows for a comparison of the role of VOD with other versions in terms of diversity of offer. Films may be the least diverse on video where US films represent almost half, and French films around one third, of all available films. French films have the highest share in theatres but they do almost as well on VOD. European films' share is more or less the same for every version market.

223 On one side M6 video offers 79% of national audiovisual content (and no US audiovisual content) and Imineo 61% of national audiovisual content. On the other side Neuf VOD offers 22% of national audiovisual content.

224 The share of US audiovisual content varies from 41% (Archos Content Portal) to 85% (XboX Live).

225 The share of US audiovisual content varies from 26% (4oD) to 98% (XboX Live). The share of national audiovisual content reaches up to 50% (4oD). The share of other EU audiovisual content remains under 18% but the share of other audiovisual content reaches up to 27% (Skyplayer).

226 It stands as an exception since in the analysed VOD sites the share of national audiovisual content is higher than that of US audiovisual content. The share of national audiovisual content actually varies from 30% (Accine) to 74% (Fimotech). Other EU audiovisual content reaches up to 28% (Accine); other non-EU audiovisual content up to 26% (Pix box).

227 The share of US audiovisual content varies from 34% (Rosso Alice) to 72% (Orbit Movies). National audiovisual content reaches up to 28% (Film is now); other EU audiovisual content up to 37% (Rosso Alice); other non-EU audiovisual content up to 31% (Rivideo).

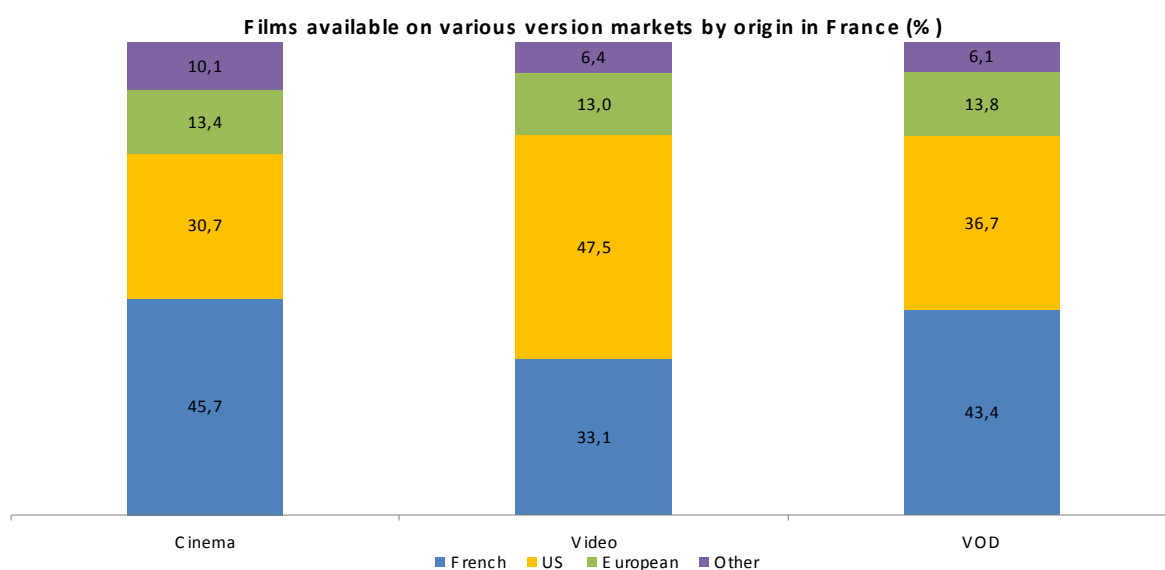
228 Similarly to theatrical, the share of other EU audiovisual content is rather high. On Clic Movies it reaches up to 68% (22% for US audiovisual content). The share of US audiovisual content however reaches up to 80% (DirectMovie).

229 The share of US audiovisual content remains around one third of all audiovisual content.

230 The share of US audiovisual content varies from 39% (Videostada TP) to 84% (ITI Neovision). The share of other EU audiovisual content varies from 16% (ITI Neovision) to 44% (Multimedia Polska). National audiovisual content has a particularly low share, always under 4%.

231 Study on the application of measures concerning the promotion of the distribution and production of European works in audiovisual media services, Study for the European Commission, May 2009, Op.cit.

232 This figure reaches 90% for VOD services of broadcasters.



Source: CNC²³³

Theatres', videos' and VOD's catalogues (i.e. what is made available for the consumers) may differ significantly in terms of origin of titles, depending on the country. As a result, VOD will not necessarily follow the path of already existing version markets. In the near future, VOD services might give more visibility to content that is not favoured by the current audiovisual system. This is already the case for some countries like Hungary. So far, however, VOD services in general have not made more EU content available than other version markets.

Consumption by origin is now considered in the next section to see whether VOD is more likely to favour the consumption of EU content.

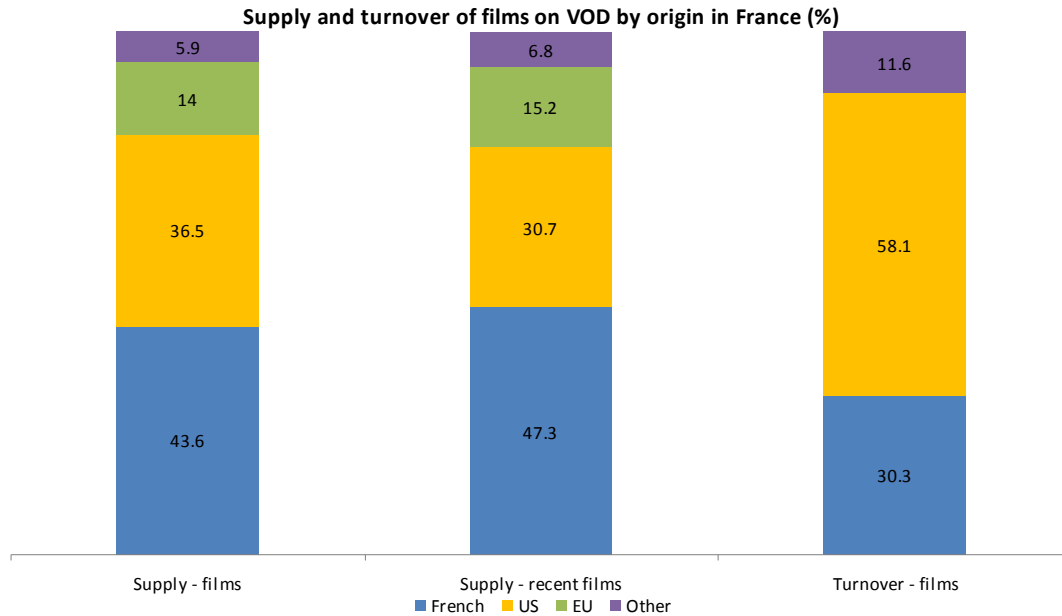
The consumption of national and EU titles on VOD services

To analyse the consumption of national and EU content on VOD services, only data at national level is available. The data is compared to the supply of VOD services and to consumption on other versions.

Data provided by the CNC on the supply and turnover of films on French VOD services shows that the dominance of US films in consumption is even greater than in availability. The fact that US films' market share is higher than their share of titles has already been noted for theatres and video. Accordingly French films' market share is much lower than the French share of supply; other films' market share is half of their share of titles²³⁴.

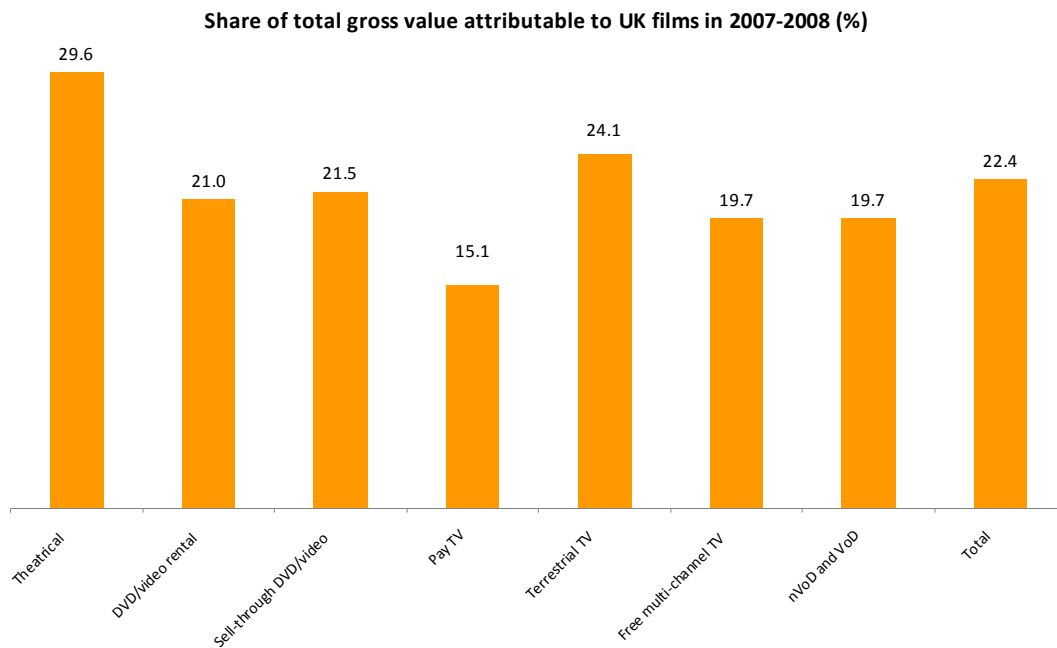
²³³ Data for theatrical distribution is for 2007, for video 2008, for VOD data is for June 2009.

²³⁴ Unfortunately European films and films coming from another country are not distinguished for turnover, however even if all films labelled as 'other' for turnover were European this would correspond to a market share that is smaller than the share among available titles.



Source: CNC

Data provided by the UK Film Council compares the share of total gross value attributable to UK films by version market. As seen before, UK films do not perform better on VOD (and nVOD) than in other version markets. On VOD (and nVOD) UK films' share is around 20%, whereas in theatres is it around 30%.

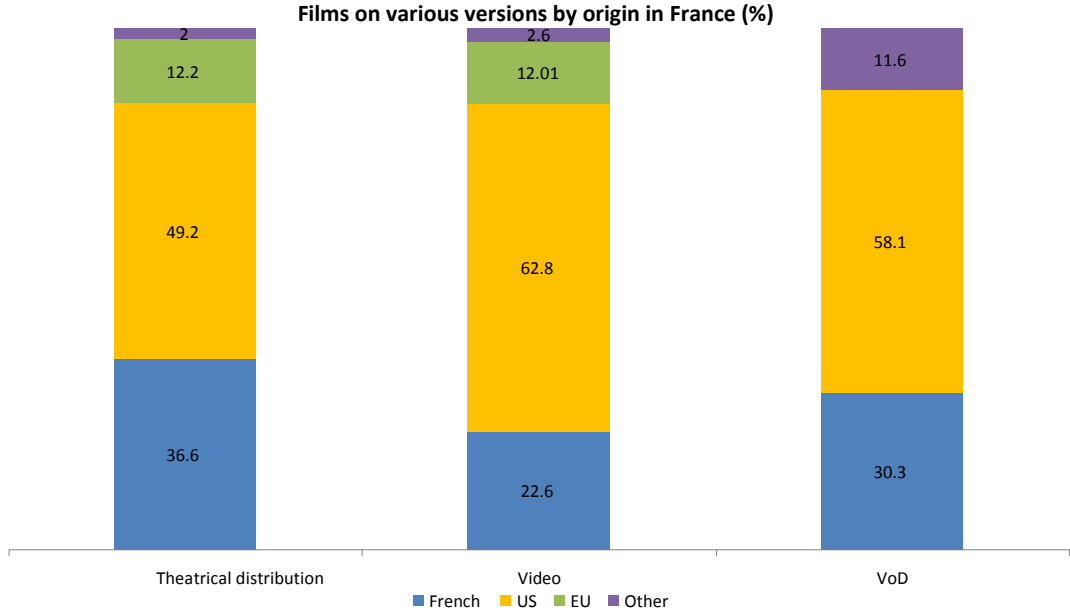


Source: UK Film Council.

Finally French data provided by the CNC on the origin of films consumed in various version markets compares the role played by VOD to other versions when it comes to promoting EU films. Films are the

least diverse on video where US films represent more than 60% of all consumed films. French films' market share is the highest in theatres and the lowest on video. Their share on VOD is average. EU films' share is the lowest on VOD²³⁵.

A recent study provides some interesting insights into the reasons why EU content is less likely to circulate²³⁶. According to representatives of VOD services, European content may be the best way to attract European audiences, but they are not necessarily easier to acquire or more affordable, and thus do not enable a higher profit than national or US content.



Sources: CNC²³⁷

It appears that VOD does not particularly favour the consumption of local films in comparison to other version markets. This is even more the case in relation to EU content. On VOD, the US films' market share is higher than their share among all titles available on VOD, at the expense of other films. From this point of view there are not many differences between VOD and the other version markets.

Moreover, the data suggests that national and other EU films' market share is lower on VOD than in theatres or on video. All these conclusions are to be taken cautiously since they rely on a very small dataset. However, it seems that VOD services are not intrinsically better placed to promote national, and most of all EU works.

235 Unfortunately no distinction is made between EU and other films but their common market share is lower than the share of EU films alone, either on video or in theatrical distribution.
 236 Study on the application of measures concerning the promotion of the distribution and production of European works in audiovisual media services, Study for the European Commission, May 2009, Op.cit.
 237 Data for theatrical distribution refers to 2007, data for video and VOD refers to 2008.

3.1.2.3 The role of local distribution and cost reductions made possible by VOD

The role played by distribution is now considered in order to complete the analysis of the circulation of audiovisual works in the EU. This leads to two important findings:

- the success of any film in any territory greatly depends on the efforts of local distributors, and
- digital distribution might allow a reduction of overall distribution costs

The importance of local distribution to the local success of a film

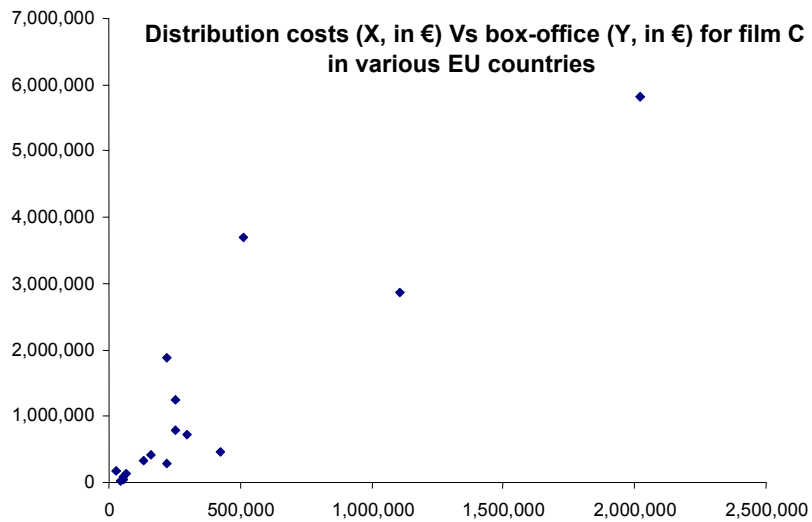
The distribution of any film incurs costs, which are of at least two kinds:

- Delivery costs of the versions to the outlets (e.g. of prints to the theatres), including all costs necessary for the film to be viewed by local audiences (e.g. subtitling, dubbing)
- Marketing costs, including the creation or adaptation of ads to be used on different media (television, outdoor, newspapers, etc.), the purchase of advertising spaces and public relations (e.g. screenings).

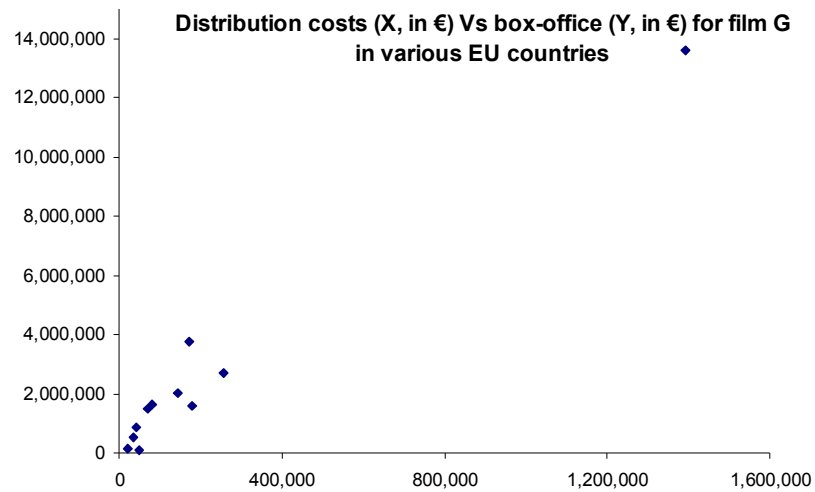
Anecdotal evidence confirms that investing in distribution costs can play a key role in the success of a film. For example, the French film *Bienvenue chez les ch'tis* (which was a significant success in France) has had uneven results in other countries. Many jokes in the film rely on the differences between the accents of the main characters, which can hardly be translated. The film was, however, also a hit in Germany. One reason for this is that the local German distributor made a particular effort to dub the film; a new German dialect was created by a linguist to reflect the differences of language, instead of, for example, using an already existing German accent or leaving aside the differing accents.

According to the data collected on the sample of films to be analysed, this idea is reflected in the positive correlation between investments in distribution and the eventual success of films in theatres²³⁸.

238 All graphs in the Appendices. The role of marketing expenditures in the success of a film is a widely recognised, e.g. see Elliott, Caroline, Simmons, Rob, Determinants of UK Box Office Success: The Impact of Quality Signals, Review of Industrial Organisation, 2008, 33-2, pp. 93-111. Production costs' role in overall success of a film has also been demonstrated in numerous studies, e.g. see UK Film Council (2009).

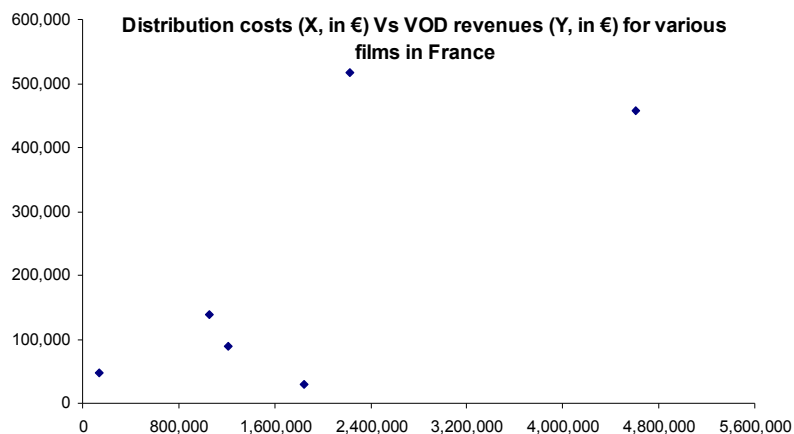


Source: a film distributor



Source: a film distributor

According to the data on the sample of films, the same kind of relationship exists between distribution costs and VOD revenues in France.



Source: film distributors

It is possible (and generally the case) that distribution costs will be higher when distributors expect a film to be successful, as they will be more inclined to invest in marketing and communications. All previous data indicates the importance of distribution in the success of films in theatres (and on VOD).

Interestingly, distribution is still carried out by national distributors, or distributors that are active at the level of a group of countries (e.g. Germany and Austria; the Scandinavian countries; the Baltic countries). It may therefore be worth considering whether international licensing would help films circulate more widely between EU countries or whether it would in fact be to the detriment of the sector, given that established local distributors might not be able to afford international licences despite their ability to best promote a title in a given territory.

Could VOD help reduce distribution costs? Some insights

While collected data on the sample of films seems to confirm the statement by some interviewed distributors that distribution costs play a role in the success of a film, dematerialised distribution might also help reduce distribution costs. Data on the sample of films is again used²³⁹. Distributors provided detailed data on the proportions of different costs within the overall distribution budget, according to their nature. As before, costs can be distinguished between delivery and marketing.

Dematerialised distribution does not necessarily reduce marketing costs. It is now widely accepted that the internet is part of any marketing plan to promote audiovisual content (especially films). Advertising on the internet is cheaper, notably in terms of purchasing advertising spaces, and can be more efficient than other media²⁴⁰. As a result, the internet plays a greater role in marketing strategies²⁴¹. However, there is no evidence that it leads to a reduction of the overall level of marketing costs. In other words, digital communications is used in addition to existing offline communications, the former does not replace the latter.

²³⁹ EU films produced between 2004 and 2006. For more details see the Appendices.

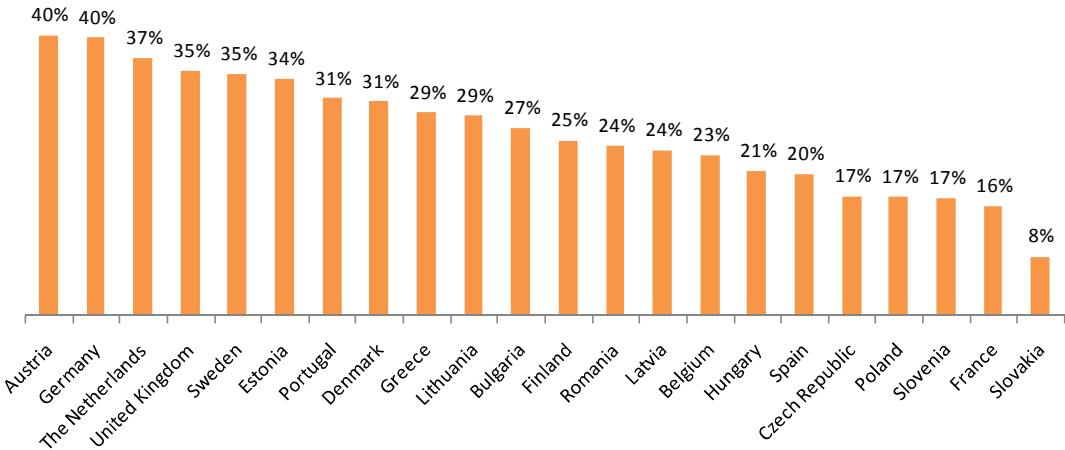
²⁴⁰ As confirmed e.g. by data provided by the CNC and Médiamétrie. The use of viral marketing through social networks is one of the most appealing strategies for film distributors.

²⁴¹ Sources: CNC, UK Film Council, film distributors.

Among delivery costs, some costs relate to the delivery of physical versions (i.e. prints, transports, freight but also censorship and all unidentified costs), and some to the adaptation for the importing country (i.e. translation, dubbing and subtitling). It is assumed that digitisation and dematerialisation are not likely to help reduce costs related to adaptation.

Consequently, any cost-reducing effects of digital distribution will likely be seen in the costs related to the delivery of physical versions. The share of the distribution costs taken up by prints and transportation according to the country where the film was distributed has been analysed. It always remains under 40% and goes down to as low as 16% in France or 8% in Slovakia.

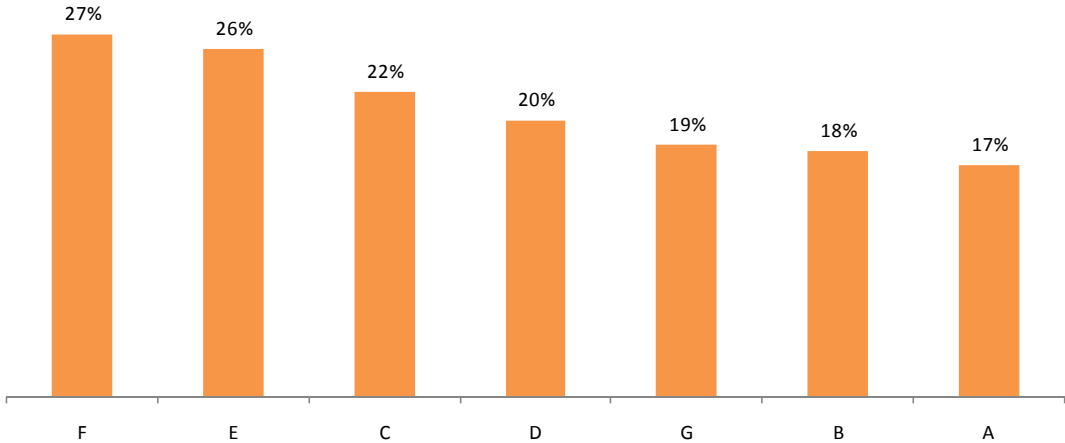
Share of prints and transportation in distribution costs by country



Source: film distributors

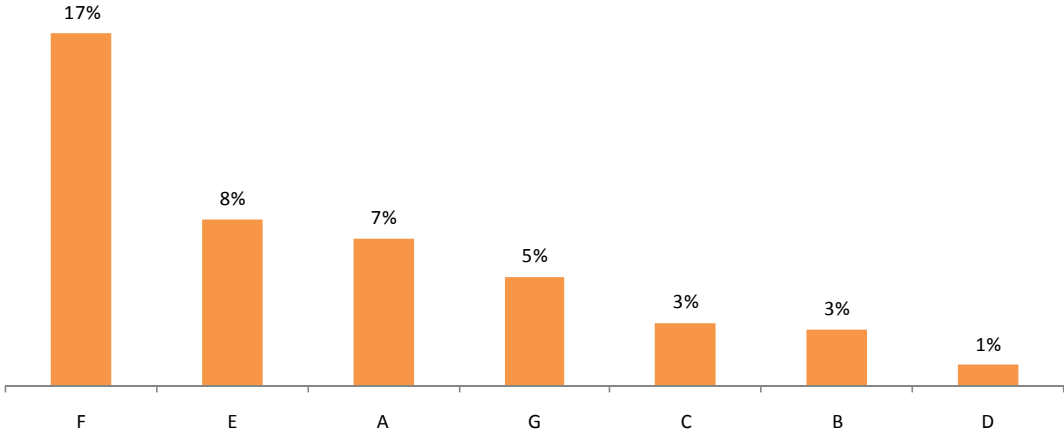
The share of prints and transportation costs in all distribution costs is lower when one aggregates data according to the film rather than according to the country. In this case, prints and transportation costs do not go beyond 27% of distribution costs.

Share of prints and transportation in distribution costs by film



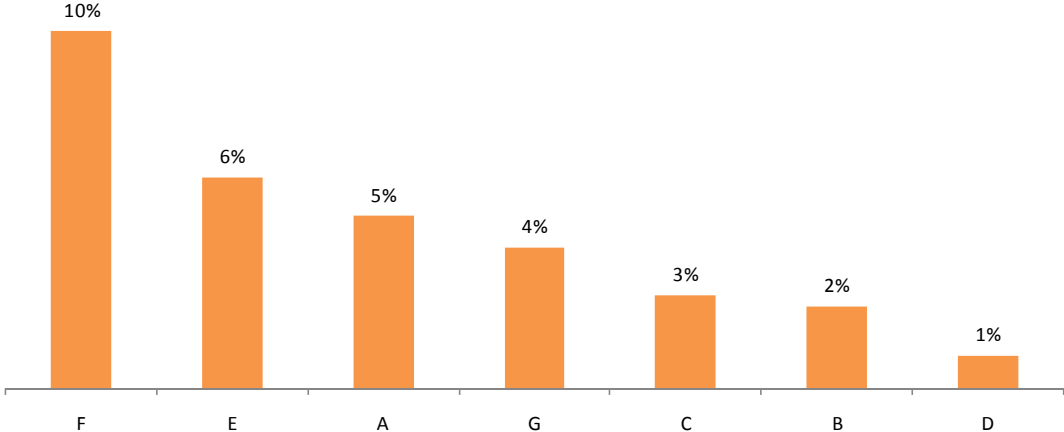
The level of prints and transportations costs is even lower when compared to the level of production costs²⁴² (rather than to distribution costs). These costs represent 17% of film F’s production costs; for all other films of the sample they represent less than 10%.

Amount of prints and transportation costs relative to production costs by film



Costs related to physical distribution correspond to between 1% and 10% of total (production and distribution) costs for the films of the sample (where available). Dematerialised distribution does not necessarily allow rights holders to save these costs as it does not lead to abandoning exploitation in theatres. However, the findings give an idea of the proportion of distribution costs rights holders might save if they were to release a film on VOD in territories where no other form of exploitation was planned.

Amount of prints and transportation costs relative to total costs by film



Costs related to retail outlets such as video or DVD stores can also be compared to those for VOD sites. So far, little research exists which compares the respective costs of a VOD service and a video store (either online or offline). One reason, one interviewed insider explained, is that every VOD service has its own peculiarities. For example, some VOD service providers share their bandwidth between various

242 The main reason is production costs are higher than distribution costs for the films in the sample.

sites including the VOD service. This makes it particularly difficult to isolate the cost of the bandwidth for the VOD service alone.

In relation to physical retail, there are barriers to entry to the market. Because of the existence of inventory costs a non-negligible share of films may be excluded from the market. Distributors sometimes simply cannot afford to pay for certain films to be available on the store's shelves²⁴³. However, through contractual arrangements between retailers and distributors these inventory costs can be shared. For example, the video rental store Blockbuster used to pay \$65 for every copy of a video with no possibility to return the copies. It concluded a revenue-sharing deal with the major studios (including a 40% share of rental revenue and a precise account of rental consumption to go to the studios) that allowed DVDs to be pushed through the video rental stores and that expanded Blockbuster's market share from 40% in 1997 to 50% in 2002²⁴⁴. Nevertheless, the fact that shelf space is limited also means that some niche products may never be available in general DVD stores.

More generally, digitisation costs seem lower for VOD than for DVD, but there are other non-negligible costs (e.g. costs related to the management of payment devices, or costs related to the use of DRM, see also the following box). However, the costs incurred for VOD are hardly comparable with the costs that were previously mentioned:

The costs of a VOD service

A study conducted in 2008²⁴⁵ assesses the respective shares of various costs according to the size of the VOD service (see following tables) and concludes that²⁴⁶:

- Costs of launching the VOD service vary from 10% to 18% of total costs. Their value increases in absolute terms but decrease in relative terms the larger the VOD service is
- Fixed operating costs vary from 11% to 25% of total costs. Their value increases in absolute terms but decreases in relative terms the larger the VOD service is
- Variable operating costs vary from 27% to 65% of total costs. Their value increases in absolute and in relative terms the larger the VOD service is. Variable operating costs include the revenues transferred to rights holders, which varies from 19% (for the smallest services) to 36% (for the biggest services) of total costs
- Structural costs vary from 14% to 31% of total costs.

243 Studies on the online sales and rentals of DVD show that it favours a form of Long Tail effect, because some delivery costs are reduced. However, the effect remains slight. See Elberse, Anita, Oberholzer-Gee, Felix, Superstars and Underdogs: An Examination of the Long Tail Phenomenon in Video Sales. Harvard Business School Working Paper, No. 07-015, 2006; Benghozi, Pierre-Jean, "Effet long tail ou effet podium : une analyse empirique des ventes de produits culturels en France", Ministère de la Culture et de la Communication, Mars, PREG-CRG, Paris, 2008.

244 See Bomsel Olivier, Geffroy Anne-Gaelle and LeBlanc Gilles, When Internet meets Entertainment - The Economics of Digital Media Industries, Presses de l'école des mines, Paris, 2006. Page 107. It should be added that US distributors are far more concentrated than EU distributors, which makes it easier for US distributors to conclude such agreements.

245 Media Consulting Group, L'économie de la VOD en France, study done for the CNC, Mars 2008. Op.cit.

246 The study could not however take into account the fact that every service has its own peculiarities.

The study finds that costs of launching are not very high, making it relatively inexpensive to launch a VOD service.

Operating costs are also distinguished according to their aim (technical / editorial / marketing / rights holders) (see following tables):

- Money transfers to rights holders vary from 39% to 50% of operating costs
- Editorial costs are very low
- Technical costs vary from 8% (for the largest services) to 42% (for the smallest services) of operating costs. Variable technical costs should decrease following technical improvements (e.g. networks' efficiency, better compression formats, etc.)
- Marketing costs vary from 18% (for the smallest services) to 43% (for the biggest services) of operating costs.

The study shows that VOD may in some cases already allow rights holders to get a higher income than DVD sales. This is notably the case where VOD allows for some cost savings. Income could be increased even more with VOD services reaching a critical size. Finally, this does not take into account the use of social media to more cheaply – and potentially more efficiently – market audiovisual content.

Table: Distribution of total costs (among costs of launching, operating costs and structural costs) according to the size of the VOD service

		Smallest Services	Medium Services	Biggest Services
Total costs, incl.:		200 K€	2,443 K€	10,924 K€
- Costs of launching		18%	12%	10%
- Operating costs	Fixed	25%	12%	11%
	Variable	27%	44%	65%
- Structural costs		30%	31%	14%

Source: CNC (2008)²⁴⁷

Table: Distribution of fixed and variable operating costs (among technical costs, editorial costs, marketing costs and money transfers to rights holders) according to the size of the VOD service

		Smallest Services	Medium Services	Biggest Services
Operating costs, incl.:		107 K€	1,400 K€	8,226 K€
- Technical costs		42%	21%	8%
- Editorial costs		-	1%	-
- Marketing costs		18%	28%	43%
- Money transfers to rights holders		39%	50%	49%

Source: CNC (2008)²⁴⁸

247 Media Consulting Group, L' économie de la VOD en France, study done for the CNC, Mars 2008. Op.cit.

248 Media Consulting Group, L' économie de la VOD en France, study done for the CNC, Mars 2008. Op.cit.

3.1.3 Conclusion

The aim of Section 3.1 was to describe the EU VOD market from an economic point of view. To do so, a description of the supply and demand sides of the VOD market was provided at the country level. The circulation of audiovisual works in the EU was then considered, notably with a view to assessing the possible implications for VOD. Section 3.1's main findings are:

- On the supply side, the VOD market is in its infancy in the EU (best illustrated by the increase in the number of services and service providers). Very different stages of development have been reached in each country. Moreover, future developments in these markets may result in a very different environment to that which exists today
- On the demand side, despite some growth, VOD revenues still remain marginal. This shows that the VOD market has yet to fully mature
- Consumers generally prefer national or US, rather than EU, films. EU films do not circulate well in other EU countries, although films should be distinguished according to their type and their country of origin
- Data indicates differences between VOD and other audiovisual markets in terms of availability and consumption of films by origin. However, VOD does not especially favour EU content compared to US or national films. This may change at the point when VOD providers are able to fund production (substituting investments from traditional distributors) in the medium to long term, as this would give producers incentives to licence to such platforms
- Local distribution still has an important role in the local success of a film and the financing of production. As a result, any policy that would threaten their position could have undesirable side effects on the functioning of local audiovisual industries
- Dematerialised distribution of audiovisual works may allow some cost reductions, which might favour circulation of so-far unexploited titles in certain territories. This includes EU films.

The VOD market is just emerging in most EU countries and there remain significant disparities between VOD markets in different countries. Efforts could be made to promote international licensing, which could allow EU films to be more easily available for consumers. This would allow EU film producers to profit from the assets of VOD, which include the possibility of using social media and new marketing strategies. The higher the income (in relative and sometimes absolute terms) directed towards rights holders, the lower the delivery costs.

Section 3.2 explores possible evolutions in the next five to ten years of EU VOD markets. This includes taking into account all features described in this section to see how they can influence the development of VOD in the EU.

3.2 Outlook and impact analysis

As requested in the tender specification, this study formulates forecasts on the likely development of online distribution for audiovisual works in the 27 EU Member States. The impact of this development is considered both from an economic and a cultural point of view.

The analyses conducted in the previous Sections are taken as a starting point. However, the VOD market is still in its infancy stage, so the outlook developed from the forecasts made in Section 3.2 should be considered with some caution.

Following the tender specification, two areas of development are taken into account: macro-economic and communication facilities (e.g. overall economic situation, development of broadband infrastructure); and the legal and commercial practice environments.

Regarding macro-economic and communication facilities, it is assumed that these are going to undergo overall development: the proliferation of digital equipment and infrastructure (such as digital televisions, computers, but also broadband connections) should increase in the next five to ten years, and as a result the size of the potential market for digitised audiovisual content is expected to increase. The crucial issue is the speed at which this development takes place both at EU and national level.²⁴⁹

Regarding developments in the legal and commercial practice environments, two potential Scenarios are identified. The first is that the status quo remains in place, i.e. licensing remains primarily territorial. However, this does not necessarily mean that nothing at all will change, only that regulation is not specifically used to favour a move towards international licensing. An observation of how EU audiovisual content markets have evolved, and most of all discussions with key players, seem to indicate a trend towards a greater unification of these markets. Most players are interested in operating in other countries, a fact which is reflected in the projections.

The second Scenario is based on the assumption that regulation would support international licensing, which would also imply that licences are sold to more than one territory at a time.²⁵⁰ In this case the VOD market would to some extent be reshaped. This Section aims to predict what the consequences of such a development would be. However, the numerous current market uncertainties mean that conclusions should be considered cautiously.

In summary, different Scenarios are provided:

- Two different macro-economic and communication facilities Scenarios (slow or rapid development)
- Two legal and commercial practice environments Scenarios (based on either territorial or international licensing)

249 The idea of an unchanged environment as suggested in the tender (2.2.b) is dismissed since the environment should at least be influenced by the development of technology. Broadband network capacity is, however, likely to be saturated, which would degrade VOD through the internet.

250 Such regulation can take many forms, e.g. by introducing a second multi-territory licence for online distribution which bundles some or all remaining EU countries for which no distribution agreements exist (see tender specifications). While we try to predict the consequences of such a development, it is obvious that the result would be greatly affected by the choice of the means. This is further outlined in the conclusions of Chapter III.

Table: The various Scenarios for the development of the EU VOD market

		Macro-economic and communication facilities development	
		Slow development	Rapid development
Development of legal and commercial practice environments	International licensing	a	b
	Territorial licensing	c	d

3.2.1 Economic and cultural outlooks over five to ten years

3.2.1.1 Economic and cultural outlooks for the EU VOD market

The description of each Scenario relies on the combination of economic analysis and formal mathematical modelling. While the economic analysis has been developed in Chapter II and Section 3.1, it is worth detailing which inputs were used in the models.

Three kinds of **inputs** were used:

- Data on VOD turnover by country from 2010 to 2013. To repeat, such data should be considered cautiously: firstly because they are *predictions*; and, moreover, because the VOD markets are in their infancy stage, which renders any prediction even weaker
- Data on the number of VOD services available in every country in 2006 and in 2009
- A typology of the EU national VOD markets

The impact of the four Scenarios on the EU VOD markets was assessed through 5 **outputs**, every one of which is analysed in the following subsections:

- Growth of VOD turnover
- The number of VOD services available in every country
- Circulation of audiovisual content on VOD services
- Concentration of VOD market
- Impact on audiovisual market

Crucially, these outputs are not necessarily correlated with one another. This is especially the case with VOD turnover and the number of VOD services. An increase in VOD turnover may incite new players to enter the VOD market, thus increasing the number of VOD services available in every country. In turn more VOD services may lead to a higher VOD turnover. The contrary is however also possible: an

increasing number of VOD services may lead to fiercer competition based on price cuts at the expense of growth of VOD turnover. An increase in VOD turnover may also rely on a more concentrated market.

Additional information on inputs used to calculate the outlook

Three kinds of inputs were used to build the models:

- Data on VOD turnover was provided by Screen Digest, considered one of the most reliable sources of data on the European audiovisual market. It is one of the only sources (if not the only source) of data on VOD markets across the EU. Data is detailed in the next subsection (see notably next graph).
- Data on the number of VOD services was provided by NPA (for 2006) and by IFTA (for 2009). These are more thoroughly described in Section 3.1.
- The typology of the EU's national VOD markets relies on four typologies described in the previous Sections, which were created using clustering methods. In Section 2.1 two typologies were built based on the characteristics of the audiovisual markets as a whole, i.e. their structure and their performance. In Section 3.1 two typologies were built based on the structure and performance of the VOD markets.

The four typologies were cross-referenced to obtain our final typology of markets (see next table)²⁵¹. Six groups of countries were obtained:²⁵²

Group 1: France, Germany, Italy, Spain, United Kingdom.

Group 2: Belgium, Denmark, Finland, Netherlands, Sweden.

Group 3: Czech Republic, Hungary, Poland, Slovakia.

Group 4: Austria, Ireland, Luxembourg.

Group 5: Portugal, Romania, Slovenia.

Group 6: Bulgaria, Cyprus, Estonia, Greece, Latvia, Lithuania, Malta.

The following table explains the links between this final typology and the previous ones. The final result is consistent with the previous analyses, reflecting the fact that previous typologies were consistent with one another, i.e. countries tended to be grouped in the same way²⁵³.

251 We were not able to directly conduct a clustering analysis based on our data, mainly because there was too much missing data, which resulted in a very incomplete and non-robust overall typology.

252 In every group, countries are ranked in the alphabetical order.

253 See the statistical analysis in the Appendices, notably the Spearman matrices.

Table: Summary of the previous typologies of audiovisual and VOD markets in the EU

Typologies of...	Groups	Countries	Characteristics		
EU audiovisual markets according to their structure	1	France Spain	Germany UK Italy	More screens per capita, more TV channels available in the country, higher share of domestic films among all films available	
	2	Bulgaria Finland Lithuania Romania	Cyprus Greece Malta Slovenia	Higher share of non-European films among all films available	
	3	Austria Denmark Luxembourg Slovakia	Belgium Hungary Netherlands	Czech Republic Ireland Poland	Higher share of films from other European countries among all films available
EU audiovisual markets according to their performance	1	Austria Finland <i>Ireland</i> Spain	Belgium France Italy Sweden	Denmark Germany Netherlands UK	Higher revenue per capita of theatres, DVD and TV companies
	2	<i>Bulgaria</i> <i>Estonia</i> <i>Lithuania</i> <i>Romania</i>	<i>Cyprus</i> Hungary Poland <i>Slovakia</i>	Czech Republic <i>Latvia</i> Portugal <i>Slovenia</i>	Lower revenue per capita of theatres, DVD and TV companies
EU VOD markets according to their structure	1	<i>Belgium</i> Italy UK	<i>France</i> Spain	Germany <i>Sweden</i>	Higher number of broadcasters among VOD service providers and of rental services among VOD services
	2	<i>Austria</i> Hungary Poland	Bulgaria Ireland Portugal	Czech Republic Luxembourg	Lower number of broadcasters among VOD service providers and of rental services among VOD services
EU VOD markets according to their performance	1	France UK	Italy	Spain	Higher turnover for distribution through satellite; higher ARPU for SVOD
	2	Austria Denmark Germany Ireland Poland <i>Slovakia</i>	Belgium <i>Estonia</i> <i>Greece</i> Luxembourg Portugal <i>Slovenia</i>	Czech Republic Finland Hungary Netherlands <i>Romania</i> Sweden	Lower turnover for distribution through satellite; lower ARPU for SVOD

Table: The final typology of VOD markets in the EU and its links with previous typologies

Group	Countries	Audiovisual structure	Classification according to:		
			Audiovisual performance	VOD structure	VOD performance
A	France, Germany, Italy, Spain, UK ²⁵⁴	1	1	1	1
B	Belgium, Denmark, Finland, Netherlands, Sweden ²⁵⁵	2 or 3	1	1	2
C	Czech Republic, Hungary, Poland, Slovakia	3	2	2	2
D	Austria, Ireland, Luxembourg ²⁵⁶	3	1	2	2
E	Portugal, Romania, Slovenia ²⁵⁷	2	2	-	2
F	Bulgaria, Cyprus, Estonia, Greece, Latvia, Lithuania, Malta ²⁵⁸	2	2	-	-

Note: The table reads in the following way: countries that belong to Group C are Czech Republic, Hungary, Poland, and Slovakia. They all belong to Group 3 for the structure of their audiovisual market; to Group 2 for the performance of their audiovisual market; to Group 2 for the structure of their VOD market; to Group 2 for the performance of their VOD market.

Output 1: Growth of VOD turnover

The future development for the EU VOD markets from 2009 to 2013 predicted by Screen Digest, which is illustrated by the following graph, is taken as a basis for our outlook (**Scenario C** of graph in introduction²⁵⁹).

254 Germany is classified in Group 2 for VOD performance.

255 Denmark, Netherlands and Finland are not classified for VOD structure.

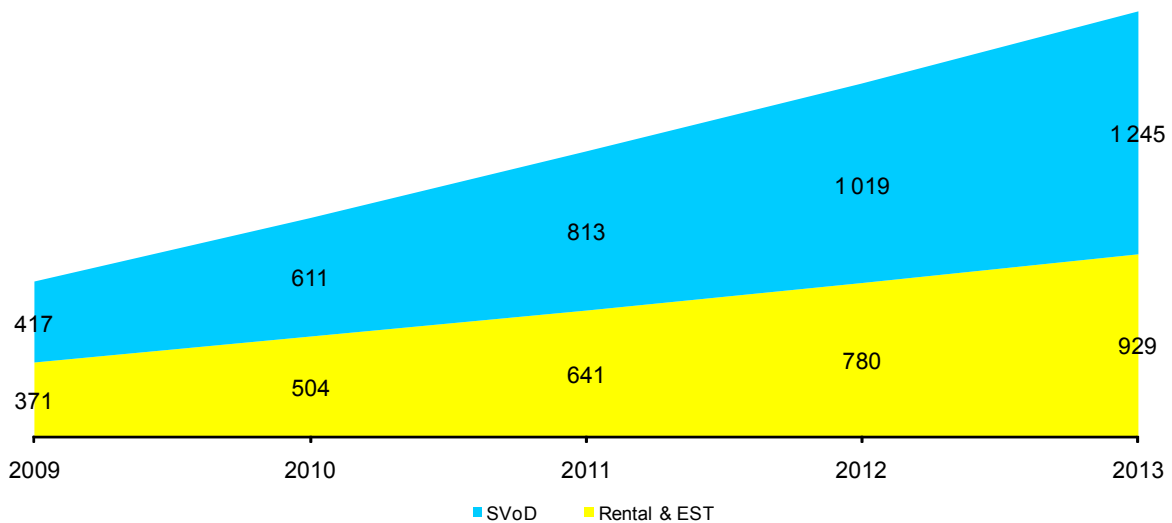
256 Luxembourg is not classified for audiovisual performance.

257 Portugal is classified in Group 2 for VOD structure.

258 Malta and Greece are not classified for audiovisual performance.

259 This data makes a distinction between EST and rental as against SVOD markets. For data by distribution platform at the EU level, see the Appendices.

Development of VoD turnover in the EU (millions of €)



Source: Screen Digest

Since Screen Digest's projections are used as a basis in this report for calculating growth in VOD turnover, it is assumed that Screen Digest's figures correctly predict the development of VOD turnover in the above graph.

In the current assignment, to avoid biases as a result of one country having a particularly high or low growth rate, growth of VOD turnover is predicted at the level of each group of countries. VOD Turnover is assumed to be the average of each country's expected growth rate (see next box). In general terms, developments under **Scenario C** are the same as those predicted by Screen Digest.²⁶⁰

For the purposes of this assignment it has also been assumed that a rapid development of macro-economic and communication facilities would increase the pace of growth of VOD turnover. Technology would become more easily accessible for consumers, which would expand the market. To assess this increase (**Scenario D**) the same calculation was applied as in the previous formula. However, in every Group the country with the lowest growth rate was dropped (see next box). The assumption is somewhat rudimentary but it provides consistency at the Group level while giving an idea of growth of VOD turnover under a more 'favourable' environment.

It is a debatable issue whether a proposed introduction of international licensing would have an impact on the level of VOD turnover (compared to territorial licensing). The economic analysis (see Section 2.1) indicates that this is unlikely to happen, largely because there are few economies of scale in the distribution of audiovisual content since each individual market requires its own marketing spend. Currently national distributors are the most capable of handling the distribution of audiovisual content in their own markets, including VOD. There may of course be exceptions, i.e. some audiovisual works may be easier to sell internationally due to new forms of marketing and promotion (e.g. on social networks).

²⁶⁰ The question of whether Screen Digest's forecast Scenarios have been confirmed by reality has not been assessed. For the moment this is only possible for 2009, but the only available data is for France. In this case Screen Digest's predictions are confirmed. In fact Screen Digest predicted VOD turnover to increase by 54% from € 62.5 million to € 96.4 million. Data provided by the CNC shows an increase by 55% from € 53 million to € 82.3 million. However there are differences in the absolute values, which may be due to different perimeters of assessment.

In addition, the international availability of some works may in itself increase the market for cross-border consumption of those works. However, these opportunities are unlikely to significantly influence VOD turnover.

Because of this, the development of legal and commercial practice environments has no direct impact on VOD turnover. This means that **Scenario A** is comparable to **Scenario C**, and **Scenario B** is comparable to **Scenario D**. This is not to say that there are no differences at all between territorial and international licensing. International licensing would in fact have a significant influence on the circulation of EU films – see the following subsections. However growth of VOD turnover should be promoted through other means than international licensing; betting on international licensing only as a means to increase VOD turnover is a risky strategy. This will be further expanded in the conclusions of this Chapter.

Table: Growth of VOD market in the four Scenarios for every group

		Macro-economic and communication facilities development	
		Slow development	Rapid development
Development of legal and commercial practice environments	International licensing	<i>Group A: + 100%</i> <i>Group B: + 740%</i> <i>Group C: + 460%</i> <i>Group D: + 380%</i> <i>Group E: + 1,500%</i> <i>Group F: + 250%</i>	Group A: + 120% Group B: + 880% Group C: + 540% Group D: + 490% Group E: + 1,850% Group F: + 300%
	Territorial licensing		

Modelling growth of VOD turnover

Growth of VOD turnover is predicted for each Group of countries and is assumed to be the average of every country's expected growth rate, i.e. $\Delta X_k(c) = \frac{\sum_{i \in \{k\}} \left(\frac{X_i^{2013} - X_i^{2009}}{X_i^{2009}} \right)}{card(k)}$, with:

- X_i^j VOD turnover for country i during year j and
- $\Delta X_k(c)$ growth of VOD turnover for the k th group (of countries) from 2009 to 2013 under Scenario C. Resulting values for the $\Delta X_k(c)_{k \in [1,6]}$ are given for the analysis of each Group.

Consistently the formula can also be applied at the EU level: $\Delta X(c) = \frac{\sum_{i \in \{EU\}} X_i^{2013} - \sum_{i \in \{EU\}} X_i^{2009}}{\sum_{i \in \{EU\}} X_i^{2009}}$ where

$\sum_{i \in \{EU\}} X_i^j$ represents the sum of VOD turnover for every EU country during year j. Literally the growth is calculated by comparing Screen Digest's predictions for VOD turnover at the EU level in 2013 with Screen Digest's prediction at the EU level in 2009. Applying this formula VOD turnover is expected to increase by 180% at the EU level in the next four years in Scenario C (i.e. slow macro-economic and communication facilities development).

In Scenario D, the same calculation is applied except that in every Group the country with the lowest

growth rate is dropped. Therefore, $\Delta X_k(d) = \frac{\sum_{i \in \{k\}} \left(\frac{X_i^{2013} - X_i^{2009}}{X_i^{2009}} \right) - \min_{i \in \{k\}} \left(\frac{X_i^{2013} - X_i^{2009}}{X_i^{2009}} \right)}{\text{card}(k) - 1}$.

Finally it is assumed that the development of legal and commercial practice environments has no impact on growth of VOD turnover, i.e. $\Delta X_k(b) = \Delta X_k(d)$ and $\Delta X_k(a) = \Delta X_k(c)$.

Both formulae (Scenario A or C on the one hand, and Scenario B or D on the other) can be applied for $k = 4$, i.e. for Group D (including Austria, Ireland and Luxembourg). In Scenario A or C the calculation is the following:

$$\Delta X_4(c) = \frac{\sum_{i \in \{4\}} \left(\frac{X_i^{2013} - X_i^{2009}}{X_i^{2009}} \right)}{\text{card}(4)}$$

$$\Leftrightarrow \Delta X_4(c) = \frac{\frac{X_{Austria}^{2013} - X_{Austria}^{2009}}{X_{Austria}^{2009}} + \frac{X_{Ireland}^{2013} - X_{Ireland}^{2009}}{X_{Ireland}^{2009}} + \frac{X_{Luxembourg}^{2013} - X_{Luxembourg}^{2009}}{X_{Luxembourg}^{2009}}}{3}$$

$$\Rightarrow \Delta X_4(c) = \frac{5.94 + 3.89 + 1.58}{3} = 3.8$$

VOD turnover is predicted to increase by 380% from 2009 to 2013 for countries that belong to Group D in Scenario A or C.

For example still if $k = 4$, the calculation is the following:

$$\Delta X_4(c) = \frac{\sum_{i \in \{4\}} \left(\frac{X_i^{2013} - X_i^{2009}}{X_i^{2009}} \right) - \min_{i \in \{4\}} \left(\frac{X_i^{2013} - X_i^{2009}}{X_i^{2009}} \right)}{\text{card}(4) - 1}$$

$$\Leftrightarrow \Delta X_4(c) = \frac{\frac{X_{Austria}^{2013} - X_{Austria}^{2009}}{X_{Austria}^{2009}} + \frac{X_{Ireland}^{2013} - X_{Ireland}^{2009}}{X_{Ireland}^{2009}} + \frac{X_{Luxembourg}^{2013} - X_{Luxembourg}^{2009}}{X_{Luxembourg}^{2009}} - \frac{X_{Luxembourg}^{2013} - X_{Luxembourg}^{2009}}{X_{Luxembourg}^{2009}}}{2}$$

$$\Rightarrow \Delta X_4(c) = \frac{5.94 + 3.89}{2} = 4.91$$

VOD turnover is predicted to increase by 491% from 2009 to 2013 for countries that belong to Group **D** in Scenario *B* or *D*.

Output 2: The number of VOD services available in each country

The second output considered is also assessed with a formal mathematical model. The model is based on data for the number of services available provided by the NPA (for 2006) and IFTA (for 2009). The trend from 2006 to 2009 was used as the basis for projections for the next five to ten years.

All predictions are made at the EU level, i.e. every country is assumed to experience more or less the same development of the number of VOD services available. It was necessary to make this assumption due to the lack of data on the sector, and to the fact that VOD markets are in their infancy stage making it difficult to make accurate projections.

Scenario C exhibits the least change in the VOD market. The countries where there were the most VOD services in 2006 and in 2009 were taken as an indicator of future development: Germany, France and the Netherlands. These are also the countries that are the closest to the maximum number of VOD services. The number of VOD services available in every country is expected to increase by 40% in Scenario C in the next five to ten years (see next box).

In **Scenario D** licensing is territorial but with a rapid development of macro-economic and communication facilities. Group A was here taken as a reference point since they are the most advanced VOD markets, largely due to the size of every national market that might have favoured the rapid emergence of VOD services. The number of VOD services available in every country is expected to increase by 70% in Scenario D in the next five to ten years (see next box). The figure is consistently higher than in Scenario C; a rapid development of macro-economic and communication facilities is expected to lead to the entrance of more VOD service providers²⁶¹ and, as a result, to an even higher increase in the number of VOD services

In **Scenario A** development of macro-economic and communication facilities remains slow but there is development towards international licensing. Group C was here taken as a reference point since it includes countries whose VOD markets are late to develop compared to other VOD markets in the EU. However countries in Group C are more open to other EU audiovisual content. As a result they might be more indicative of what the impact of international licensing could be. The number of VOD services available in every country is expected to increase by 70% in Scenario A in the next five to ten years (see next box). The figure is consistently higher than in Scenario C: international licensing is likely to increase the number of services available in every Member State and especially in the smallest ones.

Scenario B addresses two major changes at the same time, i.e. international licensing and a rapid development of macro-economic and communication facilities. It was assumed that both changes would have a cumulative impact on the development of the number of VOD services in Scenario B. As a result the number of VOD services available in every country is expected to increase by 100% in Scenario B in the next five to ten years (see next box).

²⁶¹ Moreover entrance may be easier due to a reduction in the costs of access to technology (see also Section 3.1).

Table: Number of VOD services in the four Scenarios

		Macro-economic and communication facilities development	
		Slow development	Rapid development
Development of legal and commercial practice environments	International licensing	+ 70% VOD services	+ 100% VOD services
	Territorial licensing	+ 40% VOD services	+ 70% VOD services

Modelling the development of the number of VOD services available in every country

The number of VOD services is predicted at the EU level. It is based in every case (except for Scenario B) on the trend from 2006 to 2009 for a subset of EU countries.

In Scenario C it is the average of the countries that are the closest to the maximum number of VOD services. i.e. Germany, France and the Netherlands.

$$\Delta Y(c) = \frac{\sum_{i \in \{\text{Germany, France, Netherlands}\}} \left(\frac{Y_i^{2009} - Y_i^{2006}}{Y_i^{2006}} \right)}{\text{card}(\text{Germany, France, Netherlands})}, \text{ with:}$$

$$\Leftrightarrow \Delta Y(c) = \frac{\frac{Y_{\text{Germany}}^{2009} - Y_{\text{Germany}}^{2006}}{Y_{\text{Germany}}^{2006}} + \frac{Y_{\text{France}}^{2009} - Y_{\text{France}}^{2006}}{Y_{\text{France}}^{2006}} + \frac{Y_{\text{Netherlands}}^{2009} - Y_{\text{Netherlands}}^{2006}}{Y_{\text{Netherlands}}^{2006}}}{3} = 0.38 \approx +40\%$$

- Y_i^j the number of VOD services for country i during year j and

- $\Delta Y(c)$ development of the number of VOD services in the next five to ten years in Scenario C.

$$\text{In the same way: } \Delta Y(d) = \frac{\sum_{i \in \{1\}} \left(\frac{Y_i^{2009} - Y_i^{2006}}{Y_i^{2006}} \right)}{\text{card}(1)} = 0.67 \approx +70\%, \text{ with '1' standing for Group A.}$$

$$\text{And: } \Delta Y(a) = \frac{\sum_{i \in \{3\}} \left(\frac{Y_i^{2009} - Y_i^{2006}}{Y_i^{2006}} \right)}{\text{card}(3)} = 0.71 \approx +70\%, \text{ with '3' standing for Group C.}$$

For Scenario *B* it was assumed that both changes would have a cumulative impact on the development of the number of VOD services in Scenario *B*, i.e. $\Delta Y(b) = (\Delta Y(d) - \Delta Y(c)) + (\Delta Y(a) - \Delta Y(c)) + \Delta Y(c)$. The first term isolates the influence of a rapid development of macro-economic and communication facilities; the second term isolates the influence of international licensing; the third term is the development in Scenario *C* in which the least change occurs. $\Delta Y(b) \approx +100\%$.

Output 3: Circulation of audiovisual content on VOD services

Having predicted *who* (VOD services) was going to provide VOD content and *at which level*, the third output now relates to *what* is going to be provided. In other words, which kind of audiovisual content would profit from each Scenario?

The first assumption is that the pace of development of macro-economic and communication facilities should not have any significant influence on the kind of content that is going to be provided on VOD services. Therefore the analysis focuses on the opposition between territorial licensing (Scenarios *C* and *D*) and international licensing (Scenarios *A* and *B*).²⁶²

The justification for this assumption is as follows. Independent filmmakers should benefit more from digital distribution because the costs of traditional distribution act as a barrier for them to access the market. However commercial success also depends on their ability to market their films and to make films people want to see. Thus a current rule is that films without any theatrical release do not succeed in other version markets. More generally, there is a correlation between the levels of distribution costs in different version markets and overall revenues derived from the exploitation of a particular film. As explained in depth in Chapter II, digital distribution by itself will not increase levels of circulation; instead further investment in marketing to create demand is required.

As for the difference between territorial licensing and international licensing, US films, i.e. US blockbusters, are the films that appear to be circulating most easily online as well as offline (see Section 3.1). An environment that is supportive of international licensing would favour US blockbusters since they are the least risky. These films benefit from their previous success in theatres, and more generally from global awareness levels due to the size of their marketing and communications campaigns. However currently their rights holders rely on existing distribution patterns and have not tried to impose homogeneous distribution all over Europe. As a result, it is not possible to thoroughly assume that US blockbusters will be the main beneficiaries of an environment more supportive of international licensing.

It is plausible that an environment that is more supportive of international licensing would enable EU audiovisual content to circulate more easily between EU countries. However, greater exposure might

²⁶² The issue of content is not fully summed up in the following table because there are different situations according to the country. As a result, possible developments are summed up in tables for particular Groups of countries.

not lead to higher consumption overall. A greater level of consumption implies better marketing (and generally higher advertising costs)²⁶³. The issue of the circulation of films in the EU will be further discussed on a case-by-case basis (i.e. according to the Group of countries).

Table: Circulation of audiovisual on VOD services content in the four Scenarios

		Macro-economic and communication facilities development	
		Slow development	Rapid development
Development of legal and commercial practice environments	International licensing	Significantly higher circulation of EU films	
	Territorial licensing	Only slightly higher circulation of EU films	

Output 4: Concentration of VOD market

The fourth output that is influenced by the Scenario is the concentration of the VOD market at EU and at national levels. The question here is not only the number and the market power of the players but also their nature, i.e. their original role in the audiovisual sector.

According to the previous analyses, international licensing would encourage concentration of the VOD market at the EU level. Actually there is a trend towards a greater unification of the EU audiovisual content market, i.e. most actors are interested in being active in other EU countries. This could be done notably through the development of international VOD services. The existence of such services could

263 There are several arguments to be taken into account. First, it is very likely that EU content would be more easily available across the EU since VOD services active at EU level might have an interest in proposing the widest catalogue possible. This however presupposes that transaction costs to get a licence for the content would not be too high. As a result, measures that allow a reduction of such costs would favour the circulation of EU audiovisual content. Secondly, in most cases, VOD services will be in the most favourable position to bargain. Finally – and perhaps most importantly – the availability of more VOD services active in several EU countries (i.e. operating on a larger scale) does not imply a higher level of consumption. The Long Tail theory is again relevant here (see Section 2.2); for a Long Tail to emerge there is a need for information (e.g. for localised marketing or for recommendations provided by the VOD service) that would lead to greater exploration and discovery by the consumer. In the absence of such information and the resulting change of behaviour of consumers, audiences would consume content on VOD services in the same way as they are doing in theatres. At the same time the development of international distribution models may benefit only those EU content audiovisual products that are the most likely to circulate (see Section 3.1).

be made easier by international licensing. A greater concentration is a common consequence of opening markets.²⁶⁴

Such a development would benefit VOD service providers that are able to be effectively active at EU level (at least in the major markets). Moreover, this would encourage competition between providers who were until then acting in separate markets. A possible direct consequence would be consolidation of providers at EU level with a lower number of providers – and possibly a few of them controlling most of the market. When VOD services get bigger they can benefit from economies of scale and economies of scope that make them more competitive. This includes fixed costs that can be split between more titles, or access to a larger catalogue. Increased concentration could favour market growth; it could also incite governments to incentivise, or force, the financing of production by VOD providers. Therefore there is a higher concentration of VOD market in Scenarios **A** and **B**.

The pace of development of macro-economic and communication facilities might have an influence on the nature of the providers that would see the most growth. In the most established VOD markets broadcasters²⁶⁵ dominate VOD service provision (see Section 3.1), which might be considered as a probable outcome for the structure of EU VOD markets. The reason is that broadcasters benefit from economies of scale and scope since they already own exploitation rights for audiovisual content, as well as from the power of their brands. VOD services can therefore be bundled with other audiovisual services. Scenarios **A** and **C** are characterised by the domination of broadcasters.

A rapid development of macro-economic and communication facilities would be unfavourable to broadcasters who package content. Broadcasters would become more dependent on those players who master the quickly evolving delivery networks. With a rapid development communication facilities and if territorial licensing remains the rule, telecommunications and cable operators would benefit from their current position as established players. Market entrance would be limited by the rather slow development of the VOD market. As a result they would still be the actors who keep a direct access to end-user (in their current markets).

Moreover operators' turnover in content might be very low; but VOD services could be used principally to attract consumers to operators' other services, such as internet access. VOD services can play this role and show a loss as long as the development of facilities is strong enough. In fact, the increased revenues derived from the consumers' subscriptions would compensate for the losses derived from the exploitation of VOD services. As a result in Scenario **D** both kinds of players (broadcasters and operators) might be advantaged.

International licensing should lead to a greater unification of the VOD market at the EU level. On the one hand, telecommunications and cable operators rarely operate outside of their national market. Mergers and purchases could be a way for them to expand outside their original market. On the other hand technology companies such as Google, Apple, Microsoft, Nokia and Ericsson might impose themselves in the EU VOD market. They are new players since they are not active in the rest of the audiovisual system in the EU. However they have some assets to take advantage in a scenario that would combine a rapid development of macro-economic and communication facilities and international

264 See notably Tyler Cowen, *Creative Destruction: How Globalization Is Changing the World's Cultures*, Princeton University Press, 2002.

265 The 'broadcasters' are the players whose activity consists in programming content (e.g. TV channels). Broadcasters may also be in charge of delivering the channels but this alone does not define a broadcaster. Thus cable operators are not considered here as broadcasters.

licensing. Notably they are already present in every member state; like the operators they can recoup losses in VOD through additional profits made on other activities (e.g. device or software to watch audiovisual content). Therefore Scenario B is characterised by the domination of operators and/or technology companies.

Table: Concentration of VOD market in the four Scenarios

		Macro-economic and communication facilities development	
		Slow development	Rapid development
Development of legal and commercial practice environments	International licensing	Higher concentration of the VOD market to the benefit of broadcasters	Higher concentration of the VOD market to the benefit of telecommunications and cable operators and/or technology companies
	Territorial licensing	Domination of broadcasters	Telecommunications and cable operators and broadcasters have respective advantages

Output 5: Impact on the audiovisual market

Finally, a higher pace of VOD market development might prove detrimental to other version markets – which still constitute the bulk of revenues. This might affect most of all the DVD market and, to a lesser extent, television. In some cases entire local audiovisual production and distribution systems might be endangered if competition with VOD services would increase in those systems.

This argument is based on the idea that every major technological breakthrough has substantially shaken the audiovisual system as a whole. For example, the introduction and development of television led both to lower revenues for theatrical distribution and to an expansion of the audiovisual market as a whole.

Table: Impact on the audiovisual market in the four Scenarios

		Macro-economic and communication facilities development	
		Slow development	Rapid development
Development of legal and commercial practice environments	International licensing	-	Competitive pressure on the audiovisual market
	Territorial licensing		

Table: The various Scenarios for the development of the EU VOD market – brief summary

		Macro-economic and communication facilities development	
		Slow development	Rapid development
Development of legal and commercial practice environments	International licensing	Medium increase in the number of VOD services (+ 70%) ²⁶⁶ Significantly higher circulation of EU films Greater concentration of the VOD market to the benefit of broadcasters	High increase in the number of VOD services (+ 100%) Significantly higher circulation of EU films Greater concentration of the VOD market to the benefit of telecommunications operators and/or technology players ²⁶⁷ Competitive pressure on the audiovisual market
	Territorial licensing	Low increase in the number of VOD services (+ 40%) Only slightly higher circulation of EU films Domination of broadcasters	Medium increase in the number of VOD services (+ 70%) Only slightly higher circulation of EU films Telecommunications operators and broadcasters have respective advantages Competitive pressure on the audiovisual market

3.2.1.2 Economic and cultural outlooks for the EU VOD market by country

The methodology of the grouping

The analysis is now refined to consider the implications of every Scenario on individual EU countries rather than on the EU market as a whole. The countries are grouped according to the methodology explained in Section 3.2.1.1. **To keep the analysis as comprehensible as possible, only the VOD market's features that are different from Scenario C (where the least change occurs) are mentioned.**

²⁶⁶ The number of VOD services referred to in the following analysis corresponds to the number of VOD services that are available in every EU country. This number is not necessarily correlated with the total number of VOD services made available at EU level and that cover all the 27 Member States. There are, for example, many services at EU level that are not available for a Belgian citizen. Therefore, the number of VOD services at the EU level could decrease while the total number of VOD services available for citizens in general could increase. The following numerical example shall illustrate this: You could, for example, have 10 services in country X and 10 services in country Y (total: 20 services). Given that only a share of these might be available in both countries one could end up with 7 services from country X and 5 services from country Y available in both, country X and country Y. Therefore, only 12 services are available on a common basis (vs. 10+10). However, there has been an increase as every citizen in both countries has access to more services (17 or 15, according to the country compared to 10).

²⁶⁷ "Greater concentration of the VOD market" does not necessarily mean a lower number of VOD services, but a limited number of VOD services would have a higher overall market share. Standard economic analysis shows that greater concentration may lead to higher prices and lower output (e.g. audiovisual content) made available.

Economic and cultural outlooks – Group A (FR, GER, IT, ES, UK)

Countries in Group A are the major audiovisual markets in the EU and among the largest per capita. In these countries there are more broadcasters among VOD service providers. As a result the number of broadcasters is expected not to increase any more these countries might see a rise in the importance of pure VOD players. In fact the relative importance of pure VOD players seems to be higher in the most advanced VOD markets (see Section 3.1).

These countries’ VOD markets are advanced in terms of turnover and ARPU compared to others, as shown by the high level of the ARPU for SVOD. These markets are far from mature, but they are expected to grow at a slower pace than most other Member States’ markets. Such predictions are confirmed by the formal mathematical models (see Section 3.2.1.1). While VOD turnover for the whole of the EU is expected to increase by 180% in the next four years, for countries of Group A (excluding Germany), it is expected to rise by 100% (increasing to 120% should rapid development of macro-economic and communication facilities occur). Germany stands as an exception since its VOD turnover is rather low. As a result, this turnover is expected to rise by nearly 500% in the next five years.

In the countries of Group A there is a significantly higher number of domestic films available in theatres as a share of all films available (although this does not always correspond to a higher market share). This reflects these countries’ abilities to produce a large number of films. As a result, international licensing could benefit local production by enabling increased exports to other EU countries. Finally, since there is little taste for non-national EU audiovisual content in the countries of Group A, it is unlikely that the circulation of such content would particularly increase.

Table: The various Scenarios for the development of the EU VOD market – Group A

		Macro-economic and communication facilities development	
		Slow development	Rapid development
Development of legal and commercial practice environments	International licensing	+ 100% VOD turnover Higher exports to other Member States	+ 120% VOD turnover Higher exports to other Member States
	Territorial licensing	+ 100% VOD turnover	+ 120% VOD turnover

Notes: in every Scenario there might be an increase in the relative importance of pure VOD players. The development of legal and commercial practice environments has no direct impact on VOD turnover (see Section 3.2.1.1) There are some consequences of these Scenarios that are common to all Member States. They are summarised in Section 3.2.1.1 and not recalled here.

Economic and cultural outlooks – Group B (BE, DK FIN, NL SE)

Countries of Group B are medium-sized countries that are among the largest audiovisual markets per capita. Despite this the VOD market still lags behind, at least as far as ARPU for SVOD is concerned. As a result a higher growth rate is expected for SVOD and VOD in general. According to the modelling their turnover is expected to increase by 740% (increasing to +880% should rapid development of macro-economic and communication facilities occur).

In these countries there are more broadcasters among VOD service providers²⁶⁸. Therefore the number of broadcasters is expected to remain stable. The relative importance of pure VOD players should increase.

No country of Group B has significant share of national films among all films available in theatres. Some already have a significantly higher share of other EU films. All countries appear to be closely linked to at least one other EU country (if not more) in terms of the boundaries of their audiovisual market. In this Group, there are countries that share common languages/cultures, such as the Scandinavian countries and Belgium and the Netherlands²⁶⁹. This means that the circulation of films between these countries and other EU countries is expected to increase in an environment that is based on international licensing.

Table: The various Scenarios for the development of the EU VOD market – Group B²⁷⁰

		Macro-economic and communication facilities development	
		Slow development	Rapid development
Development of legal and commercial practice environments	International licensing	+ 740% VOD turnover Higher exports/imports of audiovisual content to/from other EU countries	+ 880% VOD turnover Higher exports/imports of audiovisual content to/from other EU countries
	Territorial licensing	+ 740% VOD turnover	+ 880% VOD turnover

Notes: in every Scenario there might be an increase of the relative importance of pure VOD players.

268 This seems also to be the case for Denmark, Finland and The Netherlands.
 269 More precisely Belgium is included in three markets since it shares the same language as respectively the Netherlands, France and Germany.
 270 The study foresees an increase in imports in certain markets but this does necessarily mean that imported films will substitute totally to local works. The main assumption here (derived from the analysis of content made available and consumed on VOD services, cf. 3.1.2.2.) is that in the short run consumption on VOD (by origin) will resemble consumption in theatres. Therefore some markets should show a higher consumption of audiovisual content coming from other EU countries. It can substitute to local works – partially or totally – but also to US works or works of another origin (or obviously a mix of all these categories).

The development of legal and commercial practice environments has no direct impact on VOD turnover (see Section 3.2.1.1). There are some consequences of Scenarios that are common to all Member States. They are summarised in Section 3.2.1.1 and not recalled here.

Economic and cultural outlooks – Group C (CZ, HU, PL, SK)

Countries of Group C are transition countries of various sizes, but with low revenue per capita for the audiovisual market in general. According to the modelling, these countries are in the process of closing the gap in terms of the development of their VOD market, with a growth rate of 460% (increasing to +540% should rapid development of macro-economic and communication facilities occur).

They share the common feature of having fewer broadcasters among VOD service providers. Therefore the number of broadcasters among VOD service providers is expected to increase in all cases. This could also correspond to an increase in the turnover for distribution through satellite, and in the ARPU for SVOD which are also somewhat low.

Finally, all these countries have a significantly higher share of films from other European countries among all films available in theatres. As a result, international licensing could encourage an increase in the circulation of other EU audiovisual content for these countries.

Table: The various Scenarios for the development of the EU VOD market – Group C²⁷¹

		Macro-economic and communication facilities development	
		Slow development	Rapid development
Development of legal and commercial practice environments	International licensing	+ 460% VOD turnover Higher imports of audiovisual content from other EU countries.	+ 540% VOD turnover Higher imports of audiovisual content from other EU countries.
	Territorial licensing	+ 460% VOD turnover	+ 540% VOD turnover

Notes: in every Scenario there might be an increase of the number of broadcaster among VOD service providers. The development of legal and commercial practice environments has no direct impact on

²⁷¹ The study foresees an increase in imports in certain markets but this does necessarily mean that imported films will substitute totally local works. The main assumption here (derived from the analysis of content made available and consumed on VOD services, cf. 3.1.2.2.) is that in the short run consumption on VOD (by origin) will resemble consumption in theatres. Therefore some markets should show a higher consumption of audiovisual content coming from other EU countries. It can substitute local works – partially or totally – but also US works or works of another origin (or obviously a mix of all these categories).

VOD turnover (see Section 3.2.1.1). There are some consequences of Scenarios that are common to all Member States. They are summarised in Section 3.2.1.1 and not recalled here.

Economic and cultural outlooks – Group D (AU, EIR, LU)

Countries of Group D have high revenue per capita for audiovisual markets. Despite this the VOD market still lags behind, at least as far as ARPU for SVOD is concerned. As a result a higher growth rate is expected for SVOD and VOD in general. According to Screen Digest, turnover of these is expected to increase by 380% (increasing to +490% should a rapid development of macro-economic and communication facilities occur).

In all countries there are also fewer broadcasters among VOD service providers. Therefore the number of broadcasters among VOD service providers is expected to increase in all cases.

Above all, all three countries share the characteristic of being part of a larger linguistic territory in which at least one other country (if not more) constitutes most of the market. I.e. Ireland is closely dependent on UK audiovisual industry developments; Austria has the same relationship to Germany's; and Luxembourg has the same relationship to France and Germany. As a result, countries of Group D are expected to benefit from international licensing with regard to importing audiovisual content from other EU countries²⁷².

Table: The various Scenarios for the development of the EU VOD market – Group D²⁷³

		Macro-economic and communication facilities development	
		Slow development	Rapid development
Development of legal and commercial practice environments	International licensing	+ 380% VOD turnover Higher imports of audiovisual content from a few other EU countries.	+ 490% VOD turnover Higher imports of audiovisual content from a few other EU countries.

272 On the other hand, nothing proves that this will favour the consumption of audiovisual content coming from other EU countries, e.g. Austrian consumers might consume more German films but this might have no impact on their (presumably very low) consumption of, for example, Portuguese films.

273 The study foresees an increase in imports in certain markets but this does necessarily mean that imported films will substitute totally local works. The main assumption here (derived from the analysis of content made available and consumed on VOD services, cf. 3.1.2.2.) is that in the short run consumption on VOD (by origin) will resemble consumption in theatres. Therefore some markets should show a higher consumption of audiovisual content coming from other EU countries. It can substitute local works – partially or totally – but also US works or works of another origin (or obviously a mix of all these categories).

	Territorial licensing	+ 380% VOD turnover	+ 490% VOD turnover
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Notes: in every Scenario there might be an increase of the number of broadcaster among VOD service providers. The development of legal and commercial practice environments has no direct impact on VOD turnover (see Section 3.2.1.1). There are some consequences of Scenarios that are common to all Member States. They are summarised in Section 3.2.1.1 and not recalled here.

Economic and cultural outlooks – Group E (PT, RO, SL)

Countries of Group E have lower revenue per capita for audiovisual markets. Consistently they have lower revenue for VOD markets compared to other EU markets, which is particularly significant for SVOD. According to Screen Digest, these countries are in the process of closing the gap in terms of the development of their VOD market with a growth rate of 1,300% (increasing to +1,850% should rapid development of macro-economic and communication facilities occur).

In these emerging VOD markets US films are currently dominating the theatrical market. Therefore, it is assumed that it will be harder for EU audiovisual works to profit from the development of VOD. International licensing might in the end profit US films. This would probably satisfy the audience but could prevent local production from developing.

Table: The various Scenarios for the development of the EU VOD market – Group E

		Macro-economic and communication facilities development	
		Slow development	Rapid development
Development of legal and commercial practice environments	International licensing	+ 1,300% VOD turnover Higher imports of US audiovisual content.	+ 1,850% VOD turnover Higher imports of US audiovisual content.
	Territorial licensing	+ 1,300% VOD turnover	+ 1,850% VOD turnover

Notes: The development of legal and commercial practice environments has no direct impact on VOD turnover (see Section 3.2.1.1). There are some consequences of Scenarios that are common to all Member States. They are summarised in Section 3.2.1.1 and not recalled here.

Economic and cultural outlooks – Group F (BU, CY, EST, GR, LAT, LIT, MT)

Countries of Group F have lower revenues per capita for audiovisual markets. Unfortunately comprehensive data can be found neither on the structure nor on the performance of their VOD markets. These markets can only be expected to grow at a higher pace than the EU in general. According to Screen Digest, their VOD markets are growing at the rate of 250% (increasing to +300% should rapid development of macro-economic and communication facilities occur)²⁷⁴.

In these emerging VOD markets, US films are currently dominating the theatrical market. Therefore it is assumed that it will be harder for EU audiovisual works to profit from the development of VOD. International licensing might in the end profit US films. This would probably satisfy the audience but could prevent local production from developing.

Table: The various Scenarios for the development of the EU VOD market – Group F

		Macro-economic and communication facilities development	
		Slow development	Rapid development
Development of legal and commercial practice environments	International licensing	+ 250% VOD turnover Higher imports of US audiovisual content.	+ 300% VOD turnover Higher imports of US audiovisual content.
	Territorial licensing	+ 250 % VOD turnover	+ 300% VOD turnover

Notes: The development of legal and commercial practice environments has no direct impact on VOD turnover (see Section 3.2.1.1). There are some consequences of Scenarios that are common to all Member States. They are summarised in Section 3.2.1.1 and not recalled here.

²⁷⁴ Please note that data is missing for some countries, namely Bulgaria, Cyprus and Malta.

3.2.2 Conclusion of the outlook: impact on EU rights holders

Section 3.2 described the outlook for the development of VOD markets in the EU from both economic and cultural points of view. While projecting market developments is always a risky undertaking, this is especially the case when VOD markets are still in their infancy and therefore follow erratic trajectories.

One crucial uncertainty is that in countries with a less-developed broadband infrastructure, the bundling of content and access can be a marketing tool for speeding up the roll-out of broadband services. However in a stabilised and connected environment the competitive advantage goes to distributors that are best able to discriminate between consumers, i.e. to maximize the revenue from all audiovisual versions (see Section 2.1.). This suggests that the future consolidated landscape of VOD markets could be radically different from the one observed during the infrastructure roll-out.

Some predicted developments are expected to concern all Member States:

- VOD turnover will increase significantly. A more rapid development of macro-economic and communication facilities would accelerate the growth of VOD turnover
- The number of VOD services will increase in every market, although generally at a slower pace than the VOD turnover. International licensing and/or a rapid development of macro-economic and communication facilities would lead to a greater increase of VOD services
- EU films' circulation will increase as VOD markets are expanding. This circulation will be greater in an environment based on international licensing
- An environment based on international licensing would lead to a greater concentration of the VOD market, i.e. fewer service providers controlling most of the market. Broadcasters would be favoured compared to other VOD service providers because of the economies of scale and scope attached to the marketing of films, and the fact that VOD services are bundled with other audiovisual services. Telecommunications operators would, however, benefit from a rapid development of macro-economic and communication facilities
- A successful VOD market would place competitive pressure on other audiovisual version markets, notably video and pay-TV

Other predicted developments vary according to Member State. This is notably the case for the growth of VOD turnover. Therefore in countries of Group 1²⁷⁵ the overall turnover of VOD will increase at a slower pace than in other EU countries.

The nature of VOD service providers should also evolve in different ways according to the countries. In countries of Groups 1²⁷⁶ and 2²⁷⁷, there will be more pure VOD players entering the VOD market; in countries of Groups 3²⁷⁸ and 4²⁷⁹ there will be more broadcasters entering the VOD market. In all cases, however, broadcasters will benefit from competitive advantages (VOD being bundled with other rights). In the context of a rapid development of macro-economic and communication facilities, telecommunications and cable operators bundling access and content services could also benefit from

275 France, Germany, Italy, Spain, United Kingdom.

276 France, Germany, Italy, Spain, United Kingdom.

277 Belgium, Denmark, Finland, Netherlands, Sweden.

278 Czech Republic, Hungary, Poland, Slovakia.

279 Austria, Ireland, Luxembourg.

international licensing practises reducing the exclusivity of their TV competitors. From an economic standpoint, these operators have interest in bundling VOD services together with access when it helps them to win new clients. When their market is saturated, however, they have no competitive advantage over broadcasters in selling only one content version.

Finally, while the circulation of EU content on VOD services is expected to increase in all countries, the typology provides more accurate projections for individual countries. An environment based on international licensing will:

- increase exports to other Member States for countries of Groups A²⁸⁰ and B²⁸¹
- increase imports from other Member States for countries of Groups B²⁸², C²⁸³ and D²⁸⁴
- favour US audiovisual content for countries of Groups E²⁸⁵ and F²⁸⁶.

In summary, then, the main consequences for EU rights holders that an environment based on international licensing would bring are as follows.

Increasing numbers of VOD services available in every country²⁸⁷ and greater concentration of VOD service providers at EU level: A VOD market that is too fragmented prevents VOD services from reaching a critical size which would allow them to be profitable. This encourages greater consolidation of service providers at EU level. This will modify vertical relationships between rights holders and service providers in that rights holders will benefit from the growth of VOD revenues (linked to a more lively VOD market), but will also be in a weaker position to negotiate their share of the VOD services' revenues (unless rules exist requiring distributors to invest in production). Currently VOD services provide relatively higher revenues to the rights holders (e.g. compared to video, see Section 3.1).

EU audiovisual content will benefit from greater circulation: This will prove beneficial to EU rights holders because their content can be exploited more easily in other EU countries. This is in particular due to reduced delivery costs. However, greater circulation does not necessarily imply a greater level of consumption. Investments in marketing are required to allow audiovisual content to be consumed on a larger scale across borders. Films only released on VOD will compete with VOD releases that have benefited from greater visibility, notably through a theatrical release (and related marketing spend) in that country. Consequently, international licensing by itself, as well as any regulatory and policy action that would favour such practice, will not lead to significantly higher revenues for EU rights holders; what is required is policymaking that will encourage an increase in consumer demand.

There will of course be exceptions to this rule, i.e. some rights holders will make their content available and it will be consumed in a large number of EU countries due to international licensing. Availability may sometimes create this opportunity to reach new markets. New business practices related to the development of the internet (notably social networks) may be increasingly important in promoting such

280 France, Germany, Italy, Spain, Great Britain.

281 Belgium, Denmark, Finland, Netherlands, Sweden.

282 Belgium, Denmark, Finland, Netherlands, Sweden.

283 Czech Republic, Hungary, Poland, Slovakia.

284 Austria, Ireland, Luxembourg.

285 Portugal, Romania, Slovenia.

286 Bulgaria, Cyprus, Estonia, Greece, Latvia, Lithuania, Malta.

287 This can be the case especially in the smallest Member States that would be less dependent on the size of the market.

success as they allow a buzz to develop – sometimes with lower marketing investment. Nevertheless, promotion on the internet rarely substitutes traditional investments in advertising, which remain crucial.

However, as we will see in the final conclusions, there may be opportunities to support rights holders in accessing new markets by encouraging them to develop and implement digital marketing strategies. Nevertheless, depending on the home countries of EU rights holders their opportunities vary in this context (see the analysis by Group of countries).

Competitive pressure put on other audiovisual version markets: VOD currently represents a low share of overall revenues for EU rights holders. As a result, rights holders rely on other audiovisual version markets. The balance of the overall audiovisual system is fragile and the consequences of a growth of VOD revenues may in the end prove detrimental to EU rights holders.

Production funding which is currently based on investments made by broadcasters, for example, may be greatly affected; while VOD offers little perspective for film financing it may lead to a decline in audience figures of the major free-to-air networks, leading to the decrease of the value of broadcasting rights. In this context, European rights holders that need to finance their new content may accept broadcasters' offers to purchase all version distribution mandates. Telecommunications and cable operators or VOD pure players will then face fierce competition to acquire rights.

CHAPTER IV

TOWARDS A EUROPEAN DIGITAL SINGLE MARKET: THE LEGAL ENVIRONMENT

Video-on-demand markets in Europe are likely to continue to grow over the next decade. The European Commission is keen to assess how policymaking can support this development and how it can further promote cross-border circulation and consumption of European audiovisual works in this emerging market. It has consequently asked for a thorough analysis of regulatory frameworks and public policies at European Union and national levels in the context of its objective to promote a digital single market for audiovisual content.

A detailed survey of the circumstances of legislative frameworks and public policies in the European Union and the Member States was conducted. The country profiles resulting from this survey as well as a list of experts, policy makers and academics interviewed are included in the appendices.

The different development paths of video-on-demand markets in the EU depend to a large extent on a diverse set of international agreements, European rules and regulations and national legal frameworks and support policies²⁸⁸. While the objectives of many of these rules and interventions are diverse (economic growth, free trade, promoting cultural diversity, supporting the digital shift, guaranteeing freedom of expression – to name but a few) they all shape the environment in which new video-on-demand business models emerge.

After a brief overview of the EU policy context (in this introduction), and a description of the legal basis for EU intervention in the audiovisual field (Section 4.1), Chapter IV describes the *acquis communautaire* and steps taken by the EU regulator to encourage the development of a single market for audiovisual services (Section 4.2). In doing so, it also analyses suggestions by the EC and various stakeholders to adapt the legal framework to the digital environment in the context of DG Information Society and Media's and DG Market's Reflection Document on Creative Content in a European Digital Single Market²⁸⁹ (hereafter "Reflection Document"). The Chapter then considers structural and regulatory issues which might encourage or hinder the development of cross-border licensing activities in Europe (Section 4.3).

The policy context – a European Digital Agenda

Digital distribution across borders is considered a major opportunity for the European audiovisual sector. A competitive pan-European market for creative and diverse content was one of the key objectives of Europe's Lisbon strategy²⁹⁰ and its i2010 strategy to create a single European information space. This continues to be the case in relation to the new EU2020 strategy²⁹¹ and the EC's Digital Agenda for Europe²⁹².

288 Next to the previously identified drivers of technological infrastructure and consumer demand

289 European Commission DG Information Society and DG Internal Market Reflection Document on Creative Content in a European Digital Single Market: Challenges for the Future, 22 October 2009 (hereafter Reflection Document 2009)

290 Lisbon European Council Conclusions 23 and 24 March 2000

291 Communication from the European Commission. Europe 2020 – A European strategy for smart, sustainable and inclusive growth, Brussels 3 March 2010, COM(2010) 2020 and Conclusions from the European Council adopted on 17 June 2010.

292 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Digital Agenda for Europe, Brussels 19 May 2010, Com

Moreover, it is an important objective of the European agenda for culture²⁹³. Other recent initiatives that seek to increase Europe's competitiveness in the domain of digital content include the European Commission's Reflection Document on creative content in a digital single market, the Communication on creative content online²⁹⁴, the Online Commerce Round Table initiative²⁹⁵, and also – albeit on a different level – the recent eYouguide initiative²⁹⁶.

Furthermore, the Recommendation on rights management in online music²⁹⁷, the review of DG Competition concerning the Apple/iTunes case²⁹⁸ and the CISAC²⁹⁹ or IFPI³⁰⁰ settlements have been important recent developments linked to the EU's ambition to create a digital single market for creative content.

The Council resolution on the enforcement of intellectual property rights from March 2010³⁰¹ promotes an active EU policy regarding copyright enforcement and recognises the importance of intellectual property rights for creation in Europe.

The European Commission and the Member States are also involved in international trade negotiations in the context of the Anti-Counterfeiting Trade Agreement (ACTA)³⁰² that aims to introduce strong international standards of copyright enforcement.

The policy discussions and consultation responses surrounding the above initiatives indicate that there are diverse positions on how to best promote the creative content sector, consumer access to a wide range of audiovisual works and a level playing field for new services in Europe. Copyright and related rights ("copyright") and their exercise are often at the centre of this discussion. In relation to audiovisual content the following questions arise:

- Is copyright, by granting a monopoly concerning the exploitation of creative content at territorial level, still adapted to support creation, innovation and the distribution of content to consumers in an increasingly international digital communications infrastructure?
- And, if it is, do some of its aspects require reform to suit new forms of usage and to improve the potential for international exploitation?
- Does technological convergence affect existing copyright provisions?

(2010) 245 adopted on 31 May 2010 by the 3017th Transport, Telecommunications and Energy Council, Brussels, 31 May 2010

293 Communication from European agenda for culture in a globalising world COM/2007/0242 final

294 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on creative content online in the Single Market COM(2007) 836 final,

295 See stakeholder report, Online Commerce Round Table, Report on Opportunities and Barriers to Online Retailing, 26 May 2009

296 See DG Information Society website for more information, http://ec.europa.eu/information_society/eyouguide/index_en.htm

297 Recommendation of the European Commission on collective cross-border management of copyright and related rights for legitimate online music services, September 2005

298 Case COMP/39.154 (iTunes)

299 Case COMP/C2/38.698, of 16 July 2008 OJ 2008 C 323/07 (CISAC)

300 Case COMP/C2/38014 of 8 October 2002, L107/58 OJEU 30.04.2003 (IFPI-Simulcasting)

301 Council Resolution of 1 March 2010 on the enforcement of intellectual property rights in the internal market, 2999th Competitiveness Council Meeting, Brussels 1 March 2010

302 See the EC's website <http://tinyurl.com/yImcenx>

- Is the exercise of copyright hindering market access in relation to new digital services, and does it prevent European rights holders from making the most of an emerging international digital distribution infrastructure?
- What role do copyright management, licensing and enforcement play in this debate?
- How can transaction costs in the licensing acquisition process be decreased to encourage the presence of European content on – and the establishment of – pan-European services?

However, the digital shift not only raises questions regarding the exercise of copyright. The roll out of broadband and the proliferation of personal computers and other end devices across Europe – heralded as a significant step towards transforming Europe into an Information Society – also leaves rights holders, audiovisual service providers as well as citizens and consumers in a challenging position. At a time when consumers are increasingly unsure about their rights when conducting e-commerce transactions the creative content sector – suffering the results of copyright infringements – is equally worried about further unbalancing the delicate ecology of audiovisual finance and creation. In addition, audiovisual media service providers are looking for a legal environment that provides a level playing field and a more cost-effective copyright licensing process. In other words, more legal certainty seems to be sought by most stakeholders to address these challenges.

The relevance of copyright enforcement in the intangible economy

The relationship between the need to reward content creation, the emergence of new digital services and unauthorised sharing of copyright-protected content deserves brief consideration before entering a comprehensive legal analysis of the issues.

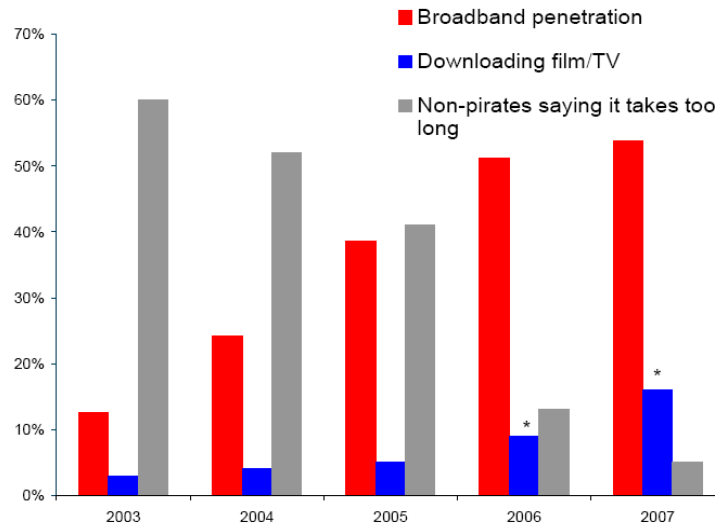
Copyright rewards creativity and investments into creation. There is a consensus that the protection of intellectual property rights is important to stimulate creation, innovation and knowledge production in Europe. As mentioned in the recent Reflection Document³⁰³ from the European Commission: “[c]opyright is the basis for creativity”.

Intellectual property rights grant rights owners the exclusive right to prevent third parties from exploiting their copyrighted work. From an economic perspective, property is a key institution that enables economic growth. According to Nobel Prize winner Douglass North it is, however, dependent on a “mechanism bringing social and private rates of return to closer parity”. If property rights are not enforced “a discrepancy between private and social benefits or costs means that some third party or parties, without their consent, will receive some of the benefits or incur some of the costs.”³⁰⁴ Most of North’s works, building upon those of another Nobel Prize winner, Ronald Coase, are dedicated to the impact of property and property rights enforcement on societal well-being and economic growth. In the information society, their scientific contributions fully apply to intellectual property.

The roll out of broadband internet services has allowed users to easily and quickly access copyright-protected content without the authorisation of rights holders. In fact, broadband take up to some degree mirrors the increase of copyright infringements online.

303 Reflection Document 2009 op.cit. p. 1

304 North Douglass, Thomas Robert Paul, *The Rise of the Western World, A New Economic History*, Cambridge University Press, 1973, pp 2-3



Source: Oxford Economics³⁰⁵

While greater broadband proliferation and use of ICTs across the EU are a major progress and change the way our societies function, one of the major impacts is the substantial increase of online copyright infringements over recent years. Even though it is difficult to statistically link increases of internet usage with the development of online piracy³⁰⁶ studies indicate that unauthorised access to copyright-protected films has grown significantly in parallel with the growth of broadband take up. While in the UK, in 2006, 44 million movies were downloaded, this number amounted to 52.2 million in 2007³⁰⁷. In Spain, in 2004, 15.4 million film files were downloaded, while in 2005 this number reached 132 million³⁰⁸. According to the Motion Picture Association (MPA) the combined costs of copyright infringements online in relation to film in major European territories (UK, France, Spain, Italy, Germany) was \$ 1.9 billion in 2009³⁰⁹. This figure naturally grows when looking at all creative industry sub sectors, which suffer significantly from copyright infringements (film, TV series, recorded music and software). A recent study estimated retail losses to up to € 10 billion and found that more than 185,000 job losses in the EU³¹⁰ were due to copyright infringements. The study mentioned above on the Economic Impact of Legislative Reform to Reduce Audio-visual Piracy shows that the proliferation of broadband has enabled more and more people to access audiovisual content without authorisation. Consistently fewer ‘non-pirates’ state that the duration of downloading prevents them from downloading illegally.

Interestingly, data from Sweden also seem to indicate that there is a reciprocal relationship between internet usage and copyright enforcement. Towards the end of March 2009 internet traffic in Sweden had reached an unprecedented peak before it suddenly fell by 30%. This sudden decrease can be linked to the closing down of illegal file sharing site “The Pirate Bay” on April 10th 2010³¹¹.

305 Oxford Economics, Economic Impact of Legislative Reform to Reduce Audio-visual Piracy, Final Report, March 2009, p.14. 2006 figure includes downloading and burning. 2007 figure includes downloading, illegal streaming, burning, emails and memory sticks

306 Due to a lack of consistent data (notably over time)

307 Ipsos Mori, Digital & Physical Piracy in GB, Wave 5

308 Gfk, Estudio de Hábitos de Consumo de Vídeo, September 2006

309 Vivarelli Nick, France, Blighty lead tough response to persistent pirates, Variety 30 March 2009, p. 10

310 Terra Consultants, Building a digital economy: The importance of creating jobs in the EU’s creative industries, 2010 p.3

311 Cnet, Nettraffic down on first day of Swedish anti-piracy law, 2009 <http://tinyurl.com/dk88uz>

Today's significant amounts of online copyright infringement disrupt the traditional economic cost-benefit analysis of copyright. In the analogue environment, the benefits of the distribution of an unauthorised copy corresponded to that of a limited release of a degraded version (implying less utility to the consumer). In these circumstances unauthorised copying was considered by some to be a means of stimulating demand in legal markets, and therefore to only have a marginal negative impact on rights holders³¹². A digital unauthorised copy, however, cannot be considered as a degraded version of the original, as no quality is lost. A downloaded film can have the same quality as a film watched on DVD and thus will not encourage users to rent DVDs or buy films on legitimate VOD sites.

In this context the cost of copyright enforcement over the internet could increase to such a point that exclusive rights become worthless to apply. In other words, if nothing is done to enforce copyright at the consumer level, the cost of enforcement will overcome its benefits. This would deprive society of a key economic institution designed to stimulate creativity, knowledge production, the arts, culture and entertainment. Potentially, this development could also impact on other IP institutions such as trademarks, whose enforcement costs are also increasing with the roll out of digital technologies.

Whether and how copyright infringements should be subject to stronger sanctions is currently debated in many Member States and by the European institutions. Naturally, many interests are at stake. This is so because each stakeholder group – be it citizens, consumers, artists and the cultural and creative industries or the ICT sector – would benefit differently. Ultimately, the on-going debate on measures to contain online copyright infringements raises the following question: is it important for the EU that this property institution is applied and, if yes, what measures should be taken to decrease copyright enforcement costs?

This Chapter provides a review of initiatives from Member States in this respect at a later stage.

4.1 The justifications and legal basis for EU interventions in audiovisual

Interventions of EU institutions in the audiovisual field are justified by legal competences conferred by the EU Treaties and the EU's international obligations. Their objectives are diverse and include the following:

- the promotion of the internal market
- the implementation of competition rules
- the promotion of cultural diversity and support for cultural industries
- the representation of consumers' interests
- the implementation of international treaty obligations

These will be reviewed in the following.

312 See Watt Richard, *Copyright and Economic Theory, Friends or Foes*, Edward Elgar, 2000 pages 25-69.

4.1.1 Internal market justifications

EU intervention in the audiovisual field is primarily justified by the aim of the Community to create an internal market. Article 3 of the Lisbon Treaty (The Treaty on European Union) states that: “the Union shall establish an internal market”. This constitutes one of the fundamental objectives of the Union. The internal market is defined in article 26 (2) of the Treaty on the functioning of the European Union (TFEU former article 14 TEC)³¹³ as “an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties”. Articles 34 and 35 prohibit restrictions on free movements and measures having an equivalent effect between Member States, whilst Article 36 provides exceptions for measures justified on various grounds including the protection of “industrial and commercial property”. The principle of free movement of goods has been interpreted very widely by the European Court of Justice (ECJ).

The Treaty furthermore establishes the freedom of establishment for nationals of Member States across the Community (Article 49 TFEU former Article 43 TEC) and Article 56 TFEU (former Article 49) prohibits restrictions on freedom to provide services.

In 2002, the EC report “The State of the Internal Market for Services”³¹⁴ identified barriers which are preventing the completion of the internal market. These barriers are still numerous and often arise from administrative burdens and legal uncertainty. Consumers also remain reluctant to engage in cross-border purchasing activities³¹⁵. The recent Study A New Strategy for the Single Market similarly acknowledges: “A number of obstacles reduce the capacity of industry in Europe to innovate and generate value added in the digital sphere: the fragmentation of online markets, ill-adapted intellectual property legislation, the lack of trust and interoperability, the lack of high-speed transmission infrastructure and the lack of digital skills. Many of these obstacles point to a simple cause: a lack of a Digital single market.”³¹⁶

With regard to VOD the removal of legal barriers to the establishment of an internal market for online content and services is at the heart of the European Commission’s EC’s 2020 strategy³¹⁷: “the Commission will work[...]to create a true single market for online content and services [(i.e. borderless and safe EU web services and digital content markets, with high levels of trust and confidence, a balanced regulatory framework with clear rights regimes, the fostering of multi-territorial licences, adequate protection and remuneration for rights holders and active support for the digitisation of Europe’s rich cultural heritage, and to shape the global governance of the internet”.

A similar objective is also spelled out in the EC’s Digital Agenda for Europe, which states that “Europe is still a patchwork of national online markets [where] commercial and cultural content and services need to flow across borders; this should be achieved by eliminating regulatory barriers and facilitating

313 Treaty on the functioning of the European Union OJ C115, 9.5.2008

314 Report from the Commission to the Council and the European Parliament on the state of the internal market for services presented under the first stage of the Internal Market Strategy for Services COM/2002/0441 final

315 As shown for instance in the Eurobarometer survey 298 “Consumer protection in the Internal Market” from October 2008 only 13% of consumers with an internet connection at home have traded cross-border via the internet, compared with 7% of the general population, p.4 accessible on <http://tinyurl.com/ybsr9xf>

316 See: Monti, Mario. A New Strategy for the Single Market. Report to the President of the European Commission. 2010. Page 44

317 Communication from the European Commission, Europe 2020 – A European strategy for smart, sustainable and inclusive growth, op.c317 t. p.12

electronic payments and invoicing, dispute resolution and customer trust. More can and must be done under the current regulatory framework to weave a single market in the telecoms sector³¹⁸.

Interventions at EU level in the field of copyright are primarily justified by the desire to create an internal market. All seven directives³¹⁹ that regulate the field of copyright protection have been based on Article 114 TFEU (former Article 95 TEC)³²⁰. These directives exist as a result of diverging national copyright rules which are considered to be detrimental to the establishment of an internal market³²¹.

The pre-eminent objective of the harmonisation of intellectual property rights is therefore neither cultural nor industrial, but instead to remove barriers to trade and competition in Europe. However the new Article 118 of the Lisbon Treaty states that:

“In the context of the establishment and functioning of the internal market, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralised Union-wide authorisation, coordination and supervision arrangements”³²².

The EC’s Reflection Document takes the view that this new legal basis could be used to justify harmonisation efforts to establish a single European copyright title that would remove territoriality inherent to the application of national copyright rules³²³.

Finally, Article 345 (former 295 TEC) also provides that EC law “shall in no way prejudice the rules in Member States governing the system of property ownership”.

4.1.2 EC competition justifications

The application of competition rules also justifies EU intervention in the audiovisual sector.

Article 101 TFEU (Article 81 TEC) and Article 102 (Article 82 TEC) respectively prohibit anti-competitive agreements between undertakings and the abusive exploitation of a dominant position. These articles are enforced by the European Commission and national competition authorities and courts.

Copyright is based on a philosophy of competition: by granting a monopoly right you encourage creators and investment in creation. Therefore, it is for example legitimate to restrain other people from taking advantage of your creation by copying your work without authorisation. Intellectual property rights are considered to promote a competitive economy. Such competition in relation to being innovative or

322

European Commission, A Digital Agenda For Europe op.cit. p. 12

European Commission, A Digital Agenda For Europe op.cit. p. 12

. p.12

Communication from the European Commission, Europe 2020 – A European strategy for smart, sustainable and inclusive growth, op.c317 t. p.12

t. p.12

323 See on this the Reflection Document 2009 op.cit. p. 18

creative is as relevant as price competition^{324,325}. In post-industrial economies this notion is of particular relevance.

On the other hand intellectual property rights may constitute barriers to entry, create market power and prevent consumers' choice. For this reason intellectual property can also act as a means to restrict competition and innovation³²⁶. This tension between IP rules and competition rules is subject to intense regulatory and judicial scrutiny as further illustrated in Section 4.4.4.

4.1.3 The cultural justification

EU intervention in audiovisual is, in addition, increasingly justified by cultural arguments.

According to the Maastricht Treaty the European Union has to take into account the cultural consequences of its actions. Article 167 (4) (former 151 (4)) of the Treaty provides that "*the community shall take cultural aspects into account in its action under other provisions of the Treaty, in particular in order to respect and to promote the diversity of its cultures*". In this context, directives and consultation papers from the European Commission increasingly stress the importance of copyright as a fundamental element of Europe's cultural policy (to nurture individual creation and art) and in relation to the competitiveness of its cultural and creative industries (music, film, videogames, publishing, audiovisual, broadcasting), which represent 3% of EU GDP and 6 million jobs in Europe³²⁷.

The protection and promotion of cultural diversity has increasingly become one of the major concerns of EU audiovisual policy. This objective was confirmed in the "European Agenda for Culture"³²⁸ in 2007. On a par with promoting competitiveness and jobs, audiovisual policymaking at EU level also aims to enhance cultural diversity, to promote culture as a catalyst for creativity. It is considered to be an important element in the Union's international relations.

Since the ratification of the 2005 UNESCO Convention on Cultural Diversity³²⁹ European institutions have committed to support the exchange of cultural products and services and to support their cultural industries (Article 6).

The new Lisbon Treaty provides in Article 3 that the internal market shall respect Europe's rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.

4.1.4 Justifications based on protecting consumers

European intervention in the field of audiovisual and especially in the field of digital technologies is also motivated by the aim of ensuring equal levels of consumer protection across the EU. The aim of establishing a digital single market is also justified by consumer interest, in the form of accessing

324 KEA, Study for the European Commission, The impact of culture on Creativity, June 2009

325 Bomsel Olivier, L'économie de l'immateriel, Gallimard, Paris 2009

326 See for instance argument made by Lessig Lawrence, Free Culture How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity, Penguin, New York, 2004

327 KEA, The Economy of Culture, Study for the European Commission, 2005

328 Communication from the Commission on a European agenda for culture in globalising world op.cit.

329 Convention on the protection and promotion of the diversity of cultural expressions, Paris 20 October 2005

content across borders and the promotion of the right to access information. Article 169(1) TFEU (former Article 153(1)) states that “*in order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests.*” Consumer protection measures can therefore be adopted under internal market objectives.

4.1.5 Justifications based on international obligations

EU involvement in the audiovisual sector is, last but not least, also based on the Union’s international competences (in trade in particular) and the need to implement international treaty obligations. In this respect it is important to consider that the EU harmonisation process is strongly governed by its international obligations. Hence, the EU and its Member States are bound to international agreements and conventions such as the Berne Convention³³⁰, the Rome Convention and the two 1996 WIPO Treaties³³¹³³². Furthermore, the EU implements international trade agreements of the World Trade Organisation (WTO) such as the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs)³³³. As mentioned before, EU institutions and EU Member States are also currently taking part in the negotiations on a new Anti-Counterfeiting Trade Agreement (ACTA).

Based on these international obligations, the 2001 Information Society Directive³³⁴ introduced major new provisions in relation to the digital exploitation of creative content, and thereby harmonised legislation to reflect technological and commercial developments which were related to the impact of digital technology. For example it implemented the 1996 WIPO treaties by broadening the field of application of the communication on the public right (introducing the right to make available), and by providing protection and effective legal remedies against the circumvention of technological measures.

The emergence of a digitally-networked communications infrastructure, and the ability to make copies of content that were as good as the original, had made it necessary to adapt the legislative framework to enable rights holders to monetise and license new forms of usage and dissemination³³⁵. On-demand and interactive services required the adoption of a new category of rights. The “making available” right was therefore introduced to enable rights holders to exploit their content via digital platforms.

As to authors, Article 3(1) of the Information Society Directive provides that:

330 Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886

331 WIPO Copyright Treaty adopted in Geneva on December 20, 1996 and WIPO Performances and Phonograms Treaty (WPPT) adopted in Geneva on December 20, 1996

332 Due to the fact that copyright law is, by its very nature, national and content markets are becoming increasingly global, such international agreements are needed to establish minimum standards of protection across borders. International principles established by the WIPO agreements, for example, have led to the adoption of the 2001/29/EC Information Society directive in the European Union. With a view to adapting copyright to the new digital environment the directive established a right of making available, in order to enable rights holders to be paid for the exploitation of online rights.

333 Agreement on Trade-Related Aspects of Intellectual Property Rights is Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994

334 Directive 2001/29/EC Directive on the harmonisation of certain aspects of copyright and related rights in the information society OJ L 167, 22.6.2001, p. 10–19. (“Information Society Directive” or “Copyright Directive”)

335 On this issue see for instance Aplin Tanya, Copyright Law in the Digital Society, Hart Publishing, Oxford) Portland Oregon, 2005 pp. 127 ff.

“Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.”

Under Article 3(2) performers, phonogram and film producers as well as broadcasters benefit from the right to authorise or prohibit the making available of a protected work. This right is territorial and exclusive.

International agreements, as well as European copyright rules, therefore enshrine major legal principles, such as contractual freedom, exclusivity, territoriality and the enforcement of copyright.

4.2 The community acquis in relation to cross-border licensing of audiovisual content

In order to give practical advice on how to encourage the development of a single market a good understanding of the legal principles underlying the rules, regulations and policy interventions that aim to promote cross-border trade of audiovisual content in the EU is essential.

Individuals and companies are granted copyrights or neighbouring rights for their creative efforts and for investments into creativity. In order to monetise these rights their use is usually licensed to numerous distributors – nationally and internationally. These licensing practices are strongly conditioned by intellectual property rights legislation.

As audiovisual rights licensing lies at the heart of cross-border trade of such content, the acquis is strongly conditioned by intellectual property rights legislation. For licensing is the practical implementation of rights granted to individuals or companies for their creative efforts or their investments in creativity.

This section describes the community acquis related to copyright standards (Section 4.3.1). It then considers actions taken by European institutions to mitigate the impact of the exercise of copyright on the functioning of the internal market and on competition (Section 4.3.2).

4.2.1 Main principles governing copyright in the EU

The acquis communautaire is built around four principles which are important features of the seven directives harmonising copyright and neighbouring rights legislation in the European Union. They largely implement international norms enshrined notably in the WIPO Treaties. The four principles are:

- Contractual freedom – the right of authors to freely decide about the terms and conditions under which they wish to exploit their works
- Exclusivity – the right to grant exclusive exploitation rights (a right linked to contractual freedom)
- Territoriality – the right for the rights holder to decide on the geographic scope of a licence (a right linked to contractual freedom)
- Enforcement – the right to prevent by law unauthorised exploitation of copyright protected works

4.2.1.1 Contractual freedom and exclusivity

International copyright law grants exclusive monopoly rights to authors and/or producers of an original work. It thereby enables them to exploit the creative content for which they own the rights. Such exclusive rights are a non-tangible prerogative provided by law. They can be considered as a form of monopoly that is set for a certain period of time (in the EU 70 years after the death of the author in the case of the individual author's right³³⁶), after which a work falls into the public domain. This entails that authors are free to exercise their rights in the way they want. They can therefore sell or assign rights by means of a licence, but they are also free not to license the use of their copyrighted work. Importantly, this exclusivity underlies many value-generating practices in the audiovisual industry, such as versioning (see Section 2.1). These characteristics have been acknowledged specifically in relation to audiovisual content exploitation by the European Court of Justice in the Coditel II case³³⁷:

“The characteristics of the cinematographic industry and of its markets in the community, especially those relating to dubbing and subtitling for the benefit of different language groups, to the possibilities of television broadcasts, and to the system of financing cinematographic production in Europe serve to show that an exclusive exhibition licence is not, in itself, such as to prevent, restrict or distort competition”.

Therefore the European Court of Justice recognises the specificity of a sector that is subject to market fragmentation for linguistic and cultural reasons. As this market fragmentation influences the way finance is raised for production, the Court concludes that such specificity justifies exclusive licensing for a certain period of time.

The Digital Agenda for Europe also acknowledges that any new solutions to facilitate cross-border and pan-European licensing in the audiovisual sector *“should preserve the contractual freedom of rights holders. Rights holders would not be obliged to license for all European territories, but would remain free to restrict their licences to certain territories and to contractually set the level of licence fees”*³³⁸

4.2.1.2 Territoriality

The exclusivity that a copyright confers upon its owner is strictly limited to the territorial boundaries of the Member State where the right is granted. This core principle of copyright has been enshrined in international law in Article 5(2) of the Berne Convention, and in the seven EU Directives dealing with copyright and related rights. The European Court of Justice has confirmed this principle when considering the compatibility of territorial exclusivity with internal market and competition rules. This principle has, for example (and *a contrario*), also been confirmed with the establishment of the “exhaustion rule”³³⁹ in relation to the distribution of physical goods.³⁴⁰ In the Lagardère ruling³⁴¹, the court clarifies that:

336 Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights, OJ L 372, 27.12.2006, p. 12–18

337 ECJ 6 October 1982, Case 262/81 Coditel v Ciné Vog Films and others (Coditel II), , para 16

338 A Digital Agenda for Europe, op.cit. p. 8

339 The exhaustion principle limits the rights holder's possibility to prevent the further distribution of copyrighted goods across the internal market, once he/she has given or sold the rights for one territory in the EC.

“At the outset, it must be emphasised that it is clear from its wording and scheme that Directive 92/100 provides for minimal harmonisation regarding rights related to copyright. Thus, it does not purport to detract, in particular, from the principle of the territoriality of those rights, which is recognised in international law and also in the EC Treaty. Those rights are therefore of a territorial nature and, moreover, domestic law can only penalise conduct engaged within a national territory”³⁴².

As a result, rights holders are entitled to grant licences with territorial limitation to take into account the market position of a distributor in a given territory. They can define licensing terms in relation to local factors that may influence the success of a release, such as market presence, available marketing spend or revenue potential. Similarly, users of audiovisual rights are entitled to take into account the territorial scope of a given licence as well as the real usage and consumption patterns when negotiating a licensing deal. There would be no point paying an extra licence fee in relation to territories not covered by the service. On the basis of international law, ECJ jurisprudence as well as EC legislation, the territorial nature of copyright “can be described as quasi-acquis communautaire”³⁴³.

4.2.1.3 Copyright enforcement

Disparities between Member States regarding copyright enforcement are seen as “*prejudicial to the proper functioning of the Internal Market[...]. This situation does not promote free movement within the internal market or create an environment conducive to healthy competition*”³⁴⁴. Harmonised enforcement of intellectual property rights is thus considered key to the success of the internal market³⁴⁵.

- The intervention of the EC regulator on enforcement is justified by the need:
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- to create a level playing field and prevent distortion of competition (harmonisation)
- to adapt enforcement mechanisms to the challenge of new technology (technical protection measures (TPM) and liability issues of internet intermediaries).

EU intervention in this field is also triggered by the need to defend and promote Europe’s commercial interests in relation to third countries. In this respect the promotion of strong enforcement measures is an integral part of EU trade policy. Enforcement measures adopted in the European Union reflect

340 See for instance ECJ 8 June 1971, Case 78/70, Deutsche Grammophon v. Metro, and ECJ, 18 March 1980, Case 62/79 Coditel I, paras. 15-17

341 ECJ, 14 July 2005, C-192/04, Lagardère Active Broadcast v. Société pour la Perception de la rémunération équitable (SPRE) and Others

342 ECJ, 14 July 2005, C-192/04 Lagardère para. 46

343 See Gaster, Jens, Das urheberrechtliche Territorialitätsprinzip aus Sicht des Europäischen Gemeinschaftsrechts, ZUM 2006, no.1, pp.-8-14, p.9

344 Enforcement Directive Recital 8 and Recital 9 states that disparities in copyright enforcement lead “to a weakening of the substantive law on intellectual property and to a fragmentation of the internal market in this field” and cause “a loss of confidence in the internal market in business circles, with a consequent reduction in investment in innovation and creation”

345 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on creative content online in the Single Market, Document COM /2007/836 final, Brussels 03.01.2008 p. 6

positions taken at international trade level as the EU is a major exporter of copyright-protected content. Europe's competitive position in the world is increasingly based on its ability to create and innovate, and Europe's creative industries drive economic growth and competitiveness³⁴⁶. Furthermore, a lack of copyright enforcement in Europe would put the EU in a difficult position in enforcement-related trade negotiations with countries that have a poor record in the fight against counterfeiting and copyright infringement.

The European Union was instrumental in the adoption of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs)³⁴⁷ and is currently also actively taking part in the negotiations on a new Anti-Counterfeiting Trade Agreement (ACTA)³⁴⁸, which seeks to agree on strong international standards of copyright enforcement.

In this context it should be stressed that political³⁴⁹ and academic voices³⁵⁰ are increasingly questioning the validity of a strong enforcement policy, in particular in relation to internet access and consumers usage of creative content. Problems arising from strong copyright enforcement, in particular in terms of conflicts of fundamental rights, will be addressed in Section 4.5.1.

As will be seen in the following Section, intervention in Europe with regard to enforcement in the audiovisual field is equally aimed at service providers (pay-TV in relation to the Conditional Access Directive³⁵¹ or internet intermediaries in relation to the E-commerce³⁵² Directive) as well as at creators or investors in cultural goods (authors, performers, producers/publishers).

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Towards a level playing field: harmonisation of sanctions and remedies

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In order to address disparities in the field of copyright enforcement that are hindering the functioning of the internal market, and to ensure equivalent levels of protection throughout the EU, the Copyright Directive³⁵³ and the Enforcement Directive³⁵⁴ require Member States to provide effective, proportionate and dissuasive sanctions, measures, procedures and remedies against copyright infringement. The scope of sanctions provided for in the Enforcement Directive is limited to civil sanctions. A Criminal

346 The turnover and employment of the cultural and creative sector is equivalent to the ICT sector in Europe: it amounted to €654 billion in n 2003 while ICT turnover was €541 billion in 2003, see KEA, *The Economy of Culture*, Study for the European Commission DG EAC, 2005

347 Agreement on Trade-Related Aspects of Intellectual Property (TRIPs) op.cit.

348 See the EC's website <http://tinyurl.com/yImcex>

349 See for instance The Pirate Party <http://www.piratpartiet.se/international/english> gaining increasing support among European citizens

350 See for instance Lawrence Lessig, *Free Culture*, Penguin, New York, 2004, or Vaidhyathan Siva, *Copyrights and Copywrongs – The rise of Intellectual Property and how it threatens creativity*, New York University Press, New York and London, 2001

351 Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access OJ L 320, 28.11.1998, p.54-57

352 Directive 2000/31/EC of the European Parliament and of the Council on certain legal aspects of information society services, in particular electronic commerce, in the internal market, O.J.178; 17.7. 2000 p.1-16 (E-Commerce Directive)

353 Article 8

354 Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, OJ L 195, 2.6.2004 p.16 – 25 (Enforcement Directive)

Sanction Directive³⁵⁵ should follow the adoption of the Enforcement Directive. However, because of the lack of consensus on the legal basis, further discussions need to take place at Council level.

More recently the Commission adopted a Communication on enhancing the enforcement of intellectual property rights in the internal market.³⁵⁶ The Communication establishes principles governing the European Observatory on Counterfeiting and Piracy launched by the Commission in April 2009. It encourages stakeholders to have a dialogue on counterfeiting and copyright infringement. There are currently two discussions: one on the digital sales of counterfeit products and the other on illegal downloading and uploading activities. The aim is that stakeholders agree on voluntary arrangements to fight illegal activities.

355 Amended proposal for a directive of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights Brussels, 26.4.2006, COM(2006) 168 final

356 Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee on Enhancing the enforcement of intellectual property rights in the internal market, 11 September 2009, COM/2009/467.

Enforcement and new technologies

Increasingly content is protected through technical protection measures (TPM). These can be defeated to enable illegal access to copyright-protected content. The law – which at European level is facilitated through the Conditional Access Directive – protects rights holders against the circumvention of TPMs for copyright infringement. The Conditional Access Directive creates a level playing field essentially with regard to pay-TV services. It grants legal protection to conditional-access services which are remunerated, essentially protecting pay-TV services against copyright infringement. It compels EU Member States to adopt a minimum level of sanctions and remedies in order to efficiently fight infringements. In the online environment, the 2001 Information Society Directive³⁵⁷ imposes an obligation on Member States to protect against the circumvention of technological protection measures.

Internet intermediaries' exemption from liability

The E-Commerce Directive's³⁵⁸ “safe harbour” provisions (Articles 12-14)³⁵⁹ protect internet intermediaries (such as access providers, hosting providers, search engines³⁶⁰) from being held liable for copyright infringements in a situation where they have no knowledge of the existence of illegal infringement of copyright-protected content on their infrastructure³⁶¹. To balance this liability exemption³⁶² with the need to enforce copyright, self-regulatory measures such as “notice and take down procedures” for illegal content have been promoted. Such procedures, well developed in the USA, give rights holders the ability to inform internet service providers about alleged copyright infringement on their services and to request cooperation for the termination of unauthorised use³⁶³.

357 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, 22.6.2001, Article 6

358 Directive 2000/31/EC of the European Parliament and of the Council on certain legal aspects of information society services, in particular electronic commerce, in the internal market, O.J.178; 17.7. 2000 p.1-16 (E-Commerce Directive)

359 The E-Commerce Directive excludes certain clearly delimited activities carried out by internet intermediaries from liability for illegal activities occurring via their services. These activities are “mere conduit” (Article 12), “caching (Article 13) and “hosting” (Article 14).

360 Internet intermediaries can be defined as services whose activity “is limited to the technical process of operating and giving access to a communication network over which information made available by third parties is transmitted or temporarily stored, for the sole purpose of making the transmission more efficient; this activity is of mere technical, automatic and passive nature, which implies that the information service provider has neither knowledge of nor control over the information which is transmitted or stored” see Recital 42 E-Commerce Directive. Internet intermediaries therefore include access providers, hosting providers, search engines and other providers of information location tools, such as hyperlinks or directories.

361 The E-Commerce Directive, however, does not restrict the possibility of a national court to require a service to terminate or prevent an infringement on a case-by-case basis as for instance to issue injunctions to remove illegal content or to disable access to it. See also Verbiest Thiebault et al., Study on the Liability of Internet Intermediaires, Markt/2006/09/E Service Contract ETD/2006/IM/E2/69, November 12th 2007 p.4-5

362 as set out in the E-Commerce Directive Article 14 (1) (b)

363 The E-Commerce Directive does not regulate notice and take down procedures, it encourages however self-regulation in the field (Article 16 and Recital 40).

4.2.2 Actions taken to mitigate the impact of IP territoriality

EU harmonisation of intellectual property has achieved much in removing national disparities in standards of protection in order to promote intra-community trade. Yet there are conflicts between the territorial exercise of intellectual property rights and the principles of the free movement of goods and services across the EU. As a result the copyright territoriality principle has been questioned as an obstacle to the development of an internal market for audiovisual goods and services, especially as regards VOD: *“If in the longer term, we want European content and creative industries to be able to compete on a global scale, and to achieve their full potential in driving European competitiveness, we may start calling into question the territoriality of copyright protection in Europe”*³⁶⁴.

The EU institutions have taken different steps to try to reconcile internal market objectives with copyright principles. Hence, secondary EC legislation has established the country of origin principle and mandatory collective licensing in relation to cable retransmission. The ECJ has developed the principle of exhaustion of rights to promote parallel imports for physical goods protected by intellectual property.

Section 4.2.2.1 reviews legal rules developed at the initiative of the European Commission to facilitate rights management in the internal market, and considers the influence of the jurisprudence of the Court to promote cross-border trade.

4.2.2.1 The country of origin principle

Based on the Treaty’s principle of free movement of services, EU legislation aimed at creating a European audiovisual internal market started with the Television Without Frontiers Directive³⁶⁵ in 1989. The “country of origin” principle is set to mitigate territoriality issues and to facilitate the emergence of a single market for television services. It establishes that when a broadcasting action or service is performed in one country but received in another, the applicable law is the law of the country where the action or service is performed.

The Television Without Frontiers Directive³⁶⁶ (now Audiovisual Media Services Directive) introduced this principle for broadcasting services in Europe in its Article 2. The country of origin principle is the core of the Directive. Its aim is to provide legal certainty and a level playing field for Europe’s information technology and media industries and services. It harmonises rules applicable to activities such as on-demand audiovisual services to promote the free movement of such services. Harmonisation relates to the law applicable to such services (the rule of the country of establishment), commercial communication, protection of minors, and product placement. To promote cultural diversity the Directive provides: “Where practicable on-demand audiovisual services should promote the production and distribution of European works (Article 3i)”.

364 Rudolf Strohmeier, Head of Cabinet of Commissioner Reding at Vienna EU presidency conference “Content for Competitiveness” 2.03.2006, pp. 11

365 Council Directive of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (89/552/EEC) OJ L 298, 17.10.1989, p. 23. The Directive was then amended in June 1997 (Directive 97/36/EC).

366 Importantly, these rules do not apply to the licensing of copyright or related rights.

Article 3(d) of the revised Directive 2007/65 requires Member States to ensure that media service providers act in compliance with windows of exploitation that have been agreed upon with rights holders.

The Directive³⁶⁷ extends the country of origin principle to non-linear service providers (Article 1(1)g)³⁶⁸. Audiovisual non-linear services must therefore comply with the rules of the country in which their provider is located. This country is also responsible for the enforcement of the rules set in the Directive. However the country of origin principle is not extended to the exercise of copyright and neighbouring rights. The matter remains contractual between parties of a licensing arrangement.

The attempt to extend the country of origin principle to audiovisual rights management took place with the adoption of the Satellite and Cable Directive of 27 September 1993 (in Section 4.2.2.1 “the Directive”)³⁶⁹. The Directive aims at coordinating rules on copyright and neighbouring rights applicable to satellite broadcasting and cable retransmission, in order to eliminate different national copyright rules and legal uncertainty for both rights holders and users. The Directive establishes which copyright law is applicable to the act of satellite broadcasting. This is to avoid the application of several national laws (all the countries of the footprint of the satellite) to one act of broadcasting, while safeguarding the general principle of copyright implementation: contractual freedom (indeed Recitals 9 and 21 specifically provide that copyright protection “is not subject to a statutory licence system”)³⁷⁰.

Article 1(2)(b) of the Directive provides that a satellite broadcast amounts to a communication to the public only in the country of origin of the signal, i.e. where the ‘injection’ of the programme-carrying signal can be located (the ‘injection right’).

It is important to highlight that the scope of the Directive is limited to the “act of communication to the public by satellite”. Therefore the existing Directive does not cover the right of making available or the right of communication to the public by audiovisual media services as defined in the Information Society and AVMS Directives.

The Directive does not prohibit licensing on a territorial basis. Rights holders therefore remain free to choose how they wish to license³⁷¹. Satellite programmes are often encrypted so as to target specific linguistic territories for which a licence to broadcast copyright-protected content has been obtained.

367 Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities OJ 332, 18.12.2007 p. 27-45 (Audiovisual Media Services Directive)

368 According to this article “on-demand audiovisual media service” (i.e. a non-linear audiovisual media service) means an audiovisual media service provided by a media service provider for the viewing of programmes at the moment chosen by the user and at his individual request on the basis of a catalogue of programmes selected by the media service provider

369 Council Directive 93/83/EC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, OJ L 248, 6.10.1993, p. 15–21. (Directive)

370 However, the Directive mandates the way a right should be exercised to take into account the specifics of cable retransmission rights and ease the licensing process (Article 9).

371 The recent case of the French channel M6 in Switzerland shows that cross-border broadcasting is indeed facilitated through the application of the “country of origin” principle. The case illustrates that a channel can be broadcast by satellite to Switzerland, including advertising aimed at a Swiss audience, without having to clear author’s rights for distribution in Switzerland. See *Métropole Télévision vs. SSR* Decision by the Swiss Federal Court Lausanne 12 January 2010 (4A_203/2009).

In relation to the ambition of achieving an internal market for satellite broadcasting, the European Commission had to recognise in its 2002 review of the Directive³⁷² that the country of origin principle did little to remedy market fragmentation. A study carried out by the European Audiovisual Observatory shows that out of 710 European satellite channels only 290 are international. The latter are essentially information channels, adult-content, and minority-language channels³⁷³.

Hence, while there is some level of demand for local content abroad (and the grey market is further evidence of this³⁷⁴) it seems that this demand remains limited, or not large enough to trigger multi-territory licensing between satellite operators (essentially pay-TV channels) and rights holders.

Nevertheless, the 1993 Directive is an attempt to foster the emergence of an internal market for broadcasting services.

An application of the country of origin principle to the online delivery of audiovisual content?

An application of the country of origin principle to online delivery of audiovisual content has been discussed as a possible legislative way forward in the Reflection Document³⁷⁵ with the objective to foster the circulation of audiovisual content in Europe. This “could imply that once an online service is licensed in one EU territory [...] then this licence would cover all Community territories.”

The proponents of such legislative action take the view that the extension of the country of origin principle to online rights would support and encourage international licensing of European audiovisual content.

This idea has been submitted to public consultation in the context of the Reflection Document. It is supported by some stakeholders, such as:

- BEUC, the European Consumer association, which “welcomes the reflection as to whether a solution based on extension of the scope of the Satellite and Cable Directive to online delivery of audiovisual content should be used for the licensing for audiovisual content.”³⁷⁶
- RTL Group which, in order to safeguard technological neutrality, is favourable to an extension of the SATCAB Directive for linear/simultaneous transmission on mobile and online services. However,

372 Report from the European Commission on the Application of Council Directive 93/83/EEC on the Coordination of Certain Rules Concerning Copyright and Rights Related to Copyright Applicable to Satellite Broadcasting and Cable Retransmission, COM(2002) 430 final, 26 July 2002

373 European Audiovisual Observatory Iris Plus, Convergence, droit d’auteur et télévision transfrontière, 2009-8

374 The “grey market” for trans-border satellite transmissions (mostly pay-TV) consists of extra territorial viewers that receive cross-border transmissions which are not licensed for the territory on which they are received.

However, despite the fact that this practice appears to be growing (and therefore reflects trends of increased migration and – possibly – a growing internal market), it has been accepted by the sector so far. The reason for this is that viewers pay subscriptions in other countries. The grey market is therefore distinct from the black market as viewers rightfully pay a subscription to pay-TV operators and are considered as legitimate clients by the latter. Grey markets can be considered as an intermediate case between legality and copyright infringement. For detail on this see KEA, CERNA, Study for the European Commission on the Impact of the Conditional Access Directive, December 2007 pp. 35-37

375 Reflection Document 2009 p. 17

376 BEUC, contribution to consultation on the Reflection Document 2009 p. 11

commercial users or rights holders should not be obliged to license multi-territorially, as there appears to be no business case for this practice³⁷⁷.

- Cable Europe, the European Association of cable television operators, which also favours such a revision of the SatCab Directive, under the condition that it is conducted on a technology-neutral basis for both broadcasting and retransmission activities³⁷⁸
- the UK Film Council, which supports in principle an extension, though it puts great importance on the requirement that any new regulation should acknowledge the contractual freedom of rights holders. Any future solution should therefore be non-mandatory³⁷⁹.
- GIART, the international organisation representing some performers' collective rights management societies, which favours an extension of the country of origin principle to online distribution if "the relevant copyright act is clearly set up for the internet". It calls for precise definitions in order to guarantee legal certainty and the distinction between all the different uses that can be made through internet and rights holders.
- Hungary, which also supports a solution based on the country of origin principle for satellite transmission. However it recalls that a detailed analysis of the legal framework needs to be carried out³⁸⁰.
- VPRT, the German private broadcasters association, which acknowledges that the provisions of the SatCab Directive have proven successful and that in case the Directive be revised it should become technology neutral. In its view, no difference should be made between content broadcasted via satellite, cable or terrestrial ways and online broadcasting through webcasting and simulcasting³⁸¹.
- Digital Europe³⁸², the association of European digital technology industry, and Ericsson³⁸³, which also mention the "extension of the scope of the Satellite and Cable Directive to online delivery of audiovisual content " as a possible solution.

However, a number of stakeholders highlight that the extension of the country of origin principle would do little to promote international licensing:

- The Society of Audiovisual Authors (SAA) and Eurocinema question the adaptation of the country of origin principle to online delivery on the grounds that the application of the satellite provisions did not provide the estimated results³⁸⁴. The SAA believes that there is no need for a radical change in the legal environment to develop pan-European online services. However, at the stakeholder workshop on 2 June the SAA representative reported ongoing talks with the EBU on the one-stop shop licensing of authors' rights in relation to TV programmes.

377 RTL Group, Contribution to the Consultation on Reflection Document 2009 p. 2

378 Cable Europe contribution to the Reflection Document p. 6

379 See UK Film Council's contribution to the consultation on the Reflection Document 2009, p. 8-9

380 Hungary's contribution to the consultation on the Reflection Document p. 4

381 VPRT's contribution to the consultation on the Reflection Document p. 9-10

382 Digital Europe's contribution to the consultation on the Reflection Document p. 6

383 Ericsson's contribution to the consultation on the Reflection Document

384 SAA contribution to the consultation on the Reflection Document 2009 p. 5 and Eurocinema contribution p. 5-6

- Aepeo–Artis, the European association of some performers’ collective rights management societies, also points out that the adaptation of the SatCab provisions to the online delivery of audiovisual content would not necessarily lead to making licensing processes easier³⁸⁵.
- The Motion Picture Association (MPA), representing Hollywood studios opposes an extension of the country of origin principle to the making available right. It recalls that the SATCAB Directive respects contractual freedom³⁸⁶.

The European Coordination of Independent Producers (CEPI), representing independent TV producers, does not specifically mention the country of origin principle, but makes it clear that “multi-territorial rights licensing and clearance should be decided by producers” and “favours allowing the market to make pan-European arrangements if it wishes, but are opposed to any requirements on companies to do so”³⁸⁷.

The European Digital Media Association (EDIMA)³⁸⁸, representing new media and internet companies, does not take any position on this issue, asking simply for “legal clarity and certainty for online media providers” and a flexible market-based licensing regime”. Similarly, ETNO, the European Telecommunications Network Operators Association³⁸⁹, only calls for easing licensing processes and harmonised “regulation for multi-territory licensing”, without going into detail about how this should be achieved³⁹⁰.

The Reflection Document makes reference to the public service broadcasters (EBU), who favour an extension of the country of origin. Their proposal³⁹¹ is, however, much more detailed and deserves some further attention: it includes the extension of the country of origin principle to all linear and non-linear “broadcast-like” on-demand services (which cover start-over and catch up services, podcast and vodcasts, but exclude “retail-like” VOD services) on all platforms. This would mean that linear and “broadcast-like” non-linear services (as defined by the EBU) would be available across Europe through digital services under a single licence granted in the country of establishment of the broadcaster, with rights holders established in this country. A broadcaster would be able to clear copyright and neighbouring rights in the country where it is established with willing licensors (i.e. licensors that are in a position to grant such international licences).

It is difficult to understand in which way the extension of the country of origin principle to “broadcast-like services” would make the current licensing process easier or more efficient. Broadcasters are already in a position to negotiate multi-territory licences in the country where they are established (but in practice such licences are not sought, as broadcasters mostly cater for a local or linguistic audience).

In relation to international licensing, the extension of the country of origin principle to “broadcast-like” services seems to be coupled with a second idea, which suggests mandatory collective licensing for any

385 Aepeo-Artis contribution to the Reflection Document p. 4

386 MPA contribution to the consultation on the Reflection Document 2009 p. 9

387 CEPI contribution to the Reflection Document p. 7

388 Edima contribution to the Reflection Document p. 2 and 4

389 ETNO contribution to the Reflection Document p. 3

390 The company Fastweb advocates the adoption of a directive (p. 9 of their submission to the Reflection Document) to foster multi-territory licensing, however it is short on concrete suggestions on the content of such legal instrument. It also acknowledges that rights licensing fragmentation is the matter of commercial practices rather than the effect of the present legal framework.

391 EBU contribution to the Reflection Document

retransmission of the television programme on digital networks. The proposal also implies that the audiovisual industry sets up a one-stop shop capable of delivering international licences in the country of establishment of each broadcaster. Indeed, audiovisual producers are not yet organised to deliver such blanket licences, with the exception of the clearance of cable retransmission rights. It would make sense to encourage the development of such licensing capabilities but it would be better to ensure that such licensing infrastructure exists in relation to all forms of digital delivery and not merely “broadcast-like” non linear services.

Prudently the EBU suggests excluding “premium content” (a concept that remains to be defined but which in the proposal includes feature films and sports content) from the scope of its proposal. This considerably limits the impact of the proposal on rights licensing. Indeed, if EBU is referring to programmes for which its members own the rights as producers, the mere clarification of the applicable law would not make licensing easier.

According to the EBU the injection principle would make less sense in relation to “retail-like” online services, such as download-to-own services. These services cannot be assimilated to satellite transmission, but are rather similar to the distribution of physical copies and rental, which are ruled by the Information Society Directive and the Rental and Lending Directive³⁹².

There are other considerations to be taken into account when considering the option of adapting the country of origin principle to online exploitation.

First, rights holders need to be assured of equal protection of, and remuneration for, their rights in any country covered by the regime to avoid encouraging a “race-to-the bottom” among VOD services to establish themselves in the territory with the lowest levels of remuneration or the weakest negotiating party. The rule would also have to work alongside the decision of EC competition authorities from October 2002 in the IPFI simulcasting agreement³⁹³. The decision accepted that whilst rights clearance would take place in the country of origin (emission state), remuneration would be due to collecting societies representing record producers and performers in all countries where the simulcast signal can be received.

Second, it should be taken into account that there remain several legal and technical difficulties linked to the differences between satellite and online transmission³⁹⁴. The exploitation of content on the internet not only requires the acquisition of the communication to the public right, but also the reproduction right³⁹⁵, which makes the application far more complex than for satellite transmission³⁹⁶.

392 Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property OJ L 376, 27.12.2006, p. 28–35 (Rental and Lending Directive)

393 Case Comp/C2/38014 of 8 October 2002, (IFPI-Simulcasting)

394 See for instance BSAC contribution to the consultation on Reflection Document 2009

395 The question of the reproduction right will be dealt with in Section 4.3.2.2 in more detail. The EBU addresses this question by calling for an exception for a common-sense interpretation of the definitions of reproduction and communication to the public rights, in order to make sure that, provided a right to communicate content to the public has been granted by a contract (or by law), that right covers the incidental reproductions necessary for the efficient and legitimate exercising of the communication act licensed. Whether this is the right solution to be adopted remains to be seen.

396 See for instance Peifer Karl-Nikolaus, *Das Territorialitätsprinzip im Europäischen Gemeinschaftsrecht vor dem Hintergrund der technischen Entwicklungen*, ZUM 2006 no. 1 p. 16

Moreover, it should be recalled that the matter has already been on the agenda of the European Commission in the past, but DG Internal Market of the European Commission abandoned the idea of amending the Directive a few years ago, as a result of important resistance from the audiovisual sector.

Similarly, to avoid unnecessary friction with the copyright community, the Directive on services in the internal market³⁹⁷ (which establishes general provisions facilitating the exercise of the freedom of establishment for service providers and the free movement of services) specifically excludes audiovisual services from its scope (Article 2(2)(g)). This Directive also provides in Article 1(4) that it should not affect measures to protect or promote cultural or linguistic diversity. Whilst it can be argued that its scope extends to rights management organisations the extension of the scope of the country of origin principle remains a difficult political proposition.

Finally and more importantly, it is not sure whether an adaptation of country of origin principle to VOD would yield the desired results of creating an internal market for audiovisual content. After all, the Directive has not achieved this aim in satellite broadcasting. It is highly unlikely that merely establishing the law applicable to rights acquisition will be sufficient to create a digital single market. In relation to the proposal of public service broadcasters a thorough assessment concerning the impacts that such system would have on rights holders as well as on all industry players – which could not be conducted as part of the present study due to its timing and the limited scope of the EBU proposal – would be beneficial.

397Directive 2006/123 of 12 December 2006 on services in the internal market, O.J.L 376, 27/12/2006 p. 36 –68

4.2.2.2 Mandatory collective licensing

The 1993 SatCab Directive also aimed to promote cross-border licensing by easing the licensing processes in relation to the exercise of the cable retransmission right.

The Directive establishes that the cable retransmission right cannot be exercised on an individual basis, but must be managed through a collecting society (Article 9(1))³⁹⁸. The Directive applies to retransmissions “of an initial transmission from another Member State” and must be “simultaneous, unaltered and unabridged” (Article 1(3)). The justification to exercise the right collectively stems from the way cable works as it would in practice be impossible for cable operators to identify and negotiate with a multitude of right holders associated to programmes subject to retransmission. In addition many national broadcasting laws often impose the obligation to retransmit broadcast programmes simultaneously on cable operators (“Must carry rule”). Mandatory collective rights management for the cable retransmission right thus ensures that cable operators acquire all rights necessary for cable retransmission. It prevents individual rights holders from causing ‘black outs’ in programme transmissions by not granting their exclusive rights for retransmission³⁹⁹. It should be noted that the Directive provides that the right should be granted contractually “unless a temporary exception is provided in the case of existing legal licence scheme” (Recital 27). It therefore again confirms the principle of contractual freedom.

The recourse to collective rights management is justified to ensure the smooth operation of contractual arrangements “to the extent that this is required by the special features of cable retransmission”. The Directive does not attempt to harmonise the extent of the right to authorise, but rather the way this right is exercised (Recital 28).

In practical terms, these provisions have led to the establishment of the Association of International Collective Management of Audiovisual Works (AGICOA). The Association is the sole collective rights management organisation that is mandated by some audiovisual producers at international level to negotiate and collect cable retransmission rights. It intervenes in combination with local collecting societies mandated to represent local rights holders. The scheme enables a category of users (cable operators) to acquire licences for national and international repertoires in a one-stop shop negotiation, thus reducing transaction costs.

European public service broadcasters also propose an extension of mandatory collective licensing to the clearance of retransmissions of television programmes on all audiovisual media services. As for cable retransmission one could imagine that broadcasters, cable and telecommunications companies should be able to clear, through a one-stop shop solution, the use of original audiovisual programmes that are retransmitted on digital networks abroad.

398 Sat Cab Directive Article 9 (1)

399 European Commission, Broadcasting and Copyright in the Internal Market, Discussion paper III/F/5363/90 – EN Brussels, November 1990 and Directive Recital 28: Whereas, in order to ensure that the smooth operation of contractual arrangements is not called into question by the intervention of outsiders holding rights to individual parts of the programme, provision should be made, through the obligation to have recourse to a collecting society, for the exclusive collective exercise of the authorisation right to the extent that this is required by the special features of cable retransmission; whereas the authorisation right as such remains intact and only the exercise of this right is regulated to some extent, so that the right to authorise a cable retransmission can still be assigned; whereas this Directive does not affect the exercise of moral rights;

Such an extension might achieve results in easing licensing processes, provided rights holders set up the mechanisms to enable international licensing, and keep their contractual freedom to negotiate licence terms. The extension could trigger a collective response from rights holders, in particular SMEs that do not have the resources to license on an individual basis, or that are in a weak bargaining position, to organise the licensing process in a more efficient way.

However, the question would be how to practically manage such a system: would AGICOA or any other organisation be mandated by rights holders to grant such a licence in relation to the communication to the public and the making available rights for retransmission of television programmes?

Furthermore, it is unclear whether this would lead to more international licensing. In its comment to the EC's Reflection Document AGICOA notes "*...in Agicoa's more than 25 years of existence no user has ever requested to benefit from multi-territorial licensing. Licences are still acquired on a country-by-country basis despite the establishment of an international licensing structure*"⁴⁰⁰.

In addition, technological developments seem to have reduced the impact of the SATCAB Directive. Indeed, according to the Supreme Court of the Netherlands⁴⁰¹, the SATCAB Directive would no longer apply for new techniques of transmission of encrypted signals that are merely intended for reception by cable operators and only subsequently communicated to the public⁴⁰². As a consequence, these transmission techniques are deemed an act of primary communication to the public, which is not subject to the Directive⁴⁰³.

In this context of digital convergence and the evolving role of cable operators (with the end of "cable retransmission") Prof Hugenholtz has given his support to the review of the scope of the Directive, so that the "simulcasting" of broadcast programmes over the internet becomes subject to mandatory collective management⁴⁰⁴, as the text applies identically to both "cable retransmission" and "the simultaneous, unaltered and unabridged retransmission" of a programme (Article 1(3))

4.2.2.3 The principle of exhaustion

Laid down by the European Court of Justice, the exhaustion principle provides that once a good protected by intellectual property rights has been sold by, or with the consent of, the rights holder in a territory of the European Community, further distribution of this good across the community cannot be prevented. A rights holder therefore cannot oppose parallel imports from goods coming from a territory where consent for exploitation has been given. The exhaustion principle was established by the European Court to mitigate the territoriality principle of copyright and neighbouring rights.

400 See AGICOA submission point V.

401 Supreme Court of the Netherlands (Hoge Raad), 19 June 2009 BUMA and STEMRA v. Chellomedia Programming, Supreme Court of the Netherlands (Hoge Raad), 19 June 2009

402 The Directive's scope is limited to cable retransmission of "an initial transmission from another Member State" (Article 1(3)). The Directive is applicable to the initial transmission in encrypted form (Article 1(2)(c)), if the means for decrypting the signal are provided to the public by the broadcasting organisation or with its consent.

403 Hugenholtz, Bernt, Revisited: The Past, Present and Future of the Satellite and Cable Directive, European Audiovisual Observatory, Iris Plus, 2009-8, p. 7

404 For details see IVIR, Recasting copyright op.cit. p. 80

The interpretation given by the European Court of Justice of Articles 35 and 36⁴⁰⁵ TFEU illustrates that, on the grounds of intellectual property rights protection, restrictions to the free movement of goods and services and competition rules can be justified⁴⁰⁶. The ECJ has, however, argued that this derogation is justifiable only if the rights constitute “the specific subject matter” of the intellectual property concerned⁴⁰⁷ and the “essential function” of intellectual property rights⁴⁰⁸. If the use of a right does not conform to the essential function of intellectual property rights it must take into account community rules on free movement of goods and services. The ECJ therefore distinguished between the standards (the *existence*) of rights, which are subject to national law, and their *exercise*. The abusive *exercise* of rights can be restricted, subject to community rules on free movement and competition⁴⁰⁹.

The court has therefore laid down several principles for reviewing licensing practices that would go beyond what is necessary to exercise an IP right.

With regard to the audiovisual sector, the exhaustion rule entails that once a rights holder, or its representative, puts a DVD on the market in a Member State it can legally be sold in a country where the good is lawfully marketed and subject to parallel imports, independently of exclusive distribution rights granted in the territory. This is justified by the fact that encouraging parallel imports increases price competition and limits the effects of partitioning the internal market through exclusive distribution agreements.

The exhaustion rule was first developed by the ECJ in the field of industrial property law (in 1976) and then extended to the trade of copyright-related goods in cases such as *Deutsche Grammophon*⁴¹⁰, *Musikvertrieb v Gema*⁴¹¹, *Bassett*⁴¹², *Warner Bros & Metronome v Christiansen*⁴¹³, *Laserdisken*⁴¹⁴. It was finally codified in Article 4(2) of the Copyright Directive.

However, as a result of ECJ jurisprudence, the rule is applicable only to the distribution of tangible properties on material support (a CD or a DVD). It does not extend to the communication to the public or

405 Article 36 states that “The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.”

406 For more details on this see Charon Christophe, *Droit d’auteur et droits voisins*, Litec 2006 pp. 39-42 and Korah Valentine, *An Introductory Guide to EC Competition Law and Practice*, Hart, Oxford and Portland Oregon, 2007, 9th ed. pp. 337 ff

407 Since 1988, the ECJ has defined the specific subject matter as comprising representation and performance rights (ECJ, 17 May 1988 case 158/86, Warner Bros) and has later stated that “The specific subject matter of those rights, as governed by national legislation, is to ensure the protection of the moral and economic rights of their holders” (ECJ, 20 Oct. 1993, cases C-92 and C-326/92 Phill Collins para.20). In relation to audiovisual works, the essential function of copyright relates to the ability of a rights holder to license for any showing of a film (ECJ, 18 March 1980 case 62/79, Coditel I, para 14)

408 The ECJ held that the exercise of intellectual property rights is only justified under Treaty rules, if such exercise is for the purpose of safeguarding the rights which constitute “the specific subject matter”. The “specific subject matter” is the corpus of rules of authors (and neighbouring) rights that fulfil the “essential function” of the intellectual property concerned.

409 Nevertheless the limits of this distinction have been shown by the Magill decision, which insisted on the close relationship between exercise and existence (ECJ, 6 April 1995 joined cases C-241/91 P and C-242/91 Magill)

410 ECJ 8 June 1971 case 78/70 Deutsche Grammophon

411 ECJ 20 January 1981, joined cases 55/80 and 57/80 MusikVertrieb Membran v. Gema

412 ECJ, 9 April 1987 case 402/85 Bassett

413 ECJ 17 May 1988 case 158/86, Warner Bros

414 ECJ 12 July 2006 case C-479/04 Laserdisken ApS v Kulturministeriet,

making available in an intangible or dematerialised format⁴¹⁵. The ECJ excluded the application of the exhaustion rule on the exhibition of films, broadcasts and other performing rights in the *Coditel I (or le Boucher)* decision. The Court distinguishes between, on the one hand, the performance rights and, on the other, the reproduction rights involved in physical distribution (para 12):

“A cinematographic film belongs to the category of literary and artistic works made available to the public by performance which may be infinitely repeated. In this respect the problems involved in the observance of copyright in relation to the requirements of the Treaty are not the same as those which arise in connection with literary and artistic works the placing of which at the disposal of the public is inseparable from the circulation of the material form of works, as in the case of books or records”.

This different treatment of distribution and communication to the public rights is justified by the audiovisual industry’s specificities. The Court recognises that rights holders have a legitimate interest in exploiting the different formats of their works separately. Indeed, the Court establishes that the ability of a rights holder to license for any showing of a film is part of the “substance” of authors’ rights in relation to audiovisual, and cannot be limited in order to create the internal market⁴¹⁶. A general rule of non-exhaustion for communication to the public rights has been codified in Article 3(3) of the Information Society Directive. Recital 29 states that “the question of exhaustion does not arise in the case of services and online services in particular”⁴¹⁷.

While the principle of exhaustion does, at present, not apply to performance rights, legal scholars⁴¹⁸ sometimes question the distinction between performance and reproduction rights⁴¹⁹. They argue that today most of the revenues in the audiovisual industry derive from sales and rentals of DVDs, which are subject to the free movement of goods rules⁴²⁰. Especially with regard to the emergence of new possibilities for the exploitation of audiovisual content online, doubts arise about today’s appropriateness of the Court’s argumentation. The notion of the absence of a material form of the copyright work, which characterises a performance according to the Court, could be questioned, as the distinction between the provision of a service and a good is rather thin⁴²¹. Furthermore, the intangible character of an object does not stand in the way of its qualification as a good.⁴²²

Moreover, the Court puts forward that remuneration of a performance is dependent on the audience, which changes every time, and on the number of showings. It takes the view that this contrasts with a reproduction of a work, for which the author receives a fixed remuneration every time a copy is sold. However, in particular with regard to VOD, some argue that VOD services will be increasingly able to

415 *Coditel I* case (ECJ, 18 March 1980 case 62/79), see also explications on this topic Jacquier Sarah, et al., *Industries de contenu: quel avenir pour les licences territoriales*, *Revue Lamy du droit de l’immatériel*, n°47, Mars 2009 pp. 65, Tjong Tjin Tai Eric, *Exhaustion and online delivery of digital works*, *EIPR*, 2003, 25 (5), 207-211 p. 208, Korah Valentine, *An Introductory Guide to EC Competition Law and Practice*, op.cit. p. 344

416 Jacquier S. op. cit. p.66 ff

417 Information Society Directive Recital 29

418 Such as Benabou, Valerie, *Droits d’auteur, droits voisins et droit communautaire*, Bruylant Bruxelles, 1997, pp. 108-109. Berr, Claude J., *Perplexités juridiques à propos du marché commun des services*, in *Revue du Marché Commun et de l’union européenne*, No. 368 May 1993, Françon, Alain *L’avenir du droit d’auteur*, in *Revue Internationale du Droit d’Auteur*, No 132 April 1987, pp. 20-21.

419 For a detailed description see for instance Jansen Astrid, LLM Thesis, “Territorial exclusivity in the broadcasting market”, University of Amsterdam, pp. 16-18.

420 See for instance Korah Valentine, *Intellectual property rights and the EC Competition rules*, op.cit p. 13.

421 See for instance Berr op.cit. p. 447

422 Gavaldi, C., Parleani, G. *‘Traité de droit communautaire des affaires’*. Paris : Litec 1996, p. 47.

calculate their audience through subscriptions and payments, which facilitates the calculation of royalties according to the number of performances⁴²³.

Nevertheless, according to copyright specialists, as well as all audiovisual stakeholders, the economic argument of the Court made in this relation is still valid today⁴²⁴. The Reflection Document from October 2009 does not consider the option of extending the exhaustion of copyright to communication to the public rights. As shown by our economic analysis, rights holders can only maximise their revenues and count on a return on investment if they are able to follow commercial strategies of versioning. The application of the exhaustion rule to performing rights would deprive rights holders of this possibility. The ECJ has justly recognised that *“the owner of the copyright in a film and his assigns have a legitimate interest [...] in authorising a television broadcast of the film only after it has been exhibited in cinemas for a certain period of time”*⁴²⁵. Depriving the rights holder of such a possibility could be detrimental to investment in European productions.

As put forward by the Reflection Document, the adaptation of the exhaustion principle to the making-available rights could only be done through legislation. Considering contributions from the audiovisual and ICT sectors to the Reflection Document, such a step is not an option.

4.2.3 EU competition rules and territoriality

The territorial exercise of copyright through licensing agreements may also be limited by trade and competition provisions within the EC Treaty. Such a review is often triggered by the duration of the exclusivity granted or its scope. These interventions are very effective in restricting unjustified territorial exploitation of intellectual property rights.

The ECJ and the European Commission have ruled against anti-competitive licensing practices that unjustifiably partition the market on the basis of Article 101 TFEU (former Article 81 TEC), which prohibits anti-competitive agreements, and Article 102 TFEU (former Article 82 TEC), which prohibits the abuse of a dominant position. The “Tiercé Ladbroke” case illustrated that agreements between two or more parties to refuse another party a licence to exploit sports content within a given territory can be anti-competitive⁴²⁶. The Court of First Instance decided that such behaviour *“may have the effect of restricting potential competition on the relevant market, since it deprives each of the contracting parties of its freedom to contract directly with a third party by granting it a licence to exploit its intellectual property rights and thus to enter into competition with the other contracting parties on the relevant market”*⁴²⁷.

The European Commission has also restricted the territorial exercise of copyright in numerous other cases, such as the UIP case or the EBU/Eurovision System case⁴²⁸. Furthermore, territorial exclusivity

423 Jansen Astrid, LLM Thesis, “Territorial exclusivity in the broadcasting market” op.cit. p. 17

424 See for instance Jaime Espantaleon, Exhaustion Might in European Television, E.I.P.R. 2010, 32 (1), 29-42 and Jacquier S., op. cit. pp. 68-70

425 Coditel I, para. 13

426 CFI 12 Jun.1997, Case T-504/93 Tiercé Ladbroke SA v. Commission,

427 Tiercé Ladbroke para 157 et seq.

428 Commission Decision 89/467/EEC of 12 Jul. 1989 (UIP) OJ 1989 L 226/25; Commission Decision 89/536/EEC of 15 September 1989 (Film purchases by German television stations), OJ 1989 L 284/36; Commission Decision 91/130/EEC of 19 February 1991 (Screensport/members of the EBU), OJ 1991 L63/32,

is also at the heart of several more recent competition cases concerning the licensing practices of collecting societies, such as the IFPI “Simulcasting” case⁴²⁹, or the CISAC Decision⁴³⁰. In the Apple iTunes case the European Commission has investigated whether the fact that Apple’s online music platform was accessible only from some EU countries does not unjustifiably partition the market⁴³¹. In the IFPI-Simulcasting case the European Commission recognised that the so-called simulcast-agreement between music industry producers and collecting societies to grant a single multi-repertoire licence for a territory of most of the EEA countries for simulcast music licensing encouraged competition between collecting societies, and facilitated the emergence of a single digital market⁴³² and could therefore benefit from an exemption from competition rules.

In this context the current ECJ case Football Association Premier League (FAPL) vs. QC Leisure⁴³³ has to be mentioned, despite the fact that rights clearance and management differ in this sector from the film sector insofar as sports companies are not holders of copyright per se, compared to audiovisual producers.

In this case the FAPL and its exclusive broadcast partner in Greece (NOVA, operator of the SuperSport Channel) have brought three cases before the High Court in the UK. Two claims are made against suppliers of satellite decoder cards to pubs in the UK, which allow people to watch FAPL matches on non-Sky channels. The third claim is against the operators of certain UK-based pubs that have shown live FAPL matches on ART channels.

The High Court required guidance from the ECJ on several issues, linked to the interpretation of the Conditional Access Directive, the Information Society Directive, and the SatCab Directive, as well as Treaty rules on free movement of goods and services especially concerning conditional access devices, in the context of the CAD and Treaty rules on competition, in particular whether the contractual restriction present in agreements between FAPL and broadcasters unjustifiably distort competition (Article 101 TFEU).

The outcome of the case, which is expected to be seen at the end of 2011, might have an impact on the scope of the obligations which licensors are able to impose on broadcasters on sports events, and more importantly on the measures which rights holders are able to take to prevent access to broadcasts in other territories.

4.2.4 Recent EC decisions concerning the exercise of copyright in music

In the past decade the European Commission’s attempts to promote cross-border trade in creative content have primarily concentrated on music. The recent Reflection Document⁴³⁴ from the European

Commission Decision 93/403/EEC of 11 June 1993 (EBU /Eurovision System), OJ 1993 L 179/23; Commission Decision 2003/778/EC of 23 July 2003 (Uefa ChampionsLeague) OJ, 2003 L 291/25.

429 Commission Decision 2003/300/EC of 8 October 2002 relating to a proceeding under Art. 81 of the EC Treaty and Article 53 of the EEA Agreement Case COMP/C2/38.014 (IFPI-Simulcasting)

430 Commission Decision of 16 July 2008 Case COMP/C2/38.698), OJ 2008 C 323/07 (CISAC)

431 COMP/39.154 (iTunes) the investigation showed that territorial licensing was not the main reason for Apple’s partitioning of the market but rather the company’s ability to create maximum commercial returns by only entering lucrative markets and by applying a country-by-country specific pricing strategy to each of these markets.

432 Case COMP/C2/38.014 (IFPI Simulcasting) Para 122

433 Case (C-403/08) – published on the ECJ’s website on 11/11/2008, Football Association Premier League vs. QC Leisure, see also appendices for details.

434 Reflection Document 2009 op.cit

Commission is the first document that clearly spells out the different specificities of each content sector, recognising, for example, the prevalence of direct licensing in audiovisual and the importance of collective rights management in music. While an important message of this report is not to confuse the business processes of the two sectors, it is nevertheless useful to briefly assess how the different services of the Commission have dealt with challenges to promote cross-border licensing in online music rights, as there might be important lessons learned for online audiovisual rights.

Unlike audiovisual content, music licensing is almost always made on a non-exclusive basis. Furthermore, the important number of parties involved in the licensing of musical and recording rights makes the process more tedious than in audiovisual licensing, where the commercial rights are assigned to the producer (the licensing of the underlying music rights attached to an audiovisual work remain a separate issue).

The interventions of the European Commission in the field of music is triggered, on the one hand, by the wish to facilitate the acquisition and management of rights, as shown with the adoption of the 2005 Recommendation on the Management of Online Rights in Musical Works⁴³⁵, and on the other, by the desire to find ways to stimulate competition in the field of rights management (examples are the IFPI-Simulcasting and the CISAC cases). Several features of EC interventions in the field of online music licensing should be highlighted, as they may nurture reflection on initiatives in the field of audiovisual online licensing.

Recent EC interventions indicate the following:

First, as shown in the IFPI-Simulcasting case, the CISAC Decision and the Recommendation on the Management of Online Rights in Musical Works, the European Commission has clearly identified the need to facilitate rights acquisition in order to promote a digital single market, and recognises that one-stop shops are a solution to the issue⁴³⁶.

EU authorities promote an evolution from domestic one-stop shops towards a European one, as a way to challenge domestic segmentation, including concerted practices between rights management bodies to partition the rights licensing market. For example, in the IFPI- Simulcasting case, in which a reciprocal agreement between collecting societies to create a one-stop shop for simulcasting licensing was under scrutiny, the European Commission acknowledged that *“by creating and encouraging competition between participating collecting societies in the EEA, the Reciprocal Agreement furthers the goal of creating and sustaining a single market, in this case a single market for the provision of inter-society administration services and a single market for the licensing of simulcasting”*⁴³⁷. The Commission also acknowledged that one-stop shops increase the efficiency of rights management and reduce transaction costs⁴³⁸.

435 Commission recommendation of 18 May 2005 on collective cross-border management of copyright and related rights for legitimate online music services (2005/737/EC) OJ L 276/54, 21.10.2005

436 The UEFA case also shows that one-stop shops and collective management has been approved in relation to the management of sport rights and pan-European competition. Commission Decision 2003/778/EC of 23 July 2003 (Uefa ChampionsLeague) OJ, 2003 L 291/25.

437 Case COMP/C2/38.014 IFPI Simulcasting para.122

438 Case COMP/C2/38.014 paras 119 and 121

Second, the partitioning of the market is not simply a result of copyright licensing as initially sought. It is primarily the consequence of a commercial decision to market copyright-protected content along territorial lines. This has been illustrated through investigations of DG Competition in Apple/iTunes.

Third, the best way to encourage competition amongst music collecting societies is still to be found. The European Commission seems to balance between two options: on the one hand, the 2005 Recommendation favours an option where collecting societies compete on the level of services granted to rights holders (like the US model), with the risk of promoting the dominance of societies able to license the most lucrative international repertoire. This forces users to seek numerous licences to be able to play all sorts of repertoire, and may reinforce the dominant position of the society that holds the most popular catalogue of titles. On the other hand EC competition authorities favour a system whereby rights management organisations should compete on the level of services rather than on copyright tariffs to attract users.

Whilst users welcome the principle of competition between collecting societies, they regret that such competition leads to a withdrawal of reciprocal representation agreements and therefore results in licensing fragmentation and increased transactions costs. Users seem to be asking for blanket licences covering all the necessary rights required to operate a distribution service. In this respect the recent EC-interventions in the field seem to disappoint both rights holders and users alike⁴³⁹.

Furthermore, it should be highlighted that the key issue in relation to making available international offers in music is not copyright territoriality *per se*, but rather the rights licensing process underlying pan-European exploitation. Potential providers such as Google (Youtube) and Apple are first and foremost interested in greater transparency as regards the availability of rights at international level, as well as in one-stop shopping opportunities for rights acquisitions⁴⁴⁰.

The problem faced by the European Commission is that international licensing in music is only possible if rights management bodies collaborate and entrust each other with their respective repertoire. This problem would not exist in film, as producers/distributors are entrusted with the management of rights and can therefore decide whether to directly license titles to a commercial user (such as a VOD operator), or whether to indirectly license titles through an aggregator or a management body.

Commercial users of music have also expressed concerns in relation to the development of regional or pan-European rights management monopolies.

This concentration in rights management is unlikely to happen in the audiovisual sector, as large European companies and Hollywood majors (the stakeholders who control the most economically-valuable rights) will most likely continue to license on an individual basis. On the other hand, collective approaches may be of interest to European audiovisual stakeholders who wish to collectively negotiate deals to access future pan-European digital platforms and extract better licensing terms. The value of EU films represents a significant 28% of the European audiovisual market, which makes this catalogue

439 As states, for instance, EDIMA: “Recent developments in the market for securing licences for online audio and audiovisual are changing the landscape and raising both new challenges and opportunities for online media providers. Intended for both licensors and licensees, some of these changes have resulted in increased complexity, cost and legal uncertainty for some licensees.” p. 3

440 See for instance Google’s response to the European Commission’s “issue paper” following the Round Table on opportunities and barriers to online retailing and the European Single Market p. 2 and p.4

comparable in size with the largest Hollywood major⁴⁴¹. The ability to offer a majority of these titles to potential licensees in a coordinated and efficient way will, to a large extent, determine its attractiveness to service providers that wish to distribute independent cinema and television productions internationally.

4.2.5 A secondary multi-territory licence system?

In order to enhance the Digital Single Market, the option of a “second multi-territory licence” has been put forward by the European Commission.

According to the tender specifications of the present study the system would be based on the idea of a primary territorial licence and a secondary “multi-territorial” licence. Rights holders would be encouraged to grant, next to main distribution licence(s) which would be reserved for the country(ies) of the producer(s) where cinema and other forms of distribution are generally pre-organised (primary licence), a second multi-territory licence for online distribution, bundling all the other EU countries for which, in general, no distribution agreements exist⁴⁴².

The objective of such measure would be to ensure some exposure of European films on VOD platforms in countries where the film did not land a distribution deal. For instance in the situation of an Austrian German-language film which would get distribution in Germany, Austria and Switzerland, a second licence would be available for enabling the distribution of such films on VOD platforms in other European territories. One could imagine that revenue would come from revenue-sharing deals between the VOD operators. According to the services of the EC the rights holder would have to consent to this exploitation, thus preserving its contractual freedom, and the system would not put into question territorial licensing.

Many issues remain unclear. Would the rights holder have to consent to license for free to a VOD operator, whilst another one would have to pay for the exclusive right of distribution? Would this decrease the value of the rights granted, and encourage would-be distributors to operate under the secondary licensing scheme instead of acquiring “a primary licence”?

Other questions relate to the geographical scope of such a licence and its management. Who would keep track of the licences and collect revenues from it? Would the terms of the licence be fixed by law to prevent abusive practices undermining the underlying intellectual property rights in the audiovisual work? Would the licensee have a claim in the case of subsequent exploitation in the territory via a primary licence? Would such statutory licensing be compatible with international law, which does not distinguish between primary and secondary licences? More importantly, would it be acceptable to users and rights holders?

It is important to note that it is already possible today for a rights holder to grant a licence for free to VOD platforms in countries where he did not land a distribution deal. As result the value of the idea remains unclear.

441 European Audiovisual Observatory, Data from 2008 quoted in World Film Market Trends 2009, p. 14

442 See Tender specifications of this study p. 3

A less detailed suggestion of a “secondary multi-territory licence” had already been submitted to public consultation in 2008, in the context of the publication of the EC Communication on Creative Content Online⁴⁴³. At the time, no rights holders or users welcomed such idea. This was confirmed at the workshop on the present study organised on 2 June 2010 in Brussels.

In its recently-published Digital Agenda for Europe the Commission has not put forward the idea of a “secondary licence”. It clarifies, however, that any “solution should preserve the contractual freedom of rights holders. Rights holders should not be obliged to license for all European territories, but would remain free to restrict their licences to certain territories and to contractually set the level of licence fees”.⁴⁴⁴. In the absence of support on such option from right holders and users alike it remains unclear how such a licensing system would operate. Therefore the present study subscribes to the conclusion reached in the EC Communication on a Digital Agenda for Europe.

443Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, on Creative Content Online in the Single Market {SEC(2007) 1710} , Brussels, 03.01. 2008 p.10 (Creative Content Online Consultation)

444 Digital Agenda for Europe op.cit p.8

4.3 Legal and regulatory obstacles to cross-border licensing activities

Policy debates concerning the challenges to developing a digital single market for audiovisual content in Europe primarily focus on copyright and its territorial exercise. They often do not take sufficient notice of other obstacles linked to regulations and policies that influence the ability of VOD service providers to offer international services.

The legal survey across the EU conducted as part of this assignment (country profiles can be found in the appendices) illustrates that many regulations and policies at national level either raise additional transactions costs for cross-border trade of audiovisual works, or contribute to establishing an unbalanced environment for pan-European VOD services:

- Insufficient harmonisation regarding copyright enforcement can lead to legal uncertainties (Section 4.3.1).
- Important legal uncertainties also continue to exist regarding the licensing of audiovisual works for digital distribution (notably with regard to orphan works) or the implementation of authors' exclusive rights (Section 4.3.2).
- VAT rules differ across the EU and distort competition between audiovisual service providers. They penalise audiovisual consumption online compared to other forms of access (Section 4.3.3).

Regulations relating to content production and distribution may also influence the development of a digital single market (Section 4.3.4). They aim to ensure a diverse cultural offering reflecting Europe's diversity, and to enable local creative expression (with support to local content production and market access). They also reflect social and cultural traditions (rating systems).

These issues are specific to the content industry and will be reviewed in the following Section. There are, of course, other issues that influence the digital single market (e.g. those related to consumer protection, security of networks, judicial redress, proliferation of household equipment, etc.) and impact on the take up of cross-border services. While some of these are considerable, they have been identified and described in other EC policy documents. To consider them as part of this assignment would exceed its scope.

4.3.1 National disparities in copyright enforcement: a threat to the digital single market?

Disparities in copyright enforcement lead to fragmentation of the internal market, as well as to reluctance of businesses to invest in the audiovisual sector on the one hand and to rights holders to embrace new technologies on the other hand. However true harmonisation in the field has not yet been achieved, as the implementation of EU directives on copyright enforcement varies greatly at Member States' level, and national responses to copyright infringement remain diverse. There is no common approach to several questions that determine the effectiveness of copyright enforcement, such as the scope of exemption from liability for internet intermediaries, or the way to address copyright infringements at citizens' level. Consequently, legal uncertainties continue to challenge the establishment of the single market. In the case of VOD, such disparities could theoretically lead to a "race-to-the-bottom", encouraging countries to adopt a weaker copyright enforcement regime with a view to attracting investment by service providers. This could eventually undermine the strong rationales

for EU copyright harmonisation: the establishment of a level playing field that benefits creators and cultural/creative industries, and preventing the establishment of copyright heavens in the Single Market.

4.3.1.1 Varying implementation of EC-directives

EC Directives dealing with copyright enforcement are interpreted and implemented differently across the EU. This indicates that there are different conceptions across Europe concerning the level of copyright enforcement that is needed, and the appropriateness and strength of measures that need to be applied. Some examples:

Conditional Access Directive: Article 4 prohibits commercial manufacturing, distribution and marketing of devices that allow the circumvention of technical protection measures (TPMs). Several Member States (France, Belgium, Italy, Poland, and Spain) have chosen to extend the scope of Article 4 to cover the private use of such illicit devices⁴⁴⁵. Article 5 of the Directive leaves Member States free to apply appropriate sanctions to infringing activities, as long as they are “effective, dissuasive and proportionate to the potential impact of the infringing activities”. However, not all the Member States have set criminal and civil sanctions, and the level of sanctions varies greatly⁴⁴⁶.

Enforcement Directive: the main Articles of the Directive that are of relevance to tackling online copyright infringements are Articles 8, 9, 11 and 13. These Articles provide rights holders with measures to enforce their rights against infringers and intermediaries. Article 8 provides rights holders with a right of information from commercial intermediaries in the context of proceedings, Articles 9 and 11 with the injunctions and Article 13 with damages. Their implementation varies widely across the EU. For example, with regard to Article 8 (Recital 14), some countries apply the right to information only to infringing acts committed on a commercial scale (Finland, Bulgaria, Spain and Germany), while others apply it to all types of acts (France) or do not distinguish commercial or non-commercial scale at all (Estonia). These disparities are of relevance as they may influence rights holders’ and/or copyright enforcement agencies’ ability to track unauthorised sharing of copyright-protected content by individuals and commercial actors. With regard to implementation of Articles 9 and 11, in most Member States⁴⁴⁷ it is possible for judges to issue injunctive relief for rights infringement. National implementations, however, differ on the provisional or permanent character of the injunction, as well as on the lack of implementation of some Articles of the Enforcement Directive. Similarly, criteria to calculate damages to pay for infringing actions as set out in Article 13 or the possibility to pay lump sum payments vary considerably across the EU⁴⁴⁸.

E-Commerce Directive: whether and how ISPs can be held liable for hosting services that enable copyright infringement differs widely across the EU. A major difference with regard to the E-Commerce transposition can be found in the interpretation of “actual knowledge” of an ISP about the circumstances and facts suggesting illegal content or activities on its services⁴⁴⁹. The 2007 review on the

445 KEA, CERNA, The Impact of the Conditional Access Directive, Study for the European Commission, December 2007

446 For details see appendices and KEA study on the Impact of the Conditional Access Directive, op.cit.

447 Austria, Belgium, Denmark, Finland, France, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Romania, Spain, Sweden and UK

448 For details see appendices

449 Thibault Verbiest et al., Study on the Liability of Internet Intermediaries, Study for the European Commission, November 2007, p 14 ff

implementation of the Directive showed that there are different ways of dealing with the subject across Europe. Some Member States (Spain, Italy, Portugal) require formal knowledge procedures and an official notification by authorities to assume actual knowledge of a provider. This can be seen as a “de facto exemption from liability of providers even if they are clearly aware of illicit activities”⁴⁵⁰, as official authorities often do not have the capacities to pursue every infringement. On the other hand, some countries leave it to national courts to determine such “knowledge” and have no formal requirements of notification (Netherlands, Germany, Austria). Only a few Member States have implemented additional notice and take down procedures (Finland, Lithuania, Germany and Poland)⁴⁵¹, which indicates that, even after harmonisation efforts at EU-level, disparities in copyright enforcement are still important.

There exists important case law relating to the issue of liability of internet intermediaries (such as website operators, hosting providers, user-generated-content hosting providers) in Europe⁴⁵². This is important as intermediaries have a role to play in limiting online copyright infringement. Moreover, as some services have in the past facilitated illegal downloading and file-sharing under the cover of internet intermediary liability exemption rules (Pirate Bay, Rapidshare, etc.), the image of intermediaries as impartial technology service providers is questioned. Nevertheless a review of case law shows that there are important uncertainties regarding this question, and no consensus across Europe on how to deal with intermediaries’ liability has yet emerged. Examples of landmark cases illustrate this development:

- In some countries (for instance Italy⁴⁵³, the Netherlands⁴⁵⁴⁴⁵⁵, Denmark⁴⁵⁶ and Belgium⁴⁵⁷) hosting providers have been asked by their respective national courts to play a greater role in filtering traffic and preventing access to certain websites than in others
- Some hosting providers have been held more accountable for copyright infringements on their systems than usual, as courts deemed them to hold certain editorial responsibility (Italian Youtube case⁴⁵⁸, MySpace case in France⁴⁵⁹) and rejected their status as mere “caching” services (Amsterdam District Court⁴⁶⁰)
- The question of whether access providers can be mandated to install filtering technology on their systems to detect peer-to-peer file sharing remains unanswered in Belgium, and has made its way to the ECJ, where it is currently under consideration (after interpretations by national⁴⁶¹ and district⁴⁶² courts in Belgium)

450 Ibid.

452 For a more detailed analysis see Strowel Alain (ed) *Peer-to-Peer File Sharing and Secondary Liability in Copyright Law*, Edward Elgar Publishing, 2009

453 Tribunale di Roma, Ord. del 15.12.2009 dep 16.12.2009

454 Decision of the Amsterdam District Court, 22 October 2009, LJN : BK1067, Rechtbank Amsterdam, 436360/KG ZA 09-1809

455 Rb. Utrecht 26 August 2009, Brein v. Miniova, LJN BJ6008, 250077/HA ZA 08-1124

456 IFPI Denmark mod DMT2 A/S, Frederiksberg Byrets kendelse, 29 January 2008

457 Tribunal de Première Instance de Bruxelles, no. 04/8975/a, decision of 29 June 2007

458 Tribunale di Roma, Ord. del 15.12.2009 dep 16.12.2009

459 Jean Yves L. dit Lafesse v MySpace, Tribunal de Grande Instance de Paris, Ordonnance référé, 22 June 2007

460 Decision of the Amsterdam District Court, 22 October 2009, LJN : BK1067, Rechtbank Amsterdam, 436360/KG ZA 09-1809

461 Cour d’Appel de Bruxelles, 9e chambre, n° 2010/740 n° 192 Decision of 28 January 2010

462 Tribunal de Première Instance de Bruxelles, no. 04/8975/a, decision of 29 June 2007

- Regarding the liability of website operators and other users, in some cases across the EU website operators were held directly and indirectly liable for copyright infringement (for instance in France⁴⁶³, the UK⁴⁶⁴, Sweden⁴⁶⁵ and Denmark⁴⁶⁶). In the Pirate Bay case in Sweden, which attracted a lot of media attention, the court argued that website providers could not be released from liability as they were acting with intent
- The question of disclosure of personal data by hosting providers is also addressed differently across Europe: while in Ireland a hosting provider was obliged to disclose the identities of alleged copyright infringers⁴⁶⁷, in Spain this same issue was far more problematic and was referred to the European Court of Justice (see Section 4.3.1.3)
- Court decisions, for instance in Germany or France, show that questions concerning internet intermediary liability are treated differently case by case in these countries, thereby preventing the development of a coherent body of national case law references^{468 469 470}.

Uncertainties regarding the liability of access providers are illustrated by the Belgian case involving SA Scarlet (formerly Tiscali). In 2007 the District Court of Brussels ruled that SA Scarlet had to install filtering software on its system so as to exclude infringing peer-to-peer files⁴⁷¹. The Brussels Court of Appeal⁴⁷² asked in January 2010 the ECJ for a preliminary ruling on the questions whether such a request to install general filtering systems for all electronic communications, in order to detect peer-to-peer activities is compatible with EC-rules. The Court is also required to assess the injunction according to the principle of proportionality regarding the effectiveness of the requested measure.

Examples of case law in Germany, and until recently in France, also show that, even among the different jurisdictions of one country, diverging positions exist and that the question of intermediaries' liability is far from solved. Inconsistencies in Germany exist between several rulings of lower courts, due to a rather wide interpretation of the Federal Court of Justice on ISPs monitoring duties⁴⁷³.

In France, the question of whether hosting providers can be considered as content editors, and thus held liable for copyright infringements occurring on their services, was answered in different ways. The Court of First Instance of Paris defined, for example, the social networking site MySpace⁴⁷⁴ as a

463 Perathoner and others v S Joseph Société Free and others (Tribunal de Grande Instance, Paris, France 23 May 2001)

464 Polydor Ltd and others v Brown and others, High Court of Justice Chancery Division, UK, 28 November 2005

465 Sony Music Entertainment and others v. Frederik Neij and others (Pirate Bay) District Court of Stockholm (Stockholms tingsrätt), Sweden, 17 April 2009

466 Koda v Lauritzen Vestre Landsret, Denmark, 20 April 2001

467 Mi Records (Ireland) Ltd and others v Eirecom Ltd and others, High Court, Ireland 8 July 2005

468 Federal Court of Justice (FCJ) judgement of 11 March 2004, ref. 1 ZR 304/01 "Internet auction I"; FCJ, judgement of 19. April 2007, ref. 1 ZR 35/04, "internet auction II"; FCJ judgement of 30. April 2008, ref. 1 ZR 73/05, "Internet auction III"; OLG Hamburg, judgement of 02 July 2008, ref. 5 U 73/07, "Rapidshare IV"; OLG Düsseldorf, judgement of 15. January 2008, ref. I – 20 U 95/07 See country profile Germany

469 In France, there have been various contradictory decisions by the court of first instance and the court de Cassation in Paris. Jean Yves L. dit Lafesse v MySpace, Tribunal de Grande Instance de Paris, Ordonnance référé, 22 June 2007, Jean Yves Lafesse et autres v Dailymotion et autres, Tribunal de Grande Instance Paris 15 April 2008, Jean Yves Lafesse et autres v Google Inc. Et autres, Tribunal de Grande Instance de Paris 24 June 2009, Zadig Productions et autres v Google Inc, Afa Tribunal de grande instance de Paris, 19 Octobre 2007

470 Dailymotion v Nord-Ouest production et autres, Cour d'appel de Paris Arrêt du 6 mai 2009

471 Tribunal de Première Instance de Bruxelles, no. 04/8975/a, decision of 29 June 2007

472 Cour d'Appel de Bruxelles, 9e chambre, n° 2010/740 n° 192 Decision of 28 January 2010

473 See country profile Germany

474 Jean Yves L. dit Lafesse v MySpace, Tribunal de Grande Instance de Paris, Ordonnance référé, 22 June 2007

content editor rather than a hosting service (“hébergeur”) and thus deemed it liable for infringing actions. In other cases⁴⁷⁵ hosting providers were exempt from liability, as the court did not recognise their status as content editors, mainly because content was uploaded by the users themselves. However, in January 2010 the Court of Cassation⁴⁷⁶ declared the company Tiscali (Telecom Italia) liable for copyright infringements on its services, being more than a mere host service. This position considerably changes the legal environment for hosting services, as the latter is more restrictive.

The legal uncertainties resulting from these disparate court decisions across Europe contribute to hamper the development of a digital single market for audiovisual content.

There is little international or pan-European coordination on the implementation of European Directives that relate to copyright enforcement at national level. This lack of cross-border dialogue and exchange between national copyright enforcement agencies, government departments, and diverse stakeholder groups concerning copyright enforcement policies contributes to the disparities and legal uncertainties. Given that VOD, at least theoretically, promises borderless content markets, cooperation and exchange across the EU are necessary to avoid the implementation of diverse copyright enforcement regimes, distorting the internal market as well as competition in Europe.

4.3.1.2 Disparities in confronting illegal file sharing at consumer level

Another important bottleneck to the development of a single digital market are the increasingly disparate solutions to tackling online copyright infringements across the EU at consumer level.

Member States are putting in place solutions to control individual copyright infringement, but the scale, scope and focus of efforts are diverse and uncoordinated at European level. Nevertheless “[...] adequate protection of copyrighted works and a close cooperation to fight piracy are urgently needed to create a win-win situation for all stakeholders, [...] and to facilitate the emergence of new, diverse and viable European business models for Film Online.”⁴⁷⁷

Research conducted as part of the legal review illustrates:

- Some countries⁴⁷⁸ rely on voluntary inter-industry agreements (Hungary, Estonia, Lithuania, the Netherlands, Slovakia)
- In Germany⁴⁷⁹, Finland⁴⁸⁰, Italy⁴⁸¹, Latvia⁴⁸², Bulgaria⁴⁸³ governments are mediating dialogues between stakeholders to help develop legislation or agreements

475 Dailymotion v Nord-Ouest production et autres, Cour d’appel de Paris 4ème chambre, section A Arrêt du 06 mai 2009 ; Jean Yves Lafesse et autres v Dailymotion et autres, Tribunal de Grande Instance Paris 15 April 2008 ; Zadig Productions et autres v Google Inc, Afa Tribunal de grande instance de Paris, 19 Octobre 2007

476 Cour de Cassation (1re Chambre Civile) 14 Janvier 2010, Telecom Italia (ex Tiscali Media) c. Stés Dargaud Lombard et Lucky Comics

477 European Commission, European Charter for the Development and the take up of film online, 23 May 2006, p.3

478 For detailed information on the situation in each Member State see country profiles in appendices

479 In Germany the government has been hosting an “economic dialogue for more cooperation to fight internet piracy” during 2009. Likewise, it has also announced new measures to strengthen legislation on illegal file sharing. See: Regierungsprogramm von CDU und CSU, 2009-2013, accessible on <http://tinyurl.com/m7rkbv>

- Spain focuses on making internet intermediaries more accountable for what happens on their systems rather than focussing on sanctioning individual users⁴⁸⁴. The draft bill is currently being examined by the Parliament
- In Ireland a private agreement, by way of an out-of-court settlement between Eircom and the Irish Recorded Music Association (IRMA), has been signed in which Eircom has committed to cooperate within a graduated response process. However, other Irish ISPs refused to sign such an agreement⁴⁸⁵.
- The Italian law transposing the AVMS Directive (the so called “Decreto Romani”⁴⁸⁶), contains a provision (Article 3) introducing a graduated response system against copyright infringements. However, for the moment, there is no certainty about how this provision would apply to copyright violations and law implementing the decree is expected for end of June 2010.
- France has been the first European Member State that has established a graduated response mechanism⁴⁸⁷
- The UK Digital Economy Act⁴⁸⁸ adopted in April 2010 established the basis for a graduated response system. ISPs are obliged to collaborate with rights holders in providing evidence on internet copyright infringements and notifying alleged copyright infringers. The sanction of blocking subscribers’ access to the internet has not been put into force, but could be considered in the future⁴⁸⁹.

480 Following a series of inter-industry dialogues on the topic, the Finnish government is also considering the possibility of introducing a graduated response system. A draft law is under preparation and should be submitted to the Parliament in spring 2010. See country profile

481 At the beginning of 2009, the Government created an internal Anti-audiovisual Piracy Advisory Committee (involving also some non-governmental representatives) in order to collect position papers by different operators (rights holders, associations, ISPs, TLC operators, etc.) and to report their opinions to government level. See country profile

482 Latvia has created a special Intellectual Property Council. One of its tasks is to propose changes in current copyright legislation. There is special experts group within the Council which has representatives from State institutions as well as NGOs.

483 In 2006 a Council on IPR Protection chaired by the Minister of Culture was established. It consists of representatives of the Ministry of Justice, Ministry of Finance, Ministry of Economy and Energy Ministry of Interior, Patent Office, National Customs, Prosecution, Sofia Regional and Sofia City Courts, etc. The main task of the Council is to coordinate the IPR enforcement efforts of the different public bodies, discuss drafts to amend the IPR legislation, monitor and analyse the IPR enforcement. The representatives of the organisations of rights holders are invited to the meetings of the Council. See country profile

484 The recent draft bill on sustainable economy proposes a new system allowing a rights owner to denounce any online infringement of his rights. This would have to be done before an administrative body depending on the Ministry of Culture, which would examine the case and issue a resolution to remove the illegal content from Internet or block the access to the suspected website. The draft bill still has to be voted by the Parliament. See country profile

485 See country profile for details

486 Schema di Decreto Legislativo "Attuazione della Direttiva 2007/65/CE del Parlamento europeo e del Consiglio dell'11 dicembre 2007, che modifica la direttiva 89/552/CEE del Consiglio relativa al coordinamento di determinate disposizioni legislative, regolamentari e amministrative degli Stati membri concernenti l'esercizio delle attività televisive" adopted on 1 March 2010, Article 3 see country profile for details.

487 The so-called HADOPI II Act introduced a system based on a newly-established administrative authority in charge of implementing the “three-strikes regime”: The authority will send three warnings to alleged infringers, and if no reaction occurs, it could then report them to a court. The court will have the ability to decide on sanctions, one of them being to order the suspension of the internet connection of the infringer. See country profile

488 http://www.opsi.gov.uk/acts/acts2010/ukpga_20100024_en_1

489 The “Digital Economy Act”, introduces a lighter version of the new French system. ISPs are obliged to send two warning letters to alleged copyright infringers before court action against them is taken. In order to disclose the personal identity of subscribers to rights holders a court order is necessary. A code specifying the process of how to detect evidence, routes of appeal and formats of notices should be created by OFCOM and the

Each of these options is further outlined in the appendices.

Copyright enforcement in Europe therefore seems to be increasingly disparate, which may be a major bottleneck to the establishment and development of a European market for audiovisual content. Furthermore the solution of a “graduated response” is strongly debated in the general public, as well as among policymakers (an example is the discussion in the European Parliament in the context of the adoption of the Telecoms Package)⁴⁹⁰, as many questions arise regarding the system’s proportionality, its respect of fundamental rights such as the freedom of expression and data protection. This will be examined in the following Section.

4.3.1.3 Balancing copyrights with other fundamental rights

Graduated response systems raise questions in relation to the exercise of individual freedom. It is argued that new mechanisms to counter copyright infringements require a careful balancing act between different fundamental rights, because they may constrain the use of the internet. On the one hand the regulator needs to respect fundamental rights listed in the EU Charter of Fundamental Rights⁴⁹¹ as general principles of Community law, such as the fundamental right to property (Article 17) – which includes intellectual property (Article 17(2)) – and the right to effective judicial protection (Article 47). On the other hand it must consider the fundamental rights to access to information (Article 11), to respect for private life (Article 7) and, in particular, the protection of personal data (Article 8).

Balancing the right to access information and the right to IP enforcement:

By enabling the suspension or the throttling of internet connectivity graduated response mechanisms raise the question of whether internet access constitutes a fundamental right to access information (Article 11 Fundamental Rights Charter). Consequently, conditions under which the regulator is allowed to impose restrictions to internet usage have to be considered.

In its decision on the “Hadopi” Law of 10 June 2009, which relates to the freedom of communication and expression (referring to Article 11 of the Declaration of the Rights of Man and the Citizen of 1789)⁴⁹², the French Constitutional Council ruled that “[i]n the current state of the means of communication and given the generalised development of public online communication services and the importance of the latter for the participation in democracy and the expression of ideas and opinions, this right implies freedom to access such services.” It therefore concluded that only a judicial authority has the power to restrict the freedom of expression of an individual and not an administrative authority, as foreseen by the first version of the Hadopi law.

In 2009, the European Parliament (EP) also held long discussions on similar questions during the revision of EU telecommunications laws (“Telecom Package”). During the overall adoption of the

stakeholders. One year after the code has come into force, the Secretary of State will have the power to impose further technical obligations on ISPs, such as limiting access to subscribers. See country profile for more details
490 Its directives are Access Directive 2002/19/EC, Authorisation Directive 2002/20/EC, Framework Directive 2002/21/EC, Universal Service Directive 2002/22/EC and Privacy Directive 2002/58/EC.

491 Charter of Fundamental Rights of the European Union, (2000/C 364/01), O.J. 18 December 2000

492 Decision n° 2009-580 of June 10th 2009, Act furthering the diffusion and protection of creation on the internet

Telecom Package Members of the European Parliament had to vote on measures that could impose restrictions on fundamental rights and freedoms of end-users without a prior judicial ruling⁴⁹³. The EP settled on a compromise with the Council. As a result the new Framework Directive states that “measures may only be adopted as a result of a prior, fair and impartial procedure”⁴⁹⁴.

Those debates clearly illustrate the tension between the right to intellectual property and other individual rights. Citizens’ and civil society movements or consumer associations rightly stress that internet access contributes to the exercise of fundamental human rights (right to education and knowledge, access to information).

The tension between data protection and copyright enforcement:

In order to effectively address online copyright infringements at consumer level rights holders need to access infringers’ identities. This requires cooperation with internet service providers (ISPs). Given exemption from liability for copyright infringements but also the need to protect personal data, ISPs are often not willing to disclose personal data. The question of whether ISPs can be obliged to disclose personal data to address copyright infringements, or whether such an obligation opposes the fundamental right of personal data protection, is also at the heart of the current debate.

The judgement of the ECJ in the *Promusicae* case contributes to an understanding of the issues at stake⁴⁹⁵. The decision addressed the obligation of ISPs to disclose information about the identity of their clients in relation to copyright infringements. The plaintiff sought to obtain a court order in Spain against the ISP Telefónica to oblige the company to disclose data about the identity of users who allegedly were illegally sharing copyright-protected musical works through the peer-to-peer network Kazaa. Telefónica argued that the communication of such data would only be justified under a criminal investigation, or for the purpose of safeguarding public security and national defence. As a result the Spanish court asked the ECJ to issue a preliminary ruling as to whether Member States are allowed to rule that the disclosure of traffic data in civil proceedings can be restricted under Community law.

The ECJ assessed the conflict between the Directive on Privacy and Electronic Communications⁴⁹⁶ and the Directive on the Protection of Personal Data on the one hand, as well as the provisions on the effective enforcement of IP rights from the E-Commerce Directive (Article 18), the Copyright Directive (Article 8) and the Enforcement Directive (Article 8) on the other⁴⁹⁷. It ruled that Community law neither excludes an obligation to communicate personal data in order to ensure effective protection of copyright in the context of civil law proceedings, nor obliges Member States to introduce such a civil law obligation

493 The debate took place in the context of the French “Hadopi” draft law in particular on the question of whether and who could take the decision to reduce or cut off internet access of consumers.

494 Article 1(3) of the new Framework Directive

495 ECJ case C-275/06 on 5 February 2008 *Productores de Musica de Espana v. Telefonica de Espana SAU*

496 Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector OJ L 201, 31.7.2002, p. 37–47

497 The conflict between data protection rights and IP enforcement rights was also addressed by the French Constitutional Court in its recent decision on the French Law “Création et Internet”. In the first draft law an administrative body was given the power to sanction presumed copyright infringers, after having received data on their identity from ISPs. The Court estimated that under data protection rules transmission of nominative private data in order to impose sanctions could only happen in the context of legal proceedings, a condition which has not been fulfilled in the first version of the law. It reminded that under French law, only a judge can provide sanctions. (Decision n° 2009-580 DC, 10 juin 2009 sur la loi favorisant la diffusion et la protection de la création sur Internet)

to disclose information. In the absence of clear EU norms the Court leaves to the Member States the duty to strike the right balance⁴⁹⁸.

The sensitive question of ISPs' liability and their obligation in relation to personal data disclosure in civil law proceedings remains unanswered at European level. Discussions between EU bodies on the Telecoms Package, as well as the "non-decision"⁴⁹⁹ of the ECJ in the Promusicae case, illustrate this. To some degree the judgement illustrates the "present disharmonised state of law"⁵⁰⁰ that results in diverging case law across, and even within, Member States.

The question of data protection in the digital environment is also addressed in the recent Digital Agenda for Europe, in which the Commission announced a review of the EU data protection framework by the end of 2010 with a view to enhancing individuals' confidence and strengthening their rights⁵⁰¹.

4.3.2 The need to further harmonise copyright and neighbouring rights rules

Next to heterogeneous copyright enforcement rules across Europe there are other issues that impede the development of a digital single market for audiovisual content. These are related to

- the need to clarify the scope of the broadcasting and the making-available rights
- the interaction between reproduction and making-available rights
- the implementation of authors' rights in relation to cross-border digital exploitation of audiovisual works
- the easing of commercial exploitation of older and orphan works on digital platforms, and
- improvement of trust in rights management bodies.

4.3.2.1 The difference between broadcasting and making-available rights

There are several uncertainties regarding the delineation between the broadcasting right and the making available right for some types of transmission that share the characteristics of broadcasting and on-demand services. As the Copyright Directive does not provide for a harmonised definition of broadcasting the distinction between the two rights is not always clear in practice. Our survey shows that in some countries (Germany, the UK, Denmark) streaming content requires the acquisition of the broadcasting right, in particular if the streaming service resembles a conventional broadcast (e.g. when no interaction with the programme is possible for the viewer). By contrast, streaming content which allows viewers to interact with the service falls under the making-available right⁵⁰².

498 Directive 95/46/EC of the European Parliament and of the Council of 24 Oct 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data OJ L 281 , 23/11/1995 p.31-50.

499 Leistner Matthias, Copyright Law in the EC: status quo, recent case law and policy perspectives, Common Market Law Review 46: 847-884, 2009 p. 871

500 *ibid.* p. 873

501 Digital Agenda for Europe *op.cit.* p.13

502 See country profiles.

Eventually different practices regarding licensing for streaming services could become an obstacle to international VOD exploitation, as uncertainties about the necessary rights that need to be acquired in different Member States could increase transaction costs in the licensing process. The need to harmonise broadcasting rights across the EU has therefore been articulated by some academic commentators⁵⁰³.

4.3.2.2 Reproduction right and making-available right

Licensing for online distribution applies to the making-available right and the reproduction right, as copies of content are made when downloading or streaming such content. Online licensing of creative content, and especially of music content, is sometimes complicated due to this requirement to clear both rights, which often have to be cleared in separate transactions. The European Commission highlights this problem but shows in its Reflection Document that this is an issue touching mainly on licensing of music rights.

The Reflection Document states: “the licensing of musical compositions and of sound recordings is further complicated by the fact that most online forms of dissemination require the simultaneous clearance of the digital reproduction right and the “making available” right”⁵⁰⁴. To solve the issue the Reflection Document puts forward the option to bundle the respective rights (digital reproduction right and making-available right) to create one unitary licence in order to facilitate online rights clearance⁵⁰⁵. Several stakeholders⁵⁰⁶ take up this proposal, however always in relation to licensing musical works. Only Cable Europe suggests aggregating the right to reproduction with the digital performance right for dissemination of audiovisual works as well⁵⁰⁷.

With respect to audiovisual works, it has to be recalled that the relevant exploitation rights are assigned to the producer. The producer thus has the ability to license any right to digital platforms and acts as a one-stop shop. Furthermore, in practice, VOD service providers can already deal with this complexity by addressing both of these rights in their contractual arrangements with rights holders in one single act.

The issue seems to be more problematic in relation to the clearance of music rights attached to audiovisual works. Answers to the consultation by stakeholders confirm this. However, due to the scope and focus of the present study on audiovisual rights licensing this certainly important point cannot be looked at in more detail⁵⁰⁸.

4.3.2.3 The remuneration of authors for cross-border digital distribution of audiovisual works

503 IVIR “Recasting Copyright & related rights for the knowledge economy” op cit.p. ii and Leistner Matthias, Copyright Law in the EC: status quo, recent case law and policy perspectives, Common Market Law Review 46: 847-884, 2009 p. 851

504 Reflection Document p. 5

505 Reflection Document p. 16, see also contributions to Reflection Document by EBU, RTL Group, MPA, Nokia

506 See contributions to Reflection Document by RTL Group, ACT, MPA, Nokia and contributions by FERA, SAA, CEPI representing the audiovisual sector and not mentioning this issue at all.

507 Cable Europe, contribution to the Reflection Document p. 3

508 For further information on this topic see for instance Stefan Ventroni, Copyright Clearance and the Role of Copyright Societies, in European Audiovisual Observatory, Legal aspects of video on demand, European Audiovisual Observatory, Strasbourg 2007 p.48

The cinema industry in Europe is essentially a talent industry. European cinema is known across the world for its originality and its distinctiveness, which represent Europe's cultural assets. As European cinema cannot compete with other territories in raising finance for large production budgets, or to enter international distribution on a large scale, it fully relies on its talent base and the imagination of its individual creators to succeed. European cinema's distinguished flavour is linked to its tradition of "film d'auteurs". The main assets of European cinema therefore lie in the creative talents of its film directors and screenwriters, such as Pedro Almodóvar, Ken Loach, Jacques Audiard, Lars von Trier, the Dardennes Brothers, Luc Besson, Cristian Mungiu and Emir Kusturica, to name but a few. International cinema has, in the past and to this day, built its reputation with the aid of an incredible amount of European talent. Unfortunately the industrial capacity of Europe's 'cottage' film industry rarely does justice to the creative power of European artists. Such highly creative individuals are the driving force of European cinema abroad.

New forms of digital distribution, and opportunities that arise from digital communications and social networking, represent an important opportunity for European cinema and the world of art and culture. This opportunity needs to be turned into tangible revenues for the sector and its talent. However, to date, important disparities regarding authors' rights in Europe prevent authors from being financially rewarded for the exploitation of their works abroad. This means that while VOD offers a great possibility to disseminate content regardless of national boundaries, the legal frameworks prevent authors from reaping the benefits of a potential internationalisation of the audiovisual market. Nevertheless the objective of establishing a single digital market needs to be as much of an opportunity for reward for talent and creators.

Authors' remuneration for digital distribution is highly diverse across the European Union and a system that rewards European authors on equal terms for cross-border digital exploitation of their works still remains to be implemented.

The level and modalities of authors' remuneration are agreed upon contractually with the film producer. However in some countries the terms of such remuneration are mandated by law⁵⁰⁹. In some countries (such as Spain, France, Italy, Greece and Poland⁵¹⁰) authors have to be remunerated for each form of exploitation. However in most European countries authors receive a lump-sum payment for their contribution to the production but do not receive additional remuneration whatever the success of their work.

It should be noted that, following EU harmonisation, authors of audiovisual works collect remuneration throughout the Union in relation to cable retransmission (which has been harmonised by the Cable and Satellite Directive (93/83/EC)) and to private copying (in the 20 EU countries where a private copying remuneration system is implemented⁵¹¹).

509 In general Spain, Italy and Poland have quite a favourable system for authors. In principle authors benefit from a higher payment guarantee, as the final distributor is by law responsible for the payment to the authors for the use of their work through a collective management society. In France, Belgium and Bulgaria collecting societies representing audiovisual authors are contractually entitled to collect, on behalf of their members, certain exploitation rights of their works. In some countries film producers are required to reserve for authors a statutory right to obtain additional remuneration under the form of a "statutory royalty right" (France, Belgium, Spain and Greece), a "bestseller clause" (Germany) or some type of "equitable remuneration" (Netherlands, Italy, Austria).

510 For details see Kamina Pascal, *Film Copyright in the European Union*, Cambridge University Press p. 195 ff 511 *ibid*, p. 195

In contrast, a few countries have adopted specific regulation to ensure that authors are paid in relation to VOD exploitation, for instance:

- In France authors receive success-based remuneration via the local collecting society SACD if their works have been licensed for download-to-own or individual payment models⁵¹²
- In Spain authors receive an equitable remuneration for each use of their work via their collecting society. This system was extended to digital delivery in 2006⁵¹³
- In Germany the revision of the national copyright act enables authors to transfer their rights for unknown means of exploitation and entitles them to remuneration in this regard.

These countries, however, remain the exception in Europe and this disparate situation leads to the fact that authors hardly receive any remuneration from exploitation of their works in other European territories. Therefore, the European market has little financial meaning for authors, as their reward is essentially derived from exploitation of their work in the home territory. This undermines the potential of an internal market for audiovisual productions, and does not stimulate the development of works that are targeted at international audiences as there is no financial reward attached to international success.

Adopting an unwaivable equitable right to remuneration for the “making available right” would provide a solution that ensures that audiovisual authors are rewarded for their creations when they are exploited on digital platforms. This right would enable the effective implementation of authors’ exclusive ‘making available’ rights that have been granted by the Information Society Directive. Such a solution would come as compensation for the transfer of the “making available right” to the producer, without interfering with his commercial prerogative. Furthermore, it would enable harmonisation of the exercise of ‘making available’ rights across Europe and therefore avoid disparities in legislation that hinder the emergence of the internal market for creators (film directors, scriptwriters, cinematographers etc).

Whether this unwaivable right to equitable remuneration should be extended to performers in audiovisual works remains open. European performers associations AEPO/ARTIS and GIART are making such a demand in their comments to the Reflection Document of the European Commission and require “the introduction of an extended or mandatory collective management system for the administration of the “making available” right of performers and the provision of an additional unwaivable right to equitable remuneration in favour of performers”⁵¹⁴. Such a remuneration right only exists in Spain at present.

4.3.2.4 Uncertainties regarding the licensing of older and orphan works

Digital distribution is an opportunity for Europe’s audiovisual sector as it can help to make available the myriad of audiovisual works that today slumber in (mostly national) audiovisual archives, and do not find

512 http://www.sacd.fr/fileadmin/exploiter-oeuvre/2008/jo_VOD_150207.pdf

513 Law 23/2006, 7 July, modifying the Royal Legislative Decree 1/1996, 12 April, por el que se aprueba el texto refundido de la ley de propiedad intelectual, regularizando, aclarando y armonizando las disposiciones legales vigentes sobre la materia, BOE 97 of 22/04/1996.

514 GIART contribution to the Reflection Document p.6

their way into theatres or DVD stores due to high distribution costs⁵¹⁵. Next to being a great commercial opportunity for the European audiovisual sector, digital distribution can help increase cultural diversity.

However rights clearance of older works can be problematic as there often is no legal certainty about rights for digital distribution in licensing contracts concluded before the emergence of VOD. Often older contracts are silent or vague in relation to who holds rights for new kinds of distribution. Therefore distributors, broadcasters and other media service providers cannot be certain of exploiting the work on the basis of rights granted in initial contracts, and might have to renegotiate them. In the audiovisual sector ownership of an audiovisual work is mostly shared between several rights holders (director, screenwriter, editor⁵¹⁶, etc.), but the initial authors vest their exploitation rights to the producer by contractual agreements for a determined period (presumption of assignment). However, their consent on new forms of exploitation has to be acquired in some countries, notably Germany and Spain, as provisions in their national legislations are such that contracts do not apply for unknown forms of use at the time the contract has been concluded⁵¹⁷. As a result, renegotiation of contracts increases licensing costs.

Additionally, legal uncertainties can arise for situations in which contractual agreements between producers and different authors are not clear, or where the presumption of assignment was not applied. In particular, films made before the entry into force of the 1993 SatCab Directive do not benefit from the system of presumption in every Member State. For instance in Spain the presumption of assignment was adopted under the copyright and neighbouring rights legislation in 1966; in Belgium this was done in 1994. France, on the contrary, had already foreseen the copyright transfer to the benefit of film producers in its copyright legislation of 1957.

These issues are especially problematic for European works, as Hollywood studios are almost always the rights holders themselves and can more easily adapt contracts. This constitutes a disadvantage for the European film industry.

The issue of so-called “orphan works”, which are copyrighted works where it is either difficult or impossible to find rights holders⁵¹⁸, is an obstacle closely linked to the previous issue of licensing older works for digital exploitation. In the audiovisual sector, if one of the authors of a work cannot be traced the entire work cannot be commercially exploited. Several stakeholders, such as European Film Archives, ask for remedies to give archive material a new lease of life

However, at this moment the real scope of the problem is not yet clear. The European Association of Film Archives (ACE) published in February 2010 a survey⁵¹⁹ in which the presumed number of orphan

515 Chapter II outlines the long tail debate in more detail and shows how niche films (including older works) gain renewed value on digital networks.

516 While in the continental author’s right system (*droit d’auteur*) in general the initial creators of the film (director, screenwriters, editors, performers, etc.) are granted authorship or co-authorship of a film, in the Anglo-Saxon Copyright system the producer is sole author of the film (in Ireland and the UK). However since the entry into force of the EC Copyright Directives, especially the Rental and Term Directives, the director of a film is designated in all countries author or co-author of the audiovisual work. Ireland and the UK had to include the director as author of an audiovisual work in their legal provisions.

517 An exception to the rule being Germany, which has recently introduced a new rule in its copyright act (Article 32c *Urheberrechtsgesetz*) which allows rights holders to license for unknown forms of exploitation (see profile for Germany)

518 Stefan Ventroni, Copyright Clearance and the Role of Copyright Societies, in European Audiovisual Observatory, Legal aspects of video on demand, European Audiovisual Observatory, Strasbourg 2007 p. 48

519 ACE, Results of the Survey on Orphan Works 2009/10, Frankfurt/Brussels 29 March 2010

works in 24 archives in Europe amounts to around 225,000 (21% of the total number of films in archives). The European Federation of Audiovisual Directors (FERA) mentions, however, that “there are very few audiovisual works that are truly orphaned⁵²⁰”. This issue requires further investigation.

Nevertheless, the ACE survey reveals that approximately 100,000 of the presumed orphan works could be made available via Europeana or the European Film Gateway if “a pragmatic or legal solution for rights clearing would exist⁵²¹”. They ask for legislative reform (a mandatory exception to the 2001 Copyright Directive or a legally binding stand-alone-instrument)⁵²².

At the moment, there are different solutions to address this issue in the different Member States:

- The Scandinavian countries (Denmark, Sweden and Finland)⁵²³ have set up a system of “extended collective licensing” to encourage agreements between users and collecting societies that represent a substantial number of rights holders in a defined category of works. It encompasses non-represented rights holders in that specific category, domestic or foreign. The collecting societies are able to collect royalties and monies on behalf of all rights holders. If these have not been claimed for five years, they are used for special public welfare programmes.
- In Hungary, after a due diligence search of the rights holder, users can obtain from the Hungarian Patent Office a non-exclusive, five-year (non-transactional, compulsory) licence to use orphan works (HPO)⁵²⁴.
- In Romania, a draft bill considers introducing mandatory collective management for orphan works⁵²⁵.
- The German Publishing Industry also intended to introduce a similar system on a voluntary basis⁵²⁶.
- Recently, the UK included provisions in the draft “Digital Economy Act” to introduce such a system, however it has been dropped by the Parliament, mainly due to resistance by photographers’ associations.

In its recent Reflection Document the European Commission is also considering the idea of promoting such a system across Europe⁵²⁷.

Do any of these approaches have the potential to be applied across EU Member States?

Looking at the specificities of the Scandinavian system it remains to be tested whether extended collective licensing would be adaptable to other countries. In Scandinavia, the system is based on collecting societies that represent all rights holders for all rights. The Scandinavian system enables thus a one-stop shop for all rights, which is not the case in other European countries where users would

520 see submission to the Reflection Document 2009 p. 9

521 Ibid p.1

522 ACE, Results of the Survey on Orphan Works 2009/10, March 2010

523 For details see country profiles.

524 See country profile Hungary for details

525 See country profile Romania for details.

526 See country profiles

527 Reflection Document p. 14 f.

have to first conclude agreements with different collecting societies for the same rights, and then acquire the different licences from different societies.

Furthermore, the system applies only to some fields of use, such as the reproduction for educational use, the online transfer of texts via libraries, public service broadcasting and retransmission of broadcasts⁵²⁸. Only in Denmark recent changes in the law have made it possible to apply the system in an unspecified manner to all rights. The extended licensing systems in Sweden and Finland do not apply for the moment for any kind of online exploitation of audiovisual works. In Denmark an extended collective licensing agreement was reached only for the use of interactive services with the Danish public broadcasters⁵²⁹.

Therefore the question arises whether the system would also be as successful for rights to digital retransmission of audiovisual works. Developments in Scandinavia indicate that agreements are difficult to reach and that there is not much demand for such licences.

In general, the application of such a system in Europe looks more feasible on a country-by-country basis, as it requires the establishment of inter-professional agreements between users, rights holders and collecting societies at national level. Even on such a basis it requires a complete reform of existing systems and supposes a strong commitment of all participants.

Besides the idea of extended collective licensing, there have already been other efforts by the European Commission to address this issue in the context of the i2010: Digital Libraries Initiative. As part of the initiative an expert group drafted a report on “Digital Preservation, Orphan Works, and Out-of-print works”⁵³⁰. The main problem identified is the lack of common search criteria for rights holders to facilitate a cross-border usage of these rights. Furthermore, different stakeholders involved in digital content dissemination (libraries, film institutes, archives, artists, film associations etc.) signed a memorandum of understanding⁵³¹ to establish due diligence guidelines that help deal with orphan works and to encourage the development of identification tools. However, the results remain to be seen, given the legally non-binding character of the memorandum on orphan works⁵³². In response to these claims the European Commission recently published a communication on “Copyright in the Knowledge Economy”⁵³³ in which the issue of orphan works is addressed.

In its Digital Agenda for Europe the European Commission announced that it will “propose a Directive on orphan works by 2010”⁵³⁴. It is not clear yet whether the scope of this legislative proposal will extend to orphan works in audiovisual.

4.3.2.5 Transparency and governance rules for rights management societies

528 See country profiles Sweden, Finland and Denmark

529 See country profile for details

530 i2010: Digital Libraries High Level Expert Group – Copyright Subgroup, “Report on Digital Preservation, Orphan Works, and Out-of-Print Works., Selected Implementation Issues”, adopted at the third meeting on 18.4.2007

531 Memorandum of Understanding on orphan works, signed on 4 June 2008

532 Ibid

533 Communication from the Commission, Copyright in the Knowledge Economy, COM(2009) 532 final, 19.10.2009

534 European Commission, A Digital Agenda for Europe, p. 9

The major characteristic of the audiovisual licensing process is that rights are managed on an individual basis. This is not the case in the music sector, where licensing occurs more often with the help of collective management societies. However, in the audiovisual sector collective management takes place in relation to the cable retransmission right, the licensing of musical works or private copying. In the intangible economy, rights management is an increasingly important feature of many value-generating activities. In this context, collective management structures might play an important role in the future digital distribution of orphan works, older works, and works from producers and distributors that individually do not have the resources to license multiple digital platform operators across the world. The myriad of SMEs producing the majority of European works will have little choice but to organise themselves on a collective basis in order to access digital distribution platforms. Such collective organisations can have different structures (informal, business structures, collecting society) and objectives (to negotiate and/or identify rights holders, to collect remuneration and/or to administrate rights), their essential role is however always the same: they create a point of access to establish licensing terms with potential users.

Indeed, users (whether broadcasters, cable operators or digital media providers⁵³⁵) highlight the importance of rights bodies to ease licensing processes, and call for a legal framework at European level that would enhance governance and transparency of such organisations when they operate as collective licensing bodies (as regards music licensing in particular).

Collective rights management enables rights holders and users to jointly decrease transaction costs. It is a way to administer certain rights, as it proposes convenience to users that do not have to track down individual rights holders for licensing purposes⁵³⁶. In a digital market rights management societies can play a crucial role in remedying territorial fragmentation and enabling access to a wide range of copyright-protected works by establishing international one-stop shop systems (for instance through reciprocal representation agreements).

The question of enhancing the governance and transparency of collective rights management is quoted as a key action of the Commission's Digital agenda for Europe. The EC indeed will propose a framework Directive on collective rights management in the course of 2010⁵³⁷.

In this context a public hearing was organised by DG Internal Market in April 2010 on collective rights management. Collecting societies and stakeholders in general agreed that harmonising transparency rules at European level would benefit rights clearance and reinforce trust in collective management. However some collecting societies felt that national specificities would need to be taken into account, in particular those related to cultural and social obligations of some collecting societies in their Member State⁵³⁸. The question of an eventual harmonisation of the conditions on acquiring licences and the tariffs to be applied has also been raised during the hearing. It remains to be seen how the proposed Directive would integrate those issues.

535 See contributions to the public hearing on collective rights management, organised in Brussels on 23 April 2010 by DG Internal Market and Services.

536 KEA, *The collective management of rights in Europe – The Quest for Efficiency*, study for the European Parliament, July 2006

537 European Commission, *Digital Agenda for Europe*, op.cit p. 9

538 For details on the different obligations of collecting societies see EAO, *Iris special, Creativity comes at price The role of collecting societies*, Strasbourg 2009

In relation to how rights management organisations are governed, a strong disclosure requirement would promote real transparency. It is central to the members' ability to exercise control as well as to maintain the confidence of users. Disclosure improves the public understanding of the structure and the activities of societies. A disclosure requirement should not, however, place unreasonable burdens on societies. This would be in line with the Resolution from the European Parliament adopted by unanimity on 15 January 2004⁵³⁹ calling on the European Commission "to examine, three years following the adoption of this resolution, whether the desired harmonisation, democratisation and transparency in relation to the management of copyright and neighbouring rights by collective management societies has been achieved and, if not, to take additional measures" (indent N° 61).

Financial information should be prepared and disclosed in accordance with high-quality standards of accounting. The financial information should distinguish the different rights subject to management and the related management costs. Annual external audits should be conducted to objectively assure members, as well as users, that the financial statement fairly represents the financial position and performance of the society. The external auditor should be accountable to the members. Channels for disseminating information should provide for equal, timely and cost efficient access to relevant information by users.

Accountability and supervision standards are set out in national legislation. The level of requirements imposed on collecting societies for their operations varies across Member States. However, most societies are subject to basic transparency rules and required to make public their annual report and accounts.

- In general collecting societies are subject to less stringent legislative rules in Northern Europe (Scandinavian countries, Finland, Ireland, the UK) both in respect to transparency requirements and to supervision by external authorities. In these countries, accountability of collecting societies is usually a matter for the society's own statutes, control exercised by members and users as well as common practice.
- Central European countries and Southern European countries are characterised by more detailed legislative provisions covering many aspects of the functioning of collecting societies. In these countries, supervision and monitoring are usually entrusted to public authorities.
- Collecting societies are subject in all EU countries to the jurisdiction of the competent competition authorities as regards the possible infringement of competition rules⁵⁴⁰.

The question of enhancing the governance and transparency of collective rights management is also quoted as a key action of the Commission's Digital agenda for Europe. The EC will propose a framework Directive on collective rights management in the course of 2010⁵⁴¹. The content of this directive remains to be clarified.

4.3.3 The complex and discriminatory VAT regime

539 European Parliament resolution on a Community framework for collective management societies in the field of copyright and neighbouring rights (2002/2274(INI))

540 For a detailed overview of national provisions see KEA study, The collective management of rights in Europe, page 87.

541 European Commission, Digital Agenda for Europe, op.cit p. 9

VAT rates for VOD vary across Europe depending on the different transmission methods for VOD, and are sometimes different to those applied to other content versions. This can slow down the development of VOD in Europe and distort the single market, as for the moment (according to EU rules) the place of taxation for electronically-supplied services is the place where the supplier is established.

In general, the standard VAT rate applies for VOD services, ranging from 15% to 25% in the EU. As a consequence, taxation rates differ across the EU (see table below).

However, even within one Member State VAT rates can differ between VOD services transmitting over the internet and VOD services transmitting over IPTV: The “e-commerce VAT” Directive⁵⁴² provides that “electronically supplied services”, which include the accessing and downloading of music, films and online video games, can only be taxed on a standard rate. Radio and broadcasting services, on the other hand, are not considered electronically-supplied services even when related content is transmitted over the internet. They therefore can be subject to reduced VAT rates. This can lead to a situation where VOD services over IPTV are subject to reduced rates, while VOD services over the internet are subject to standard rates (see table below). Moreover, in many countries cinema admissions and television broadcasting are also subject to reduced rates (see table below). The same audiovisual product can therefore be subject to different levels of taxation depending on the transmission method, often penalising new exploitation windows⁵⁴³.

*Overview on Taxes on VOD services in Europe*⁵⁴⁴

	VAT rates applicable to VOD services (over the internet)	VAT rates applicable to pay-TV/cable TV services	VAT rates applicable to cinema entrance
Austria	20%	10%	10%
Belgium	21%	12% ⁵⁴⁵ or 21%	6%
Bulgaria	20%	20%	20%
Czech Republic	20%	Exemption ⁵⁴⁶ or 20%	10%
Denmark	25%	25%	25%
Germany	19%	19%	7%
Estonia	20%	20%	20%
Greece	21%	10% ⁵⁴⁷	10%
Spain	16%	16%	7%
France	19,6%	5,5%	5,5%
Ireland	21,5%	21 %	13,5%
Italy	20%	20%	10%
Cyprus	15%	15%	15%
Latvia	21%	21%	21%
Lithuania	21%	21%	21%
Luxembourg	15%	3% and 15%	3%
Hungary	25%	Exemption ⁵⁴⁸ or 25%	25%

542 Directive 2000/31/EC of the European Parliament and of the Council on certain legal aspects of information society services, in particular electronic commerce, in the Internal market, O.J.178, 17.7. 2000 (E-commerce VAT Directive)

543 Hasan Bermek, The Impact of EC Law on the Taxation of the European Audiovisual Industry IRIS Plus, European Audiovisual Observatory, 2007 p. 7

544 Source: Commission Document, DOC/2137/2007, “VAT Rates Applied in the Member States of the European Community”, Situation at 1st May 2010

545 Only for pay or digital radio and television broadcasting

546 Public radio and television broadcasting, excluding those of commercial nature, are exempt

547 Services provided by public radio and television are exempt

548 Services provided by public radio and television are exempt

Malta	18%	18%	5%
Netherlands	19%	19%	6%
Poland	22%	7% and 22%	7%
Portugal	20%	20%	5%
Romania	19%	19%	9%
Slovenia	20%	20%	8,5%
Slovakia	19%	Exemption or 19% ⁵⁴⁹	19%
Finland	22%	22%	8%
Sweden	25%	25%	6%
United Kingdom	17,5%	17,5%	17,5%

During interviews some commentators raised the point that there may be VAT issues in relation to different levels of taxation as regards business-to-consumer transactions of VOD platforms across Member States. Stakeholders feared possible market distortions due to the fact that electronically-supplied services are taxed on the basis of the supplier's country of establishment⁵⁵⁰. This might have an impact on the distribution of VOD platforms across Europe (both Amazon and EBay are based in Luxembourg due to a low VAT rate of 15% for instance). However, as of 1st January 2015, new rules will apply to B2C services under which the place of supply of electronically-supplied services will be the place where the customer resides⁵⁵¹.

As regards service providers established in a non-EU country, but providing electronic services to the EU, these rules have already been applied since 1 January 2010⁵⁵². This potential distortion therefore seems to be solved for the future.

4.3.4 National audiovisual content regulations, support policies and the digital shift

Audiovisual works reflect and transmit different national cultures. "Europe's true "cultural identity" is made of its different heritages, of its multiplicity of histories and of languages, of its diverse literary, artistic and popular traditions"⁵⁵³. EU policy encourages co-operation between Member States, and if necessary supplements or supports endeavours to promote cultural diversity. However, Member States and regions remain the driving force behind policies that support film, the cultural sector and the creative industries.

They have established a variety of mechanisms (both financial and regulatory) to support production and distribution of audiovisual content, to enable the expression of local stories and to promote the development of a sustainable audiovisual sector. Such mechanisms address market deficiencies linked to language segmentation in a global entertainment market which is mostly dominated by Hollywood productions⁵⁵⁴.

549 Public radio and TV broadcasting, excluding those of commercial nature, are exempt

550 Article 45 VAT Directive

551 Change to Article 58 of the VAT Directive by Directive 2008/8/EC of 12 February 2008 amending Directive 2006/112/EC as regards the place of supply of services Article 5(1)

552 Change to Article 58 by Directive 2008/8/ EC Article 2(1)

553 Speech by José Manuel Barroso, President of the European Commission, on "Europe and Culture" at the Berliner Konferenz für europäische Kulturpolitik, Berlin on 26 November 2004

554 The WTO Uruguay trade negotiations illustrated the great importance that many countries put on cultural diversity in the audiovisual sector and highlighted the tensions this can cause in relation to the promotion of trade liberalisation.

The following Section considers the impact of such national interventions on the establishment of a single market for European digital content and the development of digital distribution. The objectives of such interventions range from protecting children from harmful content (e.g. through ratings and evening watersheds) to supporting cultural diversity by promoting local content production.

4.3.4.1 Film rating systems in the EU and VOD

Diverse rating and classification systems across Europe could potentially be an obstacle to the development of a single market for VOD.

Rating diversity⁵⁵⁵ reflects different underlying moral considerations regarding issues such as violence or sexual exposure across Europe. In film and television, ratings not only vary between countries, they also often vary between different forms of distribution (theatre, television, video, etc.) in one country. While France, for example, has the lowest average rating – allowing most of the films to be viewed by a very broad audience – the UK and Ireland have a comparably high average rating – allowing many films for an adult audience only. While most countries rate films separately for each distribution type the Netherlands maintain a system (the NICAM System)⁵⁵⁶ in which a uniform rating of content across all distribution platforms takes place. The introduction of a similar system is currently under consideration in the Czech Republic⁵⁵⁷.

Apart from Romania, Bulgaria, Slovakia and the UK, most of the Member States do not rate films separately for VOD distribution. However, given that VOD is growing in importance, ratings might also become more prevalent for VOD services in other countries.

In practice, rating systems for VOD do not pose a great obstacle to the internal market as different national requirements can be dealt with by technological solutions. Nevertheless they constitute obstacles for VOD service providers that wish to exploit content internationally, as they incur additional transaction and legal costs due to the need to integrate territory-specific age-control and geo-blocking technologies. Furthermore, the rating processes are associated with administrative costs in each Member State⁵⁵⁸. Moreover, if a film was to be cleared for different age groups in different countries this could have an effect on potential cross-border marketing synergies, as the film would have to be marketed to different target groups.

While the remit to establish ratings remains at national level for important cultural and moral reasons, there may be some room for harmonisation in order to decrease transaction costs of pan-European VOD services: As illustrated in KEA's study on rating practices for the European Commission, developing common descriptive criteria for national ratings, the use of similar age categories, standardisation of ratings through different media, as well as promoting standards that apply to several version markets (cinema, broadcasting, DVD, VOD, etc. – such as NICAM in the Netherlands) and territories (such as PEGI in the games sector) can be solutions in this context⁵⁵⁹.

555 KEA, Empirical Study on the Practice of the Rating of Films Distributed in Cinemas Television DVD and Videocassettes in the EU and EEA Member States, European Commission, May 2003

556 The NICAM system is further explained at <http://www.kijkwijzer.nl>

557 See Czech Ministry of Culture website <http://tinyurl.com/ybfgdgc>

558 KEA, Empirical Study on the Practice of the Rating of Films op.cit. p. 13

559 Ibid. page 116

4.3.4.2 Different release windows

An audiovisual work's exploitation often follows different release patterns in different territories. In relation to the digital single market, diverging release patterns across Member States, which may be influenced by national regulations and support policies, can impact on the ability of VOD platforms to efficiently release a film in multiple territories at a time by increasing transaction costs. Moreover, in relation to VOD in general, the position and duration of a VOD window in relation to other exploitation windows will influence a VOD operator's ability to create revenues, as well as potential investments into VOD. Additionally release patterns also have an impact on the total turnover of all audiovisual version markets.

The duration of each of the exploitation windows is, in most countries, regulated through inter-industry agreements between different stakeholders. However, in some Member States (France, Germany, Austria, Spain, Bulgaria) media release windows are regulated by law or by inter-industry agreements. In addition other countries sometimes only grant film production support to recipients if they follow certain exploitation patterns (Slovakia, Spain, Germany, France, Austria). Film support is linked to the need to release a film in a theatre first, for example. Specific details for each country can be found in the appendices.

Such legislations and support can make experimentation with new distribution strategies difficult. Arguably, every adaptation of a release strategy for an individual film would require a legislative change. On the other hand, legislation and film funding can also promote the take up of new release windows (as has recently been illustrated by moving the French VOD window up), which might benefit independent releases that did not succeed in theatrical exhibition.

In practice, different release obligations across the EU can be adhered to by VOD platforms that wish to make available a film internationally, by using geo-blocking techniques. However, such provisions can still render management of VOD platforms more complicated by increasing transaction costs and limiting cross-border marketing efficiencies. Moreover geo-blocking essentially maintains territorial exploitation and versioning, which ultimately challenges the rationale behind international exploitation.

However the survey and our interviews suggest that in many EU Member States VOD distribution windows are gradually shifting to approximately four months after theatrical release, day-and-date with DVD releases. A more homogenous environment emerges. As distribution strategies of works are increasingly adapted to the needs of individual films (an example is the previously-mentioned *Alice in Wonderland*) it is questionable whether legislators should mandate strict rules regarding the duration and chronology of exploitation windows, rather than giving individual rights holders the freedom to adapt their strategies to their needs. With time, and if sufficient cross-border demand for VOD really exists, a more homogenous exploitation chronology would most likely develop due to increased international ambitions of rights holders.

The availability of new releases on VOD platforms will, to a large extent, determine the ability of legal VOD offers to compete with illegal offers. It seems likely that rights holders will continue to push for limiting the time span between theatrical and VOD releases. Films that have limited theatrical releases due to market access problems (lack of available screens), insufficient marketing spend or poor box office results should be allowed to hit VOD exploitation sooner. It is recommended to introduce more

flexibility in the implementation of windows in order to take into consideration different scenarios and interests at stake.

4.3.4.3 Contributions to audiovisual production finance and market access across the EU

Public support for the audiovisual sector in Europe usually takes two forms: on the one hand there are several financial and fiscal measures to support content creation and distribution, and on the other hand there are content quotas and other obligations to promote or monitor the share of European content across different distribution channels (in particular on television and to a certain extent also on VOD).

Contributions to audiovisual production finance

Funding audiovisual production is very capital-intensive. Member States spend significant public resources on funding audiovisual production for cultural, social and economic reasons and establish tax incentives to attract finance to the sector. There are also a number of Member States which oblige broadcasting organisations (often public service broadcasters) and (more rarely) telecommunications operators to contribute to the financing of audiovisual production. Such an obligation is validated by EU regulation since 1989 with the adoption of the Television Without Frontiers Directive⁵⁶⁰, which authorises Member States to provide such a system.⁵⁶¹

As VOD develops its market share governments may be inclined to involve providers of VOD services in the complex system of audiovisual production finance. For example, film-funding institutions – which already receive support through financing obligations of traditional audiovisual industry stakeholders in several countries⁵⁶² – may also receive support from VOD providers in the future.

Stakeholders' contributions to public film funds are in many countries in general either organised by law or by professional agreements and can be mandatory or voluntary⁵⁶³. Nevertheless different countries oblige different stakeholders to make a contribution. Regarding VOD services, contributions are mandatory in Poland⁵⁶⁴, Germany⁵⁶⁵, Slovakia⁵⁶⁶ and Romania⁵⁶⁷, and such obligations are planned

560 Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ 1989 L 298, p. 23), as amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997, Articles 3 and 12.

561 In this respect, the Spanish Supreme Court, asked in the context of an action brought by the Spanish Union of commercial Televisions (UTECA) for a preliminary ruling from the ECJ. The supreme court asked whether the Spanish implementation of the TWF Directive (which obliges television operators to earmark 5% of their operating revenue for the funding of European cinematographic films for television, with 60% of that funding reserved for the production of films of which the original language is one of the official languages of Spain) conformed to community rules. The ECJ in Case C-222/07 of March 2009 found that the Spanish rules did conform to Community law, the restrictions made on the economic freedom of television operators being justified by reasons of general interest.

562 Our survey showed that France, Czech Republic, French-speaking Belgium, Germany, the Netherlands, Poland, Portugal, Romania, Slovakia, Sweden have such obligations in place. They usually apply to exhibitors, distributors and broadcasters.

563 See table in appendices providing an overview of contribution obligations of the different participants in the film exploitation chain. It also shows countries where, through taxation systems, these players contribute to an audiovisual fund.

564 Operators of digital platforms have to make payments of 1.5% of the revenue earned on fees from access to TV programmes broadcast or re-transmitted on the digital platform to the Polish Film Institute, Cinematography Act of 30 June 2005, Article 19, see country profile Poland for details

in France and Czech Republic, but do not exist in other EU Member States. These disparities in treatment of VOD as regards their financing obligations could have an important effect on the roll out of VOD across Member States. Given the freedom to establish a VOD company in any EU Member State, and the potential development of international licensing, it might become more advantageous for VOD service providers to be established in countries with no contribution obligations.

The promotion of European works online

The Audiovisual Media Services Directive⁵⁶⁸ (AVMSD) extends the rules on the promotion of European works to digital distribution platforms (Article 3i) “where practicable and by appropriate means”⁵⁶⁹. These rules regarding the share of EU works on video on demand platforms are meant to promote a diverse offer across the EU and enhance cultural diversity.

Similarly to broadcasters’ obligations to promote European works on television, it is expected⁵⁷⁰ that the implementation of the Directive will be varied in this respect⁵⁷¹. Moreover, the Directive does not oblige Member States to extend the rules on promotion of European works to online delivery.

- Bulgaria, Portugal, Romania, Sweden, the UK, Italy, Finland, Belgium Flemish Community and the Netherlands have implemented “general” obligations to promote European works on non-linear services. General in this context means that the laws do not include specifications or quotas concerning how to promote EU works on non-linear services.
- Latvia intends to monitor the share of EU works on non-linear platforms.
- The UK, France, and Italy are at the moment establishing further provisions in relation to the promotion of European works on online platforms. However, precise details could not be obtained.
- Belgium (French Community) requires that non-linear services “attractively present” EU works on their Electronic Programme Guides, on the services’ website and in promotional magazines sent to subscribers, etc. (Article 46 of the SMA decree)
- The Czech Republic requires services to reserve at least 10% of the total programme to European works, or to invest at least 1% of its programming budget to the production or purchase of European works (Article 7 of draft law)⁵⁷².

565 Film Funding Act (Filmförderungsgesetz), Article 66a, obliges all services offering film programmes to the consumer to pay the “film levy”, of 1.8% of their yearly net revenue, if their yearly net revenues exceed €50,000.

566 Article 28 of the Law on the Audiovisual Fond establishes that audiovisual distributors (including VOD providers) have to contribute 1% of their annual revenue to the fund. See country profile for details.

567 According to the Articles 13-17 of the Cinematographic Act, VOD providers have to contribute 3% of the price charged for downloaded films to the audiovisual film fund.

568 Directive 2007/65/EC op.cit.

569 “Member States shall ensure that on-demand audiovisual media services provided by media service providers under their jurisdiction promote, where practicable and by appropriate means, the production of and access to European works. Such promotion could relate, inter alia, to the financial contribution made by such services to the production and rights acquisition of European works or to the share and/or prominence of European works in the catalogue of programmes offered by the on-demand audiovisual media service.”

570 As transposition of the Directive is not complete in all Member States, the described circumstances should therefore only be considered as indicative. Member States that have transposed the Directive are Bulgaria, Belgium, Czech Republic, Latvia, the Netherlands, Romania, Slovakia, the UK, France (incomplete), Luxembourg (incomplete), Ireland (incomplete)

571 References can be found in the country profiles in the appendices

In the long term, a heterogeneous implementation of the AVMSD provisions across the EU could lead to a situation where international VOD service providers would be incentivised to relocate to countries with the least financial or promotional obligations. This could undermine national cultural policies aimed at supporting the local audiovisual industry, and encourage the establishment within the internal market of “audiovisual funding havens”.

4.3.4.4 Support initiatives for VOD at national level

The extent to which national audiovisual policies and support programmes engage with the newly-developing video-on-demand sector varies considerably. Whilst some focus on supporting traditional forms of distribution, others are more pro-active in adapting a support regime that fosters experimentation and risk taking with new business models or more innovative marketing and distribution strategies. In general, the provision of targeted support programmes across Europe can be evaluated as rather modest.

Innovative support schemes such as the UK Film Council’s and NESTA’s digital innovation support scheme⁵⁷³ or the CNC’s structured funding programme for VOD exploitation in France⁵⁷⁴ are exceptions. In addition, the Maltese film-funding system also supports new technologies to a certain extent and, in a less explicit way, the German film-funding law stipulates that the national film fund’s contributions to the sector may also be used for the exploitation of certain films on VOD⁵⁷⁵. Consultations showed that film-funding institutions in the Netherlands, Sweden and Germany intend to introduce new support schemes aimed specifically at encouraging the take up of VOD.

Considering the international dimension of digital distribution there is a real opportunity to coordinate such national policies to promote international promotion or distribution. The European national film institutes (EFADs) should be encouraged to work together with a view to exchange best practices and consider joint policy development with regard to better support to VOD. Digital distribution may provide the opportunity to leverage national support schemes for international gains. There is an opportunity for the MEDIA Programme of the European Commission to consider this coordination role.

4.4 Conclusion

Europe’s ambition to create a digital single market for creative content has been the underlying rationale for taking legislative action in the field of copyright⁵⁷⁶. As illustrated, important steps have been taken by EU institutions to mitigate the impact of copyright territoriality. Innovative legal principles and rules, such as the exhaustion rule, the country of origin principle or mandatory collective licensing – but also a vast

572 However, as has been shown in the EAO-study on VOD and catch-up TV (EAO, VOD and Catch-up TV In Europe, October 2009), it is today still difficult to understand whether such rules have a direct impact on consumption, as VOD service providers make available little information concerning this matter.

573 For details see NESTA website <http://tinyurl.com/ykjjvzog> and country profile for UK

574 For details see website of the CNC <http://tinyurl.com/yf8sz7k> and country profile for France

575 Filmförderungsgesetz Art. 53b para.2 see country profile Germany

576 The Green Paper on Copyright and the Challenge of Technology states “to end legal barriers in the form of disparate copyright rules that might lead to market fragmentation and distortion of competition, were to be removed and measures to defeat “audiovisual piracy” .Green Paper on Copyright and the Challenge of Technology, Brussels 7 June 1988 COM/88/172

programme of copyright harmonisation (with seven Directives) across the EU – have been implemented to create further integration of Europe’s audiovisual markets.

Despite these regulatory and judicial efforts the structure of the sector, which is essentially linked to audiovisual economics, to linguistic and cultural consumer preferences and to issues of rights management, remains significantly fragmented.

The past experiences from the sector’s development, namely in relation to satellite and cable markets, show that even if cross-border licensing of copyrighted content is facilitated through mechanisms such as the country of origin rule in satellite transmission or mandatory collective licensing, it does not automatically lead to an increase in pan-European licensing. Furthermore, present copyright mechanisms do not prevent users from obtaining international licences or rights holders from granting such a licence. Audiovisual licensing is actually more straightforward in audiovisual than in music, as the commercial exploitation is concentrated in the hands of the producer.

As a result, the practice of territorial licensing has a lot to do with commercial decisions based on the structure of a European market that is characterised by linguistic and cultural differences, as well as by high transaction costs in distributing local content across borders. These factors also explain the lack of international services and the comparably low demand for non national European audiovisual products. In short, licensing practices reflect a commercial and a structural reality.

However, some scholars⁵⁷⁷ take the view that the EU’s priority should be to investigate a “European copyright law”. This idea is also discussed in the recent Reflection Document. However even the proponents of this idea have to admit that it is for the moment rather far-fetched⁵⁷⁸: First, the attempt would require radical changes in all existing national and international copyright laws. Second, as illustrated in a previous Section, there are several other regulations and territory-specific commercial practices that would require harmonisation to make the exercise of an EU-wide copyright feasible. Finally, it is questionable whether the EU is in a position to embark on such a colossal and long-term task under current political circumstances. Would Member States hand over such important competences to the European Union, given that culture (on the premise that copyright is a key tool to achieve cultural policy objectives) remains a subsidiary competence of the EU⁵⁷⁹?

Would further regulatory intervention change this state of play and increase cross-border trade in audiovisual works? There are still many legal obstacles that are slowing down the emergence of a single audiovisual market. As has been illustrated, they relate to the insufficient harmonisation in copyright implementation in relation to:

- Copyright enforcement rules relating to liability of intermediaries or illegal file sharing
- Uncertainties regarding rights definition
- The licensing of older and orphan works
- The governance rules on rights management bodies

577 See in particular Hilty Reto M. Intellectual Property and the European Community’s Internal Market Legislation copyright in the internal market, IIC 2004, pp. 769-775, Peifer K-N. op.cit. pp 14-15, IVIR, Recasting Copyright, op.cit.page 29,

578 See in particular IVIR , Recasting Copyright, op.cit.page 29.

579 Ibid. p. 222

- The implementation of authors' rights in audiovisual works

Further obstacles to the development of a single market for "Creative Content Online" include:

- A discriminatory VAT treatment for digital distribution
- Insufficient coordination of national regulations in the field of release windows, ratings or support mechanisms.

Consumer reluctance to trade online because of security concerns and legal uncertainties constitute another major obstacle⁵⁸⁰.

Based on the results of the EC's public consultations on creative content online, and on the Reflection Document, there appears to be a consensus among stakeholders that the key issue is to enhance licensing efficiency through a more streamlined rights management process. This would involve as much as possible one-stop shop solutions (one place that can have different functions depending on mandates given by the individual rights holders; this function could be: the identification of rights holders, the negotiation of licensing terms, the administration and monitoring of usage, etc.) whilst respecting at the same time important pillars of the international copyright and neighbouring rights systems: contractual freedom, exclusivity and territoriality (the *acquis communautaire*).

This is also highlighted by the EC's Digital Agenda for Europe in which the simplification of copyright clearance, management and cross-border licensing are defined as priority areas to be acted upon⁵⁸¹. The Agenda states that "[e]asier, more uniform and technologically neutral solutions for cross-border and pan-European licensing in the audiovisual sector will stimulate creativity and help the content producers and broadcasters, to the benefit of European citizens. Rights holders would not be obliged to license for all European territories, but would remain free to restrict their licences to certain territories and to contractually set the level of licence fees"⁵⁸².

The following chapter will make concrete and practical recommendations to ease and streamline the licensing process in the interest of consumers, users and rights holders. The considerations will be driven by the ambition to help European creators and investors in creativity to make the most of a Single Market that expresses Europe's cultural diversity.

580 "There is a growing concern of citizens about the risks to their personal data and their privacy. Our surveys, studies and also the letters we receive from citizens show that many consumers feel uncomfortable in the online environment. A large number of disadvantaged users are excluded from the knowledge society or their rights are not protected." Speech by Commissioner Reding, at BEUC multi-stakeholder Forum on "Consumer Privacy and Online Marketing: Market Trends and Policy Perspectives" Brussels, 12 November 2009 SPEECH/09/524 and Eurobarometer survey 298 op.cit.

581 Digital Agenda for Europe, op.cit. p. 9

582 Ibid. p. 8

CHAPTER V

POLICY RECOMMENDATIONS AND CONCLUSIONS

Europe's audiovisual industry is valued at close to € 100 billion⁵⁸³ annually. It contributes to EU growth and employment and stimulates innovation in diverse neighbouring sectors. Audiovisual works – similar to other forms of cultural content – foster spending on digital infrastructure and consumer electronics. They are also a source of imagination, creativity and renewal for Europe's increasingly knowledge-based society. By sustaining cultural diversity and media pluralism the audiovisual sector promotes important democratic values that lie at the heart of the European project.

More than 1.7 billion people worldwide are now online⁵⁸⁴ and broadband connects 56% of European households⁵⁸⁵. Telecommunications and cable operators, internet service providers, broadcasters as well as newly-established VOD services rely on audiovisual content to attract consumers and to sell subscriptions for their services. These stakeholders manage the new gateway to knowledge, culture and entertainment.

Digital distribution provides new opportunities for European cultural and creative industries. It can enable artists and creative companies to engage with new audiences. The cultural and creative industries, and notably the audiovisual industry, are therefore important to the implementation of Europe's digital strategy, its innovation endeavours, its economic ambitions and its cultural and social objectives.

The EC wishes to help European audiovisual companies and talent to benefit from VOD and to create greater cross-border demand for their works. It perceives VOD and improved rights licensing as an opportunity to promote the establishment of a digital single market for audiovisual content, and has therefore commissioned the present study to understand how policymaking can best assist the sector in this context. Objectives of the assignment were:

- an analysis of the legal framework and prevailing licensing practices as regards digital audiovisual content distribution in the EU and Member States
- a description of the structure and the development of the EU audiovisual market and related content distribution
- an assessment of the feasibility of international licensing in the EU
- an analysis of related economic and cultural consequences

The following conclusions and policy recommendations summarise the key findings of this assignment, and subsequently suggest a range of recommendations for the European Commission to achieve the identified policy objectives.

5.1 Key findings

583 PWC Global Entertainment and Media Outlook 2009-2013, p. 193, 255 and 318

584 See Internet World Stats (2009)

585 EUROSTATS. Ibid.

There are a number of key concepts that underpin the analysis in the present report, as well as a range of findings that emerged as a result of the research conducted. These are related to the state of the audiovisual industry, its economic processes, structure and potential future development as well as to the legal context in which cross-border trade of digital audiovisual works develops.

Recognise the specificity of the European audiovisual industry

The European audiovisual industry is different from other industries, displaying a number of specific characteristics. This specificity needs to be taken into account by policymakers whose objective is to promote the internal market for audiovisual works.

Audiovisual rights holders create and trade semantic goods and services whose value depends on the willingness of consumers to pay for a meaningful experience. This experience often changes if one crosses cultural or linguistic borders. Audiovisual works also have to be intensely promoted, as a consumer often does not know the content of a film or a television programme⁵⁸⁶. Consequently, marketing efforts undertaken to attract consumers are often specific to different linguistic and cultural markets in Europe. This has to be acknowledged.

Furthermore, audiovisual rights holders maximise their revenues through content versioning, bundling and price discrimination. Versioning allows them to exploit works across a range of distribution systems (theatres, television, DVD, VOD, etc.) and linguistic/cultural markets. Bundling and price discrimination helps them to extract the greatest value from each market. These practices are essential as the audiovisual sector is characterised by high investments and considerable sunk costs. Any attempt to support the audiovisual sector needs to take into account that its rights holders crucially depend on the ability to decide where and when to license the exploitation of their works.

Because of the linguistic fragmentation of the audiovisual market there are economies of scope and economies of scale in selling audiovisual rights, corresponding to several content versions being created by the same distributor that can handle the discrimination between different market segments of the work in a given cultural/linguistic market. Marketing efforts made in this market may then benefit exploitation in all release windows. It would be unwise if European intervention prevented rights holders from maximising their returns on investment through market segmentation.

Given these special circumstances it is more difficult to distribute and exploit audiovisual content across borders in Europe than in regions of the world where cultural and linguistic markets are less heterogeneous (e.g. the US). How to enable the European audiovisual industry to overcome these obstacles, how to create more consumer demand for local language films (or film d'auteurs) and how to facilitate easier cross-border distribution and reduce related transaction costs⁵⁸⁷ linked to rights management are therefore major challenges for the European Union.

586 From an economic viewpoint, experience goods are goods that need to be tested before knowing their utility. This category is opposed to "search goods" whose utility can be known in advance and for which competition mainly relies on prices. See Phillip Nelson, « Information and Consumer Behavior », *The Journal of Political Economy*, Vol 78. N°2 Mars-Avril 1970.

587 Transaction costs are costs related to establishing market conditions. In the audiovisual sector, contractual costs related to licensing would – for example – constitute a transaction cost (see also Section 2.1). Importantly, discrimination costs (such as costs related to marketing a film in a specific market) should be distinguished from transaction costs.

The European audiovisual industry requires support to embrace the digital shift

Europe's audiovisual industry is highly fragmented and consists primarily of micro businesses and SMEs that produce on average two to three films a year. Some large European players exist in the film sector such as Pathé, Wild Bunch, Nordisk, or Svenskfilm, but vertical integration is limited to linguistic markets. Hollywood majors face little competition from individual European film companies as they cannot benefit to the same extent from the single market⁵⁸⁸. Next to a lack of market demand it is because of this structural weakness and the strength of Hollywood majors that European rights holders have difficulties accessing markets beyond the country of production and co-production. Cross-border circulation of audiovisual works in Europe remains weak⁵⁸⁹.

Because of the public interest in maintaining a healthy and culturally-diverse audiovisual sector the public sector contributes directly more than € 1.2 billion annually to audiovisual creation and distribution⁵⁹⁰. Significant EU funding through the MEDIA Programme also aims to promote cross-border distribution of European films (€ 755 million from 2007-2013). However this support policy – whether at European or national/regional level – remains essentially geared towards traditional forms of distribution⁵⁹¹.

This focus is the result of the comparably modest value of VOD markets in Europe. Despite experiencing significant growth in the past years⁵⁹² the value of the European video-on-demand market remains small compared to other version markets. In Europe, VOD revenues today represent around 1–2% of total audiovisual industry revenues. Furthermore, the fact that original rights holders often sell distribution rights for multiple version markets in return for minimum guarantees from broadcasters and distributors makes it difficult for them to experiment with new forms of exploitation on VOD. Finance is an important bottleneck to the emergence of an attractive legal VOD offer. There are so far few economic incentives for film producers to retain and exploit their VOD rights compared to exploitation in other version markets. Traditional players in distribution have an interest in a slow development of VOD if it cannibalises existing revenue sources (e.g. DVD retail or pay-TV).

Nevertheless, there are strong signs that VOD will become a more relevant market in the future. Important players in the value chain – Hollywood majors, broadcasters, ISPs and cable operators – position themselves to benefit from digital distribution. They have confidence in continued consumer interest in digital audiovisual works which, together with sports content, constitute a premium entertainment product. The fact that there are two billion videos watched on YouTube each day illustrates that there is an appetite for creative content online. The emergence of close to 700 on-demand and catch-up services throughout the European Union shows that the industry sees a real

588 US films' theatrical market share in Europe was estimated to be 67.1% in 2008. EAO Focus 2010. p.14

589 European films achieved an estimated theatrical market share of 26.7% in 2008 in Europe. See: EAO Focus 2010. p.14. As indicated before, theatrical admissions in Europe illustrate the continuing weakness of the internal market for European audiovisual content: the share of admissions regarding non-national European films in EU theatres has remained at around 8% for the past decade. See: EAO press release (2004).

590 European Audiovisual Observatory (2002). Public Funding for the European Film Industry Grows as Companies' Financial Situations Weaken. Figures excluding support for public service broadcasting and tax incentives.

591 see box on MEDIA recommendations below

592 PricewaterhouseCoopers illustrates that the digital download market for VOD has doubled last year (page 328) and that total IPTV VOD revenues for Western Europe reached US1.2 billion in 2008 (page 2009). See PWC Global Entertainment and Media Outlook 2009-2013. Telenet saw VOD demand rise by 50% in 2008 and registered 14 million visits in the first semester of 2009 (Press article on 2009 VOD Study from the EAO, 20 October 2009)

potential in digital distribution. The film industry is also aware that it needs to compensate for the decline of DVD revenues by entering VOD (Hollywood DVD revenues declined again by 13% during 2009⁵⁹³).

Despite the current economic crisis production levels for films worldwide continue to grow, and audiovisual revenues remain relatively stable⁵⁹⁴. However, an important shift of revenues occurs between different audiovisual markets. Contrary to the above-reported decline in DVD sales, Screen Digest reports (for example) that the EU VOD market represented a total turnover of € 644 million in 2008 and forecasts that revenues will grow to close to € 2.2 billion in 2013.

Based on this data, the present report projects that VOD turnover, the number of VOD services, as well as circulation of EU works will increase in the next five to ten years. A rapid deployment of digital technology across the EU can further increase this turnover. However the fact that EU VOD markets are in their infancy must be taken into account. A key uncertainty of the assignment relies on the fact that in the roll-out stage of broadband infrastructure, the bundling of content and access can be used to speed up the roll-out of broadband services. However in a stabilised and connected environment, the competitive advantage goes to the distributor that is best able to discriminate between consumers to maximize the revenue from all audiovisual versions.

Digital technology reduces delivery and storage costs, enables users to search, access and experience content in novel ways and should therefore enable audiovisual rights holders to access new markets. The sector can also use innovative tools to overcome obstacles which have previously further partitioned the European audiovisual sphere. Several of the case studies and emerging market-driven initiatives highlighted in the report illustrate that the sector can promote specialised content to specific target markets across borders, pool information about titles and rights holders and provide one-stop shops to commercial users that might want to acquire VOD licences for multiple territories in the future. More importantly digital technology enables media service providers to understand and track consumer preferences, and therefore tailor a service to people who cannot access specialised film in today's established distribution system.

In relation to international licensing, EU rights holders would benefit from the emergence of an ICT-enabled international rights licensing infrastructure that makes use of common metadata standards, promotes digitisation and subtitling of old as well as new local language works and makes information about the availability and costs of content more transparent. Such an infrastructure should resemble a network of stakeholder-driven solutions rather than one ambitious top-down EU initiative, and should provide one-stop shopping solutions where possible (see next Section). In this context, more synergies between existing EU programmes and initiatives that could be to the benefit of VOD and pan-European licensing such as MEDIA, CIP ICT PSP (Digital Libraries), FP7/8 and Europeana need to be created to bring such an environment about. Results of technology solutions that support rights clearance and management need to be widely disseminated.

593 Tom Adams, Adams Media Research, as quoted by Ayuso, Rocio, Pelicula de terror en Hollywood, El Pais, 18 Oct 2009 and Sandoval Greg, Time for Apple to get serious about video, CNet, 25 Feb 2010, http://news.cnet.com/8301-31001_3-10459494-261.html

594 Gross box office in the EU is expected to grow in 2009 (hard data is not yet available) to \$ 8720 million. EAO Focus 2010. p. 11. In Europe the level of production increased from 870 in 2004 to 1145 in 2008 (EAO World Film Market Trends 2009, p. 13). PWC recorded a slump in global entertainment and media markets in 2009 and 2010 but predicts a recovery of those markets in 2011. PWC Global Entertainment and Media Outlook 2009-2013, p. 10.

However, digital technology or a mere change in licensing practices will themselves not by default create more cross-border demand for EU works. The economic analysis projects that increased international licensing would increase the circulation of EU works. However demand in non-national European works would have to be further stimulated by implementing innovative marketing strategies. The economic analysis shows that marketing costs make up an important bulk of any costs related to a film's release, and that they are linked to a title's success in theatres as well as on VOD⁵⁹⁵. As illustrated in Section 2.2 the sector can reach out to new communities of interest by utilising social networking and the collaborative power of digital communications.

In the long term, video on demand can offer the sector the opportunity to overcome the marginalisation that EU rights holders experience in physical distribution. To achieve this, the multitude of small and medium-sized European audiovisual companies should be encouraged to collaborate and jointly formulate strategies that enable them to exploit their rights on future international VOD platforms. Europe's audiovisual industry may be fragmented but this does not prevent it from cooperating. Together, European films achieved an estimated theatrical market share of 27% in 2008, whereas US films have a market share of 67%⁵⁹⁶. At individual level European film companies are dwarfed by the market power of Hollywood majors. The market share of the largest European players is less than 1% of international distribution, compared to the average 10% to 18% for Universal, Sony, Disney, Viacom (Paramount) or News Corp (Fox). Nevertheless, collaboration among European rights holders can be used to better promote their interests in order to offer more diverse content to consumers and citizens. By acting collectively on a voluntary basis rights holders can offer VOD operators more attractive rights bundles and decrease negotiation and transaction costs on both sides (see next Section).

There is therefore a credible rationale for public policy to help the sector adapt to the challenges of the digital shift and the potential of the single market. While specific comments in relation to MEDIA are provided below, detailed policy objectives and recommendations will be examined further below.

Focus on MEDIA 2007 and Digital Distribution (also see case study in Section 2.2)

Compared to many national and regional support programmes MEDIA has, in recent years, developed a deliberate support strategy in relation to digital distribution. However the total level of funding made available for VOD, DCD and Pilot Projects is small (approximately € 8 million annually) in relation to the challenges at stake. Given that MEDIA will have spent € 755 million between 2007 and 2013 on supporting the development of the single market for audiovisual works, a larger focus should rest on digital distribution. In this context MEDIA should:

- support film companies to develop and implement digital marketing strategies
- encourage the development of innovative social media tools to promote films
- commission research in relation to VOD consumer behaviour
- facilitate more collaboration and cooperation between somewhat disconnected VOD initiatives across Europe
- promote further technical international standards setting, rights databases and interoperability

595 The report also explains that while a reduction of transaction costs (e.g. the costs of the licensing process) is a credible policy aim this cannot include a reduction of discrimination costs (i.e. costs related to marketing a film to a specific target audience).

596 EAO Focus 2010. p. 14

- forge links with other EC funding schemes and aide MEDIA constituents to participate in EC ICT research and innovation programmes
- support training of EU audiovisual rights holders in relation to technology expertise and VOD strategy
- Actions lines of the 2010 call of MEDIA, as well as recently-supported initiatives such as the EuroVOD network, illustrate that MEDIA has already shifted some of its focus towards more cross-border collaboration and the innovative use of ICT.

Copyright standards are not a bottleneck to the emergence of a single market – the real issue is facilitating rights licensing

Copyright and related rights are essential tools that reward creativity and innovation and stimulate investments in audiovisual content production and distribution. EU legislation, decisions and regulatory initiatives by EU institutions recognise this. Due to important copyright principles, creators and rights holders are able to exploit and trade their rights independently and in accordance with their legitimate commercial and moral interests.

In the past European policymakers have made many attempts to enable EU content sectors to better benefit from the single market – most recently in relation to the music sector (where the rights clearance system is particularly complex), but also in audiovisual through the harmonisation of copyright legislation:

- by clarifying the law applicable to the act of broadcasting or satellite transmission (country of origin principle) and the fight against copyright infringing broadcast activities (i.e. Conditional Access Directive)
- by adopting rules regarding the exercise of copyright in order to mitigate the impact of territoriality: for example the exhaustion principle has been applied to encourage parallel imports of physical goods, and mandatory collective licensing was introduced in relation to the exercise of cable retransmission rights.

Regulatory intervention has not been sufficient to enable the development of cross-border services and operators at pan-European level. Whether for cable, broadcast, pay-TV, satellite or telecommunications services, providers remain primarily active within specific linguistic or cultural territories. Even large pan-European operators such as RTL/Bertelsmann or UPC/Liberty Media, which operate subsidiaries in several European countries, provide localised services to cater for the needs of local audiences.

Nevertheless, the recent EC Reflection Document states: “the traditional territoriality of copyright has come increasingly into conflict with the imperatives of a borderless single market [...]”⁵⁹⁷. However, territoriality and exclusivity do not per se prevent the licensing of audiovisual works on an international basis. There are no laws or regulations that prohibit an original rights holder from granting a licence for international exploitation.

597 Reflection Document, p. 10

Furthermore, the great majority of VOD service providers exploit content in individual linguistic markets, or do not have the resources to acquire international licences. This implies that territorial exploitation is a reflection of market demand. Indeed, international licensing already occurs today when the market asks for it⁵⁹⁸.

Those players that may want to offer content on an international basis in the future think that streamlining complex licensing processes to identify and acquire rights would be necessary to enable international exploitation. Stakeholders are not in favour of regulatory intervention to impose international licensing⁵⁹⁹, an exception being consumers' organisations⁶⁰⁰ without being specific on the type of actions they deem necessary.

The EC communication on a Digital Agenda for Europe confirms the importance of territoriality and exclusivity embedded in the contractual exercise of IP rights. It states that a cross-border and pan-European licensing solution "should preserve the contractual freedom of rights holders. Rights holders would not be obliged to license for all European territories, but would remain free to restrict their licences to certain territories and to contractually set the level of licence fees".

It is also evident that, to increase the market potential of Europe's audiovisual content, the streamlining of rights licensing is essential. Enhanced licensing efficiency fosters access and demand for audiovisual works, creates new market opportunities and thereby establishes a new source of revenues for the future. The ability to provide easy access to a licence will, to a large extent, determine the presence of European works on digital networks. Cumbersome and costly clearance processes act as a disincentive to trade IP rights.

Providers of VOD and audiovisual media services are right to stress the high costs they face in identifying and acquiring VOD rights from the multitude of rights holders in Europe. They often refer to their experience in the licensing of musical works in this respect. To counter inefficiencies they ask for greater transparency of rights catalogues, or for the establishment of centralised rights databases to ease the identification of rights holders and to streamline rights clearing and remuneration processes⁶⁰¹. Furthermore, as scale is important for digital platform operators who want to attract users with a sizable offer of titles, operators often prefer to buy rights catalogues rather than acquiring individual titles (save for hit titles). Similar to the situation in the music sector, service providers that want to make the most of the long tail would therefore benefit from the emergence of onestop shop licensing solutions.

Major owners of catalogue titles (essentially Hollywood and large European media players) will be in a position to manage the licensing without many problems, and offer one-stop shop solutions in relation to their respective catalogues independently of the multiplicity of users and/or territories. They have the human and financial resources and they will be keen to monetise their properties through new distribution channels that are largely dependent on attractive and premium content.

– 598 See ACT (Association for Commercial Television) submission on the Reflection Document p. 2: "Transfrontier distribution of content does take place – but only where there is a market for it".

599 Outcome of workshop on 2 June 2010 and notably EDIMA responses to Reflection Paper in 2010 as well as its response to the Round Table Discussions on eCommerce in 2009.

600 See BEUC statement to Reflection Document

601 Apple already called for "central repositories for data about who owns what" in its contribution to the Online Commerce Round Table; Ericsson/DIGITALEUROPE called for an "online database" in their contributions to the Public Consultation on Content Online.

The main challenge is to enable European SMEs (which form the bulk of Europe's audiovisual industry and which represent its most creative force) to benefit from new market opportunities. A situation whereby the costs of licensing (identification, negotiation, remuneration) lead to their exclusion from emerging digital markets has to be avoided. From an individual European rights holder's perspective, digital distribution of catalogue titles requires a rights management infrastructure that rights holders often cannot afford. The large majority of small to medium-sized European audiovisual companies will have to consider collective approaches, or innovative services that aggregate rights and thereby negotiation power, in order to gain access to future pan-European digital distribution platforms. This will be a key requirement to make their catalogue and individual films attractive for acquisition. Failure to ease the licensing process will mean further marginalisation of European content in the international market place. A number of innovative market-driven initiatives which seek to help European audiovisual rights holders as well as commercial users to ease cross-border licensing and acquisition have been identified in the report and seem to show the way⁶⁰². These initiatives remain rare because a collective approach to rights licensing remains largely unknown in the film sector (as opposed to the music sector for instance)⁶⁰³.

This will change as rights management will become an even more essential tool for monetising creativity as Europe's economy further transforms into an intangible economy. Because the digital shift is leading to a difficult transition, which can sometimes threaten the viability of existing business models (selling for ownership or rental) or the existence of intermediaries in the value chain (distributors, retailers, sales agents, etc.), such changes require that the audiovisual industry adapts its licensing processes to meet the demand of audiovisual media service providers, the new and powerful distributors.

In this respect it is useful to highlight the so-called Google book settlement with organisations representing publishers and authors in the USA. It provides for the establishment of a licensing infrastructure, largely financed by Google, whose role is to establish a one-stop shop managed by rights holders, in order to ease the licensing process with digital platforms that make available digitised works. Such an infrastructure can trigger the availability of more digital services and expand the book market.

In its detailed comments on the Reflection Document on "Creative Content in a European Digital Single Market", the EBU calls for legislative action on licensing with a view to easing the licensing process. The EBU stresses the importance of collective licensing to prevent the fragmentation of rights acquisition. Its proposal essentially relates to the extension of the SATCAB Directive. This implies applying a country of origin rule to all audiovisual media communication to the public (linear and non linear broadcast-like) and extending the mandatory collective licensing regime to any retransmission of broadcasts, irrespective of the delivery technology. At the Round Table on 2 June 2010 to discuss the draft report the representatives of film directors' collecting societies in Europe (SAA) indicated willingness to talk with the EBU on this proposal which caters essentially for retransmission of TV programmes on digital networks.

Under the EBU proposal rights holders remain free to grant such an international licence and to determine its geographical scope. It remains that rights holders or their representatives in the "country of

602 The discussions concerning the importance of Europeana, the European audiovisual initiatives of Universcience in France and EGEDA in Spain, but also the Google book settlement and the establishment of a book rights registry in the US illustrate that the potential of approaching rights and metadata management collectively is currently taken into account by rights holders in different content industries and across continents.

603 Contribution of the European Producers Club after the stakeholder workshop

origin” would have to be mandated to negotiate on behalf of foreign rights holders that have been assigned or licensed an exclusive exploitation right in the country subject to digital distribution. This requires the establishment of industry-wide reciprocal representation agreements (a system that has recently been dismantled in musical rights following intervention from the EC competition authorities) and infrastructure enabling such mandates. It might be because of the absence of such infrastructure in the audiovisual sector that the EBU limits the proposal to content originated by the broadcaster.

In light of these developments it is argued that the regulatory focus should shift from the ambition to review copyright standards (for example by contemplating a European Copyright Law) to facilitating the development of more efficient cross-border licensing practices. This would encompass rules or support in relation to:

- the setting up of one-stop shop practices to ease the licensing process for users (on a voluntary basis and in full compliance with the principle of contractual freedom in relation to, for instance, tariffs or geographical scope)
- the establishment of databases and rights registries to identify rights holders and provisions in contracts with talents
- to clarify the rights position in relation to orphan works or audiovisual works that are not subject to presumption of assignments to the producer
- to review and streamline the licensing of music publishing rights
- to establish trust in rights management bodies

Research and innovation programmes aimed at maximising the social and economic potential of ICT as part of the Digital Agenda, one of the seven flagship initiatives of Europe 2020, should be geared towards the establishment of such licensing infrastructure to overcome market fragmentation inherent to the cultural and social fabric of Europe.

There is considerable experience in Europe of licensing processes and numerous initiatives aimed at fulfilling much-needed and straightforward back office functions. It is time to carefully consider such development and assess their potential to achieve European policy objectives. This report therefore concurs with the conclusions reached in the Digital Agenda for Europe which states that legislation may not be necessary to enable the development of new innovative business models⁶⁰⁴.

Some level of European harmonisation and coordination is required

The legal analysis surfaced a range of legislative and policy-related issues that hamper the development of a single market for digitised audiovisual works. They relate to copyright enforcement, the governance and transparency of collective rights management, as well as the harmonisation of legislation on VAT, orphan works or authors’ rights.

The EU needs to lead on copyright enforcement

604 A Digital Agenda for Europe, p. 8

Digital distribution will not turn into a profitable market that can offset declining revenues in other version markets if copyright is not enforced, and if unauthorised downloading continues to limit rights holders' abilities to invest in the creation of audiovisual works. Only if Member States and the European Union agree on robust standards of enforcement can a single digital market for audiovisual content prosper.

It has to be acknowledged that digital technology has changed the scope of copyright infringement – especially at the level of end-users who continue to download and share vast amounts of copyright-protected works without authorisation. Disparities in copyright enforcement and uncertainties of how to address the numerous challenges (identified in Chapter IV) make copyright enforcement across Europe a difficult endeavour. For example, while France and the UK have adopted legislation in this respect, and Spain is considering a draft law, each of them is offering different solutions to the same problem. Other Member States do not deal with the issue at all. In the long run such disparities and uncertainties can discourage rights holders to license works for online distribution in multiple territories, as they cannot be assured of equal protection of their rights in other jurisdictions. They can also create legal uncertainties for service providers which are risking being held liable for some actions in certain territories whilst not in others, as the e-Commerce Directive is now given a different interpretation in different jurisdictions.

To really curb copyright infringements end-consumers need to experience the disutility of unauthorised downloading. This can best be achieved if the costs of enforcement are to some extent internalised by the distribution sector. In other words, VOD operators and digital infrastructure providers should cooperate more closely with the media sector and with copyright enforcement agencies. Only if this collaboration is established in the European Union can a dynamic, pluralistic and diverse audiovisual sphere be preserved, and only then can European audiovisual rights holders really benefit from a single market for audiovisual content.

To achieve this a more coordinated approach may be required across the EU and its Member States. Articulating this approach is far from easy, as several objectives and legal principles need to be weighed against each other as highlighted by the European Court of Justice in the *Promusicae* case⁶⁰⁵. European leadership is required in this process. How the EC could address the sector's requirements is further outlined below.

The governance and transparency of collective rights management bodies

The potential of voluntary collective rights management solutions to help European audiovisual rights holders to access future digital distribution platforms has been discussed throughout this report. Collective management can increase access to a wide range of audiovisual works, decrease transaction costs for both rights holders and commercial users and may to some extent be able to reduce territorial fragmentation if coupled with other forms of support for marketing and promotion.

Both commercial users and collective rights management bodies agree that, given their importance, the market would benefit from greater transparency of collective rights management bodies, and that such transparency can best be achieved through harmonisation at European level. The EC recently

605 ECJ case C-275/06 on 5 February 2008 *Productores de Musica de Espana vTelefonica de Espana SAU*

announced its intention to propose a framework directive on collective rights management in the course of 2010⁶⁰⁶.

With a view to collective licensing such intervention should aim to improve transparency of collective rights management bodies in relation to a range of topics and acknowledge the important cultural and social roles of different societies across EU Member States (see recommendations).

Requirements of harmonisation or coordination with Member States

Furthermore, some regulatory provisions may potentially either raise transaction costs in cross-border trade of digital audiovisual works or have the potential to unbalance a level playing field for pan-European VOD services:

- Varying VAT rates for different transmission standards and content versions is to the disadvantage of VOD. Online transactions related to cultural products and services should enjoy a lower VAT rate and VOD consumption should not be VAT discriminated.
- Legal uncertainties or laborious processes regarding the licensing of older works (not subject to presumption of assignment) and orphan works slow down the development of cross-border online services.
- Different rating practices for audiovisual content also contribute to disadvantaging VOD exploitation. The study does not advocate EU harmonisation as these practices reflect strong cultural and social tradition but promotes the exchange of good practice in this area.
- It is also important to intervene with a view to make the single market a reality for authors of audiovisual works by introducing a right to equitable remuneration for the digital distribution of their works.

In the context of their unfolding digital and cultural agendas European institutions should continue to coordinate with EU Member States and all stakeholders to resolve these issues.

5.2 Policy objectives

Based on these findings the overall vision of this report's recommendations is to stimulate and promote a dynamic and pro-active European audiovisual industry that embraces new market opportunities and the potential of a single market for digitised audiovisual works, while safeguarding cultural diversity.

This breaks down into the following policy objectives:

- Support the establishment of a single market for digitised European audiovisual works
- Promote cultural diversity and a competitive European creative sector as part of EU innovation and cultural agendas

606 European Commission, Digital Agenda for Europe, op.cit p. 9

These objectives can be broken down into practical recommendations that relate to EU legal harmonisation, a readjustment of EU support policies as well as to coordinating efforts with Member States, as further outlined below. As the sector primarily consists of audiovisual companies that produce two to three films per year (feature films, documentaries, animation) the following recommendations primarily address existing digital distribution opportunities of small to medium-sized enterprises.

5.3 Policy recommendations

The proposal distinguishes between two sets of recommendations that aim to implement the above policy objectives. One relates to efforts to achieve an internal market, and the other to measures that promote cultural and industrial policy objectives. It is acknowledged that both sets are not mutually exclusive. For example, policies that increase demand for European film can also help to develop the single market. However, the first set of measures is more structural and sometimes calls for regulatory interventions.

I. Recommendations to support the establishment of a single market for digitised European audiovisual works

Different measures would support this objective. They relate to:

- Decreasing transactions costs (essentially the cost of licence acquisition)
- Further legal harmonisation to contribute to more legal security and promote investments in creation
- Increased coordination with Member States

1. Decrease transaction costs

The report emphasises the importance of safeguarding contractual freedom, territoriality and exclusivity – the pillars of the copyright system. It also highlights the importance of easing the licensing process to foster the presence of European audiovisual works on VOD platforms, in particular in relation to those platforms established in foreign countries. Two sets of measures would contribute to the establishment of a licensing infrastructure in Europe conducive to more cross-border trading and better access of European audiovisual works to digital platforms:

> *Support voluntary collective licensing initiatives and mechanisms:*

Small and medium-sized rights holders should receive support through MEDIA and other EU programmes to establish collective initiatives which can help them access VOD platforms on fair terms in the future, and which offer operators easier licensing solutions.

> *Establish an ICT-enabled and internationally-connected licensing infrastructure:*

The EC should also support the emergence of an internationally-connected and ICT-enabled rights licensing infrastructure. This can be achieved by promoting one-stop shop solutions developed by the

market, interoperability between existing services and tools, as well as stronger cooperation of rights holders, users and technology stakeholders. The development of, and interoperability between, rights registries, more homogenous technical standards (in relation to encoding, delivery and metadata) across Europe, as well as better interplay and cooperation between numerous platforms should be supported.

2. Further legal harmonisation

Legal harmonisation – or examination of the potential impacts of such harmonisation – will be beneficial to promote the digital single market. It would create an environment that promotes investments into the creative sector and provides more legal security for rights holders and users.

- > *Take the lead in promoting more effective copyright enforcement across the European Union:*
 - The EC should propose legislation to harmonise criminal sanctions in relation to online copyright infringements
 - It should promote an informed EU-wide dialogue regarding the effectiveness of copyright enforcement mechanisms: first, by preparing a discussion document on finding an appropriate balance of fundamental rights in the digital age; second, by conducting an impact assessment on the appropriateness and effects of the graduated response mechanisms in Member States
 - The essential role of copyright and neighbouring rights to promote creativity and cultural diversity also needs to be better communicated. EU media literacy initiatives and further communication efforts should therefore promote IP rights literacy.

- > *Introduce a framework directive that promotes greater transparency and governance requirements for collective rights management bodies which relates to:*
 - the financial and operating results of societies
 - major share ownership and voting rights
 - company mandate and objectives
 - governance structure and policies
 - remuneration policy for members of the board and key executives as well as their professional qualifications
 - extent of activities in the social and cultural field
 - distribution policy to the rights holders in relation to the different rights (including management fees)
 - exact scope of repertoire and applicable terms and tariffs

- > *Enable authors' societies to collect remuneration on behalf of authors when their works are exploited abroad:*

An unwaivable equitable right to remuneration for the “making available right” should be introduced.

- > *Reduce VAT for VOD transactions*

A reduced VAT rate for VOD transactions, similar to those that apply to the sale of theatrical tickets, should be introduced.

- > *Impact assessment regarding the extension of the SATCAB Directive*

An impact assessment concerning the application of the country of origin principle for the distribution of audiovisual content on digital networks, coupled with a mandatory collective licensing regime in relation to the simultaneous and unabridged digital distribution of TV programmes, should be commissioned.

- > *Promote the licensing of orphan works:*

The European Commission should continue its efforts to help solving the issue of orphan works in relation to licensing for digital distribution. Film archives should be put in a position to serve the public interest and unleash the educational and cultural potential of Europe's strong film heritage. The current impact assessment by DG Internal Market in relation to orphan works, combined with the ambition of Europeana, should encourage the EC to include audiovisual in the scope of the future draft directive that is announced for the end of 2010.

3. Coordination with Member States

There are further circumstances related to how Member States regulate and support the audiovisual sector, as well as to the general fragmentation of Europe's audiovisual industry, which require increased European coordination efforts with governments and public sector agencies in Member States and regions to fully unleash the single market for digitised works:

- > *Facilitate more harmonious rating practices:*

EU Support should help coordinate national agencies in developing common descriptive criteria for national ratings. It should promote the use of signalling techniques and standardisation of ratings through different media (not necessarily across borders). The EC should also promote the use of standards that apply to several version markets. Sharing best practices and networking relevant actors in this regard would be to the benefit of the single market.

- > *Network public sector agencies and intermediaries to the benefit of European VOD:*

Efforts to encourage cooperation within the sector should be reflected by policymakers and public sector intermediaries. By networking and encouraging national and regional audiovisual policymakers, support funds, film archives and other players in the industry to collaborate across borders the EC should help to establish a range of projects that promote a European dimension in the currently emerging VOD market⁶⁰⁷. The EC, EFADS (European Film Agency Directors), Cine Regio and the different audiovisual trade bodies should develop a shared strategy to ensure that audiovisual policies across Europe are to the benefit of a pan-European market for European works. For example, public support for film could be

607 An example of such a pan-European VOD project has been developed in the EP's recent study on Cinema Online – Past and Present, prepared by KEA (2008)

linked to the requirement to make available information (e.g metadata and ownership of each work) in international databases to facilitate more efficient cross-border licensing in the long term. VOD platforms that primarily focus on a specific regional and national market should also be encouraged to enter into cooperation and exchange with platforms in other territories to facilitate a better flow of works, as well as to improve standards and expertise.

II. Recommendations to promote cultural diversity and a competitive European creative sector:

Different measures would support this objective. They relate to:

- Creating new demand for European audiovisual works
- Encouraging risk taking and innovation
- Skills development in relation to the digital shift

1. Creating demand for European audiovisual works

The study shows that marketing and branding are essential to enable the sector to reach new audiences and to ensure better circulation and consumption of European works. Only if rights holders develop and implement digital marketing campaigns to create more demand for European works – both nationally and internationally – will they benefit from the opportunities of VOD. Dubbing and/or subtitling their works to meet the linguistic requirements of each market are also important.

> Marketing support for EU films:

European films that win awards at A-list festivals or European prizes (such as the European Film Awards) should receive specific promotional support throughout Europe to encourage international VOD releases.

> Support to digital marketing strategies to brand European works:

EU support programmes should give more support to rights holders that wish to further fine-tune and implement their digital marketing strategies in order to access video-on-demand markets. Funds should be available to develop and adapt digital applications that help to understand consumer behaviour, facilitate closer engagement with target audiences through social media, and test new business models.

> Aide to dubbing and subtitling:

Subtitling is an efficient opportunity to make available a range of catalogue films and new releases across Europe at modest costs, and it should be tested whether increasing support for such activity can trigger more demand in non-national works. The MEDIA Programme should further encourage these activities, and to a larger extent subtitling over dubbing, in order to enable cross-border access to

European foreign language content⁶⁰⁸. It costs approximately € 1,500 to subtitle a film in one other language, compared to € 30,000 for dubbing. This investment would enable cross-border distribution on VOD platforms, facilitate pan-European licensing and encourage multi-lingualism⁶⁰⁹. Support for dubbing – which should of course continue – should also be linked to the requirement to create a subtitled version of the film.

2. Support risk taking and innovation

European rights holders have to experiment with new forms of digital distribution and test new business models in order to understand the new market place and its requirements:

> *Promote schemes that allow rights holders to experiment with VOD:*

The EC should promote the idea that a share of public support given to producers in the EU should allow those that wish to do so to retain some rights for digital exploitation, rather than selling them in bundles with other exploitation rights. This would allow them to build up a catalogue of rights and to bridge the current financing gap that prevents rights holders from experimenting with digital distribution. The purpose of such mechanisms would be to test new business models and should not unnecessarily skew market demand.

Film-funding bodies across Europe should consider the establishment of audiovisual innovation funds. Such funds could support the production and distribution sectors to experiment with new ways of getting films to audiences, investing in innovative business models, distribution and delivery platforms, research and development as well as in developing new market intelligence.

> *Independent producer-friendly terms of trade:*

Broadcasters and digital operators should be encouraged to return digital distribution rights to independent producers after a certain period of time (revision of terms of trade) and/or if these rights remained unexploited.

> *Encourage flexible release windows in relation to some films:*

More flexible or shorter release windows, in particular with theatre owners in relation to European titles that were given no or limited theatrical release, should be considered. This strategy would give independent films that have problems accessing traditional distribution markets a new opportunity to succeed.

> *Stronger coordination between VOD-relevant support mechanisms:*

Better cooperation efforts within the sector have to be reflected by the public sector. EU programmes and projects that could be to the benefit of VOD (MEDIA, CIP ICT PSP (Digital Libraries), Europeana,

608 Subtitling could also be envisaged in other non-European languages, such as Arabic, Mandarin or Russian, which might enable films to reach greater markets outside Europe and also enhance a social integration across European societies.

609 Practical advice on subtitling and dubbing in relation to establishing pan-European VOD offers is given in the above mentioned study. *ibid.*

FP7/8, Lifelong Learning, Culture, etc.) need to be more in synch. For example, MEDIA could help to identify and broker relationships with rights holders that do not participate in relevant research and innovation programmes such as FP7/8. Specialised funds should be made available for rights holder (particularly SMEs) to join EC innovation and research programmes.

3. Developing skills and capabilities in relation to the digital shift

As pointed out throughout the report, the sector must develop its skills relevant to the new digital market place, its general awareness of new information technology trends and its understanding of new consumption behaviour.

Training programmes aimed at developing the strategic capacities of rights holders in relation to VOD exploitation and networked media should be further supported. Furthermore, networking events that develop rights holders' ICT knowledge and forge links with ICT companies would contribute to shared understanding.

Innovation voucher schemes, such as the Creative Credits scheme in the UK, should be used to enable film companies to buy expertise and skills in relation to digital strategy development, marketing and ICT. Such schemes help create demand-led innovation in specific sectors in a hands-off way.