Introduction

We wish to thank the European Commission for requesting input from the Motion Picture Association. The audiovisual industry stakeholder discussions taking place on the initiative of the European Commission are of paramount importance for the future of the sector.

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The Motion Picture Association serves as the global voice and advocate of the international film, television, and streaming industry. Our membership includes Walt Disney Studios Pictures, Netflix Studios, LLC, Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Universal City Studios LLC, and Warner Bros. Discovery.

Our member companies are producers and co-producers, distributors and commissioners, licensors and licensees; an important and integrated part of the local and European industry production and distribution ecosystem, contributing at every level.

With substantial investments in the European entertainment industry, infrastructure, and talent, MPA member companies are net contributors to the European creative economy; their investments also contribute to the growth of the local production and distribution community. MPA member companies collaborate with European filmmakers on numerous production and distribution partnerships to support local stories, local storytellers, and local production companies, bringing their work before local and global audiences, and ultimately helping to spread film and television diversity across the EU.

The value of the creative & cultural sectors – be it is societal, cultural, or economic, at the local and national level – cannot be overstated. A key enabling element of this value-creation is a framework which supports a diversity of business models in this complex, multi-level, and constantly evolving industry. This openness and ability to embrace a vast diversity of business models drives the activity we are seeing in Europe and around the world. It is therefore important for those participating in the sector to have a variety of options available when developing a project and considering production agreements necessary for the sector's sustainability to reflect different levels of risk-taking of the parties involved. It is necessary to also caution that any targeted intervention on one part of the ecosystem will have wider impact, necessitating a deep understanding of the fallout of any such measure.

On the retention and exploitation of intellectual property rights of European works

- **EC Question: How to ensure that European producers and authors retain and exploit copyright (which is to be understood widely, as including for example primary, secondary and ancillary exploitation rights) in their dealings with streaming platforms and broadcasters?**

There are two related assumptions in this question: The first is that retention of rights ought to be a goal in and of itself, rather than considering the broader context and role that IP ownership plays in balancing the risks and rewards of each project amongst the various production partners. The second assumption is that producers currently do not own IP or have options at their disposal to ensure they are able to sustainably benefit from the success of their projects. As we will show, both of these assumptions are incorrect.

The question also addresses two concepts: ownership and exploitation, which are distinct.

Owners of IP may seek to retain benefits associated with ownership, but these can be shared through contractual agreements and other arrangements. Likewise, parties who do not own the IP may be granted or retain means of benefiting from the exploitation of such rights, including through contractual agreements and other arrangements. We submit that these concepts should not be conflated, and it should be recognized that there are multiple pathways to sharing the benefits of exploitation of the content, and not all of them (or even most) necessarily entail outright IP ownership. That said, we would also underscore that ownership does play a foundational role in agreements, including as a means to incentivize a party to take a risk on shouldering all or the majority of the cost of a project.
If the Commission's ultimate goal is to ensure the cultural vibrancy and sustainable economic growth of the European audiovisual sector – a goal that the MPA fully supports – then we submit that this can best be achieved by creating a framework which keeps the doors open to a wide range of commercial production and development arrangements to suit the needs of the different economic models for production, including acquisition, within the ecosystem.

MPA strongly agrees with some points that several parties put forth during the exploratory AV stakeholder meeting on 12 July, notably that ownership and/or control coupled with the sharing of the benefits generated by a production should be reflected in the overall terms which take into account the overall level of risk and financial engagement taken by each party involved in any given production. For example, the level of financial investment in a project by a production partner, and hence their level of risk, often corresponds with the proportion of IP ownership they obtain. For this reason, projects that are substantially financed by a party are often owned by that party.

It is right, in principle, that even when one production partner owns the IP in the produced content, the exploitation benefits can still be shared, as these components are all negotiated between the relevant parties.

While the ownership of the rights is subject to commercial negotiation, and indeed one party coming away from an agreement with all the rights is only one of a plethora of agreement possibilities, no model should be excluded through regulation that would deny the opportunity for any party to be able to have full ownership of rights.

We also would like to stress that the production market has changed dramatically in the last 18 months. Some of the assumptions and findings of the Media Outlook are already inaccurate with interest rates soaring, less financing available, and tighter investment strategies by all players. These changes are having impact on the level of production fees and recharges, as well as on distribution of revenue, despite production partners having taken much bigger risks. In addition, as a market contraction is witnessed everywhere, it is noticeable that some production partners are increasingly engaging in deficit financing and co-productions (explained further below).

As the Outlook observes, there is not a one size fits all approach to the development and financing of an AV production. Lowering the financial risk was one of several reasons that respondents cited for transferring rights to international partners, in addition to higher remuneration and potential exposure to wider audiences. This illustrates that ownership of the IP (while of prime importance, and linked to risks taken by the production partners) is different from the actual control of the exploitation/monetization and how profits are shared between them. As the Media Outlook notes, deals which provide for IP ownership for the acquiring or commissioning party are but one of a number of different models which exist in the marketplace. While the Commission's question appears to assume that commissioners retaining all rights is currently the norm, that assumption is not supported by the Outlook itself, which shows that "buy-out" practices are not the industry norm (model 1). Sixty percent of respondents said that streamers kept full control of the IP in zero to 25% of their contracts. This confirms that Europe's audiovisual sector really is characterized by a diversity of models, and that IP ownership and/or control of the exploitation and monetization can be very important elements of the contractual negotiations. Hence, as the Outlook itself indicates, in this highly competitive and changing market, with multiple potential partners for each project, the baseline assumption that European producers are in a disadvantaged negotiating position is questionable.

We believe that the goal of cultural vibrancy and economic success is best served by giving production partners the freedom to mitigate their risk exposure by allocating some or all of the risk, and exploitation rights of corresponding value, to partners which are prepared to shoulder such risks and absorb losses should the production fail to achieve financial success. Furthermore, the current discussion fails to take into account that different types of content carry different levels of risk. As such, moving the goalposts and creating limitations on what rights may be acquired may have a wider impact on whether a project gets made at all – leading to knock-on effects on the rest of the supply chain.

The importance of flexibility is reflected in the many forms that a contractual relationship between commissioners and producers can take, and the very diverse range of agreements that manifest in the market. What follows is a non-exhaustive range of such agreements, and a reflection of how the choice for a specific contractual model will depend on the nature of the project, its scale and the ability of all parties to balance content development, production, and distribution costs, expenses and other inputs.

- Where commissioners are **granted full ownership of IP rights**.
  Companies are selective about how to assume their individual level of risk, and the Media Outlook responses also show that, as a result, this is not only far from the norm, but is also a way to de-risk for the side receiving financing, especially substantial financing, in return for transferring some or all of the rights. This approach tends to maximize risk for one side, and minimize risk for the other. Importantly, in our members' experience (which is validated in the responses of producers themselves in the Media Outlook), so-called "all rights" deals are not the overall norm, and full transfer of IP ownership is but one element of many different types of deal models, which are over time increasing in their diversity, to the benefit of the entire ecosystem including all production partners.

- **Licensing**
  Licensing is an adjunct to different forms of rights ownership and control of the exploitation/monetization of the content. Entities who have the ownership and/or control of IP will identify and make deals with the optimal licensee(s) in each distribution window for each geographical market. This is the case no matter what category the entity falls into (producers, commissioner, co-producing partner, etc.) insofar as they have a legal right to engage in licensing agreements.
  The risks and rewards associated with licensing vary greatly, but may be lower for the licensee in the sense that even in deals where the licensee assumes financial risk, their losses from an unprofitable deal will end as of a fixed date.
  The licensor, insofar as they aim to make a return on investment for the ownership and/or control of the IP, still bears very considerable risk, notably when the licensor is required to ensure the cashflow for the costs of production until the content is delivered.

- **<u>Co-productions</u>**
  Co-productions can take a wide variety of different forms (note that we use the term here in its looser commercial sense; an "official" co-production may be defined by law in some jurisdictions or by reference to a co-production treaty between countries). As a *commercial* concept, the essence of "co-production" is a negotiated sharing of risk, rights and revenues in which each party invests capital and resources in proportion to the expected benefits associated with a given set of rights. Often the rights allocation is pro-rated depending on financial and IP participation. The rights may also be allocated temporally or by means of exploitation (e.g. theatrical, or TV), with some production partners taking only a fixed-term license. Commissioning entities often participate in these types of deals, allowing for the pooling of risk that ultimately enables a project to be made.

As shown by this sample of broad and versatile possibilities, every project is unique and there is no "one-size fits all" approach to developing, commissioning, financing and/or licensing a production. The assumption that European producers and authors should retain and exploit copyright under any circumstances, as per the question, is an approach which is both disconnected from the market reality, and does not take into account the investments made by and associated risks of all production partners. It is essential that producers and distributors are still individually able to freely choose from different types of production models and terms, according to the specificities of each case including deficit financing, optioning, pre-purchase, licensing of rights, commissioned productions, backend, and co-productions, supplemented by local, regional, national and EU subsidy schemes and incentives where applicable. Finally, we would like to note that this issue is also viewed through the prism of ensuring European competitiveness globally. More regulation may be counter-productive in this respect, especially given the current complexity across member states.

- **EC Question: Producers and authors, alongside broadcasters and streamers, take on risks in developing and producing audiovisual content. In financial terms, how do you see the allocation of risks between producers and streamers/broadcasters evolving? In your opinion, what should be a fair allocation of the risk in commissioned works and independently produced works respectively?**

- **How to ensure the use of fair contractual practices, rewarding the contributions of the different players involved in the value chain (e.g. authors, performers, producers, distributors, broadcasters, streamers), e.g. from development to distribution of audiovisual works?**

As highlighted during the exploratory AV stakeholder meeting on 12 July, the production and distribution of content, alongside other processes in the value-chain, is a high-risk endeavor. As explained in response to the first question, the allocation of potential reward is tied to the assuming of risk. There is a very important demand for the development, production, licensing, and/or IP acquisition of European Works. We also note that without the exploitation of the content produced and delivered, producers cannot cover their own risks, notably their own reinvestment of fees to close finance plans, and develop projects that will be submitted to commissioners.

There are many unsuccessful projects as well as projects which end up not being produced, and their associated costs have important consequences on all companies involved, regardless of their relative size. This is why contractual freedom is the backbone of the AV sector. Any regulatory intervention could distort the market and adversely impact investments in AV content. Imposing regulatory constraints that would regulate the allocation of rights in individual AV works would indeed severely impact economic viability and distort market dynamics, whether it takes the form of a rights allocation/retention, rights reversion or rights revocation mechanisms.

Limiting potential reward through any limitation in IP ownership and/or control, and failing to adequately consider the costs involved in the development and production of certain films and TV content might also have direct negative consequences on the creation and maintenance of jobs, and ultimately limit the variety of content available to consumers. For creators, this would mean more difficulties pitching risky projects, or obtaining the maximum upfront investment to defray development costs and lower their future risks.

- **EC Question: In your opinion what is the impact, if any, of the requirements on European quotas, financial obligations and independent productions on the matter at hand?**

We view the market as competitive and evolving towards greater flexibility, offering further choices for producers, investors and distributors - as well as importantly, offering a diversity of content offerings to consumers. We regard these developments to have occurred in spite of, and not as a result of quotas, financial obligations and other regulatory requirements. Indeed, as had been predicted, the increased level of regulation has created unnecessary complexity and cost inflation, which are deterrents to investment. Importantly, quotas and obligations have been linked to labour shortages and price inflation. In "Cultural Levies and the EU Audiovisual Market"[1] Kristian Stout & Giuseppe Colangelo warn about risk of serious unintended consequences and conclude that "[a]t a certain point, the gains from trying to increase local content production will be swamped by these inflationary pressures". The Outlook itself identifies "[i]ncreasing costs across the board, and in particular for costs on technical crew and creative talent" as principal risk factors for European producers.[2] Shortage of specialised and non-specialised workers is another unintended consequence of disproportionate financial obligations. The EU and Member States should ensure that the promotion of European works does not inadvertently distort the market.

When considering the introduction of any obligation for media services within the AV sector, it is paramount, as a first step, to conduct a neutral and independent impact assessment. This should assess whether there is a particular market failure that needs addressing, the capacity of the market to absorb the changes, the effect on business activities caused by a possible legislative change, and the direct relation between obligations and investment. Obligations should also comply with the principles of proportionality and non-discrimination.

Requiring media service providers to make investments resulting from the implementation of Article 13(2) of the AVMSD, and then considering measures that would hinder their ability to own the rights for which they have been required to make these investments and hence take the financial risk would constitute a

[1] Cultural-Levies-Issue-Brief.pdf (laweconcenter.org)

[2] This was echoed by Dr. Nicola Borrelli (Director of Italy's Directorate-General for Cinema and Audiovisual) in his December 2022 speech when he stated that overproduction caused by financial obligations creates the conditions for labour shortages and inflationary pressures in the sector.

new barrier and restriction to the freedom to provide services and might artificially distort the audiovisual sector.

In terms of programme quotas, the Outlook highlights that EU-27 works already represent 28% of works available in EU VOD catalogs. And UK works represent only 9% (Outlook page 50). With already +/- 30% of catalogs being EU27 works in 2021-2022, it seems hard to argue that there is market failure, or that there is a need to revise the definition of European works.

Furthermore, if there is any intention of narrowing the scope of content qualifying as European works, whether geographically or by linking to IP ownership, this is unlikely to change the investment decisions of VOD providers, with these driven more by factors such as the availability of meaningful production incentives and the cultural specificity of each production. The likely impact of a narrower definition would be adjustments to the tail-end of VOD catalogs, as well, notably, in reduced opportunities for international co-productions[3]. International co-productions are a crucial part of the European AV ecosystem and provide a valuable solution for funding high-end productions that individual broadcasters or VOD providers would not be able to fund alone. Inflationary effects on the costs of European operators would also be a byproduct of such a measure.

- **EC Question: After acquiring copyright, do streamers ensure wide marketing and distribution of EU productions across the EU and beyond or do they just focus on local markets ?**

There is no single approach amongst streamers or across all types of content, and it is necessary to note that not all streamers are active everywhere. When content is licensed or acquired for exploitation on a global or multi-territorial basis there are generally various mechanisms on each streaming service which are aimed to ensure subscribers have access to a broad range of choices - including through recommendation systems which are calibrated to help suggest options based on prior viewing choices, which would include local/EU productions, whether those subscribers are located within the country in which the content originated, or another EU Member State, or outside the EU. Streamers therefore generally aim to ensure wide distribution of EU productions across both local and international territories.

As the Media Outlook reflects, consumers' consumption of content includes a strong preference for local content, and this would generally be reflected in the approach to marketing such content, to optimize viewer engagement and increase subscriber acquisition and retention. The precise answer to this question is dependent on individual member companies' business decisions and practices as well as the particular content itself. As a result of European content having the opportunity to be shown in territories where streamers are present, there are ample examples of European content that have been successful at international level thanks to distribution by international streamers.

As noted above, the Outlook confirms that exposure to wider audiences is in fact an important reason for some European producers to transfer rights to streamers.

[3] European works: promoting a healthy European audiovisual sector — Oliver & Ohlbaum Associates (oando.co.uk)