

## Public consultation – European Strategy for data.

(21.02.2020-31.05.2020)

### EUROKINEMA

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EUROKINEMA represents audiovisual producers at a European level.

Even more since the outbreak of the COVID crisis, our sector's developing, financing and broadcasting structure is heavily bewildered by the digital online world.

The consumption practices are changing fast and the video on demand's market share is raising rapidly<sup>1</sup>.

Our field of activity is more and more governed by the growing influence of the "streamers" (i.e the VOD platforms) for the consumption of the films and the content-sharing platforms to have access to our public.

#### 1. Findings: the content-sharing platforms and the "streamers"<sup>2</sup>:

##### a) Content-sharing platforms:

A huge number of videos are circulating on the content-sharing platforms every day. This tremendous shift in the people's habit entails many consequences. Amongst them is the impression left that everything can be uploaded without restrictions.

It has been more than ten year that the creative sector and the EU are struggling to obtain a regulation of the platforms and the latest major step was the vote of the Copyright Directive which is an attempt to organize a protected circulation of the copyrighted contents.

But what is at stake for our sector of activity with this "new" model of communication? First the piracy of our works: illegal uploads of films have an important impact on our economy. The investments to produce a film are very high<sup>3</sup> and the financiers (i.e the broadcasters) intend to have the exclusivity on the exploitation and benefit from the associated incomes. Secondly, the platforms are both offering their services to the consumers (whether they are professional or not) to upload their contents but they are also using the data of the viewers of the programs uploaded to sell targeted advertising whereas the copyright holders of such programs don't have access to them. On top of that, the market is structured in western countries around one major company i.e YouTube<sup>4</sup>.

As per the law, film producers are exclusively entitled to authorize the exploitation of their productions. This authorization is mainly granted through licensing agreements and a failure of

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<sup>1</sup> <https://rm.coe.int/yearbook-keytrends-2019-2020-fr/16809ce58e> : European Audiovisual Observatory - Tendances clés 2019/2020 - page 37 - the SVOD market is the only growing market in our sector even though it only represents 5% of the market

<sup>2</sup> The so called "streamers" or subscription VOD platforms are dominated by Netflix, Disney and Amazon Prime. Their market share is constantly growing amongst the players in each member states. See the French report of French Centre National du Cinéma 2019 : [https://www.cnc.fr/professionnels/etudes-et-rapports/etudes-prospectives/observatoire-de-la-video-a-la-demande\\_1100704](https://www.cnc.fr/professionnels/etudes-et-rapports/etudes-prospectives/observatoire-de-la-video-a-la-demande_1100704). Page 20, Netflix reaches 20% of the VOD market in France and Amazon reaches the second place.

<sup>3</sup> The price of a fiction (film or an episode) ranges in Europe approximately between 1 to 20 million euros.

<sup>4</sup> Among these platforms, YouTube represented 74,14% this year : <https://www.datanyze.com/market-share/online-video--12>

the platforms to abide by these rules is an act of piracy. If an equilibrium must be found with the principle of freedom of expression, a well-ordered system must be reached between the platforms and their users.

The data are as essential to us as to the platforms, for the main following reasons:

- The producers/broadcasters who “embed” their programs on the platforms<sup>5</sup> need to know their public. Otherwise, they rely on a third party for the consumption of the works on which they have invested. They are blind and this cannot be accepted. On the contrary, YouTube and the social network promoting these programs such as Facebook or Snapchat have a very precise view on who is interested by what. They can monetize this information to other clients that wish to launch targeted advertising or even use them for their own VOD platforms<sup>6</sup>.
- Because the films ought to be properly identified and recognized so that their circulation on the Net is traced.

b) The place taken by the streamers in our field of activity

The current main financiers of the sector are the theatrical distributors (for the feature films only), the worldwide sales agents and the TV broadcasters (private and public). They still represent the overwhelming private investors<sup>7</sup>.

The media chronology and the geoblocking of our rights is necessary to guarantee the exclusivity granted to our financiers.

However, the market penetration of the “streamers” is growing while the usual investors are diluted notably since the outbreak of the COVID crisis<sup>8</sup>.

Unfortunately, the business model of the VOD platforms is far different from the pattern of our traditional financiers and the recoupment of their investments (i.e the cost of the platform, the purchase of the catalogues and the cost of production of the “inhouse” productions) need the subscription fees of the European citizens. Indeed, the amounts invested are huge and the recoupment process need to get rid of this existing “traditional” financing system. In addition, the public wants local programs and to get more subscriptions (it is their main source of income) they undertook the production of films locally based. In order to fit to the public expectations, they have developed ingenious algorithms. With these tools, they build scripts sticking to desires of their subscribers. This practice is clearly a threat to diversity.

To put in a nutshell, thanks to the data they collect, they prescribe what the public expect, and they produce films according to the taste of the majority of their public. In the same time, the rightsholders, don't have access to the data of the consumption of their films. There is a lack of transparency and hardly no consumption/profile of the public reports are being communicated to them.

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<sup>5</sup> We are referring here to the broadcasters or producers that create their channels on YouTube (or promote their programs on Facebook). On this topic, an analysis was made by Patrizia Spina and Maxence Wallon in their article “La pratique des réseaux sociaux par les diffuseurs TV: un nouvel espace de liberté pour le téléspectateur et de gestion des audiences pour l'émetteur » in 2016. It explains why, while the broadcaster's audience is more fragmented, the time spent by the public viewing programs is very high. The prescription passes by the social medias. They became unescapable.

<sup>6</sup> Amazon has its own VOD platform

<sup>7</sup> <https://rm.coe.int/focus-2019/1680994a74> - Focus world film market trends 2019 - page 8 – distributors and sales agents (i.e pre-sales excl TV) represent 16% of the financing share and <https://rm.coe.int/yearbook-keytrends-2019-2020-fr/16809ce58e> Annuaire - Tendances clés 2019 page 9 - Broadcasters represent 24% of the investments.

<sup>8</sup> See an analysis of this phenomena in the following report issued by the Parliament in April 2020: [https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS\\_BRI\(2020\)649406](https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2020)649406)

c) The GDPR<sup>9</sup> and its “right to erasure”<sup>10</sup>

The Regulation on the protection of personal data, voted in 2016, is one of the major steps of the EU to promote and defend the values that are at the core of the Charter of Fundamental rights<sup>11</sup>. More particularly, in its article 8.1<sup>12</sup>, the Charter recalls that “Everyone has the right to personal protection concerning him or her”. The obligations enshrined into the above-mentioned regulation are opposable to platforms settled outside the EU<sup>13</sup> and an EU organization (the EDPB<sup>14</sup>) was created to control the proper implementation of the Regulation. However, so far, no evaluation of this provision was made, and one can wonder what the efficient sanction powers of the Commission

<sup>9</sup> [Regulation \(EU\) 2016/679 of 27 April 2016](#) on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)

<sup>10</sup> **Article 17: Right to erasure ('right to be forgotten')**

1. *The data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue delay and the controller shall have the obligation to erase personal data without undue delay where one of the following grounds applies:*

- a) *the personal data are no longer necessary in relation to the purposes for which they were collected or otherwise processed;*
- b) *the data subject withdraws consent on which the processing is based according to point (a) of Article 6(1), or point (a) of Article 9(2), and where there is no other legal ground for the processing;*
- c) *the data subject objects to the processing pursuant to Article 21(1) and there are no overriding legitimate grounds for the processing, or the data subject objects to the processing pursuant to Article 21(2);*
- d) *the personal data have been unlawfully processed;*
- e) *the personal data have to be erased for compliance with a legal obligation in Union or Member State law to which the controller is subject;*
- f) *the personal data have been collected in relation to the offer of information society services referred to in Article 8(1).*

2. *Where the controller has made the personal data public and is obliged pursuant to paragraph 1 to erase the personal data, the controller, taking account of available technology and the cost of implementation, shall take reasonable steps, including technical measures, to inform controllers which are processing the personal data that the data subject has requested the erasure by such controllers of any links to, or copy or replication of, those personal data.*

3. *Paragraphs 1 and 2 shall not apply to the extent that processing is necessary:*

- a) *for exercising the right of freedom of expression and information;*
- b) *for compliance with a legal obligation which requires processing by Union or Member State law to which the controller is subject or for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;*
- c) *for reasons of public interest in the area of public health in accordance with points (h) and (i) of Article 9(2) as well as Article 9(3);*
- d) *for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) in so far as the right referred to in paragraph 1 is likely to render impossible or seriously impair the achievement of the objectives of that processing; or*
- e) *for the establishment, exercise or defence of legal claims.*

<sup>11</sup> Charter of Fundamental Rights of the European Union – 2000 C 364/01

<sup>12</sup> Article 8 - Protection of personal data:

1. *Everyone has the right to the protection of personal data concerning him or her.*
2. *Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.*
3. *Compliance with these rules shall be subject to control by an independent authority.*

<sup>13</sup> Article 3 of the GDPR directive - Territorial scope

1. *This Regulation applies to the processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union, regardless of whether the processing takes place in the Union or not.*
2. *This Regulation applies to the processing of personal data of data subjects who are in the Union by a controller or processor not established in the Union, where the processing activities are related to:*
  - (a) *the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union; or*
  - (b) *the monitoring of their behavior as far as their behavior takes place within the Union.*
3. *This Regulation applies to the processing of personal data by a controller not established in the Union, but in a place where Member State law applies by virtue of public international law.*

<sup>14</sup> <https://edpb.europa.eu>

and the EDPB would be in case of violation of the law from a non-EU platform<sup>15</sup>. This asymmetrical situation between the EU and non-EU players raises a number of ethical and competition problems<sup>16</sup>.

One might do the same remark as per the right to erasure. This right, grounded on the same values than the one mentioned above, is a heavy obligation for the EU stakeholders. If there is a general agreement on its necessity, will it be the same for the non-EU players?

## 2. Suggestions

**In order to raise the efficiency of the EU data policy in our field of activity, we wish to draw your attention on the following suggestions for further developments:**

- a) Data for statistical purposes governed by the EU: while it is important to keep separate the copyright infrastructure from a broaden data economy, open data policies or such, it remains essential that general statistical information of the market be available to the EU and the Member States. The Open Data Directive<sup>17</sup> clearly excludes from its scope “documents for which third parties hold intellectual property rights”<sup>18</sup>, Nonetheless, the influence of the digital world on our public must be evaluated, analyzed. Therefore, for research and statistical purposes only, general information of the audiovisual digital market, its public, its stakeholders should be made available **to a European hub composed of stakeholders and the Commission**<sup>19</sup>.
- b) Organize the transparency of the consumption of the films necessary for the rightsholders: An effective use of data could cut down the costs of the basic rights processing and enhance efficient reporting of the incomes. **An EU regulation providing for open systems, a free access to data would foster long term availability of the information, and a level playing field between the rightsholders and the streamers/content-sharing platforms**<sup>20</sup>.
- c) In order to help achieving above points a & b, implement broader use of ISO certified identifiers for audiovisual works such as ISAN.
- d) Organize a transparency of the algorithms used by the streamers for the sake of diversity and in order to tackle the unbalanced relationship between the streamers and the rightsholders. This opacity is a threat to diversity since two major streamers (Netflix and Disney) **are producers of contents as well**.

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<sup>15</sup> See the EDPB press release about the merger between Shazam and Apple :

[https://edpb.europa.eu/sites/edpb/files/files/file1/edpb\\_statement\\_economic\\_concentration\\_en.pdf](https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_statement_economic_concentration_en.pdf)

<sup>16</sup> Some complaints are being filed : <https://www.lefigaro.fr/secteur/high-tech/2018/05/28/32001-20180528ARTFIG00177-rgpd-premieres-plaintes-contre-les-geants-du-web-en-france-et-en-europe.php>

<sup>17</sup> Directive 2019/1024 on open data and the re-use of public sector information – 20 June 2019

<sup>18</sup> See article 1.2.c

<sup>19</sup> The European observatory of the audiovisual could be the right place: <https://www.obs.coe.int/>

<sup>20</sup> See on this topic and more generally on the Copyright infrastructure the document of the Presidency of the Council 20 December 2019 : <https://data.consilium.europa.eu/doc/document/ST-15016-2019-INIT/en/pdf>