



APT - Associazione Produttori Televisivi

**Comments in relation to the
DRAFT COMMUNICATION FROM THE COMMISSION ON
STATE AID FOR FILMS AND OTHER AUDIOVISUAL
WORKS**

12 June 2012

1. INTRODUCTION

First of all, we wish to thank the European Commission (“Commission”) for the opportunity to make known our views on the draft communication on State aid for films and other audiovisual works (“Draft Communication” or “Draft”).

With this brief note, we wish to draw the Commission’s attention to certain specific features of the audiovisual market in Italy, which strongly affect the conditions of competition in our country and which we hope that will be addressed within the context of the revision process that the commission is currently undertaking.

2. APT – ASSOCIAZIONE PRODUTTORI TELEVISIVI

APT – Associazione Produttori Televisivi (“APT” or “the Association”) is the most important association of Italian television producers, active primarily in the production of tv series, entertainment, cartoons and documentaries.

Its members make up 80% of the total annual turnover of the television production sector.

APT is a member of the European Coordination of Independent Producers (CEPI) and of Confindustria.

3. TELEVISION PRODUCTIONS AND CINEMATOGRAPHIC WORKS

We regret to note that the Draft Communication frequently makes a distinction between television productions and cinematographic works and, in many instances, gives primary focus to the latter.

We refer, for example, to paragraph 2 of the Draft, where it is stated that *“Amongst audiovisual works, films still have a particular prominence, because of their cost of production and cultural importance. Film production budgets are substantially higher than for other audiovisual content, they are more frequently the subject of international coproduction, and the duration of their exploitation life is longer”*.

This is not the case, in Italy.

Not only in terms of costs of production, which, in some cases, can reach very significant amounts (for example, tv series can cost between 8 and 14 million Euro¹), but also in terms of cultural importance.

Indeed, in Italy we have experienced, in the last ten years, a highly significant increase in the artistic/cultural value of television productions, which is demonstrated by the great results achieved by such works in terms of audience figures; therefore, today it is undeniable that television productions (such as the major TV series) have more and more the same value as cinematographic works².

In this respect, it should also be noted that cinema and audiovisual works have been recognized, to all intents and purposes, as a unique cultural phenomenon by the Unesco Convention on the Protection and Promotion of the Diversity of Cultural Expressions³.

Accordingly, both European and Italian legislations have often issued common rules for the cinematographic and the audiovisual sector, thus expressly admitting that, from an artistic and cultural point of view, works belonging to those fields shall be regarded as absolutely equivalent – as they are both a means for achieving pluralism, cultural identity and social aggregation, as well as the promotion and the economic development of a nation's territory.

At European level, we can refer, for example, to:

- Directive 2010/13/EU of the European Parliament and Council, of 10 March 2010, on *“the coordination of certain provisions laid down by law, regulation or administrative*

¹ By tv series is meant a television programme composed of a set of 6-13 episodes, which usually last 100 minutes.

² On this point, reference should be made to the “White Paper on contents” drafted by the Italian Communications Authority which expressly mentions tv-series as “premium” contents like motion pictures of major success (page 98).

³ Paris Convention, of 20 October 2005, adopted by Italian Law of 19 February 2007, n. 19.

action in Member States concerning the provision of audiovisual media services”⁴, which draws no distinction between the cinematographic and the audiovisual sector;

- Directive 2006/116/EC of the European Parliament and Council, of 12 December 2006, on “*the term of protection of copyright and certain related rights*” which regulates, *inter alia*, copyright of both cinematographic and audiovisual works⁵.

Similar indications can also be found at national level:

- Legislative Decree n. 177 of 31 July 2005 “*Audiovisual and Radio Media Service Consolidated Act*”⁶ provides a common regulation for cinematographic and audiovisual works, with reference to product placement⁷ and the so-called “secondary rights”⁸;

⁴ Directive 2010/13/UE codified the provisions of 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 provision of audiovisual media services (Audiovisual Media Services Directive)*”, followed by Directive 97/36/EC of 30 June 1997, “*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*” and Directive 2007/65/EC 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*”.

⁵ Directive 2006/116/EC codified the provisions of Directive 93/98/EEC of 29 October 1993 “*harmonising the term of protection of copyright and certain related right*”. In particular, article 2 on “*cinematographic and audiovisual works*” states that: “*1. The principal director of a cinematographic or audiovisual work shall be considered as its author or one of its authors. Member States shall be free to designate other co-authors. 2. The term of protection of cinematographic or audiovisual works shall expire 70 years after the death of the last of the following persons to survive, whether or not these persons are designated as co-authors: the principal director, the author of the screenplay, the author of the dialogue and the composer of music specifically created for use in the cinematographic or audiovisual work*”.

⁶ Amended on 15 March 2010 by Legislative Decree n. 44 (implementing Directive 2007/65/EC).

⁷ In particular, article 40 *bis* allows product placement “*in movies, films and series for audiovisual media service, sports programmes and light entertainment programmes, with the exclusion of programmes made for children*”.

⁸ See article 44, par. 5. On this point, reference can be also made to Regulation n. 30/11/CONS issued by the Italian Communications Authority “*concerning criteria for the time limit for the use of secondary rights acquired by media service provider, pursuant to article 44, par. 5 of the Audiovisual and Radio Media Service Consolidated Act*”.

- Law n. 633 of 22 April 1941 “*Italian Copyright Law*” whose provisions expressly refer to the remuneration due and the rights owned by authors and producers of cinematographic and audiovisual works⁹;
- Legislative Decree n. 300 of 30 July 1999 on the “*Reform of the Government Organization*”, which identifies among the competences of the Ministry of Culture those relating to the whole cine-audiovisual sector¹⁰;

Unfortunately, such equality is not reflected in the aid measures granted at national level in Italy, which regrettably only apply to cinematographic works and not to other audiovisual works.

We refer, in particular, to the 2008 Financial Act which introduced fiscal incentives¹¹ (in the form of a tax credit) to support solely the cinematographic industry¹².

In addition, Italian cinematographic productions also benefit from:

- national contributions granted by the “Fondo Unico per lo Spettacolo”¹³, a fund which cannot be accessed by television producers;

⁹ We refer for example to: article 46-bis which states “*where the broadcasting rights are assigned to the producer, the authors of cinematographic or assimilated works are entitled to equitable remuneration from the broadcasting organizations for every use of the work that takes the form of communication to the public by electromagnetic waves, cable or satellite*”; article 71-septies which provides that “*Authors and producers of phonograms, as well as original producers of audiovisual works, performing artists and producers of videograms and their successors in title, are entitled to receive a remuneration for the private reproduction of the phonograms and videograms*”; article 78-ter providing that “*The producer of a cinematographic or audiovisual work or of a sequence of moving images shall have the exclusive right to [...]*”.

¹⁰ We refer to article 53 which states that “*the ministry, in particular, performs the duties of the Government relating to the protection, management and development of the arts and the environment; promotion of cultural activities; promotion of show business (such as theatre, music concert, cinema, ballet, circus, [...]) as well as the promotion of cinematographic, radio-television and multimedia productions [...]*”.

¹¹ These incentives – initially provided only for 2008-2010 – have been extended for further three years (until 31 December 2013) by Law of 26 February 2011, n. 10 and are provided in favour of both cinematographic producers (“internal tax credit”) and other companies not active in the cine-audiovisual sector which intend to finance the production of cinematographic works (“external tax credit”).

¹² The aid was authorised by the Commission on 18 December 2008 (State aid N595/08).

¹³ See article 12 of Legislative Decree n. 28/2004.

- a share of the “*investment quotas*” which must be destined to independent cinematographic works, in particular, by the Public Service Broadcaster¹⁴.

It is clear from the above that, in Italy, undue discriminations exist between cinematographic and television productions.

Such discriminations are not supported by any justification and are capable of determining a significant distortion of competition between television and cinematographic producers, who compete on the same market for the sale of exploitation rights relating to their works to television broadcasters and other operators active on different transmission platforms.

We, therefore, hope that the Commission will take this opportunity to strongly encourage Member States to adopt analogous support measures for the two categories of works, so as to favour the development of a truly level playing field.

4. THE LIMITED CIRCULATION OF AUDIOVISUAL WORKS AND THE NEED TO PROMOTE THE INTERNATIONAL AVAILABILITY OF AUDIOVISUAL PRODUCTIONS ONLINE

In paragraphs 2 and 3 of the Draft Communication, the Commission states that “*there is little circulation of European audiovisual works outside their country of origin*” and that “[T]his limited circulation results from the fragmentation of the European audiovisual sector into national or even regional markets”.

Moreover, in paragraphs 36 to 38 the Commission highlights the need to promote the international availability of films online, stating that “*Member States are recommended to promote the cross-border availability of European films and could for example, as a condition of the aid, encourage rights holders to release to third parties the online rights for those exploitations (including those territories) that they are otherwise unable to exploit*”.

In Italy, these two issues are strictly linked to each other as they both depend on the contract terms used by broadcasters to acquire rights relating to television productions.

¹⁴ See article 44, paragraph 3 of Legislative Decree n. 177/2005.

Indeed, the main free-tv broadcasters have consolidated, throughout the years, a policy of “total buy out” of all the categories of rights – not only the ones that they can directly exploit, but also those relating to transmission channels/platforms in which they do not operate, as well as those relating to foreign countries.

In practice, broadcasters become the exclusive holders of all rights relating to any transmission means/platforms (already invented or to be invented) and to any distribution channels, with no limits in time and number of uses¹⁵.

In addition, the rights acquired by such broadcasters remain, in a large majority of cases, wholly unexploited, as they do not use them directly, nor allow other operators, active on other platforms or abroad, to use them.

Needless to say, such practice of total buy out restricts the access to audiovisual content by online operators and by operators active in other Member States, thereby obstructing the expansion of online distribution – which in Italy is still largely undeveloped – and the circulation of television productions throughout the EU.

It is clear, then, that if Italian producers were allowed to retain their rights in the works they produce and to exploit them on the new television platforms and in other EU countries, they would be able to reduce their dependence from the main television broadcasters and grow significantly, investing new capital on innovative and technologically advanced programs and on productions addressed to a wider audience.

This would, in turn, lead to a more unified and less fragmented European audiovisual sector and to the creation of a large offer of content for online transmission, thereby fostering competition, innovation and growth in the audiovisual industry, to the benefit of consumers.

To this aim, we believe that it is extremely important that the Commission, in the future Communication, will stress the need to promote and support the availability of audiovisual productions online and the circulation of works throughout Member States.

¹⁵ This also means that Italian television producers cannot, in practice, have access to the MEDIA funds (in this respect, see “*MEDIA 2007 (2007-2013) - Support for television broadcasting of European Audiovisual Works. Permanent Guidelines 2012-2013*” which provide that “*The exploitation rights licensed to the broadcasters participating in the production have to revert to the producer after a maximum license period of : 7 years if the broadcaster's participation takes the form of a pre-sales; 10 years if the broadcaster's participation also takes the form of a co-production (...)*”).

This objective, however, should be achieved with extreme caution.

If in Italy the access to an (hypothetical) aid was to be made conditional upon the producer granting digital rights to online operators, virtually no television producer would be eligible for the aid.

This is why we believe that it is crucial that the Commission concentrates its efforts in promoting the establishment of fair contractual relationships between broadcasters and television producers.

Indeed, only by allowing producers to create their own library of rights, it will be possible to fight the fragmentation of the European audiovisual sector into national markets and to foster the development of online transmission of audiovisual content.

5. AIDS TO THE DISTRIBUTION OF AUDIOVISUAL PRODUCTIONS

In paragraph 14 of the Draft, the Commission states its intention to extend the scope of activities covered by the Communication to include all aspects from story concept to delivery to the audience. According to the Commission, *“Aid to production alone risks stimulating the supply of audiovisual content without ensuring that the resulting audiovisual work is properly distributed and promoted”* (paragraph 16 of the Draft).

Although we agree, in principle, with this initiative, we believe that the production industry represents the driving force of the whole sector and deserves to be given prior support.

Moreover, with specific reference to the aid to the distribution sector, it should be recalled that, in Italy, there is no real “distribution” of television production. As stated above, all rights relating to such audiovisual works are acquired by the main free-tv broadcasters, which generally only exploit them on the “traditional” transmission platforms and do not release to third parties the rights for exploitation on new media (such as the Internet).

The same can be said with reference to the rights for the transmission of the works abroad, which are generally acquired by the same broadcasters and remain, in a great majority of cases, wholly unexploited.

In this context, we believe that this matter should be treated with great care, so as to make sure that any aids to distribution are effectively used to foster the circulation of

audiovisual works and their transmission on new platforms and do not turn out to be aids to the broadcasting industry.

6. TERRITORIAL SPENDING OBLIGATIONS

Finally, we wish to express our concerns on the amendments that the Commission is planning to make with reference to the territorial spending obligations.

In this respect, we fear that to restrict the local spend obligations that may be imposed within the context of an aid measure would have very negative effects and ultimately result in a contraction of the support to the audiovisual sector.