

# SAA contribution to the Dutch proposal to amend Section 45d(2) of the Copyright Act

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## About the SAA

The [Society of Audiovisual Authors \(SAA\)](#) is the umbrella association of European collective management organisations (CMOs) representing audiovisual authors. Its 33 members in 25 countries manage rights for over 160,000 film, television and multimedia European screenwriters and directors. The SAA's main objectives are: 1) to support and strengthen the economic and moral rights of audiovisual authors; 2) to secure fair and proportional remuneration for audiovisual authors for every use of their works; 3) to develop, promote and advance the collective management of rights by member organisations.

## Statement

In line with the 2020 evaluation [report](#) of the Copyright Contract Law, that concluded that the current system of voluntary collective management for the on-demand exploitation of audiovisual works does not work, **the SAA supports the extension of the statutory remuneration right for audiovisual authors that already exists in the Dutch Copyright Act for broadcasting and retransmission, to the on-demand exploitation of audiovisual works, to be paid by video-on-demand services, with mandatory collective management.**

The SAA supports the amendment proposal made by the PAM organisations that, contrary to the consultation proposal, does not limit the extension to video-on-demand services paid by the public. The right to fair and proportional remuneration should apply to all video-on-demand services that generate income by any means, whether by direct payments by the public or by other sources of income like for example advertising.

In addition, following the German and recent Belgian laws implementing Article 17 of Directive 2019/790 on Copyright and related rights in the digital single market (Hereafter the DSM Directive), the SAA supports the PAM organisations' proposal that Dutch law should also provide for a statutory right to remuneration collectively managed for the exploitation of audiovisual works by online content-sharing service providers (OCSSPs).

The introduction in national law of statutory, non-transferable and unwaivable remuneration rights, collectively managed for both the making available online of audiovisual works and for the communication to the public of audiovisual works by OCSSPs is the best and only secure way to ensure that audiovisual authors receive royalties for all types of online exploitation of their works. The practise in other countries has shown that when the statutory remuneration right is regulated with mandatory collective management, CMOs guarantee the effective enforcement, collection and distribution of royalties<sup>1</sup>. CMOs' role is to value authors' activity and to distribute to them the money

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<sup>1</sup> For more information on the effective role of CMOs, see the European Commission's "[Report](#) on the application of Directive 2014/26/EU on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market".

they collect. CMOs have experience in negotiating with users, determining fair tariffs and distribution rules, monitoring the market, and managing complex databases.

## Comments

Including on-demand exploitation of audiovisual works in the remuneration mechanism provided for in Section 45d(2) of the Copyright Act would not only follow the market evolution that has today put on-demand uses of audiovisual works among the dominant consumers' practices, but it would also bring Dutch law in line with the EU countries that care the most for the development of their audiovisual industry.

## European best legislation: fair remuneration and economic growth

Legislation which effectively protects and remunerates audiovisual authors for the exploitation of their works stimulates the creation of original quality work that can compete on a globalised market. Legislation in several European countries demonstrates that, far from being an obstacle, the legal recognition of non-transferable and unwaivable remuneration rights to audiovisual authors, with collective management, helps attract and retain the best authors and supports industry growth.

### Spain

The Spanish copyright law (Article 90) provides authors with the right to receive remuneration for the exploitation of their works from the operators who exploit it, irrespective of the contract signed with the producer. This right is inalienable, unwaivable and exercised by CMOs, via collective agreements with all the operators who exploit audiovisual works. Article 90.4 of the Spanish copyright law was added in 2006 by Spanish Act 23/2006, implementing the EU 2001/29 Directive, to include the making available right. The statutory remuneration right currently in force covers all types of online exploitation (both on demand/interactive and linear streaming).

The combined collections for audiovisual authors in Spain by their CMOs - SGAE and DAMA- reached a total of 45 million euros in 2019, including 3,17 million euros for on-demand/online exploitation. Spain ranks 3<sup>rd</sup> in the world for audiovisual collections of CMOs, after France and Italy<sup>2</sup>.

### Italy

The Italian copyright law (Article 46bis) provides authors who transfer their broadcasting rights to a producer, with a right to equitable remuneration from broadcasters for any uses of their work which constitute a communication to the public. Article 46bis-2 provides that for all other uses of the audiovisual work, the authors have an unwaivable right to equitable remuneration for each act of exploitation to be paid by those who exercise the exploitation rights. The CMOs negotiate, collect, and distribute this remuneration.

The Italian CMO for audiovisual authors, SIAE, reported a total of 54,36 million euros of collections for audiovisual authors in 2019, including 3,93 million euros for on-demand/online uses. Italy ranks 2<sup>nd</sup> in the world as regards audiovisual collections after France<sup>3</sup>.

Moreover, it was reported that investments by large video streaming companies are steadily rising in Italy. Indicatively, in 2019 OTT platforms invested about 70 million euros in Italian series and film production (compared to 17 million euros in 2017), while in 2020 the estimated investments were of 90-100 million, 110-140 million in 2021, and 140-195 million in 2022.

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<sup>2</sup> CISAC/W&DW/SAA [case study on Spain audiovisual sector](#): fair remuneration and economic growth, April 2021.

<sup>3</sup> CISAC/W&DW/SAA [case study on the Italian audiovisual sector](#): fair remuneration and economic growth, September 2021.

## Poland

The Polish copyright law (Article 70) provides co-authors of an audiovisual work with a right to proportionate and equitable remuneration for the exploitation of their works in cinemas, on television and for rental. This remuneration must be negotiated, agreed, and paid by the exploiters via a CMO.

In 2020, ZAPA, the CMO that represents audiovisual authors, collected 38,6 million euros in total<sup>4</sup>.

The recent Polish draft implementation law of the DSM Directive proposes to also provide for a statutory and unwaivable right to remuneration for the making available of audiovisual works to the public with mandatory collective management.

The national legislator most probably reflected on the recent developments as the VOD market in Poland is growing in a very fast pace. Over the last 5 years, the number of users of these services doubled (from 4.86 million to 10.12 million) in both subscription and transaction models. Moreover, the value of the paid VOD services market in Poland increased two and a half times over the last 5 years. In 2019, revenues from paid VOD services exceeded 238 million euros for the first time and already accounted for around 10% of the value of the entire pay TV market. During the social isolation in 2020, Netflix alone gained a record number of 5.68 million users and 92.89 million views. In March 2022, Netflix announced that it will open a brand-new office in Warsaw that will serve as a central hub for the streaming giant's Central and Eastern European Productions.<sup>5</sup>

## Belgium

The recently adopted law implementing the DSM Directive in Belgium provides for a non-transferable and unwaivable right to remuneration for authors for the communication to the public and making available of their works by an information society service provider, with mandatory collective management. A similar provision covers the communication to the public by an online content-sharing service provider to cover uses under Article 17 DSM Directive.

These provisions constitute efficient remuneration mechanisms that translate the principle of appropriate and proportionate remuneration of Article 18 DSM Directive into actual royalties. Considering the rapid market developments with the booming of on-demand platforms, Belgium modified its previous set system of voluntary collective management agreements for on-demand exploitation into a mandatorily collectively managed system, ensuring the best possible remuneration of authors for the on-demand/online exploitation of their works.

## National treatment

### EU authors

The SAA does not see any reason to try to exclude the EU audiovisual authors from the benefit of the Dutch remuneration mechanism if their works are offered to the public in the Netherlands via VOD services. EU audiovisual authors already benefit from the Dutch statutory remuneration mechanism for broadcasting and retransmission; the national treatment required by EU law should therefore also apply to VOD exploitation.

National treatment also applies in the other EU countries that provide such remuneration mechanisms.

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<sup>4</sup> CISAC/W&DW/SAA/ZAPA [case study on Poland's audiovisual sector](#): fair remuneration and economic growth, May 2022.

<sup>5</sup> Ibid.

## Non-EU authors

For non-EU authors, there are ways to limit the application of national treatment.

One way is already provided in the Dutch law and is customary in several other European legislation (Italy, Belgium): this is the condition that the remuneration mechanism only applies to authors who have transferred their exclusive rights to a producer. This drafting excludes from the benefit of the remuneration right the makers who, unfortunately in some countries, are not recognised as authors of the audiovisual work. This condition aims at avoiding that remuneration organised for the authors ends up in other rightholders' pocket, like in the US where producers are the only holders of the copyright on an audiovisual work.

This condition seems sufficient as far as the US are concerned: the Dutch authors' CMOs in charge of the remuneration mechanism for broadcasting and retransmission have not received any claim from US makers or producers. In addition, it is important to note that thanks to the collective bargaining agreements that US screenwriters and directors conclude with producers' organisations, they already receive residuals for the exploitation of their works outside the US, including for on-demand exploitation.

Another approach would be to request reciprocity like in the Swiss law which also introduced in 2020 an unwaivable and inalienable right to remuneration for the authors, collectively managed, for the making available of their audiovisual works (Article 13a): "The author of an audiovisual work produced by a person who does not have his residence or office registered in Switzerland shall only be entitled to receive a remuneration if the country of production also provides a collectively managed right to remuneration to the author for the making available of the audiovisual work".

It is important to note that such a reciprocity condition could not apply to EU authors.

## Conclusion

If the Dutch legislator is serious about the principle that audiovisual authors should receive fair and proportional remuneration for the exploitation of their works, there is no reason to continue excluding on-demand services from the existing remuneration mechanism in place for broadcasting and retransmission, at a time when this mode of exploitation has become dominant in consumers' practices.

As proven by other European legislation, such a remuneration mechanism applied to on-demand services has proven to be efficient, cost-effective and having positive effect not only on the authors' living, but also on the industry growth. The SAA would welcome that the Netherlands join the most advanced European countries and regulate this field in an efficient way.