

STUDY CONCERNING MULTI-TERRITORY LICENSING FOR THE ONLINE DISTRIBUTION OF AUDIOVISUAL WORKS IN THE EU

STAKEHOLDER WORKSHOP
BRUSSELS, 2 JUNE 2010

AGENDA

- **Part one (9.00 - 10.45)**
 - Introduction
 - The specificity of audiovisual economics
 - Economic assessment of digital trade of audiovisual works in the EU
 - Open questions and discussion
- **Part two (10.45 - 12.30)**
 - Towards a European digital single market - the legal environment
 - Open questions and discussion
 - Conclusions and policy recommendations
 - Open questions and discussion

OBJECTIVES OF THE ASSIGNMENT

- Legal analysis in relation to cross-border licensing for the online distribution of audiovisual rights in the EU
- Description of online distribution market and economic analysis
- What are the challenges in relation to establishing multi-territory business models?
- What would be the economic and cultural consequences of multi-territorial licensing?
- Policy options to foster the single market for EU works

DEFINITIONS AND FOCUS

- Video on Demand (VOD):
 - VOD is considered as a non-linear dematerialised residential or portable audiovisual content version. This includes all digital linear systems coupled with digital video recorders.
- Multi-territory licensing:
 - The licensing of intellectual property rights for a content version that covers more than one jurisdictional territory at a time.

RECENT MARKET DEVELOPMENTS

- Hollywood is now serious about VOD (Warner to exploit 6000 titles...)
- ComCast bought NBC Universal
- Youtube: 2 bn streams/ day – film service launched
- More than 650 VOD services online (EAO)
- EU broadband penetration expected to rise to 75% by 2013
- 8% of flatscreen TVs are internet enabled - Google launched Google TV
- 70% of 18 – 34 year olds have watched TV on the web
- DVD sales dropped by 13% in 2009
- Illegal downloading = costs EU CIs € 10 bn & 185 000 jobs

WHY DOES THIS MATTER TO THE EUROPEAN UNION?

- Economic, social, cultural and democratic relevance of AV
- 5.8 mio jobs & € 654 bn turnover in EU creative industries
- MEDIA Programme will have spent € 755 mio to promote the circulation of EU works (2007 – 2013)
- Cross-border circulation remains modest
- Can digital technology unleash the potential of the sector?
- EC's Digital Agenda and DG INFSO/ DG MARKT Document on Content Online in a European Digital Single Market

THE ECONOMICS OF AUDIOVISUAL MEDIA

OLIVIER BOMSEL
ParisTech CHAIR OF MEDIA AND BRAND ECONOMICS

ABOUT MEDIA ECONOMICS

- Media are issued to provide a meaning, to make sense
 - For the consumer, getting sense is an experience
 - The value of meaning is subjective: it depends on the consumer, on his own references, his cultural trends, his very mood...
 - Meaning and its value are known only after consumption
- Each media product has to create a new market:
 - with maximal adverse selection
 - and capital intensive signalling
- Signalling depends on brands : who talks, who prescribes, who recommends matters...

MEDIA DISTRIBUTION RULES

- Nobody can predict the potential market for media
- Media are priced to capture the total utility of the consumer
 - Because this utility is unknown, consumers' preferences should be discriminated: versioning, bundled offers, two-sided markets...
- Media distribution relies on signalling and discrimination
 - The signalling investment and the discrimination scheme depend on cultural patterns and on the specific regulations of each market
- With 23 linguistic markets, Europe faces heavy discrimination costs:
 - each linguistic market carries its own risk
 - it needs to be addressed according to its cultural profile
 - it requires its own set of investments

MEDIA DISTRIBUTION ECONOMICS

- Efficient discrimination maximises rights holders' revenues
- Strong economies of scale and scope in one linguistic market:
 - in marketing several versions: mutualisation of marketing investment, fine tuning of discrimination
 - in bundling several products under one publishing brand: a theatre network, a media studio, a TV channel, a multimedia platform...
- No economies of scale in distributing the same content in various territories:
 - replication of the signalling investment
 - addition of the commercial risks
 - small value of the single content brand

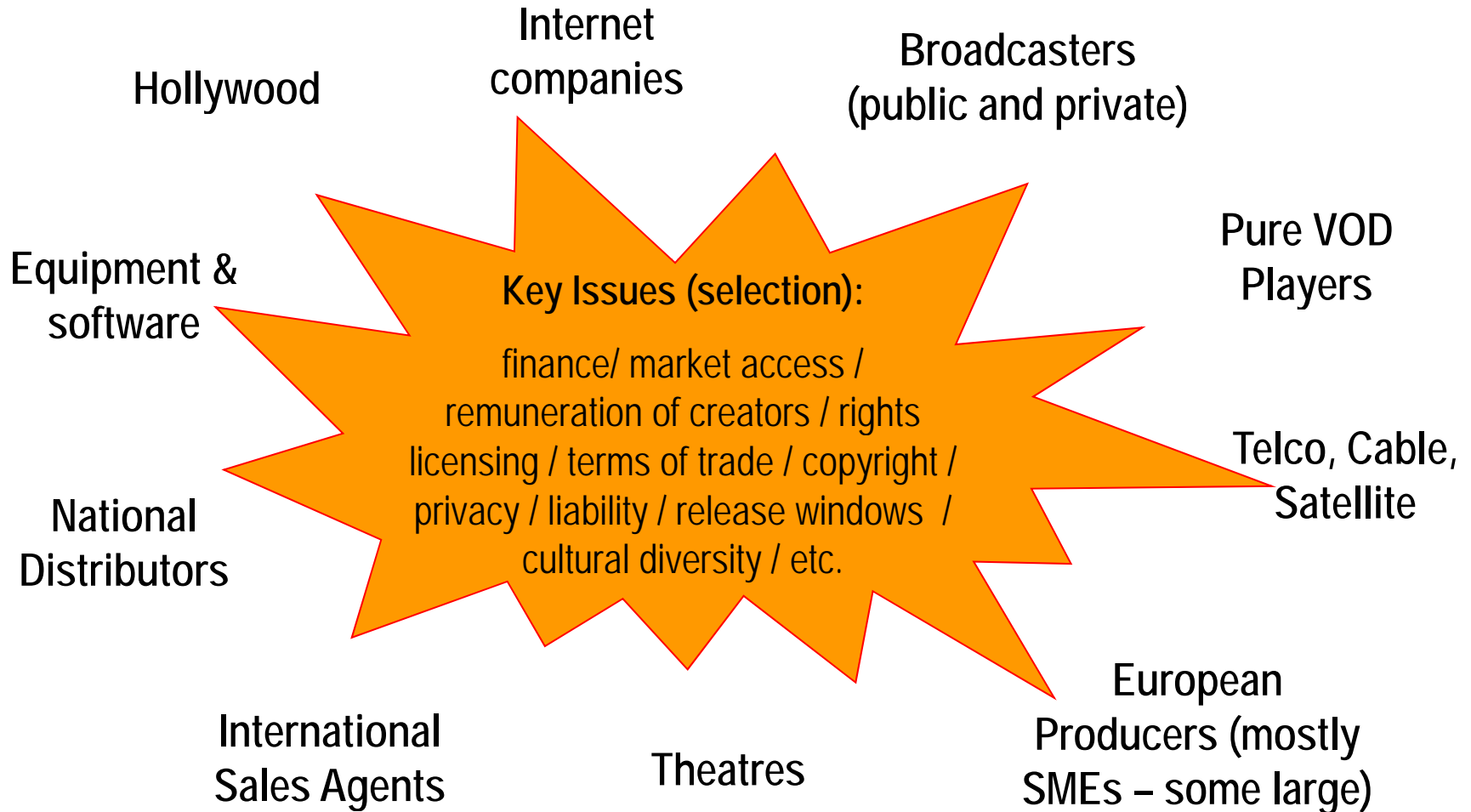
THE IMPACT OF DIGITAL TECHNOLOGY ON THE DISTRIBUTION OF AUDIOVISUAL WORKS IN THE EU

JAN RUNGE
KEA EUROPEAN AFFAIRS

IMPACTS ON CONSUMER BEHAVIOUR

- Increasingly flexible consumption patterns
 - Time and place shifting
 - Growing importance of search, selection & recommendation
 - Social networking and audience engagement
- Opportunity to promote EU works to new audiences (nat./ intl.)
- Marketing and promotion are vital to the industry

COMPETITIVE INTERESTS IN RELATION TO VOD



RELEASE WINDOWS

- Windows are transforming: VOD is moving to four month after theatrical release
- 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 want to maximise overall revenues and fear losses due to online copyright infringements
- Some new entrants argue that in order to fight unauthorised downloading windows should disappear

OPPORTUNITIES AND CHALLENGES

Opportunities

- Distribution costs decrease
- Redundancy of “shelf space scarcity” (market access)
- Original rights holders could increase their profit share in the long term
- Digital communications and social media can be used to develop new audiences

Challenges

- Complicated licensing processes may put rights holders at disadvantage
- Identification of rights holders
- Few revenue sources result in caution to invest and experiment
- Lack of digital marketing strategies
- Unauthorised downloading

EVOLVING LICENSING PRACTICES

- Territorial licensing prevails but international licensing may be requested by some – if few – VOD platforms in the future.
- Rights for VOD are primarily sold on a non-exclusive basis
- Short licensing terms (2-3 years)
- Platforms and rights holders want to benefit from more efficient audiovisual rights licensing practices and one stop shops
- Individual as well as collective solutions to facilitate easier rights identification and acquisition emerge

OBSERVATIONS

- Sector is in a phase of rapid transition – the outcome is unclear
- VOD puts into question traditional revenue sources
- The industry is adapting its commercial practices

ECONOMIC ASSESSMENT OF DIGITAL TRADE OF AUDIOVISUAL WORKS IN THE EU

HERITIANA RANAIVOSON
CERNA

CONTENT

- **Aim:** building a comprehensive and quantified view of the EU VOD market and of the circulation of AV works in the EU
- How is digital trade of AV content in the EU structured? How will it evolve in the next 5 to 10 years? What would the impact of international licensing be?
- **3 Aspects:**
 - The supply and demand sides of the EU VOD market
 - The off and online circulation of AV works in the EU
 - Outlook on the EU VOD market in the next 5 to 10 years

THE SUPPLY AND DEMAND SIDES OF THE EU VOD MARKET - SUMMARY

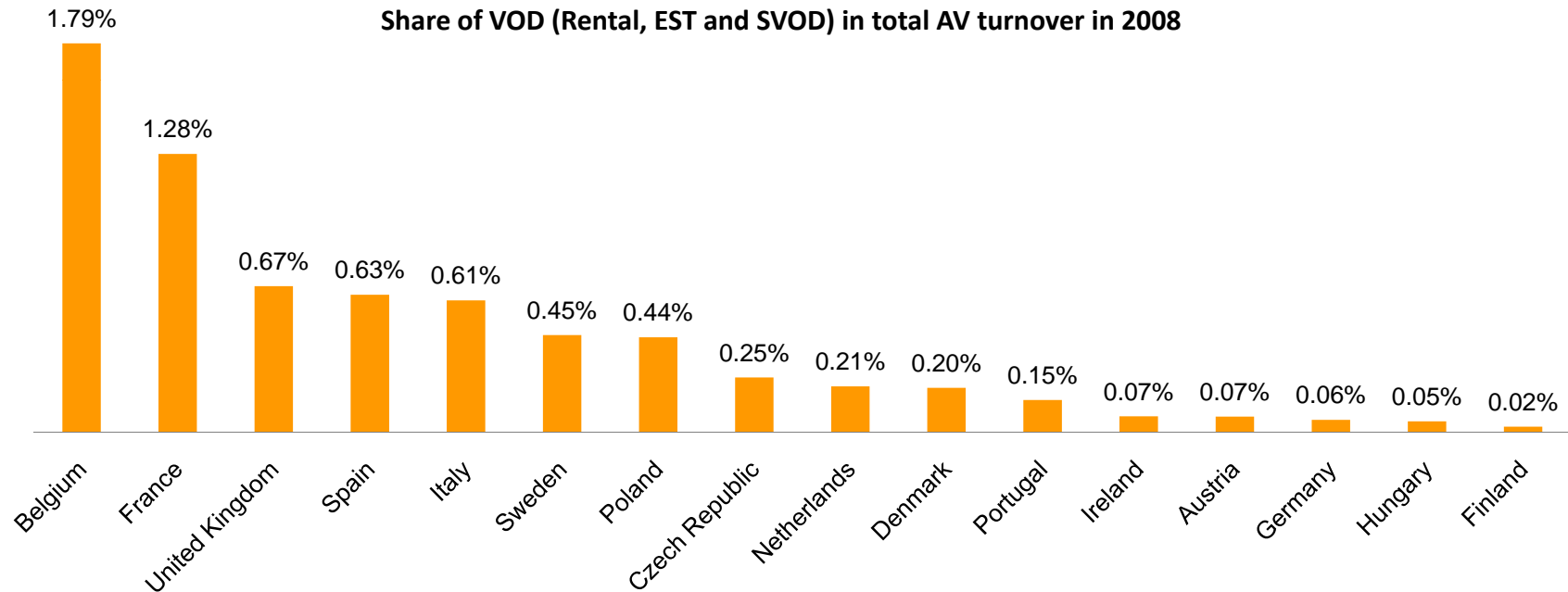
- Disparities among national VOD markets due to:
 - AV markets still organised at national/linguistic level
 - An uneven level of digital equipment across the EU
- Common trends include:
 - An increase in the number of VOD services and VOD service providers
 - VOD revenues have increased sharply but remain marginal

THE VOD SUPPLY SIDE

- A large increase in the number of VOD services and VOD service providers
- More and more titles made available through VOD
- Larger entrance on the Internet
- National VOD markets differ due to:
 - Socio-economic features (e.g. income per capita)
 - Nature of VOD service providers that are dominant/ the most numerous in the market

THE VOD DEMAND SIDE

- VOD revenues have increased sharply (from € 27m in 2003 to € 544m in 2008) but VOD revenues remain marginal



Sources: Screen Digest, EAO

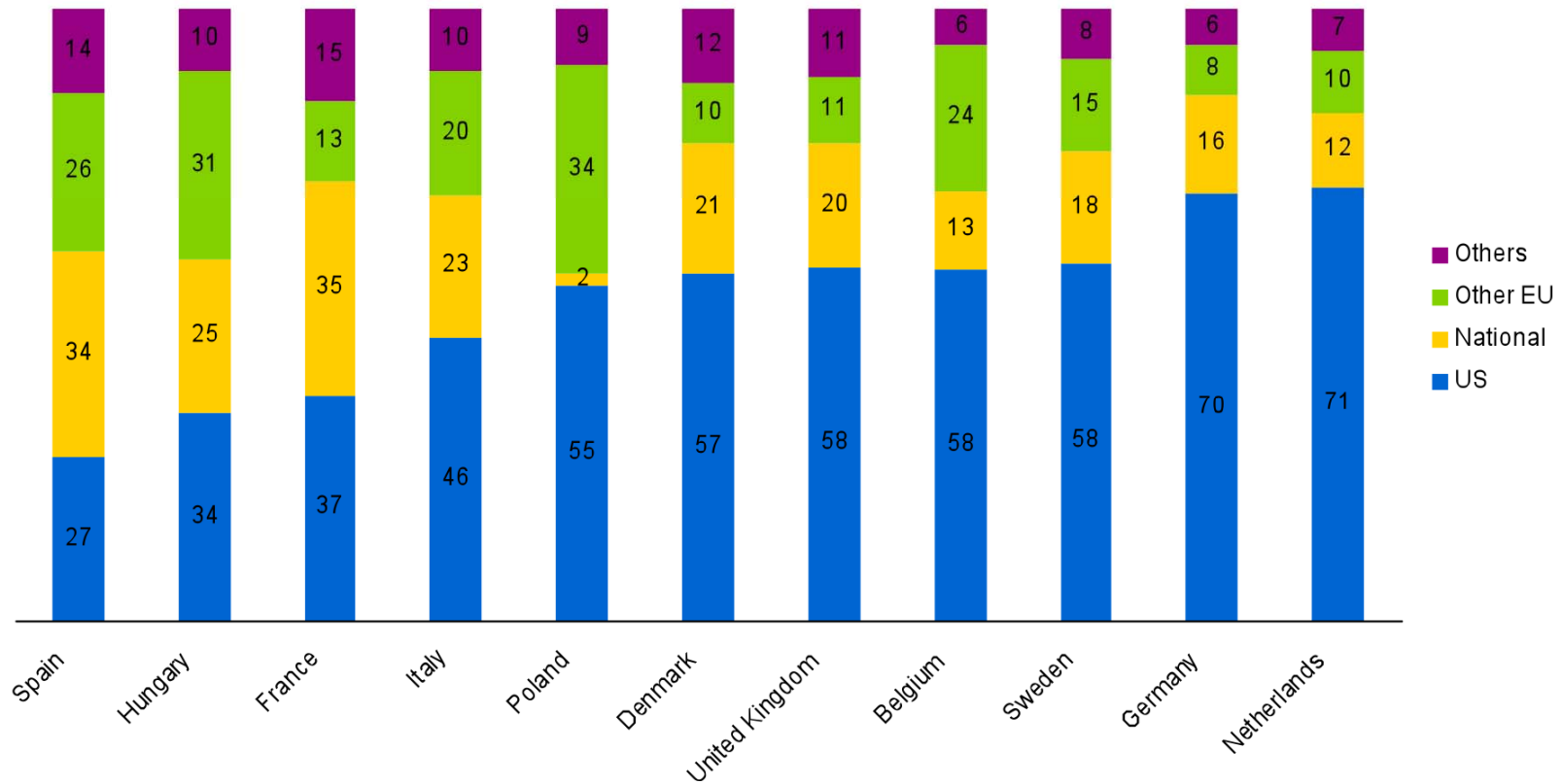
→ EU VOD markets are still in their infancy

THE OFFLINE AND ONLINE CIRCULATION OF AV WORKS IN THE EU (SUMMARY)

- Disparities among EU countries in terms of availability and consumption of AV works by origin
- Main findings:
 - VOD has not improved circulation of EU AV works yet
 - Importance of local distribution in the success of a film

VOD HAS NOT YET IMPROVED AVAILABILITY OF EU AV WORKS

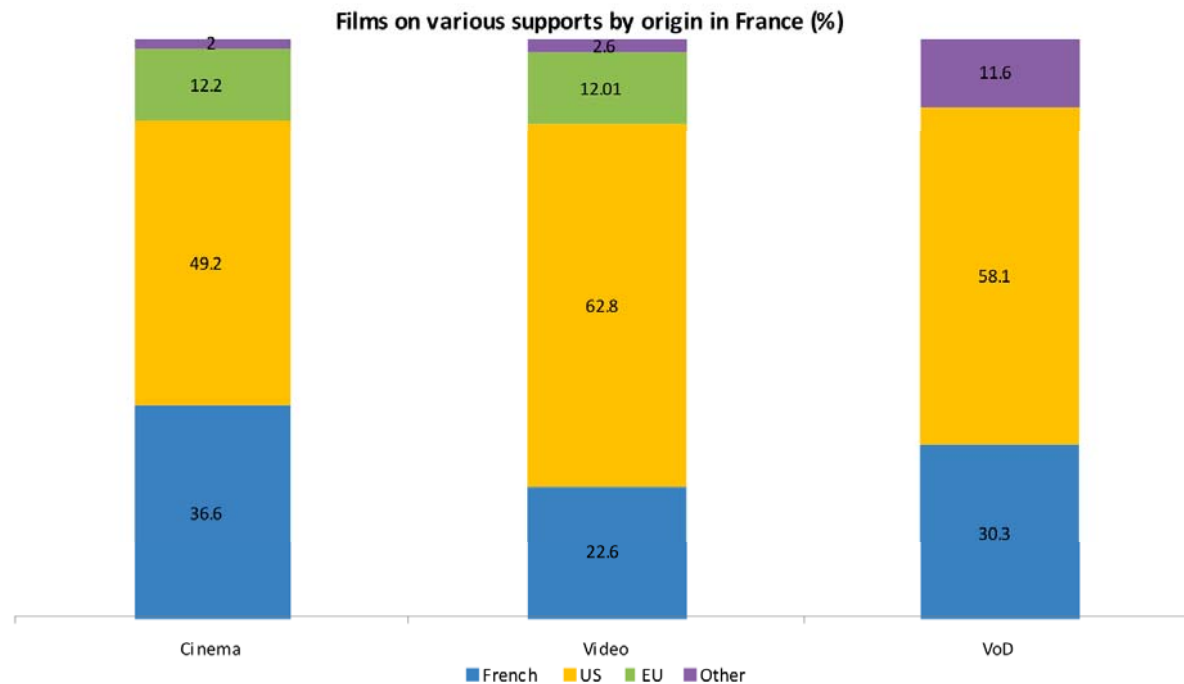
Origin of content available on VOD in 2008 (%)



Source: NPA

VOD HAS NOT YET IMPROVED CONSUMPTION OF EU AV WORKS

- UK films represented in 2007-2008 a lower share of total gross value than on almost any other AV version market
- In France VOD does not lead to a more diverse consumption than theatres



Source: CNC

IMPORTANCE OF LOCAL DISTRIBUTION IN THE SUCCESS OF A FILM

- A significant amount of literature on the role of marketing expenditures in the success of a film (e.g. Elliott and Simmons, 2008)
- Confirmed by data on a sample of films
- Can international licensing threaten local distributors? (e.g. established local distributors might not be able to afford international licences despite their ability to best promote a title in a given territory)

OUTLOOK ON THE EU VOD MARKET IN THE NEXT 5 TO 10 YEARS

- Methodological Issues:

Impact of:

- Different paces of development of macro-economic and communication facilities
- International licensing / territorial licensing

Impact on:

- VOD consumption
- VOD market structure
- Circulation of AV content on VOD services

- EU VOD markets in their infancy stage → all the harder to make predictions

THE INCREASE OF VOD TURNOVER

- Sharp increase of VOD turnover in all EU VOD markets with differentiated paces according to country
- Positive impact of the pace of development of macro-economic and communication facilities
- No direct significant impact of international licensing (few economies of scale in distributing in several territories)

THE VOD MARKET STRUCTURE

- Increase in the number of VOD services available in every national market
- Broadcasters have strong assets in competition (bundling with other AV rights & publishing brand)
- Rapid development of macro-economic and communication facilities would lead to:
 - Even higher increase in the number of VOD services
 - Stronger competitive pressure on the AV market
 - Telecom operators more incited to offer VOD services to get new clients

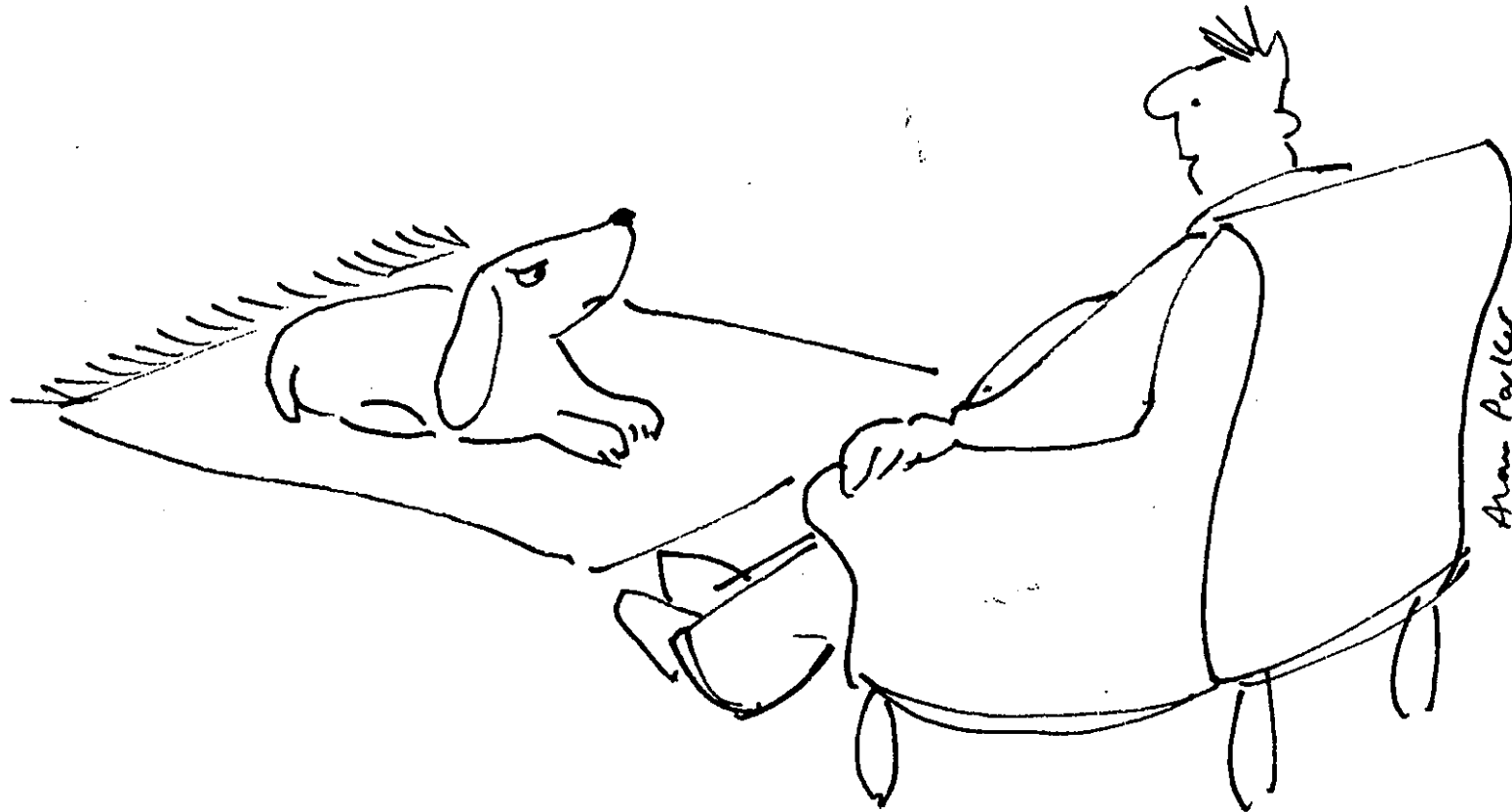
CONCLUSION: THE MAIN CONSEQUENCES OF INTERNATIONAL LICENSING

- Even higher increase in the number of VOD services available in every national market
- Greater concentration of VOD service providers at the EU level
- Some AV contents and content producers would profit from international licensing and increased circulation. However they may lose out on the broadcasting side
- International licensing would favour availability of European AV works... but which impact on consumption? Issue of signalling costs

OPEN QUESTIONS AND DISCUSSION

TOWARDS A EUROPEAN DIGITAL SINGLE MARKET - THE LEGAL ENVIRONMENT

PHILIPPE KERN
KEA EUROPEAN AFFAIRS



*“O.K. I’ll go over it one more time.
The Berne convention: in Europe the director is God.
In the States the director is garbage, a coal miner working a shift....”*

INTRODUCTION

- Task: Copyright a bottleneck to VOD exploitation?
How can EU regulators stimulate trans-national distribution of audiovisual content?
- Context: A European Digital Agenda for Europe (May 2010)
European Agenda for Culture (May 2007), MEDIA
Reflection Document (October 2009)

METHODOLOGY

- Review of the acquis (jurisprudence, secondary legislation)
- National legal survey
- Recent EC decisions (Cisac – IFPI – iTunes)
- Licensing practices and the digital shift
(360° review: publishing – music – audiovisual)

JUSTIFICATIONS AND LEGAL BASIS FOR EU INTERVENTIONS IN THE AUDIOVISUAL SECTOR

- Promoting the internal market (Art 114 TFEU)
- Implementing competition rules (Art 101 & 102)
- Promoting cultural diversity and supporting cultural industries (Art 167 (4))
- Safeguarding consumers' interests (Art 169)
- Implementing international treaty obligations (Wipo – WTO – UNESCO)

THE “COMMUNITY ACQUIS” IN RELATION TO CROSS-BORDER LICENSING

- Principles governing copyright standards and licensing practices in the EU
 - Contractual freedom
 - Exclusivity
 - Territoriality
 - Copyright enforcement

ACTIONS TAKEN TO MITIGATE THE IMPACT OF IP TERRITORIALITY

- The Country of origin principle
(AVMSD – SATCAB – Services Directive)
- Mandatory collective licensing
- The exhaustion principle
(Coditel – Art 3(3) Infosoc Directive)
- EC Competition rules
(Articles 101 & 102 TFEU)

RECENT EC DECISIONS

- Context (→ music related)
- Main indications:
 - Facilitate rights acquisitions (Cisac/ IFPI)
(from domestic to international one stop shop)
 - Collaboration vs. competition in rights management
(advantage of film over music as regards rights exploitation)
 - Partitioning of the market (Apple/ iTunes)

LEGAL OBSTACLES TO CROSS BORDER LICENSING

- National disparities in copyright enforcement
(Enforcement Directive – eCommerce Directive – illegal file sharing – consumer protection – authors' rights – orphan works – transparency & governance of rights management bodies)
- A discriminatory VAT regime
- National regulatory interventions (little coordination)
(ratings – windows – financial aid)

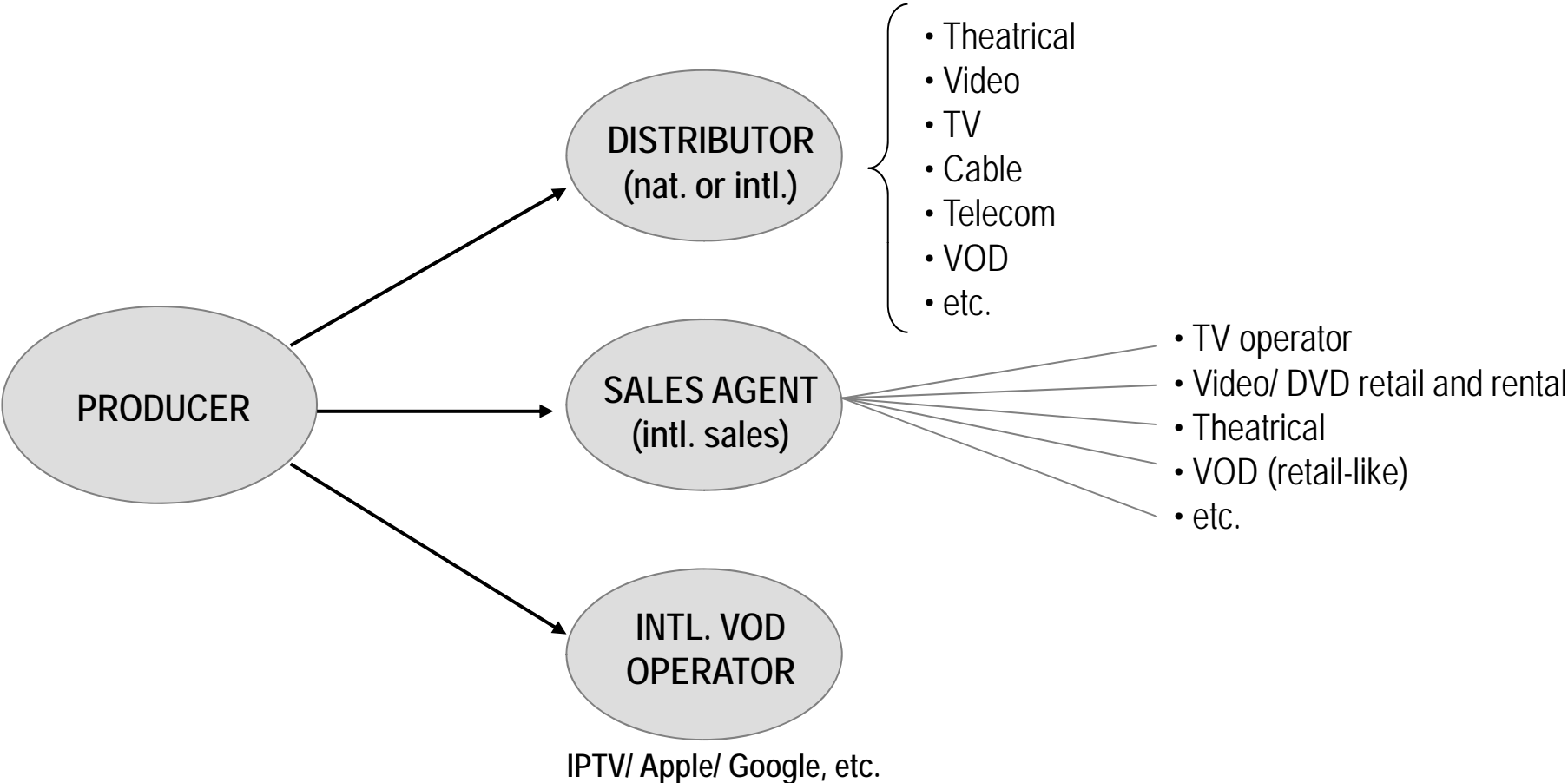
CONCLUSIONS

- Harmonisation efforts have had little impact on the structure of the sector and on pan-European licensing
- Would further interventions change the state of play?
- Copyright is not a bottleneck – its exercise can be
- The key issue is to enhance licensing efficiency whilst at the same time respecting pillars of international copyright (contractual freedom, exclusivity & territoriality)

PROPOSED LEGAL “SOLUTIONS” TO FACILITATING CROSS BORDER LICENSING

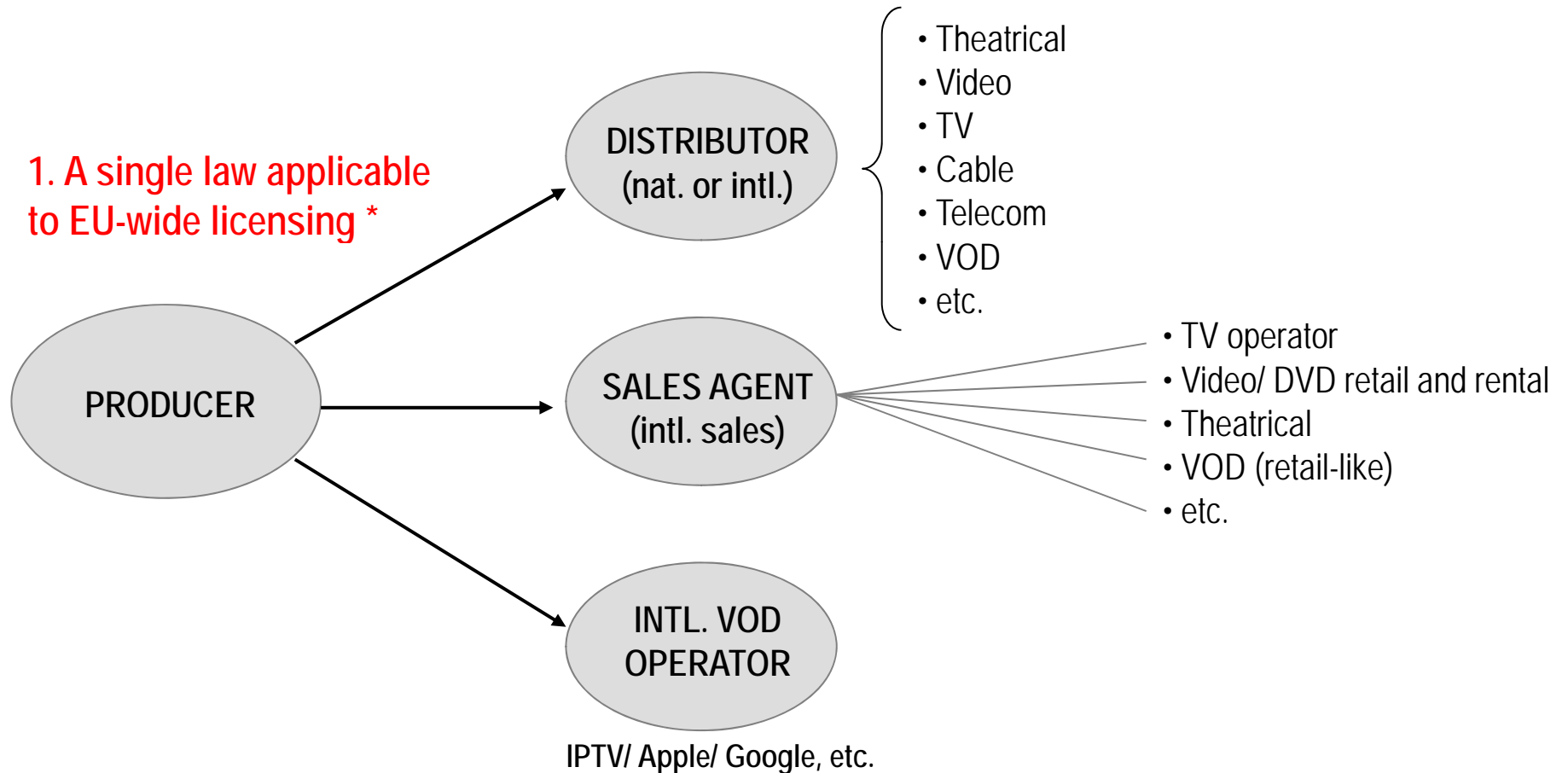
- Extend the country of origin principle to broadcasting and non linear broadcast like services (applicable law)
- Extend the system of mandatory collective licensing to any form of simultaneous and unabridged retransmission (like for cable retransmission)
- A voluntary multi-territory licence for online distribution bundling some or all countries for which no distribution agreement exist

AV RIGHTS FLOW FOR LINEAR AND NON-LINEAR SERVICES (SIMPLIFIED)



AV RIGHTS FLOW FOR LINEAR AND NON-LINEAR SERVICES

EBU PROPOSAL – (SIMPLIFIED)



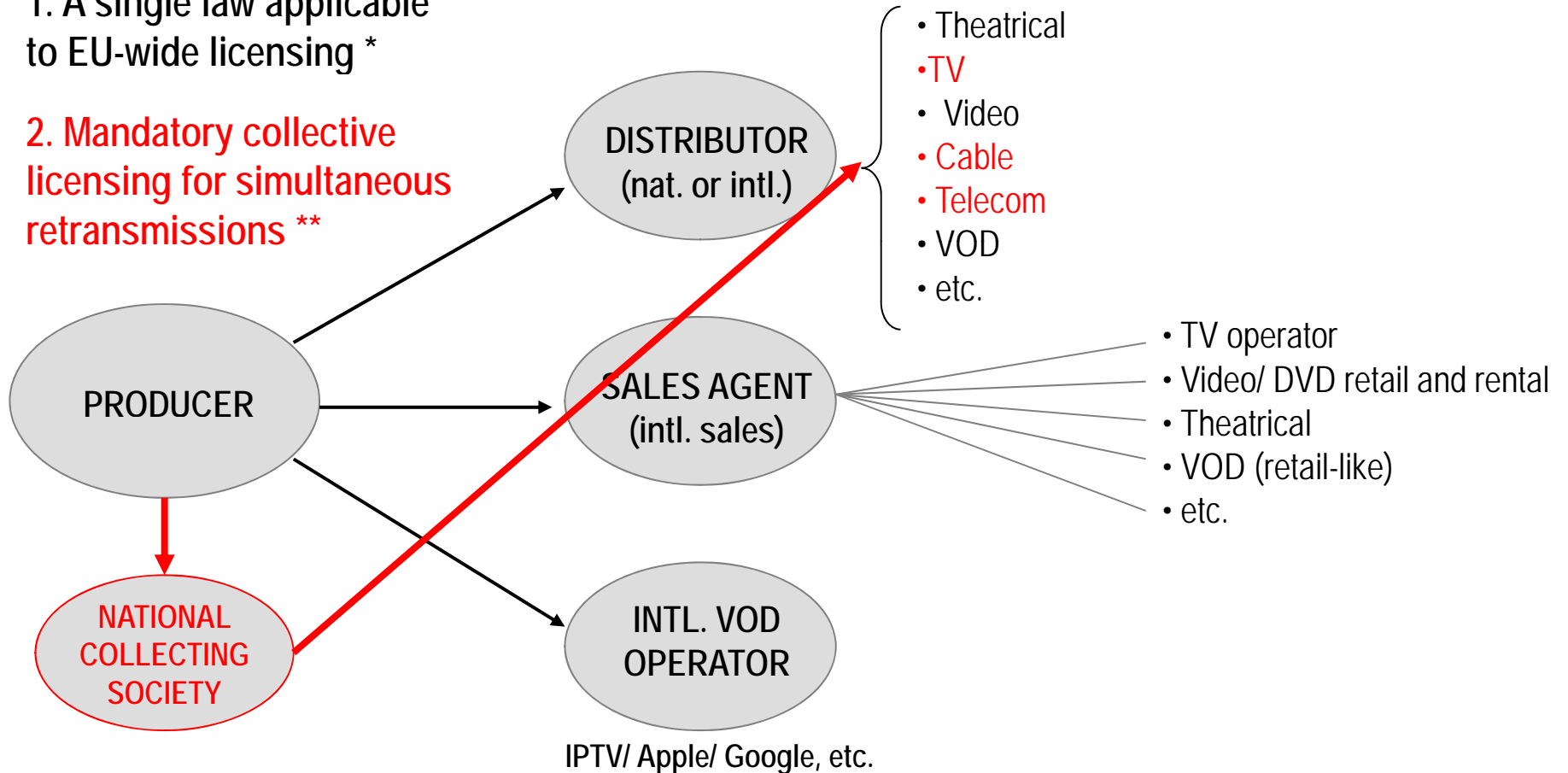
* Excludes premium content such as sports and film. Facilitates international licensing of a national programme service (contractual freedom)

AV RIGHTS FLOW FOR LINEAR AND NON-LINEAR SERVICES

EBU PROPOSAL (SIMPLIFIED)

1. A single law applicable to EU-wide licensing *

2. Mandatory collective licensing for simultaneous retransmissions **



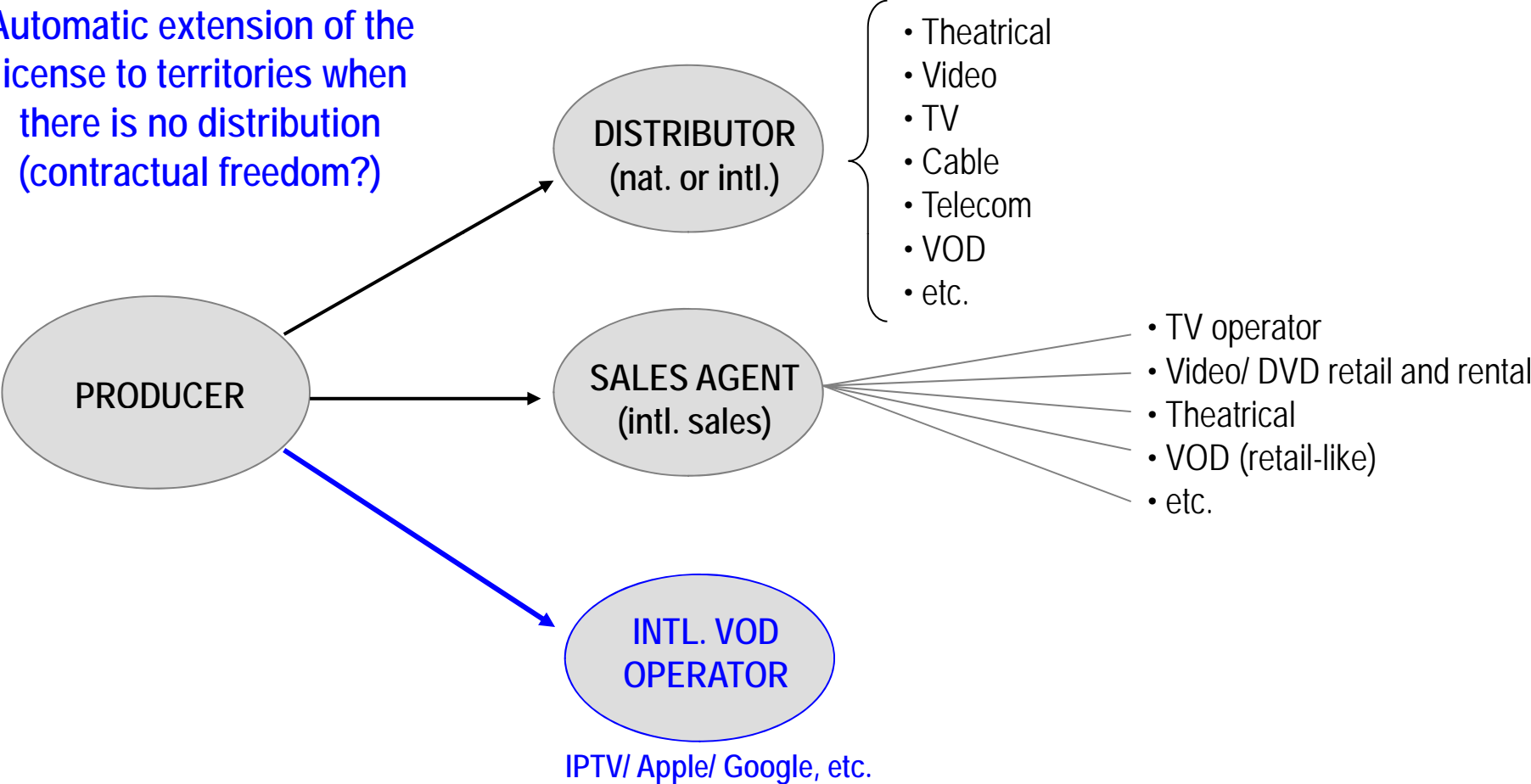
* Excludes premium content such as sports and film. Facilitates international licensing of a national programme service (contractual freedom)

** in relation to non-linear broadcast-like services

AV RIGHTS FLOW FOR LINEAR AND NON-LINEAR SERVICES

SECONDARY LICENSE (SIMPLIFIED)

Automatic extension of the license to territories when there is no distribution (contractual freedom?)



OPEN QUESTIONS AND DISCUSSION

CONCLUSIONS AND POLICY RECOMMENDATIONS

JAN RUNGE

FINDINGS (I)

- Specificities of audiovisual industries: media are experience goods – versioning, price discrimination and marketing are vital for the industry and benefit the consumer
- VOD market share is growing but marginal compared to other version markets. Circulation of EU works remains comparably low (also on VOD)
- To turn VOD into an opportunity for European AV companies the EU should support them to create market demand and implement their digital strategies
- Copyright is not a bottleneck to the development of the single market – the real issue is facilitating copyright licensing

FINDINGS (II)

- Rights holders are today free to license on an international as well as on a territorial basis – the latter prevails due to market demand
- Both commercial users and original rights holders express the need to streamline licensing practices
- There is a need to decrease transaction costs in rights licensing
- Other issues prevent the single market to prosper:
 - Divergent copyright enforcement across Europe
 - Copyright management societies need to scale up their efforts in relation to governance and transparency
 - Further varying regulations and policies in Member States create uncertainty

POLICY OBJECTIVES

1. Ease licensing processes across borders and decrease transaction costs
2. Encourage investments into culture, creation, innovation and the European creative industries
3. Review EU support programmes to the benefit of VOD and with a view to strengthen the entire audiovisual industry
4. Develop the capacity of EU rights holders to exploit new digital markets on non-discriminatory terms and promote access of content on digital platforms
5. Coordinate national regulations and policies to enable stakeholders to exploit works internationally

BASELINE RECOMMENDATIONS

1. Ease licensing processes and decrease transaction costs

- Promote a pan-European licensing infrastructure, common metadata standards, archive digitisation & rights aggregation
- Support establishment of international rights registries or back office functions

(through MEDIA, FP7/8, Europeana and the CIP – see rec. 4)

- Enable rights holders to establish collective initiatives to provide one stop shop licensing to operators and scale up their negotiation power on a voluntary basis

BASELINE RECOMMENDATIONS

1. ...Ease licensing processes and decrease transaction costs
 - Improve transparency and governance of collecting societies
 - Reduce VAT rates for VOD transactions
 - Impact assessment concerning the application of Country of Origin coupled with Mandatory Collective Licensing in relation to the simultaneous and unabridged online distribution of TV programmes

BASELINE RECOMMENDATIONS

2. Encourage investments into culture, creation, innovation...

- More effective copyright enforcement
 - Harmonise criminal sanctions in relation to copyright infringements
 - Lead on EU-wide dialogue regarding the appropriateness of graduated response or other mechanisms
 - Enable authors to collect remuneration for foreign exploitation
- Promote IP rights literacy as part of the EC's digital skills initiatives

BASELINE RECOMMENDATIONS (CONTINUED)

3. EU support: create demand, technology expertise, collaboration
 - Branding & signalling: Selected EU films should receive promotional support to encourage their international VOD release
 - Support digital marketing strategy
 - Support dubbing and subtitling to enable digital works to travel across borders
 - Encourage subtitling databases & rights registries
 - Foster collective initiatives of rights holders

BASELINE RECOMMENDATIONS (CONTINUED)

3. ...EU support: create demand, technology expertise, collaboration
 - Support collaboration between national VOD projects
 - Enhance synergies btw. MEDIA, CIP ICT PSP (Digital Libraries), FP7/8, Europeana and other VOD-relevant EU initiatives
 - Promotion of technical standards (encoding, delivery, metadata) to facilitate interoperability
 - Support rights holders to access EC research & innovation programmes
 - Training programmes that aim to develop the strategic capacities in relation to VOD

BASELINE RECOMMENDATIONS (CONTINUED)

4. **Develop capacity of EU rights holders to exploit new markets**
 - Promote schemes that allow rights holders to experiment with VOD and flexible VOD releases
 - Champion terms of trade btw. commissioning broadcasters and production companies that promote VOD exploitation

BASELINE RECOMMENDATIONS (CONTINUED)

5. Coordinate national regulations and policies...

- Promote common standards and better interplay btw. rating systems
- Encourage national & regional AV policy makers and public funds to support cross border VOD initiatives
- Support projects and policies that deal with orphan works
- Monitor the implementation of “promotion of European works online” provision of AVMS Directive (Art. 13)

NEXT STEPS

- Considerations of outcomes of workshop
- Preparation of final study report until end of June

Thank You

Contact

KEA European Affairs

51, rue du Trône

1050 Brussels

+ 32 2289 2600

jrunge@keanet.eu