



Regulation of Online Media Service Providers

Australian Writers' Guild
Australian Directors' Guild
Australian Writers' Guild Authorship Collecting Society

February 2023

1. First Nations First

A new legal framework for First Nations Traditional Owners' "cultural assets" – Screen and Stage Working Group, to be dealt with via copyright reform.

(a) The Productivity Commission Report

The **AWG** strongly supports the Productivity Commission's findings in the [Report on Aboriginal and Torres Strait Islander visual arts and crafts](#) (the Productivity Commission Report). We support the legal recognition and protection of "cultural assets" and "traditional cultural expressions" owned by First Nations Traditional Owners, and that ownership of these cultural assets should be inalienable. We join calls from other industry stakeholders that the future legislation should extend beyond arts and crafts, and include other categories of cultural assets such as oral storytelling and song.

We agree with the authors of the Productivity Commission Report that establishing this new framework to recognise First Nations cultural assets should be implemented as soon as practicable and that task of conducting further analysis and consultation "should not hold up efforts to put the legislation into practice."

(b) The National Cultural Policy

We note that Government has already committed to the introduction of this new legislation in the National Cultural Policy. The National Cultural Policy recognises the crucial place of First Nations stories at the centre of Australia's arts and culture.

This is also a recognition that existing Australian copyright law system falls short in adequately recognising First Nations Traditional Owners as the rightful owners of traditional cultural knowledge and stories.

We want to see First Nations story holders and knowledge bearers retain control over the way their stories are depicted on screen and stage and are fairly compensated when those stories are adapted and re-told. Whenever First Nations stories are told on Australian stages and screens, we want First Nations creatives to be front and centre in that project's development and production, and for First Nations people to benefit from the ongoing exploitation of their work.

Currently, we have a situation where an international movie studio or streaming platform can potentially own the copyright in a First Nations story by virtue of being first to record it in written or digital form. They would have no legal obligations to fairly compensate the Traditional Owners of that story, tell it in a culturally appropriate way, contribute back to the songline, or ensure appropriate broadcast and use.

We agree with all the stakeholders that have already articulated why the need for a new legal framework is so urgent – and why it is essential for the scope of that framework to extend beyond arts and crafts.

(c) Next steps

We are concerned both with the unauthorised use of First Nations cultural assets in general, but also the adaptation of those cultural assets for stage and screen, productions viewed by mass audiences, all across the world.

We believe that the best way to assist Government in implementing the new legislative framework proposed in the Productivity Commission Report and the National Cultural Policy would be to form a working group of relevant experts, including First Nations creatives in the screen and stage sector, whose representatives are supported by a relevant industry organisation, to consider the translation of 'cultural assets' into stage and screen contracts and performed/cinematographic works. This working group should also include representation from the collecting agencies, where relevant.

2. 25% reinvestment obligation

Online media service providers must **invest 25% of gross subscription revenue generated in Australia** to the creation of new Australian works.

The Guilds propose a combination model, consistent with other jurisdictions.

In regulating online media service providers, many jurisdictions including Canada, France, Portugal and the Czech Republic have chosen to use a **combination** of direct investment obligations and a levy obligation.

This investment obligation should be broken down as follows:

- (a) **Direct investment:** 20% of gross subscription revenue generated in Australia is directly invested into the creation of new Australian drama, children's television or documentary, with commensurate reporting obligations similar to that proposed in the 2022 [Streaming Services Reporting and Investment Scheme Discussion Paper](#); and
- (b) **Levy:** 5% of gross revenue generated in Australia paid into a Screen Australia fund dedicated to the development of new Australian drama, children's television and documentary.

CASE STUDY: CANADA

Canada [currently proposes](#) to harmonise obligations between online media service providers and terrestrial broadcasters. This would mean that the online media service providers would need to invest **30% of gross revenue made in Canada on Canadian content**. Additionally, the online service providers must **contribute to the Canadian Media Fund** which supports underrepresented genres such as drama, documentary and children's television as well as interactive digital media content, including games. The *Online Streaming Act* is in the [final stages of consideration](#) at the Canadian House of Commons.

CASE STUDY: FRANCE

In France, subject to the [Decree on on-demand audiovisual media services](#), online media service providers **must spend up to 25% of their net revenue on EU content** and **pay a levy of 5.5% to the National Cinema Centre** (for a total of 30.5% reinvestment quota) to subsidise French original content across film, television, video games and digital.

3. Sub-quotas for vulnerable genres AND minimum number of hours

- (a) **Direct investment must be made into scripted genres such as drama, children's television and documentary**

In its ['Sculpting a National Plan' Report](#), the House of Representatives Standing Committee on Communications and the Arts recommended that streaming services should be required to spend 20% of locally sourced revenue on Australian content and that a sub-quota should be allocated to local scripted content, such as kids' television and drama. Without this, we would anticipate a hollowing out of Australian

storytelling capacity and uniquely Australian stories as services fill their quota with cheaper-to-make or cheaper-to-screen content, such as reality TV (made without writers or cast and thus with reduced wage costs) or sport. This is not to say that either of these genres do not have space in a screen landscape, but that they do not address the cultural imperative to craft and tell Australian stories on screen nor to develop local creative talent. Such a model would also continue existing capacity constraints in the industry.

In jurisdictions like Canada, France and Denmark, direct investment must go towards the production of these 'vulnerable' genres. In France, the regulator negotiates genre sub-quotas with individual SVOD platforms depending on the kinds of content they generally produce. For example, Disney+ has obligations to invest in children's television and documentary while Netflix has obligations to invest in children's television, documentary and drama. A similar system should be implemented in Australia: each online media service provider should negotiate a genre sub-quota with the Australian Communications and Media Authority (ACMA), with the starting presumption being that all service providers should have sub-quotas. These sub-quotas must be transparent and made available to the public.

A sub-quota for scripted genres is essential and urgent given the content policy decisions of the previous government. During Covid, the Morrison government suspended and eventually reduced [requirements](#) to produce a certain number of hours of Australian content, reducing employment in the sector and narrowing the story pipeline. This halved investment in the industry, with particular consequences for Australian TV production and especially children's television. In 2021, Seven showed just [6.5 hours](#) of new Australian kids' content.

CASE STUDY: UNITED KINGDOM

The international precedent is clear. When the UK government relaxed children's television quotas in 2003, it resulted in a [95% reduction in spend on children's content on television between 2003 and 2015](#). A number of [regulatory initiatives](#) have been introduced since 2014 to stimulate the market and restore production to previous levels.

In contrast, Australian kids' content is selling well and making a huge impact internationally, not just with *Bluey's* well-publicised success, but the sale of properties like *Maverix* to Netflix US.

(b) Minimum number of hours

Each online media service provider should be required to comply with a specific sub-quota on the number of hours of Australian work produced within the 20% of locally generated revenue. This sub-quota could be negotiated on a case-by-case basis with ACMA. ACMA could impose a percentage of Australian content calculated in proportion to the total hours of content (or number of titles) available in the platform's catalogue within the year, which is the approach taken in many European jurisdictions, such as Germany and Italy.

A quota on hours seeks to prevent online media service providers from discharging their investment obligations by monetary expenditure alone, e.g. with one-big budget film where writing and direction are not Australian, but the property is sufficiently 'Australian' to utilise the various incentive and location schemes available. High-budget productions like these are generally calculated to entice users to subscribe to a streaming platform, not necessarily to retain them.

In contrast, a sub-quota based on hours will encourage **multiple productions** that allow Australian audiences to access more new, diverse programming while also creating more jobs for Australians working in the screen sector. A diversity of storytelling and excellence in Australian stories is critical here, not simply expenditure.

4. Further requirements: "new, Australian works"

(a) The works must be "new"

The direct investment must be spent on **commissioned** works from the last **five years**.

This investment quota must encourage the creation of new Australian content. Platforms should not be able to satisfy the quota simply by licensing or purchasing pre-existing Australian content.

Australian screen content produced prior to the date of commencement of the regulation (i.e. 1 July 2024) will comprise a total 'back catalogue' of Australian screen content. If a streaming service can comply with their quota obligations by spending on this back catalogue of content, then the regulation will unintentionally encourage a trading scheme of pre-existing Australian content between the streaming services without actually resulting in a net increase in Australian work. Existing rights holders may benefit as properties move between owners, but such an arrangement will not stimulate production nor generate new Australian stories.

(b) The works must be sufficiently “Australian”: the ‘Significant Australian Content’ test

In order to satisfy its investment obligations, Australian works must satisfy a test similar to the pre-existing [Significant Australian Content test](#) for the Producer Offset. This means, for example, that Australian works should have an Australian subject matter, be shot and set primarily in Australia, and key creatives (including the Writer, Director, Producer and Showrunner) must have an Australian nationality or place of residence.

In Canada and France, a points-system must be satisfied to show that a given work can count to meet the online media service provider’s local content obligations. Canadian and French works must, for example, be shot and set in their respective countries and have key personnel of the respective nationality to meet the regulatory requirements.

5. Prominence obligations

Online media service providers operating in Australia must have obligations to give prominence to Australian works. This can take the form of a points system, as is currently used in Italy. ACMA can publish a set of actions or interface design choices that increase prominence and discoverability for Australian works. Each item will be assigned points (e.g. 1 point) and ACMA will set a mandatory ‘prominence score’ (e.g. 10 points). Platforms will have a choice as to which items to implement in order to meet that score. A platform may choose to, for example, implement a dedicated Australian works section on its homepage directly accessible in its entirety, give prominence to Australian works during a search, or meet a quota to promote Australian works when advertising the service, in order to meet the prominence score set by ACMA.

Appendix A: Comparison of SVOD-regulation and proposed regulation across jurisdictions (EU, UK, Switzerland, Canada and Mexico)

Jurisdiction	Financial obligations	Sub-quotas	Proportion of catalogue dedicated to local content	Algorithmic prominence	Definition of local content (to access funding)
<p>Canada</p> <p>Bill C-11¹</p>	<p>Direct Investment and levy</p> <p>Bill C-11 changes the federal Broadcasting Act to create a new “online company” category, allowing the Canadian Radio-television and Telecommunications Commission (CRTC) to regulate foreign media providers active in the Canadian market.</p> <p>Currently, Canadian private broadcasters are currently subject to a direct local content investment obligation of 30% gross revenues in Canada. Bill C-11 would potentially subject online companies to the same investment obligations.</p> <p>Bill C-11 may require online that their investment be paid to another organisation or fund – i.e. the Canadian Media Fund to which</p>	<p>The Canadian Media Fund structure is designed to target identified ‘gaps’ against Canadian content policy goals.</p> <p>(a) The ‘Convergent Stream’ only supports underrepresented genres defined as drama (around half of funding), documentary (around one quarter), children’s and youth (around 10-20 per cent with greater investment in French-language productions), and variety and performing arts.</p> <p>(b) The ‘Experimental Stream’ encourages the development of innovative interactive digital media content and software applications</p>		<p>Particular emphasis is placed on discoverability of national content (“Cancon”), including Québécois content.</p> <p>Bill C-11 empowers the CRTC to make orders imposing conditions on ‘the presentation of programs for selection by the public, including the discoverability of Canadian programs’ on such services</p>	<p>Must be shot and set primarily in Canada.</p> <p>AND</p> <p>Points-based scale (requiring 10/10) e.g. key roles filled by Canadians, in front of and behind the camera</p>

¹ Bill C-11 or the ‘Online Streaming Act’ is not yet in force as of February 2023.

	Canada’s cable, satellite and IPTV distributors are required to contribute, with 45% investment into the fund coming from the Canadian government.				
Belgium Flemish Media Decree (Act on Radio and Television Broadcasting)	Choice between direct investment and levy 2% of revenue in Dutch-speaking region; and up to 2.2% of revenue in Flemish-speaking region. Direct investment obligation (to be determined) in German-speaking region		Minimum of 30% of catalogue “European works”, as required by the EU Audio Visual Media Services Directive (AVMSD) ²	EU general prominence obligation ³	
Croatia Electronic Media Act	Direct investment of 2% of total annual gross revenue invested in		Minimum of 30% of catalogue “European works”, as	EU general prominence obligation.	

² As of February 2023, every EU Member State except Ireland has transposed the AVMSD into law. In other words, the 26 Member States have legislated a minimum requirement of 30% EU content in a provider’s catalogue, along with promotion obligations consistent with the AVMSD. However, Member States are free to introduce additional financial obligations in the form of levies, direct investment, or a combination of both. See: <https://www.obs.coe.int/en/web/observatoire/avmsd-tracking>

³ Article 35 of the AVMSD states that:

Providers of on-demand audiovisual media services should promote the production and distribution of European works by ensuring that their catalogues contain a minimum share of European works and that they are given sufficient prominence. The labelling in metadata of audiovisual content that qualifies as a European work should be encouraged so that such metadata are available to media service providers. Prominence involves promoting European works through facilitating access to such works. Prominence can be ensured through various means such as a dedicated section for European works that is accessible from the service homepage, the possibility to search for European works in the search tool available as part of that service, the use of European works in campaigns of that service or a minimum percentage of European works promoted from that service's catalogue, for example by using banners or similar tools.

	production or purchase of independent Croatian works Levy: 2% of total annual gross revenue contributed for the implementation of the National Programme for the Promotion of Audiovisual Creativity for the production of European works.		required by the EU Audio Visual Media Services Directive 2017.		
Czech Republic Radio and Television Broadcasting Act	Levy: 0.5% to Czech Film Fund Direct investment: 1% revenue		30% EU content	EU general prominence obligation	
Denmark Radio and Television Act and the Film Act	Levy: 6% of revenue in Denmark paid to the Danish Film Institute	Funds used primarily for TV series and documentary	Minimum of 30% of catalogue European works	EU general prominence obligation	
France Decree on on-demand audiovisual	A. Direct investment SVOD services must devote at least 20% of the net annual revenue they generate in France to the funding of European or French cinematographic	85% of investment to works of French original expression	60% European works. 40% must be French-language works.	Visuals, trailers and specific sections for local content on the service homepage, in the	Points based system: - Location of the production and

media services	<p>and audiovisual production. The proportion increases to 25% for services that offer at least one film less than 12 months after its release in France.</p> <p>B. Levy</p> <p>5.15% levy paid to the National Cinema Centre (CNC) to subsidise French original content across film, TV, video games and digital.</p>	<p>At least 20 per cent of the investment must be in television programmes and at least 20 per cent in film.</p> <p>Regulator enters into agreements with individual providers regarding investment in genres. E.g Disney+ has obligations to invest in animation and documentary; Netflix has obligations to invest in animation, documentary and independent production.</p>		<p>recommendations (personalised or not) made to users, in programme searches initiated by users, and in marketing to promote the service.</p>	<p>where costs incurred</p> <p>- Nationality of the personnel</p>
<p>Germany</p> <p>Interstate Media Treaty</p>	<p>Levy</p> <p>1.8% to 2.5% levy based on income generated from streaming in Germany, paid to the German Federal Film Board (FFA). (1.8 per cent for EUR 0.5 million - EUR 20 million revenue/year, 2.5 per cent above)</p>		30% EU content	<p>Appropriate prominence on the user interface. Directly accessible and easy to find in its entirety at the first selection level.</p> <p>Transparency obligations and information on transparency accessible to users.</p>	<p>Case-by-case evaluation:</p> <p>- Director or writer or lead roles must be European citizens</p> <p>- At least two out of seven cultural content criteria must be met, including nationality of the crew or production location</p>

					- Films must premiere in Germany in the German language, or at an internationally significant festival
Greece Law 4779/2021	A choice between direct investment or levy: 1.5% of revenue related to their activities in Greece, either for the production of European works, or for the purchase of rights to Greek audiovisual works, or to a specific fund of the National Centre for Audiovisual Media and Communication.		30% EU content	EU general prominence obligation	
Italy Audiovisual Media Services Code	Direct Investment Up to 20 per cent of net revenue raised in Italy to be reserved for the production, pre-purchase and purchase of European works produced by independent producers in the last five years. Minimum contribution of 12.5 per cent increasing if: (a) the provider does not have operations in Italy and (b) the provider does not share secondary rights with the producer proportionally to the producer's financial contribution	A sub-quota of 6.25-10 per cent of net annual revenue raised in Italy (i.e. 50% of total quota) is to be reserved for works of Italian original expression, produced in the last five years, by independent producers.	30% European works. 33% must be works of Italian original expression, wherever produced. The percentage is calculated on the total amount of hours available within the catalogue on a yearly basis.	Regulator sets out points system from which VOD providers established in Italy must choose to reach the necessary score and comply with the requirements. E.g.: a dedicated EU works section on the homepage, a category within search, and a quota of their	

	or applies agreements that assign the producer a purely executive role.			advertising or promotional campaigns.	
Mexico ⁴	A levy to support a national production fund is being considered as an alternative to or in addition to a quota.		Proposed 30% Mexican content quota SVOD catalogues proposed and 15% quota of works no older than 25 years.	Prominence obligations are also being considered	
Poland Broadcasting Act; and Cinematography Act	Levy: 1.5% of revenue contributed to Polish Film Institute.		30% EU content	EU general prominence obligation	
Portugal Law (Law No. 74/2020) Directive (EU) 2018/1808	Levy: 1% of revenue or 1 million euros, whichever is greater, to the Instituto do Cinema e do Audiovisual Direct investment: 0.5%-4% of in-country revenues (minimum 10,000 euros to 4 million euros) in producing Portuguese-language movies, TV series, or documentaries.		30% quota obligation for European works in VOD catalogues, including 15% of independent European works	EU general prominence obligation	

⁴ The Ley Federal de Cinematografía y de Audiovisual was proposed in February 2021 and is currently undergoing review and is not yet in force.

Romania Audiovisual Act	Levy: 3% (Download to own service) - 4% (Subscription service) paid to film fund Option to contribute 40% of the levy as direct investment		30% EU content	EU general prominence obligation	
Spain General Law on Audiovisual Communication	A choice between direct investment or levy: 5% investment or contribution to the Fund for the Protection of Cinematography or to the Fund for the promotion of cinematography and audiovisual in co-official languages other than Spanish		30% EU content	EU general prominence obligation	
Switzerland Federal Act on Film Production and Film Culture	A choice between direct investment or levy: 4% of Swiss revenue to Swiss film and television projects or levy obligation of 4% paid to the Federal Office of Culture.		30% EU content	EU general prominence obligation	
United Kingdom⁵			30% EU content	In addition to AVMSD prominence obligations, UK has a well-established prominence regime for its public service	

⁵ The UK transposed the AVMSD into law in September 2020, prior to its withdrawal from the EU.

				broadcasters (PSB) on electronic programming guides (EPG). E.g. five main PSB channels on the top slot of an EPG, no lower than a certain position on the EPG.	
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Who we are

Australian Directors' Guild

The Australian Directors' Guild (**ADG**) is a not-for-profit industry association representing the interests of over 1,000 Screen Director members working across film, television, streaming and digital media.

We aim to improve professional standards, conditions and remuneration for Australian Screen Directors, protect and advance the creative rights of our members and promote a cultural voice that is truly representative of Australia's innate diversity. As a cultural organisation we also seek to advance our understanding of the director's role by sharing and exchanging future-focused knowledge and skills.

We are the collective voice of directors and represent directors' interests to federal & state governments, to state and screen funding agencies and regulators, to broadcasters, studios, to other industry bodies and to the media.

Australian Writers' Guild

The Australian Writers' Guild (**AWG**) is the professional association for Australian screen and stage writers principally in film, television, theatre, audio and digital media. We represent over 2,000 members Australia wide. The AWG has fought for over 60 years to protect and promote the rights of writers. Our vision is to see stage and screenwriters thrive as a dynamic and integral part of Australian storytelling: shaping, reflecting and enhancing the Australian cultural voice in all its diversity.

Australian Writers' Guild Authorship Collecting Society

Established by the Australian Writers' Guild in 1996, the Authorship Collecting Society (**AWGACS**) is a not-for-profit collecting society for screenwriters. AWGACS collects and distributes international and domestic royalties for Australian and New Zealand writers.

With more than 2,170 members and 34 agreements with overseas collecting societies, AWGACS has collected more than \$25 million in royalties and is expanding into new territories.