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**COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN
PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL
COMMITTEE AND THE COMMITTEE OF THE REGIONS**

on Creative Content Online in the Single Market

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1. INTRODUCTION

1.1. Creative Content Online

The availability and take-up of broadband, and the increasing possibility to access creative content and services everywhere and anytime, provide challenging new opportunities. For consumers, it means new ways to access, and even to influence, creative content available on worldwide networks such as the internet, both from home and using mobile devices. For companies, it means the possibility to offer new services and content and to develop new markets.

With the emergence of new devices, networks and services, these challenges have to be addressed by content and network operators, right holders, consumers, governments and independent regulators. Successful responses will be key to growth, jobs and innovation in Europe.

They can best be addressed at European level as most of these new services need the dual advantages of economies of scale and cultural diversity that the EU internal market provides. Therefore, EU policies should aim at promoting fast and efficient implementation of new services and related business models for the creation and circulation of European content and knowledge online. In this context, the Commission has identified as "creative content distributed online": content and services such as audiovisual media online (film, television, music and radio), games online, online publishing, educational content as well as user-generated content.

According to the study on "Interactive content and convergence"¹ (covering EU 25), by 2010, revenues from online content, will more than quadruple from €1.8bn in 2005, to €8.3bn by 2010, online content will also make up a sizeable part of total revenues in some sectors; about 20% for music and 33% for video games.

With the spread of broadband internet access, the roll-out of advanced mobile networks, and the mass availability of digital devices it is possible to distribute online content on a market of dimensions unknown until now. European consumers increasingly access films, music, news or games through different networks and electronic devices.

¹ Study on "Interactive Content and Convergence; Implications for the Information Society" commissioned by Information Society and Media Directorate-General of the European Commission, published on 25 January 2007

1.2. Results of the public consultation

With a view to exploring further ways to support the development of creative content online services in Europe, the Commission launched a public consultation on "Content Online in the Single Market" in July 2006. This consultation attracted more than 175 written contributions from a great variety of stakeholders².

A number of contributions to the public consultation³, invite the Commission to show restraint and not intervene prematurely with further legislation in a nascent and fast evolving market given the risk of adverse effects. However, some call for specific changes in the legal framework on issues such as intellectual property rights licensing, private copying levies and interoperability.

Many contributions call on the Commission to encourage cooperation (including charters or codes of conduct) between industry, right holders and consumers on issues such as DRMs, Content Online and Film Online.

Furthermore, there were various calls for financial support and various requests for promoting standards concerning the interoperability of DRMs.

The public consultation was complemented by the aforementioned independent study on "Interactive Content and Convergence". Based on a wide stakeholders' consultation, it provided an overview of the challenges to be addressed to favour the development of new content services in the EU.

1.3. Objectives of this Communication

Building on the results of the consultation process, and in order to complement the initiatives already undertaken in the context of the i2010 strategy, the Commission intends to launch further actions to support the development of innovative business models and the deployment of cross-border delivery of diverse online creative content services.

The market for online creative content is emerging and developments take place at a rapid pace. This calls for a twofold approach to deal with already identified challenges that need to be addressed quickly, and to launch further discussions on some of the existing and forthcoming challenges. Therefore, this Communication is launching a focused public consultation in preparation for the adoption of a Recommendation on Creative Content Online by the Council and the European Parliament, and is creating a stakeholders' discussion and cooperation platform, hereafter the "Content Online Platform", to initiate the work on forthcoming challenges.

This Communication addresses a first set of challenges central to the uptake of online content services in Europe. Other initiatives of the Commission such as the Internal Market review and the review of the consumer 'acquis', the review of the Satellite and Cable Directive (93/83/EEC)⁴, the report on the application of the 2001 Copyright Directive (2001/29/EC)⁵,

² http://ec.europa.eu/avpolicy/other_actions/content_online/contributions/index_en.htm

³ For a summary of the public consultation, see the Commission staff working paper on Creative Content Online.

⁴ OJ L 248, 6.10.1993, p. 15.

⁵ OJ L 167, 22.6.2001, p. 10.

the Green Paper currently being prepared by the Commission on Copyright in the Knowledge Economy, the implementation report on the Recommendation on online management of music rights (2005/737/EC)⁶ and the forthcoming Second evaluation report on the Conditional Access Directive (98/84/EC)⁷ provide further opportunities to deal with challenges related to creative content online.

2. CHALLENGES & PROPOSALS

The challenges raised by online distribution of creative content are considerable, ranging from legal issues related to licensing to attractive billing systems or broadband and spectrum issues. The last point will be dealt with in the framework of the modernisation of the legal framework for electronic communications, while others will have to be broached as appropriate.

The transfer of creative content services to the online environment is an example of major systemic change. For policy makers, making the most of this change means meeting three related objectives:

- ensuring that European content achieves its full potential in contributing to European competitiveness and in fostering the availability and circulation of the great diversity of European content creation and of Europe's cultural and linguistic heritage;
- updating/clarifying possible legal provisions that unnecessarily hinder online distribution of creative content in the EU, while acknowledging the importance of copyright for creation.
- fostering users' active role in content selection, distribution and creation.

Based on the results of the public consultation and on the study on "Interactive content and convergence", the Commission deems that there are four main, horizontal challenges which merit action at EU-level: availability of creative content; multi-territory licensing for creative content; interoperability and transparency of DRMs; and legal offers and piracy⁸.

2.1. Availability of creative content

Lack of availability of creative content for online distribution and lack of active licensing of rights on new platforms remain major obstacles for the development of online content services. Since online content is a nascent market, the value of new forms of distribution is sometimes still unknown. This results in major difficulties in settling terms of trade for online exploitation of creative content. Right holders fear losing control as illegal copying in the digital environment has proven to be highly damaging. While legitimate online offer of creative content is widely regarded as one of the means of curbing illegal copying, some right holders prefer to protect existing revenue streams rather than actively licensing their rights on new platforms. Licensing for online exploitation is also hampered by potential conflicts with rights already granted for main forms of exploitation.

⁶ OJ L 276, 21.10.2005, p. 54 – OJ L 284, 27.10.2005, p. 10.

⁷ OJ L 320, 28.11.1998 p. 54.

⁸ For the other issues raised in the public consultation, see the Commission Staff Working Paper on Creative Content Online.

Most of the difficulties related to availability of content are considered as inherent to emerging markets, and stakeholders are expected to find innovative and collaborative solutions to exploit content online and prevent or remedy bundling, exclusivity or non-use of media rights⁹. In response to stakeholders' demand, the Commission intends to enhance its role of facilitator and to encourage "win-win" deals and cross-industry agreements in the framework of the new Content Online Platform.

The application of competition law can in some cases remedy abuse relating to the exploitation or bundling of rights.

Another issue relates to the often high transaction costs for rights-clearance. One particularly acute problem is that of orphan works – i.e. books, photographs, film material and other works under copyright for which the right holders are difficult or even impossible to identify or to locate¹⁰. Efforts for identification and location are costly and time consuming. Hence, in many cases, orphan works cannot be exploited and yield no financial benefit to the (unknown or not locatable) author so they are unproductive both in economic and social terms.

The problems arising from orphan works are notably tackled within the context of the i2010 Digital Libraries initiative, which aims at bringing Europe's cultural and scientific heritage online. In its Recommendation of 24 August 2006 on the digitisation and online accessibility of cultural material and digital preservation¹¹, the Commission urged the Member States to create mechanisms facilitating notably the use of orphan works. Council conclusions of 13 November 2006¹² endorsed the Commission's approach and stressed the need to ensure the effectiveness of national solutions for orphan works in a cross-border context. This is also a key recommendation in the report on copyright issues of the High level expert group on digital libraries¹³. The Commission will closely monitor the implementation of the Recommendation and the need for further action at European level.

2.2. Multi-territory licensing for creative content

Another major market change resulting from convergence is the ability of content service providers to reach new audiences by making content available on new platforms at European or even global level. As a result of copyright territoriality, a content service provider has to obtain the right to make content available in each Member State. The costs incurred, may be detrimental to the exploitation of a vast majority of European cultural works outside their national markets.

The online environment allows content services to be made available across the Internal Market. However, the lack of multi-territory copyright licences makes it difficult for online services to fully benefit from the Internal Market potential.

While it is first for right holders to appreciate the potential benefits of multi-territory licensing, there is a need to improve the existing licensing mechanisms to allow for the development of multi-territory licensing mechanisms, for instance by promoting fair

⁹ Interactive Content and Convergence; Implications for the Information Society, 2007, p. 13

¹⁰ Gowers Review of Intellectual Property, December 2006, p. 69: "The British Library estimates 40 percent of all print works are orphan works".

¹¹ OJ L 236, 31.8.2006, p. 28.

¹² OJ C297, 7.12.2006, p. 1.

¹³ See: http://ec.europa.eu/information_society/activities/digital_libraries/hleg/index_en.htm

competition on the market for rights management. It should be noted that different practices apply to different types of content.

In the music sector, in order to facilitate the introduction of a multi-territorial system of copyright licensing for online music services, the Commission issued a Recommendation on online management of music rights in October 2005. This Recommendation aims to facilitate the grant of multi-territory licences for online use of musical works by affirming the right of right holders to entrust the management of any of the online rights necessary to operate legitimate online music services, on a territorial scope of their choice, to a collective rights manager of their choice, irrespective of the Member State of residence or the nationality of either the collective rights manager or the right holder. The Commission has recently invited all interested stakeholders to submit views and comments on their initial experience with this Recommendation and, in general, on how the online music sector has developed since its adoption.

The issue of multi-territory licensing has become relevant in other creative content sectors such as the audiovisual sector. In the audiovisual sector, while the new Directive on audiovisual media services will facilitate cross border development of on-demand services, many right holders still choose to grant licences for only a few national territories, thus slowing the availability of audiovisual works in video-on-demand catalogues abroad. Developing a system where right holders would be encouraged to grant, next to the main licence, a second multi-territory licence would be one of the issues to be covered in the public consultation in respect of the preparation of a proposal for a Recommendation, as well as an issue for discussion within the Content Online Platform. Furthermore, the Commission envisages financing an independent study investigating the economic consequences for European audiovisual works that could result from such a practice.

2.3. Interoperability and transparency of Digital Rights Management systems (DRMs)

The uptake of legitimate services passes by tackling the problem of digital piracy by enhancing the cooperation between the various players in the value chain and by developing attractive offers and business models for the distribution of digital content. DRM constitute a key enabling technology in this respect, allowing right holders to enforce their rights in the digital environment and to develop business models adapted to consumer demand and needs. However, for some time now, DRMs and associated Technological Protection Measures (TPMs) have sometimes been perceived in a negative way, as technology merely used to restrict copying and competition, failing to meet initial users' and businesses' expectations. This has led to a situation where certain market players opt for online distribution of content without any copy-restriction mechanisms. Notwithstanding, these developments mainly concern one type of content and business model; i.e. pay per download of music. Technologies allowing management of rights in the online environment might be a key enabler for the content sector's digital shift and for the development of innovative business models - especially with regard to high value content.

The move to a DRM protected environment results in a major paradigm shift for European citizens and consumers. Usage governed by licensing agreements enforced by technical measures now complements usage of copyright protected work governed by law. As a result consumers must increasingly confront complex contractual terms when purchasing music, film or other creative content online, and are not necessarily fully aware of the usage restrictions applied or the use of their personal data. This is perceived as severely affecting

user interests, and putting the existing balance between copyright holders and user interests at risk. At the same time, while a great number of DRM protected content services have been launched in the past years, stakeholders are increasingly concerned that the lack of interoperability, standardisation and cross platform friendliness in DRMs leads to gatekeeper situations. In order not to jeopardize the future of this technology as an enabling factor, it is crucial to address the question of interoperability.

Better interoperability of DRM systems would improve the level of competition and consumer acceptance necessary for the take-up of online distribution of creative content. For consumers, DRM interoperability means that they can choose different devices and still use them with different 'download-to-own' services. For content producers or content aggregators interoperability means they are not locked into one distribution channel that forms a gatekeeper to the marketplace. For device and ICT developers, interoperability means that their products can be used with different content services¹⁴.

As lengthy discussions among stakeholders did not yet lead to the deployment of interoperable DRM solutions, there is in any case a need to set a framework for transparency of DRMs regarding interoperability, by ensuring proper consumer information with regards to usage restrictions and interoperability. Providing consumers with an accurate and easily understood labelling system on interoperability and usage restrictions, allowing them to make an informed choice will improve citizens' rights and provide for a sound basis for a wider availability of content online.

2.4. Legal offers and piracy

Recording music and film industries have expressed the view that the Commission should be prepared to take legislative steps to make sure that the public interest in ensuring an adequate level of data protection is properly reconciled with other important public policy objectives such as the need to combat illegal activities and to protect the rights and freedoms of third parties.

Piracy and unauthorised up- and downloading of copyrighted content remains a central concern. The fight against online piracy involves a number of complementary elements: (1) developing legal offers; (2) educational initiatives; (3) enforcement of legal rights; (4) seeking improved cooperation from Internet Service Providers (ISPs) in stopping dissemination of infringing content. The idea of education and awareness-raising on the importance of copyright for the availability of content is widely supported as a tool in the fight against piracy.

Content owners call for increased co-operation in the fight against piracy. Annex I to the recently adopted legislative proposal for the reform of the Authorisation Directive includes references concerning compliance with national measures implementing the Copyright Directive (2001/29/EC) and the Enforcement Directive (2004/48/EC)¹⁵. Moreover, Article 20(6) of the legislative proposal to amend the Universal Service Directive provides for an

¹⁴ To the extent that DRMs are a form of conditional access system, in the second evaluation report of the Conditional Access Directive that is to be undertaken in 2008, the Commission will assess to what degree that Directive has or could facilitate the roll out of DRMs.

¹⁵ COM(2007) 697 final.

obligation for ISPs to clearly inform subscribers in advance of the conclusion of the contract and regularly thereafter of their obligations to respect copyright and related rights¹⁶.

In France, a Memorandum of Understanding¹⁷ between music and film producers, Internet service providers and the Government was signed on 23 November 2007. Under the agreement, France is to set up a new Internet authority with powers to suspend or cut access to the web for those who illegally file-share.

It would indeed seem appropriate to instigate co-operation procedures ("code of conduct") between access/service providers and right holders and consumers in order to ensure a wide online offer of attractive content, consumer-friendly online services, adequate protection of copyrighted works, awareness raising/education on the importance of copyright for the availability of content and close cooperation fight piracy/unauthorised file-sharing.

3. CONCLUSION

While the review process of Directives affecting distribution of content, such as the Satellite and Cable Directive, the 2001 Copyright Directive and the Conditional Access Directive are ongoing, this Communication launches a process to address the identified and most pressing challenges related to online distribution of creative content. The Commission wishes to address the challenges raised in this document by two means:

- The setting-up of the "Content Online Platform", a framework for discussion, at European level. This Platform devoted to content specific or cross-industry negotiations around the issues related to the online distribution of creative content, should include, according to the agenda of each meeting, content providers, right holders, companies and organisations from the telecoms and technology sectors as well as consumers. The remit of the Content Online Platform will include the issues mentioned in this Communication such as: availability of content, improvement of rights clearance mechanisms, development of multi-territory licensing, management of copyright online, cooperation mechanisms to improve respect of copyright in the online environment. The work of the Platform should also contribute to the elaboration of a Guide for consumers and users of Information Society services¹⁸.

¹⁶ COM(2007) 698 final

¹⁷ "Accord pour le développement et la protection des œuvres et programmes culturels sur les nouveaux réseaux" – <http://www.culture.gouv.fr/culture/actualites/index-olivennes231107.htm>

¹⁸ See MEP Z. Roithova's (EPP) "own initiative" report on Consumer confidence in the digital environment and European Parliament resolution of 21 June 2007 on consumer confidence in the digital environment (2006/2048(INI)) - <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2007-0287+0+DOC+XML+V0//EN&language=EN>

- Reflecting on the preparation, towards mid 2008, of a proposal for a Recommendation of the Parliament and the Council on Creative Content Online, which would cover the following issues: transparency (labelling) and interoperability of DRMs; encouragement of innovative licensing regimes in the area of audiovisual works; and legal offers and piracy. On the main elements of the future proposal, the Commission wishes to further consult interested stakeholders. Therefore, all stakeholders are invited to take position on the elements listed in the Annex to this Communication by 29/02/2008.

ANNEX

Creative Content Online – Policy/Regulatory issues for consultation

Digital Rights Management

- 1) Do you agree that fostering the adoption of interoperable DRM systems should support the development of online creative content services in the Internal Market? What are the main obstacles to fully interoperable DRM systems? Which commendable practices do you identify as regards DRM interoperability?
- 2) Do you agree that consumer information with regard to interoperability and personal data protection features of DRM systems should be improved? What could be, in your opinion, the most appropriate means and procedures to improve consumers' information in respect of DRM systems? Which commendable practices would you identify as regards labelling of digital products and services?
- 3) Do you agree that reducing the complexity and enhancing the legibility of end-user licence agreements (EULAs) would support the development of online creative content services in the Internal Market? Which recommendable practices do you identify as regards EULAs? Do you identify any particular issue related to EULAs that needs to be addressed?
- 4) Do you agree that alternative dispute resolution mechanisms in relation to the application and administration of DRM systems would enhance consumers' confidence in new products and services? Which commendable practices do you identify in that respect?
- 5) Do you agree that ensuring a non-discriminatory access (for instance for SMEs) to DRM solutions is needed to preserve and foster competition on the market for digital content distribution?

Multi-territory rights licensing

- 6) Do you agree that the issue of multi-territory rights licensing must be addressed by means of a Recommendation of the European Parliament and the Council?
- 7) What is in your view the most efficient way of fostering multi-territory rights licensing in the area of audiovisual works? Do you agree that a model of online licences based on the distinction between a primary and a secondary multi-territory market can facilitate EU-wide or multi-territory licensing for the creative content you deal with?
- 8) Do you agree that business models based on the idea of selling less of more, as illustrated by the so-called "Long tail" theory, benefit from multi-territory rights licences for back-catalogue works (for instance works more than two years old)?

Legal offers and piracy

- 9) How can increased, effective stakeholder cooperation improve respect of copyright in the online environment?
- 10) Do you consider the Memorandum of Understanding, recently adopted in France, as an example to followed?
- 11) Do you consider that applying filtering measures would be an effective way to prevent online copyright infringements?

Please submit your comments by **29/02/2008** in electronic format. All submissions will be published on the Commission's website if not requested otherwise. Contribution to be treated confidentially should indicate this at the top of the first page. Should you want to add a cover letter please do so in a separate document. In case your comments exceed four pages, please provide an **executive summary**. All submissions should be mailed to the functional mailbox of the Audiovisual and Media Policies Unit of the Directorate-General for Information Society and Media: avpolicy@ec.europa.eu.