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on Creative Content Online in the Single Market

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1. INTRODUCTION

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 phones. 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 innovation, growth and jobs 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 business models for the creation and circulation of European content and knowledge online. For these reasons, the Commission launched a public consultation on "Content Online in the Single Market" in July 2007. 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.

This Staff Working Paper is intended as a neutral survey of policy issues to accompany a Commission Communication on Creative Content Online.

1.1. Actions already undertaken by the Commission

The Commission has undertaken a number of initiatives over the past few years, with the view to promote the development of creative content online.

1.1.1. *i2010*

The "i2010 – A European Information Society for growth and employment" initiative was launched by the Commission on 1 June 2005 as a framework for addressing the main challenges and developments in the information society and media sectors up to 2010¹. It sets as a first objective, the creation of a Single European Information Space, offering increased legal and economic certainty for rich and diverse content to develop and circulate in Europe. Ultimately, this will create a sound market basis for the European content sector to distribute its great variety of content on a European and global scale.

1.1.2. *High Level Group on Digital Rights Management*

The High Level Group on Digital Rights Management (DRM)², facilitated by the Commission, provided a forum for stakeholders to develop a common understanding on the

¹ Communication from the Commission to the Council, the European Parliament, the European Economic and Social committee and the Committee of the Regions - "i2010 – A European Information Society for growth and employment" (COM(2005) 229 final).

²

http://ec.europa.eu/information_society/eeurope/2005/all_about/digital_rights_man/high_level_group/index_en.htm

challenges arising from the development of DRM³, and to discuss on possible ways to improve co-operation to address challenges such as DRM and interoperability, private copying levies and DRM, and migration to legitimate services.

1.1.3. Film Online Charter

At the initiative of the European Commission, the European Charter for the Development and the Take-up of Film Online⁴ was agreed by business leaders on in May 2006. The Charter represents the joint accomplishment of representatives of three groups of key players: film and content industry, internet service providers and telecom operators. It identifies commendable practices for bringing films online via legitimate services and in a consumer-friendly way. It is the intention of the Commission to build on the commendable practices identified in the Film Online Charter and to widen its scope. The Film Online Charter is based on three main principles: working together to improve the availability of film online services on a mutually profitable basis; education and awareness increasing respect for copyright in order to secure the sustainable availability of content and co-operation to fight piracy.

1.1.4. Digital Libraries Initiative

The Digital Libraries Initiative⁵ aims at making Europe's cultural and scientific heritage easier and more attractive to use online. It builds on Europe's rich heritage, combining multicultural and multilingual environments with technological advances and new business models. A main objective of the initiative is to facilitate the creation of 'The European Digital Library', a multilingual access point to cultural collections from all Member States.

1.1.5. Audiovisual Media Services Directive

On 29 November 2007, the European Parliament formally approved without amendments the Council's common position on the new Audiovisual Media Services without frontiers Directive. The new Audiovisual Media Services Directive will reaffirm the pillars of Europe's audiovisual model, notably the free circulation of audiovisual media services, cultural diversity, the protection of minors, a high level of consumer protection, media pluralism, and the fight against racial and religious hatred.

1.1.6. Presidency Conferences

In the first half of 2006, the Austrian Presidency initiated a dialogue at European level on the need to strengthen the European creative industries in the context of the Lisbon agenda. The Austrian Presidency seminar on "Content for competitiveness - Strengthening the European creative industries in the light of the i2010 strategy" that took place in March 2006 highlighted the role of the content and creative industries in achieving the objectives set by the Lisbon strategy. The Presidency conclusions called for a coherent and coordinated policy related to content and creative industries, in order for these industries to take advantage of technological convergence and realise their full potential for growth and employment. They

³ Digital Rights Management Systems (DRMs) are technologies that describe and identify digital content protected by intellectual property rights, and enforce usage rules set by right holders or prescribed by law for digital content.

⁴ http://ec.europa.eu/comm/avpolicy/other_actions/content_online/index_en.htm#charter

⁵ On 30 September 2005, the European Commission adopted a Communication "i2010: Digital Libraries" (COM(2005) 465 final). For more information on the Digital Libraries Initiative, see http://ec.europa.eu/information_society/activities/digital_libraries/index_en.htm

pointed at the fact that coordination, at European level, of the many European and national policies impacting the content and creative sectors was essential in this respect.

The Finnish Presidency has continued this process with a conference in July 2006 that took place in Helsinki on "Promoting the competitiveness of the content and creative industries and creative industries in a converging world". Both conferences have highlighted the need to take into account the growing interaction between cultural, audiovisual and ICT sectors and to develop a coherent policy related to content and creative industries.

The Portuguese Presidency organised a High-level Seminar on Audiovisual Content Online in October 2007. The seminar focused on issues, such as the digital challenge, non-linear services/Video-on-Demand (VoD), mobile audiovisual content and digital cinema. The purpose of the seminar was to clarify the objectives of policies and interventions relating to audiovisual content online and to focus on the relevant benefits for the industry, the consumers/citizens and the society.

1.2. Public Consultation on Content Online in the Single Market

The public consultation on "Content Online in the Single Market" ran from 28 July until 13 October 2006 on the basis of a questionnaire. A public hearing took place on 11 October 2006 in Brussels. The Commission received more than 175 written contributions, and over 160 contributions have been posted on the Commission's website⁶. A great variety of stakeholders have participated in the consultation and the main ones are: telecom operators, broadcasters (TV, radio, cable operators etc.) Internet Service Providers (ISPs), public authorities (i.e. Department of Trade and Industry and Ofcom⁷ in the UK, as well as the French Government) online and print publishers, news agencies, booksellers and libraries, journalists' associations, copyright collecting societies, right holders associations in the field of music, audiovisual products and films, organisations representing people with disabilities, game developers, manufacturers, universities, mobile phone manufacturers, associations of independent producers, film producers and distributors (European and U.S. companies), confederations of industries and private citizens.

The following are the main trends to highlight:

- *New business models*: the public consultation points at the opportunities for the development of a great variety of business models: streaming and Video-on-Demand (VoD); subscription services; special offers for groups or communities such as schools or online communities; *à la carte* downloads (to own); legal peer-to-peer; mobile services; DRM-enabled business models; online games; subscription radio; Journalists' blogs; IPTV (Internet Protocol Television), social network based services; podcasting; personalisation; user-generated content; radio and television broadcasts (simulcasting and webcasting). Collecting societies deem that non-commercial services can be complementary with commercial ones if they take place in full compliance with copyright legislation.
- *Trust in Online content services and consumer acceptance*: Consumer acceptance is widely seen as a pre-condition for the functioning of the knowledge economy. With the current take-up of new services and applications and the potential for content and

⁶ http://ec.europa.eu/avpolicy/other_actions/content_online/contributions/index_en.htm

⁷ Ofcom is the regulator for the UK communications industries, with responsibilities across television, radio, telecommunications and wireless communications services.

services to be commercialised in such a way as to reach a mass-market level, consumer issues are raising concern. One of the major problems raised by almost all stakeholders in relation to trust in online services is the lack of interoperability of devices, services and platforms and some argue that the criminalisation of file-sharers and the draconian Intellectual Property Rights (IPR) regime do not create a climate of trust. In addition, while the explosion of user-generated content is adding a new dimension to the role of users in the information society, it raised a number of challenges to public policies in very diverse fields, such as trust and security.

- DRM interoperability: The use of Digital Rights Management Systems (DRMs) is heavily criticised by consumers associations. They argue that the use of DRMs prevents customers from exercising statutory rights and currently used DRMs have the potential for hidden damage to consumers from technical or data protection perspective. In general, DRMs are not considered to be user-friendly and it is considered that DRM systems confuse the public, and are sometimes not transparent. Nevertheless, DRM interoperability is deemed essential by most stakeholders and many deem that there is a lack of interoperability of DRMs fostered by equipment and software manufacturers.
- Competitiveness: There is clear consensus that operators in national markets with linguistic barriers and limited size suffer from competitive disadvantages. Some argue that there are complicated licensing regimes in the EU compared with the US.
- Licensing: Multi-territory licensing and clearance would be appropriate for ISPs, film industries, some collecting societies, digital media organisations, some publishers and recording industries. On the other hand creative businesses and some author's collecting societies are against multi-territory licensing and argued that sale of rights on a territorial basis has enabled the right holders to extract the greatest value. It should be noted that quite a number of author's collecting societies have embraced multi-territorial licensing models (e.g. the author's collecting societies in the United Kingdom, Germany, France, Spain and Italy have all set up multi-territorial licensing platforms). Mobile operators, music organisations deem that there is a need for simplification of rights clearance and that national fragmentation is a major inhibitor of Europewide content services. For ISPs and digital media organisations private copy levy regimes are increasingly burdensome and with the increased use of DRMs and associated Technological Protection Measures, levies are no longer justified. Representatives of the film and video industries argue that remuneration of right holders should depend on individual contractual arrangements.
- Availability of content: Lack of availability of creative content for online distribution and lack of circulation of rights remain major obstacles for the development of online content services. Licensing for online exploitation is also hampered by potential conflicts with rights already granted for other forms of exploitation. Access to premium content is deemed critical for the development of new content services and platforms.

Actions at EU level, requested by stakeholders:

- Telecom operators, the UK Government, publishers, commercial broadcasters, some academics and a large number of UK stakeholders call for the Commission to show restraint and not intervene in a market which is still young and dynamic since possible consequences are unforeseeable. They feel that – for the time being - the EU

should only finance research, support dialogue and monitor the market and allow the market time to develop its own solutions. Digital content markets are evolving and unpredictable, with new content, formats, distribution platforms and business models emerging and disrupting the status quo on an almost daily basis. It is as yet unclear which approaches will be successful, and which new entities might yet emerge as key market players.

- calls for financial support (VoD-services under the MEDIA programme); supportive measures for cultural diversity; publishers request support for specific projects and digitalisation and online accessibility of edited content; the games sector calls for both content funding and technology funding, and cable operators call for funding of alternative network construction and Innovation and Development research programmes;
- requests for promoting standards concerning interoperability of DRMs (mainly publishers and broadcasters); disabled users call for the development of technical standards relating to content online;
- many requests from, mainly the content providers, for the encouragement of cooperation (including charters or codes of conduct) between industry, right holders and consumers on issues such as DRMs, Content Online, Film Online. The film industry deems that the European Charter on Film Online should be turned by the Commission into robust inter-industry codes of conduct that encourage the emergence of new services in a secure, consumer-friendly environment. Publishers would like to see similar initiatives to ‘Film Online’ for other sectors of the creative industries. The UK Government deems that the pan-industry involvement of the Film Online Charter should be continued in future work in this area. It would also be useful to involve users/consumers in such work, especially given the economic and cultural importance now evident in user-generated content. Right holders would also favour an *ad hoc* program to finance fight against piracy and awareness-raising campaigns about copyright.
- calls for changing the legal framework for issues such as: licensing, levies, and DRM interoperability.

1.3. Economic outlook

According to the independent study on the interactive content market (covering EU 25)⁸, by 2010, revenues from online content, will more than quadruple from €1.8 bn in 2005, to €8.3 bn by 2010, online content will also make up a sizeable part of total revenue in some content 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 (such as mobile phones and Mp3 players) 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. Technological development is bringing new business opportunities:

- Consumers can access existing and new forms of content through new platforms and devices. New platforms (e.g. games on mobile phones, audio-

⁸ 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.

books to download from commercial websites, newspapers or TV programmes to read or watch on a broad range of mobile devices, etc), widen consumers' options and may also widen the breadth of the content offering (e.g. through online libraries).

- For content providers there is the possibility to leverage more business from new and existing content through new platforms and delivery mechanisms, accessible in more territories, using innovative business models. Examples include: subscription-based radio services, sell-through music or video downloads to PCs or mobile devices, internet and mobile distribution of films and TV programmes, not-for-profit on-line access to public service content archives, etc.
- Hardware and software providers are seeing renewed growth and huge opportunities thanks to digital convergence. Mobile devices (mobile game consoles, multipurpose phones or MP3 players) are amongst the fastest-growing categories in the industry, and online and mobile distribution boost the demand for innovative software and chipsets. Broadband and broadband-based content services have clearly accelerated the popular adoption of PCs.
- For online access and service providers, high quality content is a proven driver. Indeed, the availability of content online through legitimate outlets is an opportunity to generate new revenues. This also explains why online access and service providers are increasingly involved in content production.

The study provides detailed data and economic forecasts of the different markets for digital content, to be used in support of the Communication on creative content online. In summary, the following table outlines the uptake of and perspective for creative content online exploitation in Europe.

Uptake of digital distribution/exploitation of content in Europe – Key figures ⁹

	2005		2010	
	€m*	%**	€m	%
Music (online and mobile)	196.3	2.0	1,794	20.4
Films (VoD)	30	0	1,269	7
Games (online, mobile)	699	11.2	2,302	33.4
TV programmes (VoD and digital advertising)	4.5	na	689	na
Publishing	849	2	2,001	5.4
Radio	15	0.3	250	4.8
Total	1,793		8,303	

* Market size in terms of revenues.

** Percentage of the total sector revenues.

Source: Screen Digest, Goldmedia. Rightscom

⁹ Study on "Interactive content and convergence; implications for the Information Society" - 2007, p.13.

1.4. Overview of the different types of creative content (based on the study and the public consultation)

1.4.1. Audiovisual media online

1.4.1.1. Film

In 2005 (the latest year for which comprehensive data are available), digital on-demand film distribution (retail or rental) was more nascent than music as it generated only €30m revenues in Europe (€28m from walled-garden VoD systems, €2m online). Digital revenues are expected to reach €1.2bn by the end of 2010, the bulk of which (€1bn) will come from online VoD (open gateway download services). At that time, digital exploitation will account for 7 per cent of all film revenues in Europe. UK is and will probably remain the largest European market for VoD. However, the European figures are not as high as those in the US, where the online market alone is expected to generate €1.5bn by 2010, compared with an expected €1 bn for Europe.

Since 1997, the European film market has enjoyed a period of sustained growth, thanks in large parts to the DVD retail sector.

In 2005, Europe's film market generated €13bn in consumer spending (excluding revenues from the sale of lucrative pay-TV and free TV rights to pay-TV operators and broadcasters), of which almost 60 per cent was generated by DVD retail. However, the significant trend in the 2004-2005 period was one of decline, as revenues dropped from a high of €14bn in 2004. This was primarily due to plateauing DVD revenues and a poor year at the European box office.

The box office in major European markets also performed badly in 2005, with only the UK bucking the trend. The drop in revenues also reveals an important fact. With the threat of piracy looming, and the DVD business no longer the growth business it once was (at least not in terms of revenues) the film industry, and the Hollywood studios in particular, have turned their attention to exploring new business models, such as video-on-demand (VoD) and digital retail. But these ventures are still in their infancy, and have yet to generate significant revenue, or generate it quickly enough to meet the shortfall.

However, new business models, such as video-on-demand and digital retail could compensated for the drop in movie revenues from physical format sales (retail and rent of DVDs).

At the end 2006 there were 142 services of pay VoD in Europe¹⁰ with four leading countries (NL, FR, D and UK) representing roughly 50% of the total supply. These services are mainly distributed via internet and IPTV. Among the services offered there is an important part of free on-demand services between 10% - 15% of total supply. An example of free VoD is represented by catch-up TV.

There is an interesting initiative by IFC Films, a theatrical film distribution company of independent and specialised films. It has recently launched IFC First Take, an initiative for a different distribution scheme supplementing the traditional release schedule of films. These

¹⁰ Video On Demand in Europe by NPA Conseil for DDM – France and European Audiovisual Observatory.

films will be specifically released both theatrically and on-demand simultaneously, ensuring that a nationwide release is guaranteed.

The film industry has tended to respond well to technological change, and as such the business model of film is a complex one, relying on a series of release windows defined by technology, time and geography. This has led to three primary models of business:

- theatrical exhibition (cinema);
- sale and rental of physical/digital copies (home entertainment);
- licensing to linear broadcast platforms (television).

As a result of this windowing policy, the film industry has created distinct value propositions for consumers so they can watch films in cinemas, rent videos, buy videos, order a pay-per-view showing, or wait for cable or network TV airings. Each distribution channel's consumer appeal results from price, content quality, and convenience factors, rather than the sheer choice or number of films available.

The fundamental value chain of films, much like music, falls into three sectors: production, distribution and exhibition/sales. That is:

- content production;
- distribution;
- sale/transmission to the end customer/end user (exhibition).

Unlike music however, the major film studios, as part of large entertainment conglomerates, are also involved in direct relationships with consumers through broadcast or other distribution outlets.

1.4.1.2. Television

Many of the issues surrounding the exploitation of television content in the digital value chain come back to the traditional business models that still operate in the TV business.

Like other forms of audio-visual entertainment, the fundamental television value chain can be simplified into three top-level categories: production, distribution and exhibition. Production is the creation of television content; distribution is the sale of that content and exhibition is the transmission of the content to the end user.

The exhibition of content on TV involves two sub-categories: the channel and the platform. The channel can be seen as the aggregator of content while the platform (a cable, satellite or IPTV operator, for example) is the means by which the channel is made available to the public.

Because traditional channels and platforms currently generate the majority of revenue for TV content producers, it is their standard business models and practices that dominate today.

However, on-demand services, such as catch-up TV, which enable viewers to access programmes broadcast earlier over TV networks, highlight the need to bridge the divide between TV and content with online connections.

The TV value chain begins with a production company and the production of a piece of content or programme. Production companies generally seek to pre-finance the production of programmes before they begin making them, either through pre-sale or commission. Depending on the size of the production company and the scale and cost of the production, a production company may seek 100 per cent of the financing or a lesser proportion. Generally, though, the majority of financing (60-plus per cent) will be sought before full production begins.

Broadcasters may also buy finished programmes (in which they have had no pre-financing involvement) outright. A licence agreement includes limited rights to broadcast the finished programme with limitations relating to the duration for which rights are held and the number of runs allowed, as well as the geographic distribution of the content. The value of a finished programme is related directly to its prior success in the market in which it was commissioned.

It is estimated that €4m was generated in 2005 from distributing TV content over the Internet in European countries. The bulk of this revenue was concentrated in the leading Western European territories such as the UK and France, where broadcasters and pay-TV operators have started to take advantage of the Internet as an effective way of distributing content commercially. As similar services continue to develop in other European markets, and major technology firms and portals launch their own offerings across multiple territories, the online segment is likely to become an ever more significant aspect of the total European TV market. By 2010, the European online TV market (distribution of television programmes over the open Internet) will generate €689m in revenues.

Advertising-supported free content will continue to drive usage, meaning that the advertising business model will constitute over 70 per cent of all online TV revenues by 2010.

On-demand television content within the walled garden space of digital TV set-top box-based services is now becoming available in Europe's more developed markets and this trend is expected to spread to other EU markets as they continue with the roll-out of digital cable and IPTV services. Overall, on-demand services within walled garden networks will remain driven by films and sports categories.

In total, online TV and transactional walled garden TV on-demand services will represent only a fraction of the total pay-TV market, which will still be driven by subscription pay-TV services. The total pay-TV market is expected to generate €34bn a year by 2010, with all revenues from online services and TV on-demand representing just two per cent of that total.

1.4.2. *Music and radio online*

1.4.2.1. Music online (music downloads, ring tones, video clips etc.)

Music was the first content category to become available for digital distribution. European online music market generated €120m in 2005 from *à la carte* sales and subscription 'all-you-can-eat' platforms. The total online music market is expected to grow to €1.1bn by 2010. As a whole, the digital segment, which also includes exploitation of services over mobile phones, accounts for one to four per cent of total 2005 music revenues in the European territories. The online segment is expected to reach 12 per cent of total European music revenues by 2010, with total digital music revenues accounting for 20 per cent of total music revenues.

In terms of units sold, the European *physical* music market has been in a state of decline in recent years, having been hit severely by piracy, both in physical and digital form. According

to the International Federation of the Phonographic Industry (IFPI), the sector registered 962m physical music sales in 2004, compared with 1.13bn in 2000.

In large parts, the revenue drop in 2005 is a delayed reaction, masked by growth in revenues from music DVD and the emerging online and mobile digital businesses up until now. However, there is every sign that conventional physical sales are in permanent decline, with DVD market growth also now starting to decline as well. Moreover, growth in the digital sales segment is not moving fast enough to make up for the shortfall.

Digital Music Market

The US, Japan, UK, Germany and France are the top five digital music markets worldwide. In general, countries with a highest percentage of digital sales are the strongest markets for music sales overall.

The European online music market generated €120m in 2005 from *à la carte* sales (that is, the sale of music tracks over the Internet either individually or in an album bundle) and subscription platforms. Online music subscriptions accounted for only 10 per cent of this total. Screen Digest expects the total online music market to grow to €1.1bn by 2010, driven by *à la carte* offerings. The UK continues to be the largest single consumer territory for online music in Europe, expected to generate around 40 per cent of total European online music revenues by 2010.

As a whole, the *digital segment*, which also includes exploitation of services over mobile phones, accounts for between 1 per cent and 4 per cent of total 2005 music revenues in the European territories.

According to the International Federation of the Phonographic Industry (IFPI), master ringtones are currently the largest segment of the mobile market accounting for 87 per cent of mobile music sales.

The *online segment* is expected to account for 12 per cent of total European music revenues by 2010 and the European digital music market is still approximately one third of the equivalent market in the US and will remain bigger in the mid-term. Arguably this is due to cultural, legal, economic and technical barriers hindering exploitation of digital music on both a national and a multi-territory basis.

The fundamental value chain of the music business can be segmented into three sectors, production, distribution and exhibition/sales. That is:

- creation of content;
- distribution to outlets;
- sale/transmission to the end customer/end user.

The main stakeholder categories therefore fall within one or a combination of these responsibilities. Companies that are considered the traditional power base of the industry, the four major record labels Universal, Sony BMG, EMI and Warner Music, are primarily involved in the business of creation and distribution.

The music business model is not very complex if compared with other forms of media and the sale of audio recordings can still account for up to 80 per cent of a major record label's total revenues.

The remainder of the European music download market is a fragmented field largely consisting of services either using DRM solutions from US software giant Microsoft, or providing unprotected MP3s. There are cross-industry attempts to promote interoperability between DRM technologies used in the consumer media market (i.e. Coral Consortium; but Apple and Microsoft are not members of this consortium) but lately DRMs have been heavily criticized and there is a tendency to eliminate them for music as they are easily circumvented.

1.4.2.2. Radio online (for instance podcasting, radio programmes, news, sport, etc.)

There are four different business models for 'digital radio' services: broadcast digital radio, online radio, podcasting and mobile handheld radio.

For personal radio streaming, an evolution of broadcast models, business models have yet to mature.

Podcasting is an extension of the radio broadcast. Podcasts are programmes, recorded as digital audio files, which are downloadable and transferable to portable digital devices such as MP3 players. So far, there has been little revenue made from podcasts (subscriptions have tended to be free) and the music royalties group MCPS-PRS Alliance in UK, Europe's largest music market, has announced plans for a trial run of podcasting licences for music podcasters.

There were around 15m weekly listeners to online radio services in EU countries in 2005. Podcasts were estimated to have an average weekly audience of 220,000, while only 160,000 were reckoned to listen to radio on their mobile phones on a weekly basis. This compares with a daily audience of about 346m for traditional radio services across the EU region.

By 2010, it is expected that the online radio audience will have more than doubled to 32m. However, the fastest growing radio segment is likely to be the mobile sector, expected to reach 21.7m weekly listeners in 2010.

The revenues brought by digital radio today are, apart from UK DAB revenues, nearly zero. Advertising revenues in the EU25 in 2005 may amount to no more than €15m.

Viable business models for digital interactive radio services have not emerged yet and it is not clear whether models mainly based on subscription fees, on advertising revenues or on transactions will dominate.

Digital radio advertising revenues are expected to represent about €250m in 2010 i.e. 5 per cent of a projected €5.2bn of the total radio advertising market. Irrespective of their economic value, online radio and podcasting will probably remain niche markets. Mobile digital radio has the potential to become a mass market – but after 2010.

Satellite radio is currently at the forefront of the evolution of subscription-based radio services in some countries, notably the United States. Mobile services allow a listener to roam across an entire continent, listening to the same audio programming anywhere. In North America, there are two satellite radio companies, XM Satellite Radio and Sirius Satellite Radio. These two former rivals have announced their intention to merge, which would create a single satellite radio entity in the United States with nearly 14 million subscribers. One critical factor for the success of satellite radio in the United States is the deployment of in-car receivers. Both Sirius and XM have convinced car manufacturers to equip vehicles with their receiver.

1.4.3. *Online games and digital distribution of games*¹¹

The games market is the most advanced content market in terms of digital distribution/exploitation.

There are a number of different digital ‘channels’ and business models for online distribution and exploitation of video games including the distribution of games via mobile phone networks, interactive TV systems, and via the Internet (comprising both digital distribution of games and playing of games over the network).

The total value of the European ‘digital’ games market was €699m in 2005, of which about 48 per cent was contributed by the mobile sector. This compares with a physical retail market of €5,537m in 2005. Digital revenues accounted for just over 11 per cent of the combined total market value.

By 2010, it is expected that the digital games market will grow to €2.3bn – 33 per cent of the total games market.

1.4.4. *Online publishing (‘printed’ material/books/newspapers online, etc.)*

Consolidated data is more difficult to obtain in relation to the publishing industry since there is no harmonised data available indicating the revenues derived from online activity. Online publishing essentially covers newspapers, scientific publications and e-books. Newspapers have developed business models based on online advertising (generating 1 to 4 % of European newspapers' advertising revenue), subscription-based access and pay-per-download. Scientific publications also operate on a free basis (ranging from open access to advertising-based business models), or by subscription or pay-per-article. E-books remain a niche-market, as from the consumers' perspective, a digital copy of a book remains an imperfect substitute for the material equivalent. Nevertheless, operators of e-book services include publishers, retailers (Amazon) or even libraries (British Library).

Print advertising revenues are declining gradually. The big question is how the growing online advertising pie will be shared between the online activities of print publishers and all other contenders. Search engines have around 30-50 per cent of the market, depending on the particular country and there is no immediate reason to suppose that this will fall; in some countries it may continue to rise, though some revenue may flow back to content providers if they succeed in gaining royalties on the use of their content.

News publishers' business models rely on controlling the on-line distribution of articles to avoid revenue streams being undercut by free-riders.

1.4.5. *User-generated or user-created content (Web 2.0)*

Convergence is leading the development of new applications building on the capacity of ICT to involve users in content creation and distribution. Web 2.0 applications such as blogs, podcasts, wiki, or video sharing, enable users easily to create and share text, videos or pictures, and to play a more active and collaborative role in content creation. User-generated content has gained momentum over the past year owing to a transformation of the media environment, with major implications for traditional media and new media companies alike.

¹¹ The Creative Content Online initiative does not cover gambling services which involve wagering a stake with monetary value in games of chance, including lotteries and betting transactions.

A fundamental shift is underway from passive to active media, with users increasingly creating and distributing their own content.

User-generated content means any form of content (including photo, video, audio, animation and text) produced or created and made publicly available online by users. It includes both original piece of content created by users – i.e. user-created content – and existing content that is simply uploaded by users. User-generated content is, in essence, intrinsic to the Internet, and it is naturally developing in tandem with the Internet's growth.

Mainstream entertainment companies are increasingly viewing this new type of content as and a valuable incubator for new talent. They have scented an inexpensive and fresh source of content, and sometimes co-opt some of the best talent from the user-produced community. In that light, a number of major broadcasting and cable companies have entered or are planning to enter this market.

Comedy and humour videos are the most popular content (witnessed by a stock of more than 200.000 of them on YouTube) together with music, dance, games and news programming. Personal video messages, such as greetings, are becoming more and more popular.

Although the user-generated content market is still relatively small and immature, it is growing and broadening. Still few firms offering user-produced content are generating significant revenue with the exceptions of large online communities such as MySpace and Flickr, which have generated most of their revenue from advertising (i.e. \$ 13 million in ad revenue for MySpace per month on average). A variety of business models is expected to emerge for user-generated content including advertising models or advertising-free zones and subscription models.

One of the greatest challenges in user-generated content has been finding a satisfactory solution to copyright issues. The market will likely face difficult copyright issues and a growing number of users will come to expect compensation for their work, though the large majority of users will be satisfied with credits and exposure for their content.

There is a significant difference between user-created content and existing content that is simply uploaded by users and is typically copyrighted.

User-created should get proper room and protection to allow for this type of content to develop. However, it is also crucial to make sure that it does not infringe existing rights.

Concerning users uploading existing copyright protected content, YouTube, for example, has instituted a policy requesting users to vouch for their ownership of the rights to the content they are posting on the service. Others such as "Turn Here" present entirely copyright-free material and explicitly have a policy of "removing any material that violates copyrights". It is very difficult to be able to screen every piece of user-published content on the service for copyright infringement and this is why monitoring and curtailing offending material is another key challenge facing the user-generated content market. In the US, Viacom has launched a \$1bn lawsuit against YouTube and its owners, Google, over copyright infringing videos hosted by the site. The case could test the limits of the 'safe harbour' protections for ISPs and influence other user-generated content sites.

The greatest participation of the user in innovation and creation with user created content and customisation of product and services, is an emerging trend in the on line world. Therefore policy implications cannot be fully grasped at this early stage. With the view to have a better understanding of the challenges and opportunities arising from the development of user-

created content, the Commission released a call for tender for a study on "User-created content: Supporting a participative Information Society" in September 2007. The objective of the study will be to identify the drivers of and obstacles to the development of user-created content, and the challenges to be addressed to ensure that it contributes to creation, innovation and a more participative Information Society in Europe.

2. LEGAL FRAMEWORK – EU INSTRUMENTS RELATING TO CREATIVE CONTENT ONLINE

2.1. EU Regulation

The existing EU legal framework affecting content has two main objectives: safeguarding the functioning of the Internal Market whilst enforcing certain social and cultural general interest objectives (including protecting consumers, minors and fundamental rights).

Creative content online has a strong potential to enhance cultural diversity; however, regulatory instruments fall outside EU competence in this area. Enhancing cultural diversity in the online environment is supported by financial mechanisms at EU level, in compliance with the provisions of Article 151 of the EC Treaty. Furthermore, Article 151(4) of the Treaty establishing the European Community lays down that "The Community shall take cultural aspects into account in its action under other provisions of this Treaty, in particular in order to respect and to promote the diversity of its cultures". This provision, inserted in Title XII, which sets out Community competence in the field of culture, reflects the desire to place culture among the major objectives of the European Community. It places an obligation on the European Community to take account of the cultural objective as part of its activity. This requirement has certainly been put into practice during the Community's history, but with the entry into force of the Treaty on European Union it has become statutory and systematic, both for legislative acts and joint policies.

The i2010 Communication is the umbrella for all EU initiatives promoting the development of the online creative content. Three major priorities were formulated in support of the Lisbon goals: the completion of a Single European Information Space which promotes an open and competitive internal market for information society and media; strengthening innovation and investment in ICT research to promote growth and more and better jobs; achieving an inclusive European Information Society that promotes growth and jobs in a manner that is consistent with sustainable development and that prioritises better public services and quality of life. The modernisation of the "Television Without Frontiers Directive" (89/552/EEC)¹² into an "Audiovisual Media Services" Directive and the review of the EU regulatory Framework for eCommunications are part of this objective.

2.1.1. Sector-specific market regulation

The "Audiovisual Media Services Directive" amended the "Television Without Frontiers Directive" in this area. Specifically it will apply some basic obligations with regard to protection of minors and human dignity, qualitative rules for advertising, and some further obligations in respect of promotion of production and access to European works, to all audiovisual media services, including on-demand (non-linear) services, while more detailed

¹² Directive 89/552/EEC (OJ L 298, 17.10.1989, p. 23.), as amended by Directive 97/36/EC (OJ L 202, 30.07.1997, p. 60.)

regulation would apply to traditional television services (linear services), whatever their mode of delivery.

The development of pay-TV has depended on the harmonisation of the legal arsenal against piracy. The "Conditional Access" Directive 98/84/EC¹³ forms part of that arsenal. This Directive harmonised the illegality of any equipment or software designed or adapted to give access to a protected service in an intelligible form without the authorisation of the service provider. The second application report on this text is due to be adopted in 2008. A study will soon be finalised evaluating the impact of this directive and a consultation will be launched before the end of 2007 to assess stakeholders views as to whether this technology neutral Directive continues to meet its internal market objectives by assisting the cross-border growth of subscription based services particularly as new digital platforms of service delivery develop.

The Electronic Commerce Directive (2000/31/EC) or eCommerce Directive¹⁴, adopted in 2000, set up an Internal Market framework for electronic commerce, which provides legal certainty for business and consumers. It aims to ensure that Information Society services benefit from the Internal Market principles of freedom to provide services and freedom of establishment and so can be provided throughout the EU if they comply with the law in their home Member State. The eCommerce Directive establishes harmonised rules on issues such as the information requirements, commercial communications, electronic contracts and liability limitations of intermediary service providers.

Within the regulatory framework for electronic communications networks and services¹⁵, the non-discrimination clause guarantees the protection of internet neutrality and regulates access to infrastructure (Access Directive – Articles 10 and 12). The provisions on universal access assure the transmission of internet content via a functional internet connection. The Commission has adopted a proposal for a reform of the EU telecom rules on 13 November 2007¹⁶. The reform of the EU's telecom rules, which is an integral part of the Commission's strategy to strengthen Europe's single market in key areas, has four main objectives: to deregulate telecommunications markets as far as possible in places where effective competition has already been established, to focus ex-ante regulation on markets where effective competition shows little prospect of emerging in the short to medium term, and to make such regulation speedier, more effective and more consistent across the EU, to create a framework for allocation and use of radio frequencies in Europe that is more effective, market-oriented and competitive and to address regulatory and market fragmentation in Europe's telecommunications markets by creating a "one stop shop" for cross-border issues.

2.1.2. *Intellectual property regulation*

Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society¹⁷ defines the copyright regime for offline but also digital works thus influences the reuse of the content in an online environment and for online works. The

¹³ OJ L 320, 28.11.1998, p. 54.

¹⁴ OJ L 178, 17.7.2000, p. 1.

¹⁵ 2002/19/EC – OJ L 108, 24.4.2002, p.7 (Access Directive), 2002/20/EC – OJ L 108, 24.4.2002, p.21 (Authorisation Directive), 2002/21/EC – OJ L 108, 24.04.2002, p.33 (Framework Directive), 2002/22/EC – OJ L 108, 24.04.2002, p.51 (Universal Service Directive), 2002/58/EC – OJ L 201, 31/07/2002, p.37 (Directive on Privacy and Electronic Communications)

¹⁶ http://ec.europa.eu/information_society/policy/ecommm/library/proposals/index_en.htm

¹⁷ OJ L 167, 22.6.2001, p. 10.

main purpose of Directive 2001/29/EC was to address copyright needs in the digital age. The Directive supports the use of DRMs by protecting technical measures and by requiring Member States to take into account the application and non-application of technological measures when providing for fair compensation in the context of the private use exception for which fair compensation is required. The Directive also calls for voluntary measures by industry to protect copyrighted material while ensuring interoperability and compatibility of different systems in the protection of copyrighted material.

The Enforcement Directive 2004/48/EC¹⁸ harmonises the enforcement of intellectual property rights. Measures, procedures and remedies which can be ordered by the competent judicial authorities in case of an IP infringement at the request of an entitled party.

2.1.3. *Consumer protection*

The provisions of horizontal consumer protection apply to all Services of General Interest. These include the general provisions on advertising which apply to all sectors contained in the Misleading Advertising Directive(2004/48/EC)¹⁹, and the Directive on unfair business-to-consumer commercial practices (2005/29/EC)²⁰ for harmonised consumer protection rules also applicable to online services. The framework Directive takes a technology-neutral approach and is also based on the country of origin principle, making it compatible with the approach of the 'Television Without Frontiers' (TVWF) Directive. Other relevant directives concerning consumer protection are the Unfair Terms in Consumer Contracts Directive (93/13/EEC)²¹, the Distance Contracts Directive (97/7/EC)²².

In 1995 the EU adopted Directive 95/46/EC²³ on the processing of personal data. This Directive established the basic principles for the collection, storage and use of personal data that should be respected by governments, businesses and any other organisations or individuals engaged in handling personal data. Directive 95/46/EC also created a working party consisting of the independent national data protection authorities in the Member States.

Directive 2002/58/EC²⁴ on privacy and electronic communications includes provisions on security of networks and services, confidentiality of communications, access to information stored on terminal equipment, processing of traffic and location data, calling line identification, public subscriber directories and unsolicited commercial communications.

2.1.4. *Competition Policy*

Beyond the targeted and sector specific undertakings, the EU also acts through its competition policy to maintain a healthy functioning market in the online content industries. Market developments in the media sector include an increase in the overall number of distribution channels, increasing consumer choice and demand for content, and the switch from analogue

¹⁸ OJ L 157, 30.4.2004 - OJ L 195, 2.6.2004, p. 16.

¹⁹ Council Directive 84/450/EEC of 10.9.84 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning "misleading advertising" (OJ L 250, 19.9.84, p. 17) and European Parliament and Council Directive 97/55/EC of 6.10.97 amending directive 84/450/EEC concerning "misleading advertising so as to include comparative advertising (OJ L 290, 23.10.97, p. 18)

²⁰ OJ L 149, 11.6.2005, p. 22.

²¹ OJ L 95, 21.4.1993, p. 29.

²² OJ L 144, 4.6.1997, p. 19.

²³ OJ L 281, 23.11.1995, p. 31.

²⁴ OJ L 201, 31.7.2002, p. 37.

to digital broadcasting, which is already providing consumers with better picture quality and a greater variety of programmes. The main objective of competition policy in the media sector is to guarantee that there is a level playing field, whether between different commercial operators or between commercial operators and publicly-funded operators.

In line with the "Broadcasting Communication"²⁵, the Commission continued to approve state financing for public service broadcasters where the state funding did not exceed the public service costs and where the other conditions set out in the Communication for the application of Article 86(2) of the Treaty are fulfilled²⁶. In order to ensure this in recent cases, the Commission has also asked Member States to introduce mechanisms to avoid overcompensation²⁷ and it has asked for state aid to be recovered if a public service broadcaster has received more public funds than necessary to fulfil their public service remit. However, the Commission has accepted that it may be justified for public service broadcasters to keep a limited surplus as a buffer against possible fluctuations in costs/revenues²⁸.

The Commission assessed state aid measures for films and other audiovisual works on the basis of the "Cinema Communication"²⁹, which sets out the criteria under which such aid can be approved under the cultural exemption of Article 87(3)(d) of the EC Treaty from the general ban on state aid. The three most significant decisions in 2006 concerned the French film support schemes³⁰, the UK film tax incentive scheme³¹ and the new German film fund³². All these measures were approved by the Commission since they complied with the criteria set out in the Communication. Moreover, the Member States concerned also offered an undertaking that the schemes would be amended by national authorities to take account any changes in the State aid rules contained in the Communication during their period of operation.

In the context of rights management, the Commission adopted the *Cannes Extension Agreement* commitment decision³³, ensuring that record producers can continue to receive rebates from collecting societies on copyright licence fees paid out of the administrative fee that the collecting societies retain from the royalties which they collect on behalf of their members and that potential entry by collecting societies in the music publishing or record production markets is not impeded.

²⁵ Communication from the Commission on the application of State aid rules to public service broadcasting (OJ C 320, 15.11.2001, p. 5).

²⁶ Cf. Commission decision approving the financial restructuring plan for the Portuguese PSB in July 2006 (State aid NN 31/2006 – Portugal).

²⁷ Cf. Commission decision closing the existing aid investigation concerning the general financing regime for the Portuguese public service broadcaster RTP (State aid E 14/2005 – Portugal).

²⁸ Cf. Commission decision concerning the *ad hoc* financing of Dutch public service broadcasters adopted in 2006 (State aid C 2/2004 –the Netherlands).

²⁹ Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on certain legal aspects relating to cinematographic and other audiovisual works (COM(2001) 534 final of 26.9.2001, OJ C 43, 16.2.2002)

³⁰ Case NN 84/05: http://ec.europa.eu/comm/competition/state_aid/register/ii/doc/NN-84-2004-WLWL-fr-22.03.2006.pdf

³¹ Case N 461/05: http://ec.europa.eu/community_law/state_aids/comp-2005/n461-05.pdf

³² Case N 695/06: http://ec.europa.eu/comm/competition/state_aid/register/ii/by_case_nr_n2006_690.html#695

³³ Case COMP/38681 *Cannes Agreement*, commitments at <http://ec.europa.eu/comm/competition/antitrust/cases/decisions/38681/commitments.pdf>. See also Press Release IP/06/1311, 4.10.2006.

2.2. Soft law initiatives and voluntary guidelines

An example of soft law is the recommendation on collective cross-border management of copyright and related rights for legitimate online music services (2005/737/EC)³⁴. Transaction costs for online music offerings are considerably increased by the obligation to contract with several collecting societies in the Member States. The recommendation aims at encouraging actors to eliminate this bottleneck.

The problems arising from orphan works as well as issues linked to out of print or out of distribution works, are 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 preservation³⁵, the Commission urged the Member States to create mechanisms facilitating the use of orphan and out of print works. Council conclusions of 13 November 2006³⁶ endorsed the Commission 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 libraries.³⁷ The Commission will closely monitor the implementation of the Recommendation and the need for further action at European level on this issue.

A concrete example of voluntary guidelines addressing challenges for Europe's online content industry is the already mentioned European Charter for the Development and the Take-up of Film Online³⁸ (see 1.1.3).

3. CHALLENGES

Technological, economic and legal challenges need to be overcome for Europe to develop a Single Information Space and ensure that creative content online to achieve its full potential.

The transfer of content services to the online environment is an example of major systemic disruption, which causes continuing friction and fights for control in a very dynamic business environment; these market conditions prevent consumer-friendly and interoperable services from becoming available for EU-wide consumption. The challenge is to ensure that value networks necessary for the emergence of large scale online services will be in place as soon as possible. More specifically, the convergence of broadband networks, content services and different electronic devices, is bringing about three major trends for changes:

- Creating new delivery channels for traditional content and opening the path to the development of interactive content and services

Convergence results in the emergence of new distribution platforms, new business and distribution models, or new forms of content. While some content sectors are more advanced than others in reaping the benefits of convergence, convergence offers opportunities for all content sectors to be innovative, to develop new business models and to add value to existing products or open up new sources of revenues.

- Bringing down technical and geographical barriers to the distribution of content

³⁴ OJ L 276, 21.10.2005, p. 54 – OJ L 284, 27.10.2005, p. 10.

³⁵ OJ L 236, 31.8.2006, p.28.

³⁶ OJ C 297, 7.12.2006 p.1.

³⁷ See: http://ec.europa.eu/information_society/activities/digital_libraries/hleg/index_en.htm

³⁸ http://ec.europa.eu/comm/avpolicy/other_actions/content_online/index_en.htm#charter

Convergence is also making it technically possible for a broad range of content to be accessible across the European Single Market. By bringing down technical and geographical barriers to the distribution of content, convergence offers opportunities for the European content sector to reach new audiences, develop niche markets, or distribute its great diversity of content on a European or global scale.

- Empowering users with regard to content selection and creation

Technological changes and convergence are also leading to user empowerment and a major shift in their habits, from passive media consumption to active content selection and creation. The rise of user-created content is becoming a major new factor. Such content is even starting to compete with content produced by established providers, notably in terms of advertising revenues.

Making the most of these three major new trends means meeting three interrelated 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 cultural 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.

3.1. Main challenges for creative content online

3.1.1. 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. Furthermore new digital platforms do not always have the scale to produce enough revenues to make up for possible losses from established platforms. Right holders also fear losing control as illegal copying in the digital environment has proven to be highly damaging. It should be noted that legitimate online offer of creative content is widely regarded as one of the means of curbing illegal copying. However, some right holders prefer to protect existing revenues streams rather than actively licensing their rights on new platforms. Furthermore, licensing for online exploitation is also hampered by potential conflicts with rights already granted for main forms of exploitation.

Each new content distribution model in the past (pay-TV, DVD, PPV and even radio) had to go through a learning curve, since new business practices had to be established and the very value of the new forms of distribution were still unknown. Arguably the new paradigm is even more difficult to tackle precisely because digital technology offers so many business model possibilities. All-industry negotiations can be useful to converge more quickly to stable business practices, especially regarding typical duration of licences/windows.

In some instances, it has been proved that, when well managed, near-simultaneous multi-platform distribution (broadcast, VoD, DVD) can increase the awareness of a given TV

programme and maximise primary audience, rerun asset value, and revenue for content owners, instead of cannibalising.

With regard to difficulties arising from potential conflicts between the rights needed for online exploitation and the rights already granted for other forms of exploitation, it is not the first time in media history that contracting parties have had to re-interpret or re-negotiate rights licences in order to embrace new technologies. For this reason, many stakeholders are confident that such a process can be handled under existing contract law or industry agreements. However, to avoid such difficulties in the future, many television broadcasters are trying to implement standard contracts focusing only on the *nature* of the service offered to the final-user (like ‘free, real-time, uncut transmission in a given territory’) avoiding any mention of specific (i) transmission technologies, (ii) delivery networks, and (iii) devices, so as to encompass new technologies yet to appear.

Most of the difficulties related to availability of content for online distribution 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 rights³⁹. A possible remedy is to increase the level of information and common knowledge, technological confidence, horizontal expectations and legal certainty throughout the value chain. Awareness raising actions would seem the appropriate way forward.

As to terms of trade, non-exploitation of new media rights and definition of rights/windows, it would 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.

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

Policy makers can accelerate the content sector's shift to digital by supporting self-regulation or cross industry agreements to maximise the circulation and exploitation of content online. Such agreements could for instance follow the lines of the work on the European Film Online Charter – where the Commission acted as facilitator.

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 locate⁴⁰. 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 preservation⁴¹, the Commission urged the Member States to create mechanisms facilitating notably the use of orphan works. Council conclusions of 13

³⁹ Interactive Content and Convergence; Implications for the Information Society, 2007, p. 13

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

⁴¹ OJ L 236, 31.8.2006, p.28.

November 2006⁴² 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 libraries.⁴³ The Commission will closely monitor the implementation of the Recommendation and the need for further action at European level.

A related challenge is for policy makers to promote transparency of authorship and ownership through dedicated, open standards databases of rights and widespread use of standardised digital identifiers, such as metadata tags which include rights information and watermarks. These databases should be operated with the assistance of the stakeholders concerned. The publishing sector is already working on the ACAP standard (Automated Content Access Protocol⁴⁴) with search engines operators and other technical and commercial partners. Furthermore, some stakeholders have argued that a copyright registration system could facilitate the clearance of rights for certain works, such as audiovisual works. While compulsory registration is contrary to international treaty obligations, adherence to a voluntary copyright registration system could simplify and lower the cost of copyright clearance. This could be done either by way of a registry or by interconnection of decentralised databases. It should record the works and rights therein as well as any subsequent contractual or statutory change thereto. Projects co-funded under the *eContentplus* programme might support the design and feasibility of such a service.

3.1.2. *Multi-territory licensing*

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. Creative businesses and authors societies frequently argue that sale of rights on a territorial basis has enabled the right holders to extract the greatest value.

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 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 (2005/737/EC)⁴⁵. 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

⁴² OJ C 297, 7.12.2006, p.1.

⁴³ See: http://ec.europa.eu/information_society/activities/digital_libraries/hleg/index_en.htm

⁴⁴ See <http://www.the-acap.org/>

⁴⁵ OJ L 276, 21.10.2005, p. 54 – OJ L 284, 27.10.2005, p. 10.

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

Collecting societies consider that the current network of reciprocal representation agreements is an effective system. Therefore they tend to think that no further regulation is necessary. Nevertheless collecting societies have entered into a dialogue with the European Commission and service providers in relation to options for improving the conditions of collective rights management as long the reciprocal agreement system is not put into question. In this context collecting societies stress that there have to be safeguards against 'dumping' of valuable content and that open competition must not result in 'forum shopping'.

Recent developments show that certain right holders and their representatives would also like to have the possibility of licensing their repertoire directly and on a Community - wide basis to certain end users. Music publishers and a variety of collecting societies believe that the value of their repertoire is enhanced when online retail services need to take out a direct license with the proprietor of this repertoire. Direct licensing of repertoire for online sales would also facilitate the multi-territorial management of rights as the repertoire licensed in this manner could be sold online across the entire Community.

The Commission's main concern is that a multi-territory licensing model does not erode the value of music when it is disseminated online. Any licensing system that results in a 'race to the bottom' on licensing rates that apply for online services, would be highly detrimental to the livelihood of musical writers and composers, the survival of collecting societies and, in consequence, cultural diversity."

The introduction of a multi-territorial system of collective copyright licensing for online music services should provide commercial users with greater certainty when clearing the rights for the online exploitation of music and encourage the development of new services.

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-territorial licensing has become relevant in other creative content sectors such as film. 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 few national territories, thus slowing the availability of films in video-on-demand catalogues abroad.

As for television services, the technology-specific Satellite and Cable Directive (93/83/EEC)⁴⁶ sought to achieve an internal market for trans-frontier satellite services by applying the country of transmission principle to programmes broadcast via satellite. As a result, these programmes shall only be subject to the jurisdiction of the Member State from which the programme signal is being transmitted to the satellite. The act of communication to the public by satellite is deemed to solely occur in the Member State where, under the control and responsibility of the broadcasting organisation, the programme-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth, meaning in the State where the programme is introduced. Since the satellite footprint does not follow national borders, application of the country of reception would have

⁴⁶ OJ L 248, 6.10.1993, p. 15.

meant that a broadcasting company would have had to clear the rights in all countries of reception prior to broadcasting. Since the transposition of the Satellite and Cable Directive, only a licence in the country-of-transmission of the satellite broadcasting is needed.

The initial report on the application within Member States of the Satellite and Cable Directive (2002)⁴⁷ pointed at the fact that ongoing technological developments (including digital television and the Internet) would generate a manifold increase in the possibilities and arrangements for the cross-border provision of audiovisual services and that the audiovisual services that would be offered in the near future would lead to changes in viewers' habits through providing them with more individualised and personalised access to these services. However, it was deemed too early to gauge the content and impact of these changes and, hence, to determine whether it would be necessary to extend the scope of Satellite and Cable Directive.

Some stakeholders, including representatives from the broadcasters suggest that the country-of-origin principle should be considered for online services along the lines of the Satellite and Cable Directive. They consider that in particular, Internet streaming/simulcasting is comparable to the case of satellite broadcasting⁴⁸. While internet streaming and indeed simulcasting may indeed be structurally similar to broadcasting, this is less true for a host of 'on-demand' services and 'online retail' of music or film. In the case of online purchases, legal doctrine has established that the relevant act under copyright laws takes place in the country where the consumer has access to the relevant services. In depth analysis will be needed before considering the extension of a technology specific solution. The application of the country of transmission was introduced by the Satellite and Cable Directive in view of an overspill that could not be avoided in the context of a specific broadcasting technology. In the case of online services, the issue is the accessibility of content services at European level. Furthermore, the extension of the country of origin principle raises a number of concerns, such as the difficulties of locating the relevant act of transmission in the digital environment, the risk of devaluation of copyright if a single tariff and license were to be applied to the whole Internal Market, or of a "race to the bottom" both regarding the emergence of the protection and the scope of the protection⁴⁹. Hence, the question of whether or not the Satellite and Cable Directive (93/83/EEC) should be made technologically neutral by extending the country-of-origin principle to online services should be addressed through a review of this Directive.

3.1.3. 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.

⁴⁷ Report from the Commission Report from the European Commission on the application of Council Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission - COM/2002/0430 final.

⁴⁸ Interactive Content and Convergence; Implications for the Information Society, 2007, p. 211.

⁴⁹ European Content Regulation, 2006, p. 89.

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 models⁵⁰ - 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 data⁵¹. 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 situations⁵². In order not to jeopardize the future of this technology as an enabling factor, it is crucial to address the question of interoperability.

Hence, 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 services⁵³.

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 online⁵⁴.

According to consumer organisations, consumers should have access to Alternative Dispute Resolution (ADR) mechanisms to solve disputes that may arise from the use of DRM in particular for cross-border transactions. ADR schemes or out-of-court mechanisms as they are also known have been developed across Europe to help citizens who have a consumer dispute, but who have been unable to reach an agreement directly with the trader. ADR schemes

⁵⁰ The Recasting of copyright and related rights for the knowledge economy, 2006, Annex 1, p. XII.

⁵¹ Working document on data protection issues related to intellectual property rights – January 2005.

⁵² Interactive Content and Convergence; Implications for the Information Society, 2007, p. 291

⁵³ To the extent that DRMs are a form of conditional access system, in the second evaluation report of the Conditional Access Directive (98/84/EC) 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.

⁵⁴ "Digital Rights Management" Report of an Inquiry by All Party Internet Group, p. 17: *"Labelling [...] may seem excessively worrying to the providers of content, however [...] accurate, easy to read and easy to understand labelling is a prerequisite for DRM [...] to be seen truly successful in the market – and not just a set of technologies foisted onto consumers without their knowledge or understanding"*.

usually use a third party such as an arbitrator, mediator or an ombudsman to help the consumer and the trader reaching a solution. Since DRM applications are mainly considered for low value products the use of Alternative Dispute Resolution (ADR) mechanisms seems especially relevant.

The advantage of ADR is that it offers more flexibility than going to court and can better meet the needs of both consumers and professionals. Compared to going to court these schemes are cheaper, quicker and more informal which means they are an attractive means for consumers seeking redress.

However, these out-of-court mechanisms have been developed differently across the European Union.

The Commission has been active in promoting the development of Alternative Dispute Resolution. Two Recommendations by the European Commission (Recommendation 98/257/EC⁵⁵ and the 2001 Commission Recommendation⁵⁶) have established quality criteria that each ADR scheme should offer to its users.

In addition, the Commission's proposal for a European Directive on Mediation in Civil and Commercial Matters⁵⁷ aims to ensure a sound relationship between the mediation process and judicial proceedings, by establishing common EU rules on a number of key aspects of civil procedure. Finally, the European Consumer Centres Network (ECC-Net⁵⁸) provides consumers with information and assistance in accessing an appropriate ADR scheme in another Member State.

3.1.4. 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 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.

The European Charter for the Development and the Take-up of Film Online identifies commendable practices for bringing content online in a consumer-friendly way identifying four key elements for the take off of the Film Online: a wide online offer of attractive films, consumer friendly online services, adequate protection of copyrighted works and a close cooperation to fight piracy.

⁵⁵ OJ L 115 , 17.4.1998, p. 31.

⁵⁶ OJ L 109, 19.4.2001, p. 56.

⁵⁷ http://ec.europa.eu/civiljustice/adr/adr_ec_en.htm

⁵⁸ http://ec.europa.eu/consumers/redress/ecc_network/index_en.htm

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)⁵⁹. Moreover, Article 20(6) of the legislative proposal to amend the Universal Service Directive provides for an 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 rights⁶⁰.

In France, a Memorandum of Understanding⁶¹ 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.

3.2. Other issues raised during the Public Consultation

3.2.1. Broadband penetration

The i2010 second annual report shows that businesses are investing in new and more mature ICT solutions, and Europeans are quickly embracing new online services. This is supported by a record number of new broadband connections: more than 20 million new broadband lines, were connected in 2006, with very high broadband penetration rates in the Netherlands (around 30%) and the Nordic Countries (25-29%). The online content market is forecast to grow rapidly for the next five years, as already seen with the explosive growth of online music sales and user-created content. Big disparities in broadband penetration among Member States could reduce the profitability of multi-territory content distribution (lack of scale effect) and thus, in a knock-on effect, reduce the attractiveness of broadband access where little local content is accessible.

The Commission's eGovernment Action plan has helped Member States boost public services online. These are increasingly sophisticated, and more Europeans use them. ICT support for healthcare and education across Europe are also experiencing strong growth. However, in creating such services, administrations must ensure that all citizens can access them and benefit from the information society in general.

National and local governments should take a more active role in promoting the adoption and introduction of broadband services, which may mean, for instance, speeding up the unbundling of the 'last mile' in countries like the UK, dismantling incumbent monopolies, or implementing specific regional initiatives to drive adoption.

⁵⁹ COM(2007) 697 final.

⁶⁰ COM(2007) 698 final

⁶¹ "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>

3.2.2. Network Neutrality

In respect of the current Internet, "neutrality" is defined for the purposes of this document to refer to carrying traffic without discrimination.

In Europe, like in the U.S., a key concern for the near future will be to ensure that the Internet remains "open". Both open from the point of view of service providers wanting to deliver new, innovative services and open from the point of view of consumers wanting to access, create and distribute the services of their choice. In general, a competitive market means that if one supplier seeks to restrict user rights, another can enter the market with a more 'open' offer.

In Europe the regulatory framework for Electronic Communication Services and Electronic Communication Networks allows operators to offer different services to different customer groups, but might not allow those who are in a dominant position to discriminate between customers in similar circumstances.

A large part of the content sector and others (broadcasters, publishers, VOIP operators, libraries, the games industry, internet portals, the film industry, one mobile phone operator, and consumer organisations) are in support of network neutrality. Telecom operators and ISPs feel that network neutrality should be dealt within the "Telecom package".

Network neutrality is a heavily debated issue in the United States. Discussions on network neutrality⁶² in the US began on 5 August 2005 with the adoption of the Federal Communication Commission's (FCC Policy) Statement that outlines the following freedoms or rights:

- the freedom to access the (lawful) content of its choice,
- the freedom to use the applications of its choice,
- the freedom to attach any personal devices,
- the freedom to obtain service plan information, and
- the freedom for users to distribute their own (lawful) content.

⁶² Currently, in the US there is no single agreed definition of network neutrality:

- The Telecommunications Industry Association refers to the principles that broadband Internet access service providers should neither hinder how consumers lawfully use the network, including what devices they attach to it, nor discriminate against content providers in gaining access to that network.
- The Research community, namely, Columbia Prof. Timothy Wu defines network neutrality as a network design principle in which a maximally useful public information network aspires to treat all content, sites, and platforms equally. This allows the network to carry every form of information and support every kind of application.
- The AT&T/Bell South merger agreement defines net neutrality as an agreement on the part of the broadband provider: "not to provide or to sell to Internet content, application or service providers any service that privileges, degrades or prioritizes any (data) packet transmitted over AT&T/BellSouth's wireline broadband Internet access service based on its source, ownership or destination." This is the first definition in law.
- The Federal Communication Commission's (FCC's) AT&T/BellSouth merger Order includes a Net Neutrality condition that applies only to AT&T's DSL service, a public Internet access service, and expressly exempts the application of the Net Neutrality condition to IPTV and enterprise services.

The original four freedoms were defined by the FCC in August 2005, the fifth one has been added later on, taking into account the evolving use of the internet, whereby users are increasingly not only receivers of information, but are also distributing their own (lawful) content. In this context one could see consumers as an individual consumer but also as the small enterprise which has some content (or application) to offer over the internet.

There may be legitimate public interest considerations which mean that discriminatory treatment of traffic is warranted or is not warranted regardless of the state of competition on the market. Moreover, there is a risk that, in some situations, the quality of service could degrade to unacceptably low levels.

In the proposal for the Telecom Review adopted by the Commission on 13 November 2007 it is therefore proposed to give NRAs the power to set minimum quality levels for network transmission services in a Next Generation Networks environment based on technical standards identified at EU level⁶³.

It is not excluded that the existing provisions for NRAs to impose obligations on operators with significant market power, and the powers for NRAs to address access and interconnection issues could be used to prevent any blocking of information society services, or degradation in the quality of transmission of electronic communication services for third parties, and to impose appropriate interoperability requirements.

Open and competitive markets together with the current provisions in the EU regulatory framework, could in principle be sufficient to offer a suitably open environment for both users and service providers.

3.2.3. *Spectrum allocation*

A key factor influencing the successful deployment of wireless technologies including Mobile TV is timely access to radio spectrum. A key challenge is to ensure that adequate radio spectrum resources can be made available without delay in all regions of Europe. The planning issue has been addressed by the regional radio communication conference (RRC-06) in June 2006⁶⁴.

Policy/regulatory intervention is also needed to create the legal framework. The successful deployment and take up of Mobile TV depends crucially on other elements too such as content availability requiring a new approach to copyright and related issues.

A critical factor for availability of UHF spectrum is switch-off of analogue terrestrial TV transmission in this part of the spectrum. The EU deadline of 2012 for the switch-off of analogue terrestrial TV broadcasting, which was endorsed by the Council and the European Parliament, is likely to be met by the majority of Member States. The Commission Communication on the Digital Dividend of 13 November 2007⁶⁵, sets out the Commission strategy for the use of the spectrum resulting from the switch-off, and addresses in particular the UHF Band.

⁶³ http://ec.europa.eu/information_society/policy/ecommlibrary/proposals/index_en.htm

⁶⁴ COM(2005) 461 on “EU spectrum policy priorities for the digital switchover in the context of the upcoming ITU Regional Radiocommunication Conference 2006 (RRC-06)”. Details on the Conference at <http://www.itu.int/ITU-R/conferences/rrc/rrc-06/index.asp>.

⁶⁵ COM(2007) 700 final.

The Commission has issued in July 2007 a Communication on "Strengthening the Internal Market for Mobile TV"⁶⁶. Its main objective is to support the introduction and take-up of mobile TV across the EU and it focuses on the following issues:

As regards spectrum, the Commission recommends in the short term, the harmonised provision of spectrum in the L-band on a pan-European basis. This may require co-ordinated authorisation procedures.

As regards technology and standards issues, the Commission will stress the importance of economies of scale for the uptake of mobile TV. The Commission supports the use of the DVB-H standard in order to ensure interoperability and certainty across EU markets.

As regards authorisation regimes, the Commission recalls that the European Communications and Audiovisual Frameworks are able to foster the introduction and development of mobile broadcasting. The Communication highlights best practices in the EU, as examples that Member States should follow to facilitate the take-up of Mobile TV. The Commission will support a "light-touch" regulatory approach calling Member States to remove regulatory obstacles wherever possible.

3.2.4. *SMEs*

The large majority of firms operating in the media sector are SMEs. They employ the largest part of the labour force and represent the most important potential of growth within the sector in Europe.

Digitisation of content and/or of the content production processes, as well as adaptation of content and business models for use on different platforms require both financial resources and appropriate technological and creative skills⁶⁷. This implies significant investments for the creative industry to adapt, and constitute a major challenge for European creative SMEs to benefit from access to new platforms, audiences and related markets.

For the content sector digital shift to fully benefit to the European content diversity and competitiveness, it is crucial to address the financial, technological and skills challenges faced by European creative SMEs to make their content available in the Single Information Space. In this respect, the Commission could plan to identify the obstacles that prevent the media SMEs from accessing to funding programmes in order to finance investments in new technologies.

3.2.5. *Payment/Billing systems*

Localisation challenges and billing/payment are two major factors that have impacted the uptake of services within the EU.

Pan-European and some specific country market billing and payment systems were mentioned in the public consultation as significant challenges to business development. This is understandable as billing costs can have a major impact on profitability, depending on the type of solution employed. Although credit cards are the most obvious payment method for many of the content markets, access to credit cards by under-18s is low and, as already

⁶⁶ COM(2007) 409 final

⁶⁷ Study on "Interactive content and convergence; implications for the Information Society" - 2007, p.295.

mentioned, some major markets have low credit card penetration. Therefore there is a general requirement for others forms of payment in certain markets.

The support of local payment systems is considerably more expensive than credit cards and therefore can have a considerable impact on profitability if done through a service provider.

In May 2007 the European Commission hosted a conference on the role of the public sector in the Single Euro Payments Area (SEPA), an initiative of the European banking industry fully supported by the Commission to make cross-border payments in the Euro area as easy as domestic payments. By showing political support and becoming early adopters of SEPA products the public sector can play a vital role in SEPA's success.

Another concern for the development of digital media is represented by micropayments (i.e. payments for very small amounts, a few cents to a few €) on the internet as they are not so easy yet. The most used payment method is still credit card, which is not very well suited for small payments because of the high transaction charges, the unwillingness of many people to use it over the internet for (motivated) security concerns, and the fact that most children do not own one. Easy and secure micropayments over the internet and with generally accepted legislative regulations on the concept of "fair price" could represent a possible remedy to the problem.

3.2.6. *Term of copyright*

The Directive 93/98/EEC (recast in Directive 2006/116/EC⁶⁸) harmonises the terms of protection of copyright and neighbouring rights. The Directive establishes a total harmonisation of the period of protection for each type of work and each related right in the Member States – e.g. 70 years after the death of the author for works and 50 years after the event setting the time running for neighbouring rights. Furthermore, it deals with other issues, such as the protection of previously unpublished works, of critical and scientific publications and of photographic works.

The recording industry argues that the term of protection for sound recordings should be extended within Europe from 50 to 95 years to match the term in the U.S. In an online global market, performers and producers in the EU are at a substantial disadvantage compared with the US and many other trading partners. They argue that consistent longer terms of protection will facilitate the dissemination of works into a larger number of markets and provide an incentive for the development of new ways of getting back catalogue, specialised genres and niche music to consumers.

Taking a contrary position, the Gowers Review of Intellectual Property, December 2006⁶⁹, includes a recommendation to retain the protection period of 50 years for sound recordings and performers' rights.

The Commission intends to address the question of term of protection of copyright and neighbouring rights in the framework of the review of the copyright acquis.

⁶⁸ OJ L 372, 27.12.2006, p. 12.

⁶⁹ An independent review into the UK Intellectual Property Framework for the UK Government

3.2.7. *Private copying levies*

Most Member States apply private copying levies (PCL) to compensate right holders for the loss of revenue resulting from private copying. While these fair remuneration schemes were initially applied to photocopiers or cassette decks, they are now being increasingly deployed on digital media storage (CDR, DVDR) and equipment (hard disks, Mp3 players, PVRs), including multifunction devices such as personal computers, printer-scanner-copiers or mobile phones.

The level of the levies in certain countries and the variations in levies between Member States is perceived, in particular by hardware manufacturers, as hindering the free movement of these goods in the Internal Market and the take-up of ICT for online distribution of creative content.

Consumer electronics and technology providers that have invested heavily in the development and deployment of mechanisms for the management and enforcement of rights, such as DRM systems, seeking to address the requirements of content providers, deem the extension of PCL to new media storage and devices to be inconsistent with the Copyright Directive. Article 5.2(b) of this Directive foresees that fair compensation mechanisms (mostly levies) shall take into account the application of copy-protection measures while setting the level of levies. On the other hand, collecting societies consider that the mere possibility to implement copy-protection measures should not lead to a phasing out of levies especially as, the migration from non-protected media storage to new digital format - typically an old CD library becomes an Mp3 collection - is deemed to increase private copying. As for consumers, while they are paying private copying levies on a growing number of digital media storage devices and equipments, copy-protection measures may increasingly restrict their capacity to copy protected works. This could ultimately have a detrimental effect on the adoption of digital content delivery platforms and online content services by consumers.

Levies for new devices and level of tariffs are disputed in many countries. This leads to uncertainties with regard to the determination of adequate levies on a number of devices already on the market and on new devices, affecting both the consumer electronic and content sectors.

Recent market developments suggest that while copy-restriction mechanisms are increasingly deployed, notably in the online environment, certain business models for online music could be based on distribution without any such mechanisms. In accordance with article 5.2(b) of the Copyright Directive, these are elements to be taken into account while setting a level of fair remuneration for private copying.

It is crucial to ensure that the application of PCL fosters the development of the creative industries, notably by contributing to the free movement and take up of ICT equipment.

3.2.8. *Competition between publishers and internet pure players (such as search engines)*

The provision of access to online newspapers' content without authorisation by search engines or other news services is one of the issues raised by many publishers, in particular newspaper publishers, in the Public Consultation on Content Online in the Single Market.

In certain borderline cases, business models relying the provision of access to copyright-protected news articles may also represent a threat to news publishers' online business models. The collection and display of cache copies of news articles is potentially problematic. Search engine relies on "indexation robots" which automatically browse and copy the contents of all

publicly available web pages at regular intervals in order to index them. Copies of web pages are stored in the cache memory of the server. Some search engines such as Google offer users a choice between viewing the cache copy or accessing the actual web page. In some cases a cache copy remains available on the search engine while the original page has been withdrawn. This may conflict with the business models of publishers who offer free access to articles only for a limited time period, before restricting access to the article to subscribers or pay-per-article readers. In such cases the article withdrawn by the publisher may remain available for a certain amount of time in the cache copy of the search engine.

The issue was considered by the Brussels Tribunal of First Instance in *Copiepresse v. Google*⁷⁰. Copiepresse, a collecting society representing French and German language newspaper publishers, brought an action for copyright infringement against Google on the grounds that Google's cache memory enabled users to access press articles which were no longer available for free on publishers' web-sites. The Google cache memory enables the users to search and display the contents of a web-page by clicking on the link "cached", even if the original page is no longer accessible (the cache version displays the contents of a web-site as last visited by the Google indexation robot). The copy of a web-page stored in the memory of Google servers and the display of a link making the cached copy accessible to the public were held to constitute a material reproduction of protected works.

A very interesting development in this respect is the business-led ACAP project (or the Automated Content Access Protocol) which would enable publishers/right holders to link content with permissions information (for access and use of content) in a form that can be easily recognised and interpreted by a search engine "crawler" so that the search engine operator is enabled systematically to comply with such a policy or licence. The Commission is following this project closely, since it would seem to offer possibilities for a win-win situation for all stakeholders.

3.2.9. *Disparate VAT rates across EU*

Publishers, video and music recording industry and collecting societies argue that a reduced VAT rate should apply on cultural content. Publishers call for an adjustment which could offer Member States the freedom to apply the same rates existing offline also to online distribution of media. Some Governments consider that identical VAT rates should apply to the same services and to the same content irrespective of the way they are provided.

In the U.S. in order to avoid multiple sales taxes, and prevent states levying extra taxes to compensate for lost revenue, an Internet Tax Freedom Act was introduced since 1998 and is currently scheduled to expire in November 2007 unless further action is taken to maintain it in force. The Internet Tax Freedom Act bars federal, state and local governments from taxing Internet access and from imposing discriminatory Internet-only taxes such as bit taxes, and email taxes. The law also bars multiple taxes on electronic commerce. Sales taxes in the United States are collected by all States except six. In some cases sales taxes also concern access to on-line services but not on content.

Press on paper has traditionally been submitted to reduced VAT rates in a majority of Member States, and this situation is in fact reflected by Directive 92/77/EEC which has introduced the current VAT rate rules and included these items in the relevant Annex H of the

⁷⁰ *Google v. Copiepresse*, Tribunal de 1ere instance de Bruxelles, 13 February 2007.

Directive that has been recently recast in Directive 2006/112/EC⁷¹, Annex III. A reduced VAT rate currently applies in almost all Member States to books, periodicals and newspapers printed on the paper medium; the situation is therefore fairly consistent across the Community. However, all Member States charge the full, standard rate of VAT on online services.

The Commission recently launched a deep process of reflection on the future of reduced rate VAT in order to simplify and rationalise the level and scope of reduced rates in the EU. This process was launched on 5 July 2007 by a Communication addressed to the European Parliament and to the Council⁷², accompanied by a Staff Working Paper and a study⁷³ conducted by an independent economic think tank on the effectiveness of reduced VAT rates. Reduced VAT on publishers' products and cultural goods or services, including packaged media, are one part of this broad debate. In order to achieve increased consensus among Member States and a more harmonised approach across the EU, the Commission suggests to examine one possible way forward – but certainly not the only one – in order to translate the different objectives into a rational framework, in particular, to achieve a balance between increased flexibility and simplification with a reduction of compliance costs. For instance, there might be two low rates of VAT in the future reduced VAT rate structure, indicating that goods and services of first necessity would fall in the list with the lowest rate and a second rate could be used for other purposes that are not basic needs but are felt deserving of preferential treatment for other reasons. However, the content of each list would have to be defined after further reflection. This will be a matter for subsequent political debate and all changes to the *status quo* will require the unanimous support of all Member States.

Publishers and press editors would like to see an extension of the reduced rate to what they see as the electronic equivalent of printed material. The electronic publishers themselves stress the added benefits the electronic services offer over and above the printed texts. Also, a majority of Member States have consistently considered that these two kinds of products should be treated differently: the standard rate should apply to all electronically supplied services whereas Member States may apply a reduced rate to paper support.

The Commission considers that a new framework for reduced VAT rates should rationalise the use of reduced rates, create more transparency, and allow for flexibility for the Member States whilst at the same time respecting the principle set out in Article 93 of the Treaty. It has presented some thought on how this can be achieved but is aware of the need for a political debate to define the orientation before a more detailed proposal can be elaborated.

In the aforementioned political debate on reduced VAT rates, the Commission insists on the need to keep in mind that any change of a VAT rate applicable to particular goods or services, either an increase or a decrease, will impact not only on the sector concerned but also on other parts of the economy as well as on government budgets.

Currently, the Commission position is that no new elements that could justify through an extended impact assessment the addition of electronic material to the list of services benefiting from reduced rates have arisen. Therefore, currently no proposal to generalise reduced VAT rates for on-line services is envisaged, but the matter has still to be examined,

⁷¹ OJ L 347, 11.12.2006, p.1.

⁷² COM(2007) 380 final

⁷³

http://ec.europa.eu/taxation_customs/resources/documents/taxation/vat/how_vat_works/rates/study_reduced_VAT.pdf

taking into account the result of the broad debate launched with the Council, the European Parliament and all the stakeholders.

3.2.10. Cultural diversity

Many stakeholders (telecom operators, cinema exhibitors, publishers, commercial broadcasters, US film industry, VOIP operators, mobile phone operators, various EU organisations representing companies dealing with digital media) feel that cultural diversity will be self-sustaining online, and that no central action to increase diversity is necessary.

Others (collecting societies, representatives of the European film industry, visual artists, organisations of musicians) deem that cultural diversity is definitely not self-sustaining and that encouragement is needed. The so-called 'long tail' of demand⁷⁴ can play an important role in having niche markets develop in the online environment.

Some deem that investment obligations in the European production are appropriate. Others argue that quotas are inadequate and legislation is not appropriate (internet portals, publishers, telecom operators, mobile phone operators) and that there should be no regulatory intervention especially for non-linear services (EU organisations representing digital media companies).

Today Media literacy is one of the key pre-requisites for active and full citizenship and is one of the contexts in which intercultural dialogue needs to be promoted. During the 2008 European Year of Intercultural Dialogue, the role of the media in raising awareness of the importance of intercultural dialogue will be crucial. Also, media education is a fundamental tool to raise awareness on IPR issues among media users and consumers.

The MEDIA 2007 programme has, among its operational objectives, the education and creation of an audience for European cinematography. The MEDIA 2007 programme underlines the importance of media literacy and image education initiatives and in particular those organised by festivals for a young public, in close cooperation with schools and other institutions. The full exploitation of the economic and cultural potential of the European audiovisual sector depends also on the integration of the European audiovisual heritage within the educational and cultural policy frameworks of the Member States.

In a Europe which will always be multilingual, learning languages opens doors. For individuals, it can open the door to a better career, to the chance to live, study or work abroad, even to more enjoyable holidays. For companies, multilingual staff can open the door to European and global markets. But there is more than this. The language a person speaks is part of their identity and their culture. So learning languages means understanding other people and their way of thinking. It means opposing racism, xenophobia and intolerance.

The European Union wants all its citizens to have access to the advantages language skills can bring. In November 2005 the Commission approved its New Framework Strategy for Multilingualism⁷⁵.

⁷⁴ The phrase "The Long Tail" was first coined by Chris Anderson in an October 2004 Wired magazine article to describe certain business and economic models such as Amazon.com or Netflix. Businesses with distribution power can sell a greater volume of otherwise hard-to-find items at small volumes than of popular items at large volumes.

⁷⁵ COM(2005) 596 final

3.2.11. *Access to funding*

During the public consultation, the EU film industry as well as some telecom operators called for new support schemes for the marketing and promotion of European films through the MEDIA 2007 programme. Some stakeholders justified this by referring to existing European 25 markets⁷⁶. Film agencies in particular, referred to an action line being developed within the MEDIA 2007 Programme to assist the establishment of online on-demand services devoted to European film. Collecting societies deemed that the MEDIA 2007 programme should also contain such a specific action devoted to video-on-demand, intended to make available the catalogues of rights to European films, facilitating the clearing of rights, the publication process (media and standardisation adapted to online distribution), availability of language versions and facilitation of upward revenue flows.

Independent producers deemed that incentive schemes should be put in place at European level in order to finance independent producers who invest in the development of new technologically advanced products for online distribution, in making available films in multilingual versions, in creating innovative formats. They argued that quotas should be extended to online providers as well.

Since the public consultation, the Media programme has implemented a new scheme dedicated to support - the creation and exploitation of catalogues of European works to be distributed digitally across borders to a wider audience - and/or to cinema exhibitors through advanced distribution services, integrating, where necessary, digital security systems in order to protect online content and launched in April 2007 a specific call for proposals for "Video-on-Demand and Digital Cinema Distribution" (EACEA/13/07)⁷⁷. The selection of the projects has taken place in October 2007.

The Video-on-Demand and Digital Cinema Distribution scheme constitutes the way in which the MEDIA 2007 programme ensures that the latest technologies and trends are incorporated into the business practices of beneficiaries of the programme. Digital technologies have made European audiovisual works more easily accessible outside their country of origin thanks to new ways of transporting audiovisual content. The competitiveness of the audiovisual content industry in Europe will strongly depend on the use of these new technologies in the distribution stage.

Furthermore, various actions under the ICT Policy Support Programme arm of the CIP focus on financing innovative and close to market online content and applications. These are for instance based on the reuse of public sector information, on the making available of public interest services online, often on a trans-European scale or involve the creation of content that enhances Europe's cultural and linguistic diversity online.

3.2.12. *Classification of content (protection of minors)*

Taking into consideration the widespread differences between what is considered to be "harmful" to different age groups in the individual EU Member States many stakeholders do not favour action at European level concerning rating or classification of content. The promotion of self-regulation or co-regulation is deemed the best way to address the different national, social and cultural preoccupations, which exist at Member State level.

⁷⁶ 25 at the time of the public consultation, now 27.

⁷⁷ 2007/C 78/12 - OJ C 78, 11.4.2007, p. 24.

Any measures to protect minors and human dignity must be carefully balanced with the fundamental right to freedom of expression as laid down in the Charter on Fundamental Rights of the European Union.

The protection of minors must be a shared responsibility between parents, teachers, the content industries and regulators. Acceptable standards for the content of audiovisual or games may vary according to the different cultures in the Member States. For that reason clear rating and labelling of content is essential – people should be able to make an informed decision on whether or not content is suitable for (their) children based on the labelling.

Video games increasingly constitute one of the favourite leisure activities of Europeans of all ages and social categories. Some of these video games are obviously unsuitable for minors, notably because of the level of violence they contain, or because of the harm they could cause to the mental development of minors.

In March 2002, the Council adopted a Resolution on the protection of consumers, in particular young people, through the labelling of certain video games and computer games according to age group⁷⁸. The Council was concerned about the consequences, particularly on minors, of certain video and computer games. Such games target a very broad market, aiming at consumers of different ages, even though certain aspects of the game play may be unsuitable for younger age groups. The Council stressed the need to provide clear information regarding the content of these games and to develop a rating system, segmented by age groups.

Industry responded to the Council Resolution with the launch of the self-regulatory Pan-European Games Information (PEGI) age-rating system. The version of PEGI for online games is in preparation, as online video games raise new issues as regards information for consumers, protection of minors and how to implement such requirements.

Through legislative proposals as well as through its other actions, the Commission has endeavoured to ensure the best protection possible for minors within the bounds of its responsibilities under the Treaty. For instance, the European Parliament and Council and Recommendation on the Protection of Minors and Human Dignity and on the Right of Reply (2006/952/EC)⁷⁹ signals the need for action concerning media literacy and co-operation among bodies which deal with rating or classification. Furthermore, the INSAFE network, co-funded by the Safer Internet programme⁸⁰ managed by the Commission, deals with awareness-raising about children's use of new media, including video games. The Safer Internet programme has also co-funded the PEGI Online project, a supplement of the Pan European Game Information system, PEGI, to cover online electronic games. The PEGI Online project ran from September 2005 until August 2007 and is aimed at enforcing self-regulatory measures within the games industry in order to secure a higher level of protection of minors in online games and to educate parents with respect to the risks and potential harms specific to the online game environment.

As to video games, it is the Commission's intention to work on a Commission report to the Parliament and the Council on the developments on the labelling of video and computer games by age group since the adoption of the aforementioned Council Resolution. To this

⁷⁸ 2002/C 65/02 – OJ C 65, 14.03.2002, p. 2.

⁷⁹ OJ L 378, 27.12.2006, p. 72.

⁸⁰ Decision No 854/2005/EC of the European Parliament and of the Council of 11 May 2005 establishing a multiannual Community Programme on promoting safer use of the Internet and new online technologies – OJ L 149, 11.6.2005, p. 1.

effect, the Commission has sent a questionnaire to the Member States. The report should be available in the beginning of 2008.

The Commission also intends to organise meetings of classification bodies to exchange best practices, for instance concerning cross-platform rating.

3.2.13. Access for people with disabilities

Organisations representing disabled users and public service broadcasters feel that "Design for All"(DfA) principles should be used as much as possible. They argue that for content online technical standards should be developed and that the AVMS Directive should include obligations to make all audiovisual media services accessible for disabled. Furthermore, they deem that an integrated approach to electronic communication services and electronic communication terminals is necessary.

The Commission has a track record in promoting the use of ICT by people with disabilities (eAccessibility). The Commission is stepping up the efforts in this area, as part of its broader policy on eInclusion, which is a key pillar of the EU information society, as outlined in the i2010 initiative. Stronger action on eAccessibility and eInclusion is needed in response to major socio-economic challenges around ageing and the importance of ICT in everyday life. Accessible ICT solutions often bring benefits to all users.

With regard to more technical contributions, the Commission has been supporting research on people with disabilities and the elderly for more than 15 years and continues to do so under the 7th research and development programme. The Commission is also supporting standardisation work on eAccessibility, both at the EU level and through international co-operation.

In the i2010 framework, an EU ministerial conference on eInclusion was held in Riga in June 2006, where eAccessibility was confirmed as a political priority and concrete targets were agreed. The Commission adopted a Communication on a "European i2010 initiative on e-Inclusion"⁸¹ indicating a series of activities in 2008 and beyond. This Communication addressed amongst other issues the accessibility of websites, on which European ministers had taken firm commitments at the Riga ministerial conference on eInclusion, and of television.

The recently adopted Audiovisual Media Services Directive includes provisions on improving accessibility for people with disabilities to audiovisual media services.

Within the framework of the review of the e-communications package⁸², there are a number of proposals for provisions which would facilitate that disabled users have access to electronic communications services.

In Article 7 of the Universal Service Directive: replaces the *possibility* for Member States to take specific measures for disabled users with an explicit *obligation* to do so.

In Article 22 of the Universal Service Directive: extends the NRAs' powers to request operators to publish information for end-users on the quality of their services to also include equivalent access for disabled end-users.

⁸¹ COM(2007) 694 final

⁸² http://ec.europa.eu/information_society/policy/ecomms/library/proposals/index_en.htm

In Article 26(2a) of the Universal Service Directive: imposes on Member States an obligation to ensure that disabled end-users are able to access emergency services with a view of achieving fully inclusive electronic communications.

In Article 33 of the Universal Service Directive: provides for a Community mechanism to address eAccessibility issues in order to ensure that disabled users have access to electronic communications services which is equivalent to that enjoyed by other end-users (paragraph 4). Paragraph 3 requires the Member States to provide information on the measures taken and the progress towards eAccessibility to the Authority.

4. FINAL REMARKS

As this Staff Working Paper is intended as a neutral survey of policy issues to accompany a Commission Communication, it is inappropriate for this paper to draw conclusions, which would inevitably have a more political character. Readers should therefore refer to the Communication on Creative Content online in order to find out which issues are priorities for the Commission and how it plans to address them.