

UK Film Council

Submission in response to the Consultation about the European Commission Communication on Creative Content Online in the Single Market

Executive summary

1. The UK Film Council is the Government-backed lead agency for film in the United Kingdom. Our goal is to help make the UK a global hub for film in the digital age, with the world's most imaginative, diverse and vibrant film culture, underpinned by a flourishing, competitive film industry. Our submission has been prepared with input from other members of the European Film Agency Directors (EFADs) network of the national agencies responsible for implementing national film policies and for distributing support for film production and distribution in the Member States of the European Union. Following some comments about the general approach of the Communication, we address the specific questions asked by the Commission.
2. The UK Film Council is committed to enabling European film to fulfil its important cultural role in member countries as well as in the world at large. The prerequisite for achieving this goal is the development and maintenance of vibrant film industries, sustained by national and European policies that support the production of films, promote the diversity of film cultures in the respective countries, and secure exchange and co-operation between EU-countries and between the EU and the rest of the world. We recognise that online networks, in particular, could have an important role to play in addressing the lack of circulation of European films, not only because they potentially represent a gateway to more effective cross-border distribution, but also because the capacity constraints associated with the analogue world, such as shelf space and TV schedules, are no longer operative.
3. In that context the UK Film Council welcomes the European Commission's concern to promote creative content online in a rapidly changing market place.
4. The UK Film Council shares the view expressed by the Commission that the fight against copyright theft and infringement is a major issue in this context. The question of Internet Service Providers' (ISPs) liability with regard to copyright infringement should be a priority (the proposals set out in the "Olivennes Report" should be examined carefully). It should be noted that the UK Government is intending to consult on legislation that would require internet service providers and rights holders to co-operate

in taking action on illegal file sharing.¹ EC Infosoc should actively use Seventh Framework Programme (FP7) research and development funding to encourage research into business models that can be commercially deployed and that reflect the interests of content providers as well as those of other industry stakeholders and of citizens and consumers.

5. However, like many other national film agencies, the UK Film Council considers that the Commission Communication on Creative Content Online in the Single Market fails fundamentally to address some key challenges faced by the audiovisual industries in the upcoming digital age for the following two reasons:
6. First, it downplays other European policy objectives, such as the promotion of cultural diversity and the development of the knowledge-based economy and fails to articulate the links with other related areas of European policy. These include the Audiovisual Media Services Directive; the Communication on a European Agenda for Culture in a Globalising World; the Communication on Media Literacy, and the directives regulating ecommerce and copyright. More importantly it fails to acknowledge the policy implications of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions according to which the European Union and member states are legally bound to take into account the measures which are necessary to respect cultural diversity.
7. Second, the approach taken by the Communication appears to assume that online services will result in incremental revenues flowing into investment in content. All evidence points to overall revenues for content falling, along with the proportion of revenues available for re-investment in content production. More broadly, Commission policy relating to online content needs to address the decline of existing business models for the content industry. It needs to include policy proposals to ensure that creativity and the creative economy are not undermined and indeed are promoted in the transition to new business models. In particular, Commission policy needs to address the issue of the contribution of online service providers to the development of the audiovisual creation.
8. The Communication proposes recommendations on an issue such as DRM which is better left to the market to consider and which, to the extent that state intervention may be required, is more appropriately handled at member state level. Moreover, the approach to multi-territory licensing is founded on a weak evidence base.

¹ See Commitment 15 at p.51 in Creative Britain: New Talents for the New Economy: <http://www.culture.gov.uk/NR/rdonlyres/096CB847-5E32-4435-9C52-C4D293CDECFD/0/CEPFeb2008.pdf>

9. The UK Film Council looks forward to opportunities, notably with the International Conference: Online Content for Creativity being held in Brdo, Slovenia, 5-6 June 2008, as part of Slovenia's EU Presidency, to develop a balanced, comprehensive and forward-looking approach to the challenges and opportunities for the audiovisual sector in an online environment.

Answers to the specific questions asked by the Commission

Digital Rights Management

1) Do you agree that fostering the adoption of interoperable DRM systems should support the development of online creative content services in the Internal Market?

What are the main obstacles to fully interoperable DRM systems? Which commendable practices do you identify as regards DRM interoperability?

2) Do you agree that consumer information with regard to interoperability and personal data protection features of DRM systems should be improved? What could be, in your opinion, the most appropriate means and procedures to improve consumers' information in respect of DRM systems? Which commendable practices would you identify as regards labelling of digital products and services?

3) Do you agree that reducing the complexity and enhancing the legibility of end-user licence agreements (EULAs) would support the development of online creative content services in the Internal Market? Which recommendable practices do you identify as regards EULAs? Do you identify any particular issue related to EULAs that needs to be addressed?

4) Do you agree that alternative dispute resolution mechanisms in relation to the application and administration of DRM systems would enhance consumers' confidence in new products and services? Which commendable practices do you identify in that respect?

5) Do you agree that ensuring a non-discriminatory access (for instance for SMEs) to DRM solutions is needed to preserve and foster competition on the market for digital content distribution?

The UK Film Council does not consider that the development of interoperable DRM systems is a key issue for the development of online creative content services in the Internal Market. First because we are not convinced that a DRM approach (in the sense of proprietary systems specific to particular hardware and or services) is likely to persist across all media covered by the draft Communication. Second, because we believe that as pan-European services emerge, they will find ways of dealing with different configurations to be encountered in different parts of Europe, different consumption habits and different commercial strategies. We would be concerned that a mandated interoperability solution might result in an increased risk of copyright theft or infringement where a single vulnerable DRM exposes other DRMs to theft or infringement through the interoperability. The best way to ensure that interoperability does not jeopardise the integrity of the DRMs is through facilitating voluntary solutions.

Furthermore, we consider that the solutions to this and the other issues raised by the Commission will by and large be specific to individual member states, for example in relation to consumer information and EULAs. In a UK context, for example, it is worth noting the specific recommendation by the Gowers Review on Intellectual Property that the UK Government “should investigate the possibility of providing consumer guidance on DRM systems through a labelling convention without imposing unnecessary regulatory burdens.”² As a consequence, “the Department for Business, Enterprise Regulatory Reform has been charged with investigating the possibility of providing customer guidance on DRM systems through a labelling convention”³ The Commission has an important role to play in assisting member states to come up with appropriate solutions, but we do not think that Europe-wide solutions are necessary, desirable or practicable.

With regard to consumer confidence in DRMs, the Olswang convergence survey demonstrated considerable consumer confusion as to what DRM is and what it is used for (people understanding it more as a tool to prevent access to material, rather than to limit the use of legitimately accessed material).⁴ The UK Film Council believes that consumers need to be better informed about what DRM is for, and not just what the extent and impact of any given DRM may be. We would note, for example, that as stated in the Commission’s Staff Working Paper, DRMs are not merely synonymous with all associated Technological Protection Measures (TPMs), and that a distinction is therefore possible between the two.⁵ The UK Film Council also strongly supports the development of support codes, such as the International Standard Audiovisual Number (ISAN), which help works to be identified and tracked across different media, including digital networks.⁶

On the issue of alternative dispute resolution mechanisms, we would note that there is already in place the mechanism in Article 6(4) of the Copyright Directive to require Member States to provide a form of resolution of disputes between DRM protected content and people wishing to avail themselves of copyright exceptions. Member States should remain free to implement the mechanism most culturally appropriate to their own legal system for such resolution.

² Recommendation 16, p.74 at: http://www.hm-treasury.gov.uk/media/6/E/pbr06_gowers_report_755.pdf

³ Taking Forward the Gowers Review of UK Intellectual Property – UK Intellectual Property Office, paragraph 115 at: <http://www.ipso.gov.uk/consult-copyrightexceptions.pdf>

⁴ For information on some of the responses to DRM see p.17 and p.118, Olswang Convergence Survey, 2007 at: <http://www.olswang.com/convergence07/convergence2007.pdf>

⁵ Paragraph 3.1.3 at http://ec.europa.eu/avpolicy/docs/other_actions/col_swp_en.pdf

⁶ An ISAN provides a unique, internationally recognized and permanent reference number for each audiovisual work registered in the ISAN system. See: http://www.isan.org/portal/page?_pageid=168,1&_dad=portal&_schema=PORTAL

Multi-territory rights licensing

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

8. In our view, the issue raised here by the Commission is not to do with cost but rather the lack of transnational platforms so that rightsholders have no choice but to negotiate on a territory-by-territory basis. We do not think, on the rather sparse evidence presented by the Commission to date, that this issue needs to be addressed by means of a Recommendation. We do not agree that a model based on the distinction between primary and secondary licensing will facilitate matters and, while we agree that selling catalogues of work will benefit if the market is wider, we do not think that mandating multi-territory licensing is the solution.

Legal offers and piracy

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

We believe that the issues raised in questions 9–10 are well-covered in Section 2.4 of the Communication. We would note that the Staff Working Paper, the Commission rightly identifies that, as set out in the *European Charter for the Development and the Take-up of Film Online* protection and enforcement are only one side of the coin in the battle against copyright theft and infringement;⁷ the availability of legal services that are attractive to consumers and offer a wide range of films is crucial.⁸ We consider that the French Memorandum of Understanding is a good example of industry co-operation to be followed. Filtering is an evolving technology and what is effective (or the best achievable) today may be inappropriate tomorrow. We would also note that filtering is likely to be susceptible to evasion by

⁷ Paragraph 3.1.4 at:
http://ec.europa.eu/avpolicy/docs/other_actions/col_swp_en.pdf

⁸ Ibid.

encryption technologies; where content is scrambled, it is harder to detect through filtering, so a balance needs to be drawn - we would not wish to drive copyright theft and infringement down a route which will make it harder to find and deter by other means.