

# BRITISH COPYRIGHT COUNCIL

## Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions On Creative Content Online in the Single Market

### Response from the British Copyright Council to the consultation on Policy/Regulatory issues

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#### 1. Executive Summary

- 1.1 Legislative intervention is not suitable at this stage as far as Digital Rights Management and Multi-Territory Rights Licensing is concerned. Premature intervention will only confuse the market and delay the development of content online.
- 1.2 As regards legal offers and piracy, we welcome supporting initiatives as proposed in the document but are confident that ultimately commercial solutions will be found benefiting all stakeholders from creator to consumer.

#### 2. Introduction

- 2.1 The British Copyright Council is an association of bodies representing those who create, hold interests or manage rights in literary, dramatic, musical and artistic works, films, sound recordings, broadcasts and other material in which rights of copyright or related rights subsist under the United Kingdom's copyright law (Copyright, Designs and Patents Act 1988 as amended) and those who perform such works (see the attached list at Appendix I).
- 2.2 The Council is an advisory group and consultative body. Our members include professional associations, industry bodies, trade unions and collecting societies representing hundreds of thousands of authors, creators, performers, publishers and producers. These right holders include many sole traders and SMEs as well as larger corporations.
- 2.3 The British Copyright Council welcomes the Communication on Content Online and its accompanying Staff working paper which we see as a helpful summary of activities and issues surrounding content online. We note, however, that the Commission concludes there is little need for legislative intervention and the Council agrees with this. We stress that at this crucial time of rapid market development, intervention would be damaging to the future of content online.
- 2.4 The consumer will ultimately decide how he wants to consume/ access content online, with or without intervention from legislators. At this stage, nobody knows which business models consumers will prefer but various business models are being developed which will be readily adopted by commercial users, such as digital/ mobile distribution platforms as well as end consumers.
- 2.5 Industry is already responding to consumer demand with developments in Digital Rights Management and in collective management as well as in services and products. All parties in the value chain, in particular right holders at the start of that value chain have

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a strong interest in launching online content services and we urge policy makers and legislators to exercise restraint. They must not inhibit the development of adaptable and flexible new business models through premature regulation of the market.

- 2.6 The members of the Council represent creators, performers, publishers and producers of creative content for the new online market. The audiovisual, cultural, media, music, publishing and production sectors are diverse and thrive as a result of that diversity which comes in many forms. From the way in which creative products are used or made available to consumers, to the ways in which each type of work is created, to the business models which are used to transfer rights or licence use. Some are collaborative works relying on complex chains of rights e.g. films; others are created by individual authors and managed by the author, their agent or by collecting societies on their behalf as in the case of literary, musical and artistic works. A single solution cannot work nor will it encourage or improve consumer choice.
- 2.7 In the rush to develop the online marketplace we must not forget that individual creators and authors are the basic elements behind creative content and the foundation on which the online market will be established. Any initiatives must include safeguards which respect their rights and ensure proper payment is made for use of their works.
- 2.8 With these issues in mind we embrace the establishment of Content Online Platforms to discuss developments. However, the Commission must ensure the Platform is led by business experts from across creative industries as well as representatives of digital/mobile distributors and consumers.

### 3. Policy/Regulatory issues for consultation

#### Digital Rights Management

**Q1. 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?**

We agree that Digital Rights Management systems support the development of online creative content services in the Internal Market, enabling consumers to access content online according to their choice of service and in a convenient and transparent way.

There is a need for greater clarity in defining the term “Digital Rights Management systems”. Too often it is used synonymously with copy protection which is only one part of the Digital Rights Management landscape.

This division of the different functions of Digital Rights Management systems is already recognised by European and international law by a definition of technological protection measures and rights management information respectively.

Legal protections for both “technical protection measures” and “rights management systems” already recognised in law at both EU level and within EU Member States should be maintained, in order that industry can develop and offer an increasingly diverse choice of products and services for the consumer in the form of online services

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and digital products.

For our members, Digital Rights Management systems provide efficient methods to administer content online. The incorporation of Digital Rights Management systems into digital content will also provide future generations with the means of identifying and verifying right holders (greatly reducing the number of 'orphan works'). Digital Rights Management systems also facilitate consumer choice by encouraging right holders to provide a much wider range of delivery methods for a greater range of products and services.

We suggest that neutral evidence-based research be commissioned to investigate how Digital Rights Management is currently employed and only then assess whether there is a role for the Commission to play in regulating and enforcing the adoption of interoperable DRM systems. We believe there is no role for the Commission. Additionally relevant market developments are already underway and in many cases well advanced.

**Q2. 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 regard of DRM systems? Which commendable practices would you identify as regards labelling of digital products and services?**

Transparency on technical protection measures applied to a product or online service delivering content to consumers is undisputedly important. However, the same level of transparency (or indeed interoperability) is not a consumer prerequisite for the development and application of rights-management information systems which our members use for the digital administration of content online. Consumers have no involvement with the application of rights-management information systems; the question of consumer protection is hence not relevant for rights-management information systems.

Consumers are not really concerned to understand how the internal mechanical parts of a product actually work. We believe that "back office" rights management information systems fall into this same category and if such systems really operate to support the recording of sales and the use of copyright works in ways that make online services more efficient for business; these systems will help to promote investment and innovation in new online services. This is something that should be fostered and encouraged.

**What 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 regard of DRM systems?**

The Commission's concern over complex contractual terms and a resulting lack of awareness amongst the public over the way these terms permit the use of personal data are challenges to industry. However, as the Commission also recognises, so are identification and promotion of licensing opportunities and provision of attractive billing systems.

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Transparency and clarity in contractual terms has always been a goal for industry at all levels. Protection of the personal data of consumers is a quite separate matter to rights-management information systems since the application of rights-management information systems occurs mainly in a business to business relationship.

**Which commendable practices would you identify as regards labelling of digital products and services?**

Within each sector there exist voluntary codes which have been developed over the years by trusted agencies. For example in the case of films there is The British Board of Film Classification<sup>1</sup>

In addition the work of groups such as the European Committee for Standardisation and the information issued in the form of Guides such as the User Guideline related to Electronic signatures in e-commerce for SMEs<sup>2</sup> provide examples of how pragmatic voluntary guidance can help to shape developments in the digital marketplace.

**Q3. 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 issues related to EULAs that needs to be addressed?**

Yes, we agree. We believe the Content Online Platform could place a useful role in investigating and identifying recommendable practices and issues related to EULAs

**Q4. Do you agree that alternative dispute resolution mechanism 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?**

Alternative dispute resolution mechanisms are generally acknowledged to provide a less costly alternative to full court hearings. In this respect they are to be welcomed.

In the context of DRM systems we need greater clarity of what is meant. We would not wish to see consumer objections to rights management information systems which facilitate the proper administration of rights purely on the basis that they object to the technology.

Of course, we recognise that the willingness of individual companies to address consumer concerns will be an important factor as far as "technological protection measures" are concerned. It is this exchange of views that will help drive developments in the market place.

**Q5. 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**

<sup>1</sup> An example is the BBFC's Video Packaging Review Committee operating a voluntary scheme of self regulation by the industry for the sleeve of videos and DVDs (see [www.bbfc.co.uk/customer/cust\\_procPack.php](http://www.bbfc.co.uk/customer/cust_procPack.php))

<sup>2</sup> CWA 14708:2003(E)

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### market for digital content distribution?

Access to DRM solutions should be a matter for individual companies to address within competition law rules.

Unreasonable bias towards any one group of companies could work against the natural evolution of the market place.

### Multi-territory rights licensing

#### **Q6. 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?**

We believe that a Recommendation is not required; any such initiative is likely to lead to confusion in the market when multi-territory rights licensing is at the point of take up. The confusion caused by a new Recommendation would merely create further uncertainty and thus delay further development of pan European licensing and, in consequence, the whole content online market. This cannot be the intention of the Commission or in the interests of content online in the future.

Our music collecting society members are putting in place more and more licensing arrangements e.g. the MCPS- PRS Music Alliance deal with Omniphone concluded early in 2008. This involves restructuring sub-publishing arrangements, negotiating the withdrawal of online rights from society membership agreements and negotiations with chosen societies for the creation of on-line rights hubs. These discussions need a realistic timeframe to allow the completion of such complex negotiations.

Parliament's lack of involvement in the lead up to the Recommendation of October 2005 should not be to the detriment of creators. The Commission's recognition of the fact that "it is first for rights holders to appreciate the potential benefits of multi-territory licensing" supports the original Recommendation. Right holders, via their collecting societies, have invested considerable time and money in the establishment of a pan European licensing system for the benefit of commercial users. Right holders themselves are benefiting from the critical principal of right holders' choice of collecting society leading in turn to higher standards of transparency and good governance.

The ability for performers to manage their exclusive rights and to exercise them through collective agreements remains a vitally important option when considering the effectiveness of the framework for the protection of performers' rights.

The role of unions and collecting societies representing individual creators in facilitating these agreements must continue to be acknowledged and appreciated. In addition, the way in which collective agreements can link with the services available through collective management societies should also be properly addressed by the Commission.

It seems right that issues relating to the way in which rights are licensed to support online services should be a matter for consideration by the Content Online Platform. Naturally these must involve representatives of individual right holders as well as collecting societies.

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### **Q7. What is in your view the most efficient way of fostering multi-territory rights licensing in the area of audiovisual works?**

The Council represents those who work in the audio visual sector and contribute to films and television programmes e.g. script and screenwriters, directors and independent producers, performers, set designers, animators, etc. We cannot speak for film production companies nor do we directly represent broadcasters.

The audio visual sector relies on collaboration between right holding creators and performers with producers and broadcasters and any attempt to foster “multi-territory rights licensing” should be approached with caution. We believe that the market is best able to develop the most appropriate type of licensing in this area.

We also believe that caution should be exercised due to the need to encourage and respect the linguistic and cultural diversity of such products in the European Union. For example, a programme produced within the UK may reach its audience in France most effectively when dubbed in French. A game show initiated in Germany may best work for UK audiences when licensed and remade to the same format, but with local participants.

### **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?**

No. This is because it is not practical to draw a fixed line between what any one right holder (or group of right holders) may regard as a “primary” market on the one hand and a “secondary market” on the other.

Instead a flexible mix of recognition for exclusive rights, appreciation of the role played by collective bargaining, and the range of services that can be provide through effective collective licensing should all remain part of the market place.

Online markets are still emerging. Their relative value in terms of audience reach, financial returns from recouping investment, and long tail archive interest are by no means fixed. We live in a world where it is increasingly difficult to value a specific market for films or audiovisual programmes “up front”. Producers admit this. This all increases doubts over the value of a market and/or its description as a “primary” or “secondary” market.

This may mean it is in the interests of producers, authors, performers and consumers to allow for ongoing revenue streams to apply, to provide fair sources of remuneration for the use of rights (avoiding what might otherwise be disproportionate “up front” buy-out fees, or an unnecessary extension of provisions to apply for statutory payment of equitable remuneration).

### **Q8. 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)**

We are not familiar with the terminology used in this question but submit that the

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success of any business models ultimately depends on the choice of consumers regarding the product, whether or not this is "Long Tail".

The matter of the territories of licensing seems unrelated to this point.

### Legal offers and piracy

#### **Q9. How can increased, effective stakeholder cooperation improve respect of copyright in the online environment?**

Education and awareness amongst consumers and service providers remains central to improving respect for copyright in the online environment. Also, we hope the time has now come for transparent and fruitful discussions on licensing between right holders and representatives of the commercial mobile and online distribution platforms.

#### **Q10. Do you consider the Memorandum of Understanding, recently adopted in France, as an example to follow?**

The Memorandum of Understanding is a useful example of encouraging ISPs to appreciate the concerns arising from unauthorised use of copyright works. ISPs can be encouraged into compliance but it must also be recognised that it is not the only way.

Furthermore, we strongly believe that it is those who benefit from access to content who should pay for it. In the French case, advertisers will in fact be paying but it is the ISPs which get value from the access. Our general feeling is that the French Memorandum of Understanding is a pragmatic one, but that it lets ISPs off the hook. We would prefer to see a menu of possibilities at a European level.

One problem is that there is no incentive or threat to ISPs to make them come to right holders to discuss and find a joint definition of what is needed. So we suggest that a solution might have to be based on legislation.

The threat of legislation which is behind Recommendation 39 of the UK Gowers Review of Intellectual Property may yet provide a more effective way of dealing with the issues. The recommendation is that ISPs must observe the industry agreement of protocols for sharing of data between ISPs and right holders to remove and disbar users engaged in piracy, with an added proviso –

“If this has not proved operationally successful by the end of 2007, the Government should consider whether to legislate”.

Similarly, Commitment 15 of the UK Creative Economy Programme comments on the role of ISPs: “We will consult on legislation that would require internet service providers and rights holders to co-operate in taking action on illegal file sharing – with a view to implementing legislation by April 2009.”

“5.9 The Government recognises the value of the current discussions between internet service providers (ISPs) and rights-holders; we would encourage the adoption of voluntary or commercial agreements between the ISPs and all relevant sectors. While a voluntary industry agreement remains our preferred option, we have made clear that we will not hesitate to legislate in this area if required. To that end, we will consult on the

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form and content of regulatory arrangements in 2008 with a view to implementing legislation by April 2009.”<sup>3</sup>

We regret that such action may prove necessary.

### **Q11. Do you consider that applying filtering measures would be an effective way to prevent online copyright infringement?**

Filtering may be one way to prevent online infringement but the technology is still in its infancy. Internet Service Providers are, whether they like it or not, gatekeepers in the online world. They therefore have a responsibility to help control traffic on their networks. In our case that responsibility lies with the traffic of that which is unauthorised and which infringes copyright or other intellectual property rights.

Now that safe harbours are no longer “safe” for ISPs it seems logical that they should turn increasingly to filtering technologies and there should be encouragement for them to develop filtering mechanisms. We would like to see ISPs install filtering mechanisms which would protect consumers as well as rights owners.

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<sup>3</sup> [www.culture.gov.uk/NR/rdonlyres/096CB847-5E32-4435-9C52-C4D293CDECFD/0/CEPFeb2008.pdf](http://www.culture.gov.uk/NR/rdonlyres/096CB847-5E32-4435-9C52-C4D293CDECFD/0/CEPFeb2008.pdf)



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## Appendix I

The following organisations are members of the British Copyright Council:

**Association of Authors' Agents**  
**Association of Illustrators**  
**Association of Learned and Professional Society Publishers**  
**Association of Photographers**  
**Authors' Licensing and Collecting Society**  
**BPI (British Recorded Music Industry) Limited**  
**British Academy of Composers and Songwriters**  
**British Association of Picture Libraries and Agencies**  
**British Computer Society**  
**British Equity Collecting Society**  
**British Institute of Professional Photography**  
**Broadcasting Entertainment Cinematograph and Theatre Union**  
**Chartered Institute of Journalists**  
**Copyright Licensing Agency**  
**Design and Artists' Copyright Society**  
**Directors' and Producers' Rights Society**  
**Equity**  
**Educational Recording Agency**  
**Mechanical Copyright Protection Society**  
**Music Managers' Forum**  
**Music Publishers' Association**  
**Musicians' Union**  
**National Union of Journalists**  
**Performing Right Society**  
**Periodical Publishers' Association**  
**Phonographic Performance Limited**  
**Publishers Association**  
**Publishers' Licensing Society**  
**Royal Photographic Society**  
**Society of Authors**  
**Writers' Guild of Great Britain**