

Response from British Equity Collecting Society
Communication on Creative Content Online

Introduction

British Equity Collecting Society (BECS) is the only United Kingdom based collective management organisation for audiovisual performers. It represents the interests of its members – over 20,000 actors and other performers - in the negotiation and administration of performers' remuneration. Rights administered via agreements with other European collecting societies include the rental, private copying, cable retransmission and communication to the public rights. Since its incorporation in 1998 BECS has distributed in excess of £12 million to performers in British film and television productions. BECS is a member of AEPO-ARTIS, an association representing audio and audiovisual collective management organisations in Europe.

BECS works to secure and distribute revenues to performers that recognise the value of performances within the increasingly diverse services now being developed through advances in technology in the digital age.

BECS welcomes the 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 (COM (2007) 836 final) and the proposals for the setting-up of the "Content Online Platform". BECS also welcomes the opportunity to comment on the further issues raised in the Annex to the Communication.

Setting up the "Content Online Platform"

The Commission suggests "the setting-up of the "Content Online Platform" as a framework for discussion at European level".

The Platform is to be devoted to content specific to cross-industry negotiations around "issues related to the online distribution of creative content".

The rights of audio-visual performers (however recognised in different EU Member States) are particularly relevant to work within the Content Online Platform. Audio-visual performers, such as those represented by BECS, have a direct interest in the debates over:-

- (a) availability of content;
- (b) improvement of clearance mechanisms;
- (c) development of multi-territory licensing on-line; and
- (d) management of copyright on-line.

It is therefore important that representatives of audio-visual performers are invited to participate in the "Content Online Platform" discussions.

Such participation will help demonstrate to the Commission the ways in which systems are developing in different EU Member States to provide for a combination of "equitable remuneration" and contract payments or other forms of collective licensing to secure payments to be paid to audio-visual performers.

Advances in technology and new business models developed on the back of them should help provide greater choice for members of the public to decide when, where and how they wish to access and view audiovisual programmes and other material in the digital age.

The Content Online Platform will fail to correctly address rights holders' issue if "expert" representatives of audio-visual performers are not invited to participate and given the opportunity to show that different and flexible sources of payment for performers' rights are likely to be the best way forward.

The “Content Online Platform” discussions must take into account the reasons why “the long tail” application of revenue streams for performers linked to application of new online business models should not be ignored.

In other words – proper consideration must be given to the benefits of payments to audio-visual performers continuing to flow from use of performances in new markets, whether as a result of the application of collective bargaining agreements or through statutory recognition.

This will be particularly true in any cases where there is doubt over the value of a market and/or its description as a “primary” or “secondary” market (and therefore it is unfair to have a buy-out imposed as the only possible option for performers). (Further issues relating to this are set out in answer to question 7 below).

The system for securing returns from markets, whether primary or secondary, must remain flexible. This is vital if fair compensation for performers is to be secured in the “long tail” world of online electronic services.

In this new world, online electronic services will offer vast libraries of audiovisual programming on an increasingly non-exclusive basis, but in innovative and imaginative ways which appeal to different audiences at different times of their lives.

Within this flexibility there is one vital point that must not be overlooked when considering the potential impact of EU law on the effective protection of performers’ rights and the term of protection. This is the way in which the recognition of exclusive rights has positively bolstered the negotiation of agreements for assisting in the management of exclusive rights by means of collective agreements. The emergence of these new style agreements that deliver benefits for performers must be recognised and taken into account.

Securing payments for the secondary use of performances linked to the granting of exclusive rights for performers is central to the work of Equity in the UK. In the period 2004 to 2005, secondary payments of over £15.8 million were secured from one UK broadcaster alone.

But, collective management may also have a greater role to play in ensuring that revenue secured by collective bargaining against the use of exclusive rights is fairly allocated and paid to performers in the future. This is because collective management may assist in the collection and distribution of micro payments due to performers from licensing exclusive rights, which on their own might be held to be uneconomic to administer by each service provider operating online services. In other words, a system of collective agency can work alongside the more traditional role of collecting societies where a rights owner is required to vest rights in the collecting society to enable it to act on behalf of its members. This presents new opportunities for collective bargaining and rights’ administration for the benefit of users and rights owners.

We believe it is important to take into account the following points:

- (a) the aspects of licensing exclusive rights in the context of collective agreements when the terms are negotiated by unions or representatives other than collecting societies on behalf of performer members;
- (b) the considerable sums that have been secured for secondary uses against the exercise of exclusive rights of performers in new services operated by broadcasters and other services involving the communication of audiovisual programmes to the public;
- (c) the different ways in which new business models are being developed for the use of audiovisual programming, as opposed to radio or use of audio only recordings; and,
- (d) examples of the ways in which unions and collecting societies are already working together to ensure that the existing rights framework delivers effective recognition of the rights of performers whenever possible, and where, even with this cooperation, further action is required.

It is to be hoped that representation for audio-visual performers within the Content Online Platform will enable effective and fair remuneration from the licensing and use of performers' rights in future.

Creative Content Online – Policy/Regulatory issues for consultation

Digital Rights Management

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

Not if “fostering” means “regulating to enforce” interoperability of DRM systems.

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 and digital products.

This is particularly true of the careful balance provided within Article 6 of the Copyright Directive¹ and its links between beneficiaries of exceptions or limitations to copyright protection and “technological measures”.

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

The Commission must differentiate between “technological measures” as defined under Article 6.3 of the Copyright Directive (Directive 2001/29/EC) and “rights management information” as defined in Article 7.2 of the Copyright Directive².

This is important when considering the over simplified statement on page 7 of the Commission's staff working document which claims: “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”.

It is submitted that, whilst appropriate transparency over technical protection measures applied to a product or online service delivering content to consumers is important to improve trust over what a consumer is actually acquiring when buying, accessing or otherwise using the product or service, the same level of transparency (or indeed interoperability) is not a **consumer** prerequisite for the development and application of rights-management information systems.

When a consumer buys a product they will be concerned to know that it allows them to do “what is says on the tin”. They are not really concerned to understand how the internal mechanical parts of a product actually work.

If “back office” rights management information systems really operate to support recording sales and use of copyright works in ways that make Online services more efficient for business, these

¹ EU 2001/29/EU

² Article 6.3 – “technical measures” means any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject matter, which are not authorised by the right holder of any copyright or any right related to copyright as provided for by law or the *sui generis* right provided for in Chapter III of Directive 96/9/EC.

Article 7.2 – “right-management information” means any information provided by rights holders which identifies the work or other subject-matter referred to in the Directive or covered by the *sui generis* right provided for in Chapter III of Directive 96/9/EC, the author or any other right holder, or information about the terms and conditions of use of the work or other subject-matter, and any numbers or cods that represent such information.

systems will help to promote investment and innovation in new online services. This is something that should be fostered and encouraged.

(2) Do you agree that consumer information with regard to interoperability and personal data protection features of DRM systems should be improved?

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. Information overload is not ultimately helpful for consumers.

Transparency and clarity in contractual terms is a goal for industry at all levels.

What could be, in your opinion, the most appropriate means and procedures to improve consumers' information in respect of DRM systems?

Transparency and clarity should be promoted by individual companies seeking to attract and retain customers, alongside support for good practice being developed by industry trade associations and representatives' bodies within sectors of the creative industries.

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

Voluntary codes developed by trusted agencies such as The British Board of Film Classification³.

A recent welcome development is the launch of ISAN UK. The value of encouraging use of ISAN (International Standard Audiovisual Numbers) as a voluntary numbering system for the identification of audiovisual content should help with straightforward identification of contributors to an audiovisual production by using an ISAN that remains the same for an audiovisual work throughout its lifecycle, from conception, to production, to broadcast and through to distribution.

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 SME's⁴ provide examples of how pragmatic voluntary guidance can help to shape developments in the digital market place.

(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?

Yes. This should help consumers understand the choices that they can make about the services that they choose to use.

Which recommendable practices do you identify as regards EULAs?

Providing for relevant terms to be clearly brought to the attention of a user and for the terms to be easily stored and/or printed for reference.

Do you identify any particular issue related to EULAs that needs to be addressed?

No.

³ 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)

⁴ CWA 14708:2003(E)

(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?

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.

However, the willingness of individual companies to address consumer concerns will also be an important factor as "technical measures", which are understood and accepted as "effective" by both consumers and rights owners become more and more established.

It is this exchange of views that will help drive developments in the market place.

This exchange should not be hampered or reduced by the creation of dispute resolution bodies whose proceedings may block or delay developments that might occur more quickly and naturally through company/consumer response to the market.

The way in which these developments occur is best exemplified by the way in which certain technical protection measures have been applied and tested in the market place on CDs with a less than positive reaction from consumers. As a result, products have been redeveloped or withdrawn and new digital offerings provided in their place.

In contrast, other technical protection measures applied to define the scope of new video on demand services have been developed without the level of adverse publicity that was triggered linked to earlier CD releases which included "surprise" copy protection measures.

(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?

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

(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?

No.

It seems appropriate 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.

However, the Commission's welcome recognition of the fact that "it is first for rights holders to appreciate the potential benefits of multi-territory licensing" appears to be contradicted by the suggestion that a Recommendation may be needed.

As the Commission's staff working paper recognises, "for content owners 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".

However, this is by no means guaranteed. Rights owners must therefore be enabled to work with the risks and rewards that such opportunities afford, whilst knowing that the copyright and related rights in creative content will continue to be respected in accordance with the internationally recognised territorial principles of copyright law.

The ability for performers to manage their exclusive rights and 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 such as Equity 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.

The role of collecting societies in administering rights for performers to receive equitable remuneration from exercise of rights remains vitally important to ensure fair compensation is secured for the use of performers' rights in genuinely "secondary" markets.

However, collective management may also have a greater role to play in fostering efficient multi-territory licensing of rights by ensuring that revenue secured by collective bargaining against the use of exclusive rights is fairly allocated and paid to performers. This presents new opportunities for collective bargaining and rights' administration for the benefit of users and rights owners.

It is also important to recognise the market benefits provided by collecting societies in administering the rights of audio-visual performers to receive fair compensation and equitable remuneration from exercise of rights in cases when remuneration against exercise of exclusive rights cannot practically be secured by the intended beneficiaries.

(7) What is in your view the most efficient way of fostering multi-territory rights licensing in the area of audiovisual works?

There are real dangers that seeking to "foster multi-territory rights licensing" could work against the interests of consumers.

The online world opens up opportunities for choice, but this should not be with total disregard to the linguistic and cultural diversity that is such an important facet of life within the EU.

It is surely not in the interests of consumers or rights owners to have a "one size fits all" to licensing audiovisual works within the EU?

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 audience when licensed and remade to the same format, but with local participants.

Programme producers generally want their work to reach a wide audience.

It is therefore the increased availability of services which should operate to foster the licensing and use of audio-visual programmes.

Whilst the Commission recognises that settling terms of trade for online creative content has presented difficulties, there are plenty of examples now in place to show that agreement can be reached against the background of existing rights structures.

These include the development of "Catch-up television" video-on-demand services, such as the service operated through BBC iPlayer in the UK and Channel 4's subscription video-on-demand services.

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 rights holder (or group or rights owners) may regard as a "primary" market on the one hand, and a "secondary market" on the other.

This is emphasised by the way that audiences for films and other audiovisual programming are becoming increasingly dispersed across increasing numbers and types of service.

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 provided 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 for recouping investment and long tail archive interest are by no means fixed. We are therefore 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, performers and consumers to allow for ongoing revenue streams to provide fair sources of remuneration for the use of rights of performers over time (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).

In addition, to help reduce administrative burdens for producers (with the approval of unions when appropriate) the way in which collecting societies already operating in the field of representation for audio-visual performers can assist in pan-EU clearances must be given proper recognition.

The network of reciprocal agreements already developed between such societies to help process payment of blank tape levies/private copying levies to performers, either:-

- (a) when the clearances required genuinely do service use in secondary markets; and/or
- (b) when the amounts of money to be paid through to individual performers are small;

operates and provides value to rights owners, to producers and to the public by providing for licensing of rights covering use in multiple territories.

The reproduction right for performers helped to support the licensing and use of performers' rights in a whole range of ways that could not have been fully envisaged when the right itself was provide for with International Treaties (and in particular Article 2 of Directive 2001/29/EC (the Copyright Directive).

The same sort of diversity and choice is now being developed through licensing and use of the “communication to the public” right linked to performers and fixations of their performance.

Some have argued that this right to consent to the “communication to the public” is really “just one right”. It is, in fact, the source for performers giving consents to the use of performances in audio-visual works in a whole range of new electronic transmission services.

Precisely because this range of new services cannot neatly be valued or allocated into “primary” and “secondary” markets – union negotiation and collective bargaining have important roles to play – alongside any delegation of secondary rights to administration through collecting societies (and reciprocal agreements entered into between collecting societies).

This system must remain flexible if fair compensation for performers is to be secured in the “long tail” world of online electronic services. Theses services have the potential to offer vast libraries of audiovisual programming on an increasingly non-exclusive basis but in innovative and imaginative ways which appeal to different audiences at different times of their lives.

However, some of these new developments will occur at the expense of existing markets. The structures for payment of remuneration to performers for the use of their work must recognise this. The way in which the market for VHS has been replaced by the market for DVD is an example. Currently, new video-on-demand services are challenging the DVD market. Markets must be allowed to evolve but not to the exclusion of payments for the contributors who ultimately act as the reason for viewers to choose to watch a particular film or other form of audiovisual production.

(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)?

No.

A "one size fits all" approach to copyright works as a whole appears to lie behind this question.

It is not the correct approach for fostering new and innovative business models.

Whilst some content may appear to have a short shelf life and be marketed and exploited to fully recoup its costs within a short time period, the vast majority of commercial music and films do not achieve such a luxury.

If anything, the new opportunities opening up in the online world are reducing the surefire early recoupment opportunities within markets recognised in more recent years. Instead, the patchwork of non-exclusive licences that may be granted to cover online use will "kick in" at different times for different works. A two year cut-off for describing a work as "archive" would be impractical and unnecessary for business.

Children's programming is a good example of how a two year term for recoupment of investment would be entirely unrealistic. Successful children's programmes have a shelf life far longer than this.

In addition, the death of an artist, the sudden emergence of talent with a catalogue of previously unrecognised work, a world event that triggers interest in particular works all go against the concept of works falling neatly into categories of "new/current" and "archive" in an online context.

Collective bargaining agreements often recognise this. Equity regularly negotiates terms for the long-term use of programmes where initial licences have expired. Far from fees automatically reducing over time, escalators are often agreed for fees to ensure that their value is retained for performers.

Legal offers and piracy

(9) 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.

(10) Do you consider the Memorandum of Understanding, recently adopted in France, as an example to be followed?

The Memorandum of Understanding is a useful example of encouraging ISP's to appreciate the concerns arising from unauthorised use of copyright works.

However, the threat of legislation behind Recommendation 39 of the UK Gowers Review of Intellectual Property may yet provide a more effective way of dealing with the issues.

This recommended that ISPs must observe the industry agreement of protocols for sharing of data between ISPs and rights 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".

Such action may now prove necessary.

(11) Do you consider that applying filtering measures would be an effective way to prevent online copyright infringements?

Yes. Internet Service Providers are gatekeepers in the online world.

Internet Service Providers are increasingly moving beyond acting as "mere conduits" for the provision of information. Instead they operate businesses which act as true intermediaries between rights owners and consumers.

In this role as intermediaries they therefore have a responsibility to help control traffic on their networks which is unauthorised and infringes copyright, the rights of performers, or other intellectual property rights.

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