COMMUNICATION FROM THE COMMISSION ON CREATIVE CONTENT ONLINE IN THE SINGLE MARKET

BRITISH SCREEN ADVISORY COUNCIL RESPONSE TO THE POLICY/REGULATORY ISSUES FOR CONSULTATION

Executive Summary

BSAC welcomes the opportunity to respond to the questions asked in the Communication on Creative Content Online in the Single Market. As an advisory body spanning many parts of the audiovisual sector in the UK we take a very active role in investigating and understanding technological changes, and the likely impact on business models and consumption patterns both now and in the future.

Some of the points we have set out in our response are as follows:

- Consumption of audiovisual material in online environments is growing fast as industry responds to consumer demand and develops new and exciting business models, but constraints such as bandwidth remain a problem so that penetration levels for audiovisual material in the online world are likely to remain much lower than for some other types of content for sometime.

- There are other differences too regarding consumption of audiovisual material and other content, particularly the fact that much audiovisual material is only viewed once. Business models in the online world, enabled by DRMs, are likely to provide the same sort of choices as in the physical world where consumers can pay less for less consumption.

- Conclusions drawn from behaviour in one sector should not, therefore, be used to justify regulation in another sector and BSAC continues to support a light touch regulatory regime and a market driven approach. However, solutions to permit use of orphan works are important.

- DRMs permit right holders to monetise content and consumers seem to support their use where this permits them to pay for only what they really want. Issues of interoperability may be less important for streamed content which may be the predominant way audiovisual material is consumed in the future, but BSAC supports continued efforts to reach a consensus on standards.

- Providing consumers with simple information about what they can and cannot do, and that DRMs have been used, is fair, but flexible guidance rather than regulation is the right approach if this needs to be formalised given that what is appropriate is likely to change as business models change. Awareness campaigns about copyright should draw attention to the beneficial enabling features of technology.

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- A Recommendation on multi-territory licensing is not appropriate for audiovisual material, not least because there is no convincing evidence of problems and/or that multi-territory licensing is the best way to meet consumer demand and deliver diversity across the EU. Single territory licensing is likely to remain an important option and for the foreseeable future online licensing must fit in with licensing of the different windows in the physical world and how these vary between territories.

- Many factors are important to licensing choices, such as likely consumer interest in the material, access to marketing spend, other copyright issues such as exception regimes, and non-copyright issues such as bandwidth and rules of classification, so any perceived lack of multi-territory licensing for audiovisual material should be used with great caution in drawing any conclusions on licensing alone.

- Collaboration with ISPs in the fight against piracy in the online world is essential and urgent but is proving difficult to achieve in the UK. In considering the approach going forward a number of models could be used. The principles of the French scheme appear to be interesting but conditions in Member States may vary and it is important that schemes are practical and workable.

Introduction

The British Screen Advisory Council (BSAC) is an independent, industry-funded advisory body which focuses on audiovisual policy issues. It brings together many of the most influential players from the TV, film and new media sectors[1].

BSAC provided a comprehensive reply[2] to the earlier Commission consultation on Content Online in the Single Market and is not intending to repeat here all the information contained in that response. However, much of it is relevant to the questions asked in the Communication on Creative Content Online in the Single Market. We are, though, pleased to have the opportunity to outline our further views in this response to the questions asked in that Communication.

BSAC continues to take a very active part in exploring many of the issues that arise due to ever changing technological developments, including by studying certain issues in greater depth in specific working groups. A BSAC working group has examined On Demand Rights, thus covering issues particularly important to the Commission's Communication. Another working group is undertaking some more visionary thinking about what business models might look like beyond the immediate future, the nature of payment systems and what should be the character of the regulatory environment. We would be happy to share the outcomes of our work with the Commission.

The major reason for BSAC's exploration of new business conditions, and consumer behaviour and preferences in the online world, is to be better placed to advise policy makers so that any decisions on regulatory intervention are supported by the evidence. We are therefore pleased to note in the Communication that the Commission intends to set up the "Content Online Platform" as a framework for discussions between stakeholders at European level about issues such as those in the Communication. It is disappointing, though, that the Commission seems to be planning to draft a Recommendation on Creative Content Online before that Platform can have properly considered whether there is evidence for action at European level and, if so, how all the issues apply to the various sectors that might be affected.

Availability of creative content

Consumption of audiovisual material online is still at a relatively early stage compared to, for example, music. The Study produced for the Commission on Interactive Content and Convergence: Implications for the Information Society estimates that even by 2010 VoD will only comprise 7% of the total revenues for this sector in Europe. The audiovisual industry is, however, actively identifying the opportunities for, and the challenges arising from, creative content in the online environment. The availability of online content in the audiovisual sector in the UK has increased markedly since BSAC responded to the Commission's consultation on Content Online in the Single Market in October 2006. For example, the BBC iPlayer, the catch-up TV service launched by the BBC at the very end

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[1] See http://www.bsac.uk.com/members.html for a list of BSAC Members
[2] See http://www.bsac.uk.com/reports/publiccontentonline.pdf for a copy of that response

of 2007, attracted more than one million viewers watching more than 3.5 million programmes by the middle of January. These trends are likely to continue without any intervention by policy makers as the audiovisual sector has a long tradition of successfully exploring and pursuing new business models as opportunities arise.

It is important to remember that the market for online content will continue to develop in different ways and at different paces for different types of content as the factors that affect the development will not apply equally in all areas. Moreover, drawing conclusions about what intervention is needed from the experiences of one sector without properly understanding to what extent the same problems arise in another, as yet fairly undeveloped, sector needs to be done with extreme caution. We therefore continue to support a light touch regulatory environment. We believe that in general letting new business models develop in response to market forces is most likely to lead to greater availability of online audiovisual content offered in attractive ways and at a fair price for consumers.

The audiovisual sector has for a long time offered a range of business models to consumers, including cinema exhibition, DVD rentals and sales, and broadcasting on pay TV and free-to-air channels. The differences compared to music, for example, arise because for most audiovisual material consumers prefer to watch the material once rather than repeatedly, and value the ability to pay less for such single viewings compared to the cost of purchasing copies to own. As new business models are rolled out, these are replicating the choices in the physical world and it is most important that the industry is not deterred in any way from experimenting to find out what consumers prefer. It may be instructive to note that, although programmes on the BBC iPlayer mentioned above are available for download or streaming, in the same period to the middle of January streaming was roughly eight times more popular than downloading. Drawing conclusions from the music sector where downloading to keep is popular and applying these conclusions to the audiovisual sector where streaming may be the main way of consuming content could be dangerous.

For the audiovisual sector, it is also extremely important to remember that one of the main limiting factors regarding availability of online content is in the technology needed to deliver the services. Although broadband penetration is high in the UK, bandwidth constraints in much of the country are likely to be a deterrent to massive expansion of the online content market for some time to come. Consequently traditional business models will operate alongside new online business models. The way new services operate, including how use of content is licensed to service providers as well as to consumers, must not jeopardise returns on investment in the production of audiovisual material that will need to be made from traditional services. Indeed, the income from traditional business models is crucial if industry is to be able to pay for investment in the transition to business in the online environment. Industry has, though, had to accept that the move to greater availability of online content in the audiovisual sector is likely to continue to be rather slower than for music at least for the time being. This does not prevent continued experimentation with new and exciting online business models so that the industry is ready to meet the challenges whenever the technical infrastructure can support expansion.

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In our response to the earlier consultation on content online we mentioned constraints on use of orphan works and difficulties sometimes encountered when trying to clear just one of the rights in an audiovisual work as issues that could be addressed to facilitate availability of audiovisual content. These two issues remain unresolved, although we welcome the Commission's engagement in the area of orphan works under the EU Digital Libraries Initiative and have been pleased to participate in the audiovisual working group developing diligent search guidelines to trace right holders. We remain somewhat concerned that this activity at European level is not currently matched by equivalent efforts in the UK to work towards a national solution that would permit use of orphan works.

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?

DRM technology is currently an important means by which right holders can monetise content, including by operating services, or agreeing licences with other service operators, that enable different levels of access to audiovisual content for different prices to be offered to consumers. Indeed, the Indicare Survey on Digital Video Usage and DRM of February 2006[3] showed that two thirds of those asked agreed that technical measures such as DRM should be employed to allow consumers to pay only for what they really want. This means that business models offering consumers less access for a lower payment are likely to be popular even if supported by DRMs. As we have already said, it may be that streaming to view will be the predominant, and perhaps eventually even the only, way that consumers pay for audiovisual content online. For streamed content where consumers choose what device to receive the transmission on when requesting the service, issues of interoperability may be less important if consumers have access to the content on a service that is compatible with that device. Consumers will have no entitlement to make a copy to keep that they want to transfer between devices they own but which is prevented because the DRMs are not interoperable.

Nevertheless, BSAC supports interoperability as a desirable aim, but not an issue on which there should be government regulation. We would urge the Commission to foster dialogue and encourage the industry to do more to achieve voluntary solutions that might lead to a greater consensus on standards.

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

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[3] Published by Indicare at http://www.indicare.org/tiki-read_article.php?articleId=178

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

We agree that it is fair for consumers to be provided with sufficient information so that they know what they can and cannot do with content they have legally acquired to view or own, whether or not this use is underpinned by DRM technology. Ideally licences need to be as simple and transparent as possible for consumers, but the precise scope and so the complexity of licences will depend on what business models are most attractive to consumers. If consumers prefer a licence that permits them to do more, then this should be the deciding factor rather than how simply the licence can be written.

One complication is when there may not, however, be a contractual relationship between the service provider and the consumer as the content is being paid for other than by a direct payment, such as by advertising revenues. Ideally consumers still need to know what they can and cannot do, not least because DRMs may have been used to control or monitor usage. But consumers may prefer that this information is not something they must read before they can access the service. It may be preferable that the information is merely there for consumers who want to refer to it. Issues such as this are ones that industry will have to experiment with as business models are rolled out to determine what is most attractive and friendly to the majority of consumers.

In addition, it would be fair for consumers to be told when technical means have been used to enforce and/or monitor usage rights under a licence, and that with the latter this could mean personal data about use being transmitted to the service provider. However, providing more details about how DRMs will work does not seem to serve any useful purpose as most consumers are unlikely to be interested. Indeed, many consumers may currently be unaware that DRMs have been used because they are simply not trying to undertake any activity beyond what has been licensed, and this is arguably a reasonable situation to exist. Moreover, providing too much information about how DRMs will work could make it slightly easier for hackers to work out how to overcome them with no real benefit to the vast majority of law-abiding consumers.

Specific regulation on labelling requirements could cause problems in the future given that technology and how it is likely to be used is changing fast. If it is not, therefore, deemed appropriate to leave it up to industry to devise sensible and fair labelling of online content, then voluntary guidance or codes of practice would be a more flexible approach and these should be developed in collaboration with all stakeholders.

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Despite the considerable support for use of DRMs shown by the Indicare Survey, we accept that there is a problem with many consumers' negative perceptions of DRMs. The EU Commission and governments could therefore make sure that the benefits of DRMs for consumers as well as right holders are explained as part of any campaigns to raise awareness about copyright. Indeed, it may be that in the future technology which blocks or limits usage will increasingly be replaced by technology which simply monitors and tracks usage with payments being taken when certain types of usage are detected, or enforcement action for infringement of copyright is initiated if that usage goes beyond what has been offered under a licence. The latter type of DRM clearly raises issues of personal privacy more, but arguably delivers content in a way that consumers may prefer. Of course, it will be important for industry to decide what consumer preferences might be and adapt services accordingly. But the Commission and the governments of member States should play an active part in making sure that consumers better understand the enabling features of technology that can lead to products where they only pay for what they really want so that personal data issues are not considered in a vacuum.

> 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?

BSAC would welcome ADR as a useful approach for settling any disputes, but we are somewhat unclear what the nature of the disputes suggested by this question is likely to be. We would not support a system that encourages consumers to think they can dispute the existence of DRMs simply because they do not like such technology. As we have already said, governments need to clearly support the legality of the use of DRMs in delivering content online, and the benefits such uses can bring to consumers.

> 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?

As indicated above we support working together to agree common standards to facilitate interoperability but this does not necessarily require access to any specific DRM solution to be provided to anyone. Normal competition laws should apply to any lack of access to any specific technology where that is anti-competitive.

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. We do not agree that a Recommendation is needed in order to address the issue of multi-territory rights licensing. As we have said previously, the market for new online services and business models in the audiovisual area is at an early stage of development. It could be dangerous to make a Recommendation based on insufficient evidence of whether there are problems, and if so what these might be, and what might be the best solutions. We also think it can be dangerous to judge the success of content online only by how much material is available for EU-wide consumption, which seems to be the rationale adopted in the Communication. Such business models are not the only way of meeting consumer demands in the EU, nor may they necessarily be the best ways in many cases. EU consumers – or rather national and local consumers - and audiovisual content are both extremely diverse, and solutions that best meet consumer demand can be many and varied both between different consumers and different types of content. A one size fits all approach to licensing and payment for use will not, therefore, benefit consumers or any of the different right holders in audiovisual content from producers to performers.   Of course, not long ago many stakeholders did believe that territorial boundaries might disappear as the internet gives global access and technology could not easily limit delivery on a territorial basis. But technology now offers real choices for right holders and service providers on how best to cater for the specific needs of national markets and local audiences.

There is ample evidence that consumers prefer content delivered by a service using their first language, especially if they need to make careful choices about the service they desire, such as streaming, download to watch for 24 hours, download to watch for two weeks or download to keep, and understand whether DRMs have been used, what interoperability is possible and so on. Language territories are therefore likely to remain relevant and important.   In addition, where content is paid for by advertising, those delivering the service will need to maximise the revenue from this source, which is likely to require country specific adverts. It is therefore unlikely that a single service will often apply across all territories of the EU, although we accept that where content has EU wide appeal, differently adapted services could be operated by the same service provider.

Much audiovisual content is likely to be of very little interest outside the country of production. For example, there may be little interest in VoD services for much broadcast content outside the country in which it was broadcast, but considerable interest, as is already apparent in the UK, in catch-up TV services in the country of the broadcast.   The Communication seems to argue in favour of cross-border licensing in order to encourage cultural diversity. However, in our view encouraging cross-border licensing rather than leaving the market to develop such licensing or single territory licensing as appropriate could act against diversity. Cross-border licensing would favour content that has cross-border appeal and niche content of interest to consumers in only one or two territories could receive less support. In the UK, tastes for audiovisual content even vary to some extent in different parts of the country. For example, regional broadcasts can be popular. Regional variations apply for other types of content too. For example, a very recent

survey of regional musical tastes in the UK shows marked differences in what type of music is most popular in different parts of the country.

It is important to remember that many of the audiovisual online services being developed are controlled by those who own the rights in the content and so rights clearance issues where cross-border services are being planned are likely to be less of a problem than in the case of music downloads being offered in services not operated by right holders. However, especially given the continued reliance that content producers will have on business models in the physical world for sometime to come, it is important to let content owners decide where and when audiovisual material is released in any new business models. These decisions will need to take into account what should be the appropriate windows between the different business models, and unless all of these are harmonised across the EU too, harmonised multi-territory licensing for VoD services is unlikely to make sense.

Smaller players may be at a disadvantage compared to large international entities in terms of marketing spend available to them when they release content and the consequences for such smaller players if encouraging multi-territory licensing needs to be carefully taken into account. They may not have the ability to launch EU wide services and should not be disadvantaged in any way where services are rolled out territory by territory. Indeed, territory by territory services could make sense for any content that is not as immediately popular as a blockbuster film, but which could in the end find an audience across much of Europe. Business models, both online and otherwise, can be developed in stages across territories as advertising and other support is devised on a territory by territory basis.

Other copyright issues which would not be solved by a Recommendation directed at licensing alone could also play a part in business decisions about multi-territory licensing. For example, different private copying exceptions covering time shifting of broadcasts and format shifting of content could lead to different business models being appropriate in different territories. The extent to which collective licensing exists could also be important. Collective licensing of audiovisual material is not nearly as common as for some other types of content. Furthermore, online services, particularly those that permit downloads, are not exactly the same as satellite services where a signal is not necessarily intended for reception in another country.

When analysing the extent of cross border licensing of audiovisual material, it is important to remember that non-copyright issues such as differing VAT rates, differing rules on classification of content and the penetration of broadband connections able to support audiovisual VoD services are also likely to affect decisions about such licensing. Many of these other issues were identified in the Commission Staff Working Document. Great care should be taken to discount the effect of these other issues before reaching conclusions about a solution directed just at licensing.

Looking at only the current availability of multi-territory services for audiovisual material will, for all the above reasons, therefore be an unsatisfactory approach for deciding whether there is a problem with the licensing as such that needs to be solved.

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Moreover, in the absence of any convincing arguments why territorial boundaries for licensing of rights in the audiovisual area are wrong and why cross-border licensing should be encouraged, a Recommendation would be inappropriate.

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?

We do not believe that any action needs to be taken to foster multi-territory licensing as for the reasons explained above we believe the most appropriate type of licensing should be left for the market to determine.

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 of more than two years old)?

As for original content, much of the material in the so-called "long tail" is likely to be of interest in only one or two territories and so multi-territory licensing is not necessarily relevant. We do, though, agree that there are business opportunities from making older material available in VoD services and such services are already being developed. For example, Project Kangaroo, a joint venture being developed between the BBC, ITV and Channel 4, is aimed at offering catch-up TV services from all these public service broadcasters from a single platform, as well as VoD services for some older programming.

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 follow?

BSAC agrees that one of the keys to reducing piracy is meeting consumer demand for new services, and another important approach is better awareness about and understanding of copyright and why businesses use DRMs. In the UK, collaboration

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between the major DVD distributors and retail and rental outlets in the Industry Trust for IP Awareness has led, amongst other things, to consumer awareness campaigns, but these until recently have been directed principally at the physical world. Stakeholders in the television area in the UK are already working together to investigate opportunities for greater collaboration against online piracy of television programmes. However, in the online world ISPs become important stakeholders. Despite lengthy discussions in the UK, comprehensive collaboration between this sector and right holders has not as yet been possible to agree.

We welcome the commitment shown by the French Government to working with other stakeholders on this issue. Reaching agreement on a Memorandum of Understanding is interesting. The principles underpinning this are interesting. Whether this approach or another is appropriate will depend on the likely chances of success of the former within a reasonable timescale given the urgency of securing collaboration. We are currently considering the UK Government's very recent indications in the Creative Economy Strategy Document to pursue this issue.

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

We welcome the fact that such technology will be subject to experimentation by access providers under the recently signed French Memorandum of Understanding and we would welcome further experimentation with this sort of technology. We also note that a court judgment in Belgium last year reportedly imposed a requirement on an ISP to use filtering technology to block or filter copyright infringing material on P2P networks. We do understand the problems if such technology filters out non-infringing content too, and that is why experimentation is so important to make sure that it delivers an effective and targeted solution to illegal, and only illegal, online use of copyright content. We would encourage the Commission to facilitate in the framework of the Content Online Platform an exchange of information about such technologies to identify where and how they have been used successfully.