

**CBI response to European Commission Communication on
Creative Content Online in the Single Market**

The CBI welcomes the opportunity to respond to the Commission's consultation on Creative Content Online. As the UK's leading business organisation, we represent thousands of companies who, in the face of competition from low-cost overseas rivals, are creating and using online content in their business processes and developing higher value services and greater customer loyalty through building more sophisticated online services.

The Communication asks a broad range of useful questions about the future growth of online creative content in the EU. We see the market as broadly functioning very well, providing value-adding and culturally enriching services for citizens and companies within (and outside) the EU. Driven by the use of internet technologies, market dynamics are being transformed. Economic bottlenecks will occur as new business models and monetization methods are developed. However, we would urge the Commission to recognise the effectiveness of market relations, driven by customer demand, in resolving commercial issues that are still present within certain areas of the online content market. Policy recommendations to come out of this Communication, which could well lead to future legislation, need to recognise this level of market efficiency and be developed firmly in line with better regulation principles of transparency and appropriate consultation.

The UK, perhaps more than any other Member State, has benefited culturally and economically from having a vibrant creative sector. In 2004, the creative industries accounted for 7.3 per cent of total UK gross value added (GVA). Creative industry GVA also grew by an average of 5 per cent per annum between 1997 and 2004, compared with the UK average of 3 per cent for the same period.¹ The creative industries are also a major employer – between them employing over 1 million workers, or 2.7 per cent of total employment. The number of individuals employed in all creative occupations in the whole economy (including those working in sectors formally outside the creative industries) is greater still, at 1.8 million.²

The creative sector also provides value-adding services to the broader business community. In looking for compelling ways to engage their customers, UK companies are becoming publishers and users of creative content in their own right. A CBI survey carried out in 2006³ showed that forty eight percent of businesses believed adapting to their customers' internet behaviour would be crucial to their success. The most widely cited reason for engaging with customers via the internet was to develop new sales channels (78 per cent), with 67 per cent citing competition from business rivals as a driver. The creative sector provides a crucial service for modern businesses in terms of product and service differentiation, making an important contribution to European competitiveness. Their continued development will be critical to achieving the European Commission's i2010 goal of

¹ *Creative Industry performance A statistical analysis for the Department of Culture, Media and Sport* - Frontier Economics Ltd, 2008

² *Staying ahead: the economic performance of the UK's creative industries* - The Work Foundation, 2007

³ *CBI/Google survey of internet trends for business and consumers*, 2006



promoting 'an open and competitive digital economy' within the broader Lisbon Agenda for European economic growth and employment.

In line with the principles of better regulation, it is crucial all relevant stakeholders are widely consulted in the creation of the Recommendation and their input incorporated into the final proposal. We are concerned this process was not fully followed in the build-up to the publication of the Communication – the extension of the Communication's scope into user-generated content (UGC) and interactive content was not raised within the 2006 consultation. It was clearly recognised during the Audiovisual Media Services (AVMS) Directive review that UGC is an emerging area which did not require regulation beyond statutory horizontal laws as there is no defined market structure and business models. Fettering emerging media services in a complex regulatory or bureaucratic framework could slow or even skew their growth and might cause investment capital to move outside the European Union.

Broadening participation in the Content Online Platform (COP) would also be in-line with the principles of better regulation in terms of transparency and consultation. We see potential value in the COP as a forum for dialogue which can feed independent advice from expert stakeholders into policy development, possibly including this summer's Recommendation. However, there is currently a real lack of transparency over its form and function which should be clarified prior to its first meeting. As noted above, there is a danger that over-bureaucratisation will reduce the competitiveness of the sector, thereby removing the financial incentive to invest in it, going against the original goal of promoting economic growth. In that regard, the COP should be willing to recommend that no legislative intervention is necessary in certain markets where private sector relations are producing results – for instance, music companies are making digital content available without DRM in response to consumer demand for flexibility with that content – so mandating interoperability would be unnecessary or premature.

Whilst this summer's Recommendation is not a legislative proposal, it could act as a benchmark for future legislation if Member State compliance is not deemed adequate. Whatever policy proposals are put forward, they should allow the market adequate flexibility to offer the products and services customers desire. The proposed Recommendation would be most effective if it focused on targeted action at the EU level and, following principle of subsidiarity, allowed Member States the flexibility to implement national measures on the more technical aspects of creative content online, according to specific conditions of that market. Finally, we would highlight the importance of linking-up with other Directorates within the Commission, particularly DG MARKT and DG COMP in following-up policy recommendations in this area.

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?*

Interoperability is relatively greater in the networked knowledge economy than the physical world of 20 years or so ago. A guarantee of full interoperability has never proved necessary for a wide range of music and video to be digitised and made available in various formats. However, a lack of

interoperability could limit the growth potential for legitimate online content. Ultimately, consumer demand will dictate how these issues are addressed, and for this to occur, the industry must be allowed to develop market-driven solutions and industry-led international standards. The current legal framework seems suited to this goal.

It is essential the Commission does not look to pick winners by mandating one particular DRM technology over another. Any centrally mandated solution carries the danger that it will quickly become out-dated and therefore deprive consumers of new features and functionality. A legislative requirement for interoperability between DRM systems could prompt content owners to offer less of their content online if they are concerned that such a requirement might reduce the effectiveness of copy-protection systems against piracy or unlawful copying. If done properly, content licensing systems can be cost effective and complementary to DRMs, through allowing many small players to enter the market at tariffs levels that maximise usage and generate a return to the rights' holders.

- 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?*

- 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?*

The threat of impairing consumers digital content legal rights is somewhat illusory, given how much copyrighted material has been made available in different forms and formats in the 12 years since the adoption of the WIPO Copyright Treaties.⁴ Most if not all of the concerns raised about DRM, which often seem overplayed, can be solved by ensuring that consumers are fully informed about the scope of their rights when they buy. It is equally important to recognise that the consumer has a lot of choice when buying.

One area we would see benefitting from European-wide action is in the labelling of DRM systems for consumers. There are already a number of national schemes which provide consumers information as regards the terms of the package of rights they have paid for. A more standardised system across Europe could be a strong platform for increased take-up of new business models and digital content in general if consumers possessed a general understanding of what rights and obligations different DRM systems entailed. In the longer term, media literacy could also help ensure that consumers understand what they are purchasing and what they might reasonably expect to be able to do with digital content. Any such labeling conventions should be industry-led and easy to understand.

- 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 WIPO Copyright Treaty, http://www.wipo.int/treaties/en/ip/wct/pdf/trtdocs_wo033.pdf; WIPO Performances and Phonograms Treaty, http://www.wipo.int/treaties/en/ip/wppt/pdf/trtdocs_wo034.pdf.

We are not aware of any consumer detriment being currently being caused by EULAs and would be interested to see data that shows otherwise. The EU is already rightly regarded as being a leader in consumer protection standards, a lead which has been driven forwards by the Commission. We see the resolution of any customer concerns relating to EULAs that fall outside of horizontal consumer protection standards (such as fair trading laws) as a market issue rather than one that requires legislative action.

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 should always be available via licensing on commercial conditions.

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?

The main restraint against the emergence of multi-territory rights licensing bodies is European competition law. There seems to be a dilemma between the desire for the efficiencies of one-stop shop licensing and the fear of monopolistic practices. We would call on the Commission to work proactively to engage licensing and collecting societies to allow for the creation of pan-European collective licensing as a means of generating a better return on the investment made in the production of digital content by the creative sector. This would entail working closely with other Commission Directorates, particularly DG COMP. It would be crucial to put in place robust dispute resolution processes for when there are instances of conflict between licensing bodies and their customers. This would be particularly relevant were, as is likely, a single licensing body to emerge for pan-European licenses relating to a specific type of creative content.

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)?

This question has substantial implications for businesses that derive substantial parts of their revenue streams from licensing of back-catalogues, often containing material a great deal older than two years. It is not clear what issues it might be trying to solve, nor does it indicate where the Commission might be intending to go with it. We do not see a clear causal link between multi-territory licenses for back catalogue works more than two years old and the economic theory behind 'long tail' business models. In line with better regulation principles, we would urge the Commission to provide a lot more clarity of what this question might be trying to solve before taking forwards any related actions.

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

Digital piracy—unauthorized, unpaid electronic copying and distribution—competes unfairly with and undermines the business models for legitimate online content distribution. This kind of piracy, no less than physical piracy and counterfeiting, brings lost legitimate sales, lost taxes, lost jobs in upstream and downstream industries and lost innovation and competitiveness. The CBI recognises that the question of the best policy and regulatory framework for resolving issues related to piracy is fraught with different interests and implications for competitive positioning on all sides. There is much to gain in the medium to long term; there is also much that can be lost in the short to medium term if decisions are poorly made. The many potential stakeholders means that policy formulation is and will be subject to quite intense pressures when looking at the issue. Due to the breadth of our membership, we do not take a specific position on the issues outlined by the Commission, but we hope in the first instance that technological, market-led and self-regulatory means can provide solutions that satisfy all sides of industry.