CMBA
CreativeMediaBusinessAlliance

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Public Consultation on Creative Content Online – Policy/Regulatory issues – Comments of the Creative Media Business Alliance (CMBA)

I. Executive Summary

The Creative and Media Business Alliance (CMBA – http://www.cmba-alliance.eu/) is an informal coalition comprising trade associations and individual companies active in the advertising, broadcasting, film, music and publishing sectors. The CMBA's written response to the questions posed by the European Commission in its Communication on Creative Content Online in the Single Market (COM(2007)836 final) underlines that mass copyright theft remains the most important obstacle to the development of a thriving legitimate market in content online. The CMBA underlines that there is an urgent need to address this phenomenon, which is threatening all creative content sectors.

The CMBA notably calls upon the European Commission and the European Union to:

(i) encourage increased effective stakeholder cooperation to improve respect of copyright in the online environment (more generally, cooperation will also constitute a key enabler for the development of modern knowledge-based societies where legitimate business ventures are encouraged and online fraud and illegal activities are fought jointly and efficiently),

(ii) consider legislative measures, as necessary and appropriate, to facilitate and/or remove potential obstacles to effective stakeholder cooperation,

(iii) support industry solutions developed to promote DRM interoperability while ensuring the protection of copyrighted content,

(iv) refrain from taking any measures that could threaten the current contractual freedom that allows rights-holders to license their content as they deem fit from a commercial point of view – be it on a national, linguistic or multi-territorial basis,

(v) explore the take-up and use of technological instruments discouraging illegal activities, such as content recognition tools.

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

The top priority of the creative media sector is to make sure that consumers are able to enjoy the widest variety of copyrighted content in a secure way on the largest number of different platforms and devices. Adoption of interoperable DRM systems will encourage such consumer-friendly and technology-friendly services facilitating mobility and portability. CMBA therefore believes that interoperability is essential to the development of a robust online market in content. In this context, it is important to note that DRM systems are key enablers that play an important role in supporting the development of online creative content services, as also acknowledged in the Commission Communication. It is crucial that industry solutions be developed promoting DRM interoperability without sacrificing the need to ensure "security". To achieve this, commitments from device manufacturers and platform operators will be needed in addition to the continued involvement of the content providers. This said, a "one-size-fits-all" solution does not exist and would not be appropriate for two main reasons. First, there is such a wide variety of business models and content to be supported (advertising-based models, subscription-based offerings, etc.). Secondly, Technological Protection Measures (TPMs), which are important components of DRM, used to create appropriate secure environments must constantly adapt to new challenges.

One of the main obstacles to fully interoperable DRM systems in the Internal Market has been a lack of inter-industry standards. In this regard, we believe more support and encouragement deserve to be given to initiatives already underway in standardisation bodies to address issues of content, platform and DRM interoperability. As mentioned, such solutions require commitment from all parties involved including, in particular device manufacturers and platform operators. As concrete examples of existing market-led initiatives, the European Digital Video Broadcasting project (DVB) has recently released a technical specification called DVB-CPCM (Content Protection and Copy Management). It has been developed by industry consensus and will be standardised by the European Telecommunications Standards Institute (ETSI). DVB-CPCM aims at providing a very comprehensive technical framework for digital home networking which, while able to sustain a large variety of business models, is not tied to a particular mode of delivery of the content. Ultimately, it will enable interoperability across a wide variety of consumer equipment and devices. Another initiative worth mentioning is CORAL. This initiative aims to provide interoperability by facilitating export of content from one DRM to another.

The CMBA is not calling for a legislative approach, at this stage, to impose DRM interoperability. The right basis for a healthy and legitimate content online marketplace was already set in 2001 when the EU adopted the "Copyright" Directive (2001/29/EC). This Directive rightly notes that "interoperability of the different systems should be encouraged". Moreover, the EU's existing competition rules are there to provide the appropriate tools and remedies to make sure that "gate-keeper" situations on the market for online content delivery are dealt with. This will benefit consumers without jeopardising the contractual freedom granted to rights holders and technology providers to engage in arm's-length licensing negotiations.

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?

The CMBA supports clear and conspicuous consumer information as to the features and usage rights associated with DRM systems. This aspect is an important part of ensuring a good consumer experience as regards content purchased online. It should also be noted that the online environment differs from the physical environment with regard to a number of aspects, and this would have to be taken into account when considering solutions for labelling online. Given the variety in services, the development of labelling is better left to the market players, and existing consumer rules provide the necessary framework in that regard. There are already a number of examples on how the market is addressing this. Microsoft Windows's *PlaysForSure* can for instance be cited as enabling consumers to be informed of various devices being WMDRM compatible. As to Question 2's reference to "data protection features of DRM systems", it should be recalled that existing data protection rules provide a detailed and appropriate framework, including with regard to required information to be given to the data subject.

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?

End-user licence agreements (EULAs) have been commonly used in the software industry ever since the 80's. The CMBA supports their use and consider that EULAs have substantially contributed to the mass-market development of software transactions between users and licence-holders by facilitating diversified terms and conditions. As the use of software solutions like DRM becomes more pervasive with the growth of the online market-place for creative content, individual consumers of the said content are increasingly faced with EULAs.

The CMBA considers that the contractual freedom granted to creators and users of DRM solutions will lead to an increased use of EULAs that will both contribute to – and result from – the development of creative content online. As to "any particular issue related to EULAs that would need to be addressed", we would argue that all rights holders, consumers and potential intermediaries have an incentive to make sure that appropriate transparency and legibility of EULAs are guaranteed, so that all parties to a content-delivery transaction are fully informed of the terms and conditions associated with the use of a specific software.

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 CMBA shares the opinion that Alternative Dispute Resolution (ADR) mechanisms offer more flexibility to the parties involved than going to court. Since ADR schemes are also generally less costly, faster and informal than court proceedings, they should present consumers with an attractive means to seek redress in case of potential issues linked to aspects of consumer law. However, as DRM systems involve complex questions regarding both law and technology, we are not convinced that ADR would be an appropriate approach to deal with issues related to the application and administration of DRM technologies. Furthermore, a large number of different players are involved, which makes this issue less suited for ADR. Also, at the time of the adoption of the 2001 Copyright Directive, it should be recalled that the inclusion of an EU-level ADR scheme into the Directive had been advocated but that this idea was at the time not retained by the EU. However, in implementing the Directive, a number of Member States have introduced various ADR mechanisms to address issues that might arise between so-called beneficiaries of exceptions and right holders employing Technological Protection Measures to manage their content.

In any event and as a general matter, it is important that bodies competent for ADR are perfectly neutral in order to be trustworthy as fair mediators. ADR should also be voluntary and parties' recourse to the courts should be preserved. Besides, appeal against decisions of the ADRs to the court should absolutely be allowed and provided for. In the context of the above-mentioned interaction between legal protection of technological measures and copyright exceptions/limitations, it is probably also worth recalling that Article 6.4.4 of the Copyright Directive makes it clear that Member States must not intervene in the framework of works or other subject-matter made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them.

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 a general answer, the CMBA would agree that in the context of standardisation non-discriminatory access to DRM solutions contributes positively to a digital content distribution market characterised by healthy competition. Standard bodies, like the DVB which is mentioned above, will generally have IPR policies that require that participants undertake to license any IPRs that are implicated by specifications developed by standards body on fair, reasonable and non-discriminatory terms. The purpose here is to encourage the development of open standards, while allowing companies to benefit from the IPRs in technologies which they may have invested great amounts of resources to develop. This said, we would also point out that SMEs and larger enterprises benefit from the application of general competitions rules preserving a healthy and dynamic marketplace conducive to both choice and innovation in the field of DRM solutions.

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?

The short answer of the CMBA to this question would be “no” since we believe that the more important issue at stake here is the need to preserve, under the existing international and EU frameworks, the contractual freedom that currently allows parties involved in the “Creative Content Online” marketplace to enter into arm’s-length commercial negotiations with a view to defining the most appropriate licensing and remuneration arrangements for each individual case. Indeed, it is the current flexible system that allows rights-holders to license their content as they deem most appropriate from a commercial point of view – be it on a national, linguistic or multi-territorial basis or pan-European basis

The CMBA would also like to point out that it would be extremely wary of any intervention in this area. Indeed, while the end-goal of content providers will always remain the need to ensure full consumer satisfaction, the management of rights may need to differ greatly depending on the type of content considered. As illustrations, it can be mentioned that producers/distributors in the audiovisual sector will most often need to take their decisions with due consideration for local specificities (cultural preferences, classification regulations, language, window regulations, etc.), whereas digital book publishers usually license their copyrights on a world-wide basis.

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 European Commission needs to fully take into account the way in which films and other audiovisual works are financed, produced and distributed in the European Union. The relevant "exploitation" rights in an audiovisual work are usually "centralised" in the producers by operation of law or contract or a combination of both. This mechanism includes rights relevant to licensing of audiovisual works for new online services, including "video on demand" and permanent downloads. It should here be noted that while international, EU and national law recognise the territorial nature of copyright, these rules do not preclude, from a legal point of view, EU-wide or cross-border licensing models. In other words, there is no need for a Recommendation since the contractual freedom granted to content owners to license their content territory by territory does not constitute an obstacle to the launch of services across borders.

In the marketplace, new on-line business models for the online delivery of audiovisual works are currently being tested and embraced by the content industry. The CMBA believes that the European Commission should refrain from trying to impose any model or specific restrictions on the industry's freedom to license. This would penalise creators and eliminate market-driven incentives to invest in the new works that are necessary to drive these new online services. As an illustration in the film sector, it is not unusual for independent producers in Europe to depend on pre-sales to individual markets to finance their projects; any form of mandated of EU-wide license would therefore undermine an important source of financing and thus be detrimental to consumers by ultimately restricting the available menu of choices and ultimately the richness of European cultural diversity.

For the reasons outlined above, we do not see any practical interest, let alone commercial value, in the idea of imposing so-called "secondary multi-territory" licences on producers and distributors of audiovisual works. This view is compounded by confusion over what exactly "secondary multi-territory" licensing would entail and the negative impact it would have on the revenue streams.

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)?

Ever since the concept emerged around 5 years ago, the members of the CMBA have shared the opinion that the "Long Tail" theory – i.e. the notion that products which have low sales volume can collectively reach a market share that exceeds/rivals the aggregate sales volume of a more limited number of best-selling

products – can have interesting business implications for the distribution of certain types of creative content, be it online or offline. This phenomenon has notably been very interesting to observe (and certainly also to exploit commercially) in the case of online bookstores, such as *Amazon*.

This said, the statistical notion of a "long tail" – whereby a low-amplitude population makes up the largest proportion of a given graph, in comparison with a high-amplitude population also visible on the same graph – also refers to the distinction between "niche content" and "best-selling content". Unlike what the wording of "Question 8" seems to suggest, the CMBA does not see any real value in using only "new" vs. "old" content as a useful metric in this regard. Besides, the "works more than two years old" alluded to in the wording of Question 8 does not in the CMBA's view constitute a useful notion of what could be considered back-catalogue works.

As a case in point in sectors characterised by successive windows of exploitation (i.e. media chronology), such as the film sector, a specific content product will often not yet have hit free-to-air television screens two years after its initial release and certainly not be considered as "old". Indeed, it will be in the middle of the cycle of specifically-crafted licensing agreements that always need to take into account local specificities, such as cultural preferences, classification regulations, language, window regulations, etc.

In short, the CMBA members are eminently aware of how markets for creative content evolve and operate. In this specific regard, the CMBA would like to stress again that contractual freedom and the liberty to engage in arm's-length negotiations of licensing agreements are the best guarantees that new business opportunities will be seized and exploited efficiently by market players. Where there is a market for multi-territory "long-tail" products such licenses will be made available.

Legal offers and piracy

Copyright theft online remains the most important obstacle to the development of a thriving legitimate market in content online. There is an urgent need to address this phenomenon, which is threatening all creative content sectors.

9) How can increased, effective stakeholder cooperation improve respect of copyright in the online environment?

The CMBA believes that increased effective stakeholder cooperation is much needed to help improve respect of copyright in the online environment by translating past declarations of a more "political" nature into robust and effective inter-industry codes of conduct that are actually applied and legislative measures as necessary and appropriate. Clear commitments from stakeholders, including in particular ISPs and other intermediaries, are needed to assist right holders in the fight against mass-scale online copyright theft. Such measures are also absolutely necessary to encourage the emergence of new legitimate online services and to foster a secure,

legitimate and consumer-friendly environment. We believe that increased effective stakeholder cooperation will not only go a long way in encouraging respect online for copyright but that it will also constitute a key enabler for the development of modern knowledge-based societies where legitimate business ventures are encouraged and online fraud and illegal activities are fought jointly and efficiently.

Recent positive experiences at both EU and national levels provide precious information about how stakeholder cooperation can become truly effective in the Content Online environment. In the CMBA's view, the following main lessons can be drawn from these experiences:

- Public authorities have an important role to play, and their active involvement is vital to facilitate and press for effective solutions to be found in inter-industry negotiations and, where appropriate, legislation. As a concrete example, the fact that the French agreement discussed below (see "Question 10") was adopted (and to be reinforced by law) under the auspices of the Government was extremely useful in fostering the required climate of constructiveness and compromise among the stakeholders involved. Another good example is the recent announcement by the UK Government, which has made clear that it will legislate in the area of ISP cooperation if required. To that end, it will consult on the form and content of regulatory arrangements in 2008, with a view to implementing legislation by April 2009 (see notably Recommendation 39 of the December 2006 "Gowers Review of Intellectual Property" and Commitment 15 of the February 2008 "Creative Britain – New Talents for the New Economy" Strategy Paper.
- Governments and parliaments should also stand ready to overcome possible legal/regulatory impediments that might be perceived as standing in the way of effective stakeholder cooperation.
- The nature of the problem calls for an approach, which supplements existing measures, and which is suited to efficiently tackle the scale of the problem. It is therefore important to ensure not only that all existing options remain open to right holders to enforce their rights in the online environment, but also to provide for additional means such as the ones announced in France.
- Effective technological tools exist and should increasingly be implemented and effectively applied to discourage illegal activities occurring online at source. Increased stakeholder cooperation will facilitate the use of such technologies in the online world. We also refer to our answer to question 11.
- Appropriate joint responses to illegal and/or harmful behaviour will benefit all stakeholders, as they will allow legitimate content services to flourish and favour a secure and healthy online environment. In this regard, we would like to emphasise "ACAP" (the "Automated Content Access Protocol") as a clear example of fruitful inter-industry co-operation. ACAP was jointly devised by search engines and online publishers and launched in

November 2007. It is destined to become a universal permissions protocol on the Internet, through which online publishers can communicate permissions for access and use of copyright-protected content to online intermediaries.

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

The CMBA considers the French Agreement signed on 23 November 2007 in Paris as a constructive step in promoting the development of the marketplace for Creative Content Online. It should here be recalled that this agreement was signed by no less than 42 signatories, including most of the telecom operators and ISPs. The agreement sends a clear signal that copyright infringement online must and can be addressed and that ISPs have a part to play in doing so. The French agreement illustrates that political commitment to reach satisfactory solutions is key, and this fact should be acknowledged also in the context of future initiatives in this field. The CMBA therefore thinks that the gist of the French agreement, and the clear political commitment to finding solutions that it entails, represents an example to be followed. The details of similar solutions at national or EU level would of course have to be adapted to local specificities. In this context, it should be borne in mind that some of the commitments included in the agreement, such as those related to DRM and release windows, are clearly sector-specific and country-specific. It is also important that solutions reflect the variety of business models, e.g. the broadcasting, film, music and publishing sectors[1].

In essence, the CMBA sees the French agreement as an interesting example with potential to be followed because it is founded on the idea that effective inter-industry co-operation is a key enabler for the development of modern knowledge-based societies where legitimate business ventures are encouraged and all types of online violations of the law are fought jointly and efficiently. This acknowledgment is crucially important for the development of “Creative Content Online” since it provides that stakeholder co-operation constitutes a pre-condition for the further development of thriving e-commerce sectors, notably for immaterial goods and services, where infringements of intellectual property rights need to be effectively tackled. Finally, as a measure with direct impact on the development of a dynamic e-commerce sector for content online, the CMBA wishes to stress that it strongly supports the agreement’s commitment to work, at the EU level, towards the generalised application of reduced value-added tax rates (VAT) to all cultural goods and services, in order to put an end to the current discrepancy between VAT applied in the online environment as opposed to the offline world.

[1] Duly aware of the specificities of the various sectors, the French Government has for instance set up a specific working group for the book publishing sector.

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

The CMBA considers that the application of technology, including filtering technology, should be one important part of any successful strategy against copyright theft. We believe it could help keep piracy at a sufficiently low level to preserve the virtual circle whereby people who contribute to creativity can be remunerated and the production and distribution of new creative content online is made possible by the reinvestment of revenues stemming from existing creative content. It also needs emphasizing that filtering technologies are not distant promises but that many are being considered and tested or already used in the marketplace (e.g. the Web 2.0 platform www.dailymotion.fr).

As concrete examples, one might mention the set of collaborative principles that were agreed and announced in October 2007 in the United States by several of the world's leading Internet and media companies, with the aim to reconcile the growth and development of so-called "user-generated content" (UGC) platforms and the respect for the intellectual property of content owners (see http://www.ugcprinciples.com/). The number of companies (e.g. Advestigo, Audible Magic, Auditude, Gracenote, Safemedia, Intellivision, M2any, NTT, Philips, Thompson, Vidyatel LTD, Vobile, etc.) involved in research & development on filtering is a clear testimony to the great potential of online content recognition technologies. Deployment is notably occurring in a wide range of online environments, including university networks, UGC services and client file-sharing applications such as Azureus and Imesh. It also bears reminding that in June 2007, the Brussels Court of First Instance ordered the Internet service provider Scarlet to implement a solution to address peer-to-peer piracy over its networks and stated, based on expert evidence, that notably filtering solutions were perfectly feasible.

The CMBA is of the opinion that filtering measures will be beneficial to all stakeholders, not just copyright holders, since the amount of ISP broadband currently clogged up by illegal content (e.g. on P2P file-sharing services and Web 2.0 applications) is clearly threatening the quality of service provided by telecom operators and Internet service providers, to the detriment of subscribers. By treating Internet Piracy like spam and viruses, content recognition technologies thus have the merit of reducing the occurrence of illegal content.

As a crucial last point in our comments, the CMBA would like to recall and underline that its members are strong advocates of freedom of expression. We believe that the specific measures suggested under Question 11 to combat online copyright theft are fully compatible with this fundamental right. Censorship and filtering of illegal content are two totally distinct matters that should remain separate. In short, filtering measures are based on content recognition technologies that are neither meant nor designed to threaten the universal right of freedom of expression.

We are the industries that were founded on the freedom of expression. Collectively we have defended it in our countries and courts over decades. Today's networks have been and continue to be an engine for the freedom of expression just as they are an engine for our industries. As creative and media businesses we continue to stand ready to defend this freedom on the Internet while safeguarding the rights and freedoms of others in cooperation with network and service providers, in a legal framework which enables educational, contractual and technological action to stop unlawful transmission.

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The CMBA remains at the Commission's disposal for further information where necessary.

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