



## **EFCA's Answer to the Consultation on Policy and regulatory issues in relation to the Communication on Creative Content Online**

Brussels, 28<sup>th</sup> February 2008

The European Film Companies Alliance (EFCA, [www.efcasite.org](http://www.efcasite.org)), founded in Brussels in September 1995, is a non-profit organisation with a scientific and artistic purpose. It aims to bring together European entrepreneurs active in film production and distribution. EFCA members include the following companies: AB Svensk Filmindustri (Sweden), Eurofilm Studio (Hungary), Filmkameratene (Norway), Lusomundo Audiovisuais SA (Portugal), Nordisk Film and TV A/S (Denmark), Pathé (France) and Producciones Aguamarga (Spain). It is an essential platform for information exchanges and business networking. EFCA considers that the following key issues are central to its mission:

- To promote European cinema within Europe and in third countries
- To encourage a sustainable and competitive European film industry
- To facilitate and improve access to EU grants and capital for the sector
- To sustain the development of digital distribution platforms
- To stimulate European co-production
- To liaise with film bodies, associations, film professionals and European authorities
- To raise awareness to the key issues at stake in the European film industry

The digital film market is at the moment still at a nascent stage. However it is expected to grow to €1.3 billion by 2010 of which 1 billion euro from online VOD<sup>1</sup>. Thanks to the constant improvement of data compression which enabled the size of digital video to be reduced and to the increase of the broadband penetration and availability, transfer of video files are made more easy and are of a better quality. Broadband penetration is currently covering 15.7% of households the 25 EU countries but there is a high potential of growth (40% of EU25 have narrowband connection and expected to switch).

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<sup>1</sup> Study carried out by Screen Digest for the European Commission (DG Information Society and Media), 2007: *Interactive content and convergence: implication for information society*

The VOD study commissioned by the European Audiovisual Observatory<sup>2</sup>, carried out in 2007, identified more than 150 paying VOD services in the 24 countries studied. Four countries are particularly advanced (France, the Netherlands, Germany and the United-Kingdom) as they account for 71 services or almost 50% of the entire offer. The market leaders are so far national broadcasters, telecoms and ISPs. Films constitute the vast majority of content offered so far by all the VOD pay services. So far, three types of business models are rising in the VOD market: rental VOD (screening or download for a limited period of time); purchase (download to own) and free of charge VOD/Free on Demand (usually catch-up TV; financed by advertising or without monetisation).

The VOD business is not yet seen as a profitable one. Europe's current digital revenue currently entails 30 million euro in 2005<sup>3</sup> (28 million euro walled garden – 2 million online VOD). However, digital on-demand movie distribution market is expected to generate 1.269 billion euro by 2010 in Europe of which 1 billion euro from online VOD. In the USA, online VOD market is expected to generate 1.5 billion euro by 2010.

The internet offers a clear advantage over traditional film distribution channel as it gives the tool to the European film industry to develop new economic and growth opportunities. Indeed European film makers have now the potential to reach new consumers at international level. VOD is undoubtedly an opportunity for the European film industry to address market access issue characterised by strong dominance of a few players at traditional distribution level whether theatrical, television or retail.

However, online distribution brings about several challenges.

The first is piracy. So far, the film industry has far less suffered from illegal downloading than the music industry, mostly because it takes a lot more time to download a film. However, with improvements of broadband access, this is bound to change. An attractive legal offer need thus to be quickly set up in order to fight efficiently against piracy.

Secondly, VOD does not yet represent a funding opportunity to finance productions thus making the exploitation of VOD rights a distant scheme. The European film industry is very ill-prepared to take on this business opportunity as the European audiovisual market is notoriously fragmented along national and linguistic frontiers. European filmmakers are short of resources to master the technology and its potential. The industry's lack of vertical structure prevents it to ensure visibility on the market place through advertising and marketing to attract consumer's attention. Besides, concerning revenues, the European film industry is dependant on large broadcasters which want to control VOD rights to comfort their position at national level and maintain traditional windows.

Fragmentation of rights, in particular, remains the largest issue with regards to the development of VOD in Europe and more importantly the circulation of European films internationally on digital platform. Indeed rights for each film are sold on a territory-by-territory basis to ensure local distribution. This makes the exploitation of VOD rights at an international level impossible or very difficult.

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<sup>2</sup> Study carried out by NPA Conseil for the European Audiovisual Observatory and the French Directorate for Media Development (DDM – France): *Video on Demand in Europe*, European Audiovisual Observatory, May 2007

<sup>3</sup> Source: Screen Digest, Goldmedia. Rightscom

Therefore the main question is thus how to make the licensing (or availability) of European films for international VOD exploitation easier considering the rights fragmentation issue. This issue will be addressed with more detail in the second part of the questionnaire.

EFCA welcomes the *Communication on Content Online in the Single Market* recently released by DG for Information Society and Media. Content online is the next opportunity to make European films reach more consumers. Endowing European creative contents with the means to being circulate on the online environment is instrumental to cultivate culture diversity. Besides, it is a useful follow-up to the *Online Film Charter* which tried to encourage better collaboration between ISPs, telecoms and the audiovisual industry. Content online.

However, we wish to point out that we regret that the Communication does not explicitly recognise that the absence of proper business model is today deterrent to the development of a legal offer of films online. Such business models cannot emerge as long as security on networks is not tightened or access to content is not monetised. The Communication should also have covered the decline of current business model for the film industry and transition to new ones. The Commission is hence expected to make concrete policy proposals to ensure that the film sector will not be undermined in the switch to digital distribution.

The Communication does not clearly stress the importance of copyright and the respect thereof. Copyright protects creativity and investment in cultural goods. Without its protection, creators and investors in creation would not be able to earn a living from their work as copyright is their main source of revenue, their only tradable assets. Whilst piracy supports the broadband roll out, it threatens the return on investment of the industry.

Furthermore, the Communication could also be an opportunity to review support mechanisms at national level that act as a brake to innovation and new business models. The review of national support mechanisms should be on the agenda as they are essentially directed to the traditional business models and not geared towards the digital economy. Should theatrical distribution remain a condition to access state support for instance? Should state support be made dependent on the respect of windows set up to cater for the analogue world? The beauty of the European film industry is that it has the size to adapt more quickly than the majors to this new world. Current regulation may deter those that want to adapt to the future economy of cinema.

EFCA also regrets that the Communication does not clearly articulate the links with other areas of EU policies, namely, the e-commerce Directive, the Copyright Directive and the forthcoming Recommendation on Media Literacy.

Finally, the Communication fails to examine the potential of the FP7 programme as a tool to promote innovative rights management systems or to test new business models. The Commission on the one hand wishes to encourage “development of innovative business models and the deployment of cross-border delivery of online creative content services”, but fails to provide funding for R&D in this field. The content industry is not even consulted on a programme that relates to networked media. The technology focus is clearly unbalanced. Building a bridge between the audiovisual industry and the ICT sector should be a fundamental mission of DG Information Society. This would enable a better apprehension of technological innovation for the development of new business models.

## Digital Rights Management

DRM (Digital Rights Management) systems are used to manage consumer's use of digital content. They are essential tools to monetise VOD activities as DRMs facilitate efficient economic transactions between content producers and content users. However, DRMs are also used as a protection for any digital content against unauthorised use.

Production costs are usually not recouped by exploitation in theatres, which are only the first step of a long commercial chain. European films must ensure they derive revenues from other channels of exploitation, including DVDs and VOD. However, with the incredible advance of broadband penetration and availability, all content including films has become vulnerable to illegal copying and distribution across the Internet. Digitalisation has enabled the financial and skills barriers to making content available worldwide to fall: any internet users, even technically illiterate, can nowadays download or distribute content whether they have a right to it or not. Consumer piracy clearly entailed revenue decline for a large amount of film companies. DRMs are thus both a means to ensure a means to ensure respect of Intellectual property rights and thwart piracy.

Furthermore, DRMs should not be considered a substitute to private copying compensation. The private copying scheme was set up to compensate a damage suffered by rightsholders as possibilities to make copies of a protected work developed. The private copying levies does not give the right to make copies, but recognises the existence of the exception of private copying and aim at compensating the harm suffered by authors. However, the digital technologies, by their ability to facilitate copies to a huge extent, have increased the harm. Hence, the existence of DRMs is not a ground to phase out private copying.

Content users are more tempted to gain free-access to copyrighted works rather than having to pay for it. Besides, the DRM deployment has been a failure in the music industry. It is hence important that the use of DRMs that control and protect distribution of copyright material is balanced with consumers' interests to have access to those contents.

Interoperability is important for consumers if they want to enjoy content they acquired on different platforms. EFCA supports interoperability and agrees that it can only encourage creative content online services to improve. Right holders have an interest in having their work disseminated as far as possible. However, the level of security of DRMs used in the audiovisual sector needs to be maintained across platforms. Interoperability should not be made at the expense of security and should not foster piracy. EFCA welcomes the industry efforts to improve interoperability, however believes it is up to the industry to decide on that matter.

EFCA agrees that consumer should be properly informed through appropriate labeling on packaging or end-user licences. The Commission should promote in that respect a self regulatory approach such as the one existing in the videogame sector.

Better flow of information should be encouraged between technologies companies and audiovisual SMEs on the costs and opportunities associated to DRM.

## Multi-territory rights licensing

First of all, EFCA shares the Commission's vision that the licensing process is a key element in the battle to ensure European content on international VOD platforms. It is however difficult to grasp the concept promoted by the European commission on a two tier licensing process. Therefore it welcomes the idea of launching a study on primary and secondary licensing to consider means to ease the licensing process in a market characterised by market fragmentation.

The licensing of rights should be encouraged and facilitated for online content as licensing rights are key to the film industry to generate value from their catalogue. It has become an ever increasing part of producers' business to negotiate rights for audiovisual content with multiple partners for different uses (VOD, pay-per-view, subscription, trailers, web-streaming, etc.). European companies risk being at a competitive disadvantage with large users of rights due to their size (most EU producers are SMEs). Users and platforms are eager to get audiovisual contents, however, they cannot easily access them. As a consequence, it is positive that the Commission sees the importance of encouraging pan-European licensing.

EFCA believes that the priority should be for right holders to make it easier for service providers to access licences. Indeed ISPs are going to be reluctant to operate international services if it implies negotiating on a territory by territory basis with individual companies, most of them quite small.

Nonetheless, EFCA would be against any form of compulsory licensing. This would be against principles of copyright which is based on territoriality and which requires that actors of the sectors negotiate on a contractual and individual basis whether they want to license their rights.

In reality, pan-European or even multi-territory rights licensing is extremely complex and implies dealing with a great array of different copyright regimes and regulations. There are for instance still far too many differences between legislations on piracy or release windows. Apart for a few number of films with international appeal, international licensing makes little sense.

Territory by territory licence will continue. Independent European cinema is characterised by a scattered financing, with varied financial sources. Fragmentation of rights is structural to the way European production companies raise money for their films. This approach rests upon territoriality of rights, granting a licence bearing upon certain rights is nowadays the main means of financing European films. Most of European films are essentially made for a local audience and the presales to distributors and broadcasters on a territorial basis reflect this economy. Buyers of licence want to acquire VOD rights for the territory they are active in, and film producers need the money of those rights' buyers (theatrical distributors and national broadcasters) to finance their films. Most of European films are co-productions and barely any production companies concentrate all rights (copyright and exploitation rights). Costs of the theatrical exhibition vary a lot from one country to the other according to linguistic versions, subtitles etc. In addition, European film makers are not able to apply a "day-and-date" approach such as some successful Hollywood blockbuster can. They have to respect window release of each country, rating practices and more importantly the specific marketing strategy of the respective national distributors.

There is currently in the market place no operator seeking pan-European licences as operators in the audiovisual area operate on a linguistic/ territorial basis, however VOD could change this.

Why would an operator pay for an international license whilst the rights will be used only for a given territory?

Rightholders must make the acquisition of licence easier for ISPs. A rich and attractive legitimate offer will enable to fight piracy. The risk is that European films will be marginalised on the most successful platforms which will feature a film offer. It would be much easier for them to feature US content for which US content owners control the rights internationally. Few European companies have a catalogue large enough to interest a service provider or a digital delivery platform. European independents film producers will be the last in the rights acquisition chain. In addition, European companies risk being dictated discriminatory licensing terms at international level because of their poor bargaining position in view of the European films' international market share.

The "Long tail" is an opportunity to increase the distribution across borders of European films and improve market access for European film companies. The latter would hence increase their presence in such a new environment and reach consumers interested in European films but not served by traditional outlets (theatres, video retail), in particular in foreign market. Internet gives the tool to overcome the crossborder distribution problems, provided the film industry and the regulators play their part in supporting the emergence of a market that nurtures diversity and consumer choice.

In order for the long tail to become reality, and thus availability of European films on an international scale, European film makers must absolutely address the licensing process and make it easier for service providers to access European films. The essential point in relation to VOD development is thus the issue of market access. Licensing is not a problem for companies with a certain size and catalogues and with successful films in their catalogues, but it is one for smaller companies that do not have the visibility and means to negotiate licensing terms (most of film producers do less than two films a year).

Besides, EFCA considers that it is imperative to ensure that European films have market access to new delivery platforms is made on a fair basis i.e. on non discriminatory terms. Therefore competition law will have to play a role to avoid abusive position or control by large market players of the forthcoming distribution infrastructure

EFCA proposes that the MEDIA programme should support initiatives aiming at making the licensing of VOD rights on an international basis an easier proposition

Furthermore, the regulators should ensure that VOD rights are properly exploited and not locked out in the hands of operators unwilling to commercial exploit these rights with the intention to prevent new market entrants. .

Alternatively there could be a system of compensation to help film producers holding on their VOD rights and not be obliged to sell them to be able to finance their films. It could be in the form of an advance recoupable from future VOD revenues.

## Legal offers and piracy

The Communication is highly disappointing in respect of its proposals regarding the thwart of piracy. EFCA believes that increased stakeholder cooperation, especially between ISPs, telecom companies and rights owners, is imperative to fight against piracy. It approves the Commission's will to develop platforms to engage discussion with ISPs and telecom companies. However, we wish to strongly reassert that the issue of ISPs liability in monitoring and preventing copyright infringement should be a priority for the Commission and the national authorities.

Whereas it the film industry's responsibility to facilitate the availability of European films on new platforms and ease the licensing process with a view to discouraging unauthorised activities and promote the international circulation of European cinema, it is, on the other hand, the responsibility of ISPs and telecom companies to ensure that films are not pirated on their networks. Piracy of copyright protected content actually has the effect of subsidizing broadband's roll out.

ISPs should hence be made liable for copyright infringements and enforcement of copyrights should be improved. The Communication fails to liaise with other pieces of legislation. In the framework of the revision of the Telecom Package, two amendments were proposed by the Commission: one on the respect of copyright and one on piracy. First, the Authorisation Directive (2002/20/EC) should include in its Annex an obligation for telecoms operator and access providers to respect the *acquis communautaire* in Copyright related issues. Second, article 20 of the Universal Service Directive (2002/22/EC) will impose an obligation on providers to inform their subscribers, before they sign a contract, on their rights and obligations concerning copyrights as well as the legal consequences of pirating. EFCA welcome this steps, nonetheless, this is not enough. There is a need to impose a more explicit legal base to the notion of cooperation between rightsholders, ISPs, telecom operators and other stakeholders, namely in order (i) to favour the emergence of legal services making available cultural contents and (II) to encourage a common fight against copyright infringements. In that respect the e-commerce directive, which provides a safe-harbour for ISPs in its article 12 which exempts them for third party liability regarding the information transmitted via their network, should be reviewed.

Privacy and data protection laws at European and national level can be used with the aim to shield peer-to-peer final users from legal action initiated by right holders on ground of copyright infringement. In the decision *Promusicae v. Telefonica* on 28 January 2008, the European Court of Justice sitting in a Grand Chamber states clearly that it lies within the responsibility of Member States to provide in their legislation for means to fight effectively against piracy. To this effect nothing in EC law prevents a Member State to ensure effective copyright protection by requiring a telecom operator or an ISP to communicate personal data in the context of civil proceedings with a view to stop mass illegal downloads. The court clarifies that the existing EU directives do not prevent Member States to lay down in national legislations an obligation to disclose personal data in the context of civil proceedings provided the principle of proportionality is respected between different fundamental rights such as the right of intellectual property and the right or privacy. The decision clarifies rules and obligations created by various directives (Copyright, e-commerce, information society Directives and the telecom package). The judgment outlines a frame for the coexistence of the protection of IP rights and the protection of privacy by laying down some general principles, but leaves it firmly to Member States to decide how to manage an adequate balance.

The Memorandum of Understandings, an inter-professional agreement on illegal file-sharing activities, signed in France on 23 November 2007 between music and film producers, ISPs and the government is very significant to EFCA which considers it as an example to follow. The text recalls the importance of compliance with national measures implementing the Copyright Directive and aims at setting up a new authority with powers to suspend or cut access to the web for those who illegally file-share. This is an example how cooperation between right owners and ISPs can be achieved. The deal foresees the implementation of a “graduated response” to illegal file-sharing activities: Internet users downloading illegal music or film files risk losing web access should they not answer positively to initial warnings.

Finally, filtering measures are another way to prevent online copyright infringement and render enforcement of copyright law more effective. The *Scarlet* case, ruled on 29 June 2007 by the Court of First Instance of Brussels stated that ISPs must use technical measures to prevent Internet users from illegally downloading SABAM’s musical repertoire via P2P networks. This is the first case in Europe that examines in detail the technologies that are available to block or filter copyright-infringing traffic on P2P networks. This decision follows a 2004 judgment which acknowledged that copyright infringements were being committed by Scarlet customers. At that time the Court of First Instance commissioned a study to assess the technical feasibility of filtering measures. Published in January 2007, the report describes 11 solutions for blocking or filtering illegitimate copyright works in P2P networks.

## **Conclusion**

EFCA wishes to call the Commission’s attention on the following which we consider as being priorities:

- DRMs are a means to control the use of a protected work, both to monetise the work but also to protect it against piracy. Interoperability should be encouraged, although not at the expense of security. The content industry should have its say on that. Consumers need to be properly informed, this should be made through appropriate labelling on a self-regulatory approach. Information exchange between technologies companies and audiovisual SMEs on the costs and opportunities entailed to DRMs systems should be encouraged by the Commission.
- Public policy in general and the European commission should support innovative business models by encouraging collaboration with the technology sector ( in particular via the FP7 programme), by promoting initiatives that tend to overcome market fragmentation, by encouraging national VOD initiatives to work together and by promoting copyright protection amongst consumer groups.
- The fight against piracy and the support of ISPs and telecoms to take their share in ensuring that content distribution is being rewarded. EFCA considers that the availability of films through uncontrolled peer-to-peer networks as a serious impediment to investment in films. The issue of ISPs and telecoms liability needs to be addressed in this context. EFCA fully supports the recommendation of the Olivennes report which has received the support of the French government, as well as the Memorandum of Understandings that stems thereof, as a means to step up effective collaboration against illegal activities.