

QUESTIONS & ANSWERS CONCERNING CREATIVE CONTENT ONLINE IN A COMMON MARKET

This response to the consultation was formulated by Entidad de Gestion de Derechos de los Productores Audiovisuales, de España, (the Audiovisual Producers' Rights Management Association, for Spain).

EGEDA is a rights' management body set up by audiovisual producers in 1990. It represents and defends the interests of audiovisual producers in Spain and Latin America. EGEDA manages the copyright granted to audiovisual producers. The great majority of EGEDA members are SMEs. Its membership also includes TV production companies and broadcasters as producers.

In 2006, EGEDA developed a VOD platform called 'Filmotech.com' managed by a subsidiary EGEDA DIGITAL. Filmotech.com enables viewers to watch audiovisual works from any place in the world, at a reasonable price, with a very good quality and in a safe environment, safeguarding the European Film Heritage.

EGEDA Digital works on an individual licensing system since each producer will decide on the conditions of exploitation of his/her works (streaming, temporary or permanent download) and the price. The aim of EGEDA Digital is to create economies of scale by agglomerating a significant repertoire of works – most independent producers individually cannot manage these rights. Collectively they represent a large market share, and therefore they cannot be ignored by users of audiovisual works.

EGEDA has developed 'Filmotech.com' because we consider that the best way to fight piracy is to offer an attractive legal offer. It is also as a chance for the European film industry to develop an international competitive distribution infrastructure that enables a better circulation of European films.

However, for this to happen, producers must be in the condition of mastering the changes brought by the digital market. Accessing the online environment has specific related cost: digitalization of content, storage, encoding, editing of EPG (Electronic Program Guides).

VOD will in future both act as a substitute to other revenue channels (notably DVD rental and sell through) and will complement existing revenues. The VOD also represents a way to cope with the different obstacles of the distribution sector, as far as internet's network neutrality remains and the oligopolistic situation existing in the off line world is not reproduced online. A deeper insight shows that the actual development of VOD in Europe mainly benefits non-European productions. On top of this, in the absence of voluntary measures to help circulate European works, VOD in Europe remains an aggregation of national markets. A single European marketplace is still a distant dream.

EGEDA welcomes the Commission initiative to issuing a Communication on Content Online in the Single Market.

To start with, we would like to highlight the fact that production and commercial exploitation of audiovisual works must face circumstances that are not common to other cultural industries in the European Union, and so it is necessary to take into account the context in which audiovisual works are developed.

The first of these particular circumstances is that, although conceptually and from the outside audiovisual works seem to constitute one single sphere of activity, the reality is that the concept concerns three differentiated types of production and commercial exploitation, and as a consequence, each one of these is subject to different determining factors.

The production and commercial exploitation of European cinematographic works currently depends on a business model that has been developed over time through the successive addition of new forms of commercial exploitation. The process of absorbing these new media, which has been being imposed more by the market than by the leaders in the cinematographic world, has enabled an accommodation of the financial structures of production that has itself made the survival and maintenance of an easily identifiable European production possible. The absorption of the new forms of commercial exploitation has come about naturally, without the intervention of the public administrative authorities, who have done little more than put matters in order from the administrative point of view, with the objective of not interfering in the development of the markets.

However, this business model has a special peculiarity which is the segmentation of the different relevant markets. It has been structured in such a way that it is extremely important for the general production structure and for investors' returns, and even for the very financing of production, that the commercial exploitation of content online is introduced in a suitable position within the hierarchy of exploitation, such that it does not change the business model of the producers.

In addition, it is necessary to take into account the fact that a good part of European cinema production receives various incentives from one or more member states, and even the European Union itself (through the Media Programme) in accordance with schemes that have been approved by the European Commission. These schemes make it obligatory to respect a certain hierarchy of commercial exploitation that reserves certain specific spaces for the exhibition of this type of work in cinemas, with specific exclusion of any other type of medium or form of exploitation. Most of this legislation does not take into account the possibility that the release of the product onto the market may be prior to or at the same time as its commercial exploitation in the cinema.

Non-audiovisual works are, as a general rule, produced by independent producers for television broadcasters, who obtain the ownership of the exploitation rights in perpetuity. Their exploitation starts on the third (pay television) or fourth (free television) exploitation window for cinematographic work and, except for occasional national exceptions, the producers do not receive public subsidies, and so they do not have specific obligations in relation to calendars or forms of exploitation. By means of different mechanisms, the market has started to open an online form of commercial exploitation for this type of work, although it is not yet commercially significant, and so generally the only limitation to its free circulation within the European Union is the extent of the demand for the language in which it is broadcast.

A third type of production is that which we could call non-fiction, consisting of a wide range of work, including simple recordings, which is generally commissioned and totally or partly financed by television broadcasters and which through the conceptual breadth of this type of production includes productions that have little or no possibility of being exploited online, except when this exploitation is effected by means of IP television or mobile technology, which is simply a particular type of IP television.

In addition, we would like to emphasize the following points:

- EU funding, ie MEDIA 2007, should help structure that offer pan-European solutions that are respectful of producers' commercial decisions;
- The Commission should find ways to ensure that the revenue stream generated by new operators such as telecoms from the use of the European content is re-invested in content creation.
- The Commission should ensure that competition rules should guarantee market access to European productions on non discriminatory licensing terms.

1. – 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?

a) With regard to the first question:

The first concern of audiovisual producers, even before interoperability, is the efficiency and security of the rights management systems. Currently, the relatively low levels of security and the difficulties with interoperability deriving in many cases from the source of the products and from the conceptual and computing systems on which they are based, means there is a clear difficulty in developing content services in the home market.

This lack of interoperability is producing an artificial segmentation of the markets, which is getting worse due to the negative attitude of some of the developers of these systems in relation to sharing their technology, with the result that free competition is affected.

b) With regard to the second question:

The factors that contribute to the difficulty of interoperability are strictly technological in nature and, therefore, can be resolved technologically. European consumers already have experience with computer systems that were completely incompatible initially for which, as a result of simple market pressure, technological tools were developed that make it

possible, for example, for APPLE operators to run programmes belonging to the nearest compatible system, namely Windows.

c) With regard to the third question:

It seems evident that the deliberate lack of interoperability between different rights management systems tends to artificially fragment the online market content, so this situation and its causes must be examined in light of competition rights.

DRM are important to rightsholders, on the one hand to monetise their work, and on the other hand to protect films online, which is made more vulnerable in a digital environment. However, effective use DRMs should not be made at the expense of interoperability.

Interoperability of DRM systems is fundamental to the future digital content markets. For audiovisual producers, interoperability is a key condition to boost online services' revenues, as it extends the potential market by increasing costumers' choice and by increasing the willingness of consumers to adopt digital systems. Indeed, interoperability is essential for having consumers' acceptance; without consumers VOD platforms will not be successful and the digital roll-out will suffer. Moreover, lack of interoperability would limit competition between two or three big market players to the detriment of consumers who would be confused with incompatibility between formats and devices. Advantages of interoperability are consumers' trust, as they will be able to purchase any device they wish having the certainty that it will be compatible with any product. Such certainty will encourage consumers to purchase audiovisual or musical products in legal distribution chains, which guarantee good quality and fair prices.

Successful interoperability is a situation where services and devices from different providers work together to ensure there are no security compromises in the DRM and Technical Protection Systems (TPS) and that the level of functionality stays the same.

It is important that DRM are not implemented unilaterally by hardware manufacturers without the agreement of the content industry. The latter should exercise its copyright not the former.

Finally, the Commission should keep in mind that DRMs are not the universal remedy. As DRMs can manage remuneration attached to certain exclusive rights, levies are still the only appropriate possibility to remunerate exceptions. Right holders need both. It is not and it will never be a black and white situation. Levies provide the opportunity to maintain the exception to the benefit of consumers while DRM's provide the opportunity to exploit exclusive rights.

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?

a) With regard to the first question:

This question relates to two different issues: the interoperability of systems and rights management and protection of personal data in such systems.

With regard to the first issue, at least as long as the present situation of lack of interoperability is maintained, consumers must be informed of the limitations of the online services they access in a sufficiently clear way.

With regard to the possibility that rights management systems have to make use of personal information about consumers, we understand that this is inevitable in paid-for services except when they are produced through an intermediary mechanism that, without affecting the functioning and interoperability of the management systems, prevent the provider of the content from accessing the consumer's personal data. Even then, one would have to consider to what extent the existence of these intermediary bodies could affect the online market for creative content. Requesting, on each occasion, detailed information, including the sex, age and geographical area of the consumer, along with certain other data can serve to facilitate the provision of personalised content and, consequently, the use of online content.

b) With regard to the second question:

The information about rights management, the personal data that the operator will obtain and the administration of such data, qualification by age, the languages or versions available, the availability of access systems for people with physical disabilities, and reasonable information about the content of the work or service to which access will be provided must be obligatory, and must be presented to the consumer from the beginning of communication, prior to actual access.

c) With regard to the third question:

Please see our response to the previous question.

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?

With regard to the first question:

Clearly licencing agreements available both on the internet and outside of it present serious difficulties of comprehension for a significant number of end users. However, it is also necessary to point out that, given the regulations regarding the protection of consumers and the applicable laws, such agreements require a series of additional statements that, without a doubt, make their reading very difficult. We understand that it is the content provider industries themselves that must make the necessary effort with the objective, insofar as is possible, of trying to reduce the technical-legal level of the language used in such agreements.

a) With regard to the second question:

Please see the response to the first question.

b) With regard to the third question:

There is no particular issue relating to these agreements that needs to be addressed.

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?

a) With regard to the first question:

Consumers must have the opportunity to resolve conflicts caused by the digital rights management systems with providers in a rapid, efficient, economical and simple way. As a rule, consumers cannot take on the cost or the duration of judicial proceedings, which is why we are encouraging alternative mechanisms for resolving conflicts to be made available.

b) With regard to the second question:

The alternative mechanisms must be easy for consumers to access, and must be based on simple and clear regulations, and follow pre-established procedures that, nevertheless, make mediation possible. Possibly the most adequate solution, which already exists in some countries, is the establishment of consumer arbitration systems which are processed electronically via the internet.

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?

The costs of patented systems for the administration of digital rights can represent a barrier to certain operators in accessing the online content market. This is particularly so for micro-companies and self-employed workers, as well as companies that are small in size. We favour supporting research into efficient and interoperable systems, and at a reasonable cost, as a means of making access possible, and in particular, as a means of recognising the value of the content provided by this type of operator to the market.

Multiterritorial Licences on Rights

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?

VOD platforms need an attractive catalogue in order to be successful. Licensing of rights is hence key to the film industry to generate value from catalogues. Yet, the fragmentation of rights that characterise the European film market remains a challenge in respect of the development of an attractive pan-European online legal offer.

However, the situation is now that rights for audiovisual content need to be negotiated with multiple partners for different services and platforms (VOD, pay-per-view, subscription, trailers, web-streaming etc). Devising a suitable licensing mechanism allowing film producers to maximise exposure and helping on-line service providers to identify right holders is a critical step towards a successful strategy for developing an effective European digital film market.

In the digital content market not only are copyright operating bodies participating, some of which, especially the copyright management organisations, have a series of peculiarities deriving from the particular functions that they carry out. Other commercial operators are competing that are owners of, or are entrusted with the management of commercial exploitation rights, in some cases with catalogues larger than a large number of the copyright management bodies.

The copyright management organisations, which in some cases have been in existence for over a century, have been adapting themselves to the circumstances imposed by the market, and have even greater obligations than other economic operators. As a result, the question to reflect upon is whether the Resolution will have as its subject all the operators in the market, including companies that are non-

European but have a substantial market in Europe, or only those operators that act as management bodies or are involved through such management organisations.

Experience shows that up until now the Commission has placed special emphasis on the possible territorial segmentation of the markets derived from the intervention of these management organisations, without having carried out the same reflection regarding the commercial operators that do not act in this way. We see that if there is a problem in the market or a question to be debated, there is no one individual or body that takes responsibility for this. The territorialisation of the market results not only from the intervention of the management organisations but also by the commercial operators that follow almost identical patterns. Furthermore, we would say that the same behaviour can be observed not only in the market for products deriving from intellectual creation, but also in the market for other consumer goods and even industrial goods.

In the audiovisual world there exists, furthermore, another factor that is common to another type of creation, and this is the language in which they are expressed. Experience shows that markets that share the same language are especially receptive to production in that language.

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?

EGEDA believes that collective licensing represents a convenient way to ensure online distribution of content for European small and medium sized companies. The basic principle underpinning collective licensing, the one-stop-shop scheme, is a guarantee for users to have access to a large

catalogue of works without spending time and resources identifying individual right holders. Collective licensing thus lowers transaction costs and increases the economic value of rights trading. Moreover, acting collectively individual producers are in a better negotiating position as they represent an interesting catalogue for online services. Collective licensing is especially suited to the structure of the European market which is composed of a great number of small and medium sized companies, which are not integrated into vertical structure. Finally collective licensing does not imply giving up on commercial freedom - under the model developed by EGEDA, the producer remains free to decide about the works available, the price, the timing and the territory of release.

Licensing should not constitute a bottleneck to technology and new service developments – therefore the mechanism of negotiation and licence delivery should be simple and fast. A full network of reciprocal agreements ensuring clearance for the exploitation of protected works in every EU country, is essential for the good functioning of VOD platforms. The advantage is that every EU territory will be covered, as far as it ensures revenue flows back to right holders.

a) With regard to the first question:

Multiterritorial licences provide content to a larger number of potential users but, at the same time, can mean an additional promotional cost that limits access by national small and medium sized companies to wider markets. With regard to this, it must be taken into account that, as has been indicated on different occasions, making content available, independently of whether the field is national or international, does not mean per se that demand for the content will be generated. It is certainly true that beyond promotional systems, the Internet has its own specific systems, the function of which is in part identical to traditional media and in part different. But in either case, as the objective is the achievement of a greater number of hits, the cost will be greater.

In any case, the decision regarding issuing monoterritorial or multiterritorial licences must be under the perview of the rights holders.

b) With regard to the second question:

It is difficult for us to determine what is meant by a primary multiterritorial market and another secondary multiterritorial market. Once the meaning of both expressions is clarified we will be able to answer.

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)?

Digital delivery provides new sources of revenues for audiovisual producers as it enlarges the spectrum of potential customers and offers a tool for international distribution at no additional cost. Digital platforms are an opportunity for European cinema to address chronic market access problems, especially as regards poor distribution of non-national European films. EGEDA hence believe in the "long tail" theory which states that Internet will create a market which is no longer hit-driven - a market where specialist products will attract small but faithful audiences whose weight, in economic terms, will equal that of mainstream works. VOD platforms are a far-fetched tool for promoting European works, being VOD platforms an additional window in the release chain. Consumers will be able to have access to niche films which in the off-line distribution market are difficult and sometimes virtually impossible to find. Nowadays many European films are distributed through niche market channels; therefore on-line distribution channels are the best opportunity for European films to raise a broader audience than the one currently achieved.

Business models based on that theory will obviously benefit from easier licencing of this back-catalogue. However, as stated above, this cannot be made compulsory and can only be encouraged.

The long tail theory, as an economic reality is not new in the audiovisual market and, in fact, the underlying phenomenon was already known in the marketing of audiovisual works.

You have to take into account that audiovisual works, unlike other cultural productions, have a plurality of successive exploitation windows, which extend over time and which, furthermore, increase in number and duration as new media are added through which transmission is possible.

Until the end of the 1960s there was, in fact, no other means of exploiting films made for the cinema other than in cinemas. Subsequently this widened to include television, with only one channel per country at that time. In the following decade (1970-1980) the number of possible outlets increased with the introduction of new television channels, both public and private, as well as provision through domestic portable devices. In the following decade the possible outlets increased once again with the introduction of cable television and satellite television, which started in the 1980s.

Another possible market has opened up in the last five years that will not affect the previous ones; this is the start-up of the multiterritorial Internet market.

The theory of obtaining the best results from a large number of sales at a low price is sufficiently well-known in the audiovisual world, since the exploitation of films made for the cinema has been based on the ticket sales to a limited number of people at a high price at cinemas. Now, as the number of spectators is increasing through the addition of new methods of disseminating films, the price per capita received by the copyright holder is decreasing. From this, we can see that the

phenomenon is sufficiently well-known and that parameters exist within the industry for the industry to take ownership of it.

It is in this framework in which multiterritorial licences must be set, but the existence of such licences, without promotional support, does not guarantee per se greater diffusion of the works.

3. - Legal Provisions and Piracy

EGEDA considers the illegitimate distribution of films online as its main problem. Piracy affects the whole distribution chain, as it enables films to be available online for free on illegal p2p networks from the day of the cinematographic release. The physical distribution of audiovisual works – DVD and video tapes – is also suffering from selling of illegal copies, Spain is a major market in Europe for pirate products. Legitimate distribution platforms for audiovisual works are emerging, yet for their successful development an attractive catalogue is essential.

According to a study published by the MPAA, the US film industry (MPAA-affiliated studios, i.e. the Hollywood majors) lost \$ 6.1 billion to piracy in 2005, out of which \$ 1.3 billion came from piracy in the US and \$ 4.8 billion internationally, with around half of this loss occurring in Europe. The MPAA estimates that in 2005 \$ 2.4 billion were lost by studios because of purchase of illegal copies of VHS/DVD; \$ 1.4 billion were lost because of illegal copying of legitimate VHS/DVD; and \$ 2.3 billion were lost through Internet piracy (illegal downloads of films).

EGEDA is a key institution in the fight against piracy in Spain, having an anti-piracy department since 1994. The steps taken have ensured that fraudulent broadcasts of audiovisual works by local television stations and cable networks have declined to practically zero. The department made preparations to fight against audiovisual piracy carried out with new

technologies (internet, DVD, etc.), and has scored different successes against these new methods of committing fraud. EGEDA has obtained many favorable sentences condemning illegal distribution of films in physical support through the internet since 2001. EGEDA also pursues illegal film sales made through chats or web sites, which is different from films exchanged in p2p networks.

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

EGEDA believes that cooperation with telecom operators and ISPs should be sought and is vital. We regret that the Communication does not draw on the arrangements set out in the European Charter for the Development and the Take-up of Film Online and does not provide yet any framework of appropriate measures.

Intellectual property protection is not fully implemented in Member states. Broadband access still results in massive illegal up- and downloading of protected content. One priority should be to remedy to this situation at European level by ensuring effective implementation of protection recognised in the various applicable European directives, in cooperation with stakeholders (telecom companies, ISPs, rightsholders and consumers). In the decision *Promusicae v. Telefonica* on 28 January 2008, the European Court of Justice ruled that it Member States are responsible to provide in their legislation for means to enforce intellectual property rights and fight against illegal file-sharing. The decision throws light on the conflict between protection of privacy and protection of intellectual property rights. Nothing prevents Member states to require from ISPs personal data in the context of civil proceeding against aiming at stopping massive illegal download.

However, the emphasis should be put on the ISPs whose responsibility is still exempted by article 12 of the e-commerce Directive in relation to information transiting through their

network. It is more than essential that the Commission understand it is the ISPs' responsibility to prevent copyright infringement.

Establishing systems for the voluntary resolution of conflicts and within a framework of self-regulation by the sector is essential for the functioning of the system.

The ease of fraud, the difficulty of pursuing offenders often located outside national borders and the lack of systems for rapid, efficient and low-cost resolution is slowing down making works available online.

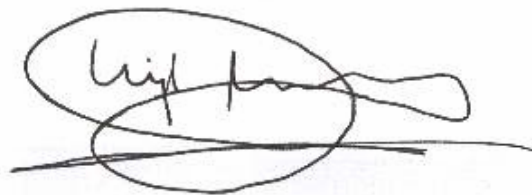
10) Do you consider the Memorandum of Understanding, recently adopted in France, as an example to followed?

EGEDA fully supports French initiative to seek effective and concrete measure to enforce Intellectual Property Law. The Memorandum of Understandings is a inter-professional agreement that gather ISPs, telecom companies and rightholders to agree together on solution to thwart piracy. This agreement entails the setting up of an Agency in charge of applying the 'graduate response' or 'four-strikes' regime which aims at warning by emails consumers who infringe copyright law by illegally downloading protected works. If they commit another infringement their subscription will be suspended. The fourth offence will lead to a cut off of internet access and a prohibition to subscribe to a new one for a year. Illegal file-sharers are expected to stop illegal activities after the second warning. Rightholders are the one who should notify the Agency of any infringement. This is an example of cooperation between ISPs and rightholders which should be widened to the rest of Europe.

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

The case Sabam v. Scarlet, on 29 June 2007, is a remarkable decision as for the first time in Europe, ISPs has been recognised liable to monitor and enforce intellectual property rights. Experts on the case found out that technologies were available to filter or even block copyright infringing file-sharing on p2p networks. A report commissioned by the Brussels Court of First Instance identified 11 filtering solutions which would effectively prevent online copyright infringements. EGEDA does not see why those solutions should not be enforced on a European scale.

But the current European Union regulation concerning personal data protection, together with a varying transfer to Member State law depending on the country, has created a real defensive barrier for offenders, as attested by the resolution of the Court of Justice of the European Communities of 29th January 2008 (Case 275/06).

A handwritten signature in black ink, appearing to read 'Miguel Benzal', is written over a horizontal line. The signature is stylized and somewhat cursive.

Miguel Angel Benzal
Managing Director EGEDA