



EICTA response to the Creative Content Online – Policy/Regulatory issues for consultation

Brussels, 29 February 2008

EXECUTIVE SUMMARY

EICTA welcomes the opportunity for its industry members to participate in the Content Online consultation and offers the full engagement of our member industries that are building the Digital Economy. EICTA is therefore well placed to provide substantive assistance for the next steps towards a Recommendation, given our unique representation of the world's leading digital innovators, together with recognized expertise on key matters such as digital rights management (DRM), private copy levies and future offerings in broadband access to content throughout the EU.

The Commission is absolutely right in making piracy a key priority to address as piracy has deeply, if not fundamentally, spoiled trust between content makers and consumers and even between stakeholders. EICTA however regrets and is surprised to note that the proper understanding of the relationship between piracy and levies has been left untouched considering that the two are so intimately linked at this time. Collecting societies all over Europe are claiming new levies to compensate for Internet piracy, and in some Member States such claims are even formally approved by national governments. However, the fact remains that levies can only provide compensation for acts actually permitted under law. Levies are entirely unsuitable to provide compensation for unlawful activities such as piracy. Among other arguments, we must ask the question how consumers can be educated to stop unauthorized file sharing when at the same time they are made to believe that they pay for unauthorized file sharing via levies.

Obviously, EICTA took note of the Second Call for Comments on "Fair Compensation for Acts of Private Copying" that has just been launched by DG Internal Market. We warmly welcome the initiative and will submit a response in which we will continue to plead with the European Commission to urgently help in finding a solution regarding the serious disagreements between stakeholders on copyright levies. As the European Commission is well-aware, all stakeholders feel the urgent need for a reform as the system is ill-adapted for the common European market in its current form. Many Member States are currently reviewing their levy system in reaction to the fast-changing digital environment, although merely from a "national" perspective. EICTA is convinced that only the European Commission is the position to play a decisive role in this EU wide debate as a neutral facilitator, bringing opponents closer together.

However, we are confident that the European Commission will consider additionally addressing the issue of copyright levies as part of the Content Online Platform, as levies and online content distribution are intrinsically related. In fact:

- (1) Payment of levies is perceived by consumers as a blank authorization to copy, jeopardizing efforts to fight piracy.
- (2) Levies imply an increase of the price of the ICT and consumer electronics products required for consumption of online content, thus increasing the "total cost of service" from an end-user perspective, limiting access to those devices required for broad deployment of online business schemes, or forcing manufacturers to limit the technical performance of those devices in order to limit the levies impact.
- (3) TPMs manage and control the copying of content as authorized by the right holder. This implies that, where Technological Protection Measures (TPMs) are available, there is no uncontrolled private copying for which "fair compensation" is due. The use of TPM/DRM should be taken into account as explicitly provided in the Copyright Directive 29/2001.
- (4) The system of blanket levies affecting all consumers serves as a disincentive to the creation of alternative systems for the compensation of private copies.

EICTA's response to the questionnaire is therefore first and foremost focused on the issue of piracy and levies as we are convinced one can not be resolved without the other.

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?***

EICTA strongly believes that DRM solutions (as well as other non-DRM solutions) should first and foremost be simple for consumers so that the latter can make an informed choice based on clear and transparent information on the use of the service and its restrictions imposed by the right holders.

The online environment for protected content affects a broad range of consumers and businesses and has high visibility. It is a key market place where IP rights and consumer expectations should be well balanced as they are the corner stone for the successful uptake of the online creative content services.

Alongside the work to achieve technical interoperability, it may be more productive in the still nascent content online market to further explore ways for DRM models to be interoperable while, on the one hand, maintaining the flexibility to be able to continually adapt the usage rules to the changing wishes of the consumer and, on the other hand, maintaining robustness and security in protecting the content of the right holder. By doing so, we support the exploration of many different business models (pay per download, subscriptions, advertising etc) with different usage rules adapted to each model. The creative content services are very complex and require considerable technical flexibility from our industry.

DRMs are managing rights in the digital environment according to usage rules, as authorized by the right holders, allowing different usages of the very same content. The ability to explore different online distribution models is key to the uptake of the content online sector. Mandating full interoperability, for instance, would imply mandating one type of business model. This would stifle innovation and the development of creative content services in this nascent market.

Also, we must avoid a situation where for the sake of interoperability measures that would unduly complicate the design of electronic products are enforced. This would not be in the interest of consumers. Therefore we must handle this issue with extreme caution.

- 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?**

EICTA has always supported clear and transparent rules on data protection in support of the existing EU laws on privacy and data protection. EICTA considers that trying to strictly prescribe how DRM services should be built to ensure protection of privacy would not be good policy as this would stifle the innovative and nascent market. We therefore encourage the commission to promote good redress mechanism to stop unlawful misuse of personal data, rather than seeking to control technology.

With regards to consumer information on interoperability, EICTA strongly supports the need for increased transparency regarding the usage rules of creative content and its inherent incompatibility or restrictions. These measures should be promoted through self-regulation, based on self certification and multi-stakeholder cooperation. They could take the form of basic principles such as intelligent labeling, which is easy for the consumer to understand yet flexible enough and easy for industry to manage. EICTA however does not support technical mandates with regards to labeling as these would be again counter productive in this nascent market and stifle innovation.

- 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?**

EICTA does not agree that there is a need for the Commission to review EULA practices. EULAs are designed to provide protections and assurances for consumers and vendors alike. EULAs already conform to EU and Member State consumer protection laws and vendors strive to make their EULAs as consumer-friendly as it is possible for a legal document to be.

- 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?**

- 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*

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?*

EICTA welcomes the efforts from the European Commission to promote a one-stop shop pan-European licensing model for clearing the rights for Creative Content online for digital music services through an entity which represents all works and can offer competitive terms. Enabling online creative content services to offer a global cross-border repertoire to consumers is a great way to move the end-user away from illicit behaviour. A global, pan-European or multi-territory blanket licence could be much more resource-efficient both for the digital service provider and the rights holders if it eases the licensing, reporting and accounting processes.

Regarding the online content music services, the introduction of a pan-European licence or multi-territory licences founded on the basis of reciprocal agreements between collecting societies is considered to be the best way forward, as this would tackle the main stumbling block for the uptake of more services. As a comparison, Europe has a big disadvantage versus the US when it comes to obtaining the necessary licences for music. In the USA, a company launching a digital download service with content from the four major labels needs only four licences: with one licence from each of the major labels the company can obtain the rights of music publishers pre-cleared through the record company labels. A company launching the same service in an EU Member State currently requires at least six licences: one from each of the four major labels, one from the national music author societies and one from CELAS for EMI Publishing "Anglo-American" repertoire. Today, European companies that want to offer an EU-wide service need 32 to 50 or more licences: licences not only from the four major labels (as well as many independent labels), but also from each of the 27 groups of national music author collecting societies and additional licences from CELAS for EMI Publishing "Anglo-American" repertoire. The complexity of the present system of rights clearance is not solved or lessened through the creation of new entities which represent only fragments of repertoire.

The major labels have the comparative advantage, in an already developed market, of negotiating and obtaining a pan-European licence for their physical formats – such as CDs – from a single collecting society, as well as the further advantage of having a third party agent conduct multi-territorial negotiations on their behalf (e.g. IFPI has concluded on behalf of its members pan-European licences and tariffs with BIEM in respect of royalties payable for the rights of music publishers, authors and composers). Companies offering digital services in numerous territories should also be entitled to benefit from the economies and efficiencies of scale and volume and have the same option to obtain a single pan-European blanket music publishing licence. Industry currently assumes the more burdensome and costly obligation of licensing nascent digital services by country, and, as a result of the CELAS model, additionally by segment of publisher repertoire.

Further, it is important that both “local” and “Anglo-American” repertoire for the European market are treated equally, enabling rights clearance from one source transparently and efficiently whilst promoting cultural diversity in what is offered to the public. Therefore blanket licences are more pragmatic and efficient solutions both for right holders and digital service providers, ensuring that substantially all works exploited in each country will be licensed. It is also critical to enable different licensing models to be available according to the needs of each specific business situation. It is of great importance to the industry to avoid a situation where the major right holders hold in practice in a monopoly or a quasi-monopoly position, as this may naturally increase the cost and delay or prevent deployment of new business models.

- 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?***

- 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)?***

Legal offers and piracy

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

The most effective measure against unwanted practices such as illegal sharing of works proves to be a flourishing legitimate on-line distribution market with abundant offerings and choice. The more recent developments in the music market demonstrate that consumers generally prefer ease of use and comfort in shopping at a fair and reasonable price over free downloads with hassle and complications.

Secondly, but rapidly gaining in importance, we believe that where consumers are increasingly exposed to private copy levies, it will not be possible to educate and explain to consumers that despite their payments they are not allowed to copy or download as much as they want. Moreover, levies are increasingly and worryingly justified by some collecting societies as compensating for increased piracy.

EICTA strongly believes that consumer awareness on how to use creative content in respect of IP rights is a key enabler for the Creative content online. Copyright levies currently blur this message as authorities increasingly allow levies to be claimed on devices and media that have little or no practical relevance to private copying – such as mobile phones, personal computers, printers and next-generation recordable DVDs – thus creating the impression that free copying is allowed. In short, the aggressive expansion of levies has begun to blur the line between legal personal copying and piracy.

In some Member States this confusion and uncertainty is even further aggravated by government positions that state that private copy levies are indeed also intended to compensate for unauthorized downloading despite the opposing conclusion in the

Copyright Directive. For example, in The Netherlands consumers are permitted to download illegally hosted works, and are even helped and directed by professional media publications including magazines and websites which provide information as to where to find the unauthorized uploaded content. It is clearly not realistic to educate consumers on IP rights in these circumstances.

This trend also conflicts with the intention of EU and government policies to further develop new and innovative digital content delivery. Most digital online and offline content formats use TPMs and DRM technology to allow distributors to set usage rules, including rules on authorized copying. Yet under the current system consumers are subjected to levies across a range of digital products and devices, often in addition to payment made while purchasing copy-protected digital content.

Furthermore, some collecting societies and other promoters of levy systems want consumers to believe that levies are preferable to DRMs or TPMs. They give the impression that the latter make private copying impossible. Yet again, this may reinforce the perception of consumers that with levies in place they have a right to download anything.

EICTA would therefore encourage the European Commission to tackle the copyright levy issue in the upcoming Recommendation, as it is inextricably interlaced with the issues of DRM and piracy. This could be done by first and foremost clarifying the limits of the private copy exception and ensuring that private copying does not include piracy or illegal downloads and/or illegal copying from the Internet, and that levies should not be seen as a means to compensate for the losses resulting from piracy.

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

The French MOU can be perceived as a positive development as far as it tackles the issue of piracy.

However, although the MoU is presented as “voluntary”, it considers going beyond the private parties involved and constitutes a first step towards government technology mandates, which EICTA does not support. EICTA would hope the European Commission monitors the agreement and upcoming policy closely so that it remains consistent with the existing European legislation, and in particular with the e-commerce Directive, which is the cornerstone legislation for our EICTA members.

EICTA believes that only truly voluntary market efforts could ultimately contribute to approximating different positions. The French MOU lacks balance, as proves the strong consumer rejection. In addition, as French Collecting Societies increasingly claim new levies to compensate for illegal downloading in direct negotiations with consumer organizations, consumers will sustain in their negative reaction to track consumer Internet traffic and risking disconnection.

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

Applying filtering measures would have a great impact on all stakeholders and needs to be carefully assessed. A distinction should be made between Internet filtering technologies and other measures such as forensic software, all of which have considerable implications

for the consumer (privacy), Internet Service Provider (liability) and manufactures (technology neutrality) as well as for the right holders who are demanding these measures. Functionality of solutions varies; e.g. Internet filtering technologies cannot in themselves make the distinction between copyright-free material, User Generated Content (UGC) and copyright material. Hence, filtering measures can only be effective if copyright material can be clearly distinguished. Both on the side of the problem of online piracy and on the side of emerging solutions, technology develops at a fast pace that requires a voluntary approach driven by the parties involved.

EICTA MEMBERSHIP

About EICTA:

EICTA, founded in 1999 is the voice of the European digital technology industry, which includes large and small companies in the Information and Communications Technology and Consumer Electronics Industry sectors. It is composed of 58 major multinational companies and 40 national associations from 28 European countries. In all, EICTA represents more than 10,000 companies all over Europe with more than 2 million employees and over EUR 1,000 billion in revenues.

The membership of EICTA:

Company Members:

Adobe, Agilent, Alcatel-Lucent, AMD, Apple, Bang & Olufsen, Brother, Canon, Cisco, Corning, Dell, EADS, Elcoteq, Epson, Ericsson, Fujitsu, Hitachi, HP, IBM, Infineon, Ingram Micro, Intel, JVC, Kenwood, Kodak, Konica Minolta, Lexmark, LG Electronics, Micronas, Microsoft, Motorola, NEC, Nokia, Nokia Siemens Networks, Nortel, NXP, Océ, Oki, Oracle, Panasonic, Philips, Pioneer, Qualcomm, Research In Motion, Samsung, Sanyo, SAP, Sharp, Siemens, Sony, Sony Ericsson, STMicroelectronics, Sun Microsystems, Texas Instruments, Thales, Thomson, Toshiba, Xerox.

National Trade Associations:

Austria: FEEI; **Belgium:** AGORIA; **Bulgaria:** BAIT; **Cyprus:** CITEA; **Czech Republic:** ASE, SPIS; **Denmark:** ITEK, IT-Branchen; **Estonia:** ITL; **Finland:** TIF; **France:** ALLIANCE TICS, SIMAVELEC; **Germany:** BITKOM, ZVEI; **Greece:** SEPE; **Hungary:** IVSZ; **Ireland:** ICT Ireland; **Italy:** ANIE, AITech-ASSINFORM; **Latvia:** LIKTA; **Lithuania:** INFOBALT; **Malta:** ITTS; **Netherlands:** ICT-Office, FIAR; **Norway:** ABELIA, IKT Norge; **Poland:** KIGEiT, PIIT; **Slovakia:** ITAS; **Slovenia:** GZS; **Spain:** AETIC, ASIMELEC; **Sweden:** IT Företagen; **Switzerland:** SWICO, SWISSMEM; **Turkey:** ECID, TESID, TÜBISAD; **Ukraine:** IT Ukraine; **United Kingdom:** INTELLECT.