

**THE ENGLISH PREMIER LEAGUE RESPONSE TO THE EUROPEAN  
COMMISSION'S CREATIVE CONTENT ONLINE COMMUNICATION  
(COM (2007) 836 FINAL)**

EXECUTIVE SUMMARY

The Premier League is the top level of English club football. It is a not-for-profit body from which all revenues are redistributed to its Clubs. Because Premier League content is provided on all platforms, throughout Europe and internationally, the Creative Content Online Communication is of significant importance to the Premier League in common with all creative industries.

The creative economy is flourishing in Europe and rather than being held back by content owners unwilling to see new forms of distribution emerge, we believe that the opposite is true, with existing copyright systems and DRMs encouraging content creators to exploit their content on new distribution platforms.

The main threat to the health of content industries is the rapid growth of online piracy. This damages employment, investment, creativity, technological innovation and tax returns to the public sector. Piracy reduces the income available for reinvestment back into grassroots sports and facilities, youth training and development and our solidarity between Leagues. In general, sport shares the same economic and regulatory concerns as other generators of content. However, there is one unique feature that makes sport particularly vulnerable – the bulk of the value in the broadcast distribution of sporting action lies in live, near live and delayed transmissions. Thus, the effective and rapid enforcement of intellectual property rights is an essential element in the successful fight against piracy. We urge the Commission to make the fight against piracy the cornerstone of its Content Online initiative, and welcome the Content Online Platform as a valuable opportunity for further discussions between the relevant stakeholders, including sports rights owners.

The Premier League believes that there is a lack of evidence to justify concerns about the need for increased multi-territory and pan-European licensing. The stated lack of pan-European exploitation of content is due to a lack of demand for that content on a pan-European or multi-territory basis outside the originating national markets (a reflection of the wide range of different audiences with different languages, cultures, tastes and preferences) rather than the absence of appropriate licensing structures. The natural operation of the market will deliver new multi-territory licensing mechanisms where there is sufficient demand. The Premier League believes that regulatory changes in this area should be subject to rigorous

examination of the evidence, and to a full impact assessment, so as to ensure that the strengths of the current system are not undermined.

## **Introduction**

The Premier League is the top level of English club football. It is a not-for-profit body from which all revenues are redistributed to its shareholders or in solidarity payments, with the 20 Clubs at any one time in the League being the Shareholders. Each Club looks to the League to act as its trade association as well as its competition organiser and regulator. The competition comprises 380 games in a season, attracting in excess of 325,000 stadium fans over each match weekend.

The Premier League's economic position depends in large part on the ability to realise the value of its media rights. We seek to provide a wide range of content on all platforms across the 207 territories in which we are broadcast (beaming into 611m homes worldwide). Every EU Member State is served by at least one Premier League rightsholder. We actively innovate, seeking to ensure that market demand is met by allowing our licensees to use the new and emerging technologies as well as the established media. Income from the exploitation of media rights has been re-invested in the English game, on playing talent, on youth development, on training and other facilities, on new and refurbished stadia, and on one of the largest sport-based solidarity programmes (funding for lower leagues, for community football and wider community engagement) in the world.

As a result English football is in good health, with attendances up by 60% in 15 years in the Premier League, with attendances also growing in the Football League and with community investment from the Premier League exceeding £120m per year (approximately €156m) estimated by Deloitte<sup>1</sup>.

Although the Creative Content Online Communication ("the Communication") does not explicitly include sport in its remit, we are grateful that our arguments have been considered and the Commission has invited sports bodies such as the Premier League to join the Content Online Platform now being established. We believe the involvement of sport is vital because we share the same areas of concern and priority as many creative industries with copyrighted

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<sup>1</sup> Deloitte's assessment of community work done by the League and its 20 clubs forecasts that in season 2007/08, the value of goods and services contributed in support of community activities will equate to an estimated value of £122 million. This includes the Premier League's own commitments to organisations such as the Football Foundation, the UK's largest sports charity who have already overseen investment of more than £500 million in 4,000 community projects right across the country.

intellectual property – combating piracy, maintaining a strong copyright framework and the ability to innovate and realise our media rights on the latest platforms. Any initiative regarding the regulatory framework for the distribution of content will have a direct impact on the Premier League’s operations, potentially affecting every level of our investment strategy, and the other industries which depend on the use of our material.

The Communication recognises the importance of the online content economy in Europe; however it asserts that the distribution of content might be being held back by content owners unwilling to see new forms of distribution emerge. The Premier League disagrees, and this view is shared by other content providers. A measure of the health of the creative economy in Europe is that it is growing more rapidly than GDP as a whole. The creative marketplace is characterised by technical, product and marketing innovation with the main threats coming from unauthorised use of material. These threats mean that copyright and other legal protections, which ensure that content creators can get fair returns on their investment, should not be considered as obstacles, when, in our view, they underpin the flourishing European creative economy and in so doing help create the conditions for further investment and innovation. They are an asset not a barrier.

Furthermore, we do not believe that existing rights regimes are hampering economic development or availability of cultural goods and services. The opposite is true.

The following responses to the Communication questions serve to outline the Premier League position in more detail. In terms of process, we would support (and be happy to be involved in) an approach rooted in systematic evidence collection and analysis, subject to peer review and sector consultation, before any policy changes are proposed.

### **Digital Rights Management (questions 1 to 5)**

We believe that the ability to develop and deploy DRMs can be an important inhibitor of the spread of piracy. No DRM can ever be 100% effective and so incentives to develop new technologies appropriate to the different kinds of content in the marketplace are important. Regulation in this area could inhibit choice, discourage innovation and encourage piracy. This would then lead to less investment, weaker development of new technologies and reduced quality for the consumer.

Provided consumers are fully aware of the implications of purchasing creative content for use in DRM protected environments the issue of what kind of DRMs should be used should be

left to the market to determine. All the existing consumer protection and competition regulation will still apply and additional controls in this area are unnecessary.

### **Multi-territory rights licensing**

The natural operation of the market will deliver new multi-territory licensing mechanisms if there is sufficient demand for them. The Premier League believes that regulatory changes in this area should be subject to rigorous examination of the evidence, and to a full impact assessment, so as to ensure that the strengths of the current system are not undermined. Any measure which imposes mandatory multi-territory licensing mechanisms would also be likely to damage returns on investment, to reduce the incentives to create and invest and to inhibit rather than promote innovation.

#### ***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?***

No. We do not believe that addressing the issue of multi-territory rights licensing by means of a Recommendation (or any other measure) is either necessary or desirable at the current stage of development of the market for audiovisual content online.

The Communication recognises that there is a great deal of audiovisual content created in Member States which is exploited in the country of production but cites a lack of exploitation of much of this available content on a pan-European or multi-territory basis. There appears to be an assumption that there is a significant market for "pan-European" audiovisual content which is being held back, and that the reasons for this are the territoriality of copyright and a lack of suitable multi-territory licensing systems. Implicit in the Communication is a further assumption that the "success" of the European online audiovisual content industry can and should be assessed by reference to the level of cross border consumption. However, the Communication gives no evidence to support those assumptions and, in the absence of any compelling evidence, we do not believe that multi-territory rights licensing is an issue which needs addressing by regulatory intervention.

In our view, the market is working well to satisfy demand, and as such, there is no need for the introduction of mandatory multi-territory licensing mechanisms. There is no evidence of significant market demand for audiovisual content outside its country of origin which is not being served by the current structures in place. Any such intervention necessarily involves an assessment of the scale of any consumer demand, and there is no such assessment present in the Communication. Compelling evidence is needed in order to establish what the real

problems are (if any) before appropriate solutions are researched and the impact of any such suggested solutions should be fully assessed in respect of all types of audiovisual content.

In many cases there will be limited consumer demand for audiovisual content outside the country of origin. This limited consumer demand will often flow naturally from the nature of the content. It is in the nature of the vast majority of cultural and creative content services that the people of different countries will demand that those services are made available to them in their own language and in styles that reflect their own preferences, cultures and priorities. Audiovisual content developed in one Member State will, in general, be created in the language of that Member State and will therefore be of limited appeal to persons speaking another language.<sup>2</sup> Content produced in a Member State will frequently reflect cultural sensibilities in that Member State with which audiences in other Member States may not identify. National preference can also apply equally to audiences for sporting content (despite the arguably reduced importance of language), where interest levels outside the country of origin will depend on the popularity of the particular sport in other regions and the extent to which there is interest in viewing non-domestic competitions, teams and players. For example, the demand for viewing Premier League football in other European countries with major leagues of their own (such as Italy, Spain and Germany) is less than in countries with less high profile leagues (such as the Republic of Ireland and the Scandinavian states).

Broadcasters, media groups, advertisers and sponsors all reflect the essentially national basis of market demand. As a result they buy and exploit media rights and promotional opportunities on the basis of that essentially national demand. We believe that the proportion of audiovisual content created in Member States which is of cross-border appeal is relatively low and that therefore the perceived lack of pan-European exploitation of content is due to a lack of demand for that content on a pan-European or a multi-territory basis outside the originating national markets rather than the absence of appropriate licensing structures.

Further, the Communication does not include any evidence that existing structures are not serving the market where there is some consumer demand for content on a multi-territory basis or throughout Europe. Copyright law, and in particular the territoriality of copyright, gives rights owners the flexibility to license content on a national, regional or pan-European basis according to demand. The fact that demand is often most effectively met on a national basis (and will often be low outside the country of production) is the reason why content is frequently exploited on the basis of single territory licences, predominantly in the country of production. This is a consequence of demand rather than any restriction caused by the nature

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<sup>2</sup> In this respect, audiovisual material can in general be distinguished from musical works where the language of performance is not such a significant barrier to cross-border take up.

of copyright. Where demand is more widespread, there is nothing inherent in copyright law which prevents rights owners from licensing on a multi-territory, regional, pan-European or indeed worldwide basis.

Sports content is one area where there is demand for content from particular competitions outside the country of origin. The Premier League is an example of such a competition and our experience does not suggest that new licensing structures are necessary. Throughout the EU and elsewhere, Premier League audiovisual content has been marketed for online exploitation in individual national markets and on a regional basis and has been licensed, according to market demand, on an individual territory or (where appropriate) on a regional basis. Neither the territoriality of copyright nor the lack of multi-territory licensing mechanisms has acted as a barrier to the licensing of our content throughout Europe. Rather, by recognising that demand for Premier League content online varies from Member State to Member State, the Premier League has been able to use the territorial flexibility of copyright so as to market and license its content in order to meet that varying consumer demand effectively.

Not only have we seen no evidence of a problem requiring regulatory intervention, but we also believe that placing undue emphasis on cross-border licensing may have negative or perverse effects. There is a risk that artificially stimulating the market for multi-territory licensing will result in the creation of culturally homogenous content at the expense of cultural diversity.

The market for audiovisual content online is rapidly developing and should be left to find its own solutions for addressing demand. In any event, rights owners should retain the ability freely to license rights across Europe using existing legal structures and to adapt their marketing strategy in order to meet demand from a wide range of different audiences who speak many different languages and have very different cultures, tastes and preferences.

***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?***

We believe the most efficient way of fostering multi-territory rights licensing is to let the market determine - without any regulatory intervention - whether rights should be licensed on a national, regional or pan-European basis.

*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)?*

No - see our answers to questions 6 and 7 above. We see no difference between back-catalogue works and any other type of audiovisual content

### **Legal offers and piracy**

In common with other forms of creative content, sports' copyrighted material (such as the content from major sports events and competitions) is attractive to consumers, making it particularly vulnerable to attack from pirates. The Premier League considers this unauthorised use of content as a serious threat to the economic health of the creative and related industries, and thus a threat to the success of online content growth in Europe. By undermining fair returns, piracy reduces incentives to create, innovate and distribute attractive content. In turn this has a negative impact on employment, investment, creativity, technological innovation and tax returns to the public sector. From a sporting perspective, piracy damages our reinvestment model, by reducing and/or putting at risk the income available for reinvestment back into grassroots sports and facilities, youth training and development and our solidarity between Leagues. Combating piracy is expensive and time-consuming and diverts resources from developing sport and services for supporters. This view is shared across all major sports in the EU, and expressed by, inter alia, the Sports Rights Owners Coalition.

In general, sport shares the same economic and regulatory concerns as other generators of content. Our content is attractive to illegal commercial undertakings looking to sports content to create profit, without contributing to the development and advancement of the sport they feature. However, there is one unique feature that makes sport particularly vulnerable – the bulk of the value in the broadcast distribution of sporting action (whether via traditional television, IPTV, mobile telephony or the Internet) lies in live near live, and delayed transmissions. Piracy is therefore aimed primarily at this market, and regulatory action which takes days, weeks or even months to enforce currently offers very little protection. Indeed, newer forms of piracy, such as the phenomenon of Internet streaming of live sporting events, present particular problems for sports, requiring burdensome actions such as the recently obtained injunctions against the operators of two P2P and one streaming site in the UK High Court which were illegally providing access to live and unauthorised footage of Premier League matches.

Peer to peer (“P2P”<sup>3</sup>) piracy is a very real example of the need for a coordinated international response across the content-generating industries to online piracy, hence the Premier League involvement in an OECD case study on sports internet piracy. Furthermore, the boom in so-called ‘user-generated content’ (“UGC”) online poses an additional threat to right owners, as their investments risk being undermined by widespread violation of copyright unless effectively tackled. UGC sites hide behind safe harbour provisions of either the e-Commerce Directive or Digital Millennium Copyright Act, and permit copyrighted content to appear on their sites and often do not take appropriate or effective measures to take down such content. In May 2006 the Premier League commenced a class action lawsuit in the Southern District Court of New York against Google and YouTube in respect of the popular UGC website [www.youtube.com](http://www.youtube.com).

Any changes to the regulatory regime must make prevention of unauthorised use of content the highest priority. Only by securing fair rewards for creativity and investment can the creative and related industries thrive, generate jobs and investment, incentivise further creativity and improve services to consumers. Inconsistencies in the application of the Enforcement Directive and the existence of too many safe harbours for pirates make effective enforcement extremely difficult. Given this situation, we urge the Commission to make the fight against piracy the cornerstone of its Content Online initiative and to ensure coherence with the numerous other EU regulatory and international initiatives in which it is involved.

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

The Premier League firmly believes that any consideration of online piracy of copyrighted material should not fail to recognise the need for all stakeholders to co-operate in the fight against such unlawful use of online content. Indeed, the Premier League and other sports rights owners are already cooperating with other rights owners, broadcasters, operators and, increasingly, regulators on piracy-related issues. The effective enforcement of contractual terms and conditions between Internet Service Providers and subscribers who infringe intellectual property rights is an essential element in the successful fight against piracy. Internet Service Providers continue to be a stumbling block in removing online copyrighted content, especially those who are based in “low protection” countries. We believe that the

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<sup>3</sup> P2P software, may be either free or “paid for” and works simply – subject to some usage limitations – by bandwidth being supplied by users themselves, with the users inserting unauthorised streams onto the site using the software. Generally the more users, the higher the quality of the stream.

Content Online Platform will provide a valuable opportunity for further discussions between the relevant stakeholders, including sports rights owners.

The Premier League would also stress the need to acknowledge the scale of piracy taking place outside of the EU's borders, often targeting markets back within the UK and other EU markets. Any consideration of online piracy would not be complete without reference to the need for internationally recognised and enforced regimes for the protection of intellectual property rights. The Premier League welcomes the Commission's increasing focus on the international dimension of tackling piracy, whether through multi-lateral initiatives like ACTA or bilaterally with key trading partners. The Premier League also supports attempts by WIPO to codify a Treaty on the Protection of Broadcasting Organisations and would support a Treaty that specifically encompassed protection of online signals.

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

The French 'Olivennes' Memorandum of Understanding is a welcome development in that it is based on the reality outlined in our response to question 9 and proactively attempts to ensure all stakeholders are involved collectively in fighting piracy. The Premier League would emphasise the need for the Commission to examine how all relevant interest groups could better work together to ensure only legitimate content is exploited online. The 'live' nature of sports events outlined above makes rapid cooperation between stakeholders even more salient.

The Premier League believes that every actor in the chain of online content distribution has an important role to play when it comes to tackling piracy. The consequences of digital piracy will inevitably have a negative impact on all actors in this chain, as investment in future content will be undermined. We note that the Olivennes agreement does not provide all the details of how a system which imposes liability on Internet Service Providers (ISPs) for failure to tackle piracy through its networks would work. We would be supportive of a solution which required the ISPs independently and proactively to police the activities of its users rather than a system which relies on the rights owner identifying and complaining about infringements. ISPs are much better placed to monitor and detect infringements on their own networks than the rights owners whose content is being infringed. It is incorrect to claim that it is technologically or financially impractical for Internet Service Providers to take responsibility for their role in fighting illegal content. On the contrary, Internet Service Providers are well placed to enforce the contractual terms and conditions of subscribers, to

ensure the latter group act responsibly when accessing and re-using copyrighted content. ISP liability should be a key component in the fight against the growing phenomenon of digital piracy. The Premier League would advocate further consideration and consultation by the Commission on the development of an EU framework that could give practical effect to the principle of ISP liability and the Olivennes initiative is a welcome step in that direction.

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

Technological developments that increase the effective detection of copyright infringement online, and thus reduce the incentives of piracy, and reduces the amount of online copyrighted content are to be welcomed and encouraged. However the Premier League would stress that the core value of such measures comes from the combination of these tools in conjunction with effective enforcement efforts. The Premier League welcomes efforts by technology companies in developing technology to prevent online copyright infringements of live broadcasts.