

Consultation on Creative Content Online

EUROCOPYA'S CONSIDERATIONS
FEBRUARY 2008

EUROCOPYA is the European Association of Audiovisual & Film Producers' collective management societies. EUROCOPYA's statutory members are : **EGEDA (Spain), FILMKOPI (Denmark), G.W.F.F. (Germany), PROCIBEL (Belgium), PROCIREP (France), SEKAM VIDEO (Netherlands), V.A.M. (Austria), F.R.F. VIDEO (Sweden), SUISSIMAGE (Switzerland).**

Other collecting societies or organisations representing audiovisual producers, established in countries in and outside Europe are also associated to EUROCOPYA's activities. They are as of today : **ZAPA (Poland), FILMJUS (Hungary), INTERGRAM (Czech Republic), GEDIPE (Portugal), SAPA (Slovakia), TUOTOS (Finland), COMPACT (United Kingdom), SCREENRIGHTS (Australia), PACC (Canada).**

European Audiovisual & Film producers are remunerated through exclusive rights and - more marginally - through collectively collected remuneration rights (mainly cable retransmission rights & private copy levies).

EUROCOPYA expresses the view of the various European audiovisual & film producers whose rights are administered by their respective national collecting societies, founding members of the association.

Preliminary comments

Present preliminary comments concern the communication itself, where the Commission – pursuant to its consultation in July 2006- has identified 4 challenges which are deemed to merit a horizontal action at EU-level.

First, EUROCOPYA would again like to express its deep concern with the fact that both the communication as well as the new public consultation still seem to be thinking that “Online Creative Content” can be addressed as a whole, through a horizontal EU-wide approach, whereas this notion actually covers various interests and very different industries such as online music rights, press, audiovisual works, feature films, sport programs, etc. All these various contents are related to different industries and economies that can not be aggregated in one single paradigm such as “online content industry”.

EUROCOPYA would especially like to stress the differences that exist between the music industry, often used by the Commission as a paradigm in its approach to the online world, and other creative industries, such as the movie and audiovisual industries. In particular, unlike music, “release windows” and territorial exploitation of rights are applicable to the audiovisual industry, especially in the movie industry, and are still making sense in the online market¹.

The following remarks made by EUROCOPYA will therefore also mainly address said audiovisual & film industries.

¹ See infra our response to the Consultation regarding « Multi-territory licensing », but also Eurocopya's submission of October 2006 to the July 2006 Consultation on Content Online : resp. to Questions 7, 8, 14 & 19.

- Regarding availability of creative content :

Producers represented by EUROCOPYA support the rapid development of online business in the EU, and EUROCOPYA agrees with the European Commission on saying that the market for online creative content is emerging. However, to the contrary of what seems to be the European Commission's position (which seems to take the view that obstacles along the road to Online Content development are numerous), this market is developing in a globally conducive environment, as already stated in our response to the previous consultation² :

- Non-linear services such as VOD, subscription VOD (S-VOD), download to own, time-shifting of linear services (TV on demand), etc., are exploited on a growing number of digital platforms : traditional cable, IPTV, satellite, UGC websites, ...³
- Available content is increasing rapidly, as more and more film catalogues are now put online for exploitation, with consumers getting access to an increasing number of creative audiovisual content, although today mainly "backstock" or "blockbusters" (films and TV series)⁴.
- The market is testing various business models, in order to improve also overall welfare of both IT and content industries.

This means however continuing to revisit the various "release windows" and the pricing : What is the most appropriate place of VOD (and assimilated) within the current media chronology ? How to deal with exclusivity granted to Pay TV or Free TV ? Will the VOD rights be distributed together with video/DVD rights, together with TV rights, etc. ? Up to now, different approaches coexist among producers and distributors, and -as stated by the Commission in its communication- application of competition law can in some cases remedy abuse relating to the exploitation or bundling of rights.

Also, transaction costs and alleged "orphan works" cannot seriously be considered as a real problem as far as movie & TV industries are concerned : existence of extensive right holders databases and concentration of most exploitation rights in the hands of producers, traditional broadcasters and audiovisual libraries provide already necessary tools for appropriate rights clearance.

- Regarding multi-territory licenses :

Presently developing VOD services are most of the time part of larger Digital TV offers. TV markets in the EU are driven by national operators whose services are getting the major market shares. Even new entrants such as Telcos are developing their online services on national bases. Non linear services such as VOD are therefore as of today mainly oriented - not to say tailored- to national audiences. The territory and the language versions remain major contractual terms. Where practicable and profitable, multi-territorial deals are reached but it is not a goal as such for the industry. Like explained later in the present response to the consultation, the development of VOD is therefore mainly taking place on a country by country basis and should continue to do so.

² See EUROCOPYA's submission dated October 2006, response to Question n°3.

³ According to a NPA Conseil / GfK survey, VOD turnover in France will for instance be multiplied by 2 between 2006 and 2007, amounting to an estimated 30 M€

⁴ In France, only 10 to 16% of new movies are put online within 7,5 months after theatrical release according to NPA Conseil. Offered content is therefore now shifting to TV series.

In its communication (when for instance speaking about « ability of content service providers to reach new audiences by making content available on new platforms at European or even global level »), the Commission seems on the contrary make the same mistake than the one that was done originally with the “Cable & Satellite” Directive : it is not because a new technology (like was satellite retransmission) provides for a theoretical pan-European exploitation that rights should be necessarily cleared accordingly on a pan-European basis. Experience has proven that there is no spontaneous pan-European (or global) audience for European programs, and it is only when satellite platforms developed country-based offers driven by conditional access systems that satellite TV really started to develop ...

Based on this experience, and unlike what is stated in the communication, it is not the lack of multi-territory copyright licenses that prevent audiovisual works from benefitting from the Internal Market potential. To the contrary, as one characteristic of audiovisual and cinematographic industries is the fact that consumption is mainly conditioned to marketing and promotion, the problem remains if said works are not promoted, and therefore not raising the interest of the public in order to watch them online. It is therefore unlikely that multi-territory licenses can revert –actually it is EUROCOPYA’s feeling that they might increase to the benefit of a limited number of blockbusters– the present trend of both off-line and online markets where blockbusters = marketing & promotion = concentration of consumption & revenues on a limited number of titles.

- Regarding DRMS and interoperability :

EUROCOPYA shares the view that DRMS constitute a “key enabling technology” in the uptake of legitimate digital services, not only because it is one of the tools enabling to tackle the problem of digital piracy (see below), but also because they allow right holders to enforce their rights, and recoup production and distribution investments by securing adequate transfers of rights. Online distribution of audiovisual works is governed by exclusive rights implemented by DRMS, and geolocalization features of said DRMS will continue to enable territorial exploitation of online rights.

Some stakeholders support the use of robust DRMS, as other shifted from strong DRMS to no DRMS at all. However, what seems to be clear now, is that what was envisaged regarding DRMS in the late 90s is no more valid today : nobody can reasonably assert -as it still was the case a few years ago⁵- that the content industry will become 100% DRM-driven (in that respect, the music industry has given a counter-example, by progressively shifting from DRM-protected content to DRM-free available content).

- Regarding legal offers and piracy :

On that aspect, EUROCOPYA fully supports the Commission’s analysis as described in § 2.4 of its communication, as piracy is clearly THE topic meriting a horizontal action at EU-level. EUROCOPYA therefore supports legislative steps at EU level (some of them having already been taken during the “Telecom Package” review – see below).

⁵ And like what still seems to be the Commission’s position, when the communication qualifies the move to DRM protected environment as a « major paradigm shift for European citizens and consumers », p. 6.

- As a preliminary conclusion :

Except for piracy (see above), one could ask the question whether it is not premature to propose a new legal instrument, even a soft one, in such an emerging market where the rules and the practices are evolving nearly on a day to day basis. The risk of adverted effects exists and cannot be denied.

But, on the other hand, the setting-up of a Content On line Platform at European level could be a productive initiative which will provide the interested parties the opportunity to confront their views and share bad and good experiences with a certain distance.

Response to the Consultation

Digital Rights Management

1) Do you agree that fostering the adoption of interoperable DRM systems should support the development of online creative content services in the Internal Market? What are the main obstacles to fully interoperable DRM systems? Which commendable practices do you identify as regards DRM interoperability?

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?

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?

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?

1. Interoperability is a concern for both consumers and rightholders :

- Consumers need to be adequately informed about the exact level of interoperability between various content and devices, as content and devices are today often linked (for instance iTunes online platform and iPod devices). Consumers also need to be recognised some possibilities of private copying that does neither challenge what was deemed acceptable in the analog world, nor infringe copyright. Such private copy facility should in return be remunerated to the benefit of rightholders through private copy remuneration schemes.
- For audiovisual producers, interoperability is a possibility to favour increase of online services' revenues, as it extends the potential market.

But interoperability cannot be an argument to challenge copyright protection, by justifying for instance circumvention of technical protection measures and/or non-authorized uses of works.

Furthermore, lack of interoperability does not seem today to be a major issue regarding audiovisual content, because VOD services seem to develop on non-exclusive bases (films available on one platform can be accessible on other platforms), and audiovisual content -as of today- is less concerned than music by issues of transfer of content from one portable player to another.

Finally, the development of global systems as stated in recital 54 of the Copyright Directive should not hinder the territorial exploitation of audiovisual works.

2. & 3. Improve consumers information is probably necessary. The point is to explain to the consumers what they are purchasing and precisely what they can do or not do with the purchased items. But clear information and explanation should be delivered not necessarily in the framework of a EULA (end-user license agreement) only. Consumers do not pay a large attention to EULAs, which are most of the time not readable when purchasing something on the Internet. One could recommend to publish ad hoc user's guide: one short version for immediate usage and one extensive version for further investigations. Equipment and services providers should deliver information through green telephone lines and/or on the internet.

4. As we quoted above, the market is growing so it is difficult to state that consumer's confidence should be enhanced. This being said, alternative dispute resolution mechanisms related to DRMs and to ICT products can be envisaged, but those already put in place (see the "Autorité de Régulation des Mesures Techniques" in France⁶) did not turn out to be really used.

5. Innovation should be protected by adequate licenses. Accessing the online market for new entrants is difficult because online business is most of the time linked to other pre-existing business such as pay TV or Free TV or telephony, not because of problems of access to DRM-technologies & solutions.

Multi-territory rights licensing

6) Do you agree that the issue of multi-territory rights licensing must be addressed by means of a Recommendation of the European Parliament and the Council?

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)?

6. Like other means of distributions of films and other protected audiovisual content, the national market represents the relevant market. This has the advantage of inserting VOD services in the applicable national "chronology of media", and enables to protect as much as possible other release windows (theatrical releases, DVD, Pay TV, ...). Being pan-European is not an objective as such, but this does not prevent European works from being put online on each VOD platform. Chosen territorial licensing should therefore remain the rule also for the online environment.

⁶ French copyright law (Code de la Propriété Intellectuelle), article L.331-17.

Multi-territory rights licensing in the movie and audiovisual field is in our opinion a false issue, like has proven the way satellite TV broadcasting has developed despite the provisions of the Cab-Sat Directive which promoted pan-European clearance of rights (see our preliminary comments above). There is no spontaneous pan-European (or global) audience for European programs. As films and other patrimonial audiovisual content are prototypes, their exploitation differs radically from music, and requires an individual treatment as well as a primary market. Each movie has its own distribution & marketing plan, and European films are most of the time distributed by independent distributors at national level, and then gradually at international level. Therefore, it is not clear today how an imposed pan-European licensing of rights would favour demand for European films.

Moreover, it has to be stressed here that, as far as European works are concerned, territorial exploitation of rights across various “release window”, with corresponding exclusivity granted to existing media, is not only a way to recoup investments made by producers, but also and mainly the counterpart of the pre-financing of said works by said media (Free- and Pay-TV broadcasters, DVD editors, etc.). If chronology of media and territorial exploitation of rights would be challenged as such, the consequences on European production, therefore on cultural diversity, would be immediate, putting at risks all existing sources for pre-financing.

This is to say that prior to any recommendation in the field of multi territorial rights licensing, the Commission has to study carefully the way films and other audiovisual content are produced and exploited in the EU, and acquire a relevant perception of the reasons why European films would not circulate enough. The impact of multi-territory licenses in the field of movie and audiovisual works should be investigated in depth prior to any kind of regulation, whether through a recommendation or any other instrument, bearing in mind that the Commission’s goal should be to improve the circulation of European films in the Single market, and not favour the few global actors that might have the capacity to promote a limited number of blockbusters at EU-wide level⁷.

7. Crossing territorial exploitation with the different “release windows” that exist in the various Member States makes it difficult to distinguish between a “primary” and “secondary” market, unless the later is set five or six years after theatrical release. In the audiovisual field, TV and digital platforms, which will be in competition with VOD platforms often operated by themselves, are mainly operating at national level, and do not request pan-European rights clearance (or actually are not ready to pay for such a clearance), as their audience is mainly domestic or language-driven.

8. For the same reasons expressed above, EUROCOPYA is neither convinced that “long tail services” would automatically benefit from multi-territory rights licenses. One concern regarding development of “long tail services” is the technical cost related to put a film on line. In that respect, mutual digital archives could be encouraged, as well as an increased support to digitalisation of catalogues (as has already been started to be done through the MEDIA program).

⁷ However, even those global actors seem to favour a country-by-country approach in order to maximize their revenues

Legal offers and piracy

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

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

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

9. Contrary to what is often said, intellectual property rights (IPR) receive adequate protection, at both international and Community level. The WIPO treaties on performances and phonograms (WWPT-WIPO Performances and Phonograms Treaty) and copyright (WCT-WIPO Copyright Treaty) offer extensive protection for the distribution and exploitation of cinematographic works in the digital universe⁸. Despite an abnormally high list of exceptions⁹, the 2001 Copyright Directive (on the harmonisation of certain aspects of copyright and related rights in the Information Society) constitutes the appropriate basis for protection of works in the digital universe. The Commission's clearly expressed desire to see telecommunications operators respect IPRs in the revision of the telecoms package currently in course also helps to consolidate the IPR protection¹⁰.

But all problems have not yet been resolved. The development of high-speed Internet access continues to allow substantial illegal access to protected works and is hindering the development of legal offers of online content. The priority, therefore, is to find appropriate remedies at European level (and concomitantly at world level), in order to favour **effective implementation** of the existing legal framework of IPR protection, in cooperation with all those concerned (telcos, ISPs, cable distributors, rightholders, and the public).

As transposition into national law of the Directive on Privacy and Electronic Communications (2002/58/EC) (dealing with processing of personal data and the protection of privacy in the electronic communications sector), the Directive on Electronic Commerce (2000/31/EC), and even the above-mentioned Copyright Directive (2001/29/EC), have introduced some uncertainties, these should be **clarified** in order to enable a uniform and adequate implementation of IPR protection at Community level¹¹.

10. From this point of view, the efforts by the public authorities in France to reconcile the different points of view and propose socially acceptable remedies to online piracy constitute a very positive signal, due to:

⁸ It should be observed here, however, that the current downward pressure on the protection of intellectual property rights would make it virtually impossible to sign these treaties in the present context (see the revision of the WIPO broadcasting treaty, blocked at the moment yet intended almost exclusively to protect the signal in the pre-broadcast among broadcasters ...).

⁹ Which were requested at the time by the Member States ...

¹⁰ Provision introduced in the "Authorisation" Directive (Annex 1, point 19) and the "Universal Service" Directive (Article 20 new) currently under examination at the Council and the European Parliament (cf. Commissioner Reding in the presentation of the telecoms directives to the European Parliament, December 2007).

¹¹ From this point of view, an outstanding example is the transposition by the Member States of the directive on the processing of personal data and the protection of piracy in the electronic communications sector, with some Member States allowing a sort of franchise enabling IPR offenders to be identified and others – the majority – prohibiting such facilities and thus introducing a de facto hierarchy of rights between the protection of privacy and IPRs, the principle of which is debatable (see in this respect the judgment of the CJEC in the Promusicae case).

- The strong involvement of public authorities (cultural players cannot, without the sword and scales of the Republic, implement the appropriate solutions because the balance of power between them and telecoms operators and access providers is out of kilter) : it is up to public action to organise mediation to provide solutions aimed at reducing mass piracy of protected works. To be effective, this mediation must be sanctioned by the law. Codes of conduct and good practice tested at both national and European level have not produced any obvious results¹².
- The fact that the solution recommended by the agreement is a mechanism for prevention and education of would-be or confirmed pirates, by sending messages warning them about the seriousness of the acts that they are committing and the equally serious nature of the final penalty (suspension of the subscription), a procedure aimed more at preventing & dissuading than at penalising.

This solution takes up the idea of “graduated response” which was backed by a very large consensus within the different component parts of French cinematographic and audiovisual creation, and even beyond. The balanced conclusions reached in the M.O.U. of the “Olivennes mission” in France, which covers (i) the conditions for the development of legal online music and film offers¹³, (ii) raising public awareness on the question of copyright, and (iii) the application of adapted and proportionate penalties, should inspire the measures envisaged in other Member States (just as the conclusive experiences of warning messages sent to Internet users in the United Kingdom have inspired some of the conclusions of this M.O.U.).

11. In theory, introducing filtering measures is an effective way of preventing attacks on IPRs online. Although the Olivennes report –as quoted by the Commission– mentions the complexity of application of such measures, these should be further studied and subjected to expertise, so that they can be implemented in the medium range, especially in case of failure of above-mentioned cooperation policies.

¹² This has unfortunately especially been the case at Community level with the “Film On Line” Charter.

¹³ Including engagements from the music industry to abandon DRM protection on French online music offers if no interoperability can be reached at the time the agreement enters into force.