



International Federation of Film Producers Associations

February 29th, 2008

**SUBMISSION IN RESPONSE TO THE
EUROPEAN COMMISSION'S PUBLIC CONSULTATION
CREATIVE CONTENT ONLINE IN THE SINGLE MARKET
POLICY / REGULATORY ISSUES**

FIAPF – International Federation of Film Producers' Associations

The International Federation of Film Producers Associations is a trade organisation dedicated to the defence and promotion of the legal, economic and creative interests of film and audiovisual producers throughout the world.

FIAPF members are 25 national producers' organisations from 23 countries across the globe, from Europe, India and China to Japan, North America, Latin America.

Put together, the creative output of the production companies in FIAPF's member organisations represents the majority of all theatrical feature films made each year in the world, and a fast growing proportion of all television programming.

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?

The development of online distribution has been possible thanks to the deployment of robust DRM technologies.

Ten years after its market introduction (DVD format with copy-protection technology applied), the Digital Rights Management technologies maintain their key role in the most recent distribution models, including those using Internet : guaranteeing to the consumer that he/she will pay only for the content he/she wants, when and where he/she wants.

To provide consumers with greater choice in their use of copyright works, copyright owners need to be able to effectively exercise and protect their rights in copyright works through constructive management of their exclusive rights in the online environment. Effective DRMs are needed to ensure secure exploitation of works, recovery of related investment, and deployment of new business models.

The main driver for the FIAPF members is to meet consumer needs and demands. It goes without saying that it is in the interest also of right holders that their content may be enjoyed in as many different forms and on as many different types of equipment as possible.

The market -and its operators- deal with these issues. Consequently it is advisable that the public intervention be as limited as possible, especially when it could impact the legal protection of technological measures granted by the Copyright Directive. Before any future action or intervention is considered, a proper assessment of the scope of the purported problems should be conducted. Cooperation between industries already exists to address security and interoperability matters. Public intervention should be limited to cases of market failures and only where it can be demonstrated that intervention would lead to improved investments incentives and greater service innovation.

As commendable practices, FIAPF would like to refer to the *Coral Consortium* and the *Digital Video Broadcasting Project* as concrete examples of inter-industry forums where operators pursue solutions to the challenges outlined above and which would benefit from the support of the European Commission.

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?

As mentioned above, DRMs are widely used by the film industry, notably to support the new online distribution services that allow copyright owners to make content available to consumers in innovative ways involving extensive product and services diversification.

Hence, it is by facilitating the legitimate provision of copyright content to consumers that DRMs and technological protection measures help strike a fair balance between ensuring right holder remuneration and meeting consumer expectations in the digital environment.

Copyright holders and consumers have converging objectives, with right holders having a clear market incentive to satisfy effective demand for flexible pricing and innovative means of consumption, whereas consumers are expecting a diversified menu of choices. Improvements of user-friendliness are being made to ensure that consumers are fully aware of the exact usage rights – defined in the DRM tool or by the technological protection measure – associated with a particular piece of content.

Industry self-regulation provides the most appropriate means to define and implement adequate and transparent labelling on online products and services as well as the required compliance rules for services and devices that provide interoperability. For instance, physical video supports - such as DVDs - propose a clear and easily readable information (using icons and symbols).

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?

The alternative dispute resolution mechanisms in relation to the application and administration of DRMs offer the means to solve potential disputes between the parties. In that way, they are effective tools.

FIAPF concerns in that field is to remind that the Member States that consider introducing alternative dispute resolution mechanisms that they must ensure that the rules and the regulations governing the scope and activities of such mechanisms are in full compliance with relevant EU law (cf. EU Copyright Directive stating in reference to DRM-type technologies and copyright limitations – that national public authorities shall refrain from intervening in the context of “works or other subject-matter made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them”).

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?

As a general point of view, non-discriminatory access, i.e. licensing on fair, reasonable and non-discriminatory terms, to DRM solutions tend to contribute positively to the market development. The continued application of competition law constitutes the best tool to promote innovation and to ensure that access issues do not become market inhibitors.

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?

The questions in points 6 & 7 are strongly linked. FIAPF will therefore answer the two questions together.

The opportunity of licensing a film on a multi-territory basis must be decided by the producer. Therefore any issue of multi-territory rights licensing addressed by means of a Recommendation of the European Parliament and the European Council is not considered desirable by FIAPF.

FIAPF Members are involved in the rights clearance as licensors -and licensees as well for some of them- on a regular basis across borders, whether geographical or linguistic. These licenses are the results of the reality of the financing and the distribution of the films. The essence of the film industry's financing model is the licensing negotiations and the rights clearance. This is how the production, creative and distribution process is structured and it constitutes the essential way of financing production and distribution of content. This reality is particularly relevant for the smaller and medium-sized producers whose film projects depend on a mix of funding sources including foreign co-producing companies – which get the local rights in most of cases - and pre-sales of right. These practices are common to the whole film industry worldwide, Europe included.

As to the unilateral decision of the right holder to license on a single or multi-territorial basis, right holders choose one or other option on a case-by-case basis as a function of many elements and specificities of the local market (cultural preferences, classification regulations, language, etc.) and the desire to ensure consumer satisfaction. International, EU and national law recognize the territorial nature of copyright as a choice of the right holder, and the territorial application of copyright does not in any way preclude, from a legal point of view, EU-wide, multi-territory or cross-border licensing models.

The contractual freedom granted to right holders to license their content the way they choose does not constitute an obstacle to the launch of innovative services available across borders. As to the licensing models that are actually being pursued in the market-place, these reflect, and correctly so, the diverse needs and demands of the European creative community and their customers. All parties are best served by arms-length commercial negotiations based on the principle of contractual freedom.

FIAPF does not see any commercial or practical advantage in the distinction between “primary” and “secondary” licences. This would in addition be in contradiction with the current contractual obligations. The negotiation of the territorial scope of a particular license is, and should remain, a commercial matter between the right holder and the content distributor or aggregator. The result is a multitude of different models for different content aimed at meeting different consumer demands.

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)?

Pursuing niche market strategies can certainly provide interesting business opportunities for the distribution of certain types of content. The negotiation of the territorial scope of a particular license in all business models should remain a commercial matter between the right holder and the content distributor or aggregator. This implies the widest possible range of different models for different content aimed at meeting different consumer demands.

Whether or not a work forms part of “back catalogue” is irrelevant in this context: in the film sector, audiovisual works remain in full cycle of exploitation for several years, and the commercial value of each individual work is best optimized by a case-by-case decision as to the optimal exploitation cycle and distribution opportunities.

Legal offers and piracy

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

Fighting against online piracy and unauthorized sharing of copyright content in the online environment requires committed and good faith joint efforts from all the parties involved: right holders, ISPs and consumers. Enabling and fostering the development in the market place of a legal and legitimate content online offer is needed from the public policy perspective.

The *European Charter for the Development and Take-up of Film Online* signed in 2006 in Cannes was a first important step towards a better coordination between the content owners and access and

network providers. Increasing such cooperation and making it effective by developing wider-ranging inter-industry cooperation agreements accompanied by adapted legislative adjustments is the necessary further step. Hence the necessity of concrete translation of the above mentioned Film Online Charter. These steps should encourage the emergence of new services in a consumer-friendly and secure environment. Concomitantly they also should facilitate the emergence of efficient online enforcement mechanisms that should be in line with the important public policy requirements of data privacy protection as well as protection of intellectual property (accompanied with adapted tools discouraging illegal practices).

Further to securing a favorable framework for the development of larger bandwidth, the other key issue for the European public authorities, through European legislation, should be to ensure the right framework for legal delivery and exchanges of copyright content on the Internet. These are complementary and not substitutable initiatives, as the European Commission also recognized in its proposal to the European Parliament and the Member States for the review of the EU telecommunications package.

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

Increased cooperation between all the stakeholders in the online environment will imply collective rewards much wider than the improvement of the respect for copyright. It will also ensure the respect of fundamental rights and freedoms of others on electronic communications networks and services. There are several recent examples at Member State level which go a long way towards real, effective stakeholder cooperation.

FIAPF supports the main objectives of the French agreement for the development and the protection of cultural works and programmes on the new networks. Initiated by the highest French authorities, this agreement and its negotiation process illustrate the crucial role that public authorities have in encouraging the development of inter-industry agreements on cooperation in the fight against piracy and providing a level playing field for new legal content services online.

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

The content recognition technologies form part of the strategy aiming to fight against online piracy of creative content and to secure the development of the legal content online services.

FIAPF wishes to emphasize that the application of content recognition technologies would provide wider benefits in that they would help reduce broadband capacity currently taken up by illegal activities.

FIAPF remains at the European Commission's disposal for any further information.