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Dear Vivane Reding,

**Subject: Communication from the Commission the European Parliament, the Council, the Economic and Social Committee and the Committee on the Regions on Creative Content Online in the Single Market (SEC (2007) 1710) COM (2007) 836 final.**

RESPONSE FROM THE FEDERATION OF SCREENWRITERS IN EUROPE TO THE QUESTIONNAIRE ON CREATIVE CONTENT ONLINE

The Federation of Screenwriters in Europe is a Brussels based organisation with twenty-six member organisations from twenty-one European countries that between them represent more than nine thousand writers of the creative content being considered in this consultation process.

#### Introduction

The FSE wishes to play a full role in the consultation process and is willing and able to participate in all and any aspects of the consultation. Indeed, FSE would like to be an active participant in the “**Content Online Platform**” which the European Commission is planning to set up. The FSE represents the writers whose work so much audio-visual and multimedia content is based on. As rights holders, their voice should be heard on this Platform.

However, the current questionnaire offers little opportunities for FSE to contribute to the needed debate.

Although the subject under discussion is Content Online the questionnaire does not address the availability of content or the potential market for such content. Nor does it address the potential complexities for the online content market of the remit of Public Service broadcasters.

Centrally for the FSE the questionnaire offers little opportunity to address the central tension of this debate on content on line, which is how to compensate the creators of the content that will be bought and sold on line.

Our answers therefore are primarily in response to Questions 6), 7) and 8) which raise important questions about multi-territory licensing of rights. These questions, at least obliquely, imply that the complex question of existing patterns of control of rights and compensation for the creators, is a core part of this debate.

**Questions 1), 2), 3), 4) and 5)** seek the views of stakeholders on interoperability, improved consumer information, end-user licence agreements, dispute resolution mechanisms and non-discriminatory access to DRM solutions.

Our limited response to these questions is to support transparency of transactions for consumers in every effective way but to question whether any particular form of Digital Rights Management is necessarily essential to ensuring this transparency. The current moving away from DRM solutions in some aspects of the distribution of music online suggest that DRM may not be the panacea suggested. That DRM could have the effect of monitoring use of audio-visual production and thereby assisting in ensuring fair compensation for writers is

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evident, but it is unlikely that it will be designed to have that function unless that regulatory environment requires fair compensation to creators.

The Commission's approach to private copy levies would not inspire confidence in creators that the Commission will take their priorities into account.

**Questions 9), 10) and 11)** concentrate on the important issue of copyright protection, but largely in the context of piracy.

FSE abhors the theft of copyright property and favours the strongest measures to restrict the possibilities of piracy and, in general, supports the use of regulatory and legal recourse against those who steal copyright.

However, we would share the widespread view that the most effective response to online piracy is ready and easy legitimate access to legal downloads.

In respect to the Question 10) concerning the Memorandum of Understanding signed in France with music and film producers (23.11.2007) to set up an new internet authority with powers to suspend or cut access to the web for those who illegally file-share we believe that it is too early to say whether this approach will work, and while we note that the UK government is also considering the introduction of such a system, we also believe that the system may be difficult to successfully implement and may not suit the legal and administrative structures of many member states.

**Questions 6), 7) and 8)** raise questions related to multi territory licensing in the context of; the appropriateness or otherwise of a Recommendation of the European Parliament and the Council; the most efficient way of fostering multi-territory rights licensing; the distinction between primary and secondary markets; 'long tail; business modelling.

These questions come closest to addressing the issues of primary concern to creators.

As creators of much of the content that is to be distributed online the interest of writers is in direct proportion to the extent to which it is intended to compensate writers for the use of their material in this potential new market. Should it be proposed not to compensate writers for the use of their creation then clearly we would oppose such use.

#### **Online distributors have an interest in securing free content**

It is regrettably not fanciful to imagine that it is intended to try to establish business models for online distribution of audio-visual content constructed on the principle that acquisition of the content is free.

Indeed this is exactly what the member companies of the Association of Motion Picture and Television Producers at the beginning of their recent negotiations with the Writers Guild of America (East and West) proposed. These proposals led directly to a 100-day strike, finally resolved by the companies agreeing to pay writers for use of their work on the internet in streaming, downloading and in the creation of material directly for internet distribution.

In the US the companies argued that there was little evidence as yet that there was a potential market online, (a position contradicted by their assertion to investors, both actual and potential, that the Internet would prove very profitable).

This argument - that the profitability of distribution of audio-visual content on the internet is not yet known - is being presented already by European stakeholders in a variety of contexts, but with more force, given the complex nature of the many separate markets for audio-visual product in Europe and the immensely complex regulatory and cultural diversity of European Audio-visual production and consumption.

#### **Europe is not simply a market place for audio-visual production**

Indeed one of the first and most important contradictions that has to be addressed in this discussion is the stated policy of the European Union (reaffirmed by its active promotion of and signature to the UNESCO Convention for the Protection and Promotion of the Diversity of Cultural Expressions) to encourage cultural diversity in Europe. While encouraging distribution of audio-visual product across European borders and outside

Europe clearly contributes to the promotion of the product of cultural diversity the effect of such distribution, if the creators are not compensated, will tend to undermine the capacity of creators to produce content in the first place. This effect would be particularly severe in smaller member states.

The complexity of the European situation relative, for example, to that of the United States is demonstrated again by the role and responsibilities of Public Service Broadcasters for whom it may well be problematic to charge consumers for access to material produced under the public service mandate when those materials are distributed online. But if public service broadcasters are to make high quality drama, news and current affairs available at no price to the consumers they may well be undermining market pricing by commercial online facilities.

(It is noteworthy in this discussion that the BBC has made much of its production extensively available on so-called 'catch-up' streaming services but has done so having negotiated a rate of payment with the Writers Guild of Great Britain (based on a percentage of the original price) for all writers whose work is to be distributed online.)

Clearly it is the case that in Europe, even online, there is no clear open market for the production and distribution of audio-visual product.

At the input level a complex web of state subsidies; tax benefits and so on make the cost and therefore the price of European audio-visual product widely variable. Distributors themselves have a variety of motivations in putting production online; few of them linked to profit. The opportunities for income are still various and unclear, and include advertising, payment by device manufacturers, by service providers and by consumers themselves; and consumers are already used to having easy access to free content.

These complications exist even before considering whether there is in fact any substantial market for audio-visual product across language and cultural barriers in Europe. Even distribution of audio-visual production across borders but within language blocks is somewhat problematic in that it tends to favour the production of the larger country at the expense of the production of the smaller.

It seems evident to us that this issue is primarily an issue of culture, secondly of regulation and lastly of market.

In this context the question of whether distribution of content online can best be managed in a DRM environment becomes less critical.

### **Multi territory licensing is potentially beneficial**

The Commissions interest in multi territory licensing is therefore interesting from a cultural perspective in that it offers a possibility to encourage the promotion of cultural diversity by making available the production of each of the cultures of Europe to the consumers of others. FSE would of course strongly support any initiative which would encourage such a result but would urge caution that the desire to promote such a result may, if basic concerns are not addressed, cause more damage to production by undermining creators compensation than it would benefit production by facilitating a modest amount of additional distribution.

### **But uncompensated online distribution will damage cultural production**

If the distribution of product inside its territory of production is reduced because of competition from production of other territories, but the creators of both territories are not compensated for the distribution of their creations outside their own territory the result is negative for both.

Key to ensuring that the result of online content distribution is not damaging to the culture it purports to serve is a regulatory environment that ensures compensation to the creators for online distribution of their work.

### **Regulation to ensure compensation is a prerequisite of effective online distribution including multi territory licensing**

At present the varying and sometimes contradictory policy objectives and goals of individual member states in respect of arts and culture policy; promotion of the industries of film and television production; mandates to public service broadcasters and deregulation of the broadcasting industry; protection of minority languages; and so on - in the context of differing approaches to the nature of intellectual property and the consequent

differences in the legislative structures for its creation, contract law and procedure for its use and assignment and (in some countries) hundreds of years of differing practise make the prospect of a multi territory license for audio-visual production impossible to imagine without radical restructuring of existing practise.

No national system however actively prevents creators from being compensated for a new form of distribution of their creation.

In order to make multi territory licensing systems possible; the EU will have to establish at European level an obligation to fairly compensate creators for each online exploitation of their work. Such a system should insist that:

- the screenwriter receives appropriate compensation
- which reflects the revenue generated by the online exploitation of the work
- and should receive payment directly from the online operator or through the authors society of his/her choice.

Such a regulatory requirement would be implemented at member-state level in a way appropriate to existing practise.

List of Questions asked

### **Creative Content Online - Policy/Regulatory issues for 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 regard 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?

### **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 audio-visual 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 co-operation improve respect of copyright in the online environment?

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

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

Sincerely,

Christina Kallas  
President, on behalf of the Federation of Screenwriters in Europe