Creative Content Online – Policy/Regulatory issues for Consultation ISFE Response to Commission Questionnaire

ISFE, the Interactive Software Federation of Europe represents the European interactive software industry [1] which produces entertainment and educational software ('videogames') for use on personal computers, game consoles, portable devices and mobile phones. The videogame industry is the fastest growing 'content' sector in Europe. ISFE submits this response to the recent questionnaire to supplement its original submission on Creative Content Online made in October 2006.

Executive Summary

ISFE welcomes the ongoing review of this area by the Commission and takes this opportunity to include additional comments as well as re-emphasising and developing some of the information stated in its original comments. Digital Rights Management ('DRM') Systems are an integral part of the workings of the videogame industry and must continue both to be strongly protected by law and also allowed to develop to benefit both the consumer and the rights holder. DRM Interoperability is not a significant issue for this industry due to consumer demand for different types of game consoles and the related supply of different console-specific versions of games by publishers. Multi-territory rights clearance remains a problem for our members despite some welcome recent innovations so further legislative action is necessary. Online Piracy remains a major concern so recent memoranda of understanding are a positive development in forging a positive relationship with Internet Service Providers. However present filtering technologies do not, as yet, fully meet the requirements of this industry in identifying illegal online content.

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[1] **ISFE** Membership consists of the following: **Associations** - AESVI (Italy), ADESE (Spain), BIU (Germany), BLISA (Belgium), ELSPA (UK), FIGMA (Finland), MDTS (Sweden), MUF (Denmark), NVPI (The Netherlands), NSM (Norway), OVUS (Austria), SELL (France), SIEA (Swizerland). **Companies** – Activision, Atari, , Eidos, Electronic Arts, Konami, Microsoft, Nintendo, SCEE (Sony Computer Entertainment Europe), Take 2, THQ, UbiSoft, VUG (Vivendi Universal Games), The Walt Disney Company France

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?**

As is well known, the term DRM ('Digital Rights Management') is used to describe a number of technologies that can be incorporated into electronic devices to protect and control the use of digital media. ISFE members use DRMs to safeguard both their intellectual property and also the relationship between the company and the user. They are an essential ingredient in a successful, secure and legitimate online industry.

The interactive software industry has always used technological protection measures on its products in a variety of forms. These are referred to generally in the industry as "TPMs" and can include "copy protection" mechanisms. DRMs generally provide for broad and varied rules on how content is accessed and consumed and can often be based on a third party or industry-mandated standard.

This industry has made its own contribution to the development of very successful TPM solutions for the online environment. We believe this form of self-help by individual companies has a self evident, successful history and must be encouraged. We wish to reiterate our assertion that, a 'universal' DRM system, particularly if imposed from the outside or mandated by government could only adversely impact on an industry that has been seen to thrive through the use of own TPMs since inception.

We cannot stress too highly the importance of the continued protection of both TPMs themselves and also the legal regimes under which they exit. Our industry's continued online growth rests on the protection and preservation of those TPMs, but developed and utilised on an individual company by company basis, as opposed to any mandatory imposed DRM system.

DRM-related **interoperability** is not a factor in the videogame industry because software publishers generally release their titles on multiple game consoles ('platforms') and/or personal computers and those titles are platform specific. A single title may vary both in features and in game play style depending on the platform for which it is released. In fact, while the on-screen output of a single title across the various different platforms may be very similar, the underlying software program itself is unique to each platform and must be in order to operate on the different platform systems. In short, whilst other industries such as music may have platform-specific DRMs, games offer platform-specific content. (Note: it is not unusual for the same videogame title to have different PEGI 'age suitability' ratings depending on the type of platform on which it is to be played).

This is because each platform uses a different proprietary operating system, 'firmware' and library programs for standard tasks, etc. and thus compatible software must be written to operate in each distinct environment.

Moreover, publishers take advantage of the very different hardware and game play capabilities associated with each different platform and design games to specifically appeal to the audience that prefers that platform. This is now also true in online environments given that online game play is increasingly available not just as in the past via Personal Computers, but also via games consoles including mobile devices. In addition some games are adapted for use on mobile phones where limitations such as screen size, software etc allow. All of the foregoing ensures that a wide range of game players can have access to content both on and offline using the type of platform which best suits their style of game play. It is our experience that players display fixed preferences for the type of platform/console that best reflects their personal style and identity.

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?

Yes, the current licensing environment is unnecessarily complicated and complex and, for example, based on our members' limited experience with collecting societies we feel that existing licensing structures remain relatively complicated. Greater clarity, responsiveness and responsibility must be achieved in this area and this has not been so far secured under the auspices of existing EU legislation. It is therefore necessary that legal bases continue to be established by the European Commission to enable maximum flexibility in the way rights are cleared on a multi-territory basis. Not enough changes have been made in practice so far. Users of content online still face considerable territorial restrictions and the European market therefore remains largely fragmented.

This greatly hinders online business within the EU and also the development of EU – based online business outside the EU to the detriment of all involved including, of course, the consumer.

If we are to be specific, it is clear that there is still some reluctance by collecting societies to permit direct forms of licensing involving their members which would facilitate both global, and therefore also EU-wide, licensing arrangements and clearances.

In conclusion, our limited experience in this area has left us with the view that the less our members have to deal with multiple national collecting societies the more likely it is that European interactive software can continue to achieve the unparalleled global success realised so far.

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)?

Not applicable

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

Yes, ISFE members greatly favour increased co-operation between all of those who profit from the greater availability of attractive and legitimate content online, consumers, internet service providers, governments and content providers themselves. We welcome the recent government–led initiatives concluded in France and now being considered in the United Kingdom in this regard (see below).

ISFE and its membership are continually involved in another aspect of stakeholder cooperation i.e. the education of the public, government and law enforcement in relation to the protection of Intellectual Property Rights ('IPR') Online. ISFE membership feels that EU/government and stakeholder supported and funded educational campaigns are key in educating consumers, especially the young, in both refraining from engaging in illegal activity including the purchase of pirate and/or counterfeit goods which are made available online . In the past ISFE has focused its activities in this area on the member states which have recently joined the EU but due to a huge increase in internet based piracy in 'older' EU member states ISFE and its member associations and companies are now active throughout the entire EU in fighting online piracy

As we stated in our original submission equally important to the expansion of online content is the protection of that content and also of the technical systems through which it is both delivered and protected from theft. We continue to therefore seek the active support of the European Commission in securing a firm legal framework which delivers strong enforcement of IPR worldwide and welcome the ongoing review of the copyright *acquis* as a method of improving IPR protection in this regard. The need remains for stronger protection of the technical measures which our industry uses to protect its IPR as well as the need for strong action against those who make illegal copies of video games available online.

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

ISFE supports the development of such initiatives in general as a starting point to ensure better protection of our members' IPR online and specifically with respect to internet service provider cooperation with rights holders in the online environment. However, it is important that such initiatives take into account the different types of content available and the varying issues relating to protecting that content. It is equally important that all interested parties be invited to participate in any discussions intended to address how online piracy might be addressed. A critical, and difficult, question pertains to the manner in which technology is employed in addressing this online enforcement. This aspect must also be carefully considered.

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

Development of such measures has real potential but is a complex process which must be undertaken in cooperation with the rights holders whose IPR are being infringed online. Filtering technologies are not yet fully effective for all types of content. For example, such technology employed in identifying infringing audiovisual content will not necessarily work for software programs such as videogame files. The fingerprint generated by the legitimate videogame product may differ significantly from the "hacked" version to the extent that the technology may be unable to effectively identify and then "filter" out the infringing material.

ISFE Secretariat
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