

February 29, 2008

**SUBMISSION IN RESPONSE TO THE
COMMISSION'S 2008 PUBLIC CONSULTATION ON
CREATIVE CONTENT ONLINE IN THE SINGLE MARKET**

EXECUTIVE SUMMARY

The members of the IVF are involved in the distribution of cinematographic works and other audiovisual content both on physical carriers (DVD) and over digital networks, including the Internet. More and more IVF members are pursuing the offer of cinematographic and audiovisual works online, either directly to end-users or working in cooperation with service providers or content aggregators following different business models (e.g. time-limited viewing, streaming or digital delivery of permanent copies). Such new services bring wider choice to consumers as they involve an increasing variety of content, both on the Internet, but also through other types of networks. Although most of the content offered on-line is also offered off-line (e.g. on DVD), specific on-line versions and new content produced specifically for on-line distribution are also being developed.

Effective DRMs constitute the necessary tools to ensure secure exploitation of works, recovery of related investments, and deployment of new business models. Not all devices/platforms will necessarily accommodate all types of content in all forms and/or formats, but multi-industry cooperation is evolving to address issues of security and interoperability. Industry self-regulation provides the most appropriate means to define and implement adequate and transparent labelling on online products and services.

Right holders' contractual freedom and exclusive right to choose the territorial scope of the rights licensed is crucial to maximising revenues from audiovisual content and remains vital in many cases of European film-making in order to secure financing prior to the shooting of the actual film as the various exploitation rights are basically sold off/licensed prior to, or during, the shooting of the film. New distribution channels such as online delivery of film will naturally have to contribute to the financing of films in a manner similar to that already provided by the pre-sale of rights to theatrical, video and television distribution.

Joint efforts by all stakeholders to fight against online piracy and unauthorized sharing, dissemination and use of copyright content are essential. The Cannes 2006 "European Charter for the Development and Take-up of Film Online" constituted a first important step towards improved cooperation between content owners and access and network providers. The next step is to increase such cooperation and to make it effective by developing wider-ranging inter-industry cooperation agreements accompanied by appropriate legislative adjustments and by public authority encouragement to employ technological tools discouraging illegal activities.

Recent government initiatives at Member State level bear testimony to the fact that public authorities have a crucial role to play in encouraging and facilitating 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.

CREATIVE CONTENT ONLINE 2008 – 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 regards DRM interoperability?

The members of the IVF have used DRM technology since the market introduction some 10 years ago of the DVD format. In the new network distribution models, including over the Internet, DRM technology continues to play a central role in offering consumers the ability to enjoy content when and where they want and to pay only for what they want to receive.

The key to providing consumers greater choice in their access to copyright works is enabling copyright owners to effectively exercise, manage and protect their rights in copyright works - effective DRMs constitute the necessary tools to ensure secure exploitation of works, recovery of related investments, and deployment of new business models.

The topic of “interoperability” often confuses concerns that not all devices/platforms will necessarily accommodate all types of content in all forms and/or formats with concerns about the scope of copyright exceptions and whether copyright content protected by technological measures and offered to consumers can be accessed by consumers when and where copyright exceptions allow certain uses that would otherwise be considered copyright infringements. As always, the relationship between copyright exceptions and the legal protection of technological measures gives rise to much controversy, despite the fact that the Copyright Directive, upon much reflection by the Member States and the European Parliament, provides a balanced mechanism to deal with this issue.

The market is dealing with these issues and the IVF therefore favours avoiding public intervention, for example in the form of prescriptive or simplistic solutions that waive the legal protection of technological measures granted by the Copyright Directive. Moreover, a proper evaluation of the scope of the purported problems would be necessary before considering any future action/intervention. Multi-industry cooperation is already evolving to address security and interoperability issues. Any intervention should be limited to properly evidenced cases of market failure and only where it can be shown that proposals would lead to improved investment incentives and greater service innovation.

As concrete examples of inter-industry forums where stakeholders are seeking solutions to the challenges outlined above and which would benefit from the support of the European Commission, we refer to the Digital Video Broadcasting Project (DVB) on a “Content Protection & Copy Management” (CPCM) system and the Coral Consortium on an interoperability framework across proprietary DRM solutions.

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?

The IVF supports the protection and promotion of public interests, including the protection of intellectual property rights and the protection of personal data, both in the offline and online environments. In our view, this does not automatically imply a conflict between consumer interests (e.g. protection of privacy, access to information, etc.) and business interests (e.g. copyright, enforcement, etc.). For example, DRMs enable copyright owners to make licensed content available to consumers in very diverse models at different price points (premium content, on-demand, subscription, one copy or several copies) and/or on new delivery forms or formats (e.g. next-generation DVDs).

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. DVDs are labelled – with a combination of text and icons – to ensure that transparent, clear information is provided to consumers to enable them to make an informed choice at the purchase of content.

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?

The application of EULAs has played a positive role in facilitating software transactions between users and suppliers. Since many business models for the delivery of creative content on digital networks rely on DRM technology, consumers are likely to be offered content on the basis of single-user licences of this kind. It is in the interest of all stakeholders to pursue a high and adequate level of transparency and legibility of EULAs.

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?

Alternative Dispute Resolution (ADR) mechanisms provide stakeholders with informal but effective means to seek solutions and/or redress to potential disputes between parties over the application and administration of DRMs, e.g. in relation to the interaction between the legal protection of technological measures and limitations/exceptions to copyright.

As regards DRM-based online content services, it is important to recall that the EU Copyright Directive clearly stipulates – with 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”, the purpose of this provision being to encourage the launch of creative content online business models. It is imperative that Member States, if introducing

ADR mechanisms (as some have done), ensure that the rules and regulations governing the scope and activities of such ADR mechanisms are in full compliance with relevant EU law.

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?

Generally speaking, we consider non-discriminatory access, i.e. licensing on fair, reasonable and non-discriminatory terms, to DRM solutions as contributing positively to the development of the market place. The continued application of competition law constitutes the best tool to ensure stimulation of innovation and that issues of access 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?

Joint answer to Questions 6 & 7:

The members of the IVF do not agree that the issue of multi-territory rights licensing must or should be addressed by means of a Recommendation by the European Parliament and the Council.

The members of the IVF are involved in rights clearance both as licensees and licensors on a daily basis across borders, whether geographic or linguistic. Although defining and agreeing on a specific licensing contract can sometimes involve time-consuming contractual negotiations, licensing negotiations and rights clearance are the essence of the film industry's financing model – this is how the production, creative and distribution communities attempt to meet the production costs and make a return on investments in producing and distributing the film. Without these negotiations, content producers and distributors are deprived of the essential way of financing production and distribution of content. This is particularly true for smaller and medium-sized producers whose very existence depends on a precarious mix of funding sources including pre-sales of rights.

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-base 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.

The IVF also wishes to emphasize the importance of maintaining the supremacy of exclusive rights as provided for in international copyright treaties and the mirroring *acquis communautaire*. Exclusive rights are essential to the copyright system in the audiovisual sector, including the right holder's entitlement to choose whether to manage the rights concerned individually or collectively. As many right holders collaborate to create a film, the producer will almost always be responsible for securing the investment and funding for the film project as well as for the subsequent exploitation and distribution of the finished film. The producer exercises this role either by direct ownership of copyright or by transfer of rights from other right holders by law or contract. Depending on the national system, these right holders comprise directors, scriptwriters, actors, music score composers, and other relevant parties whose creative contribution to the collective work earns them individual rights under national copyright law. This system has evolved over the years to ensure the optimal exploitation of the audiovisual work as well as legal certainty for down-stream licensees. This centralization of rights provides the producer with the flexibility needed to efficiently exploit the film on behalf of all the right holders involved in the creative process and to take into account the specificities of particular films, markets, consumer tastes, etc.

The members of the IVF do not see any commercial or practical advantage in the distinction between "primary" and "secondary" licences. 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)?

The members of the IVF are active across the European Community and are involved in many different forms of online activities. They believe that real and measurable consumer demand will ultimately determine whether specific models will prevail both with regard to the distribution of content on physical carriers and/on on networks, including the Internet.

Pursuing niche market strategies can provide interesting business opportunities for the distribution of certain types of content, on physical carries as well as in online distribution. The negotiation of the territorial scope of a particular license, also in business models pursuing the "Long tail" theory, 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. In this context, "back catalogue" is not a useful or relevant parameter; for example, 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.

The real issues/challenges are: how to provide the best conditions for the development of a real substantive business which contributes back to film production costs? Producers and creators need to be free to license their content on linguistic, multi-territorial or other bases, as a function of what THEY deem to be the optimal commercial exploitation of the copyright work itself to the benefit of all the creative and financial contributors to the work. Should they deem a multi-territory license the optimal commercial solution for the work in question, then they will certainly pursue that solution.

Legal offers and piracy

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

Joint efforts by all stakeholders to fight against online piracy and unauthorized sharing, dissemination and use of copyright content are essential to improving the respect of copyright in the online environment. Therefore, public policy should be about enabling the development in the market place of a legitimate content online offer. The Cannes 2006 “European Charter for the Development and Take-up of Film Online” constituted a first important step towards improved cooperation between content owners and access and network providers. The next step is to increase such cooperation and make it effective by developing wider-ranging inter-industry cooperation agreements accompanied by appropriate legislative adjustments.

This means taking concrete steps to push for the translation of the “European Charter for the Development and Take-up of Film Online” into robust inter-industry agreements that encourage the emergence of new services in a secure, consumer-friendly environment while also facilitating the emergence of efficient online enforcement mechanisms that comply with the important public policy requirements of data privacy protection as well as protection of intellectual property. These activities should be accompanied by public authority encouragement to employ technological tools discouraging illegal activities. Ongoing reviews of European legislation, e.g. in the telecommunications sector, constitute crucial tools to ensure that the European information society networks not only provide larger bandwidth, but also contribute to the development of a favourable environment for legal delivery and exchanges of copyright content on the Internet. These are complimentary, not substitutable initiatives, as the Commission also recognized in its proposal to the European Parliament and the Member States for the review of the EU telecommunications package.

The members of the IVF are of the opinion that the collective rewards of increased and effective stakeholder co-operation in the online world will be substantially wider than just improving the respect for copyright on the Internet. Increased stakeholder cooperation will ensure respect of all fundamental rights and freedoms of others on electronic communications networks and services.

In this context, inspiration and useful examples are provided by recent initiatives at Member State level, i.e. the UK Government’s commitment to pursue stakeholder cooperation in

follow-up to the 2006 Gowers Review of Intellectual Property, the Swedish Renfors report's call for the adoption of provisions formalizing ISPs' rights and obligations to terminate subscriptions used for copyright infringements, and the French agreement for the development and the protection of cultural works and programmes on the new networks of November 23, 2007 (mentioned below).

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

The IVF supports the main objectives of the French agreement for the development and the protection of cultural works and programmes on the new networks, which was signed at the *Palais de l'Elysée* on 23 November 2007 by a wide range of stakeholders, including by the IVF's French member, SEVN. This agreement bears testimony to the fact that public authorities have a crucial role to play in encouraging and facilitating 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.

The French agreement provides an example which should serve as inspiration across the European Union. Whether at EU or national level, the details of the mechanisms eventually put in place will have to be adapted to the specific characteristics of the given context.

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

Content recognition technologies play an important part in any larger effective strategy against not only online piracy of creative content, but also the continued development of legal content online services. Content recognition technologies constitute one of many tools inherent in a comprehensive online piracy strategy. Content recognition technologies are interesting in that they can treat Internet piracy like other filtering tools would treat for example spam and virus activities.

The application of content recognition technology has a beneficial effect on ISPs' quality of service by reducing the very substantial portion of broadband spectrum currently taken up by illegal activities to the detriment of all end-users whose connection and access speeds are seriously impeded by others' illegal activities.

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The IVF remains at the Commission's disposal for further information where necessary.

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INTERNATIONAL VIDEO FEDERATION