



PPA Response to the Commission Communication on Creative Content Online

Introduction

PPA

PPA is the association for publishers and providers of consumer, customer and business media in the UK and in this role welcomes the opportunity to respond to the questions raised by the Commission in its Communication on Creative Content Online in the Single Market.

The association's membership consists of some 500 members who publish or organise over 4,400 products or services. These include over 2,500 consumer, business and professional magazines and nearly 1,000 online products. PPA members produce a large range of directories and websites, in addition to organising conferences, exhibitions and awards.

Many PPA members offer online services, including websites, online versions of print publications and publications only available online, or through electronic transmission. Online publications also encompass consumer, business to business and customer magazines, and increasingly involve the use of new technical measures and electronic rights management systems to help improve the provision of publications and services to subscribers.

Increased use of digital technologies is having a significant impact on the way in which magazine publishers compile and design their products and services, and subsequently publish and make them available to customers and individual consumers. In particular magazines have been part of the front line within the creative industries in promoting interactivity between publishers and their consumers. The concept of consumer contributions to magazines, now being described as "user generated content" is not new to the industry. However the way that technology is opening up the number of ways in which such interactivity will add to, and shape many new publications and on line services based around them in the future is central to the strategic thinking of companies working in the sector.

In looking to embrace the opportunities opened up by on demand delivery through electronic transmission, consumers and rights holders share many common objectives, involving affordable access to a wide range of content to satisfy effective demand for consumption across an ever increasing number of delivery platforms and devices. The successful use of new technologies embracing delivery platforms, electronic rights management systems, and technical protection measures will help to support these ambitions, stimulating new business models and creating opportunities for business to offer more choice to the consumer/citizen.

Setting up the "Content Online Platform"

The Commission suggests "the setting-up of the "Content Online Platform" as a framework for discussion, at European level".

The Platform is to be devoted to content specific to cross-industry negotiations around "issues related to the online distribution of creative content".

The rights of publishers are becoming increasingly relevant to work within the Content Online Platform for the reasons outlined in the Introduction.

PPA publisher members have a direct interest in debates concerning:

- (a) availability of content;
- (b) improvement of clearance mechanisms;
- (c) development of multi-territory licensing on-line; and
- (d) management of copyright on-line.

It is therefore important that representatives of online periodical and magazine publishers are invited to participate in the “Content Online Platform” discussions.

Such participation will help demonstrate to the Commission the ways in which systems are developing to support a variety of new business models linked to the way that a successful and innovative combination of compelling content, attractive advertising and well known brands can find a central place within the increasing demands on the time of readers, viewers and listeners in the online world.

Advances in technology and new business models developed on the back of them, should help provide greater choice for members of the public to decide when, where and how they wish to access and view online publications and other material in the digital age.

The Content Online Platform will fail to correctly address rights holders’ issues if “expert” representatives of the online magazine and periodical community are not invited to participate.

The system for securing returns from markets, whether primary or secondary, must remain flexible. This is vital if fair compensation for valuable content and imaginative presentation is to be secured in the “long tail” world of online electronic services. Publishers are already developing online electronic services offering vast libraries of content on an increasingly non exclusive basis, but in innovative and imaginative ways which appeal to different audiences at different times of their lives.

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?

Not if “fostering” means “regulating to enforce” interoperability of DRM systems.

Legal protections for both “technical protection measures” and “rights management systems” already recognised in law at both EU level and within EU Member States should be maintained, in order that industry can develop and offer an increasingly diverse choice of products and services for the consumer in the form of online services and digital products.

A good example of the current legal protection that should be maintained is provided within Article 6 of the Copyright Directive¹ and its links between beneficiaries of exceptions or limitations to copyright protection and “technological measures”.

What are the main obstacles to fully interoperable DRM systems? Which commendable practices do you identify as regards DRM interoperability?

The Commission must differentiate between “technological measures” as defined under Article 6.3 of the Copyright Directive (Directive 2001/29/EC) and “rights management information” as defined in Article 7.2 of the Copyright Directive².

This is important when considering the over simplified statement on page 7 of the Commission’s staff working document which claims “.In general, DRMs are not considered to be user friendly and it is considered that DRM systems confuse the public, and are sometimes not transparent”.

It is submitted that, whilst appropriate transparency over technical protection measures applied to a product or online service delivering content to consumers is important to improve trust over what a consumer is actually acquiring when buying, accessing or otherwise using the product or service, the same level of transparency (or indeed interoperability) is not a **consumer** prerequisite for the development and application of rights-management information systems.

When a consumer buys a product they will be concerned to know that it allows them to do “what is says on the tin”. They are not really concerned to understand how the internal mechanical parts of a product actually work.

If “back office” rights management information systems really operate to support recording sales and use of copyright works in ways that make online services more efficient for business, these systems will help to promote investment and innovation in new online services. This is something that should be fostered and encouraged.

2) Do you agree that consumer information with regard to interoperability and personal data protection features of DRM systems should be improved?

The Commission’s concern over complex contractual terms and a resulting lack of awareness amongst the public over the way these terms permit the use of personal data are challenges to industry.

¹ EU 2001/29/EU

² Article 6.3 – “technical measures” means any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject matter, which are not authorised by the right holder of any copyright or any right related to copyright as provided for by law or the *sui generis* right provided for in Chapter III of Directive 96/9/EC.

Article 7.2 – “right-management information” means any information provided by rights holders which identifies the work or other subject-matter referred to in the Directive or covered by the *sui generis* right provided for in Chapter III of Directive 96/9/EC, the author or any other right holder, or information about the terms and conditions of use of the work or other subject-matter, and any numbers or codes that represent such information.

However, as the Commission also recognises, so are identification and promotion of licensing opportunities and provision of attractive billing systems.

Transparency and clarity in contractual terms is a goal for industry at all levels.

But, it should be remembered that “better information” does not necessarily mean “more information”. There is a danger that overloading consumers with information slaves the conscience of the manufacturers without clearly explaining the important points that may affect consumer choice as a consumer selects a product of service.

What could be, in your opinion, the most appropriate means and procedures to improve consumers' information in respect of DRM systems?

Transparency and clarity should be promoted by individual companies seeking to attract and retain customers, alongside support for good practice being developed by industry trade associations and representative bodies within sectors of the creative industries. Magazines rely heavily on their strong brands, which they seek to protect and enhance by being open and keeping their customers informed.

Which commendable practices would you identify as regards labelling of digital products and services?

The work on the Automated Content Access Protocol (ACAP) should be noted by the Commission. PPA members have been interested in ACAP since its inception and are currently contemplating how it can form part of their digital strategies going forward. ACAP has been developed to communicate information about permissions and rights policies for online content in a way that can be understood by computers. The technology is envisaged as a way of helping publishers communicate to search engines how the content on their websites can be used.

However, this could be extended to allow all users of online content to discover ownership and rights attached to individual digital items and potential licensing opportunities. ACAP is nascent and in need of further R & D funding, as hitherto it has been driven by publishers and their business partners.

In addition the work of groups such as the European Committee for Standardisation and the information issued in the form of Guides such as the User Guideline related to Electronic signatures in e-commerce for SME's³ provide examples of how pragmatic voluntary guidance can help to shape developments in the digital marketplace.

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?

Possibly, but not definitely. Enhancing legibility should help consumers understand the choices that they can make about the services that they choose to use.

³ CWA 14708:2003(E)

Which recommendable practices do you identify as regards EULAs?

Providing for relevant terms to be clearly brought to the attention of a user and for the terms to be easily stored and/or printed for reference.

Do you identify any particular issue related to EULAs that needs to be addressed?

No.

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 mechanisms are generally acknowledged to provide a less costly alternative to full court hearings. In this respect they are to be welcomed.

However, the willingness of individual companies to address consumer concerns will be an important factor as "technical measures" which are both understood and accepted as "effective" by both consumers and rights owners become more and more established.

It is this exchange of views between companies and consumers that will help drive developments in the market place.

This exchange should not be hampered or reduced by the creation of dispute resolution bodies which may actually put brakes on developments that might occur more quickly and naturally through company/consumer developments.

The way in which these developments can occur is best exemplified by the way in which certain technical protection measures have been applied and tested in the market place on CDs with less than positive reaction from consumers. As a result, products have been redeveloped, or withdrawn and new digital offerings provided in their place.

Other technical protection measures applied to define the scope of new online publishing and "podcasting" video on demand services have been developed without the level of adverse publicity that was triggered by the unexpected application of technical protection measures within CDs.

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?

Access to DRM solutions should be a matter for individual companies to address within competition law rules.

Unreasonable bias towards any one group of companies could work against the natural evolution of the market place.

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?

No.

It seems right that issues relating to the way in which rights are licensed to support online services should be a matter for consideration by the Content Online Platform.

However the Commission's welcome recognition of the fact that "it is first for rights holders to appreciate the potential benefits of multi-territory licensing" appears to be contradicted by the suggestion that a Recommendation may be needed.

As the Commission' staff working paper recognises "for content owners there is the possibility to leverage more business from new and existing content through new platforms and delivery mechanisms, accessible in more territories, using innovative business models".

However this is by no means guaranteed. Rights owners must therefore be enabled to work with the risks and rewards that such opportunities afford whilst knowing that the copyright and related rights in creative content will continue to be recognised in accordance with the internationally recognised territorial principles of copyright law.

7) What is in your view the most efficient way of fostering multi-territory rights licensing in the area of audiovisual works?

There are real dangers that seeking to "foster multi-territory rights licensing" could work against the interests of consumers.

The online world opens up opportunities for choice, but this should not be with total disregard to the linguistic and cultural diversity that is such an important facet of life within the EU. It is particularly significant for magazine and periodical publications.

It is surely not in the interests of consumers or rights owners to have a "one size fits all" to licensing audiovisual works within the EU?

A programme produced within the UK may reach its audience in France most effectively when dubbed in French. A game show initiated in Germany may best work for UK audience when licensed and remade to the same format, but with local participants.

Programme producers generally want their work to reach a wide audience.

It is therefore the increased availability of services which should operate to foster the licensing and use of audio-visual programmes an online magazine and periodical content.

Whilst the Commission recognises that settling terms of trade for online creative content has presented difficulties, there are plenty of examples now in place to show that agreement can be reached against the background of existing rights structures.

These include the development of "Catch up television" video on demand services such as the service operated through BBC iPlayer in the UK, and Channel 4's subscription video on demand services.

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?

No. This is because it is not practical to draw a fixed line between what any one rights holder (or group of rights owners) may regard as a "primary" market on the one hand, and a "secondary market" on the other.

Instead a flexible mix of recognition for exclusive rights, appreciation of the role played by collective bargaining, and the range of services that can be provided through effective collective licensing should all remain part of the market place.

Online markets are still emerging. Their relative value in terms of audience reach, financial returns for recouping investment and long tail archive interest are by no means fixed.

We are therefore in a world where it is increasingly difficult to value a specific market for films or audiovisual programmes "up front". Producers admit this.

This all increases doubts over the value of a market and/or its description as a "primary" or "secondary" market.

The reproduction right for literary works and artistic works helped to support the licensing and use of performers rights in a whole range of ways that could not have been fully envisaged when the right itself was provided for with International Treaties (and in particular Article 2 of Directive 2001/29/EC (the Copyright Directive)).

The same sort of diversity and choice is now being developed through licensing and use of the "communication to the public" right.

Some have argued that this right to consent to the "communication to the public" is really "just one right". It is in fact the source for publishers giving consents to the use of their publications in the context of a range of new electronic transmission services.

Precisely because this range of new services cannot neatly be valued or allocated into "primary" and "secondary" markets the system for rights recognition must remain flexible if fair compensation is to be secured from consumer access to and use of published content in the "long tail" world of online electronic services.

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)?

A "one size fits all" approach to copyright works as a whole appears to lie behind this question.

It is not the correct approach for fostering new and innovative business models.

Whilst some content may appear to have a short shelf life, and be marketed and exploited to fully recoup its costs within a short time period, the vast majority of commercial music and films do not achieve such a luxury.

If anything, the new opportunities opening up in the online world are reducing the sure fire early recoupment opportunities of more recent years. Instead the patchwork of non exclusive licences that may be granted to cover online use will "kick in" at different times for different works. A two year cut off for describing a work "as archive" would be impractical, unnecessary and harmful for business.

Publisher investment in scanning back catalogues and making them searchable - and investment in databases which help support publishers archives going forward is increasing. This is a significant investment for the future. The value of these archives may be highlighted by a world event that triggers interest in particular works, or by a new fashion trend that brings forgotten styles back to the forefront of public consciousness. Such revivals of interest directly contradict the concept of works falling neatly into categories of "new/current" and "archive" in an online context.

Legal offers and piracy

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

Education and awareness amongst consumers and service providers remains central to improving respect for copyright in the online environment.

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

The Memorandum of Understanding is a useful example of encouraging ISP's to appreciate the concerns arising from unauthorised use of copyright works.

However the threat of legislation behind Recommendation 39 of the UK Gowers Review of Intellectual Property may yet provide a more effective way of dealing with the issues.

This recommended that ISPs must observe the industry agreement of protocols for sharing of data between ISPs and rights holders to remove and disbar user's engaged in piracy, with an added proviso – "If this has not proved operationally successful by the end of 2007, the Government should consider whether to legislate".

Such action may now prove necessary.

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

This is a potentially controversial issue, and careful consideration needs to be given over who applies filtering measures and how these are carried by service providers,

In this context it is worth noting that ISP's are increasingly not "mere conduits" for the provision of information. Instead they are businesses which act as true intermediaries operating between rights owners and consumers.

In this role as intermediaries, they therefore have a responsibility to help control traffic on their networks which is unauthorised and infringes copyright and other intellectual property rights.

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