

Position Paper

Reflection Document on Creative Content in a European Digital Single Market

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The Federal Association for Information Technology, Telecommunications and New Media (BITKOM) represents over 1,300 companies in Germany. Its more than 950 direct members generate a sales volume of 135 billion euros annually and employ 700,000 people. They include providers of software, IT and telecommunication services, manufacturers of hardware and consumer electronics as well as digital media enterprises. BITKOM is committed in particular to an improved regulatory framework, a modernized education system and an innovation oriented economic policy.

BITKOM welcomes the opportunity to express its views on the European Commission's Reflection Document on Creative Content in a European Digital Single Market.

Preliminary Remarks and Summary

Many BITKOM members play an essential role in media businesses and provide creative content to satisfy growing consumer demand e.g. as provider of on demand platforms (full track music, ringtones, videos and audiovisual content), provider of Internet Protocol Television (IPTV), cable operator and private broadcaster. In those roles our members are facing different challenges in the digital age.

BITKOM appreciates any initiative by the European Commission to tackle important aspects of distribution and access to creative content online. However the development of sustainable business models should be left to the market forces and any regulatory intervention should be carefully considered and subject to a market impact assessment involving stakeholders of each sector. As a prerequisite thereof we consider that the market of audio-visual offers should not necessarily be divided into content available online and offline, because in many respects it is one market with synchronous appearances. Though the addressed sectors (music, books, audiovisual, games) are very different.

Regarding works that are subject of collective licensing (e.g. music content) facilitating existing complex rights clearance practices in the online area would be a major prerequisite to realize a thorough digital Single Market. The focus of the European Commission should therefore be on the improvement of the current licensing system to reduce the complexity of the current time and cost consuming rights clearance procedures. BITKOM members are confronted with major problems caused by current collective licensing practices with regard to musical works (compositions and lyrics) embodied in music recordings. Pan-European collective licensing in combination with a real one-stop-shop would be a major step for further developing a thorough digital Single Market. BITKOM doesn't appreciate activities of exclusive companies like CELAS that made licensing more complicated and led to large legal uncertainty. The Commission should

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concentrate on the improvement of the current reciprocal agreements between the collecting societies in a way which allows each collecting society to grant multi-territory licenses.

BITKOM supports the idea aggregating the two “digital copyrights” (digital right of reproduction and the digital performance right). Both rights are always needed for online services and a package offer could be a first step towards enhanced licensing efficiency.

Considering fragmentation of repertoire we strongly support the idea that right administrators have to be obliged to make their portfolio transparent by an information platform or a meta data agency to provide transparent and complete information about the ownership of musical works.

BITKOM doubts that extension of the Satellite and Cable Directive would produce the type of “one stop shop” for collectively licensed rights clearance that our members would like to use. In contrast there are potential downsides to any revision, particularly if established commercial practices were called into question.

A prerequisite to increase legal offer of digital content online in the European Union would be the harmonisation of private copyright exception and compensation for private copying. All involved parties should work on alternative licensing and remuneration schemes instead of copyright levies.

It should generally be left to market forces to develop sustainable business models. BITKOM considerably doubts that copyright levies on internet connections would be the right approach to justify a compensation for rightholders for illegal downloading. In particular such fee would mean a double payment when retaining actual levies.

Apart from that currently a couple of national governments and the European Commission are working on a multilateral trade agreement for establishing international standards on intellectual property rights enforcement, Anti-Counterfeiting Trade Agreement (ACTA). Because the scope of ACTA includes fighting piracy over the Internet, many BITKOM members are highly concerned about the impact of the agreement on their business, since ACTA shall be concluded in 2010 and only very few information on the negotiations are made available to public yet. BITKOM strongly calls for more transparency to be able to evaluate and discuss with participants the impacts on digital business. Moreover, the European Commission’s negotiating mandate must be restricted to the respective provisions of the *acquis communautaire*, such as the EU Directive on Electronic Commerce.

Comments on “possible actions” mentioned in the reflection paper:

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1 Consumer access

1.1 Extended collective licensing

BITKOM does not agree that an extended collective licensing via a rights manager to represent “outsiders” could support the consumer access to content, since such extension may require additional clearance for commercial users and may cause further fragmentation of the referred rights. The issue of “orphan works” is presumably restricted to print works which is for the time being mainly out of the scope of business of most BITKOM members and therefore should be addressed separately.

1.2 Further harmonisation of limitations and exceptions

We welcome the goal of a rather more nuanced approach to exceptions and limitations. Nevertheless, we agree that further dialogue would be necessary to differentiate between “public interest” exceptions and “consumer exceptions.”

A prerequisite to increase legal offer of digital content online in the European Union would be the harmonisation of private copyright exception and compensation for private copying. Copyright levies convey user’s opinion to act lawfully when copying in any way. Many users feel wrongly confident by having paid copyright levies to be allowed producing copies of any kind and amount. Actually users are disposed to pay individually. But within system of copyright levies they feel having paid twice and hardly accept any restriction. All involved parties should work on alternative licensing and remuneration schemes instead of copyright levies.

2 Commercial users’ access

2.1 Creation of a streamlined pan-European and/or multi-territory licensing process for works being subject of collective licensing

We believe that a pan-European or multi-territory licensing process for subjects of collective licensing (e.g. musical content) would support the commercial user’s access and at the same time broaden the commercial offers to the end-users. National restrictions within collective licensing hinder pan-European offers through the internet since the licensing processes which needed to be carried out for a pan-European service are too complicated time and cost consuming and, accordingly, the services are only offered on a national basis.

Even though we believe that there is a need for multi-territory licensing of works being subject of collective licensing, it is even more important to acquire global-repertoire or multi-territory-repertoire licences on a one-stop-shop-basis provided by collecting societies (see below). Otherwise the efforts to identify the numerous right owners (co-lyricists, co-composers, co-publishers) for each music work contained in broad music repertoire offers is higher than the effort for the acquisition of global repertoire licenses from a limited number of collecting societies.

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The ideal license for on-demand-platforms and other mass users of creative content to be licensed collectively (such as broadcasters) essentially combines both global-repertoire and multi-territory licenses.

2.1.1 Aggregating the two indispensable "digital copyrights: the digital right of reproduction and the digital performance right

In fact both rights are always needed for online services. So BITKOM supports the idea aggregating the two "digital copyrights". A package offer could be a first step towards enhanced licensing efficiency. The multiple split up of digital rights and the creation of new digital rights for new technologies or business models by right owners or right administrators makes the licensing process more complicated and the licensing practice less transparent and also aggravates the danger of double-payments. We therefore strongly support the idea of aggregating digital rights for interactive online dissemination and in general.

Nevertheless, it is worth to mention that the sole aggregation of rights incurred will not necessarily lead to a more straight forward rights clearance procedure and/or enhanced competition on license rates, which would be presumably dependent on the level of negotiation power of commercial users towards the referred contractual partner.

2.1.2 "One-stop-shop"

The approach of a one-stop-shop for works being subject of collective licensing is highly appreciated by BITKOM, even more if this one-stop-shop would aggregate both, copyrights and performance rights. This does not necessarily mean to substitute individual licensing through collective rights management, but the territorial segmentation and dissemination of online rights as such may hinder further competition.

Commercial users have to face many uncertainties when new business models are implemented. It is always unclear which collecting societies might be involved and which rights are in fact held by the licensor. In particular as regards a cross-boarder licensing process we experienced many problems since the licensor from another country granted a package including all rights (since e.g. the French collecting society granted rights also for Germany) whereas national collecting societies (e.g the GEMA) claimed that an all rights model was impossible since the collecting society owned some of the relevant rights on an exclusive basis for the German territory. This situation is unbearable for both licensor and licensee since the scope of the licence remains unclear and third party claims are a threat to contract negotiations.

Any European initiative should focus on the improvement of the current reciprocal agreements between the collecting societies in a way which allows each collecting society to grant multi-territory licenses for works being subject of collective licensing. This would be one important step to reduce the complexity of the current time consuming and costly rights clearance procedures. The Commission's Recommendation on collective cross-border management of copyright

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and related rights for legitimate online music services (2005/737/EC) unfortunately did neither lead to more competition nor does it solve the problems caused by complex, time consuming and expensive rights clearance procedures. This Recommendation has encouraged major publishers to withdrawn certain rights for online uses from collecting societies, transfer them to new licensing managers and grant a pan-European licence on this partial repertoire. In our experience these initiatives currently don't facilitate the acquisition/clearance of rights in the online market at all and led to a further fragmentation of repertoire and needed rights. It is much more difficult for platform providers to clear the necessary rights and uncertainty as to who controls which rights is increasing. And in addition the consequence is that not only one licensing agreement with each national Collecting Society is needed but additionally with every new licensing manager to acquire needed repertoire. This current licensing practice is to the disadvantage of right owners, commercial users and private users.

2.2 Online database containing information on rights and their owners

Considering fragmentation of repertoire described above the lack of transparency is a severe problem for the effective and efficient rights' clearance of works licensed by collecting societies or collective licensing companies. We therefore strongly support the idea that right administrators have to be obliged to make their portfolio transparent by an information platform or a meta data agency to provide transparent and complete information about the ownership of musical works. This platform should allow all users in an automated and pragmatic way to control, whether claims from collecting societies/rights managers regarding sold music are correct. This would remarkably increase the legal certainty for rights' users and would support dispute resolution mechanism. Additionally a database would avoid double payment from professional users as result of a non-transparent entanglement of rightholders.

On the other hand, this central repository should not hinder further efforts of right holders to aggregate "digital copyrights". Any costs incurred for setting up the data base shall be established by rightholders and the use by commercial users shall be without further remuneration. In order to determine a clear view on the ownership of rights, the participation on such database shall be obligatory for rights holders. Otherwise, we doubt that such repository would be an option. At least, setting up an online database with a certain level of standardization will presumably require some time and efforts from all parties involved. Therefore our members would welcome the possibility to actively work on such a platform together with right holders who possess the relevant data.

2.3 Extension of the scope of the Satellite and Cable Directive of 1993 to online delivery of audiovisual content

The Commission's desire to facilitate the rights clearance procedure is to be welcomed. However, it is not clear to what extent amending the Satellite and Cable Directive would produce the type of "one stop shop" for collectively licensed rights clearance that BITKOM members would like to use. There are potential downsides to any revision of the Satellite and Cable Directive, particularly if established commercial practices were called into question.

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Additionally from a German perspective an extension of the scope of the Satellite and Cable Directive of 1993 is not attractive since its implementation into national law has caused and still causes many problems for cable network operators. The reason is that the German legislator extended the scope of the cable retransmission to national TV-programmes which results in regular interminable negotiations with collecting societies and broadcasters, with the latter in addition to the distribution agreements. Regularly new collecting societies demand a compensation from the cable network operators. Existing collecting societies such as GEMA refuse to grant the broadcasters any and all rights for their programme although Section 8 of the Directive expressly states in order to prevent such a situation which we have in Germany.

From BITKOM's view it would be more effective, especially given the need for timely solutions, to work with rightholders to see how they can open up their works to pan-European use within the current system of copyright legislation.

2.4 "European Copyright Law" (established, e.g., by means of an EU regulation)

We fully endorse a European Copyright Law provided that its correct conception is guaranteed and the framework to be created would actually reduce transaction and licensing cost to any significant degree. Otherwise the issues identified by the Commission are capable of being resolved by market players.

2.5 Alternative forms of remuneration

It should generally be left to market forces to develop sustainable business models. These business models have to match consumer demand in terms of a broad service and product portfolio and attractive pricing models.

BITKOM considerably doubts that copyright levies on internet connections would be the right approach to justify a compensation for rightholders for illegal downloading. In particular such fee would mean a double payment when retaining actual levies. Inevitable higher costs of an internet access could deteriorate the EU's goal to broadband access for everyone. Finally, it would very likely make any commercial service as we know them today obsolete. As currently illegal offerings would be legalised by such a levy, consumers' willingness to pay separately for such offerings will be minimized rendering these offers unprofitable. As a consequence, the diversity and quality of digital content would decrease severely. Rather all involved parties should work on a consistent system of remuneration.

Thereby we consider individual licensing and payment organised by digital rights management (DRM) as an efficient alternative form of remuneration. Although DRM does not address all trends of the market (e.g. music sector has mainly abolished DRM solutions by now) generally robust and consumer friendly DRM systems are still a precondition to receive high value content from content indus-

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try partners in other sectors (e.g. download of video, films etc.). Such systems grant individual and equitable remuneration of rightholders.

3 Protection of rightholders

3.1 An extended or mandatory collective management system for the administration of the "making available" rights

Since commercial users have to negotiate with the content owner anyway, we do not see any positive effect with regard to a collective management system for the administration of making available rights. In the contrary, the need to negotiate additionally with collecting societies hinders the launch of new business models.

3.2 Governance and transparency of collective rights management organisations

We fully endorse a better transparency of the collective rights management organisations by the obligation to maintain databases that contain all rights administered and a right of disclosure for right users.

3.3 Collaboration with ISPs

In contrast to content flat fees imposed on Internet Service Providers (see above), voluntary subscription models seem to be a promising option. Licensing practice of German Collecting Societies (in particular GEMA) in this context is still inflexible yet.

3.4 Financial incentives

We do not think that financial incentives are required. We believe that a free market which is easier accessible for consumers and which is not limited by national borders will generate higher revenues for right holders anyway.