



One voice for sport and recreation

Creative Content in a European Digital Single Market: Challenges for the Future

CCPR Response

CCPR is the national alliance of governing and representative bodies of sport and recreation in the UK. Our 311 members represent 150,000 clubs across the country and some 8 million regular participants. CCPR exists to promote the role of sport and recreation in healthy and active lifestyles, to encourage a policy and regulatory environment in which sport from grassroots through to elite level can flourish, and to provide high quality services to help its members to continually improve and progress.

CCPR provides these organisations with a single, independent voice ensuring that their interests are represented and that they have the skills and capacity to deliver high quality sport and recreation across the country.

In the context of this consultation, CCPR represents major spectator sports in the UK whose national governing bodies own the property rights to sports. Sport is offered through media packages on both television and internet; and it is internet streaming that affects sport in this consultation. The bodies in our membership who are most affected by content online include the Football Association, England and Wales Cricket Board, English Rugby Union and the World Snooker and Billiards Association.

CCPR welcomes the opportunity to contribute to the DG INFSO and DG MARKT consultation on Creative Content in a European Digital Single Market: Challenges for the Future. CCPR also works closely with the Sports Rights Owners Coalition (SROC) to produce a united voice for sport and refers the Commission to its submission for further detail on the effect of creative content challenges to sport.

The Evolution of Technology & Content Markets

Sport has long been at the forefront of new technology, and in the digital age this is no exception. The 2012 Olympics will see the use of 3D and Super HD television, along with every hour of every sport available digitally and on-line. This accounts for over 5,000 hours or in excess of 200 days of live, continuous sport¹. Likewise the internet is transforming the way consumers

¹ Roger Mosey [Director BBC 2012] (2009) "Three dimensions, 5,000 hours, and an audience of billions". http://www.bbc.co.uk/blogs/rogermosey/2009/09/im_speaking_today_thursday_at.html

watch sport with most major sports events available live on the internet² and media rights contracts becoming increasingly platform neutral.

With ever-improving technological advancements, the internet is posing both challenges and opportunities for sport. As sport extends to a wider audience through the internet, so too does the pirating of its events. Ukraine v England became the first football match to be shown exclusively live on the internet in the UK, with around 500,000 paying subscribers. Unfortunately the match was watched by a similar number of viewers illegally watching pirated streams³. Given the advance fee for watching the match was £4.99 (€4.50), this amounts to a theft worth at least £2.5m (€2.25m).

This indeed highlights a huge difference between pirated sport and other forms of media. The value of sport lies substantially in its live product; whereas other media are far more under threat from pirating of recorded media. The fact that piracy is only genuinely worthwhile for live or nearly live sport, means only now, as technology improves, is sport coming under the intense threat from internet piracy that the film and music industry have encountered for some time.

As the threat to sport is fundamentally different to music and film, it is very important that sport is included in discussions. The recent involvement by sport through SROC in DG MARKT's Stakeholders' dialogue on illegal up and downloading has proved a very positive step, and sport hopes that future work and consultations such as this one will refer explicitly to sport as a stakeholder as it does with music, film, publishing and video games. As the challenges facing sport are very different to other media, a broad-brush approach to creative content will fail to hit the mark and provision for illegal live streaming must be considered.

Why Does Internet Piracy Damage Sport?

The consultation document mentions the three main groups of the value chain- consumers, commercial users and rights holders⁴. However, because of the unique way sport is run, there is also a fourth element in sport's value chain- grassroots sport. In the UK the major sports sign up to CCPR's voluntary code which ensures that a minimum percentage of media rights is invested by the sports rights owners directly into grassroots sport. This means that the value of media rights, which is threatened by piracy, directly and proportionally affects the funding of grassroots sport. The value of this investment should not be underestimated, in fact the investment from football alone through this scheme exceeds the total investment from the Department of Culture Media and Sport of €170m per year⁵.

² DG MARKT (2009) Stakeholders' dialogue on illegal up and downloading – 09 October 2009

³ UK Parliament (2009) All-Party Parliamentary Group on Intellectual Property. 24.11.09

⁴ DG INFOS and DG MARKT (2009) Creative Content in a European Digital Single Market: Challenges for the Future. **Page 9 Paragraph 4**

⁵ Ministry for Health, Youth, Sport and the Voluntary Sector [France as part of EU presidency] (2008) Study of public and private financing of sport in Europe. Compared to CCPR voluntary code of conduct investment figures (2009)

The threat to sport from internet piracy is genuine. Football matches regularly see illegal streams watched on hundreds of thousands computers per match⁶. But the most pirated sport remains cricket. Here a study in 2009 showed nearly 1000 dedicated websites showing illegally streamed cricket, over 200⁷ of these actually charged consumers to illegally watch the content. This could be particularly damaging to a sport in the UK which receives over 80% of its funding from selling its media rights; with over 90% of that coming from international match sales. This funding has enabled them to implement the £30m (€27) Chance to Shine project which, in 2008, saw 226,844 children participate in the programme, involving 2,082 schools and 56,076 coaching hours. More than 10,000 boys and girls have migrated from *Chance to Shine* schools into clubs- and it is this virtuous circle of reinvestment in grassroots sport which keeps sport alive across Europe.

Key Principles for Sport

The cultural and creative sectors account for 2.6% of the EU's GDP and more than 3% of the EU workforce⁸, however the sport sector contributes 3.7% of EU GDP, and employment for 15 million people or 5.4% of the labour force⁹. By the rationale given in the consultation paper that "European Policymakers therefore have the responsibility to protect copyright, including in an evolving economic and technological environment"¹⁰, the sport sector should also be protected in this developing policy stream. The sport sector is unlike any other in Europe, with the grassroots sport sector relying on volunteers (over 90% of sports clubs in the UK use volunteers¹¹) and investment in grassroots sport heavily depending on the success of media rights sales at the professional level as shown in the last section.

The Lisbon Treaty affords the European institutions a competence in sport for the first time. The Treaty says "the Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport"¹² and, while this does not mean (and in fact neither does sport want) an exemption from EU law, it is hoped that the specificity of sport in the field of creative content and the media which has been previously outlined by the European institutions will be continued in the post-Lisbon era.

1. Solidarity mechanisms

The European sporting pyramid would struggle to function without the solidarity mechanisms which allow sport rights owners to collectively sell their rights and then redistribute the funds. In order to maintain equitable balance

⁶ E.g. UEFA (2009) as quoted in DG MARKET'S stakeholder dialogue on illegal uploading and downloading 11.09.09. e.g. Celtic v Arsenal. Champions League 18.08.09.

⁷ NetResult (2009) for the England and Wales Cricket Board

⁸ DG INFOS and DG MARKET (2009) Creative Content in a European Digital Single Market: Challenges for the Future. **Page 2 Paragraph 1**

⁹ Dimitrov, D., Helmenstein, C., Kleissner, A., Moser, B. and Schindler, J. (2006) *Die makroökonomischen Effektedes Sports in Europa*, Studie im Auftrag des Bundeskanzleramts, Sektion Sport, Wien. (As in EC White Paper on Sport)

¹⁰ DG INFOS and DG MARKET (2009) Creative Content in a European Digital Single Market: Challenges for the Future. **Page 2 Paragraph 1**

¹¹ CCPR Sports Club Survey (2009) www.ccpr.org.uk

¹² Lisbon Treaty. Art. 169

and encourage fair sporting competition, the leagues can redistribute media funding as prize money much more equitably than if the large clubs defined their own media contracts. In the German Bundesliga, for example, the top team receives only twice the prize money as the bottom club, in the English Premier League the redistribution ensures the Champions receive 1.65 times the amount of the last placed team¹³.

More important, perhaps, is the fact that the leagues and national governing bodies do not have to distribute all the media revenue to the clubs. This means substantial investment in grassroots sport is therefore made a possibility. As previously mentioned, in the UK this process is formalised through CCPR's Code of Conduct which ensures a minimum percentage is reinvested in grassroots sport.

CCPR welcomes the Commission's reiteration of its support for such mechanisms in the White Paper on Sport¹⁴ and hopes that the principle already established by the Commission will be formally recognised in the discussions on content online.

2. Exclusivity

In 2003 the European Commission issued a competition decision concerning UEFA's selling of media rights which has since served as a template for sports selling media rights. In this decision and others (e.g. Premier League¹⁵, Bundesliga¹⁶) the Commission has explicitly endorsed the notion of exclusivity, stating that "UEFA's joint selling arrangement provides the consumer with the benefit of league focused media products from this pan-European football club competition that is sold via a single point of sale and which could not otherwise be produced and distributed equally efficiently".¹⁷

In this case there are benefits for the consumer who does not have to subscribe to a host of media suppliers to follow one competition, the media supplier who can increase revenue from advertising, the advertisers who will have a defined target demographic and sport which can improve revenue through exclusivity. All these benefits are set out in more detail in the Commission's 2003 decision.

While the Commission decision backs exclusivity in the sense of economic efficiency, the benefit to grassroots sport through solidarity mechanisms is another major factor for the sporting world. Estimates suggest that the exclusivity of media rights can add substantially¹⁸ to a contract and this value correlates to a significant investment in grassroots sport.

¹³ Data from European Commission conference on Licensing Systems (17/18.09.2009)

¹⁴ DG CULTURE (2007) White Paper on Sport: Action Point A48

¹⁵ European Commission (2006) COMMISSION DECISION of 22 March 2006 relating to a proceeding pursuant to Article 81 of the EC Treaty (Case COMP/C-2/38.173 – Joint selling of media rights to the FA Premier League

¹⁶ European Commission (2003) Joint selling of Bundesliga media rights — first Commission decision pursuant to Article 9 of Regulation 1/2003

¹⁷ European Commission (2003) COMMISSION DECISION of 23 July 2003 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (COMP/C.2-37.398 — Joint selling of the commercial rights of the UEFA Champions League)

¹⁸ CCPR & ECB (2009) Confidential data

A clear European example of the advantage to grassroots sport from exclusivity and collective selling is UEFA's European Championships. Here, the specific beneficiaries are often the smaller European countries and grassroots sport. 60% of the media rights from the tournament are redistributed to the national federations, with that money specifically ring-fenced for grassroots projects¹⁹. As this split is an equitable split, the smaller European countries would be proportionally hurt much more if exclusivity were to be prevented. CCPR hopes that exclusivity will continue to be supported by the European Commission both with respect to television and on-line rights.

3. Territoriality

Sport is territorial by nature. National matches and competitions are watched more fervently by those from the hosting or participating countries. This can be seen at a glance from the list of designated events which can be safeguarded for free-to-air television²⁰. While the lists of course include major world events like the Olympics, they serve as a clear demonstration that sports events- from the Giro d'Italia in Italy to the All-Ireland Senior Inter-County Hurling Finals in Ireland- are principally of importance territorially; and likewise their value and appeal differ across Europe.

This has clearly been shown by interrogating the viewing figures of sports events. For example, through regression analysis of viewing figures in 54 countries in the six major football tournaments since 1998, it has been found that broadcasts which involved a match in which the home country played saw an extra 17.9% of the population watching the match.²¹

This territorialism has been recognised by the Commission in its 2003 UEFA decision in which it notes that "media rights to football events like the UEFA Champions League are normally sold on a national basis. This is due to the character of distribution, which is national due to national regulatory regimes, language barriers, and cultural factors. The Commission therefore considers the geographic scope of the upstream markets for the media rights to be national".²²

The result is that sport has a very different value depending on the territory in which it is being watched. It is important for both sport and Europe's citizens that sport is allowed to be sold to media organisations territorially. If this was not the case, only the largest media empires in Europe would win contracts and there is the possibility that smaller territories in which these organisations did not operate would receive less choice.

¹⁹ HatTrick provides perfect Finnish (2009) <http://www.uefa.com/trainingground/news/kind=1/newsid=926064.html>

²⁰ European Commission (2009) Audiovisual Media Directive COM/2009/0185 (2009)

²¹ Alavy as quoted in Simon Kuper and Stefan Szymanski (2009) *Why England Lose and Other Curious Football Phenomena Explained*. Harper Collins.

²² European Commission (2003) Paragraph (88) COMMISSION DECISION of 23 July 2003 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (COMP/C.2-37.398 — Joint selling of the commercial rights of the UEFA Champions League)

There is also precedent that live sport should be sold territorially as it is not a tangible good, and therefore the principle of exhaustion should not apply. The ECJ has ruled in *Coditel I (or Le Boucher)*²³ that there is a fundamental distinction between public performance and the circulating of physical copies and, while this ruling applied specifically to film, the same should hold true in sport.

Key Issues from the Consultation Paper

1. Consumer Access

The consultation paper only mentions sport once. It states that in recent years requests for information with regards to why sporting events are not available in some territories have filtered in to the Commission and European Parliament²⁴.

Positively, it should be noted that sport is addressing this issue through embracing a new technological era. Sports' media contracts are becoming more and more platform neutral allowing (or in the case of some contracts obliging) operators to provide on-line alternatives. Sport is also developing platforms to supply territories in which there is no media rights holder; a few examples are World Marathons²⁵, International Tennis Federation²⁶ and Cricket Australia²⁷ where you can now watch events on-line if no rights holders exist in the territory.

The fact that such options are now available has been shown in DG MARKT stakeholders' dialogue on illegal up and downloading²⁸. Sport welcomes this opportunity to be actively involved in dialogue and believes discussion in this forum is important to clarify the current legal offers and to take positive steps forward in creating consumer access models which benefit both consumer and industry.

As highlighted previously, exclusivity of the sale of media rights in sport is vital for the funding of sport across Europe. The consultation states "that the private copying exception appears too broad. In these circumstances, policy could take a more focused approach, examining each type of exception individually and stating clearly what policy aim is furthered by harmonising an exception and making it mandatory in all Member States."²⁹ The idea that the policy should take a focused approach is welcomed, as stated in the White Paper on Sport where the goal of solidarity mechanisms is linked directly to collective selling as a policy outcome; "sports media rights, such mechanisms can take the form of a system of collective selling of media rights or,

²³ European Court of Justice (1980) Case 62/79 E.C.R. 881.

²⁴ DG INFSO & DG MARKT (2009) Creative Content in a European Digital Single Market: Challenges for the Future A Reflection Document of DG INFSO and DG MARKT 22 October 2009

²⁵ World Marathon Majors (2009)

http://www.universalsports.com/SportSelect.dbml?DB_OEM_ID=23000&SPID=13048&SPSID=105671

²⁶ International Tennis Federation (2009) www.itfteamevents.tv

²⁷ Cricket Australia (2009) www.cricketaustralia.tv

²⁸ DG MARKT (2009) Summary Record Stakeholders' dialogue on illegal up and downloading – 09 October 2009.

²⁹ DG INFSO and DG MARKT (2009) Creative Content in a European Digital Single Market: Challenges for the

alternatively, of a system of individual selling by clubs, in both cases linked to a robust solidarity mechanism.”³⁰

As also previously shown, the value of sports property rights is substantially in live or near live reproduction, therefore private copying of legally obtained media³¹, orphaned works³² or research and training³³ has limited affect on sport. This goes to show that a one-size-fits all approach to content on-line will not help all the creative industries, and nuanced exemptions are likely to be required for each creative industry.

The consultation also notes that “Community rules on copyright have harmonised the scope and tenor of the exclusive rights without, however, providing clear boundaries for these rights by means of uniform exceptions. This is indeed a state of affairs that should not persist in a truly integrated internal market.”³⁴ In terms of exclusivity, the sports sector is content that the 2003 decision by the Commission³⁵ (as highlighted previously) provides clear boundaries for exclusivity. Sport also notes that, due to the territorial nature of sport as highlighted in the Commission Decision and through academic research, a truly integrated market in sports rights is highly unlikely- the value of a single match across Europe, unlike a single film, will never be the same and a truly integrated market will not exist.

2. Commercial users’ access

With respect to commercial users’ access, due to the territoriality of sport, a move towards a multi-territory licence would not be in the best interest of either sport or consumer. Territoriality affords the consumer a superior product that focuses on specific needs. Live sport requires commentary, interview and expert analysis for a complete product; which, for the consumer’s benefit, is done in their mother tongue. This requirement is simply not needed in recorded media such as film and music and the difference between the creative media should once more be noted in any legislation.

A pan-European product would serve to damage the important cultural nature of sport and any interpretation of the Audio Media Services Directive which would “imply that once an online service is licensed in one EU territory, for example the territory with which the service provider is most closely linked, then this licence would cover all Community territories”³⁶ would detrimentally affect the product for the consumer (as outlined in the Commission’s 2003 decision) and the ability of sport to self-fund its grassroots arm through media

³⁰ DG CULTURE (2007) White Paper on Sport: Action Point A48

³¹ DG INFOS and DG MARKT (2009) Creative Content in a European Digital Single Market: Challenges for the Future. **Page 15 Paragraph 2**

³² DG INFOS and DG MARKT (2009) Creative Content in a European Digital Single Market: Challenges for the Future. **Page 14 Paragraph 5**

³³ DG INFOS and DG MARKT (2009) Creative Content in a European Digital Single Market: Challenges for the Future. **Page 15 Paragraph 2**

³⁴ DG INFOS and DG MARKT (2009) Creative Content in a European Digital Single Market: Challenges for the Future. **Page 15 Paragraph 1**

³⁵ European Commission (2003) COMMISSION DECISION of 23 July 2003 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (COMP/C.2-37.398 —Joint selling of the commercial rights of the UEFA Champions League)

³⁶ DG INFOS and DG MARKT (2009) Creative Content in a European Digital Single Market: Challenges for the Future. **Page 17 Paragraph 4**

rights. Because of the benefits of territorialised licensing in sport, sport recognises the need to encrypt satellite signals under the Satellite and Cable Directive³⁷ and the need for rights holders supplying their product over the internet to geo-block their sites to mutually protect their fellow European rights holders. Without territoriality, the threat is that only the largest providers would be able to afford sport rights to such an extensive market as a pan-European one, limiting the field to a small number of quasi-monopolies.

Instead of creating pan-European licences³⁸, sport should be encouraged to provide sport in all territories and, where no commercial arrangement can be found, the internet provides an affordable opportunity for sport to provide its product cheaply and effectively. Sport continues to develop legal offers on-line with its rights holding partners be it through “feels-like-free”³⁹ sponsored websites giving free access such as Formula One on commercial sites such as RTL, “a-la-carte” sites such as UEFA or the International Rugby Board where matches are bought individually or “all-you-can-eat”⁴⁰ versions such as the Sky-player for Premier League Football or the International Tennis Federation where a whole season can be bought. The models above are all viable business models and should all be available for rights holders and sports to take sport into a new era of on-line viewing.

To this end sport supports the traditional copyright model outlined in the consultation which “implies that the owner of a particular copyright (be it a sound recording, a film or a book) would license his property to a user of his choice for use in territories of his choice”.⁴¹ Sport should also be included in this definition, as it should in many sections of the consultation. Sport welcomes the recognition in the paper that different content have different needs where the consultation correctly points out⁴² that the “ownership of rights in musical compositions, audiovisual works and books is substantially different and each would require different solutions”, but again sport asks to be explicitly involved in the consultation process and wish to be involved in “a debate on how to consolidate the often fragmented ownership of rights in musical works [which] might lead to some welcome clarification.”⁴³

³⁷ DG INFSO and DG MARKT (2009) Creative Content in a European Digital Single Market: Challenges for the Future. **Page 17 Paragraph 5**

³⁸ DG INFSO and DG MARKT (2009) Creative Content in a European Digital Single Market: Challenges for the Future. **Page 16 Paragraph 4**

³⁹ DG INFSO and DG MARKT (2009) Creative Content in a European Digital Single Market: Challenges for the Future. **Page 20 Paragraph 3**

⁴⁰ DG INFSO and DG MARKT (2009) Creative Content in a European Digital Single Market: Challenges for the Future. **Page 19 Paragraph 3**

⁴¹ A variant of the “property rights” based approach to online licensing would be that a CMO, or a group

of CMOs acting jointly, license their own repertoires for all European territories. While this model would surmount territorial fragmentation, it would fragment repertoire as the licence is by necessity limited to the repertoire of one society or a group of partner societies. SEE THIS CONSULTATION

⁴² DG INFSO and DG MARKT (2009) Creative Content in a European Digital Single Market: Challenges for the Future. **Page 17 Paragraph 2**

⁴³ DG INFSO and DG MARKT (2009) Creative Content in a European Digital Single Market: Challenges for the Future. **Page 17 Paragraph 1**

3. Protection of rights holders

As this paper has shown, the protection of sports rights owners' property rights is paramount to the European sporting model and redistribution of funds through collective selling. Once more, it should be emphasised that the needs of the different creative industries of film, music, literature, gaming and sport cannot be covered by general legislative action, and all stakeholders need to be involved in consultation.

It is very much hoped that the future of creative content on-line will indeed prove that "easier access to creative content will have to be combined with adequate protection of rightholders."⁴⁴ Sport has a substantial variety of legal on-line offers, but illegal live-streaming of sport threatens to undermine the value of media rights. Technical measures such as notification of rights from Internet Service Providers or the possible restriction (or in extreme cases even suspension) of services are needed. While legal action must only be taken as a very last resort and, in that instance, targeting websites not individuals is preferred, a credible legal threat is needed to help act against piracy. The fight against internet piracy cannot be won in a legal vacuum and credible threats must exist to prevent pirating.

Conclusion

Sport is the biggest social movement in Europe, with over 300 million European regularly participating in sport⁴⁵. CCPR asks the European institutions to recognise the cultural needs of the people of Europe with respect to sport, and note that the solidarity mechanisms supported in the European Commission's White Paper on Sport enable sport to help self-fund grassroots sport. This reinvestment in grassroots sport is only available through derogations already made by the European Commission in terms of exclusivity, territoriality and collective selling. CCPR asks the European institutions, in the light of the new competence in sport in the Lisbon Treaty which instructs the institutions to respect the specific nature of sport, to do just that and to continue to transfer these specific areas to new technological areas when defining content on-line in order to fully protect sport rights owners' property rights.

CCPR welcomes the opportunity to respond to this consultation, and would be happy to follow up on any issues that arise from this response.

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18 December 2009
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⁴⁴ DG INFSO and DG MARKT (2009) Creative Content in a European Digital Single Market: Challenges for the Future. **Page 20 Paragraph 0**

⁴⁵ Special Eurobarometer (2004): The Citizens of the European Union and Sport