



## **EDiMA response to the European Commission Public Consultation on: *Creative Content in a European Digital Single Market: Challenges for the Future – Reflection Document of DG INFSO and DG MARKT*<sup>1</sup>**

The European Digital Media Association (EDiMA)<sup>2</sup> is pleased to provide its response to the European Commission's call for comments on the Reflection Document of DG INFSO and DG MARKT on *Creative Content in a European Digital Single Market: Challenges for the Future*.

EDiMA has consistently contributed to European Commission consultations relevant to the new media and Internet sectors and, more recently, has engaged policymakers and stakeholders as EDiMA and its members work to promote EU Internet policy aimed at achieving a Digital Single Market in Europe<sup>3</sup>. EDiMA believes that the development of a European Digital Single Market is vital for Europe's cultural diversity, competitiveness, and innovation and that new media and Internet services can drive that growth both in collaboration with Europe's creative industries and to the benefit of European consumers.

**Accordingly, EDiMA welcomes the Commission's stated objective of 'creating in Europe a modern, pro-competitive, and consumer-friendly legal framework for a genuine Single Market for Creative Content Online'.** EDiMA agrees with the Commission that encouraging the provision of legal offers in Europe, promoting a level playing field for new business models and innovative licensing models for the distribution of creative content, while ensuring appropriate remuneration for rightsholders and creators are the appropriate principles that should guide Internet policy moving forward and as the Commission develops its post-2010 strategy.

Contributing to the ongoing discussion amongst policymakers and stakeholders on the best means to achieving a Digital Single Market in Europe, EDiMA has structured its response to this consultation around the following policy priorities:

- Achieving a Digital Single Market in Europe: Importance of completing the Internal Market for consumers and new media services to harness the potential of the Internet and capitalise on Europe's cultural and creative resources.
- Copyright licensing regime fit for the digital age: Recommendations for improvements in rights clearance which would contribute to the creation of a Digital Single Market in Europe by addressing several of the principal barriers.
- Other factors to be considered to achieve a Digital Single Market: Promotion of consumer confidence online, coordinated policy formation, and consistent implementation of EU law.

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<sup>2</sup> EDiMA, the European Digital Media Association, is an alliance of new media and Internet companies whose members include Amazon-EU, Apple, eBay, Google, Microsoft, Nokia, RealNetworks, Yahoo! Europe, Orange, and others. EDiMA's members provide new media platforms offering European consumers a wide range of online services, including E-content, media, E-Commerce, communications and information/search services. EDiMA represents the interests of the new media and Internet sectors in Europe in policymaking.

<sup>3</sup> See *EDiMA White Paper on policy strategy for the development of new media services 2009-2014*, available at [http://www.europeandigitalmedia.org/uploads/Press/documents/Speech\\_Redding\\_Digital\\_Single\\_Market.pdf](http://www.europeandigitalmedia.org/uploads/Press/documents/Speech_Redding_Digital_Single_Market.pdf)

## Achieving a Digital Single Market in Europe

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As the Commission correctly highlights, *“the growing importance of the Internet and of digitization technologies is opening up new possibilities for distributing creative content online. This technological development opens the door for consumers to access creative content online wherever they are wherever they go in the EU’s Internal Market.”* EDiMA believes that a measure of success of the Internal Market and the free movement of goods and services is the existence of an environment in which new media services can be offered to their full potential across the EU for the benefit of European consumers.

In both its recent Communication on Cross-Border Business to Consumer e-Commerce in the EU<sup>4</sup> and DG SANCO’s Report on cross-border e-commerce in the EU<sup>5</sup>, the Commission acknowledges the significant benefits that a more integrated online internal market for goods and services would bring to Europe’s consumers. A Digital Single Market will provide online consumers a greater and more convenient access to an ever-increasing selection of products and services. The online consumer is rewriting the rules of engagement for the media and entertainment industries and has increasing expectations about convenience and availability that are having repercussions throughout the value chain. Advances in digitization and online distribution allow content to remain commercially available for a longer period of time, thereby adding greater value to copyright. Digitization and online distribution results in creative content that can be available for the full duration of the copyright term.

**Against this backdrop, developing policy approaches for the new media sector that meet consumer demand whilst providing reward and incentives for the whole value chain is vital for Europe’s cultural diversity, competitiveness, growth, and job creation.**

Despite recent advances in technology and consumer expectations, existing policy and regulatory frameworks often add rather than remove barriers for consumers and for the new media and Internet-based businesses. EU policy has historically focused on ‘updating’ or ‘adding-on’ to existing policy in order to address issues arising from the online consumption of goods and services. This approach has had limited success and, as a consequence, a true Digital Single Market for new media services, and consumers’ consumption thereof, is still far from complete and remains fragmented in key places.

As more and more economic and cultural activity moves online, we remain confronted with a major paradox: while the Internet is borderless, much online activity – particularly the distribution and consumption of creative content – remains tied to national borders, often as a direct result of regulatory barriers. Consumer expectations for convenience and broad availability must be embraced and supported and taken into account by the EU policymaking process. The business models capable of meeting these consumer expectations depend on scale which requires them to extend their market beyond individual Member States and, ultimately, beyond the EU. To be a successful and thriving digital economy, the EU must respond to these realities.

### Achieving a Digital Single Market: benefits for the entire value chain

- For the **consumer**, the Digital Single Market would represent greater freedom to shop around online in a larger and more competitive market. A Digital Single Market would also provide easier access to Europe’s creative content; currently too many frustrated citizens, despite a willingness to pay, resort to piracy in order to obtain content unavailable to them as they exercise their freedom of movement around the Union.
- **Artists, authors and rightsholders** will be able to reach a larger audience for their works as the economics of distribution have changed and the marketing of creative content continues to evolve. Cultural diversity has never before been so strong, as ideas, content, services, and goods have become more accessible across national boundaries thanks to digital distribution. A

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<sup>4</sup> COM(2009) 557

<sup>5</sup> SEC(2009) 283

continued reduction in the barriers to the distribution of such content would enhance the development of new media platforms in Europe and contribute to the development of revenue streams for rightsholders.

- Meanwhile, for **industry** a Digital Single Market would provide access to a larger market at a lower cost, thereby providing the opportunity for maximization of cutting-edge innovation online.

### **Copyright licensing regime fit for the digital age<sup>6</sup>**

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EDiMA completely agrees with the Commission that *“the online distribution of creative content in the EU has the potential to create more choice and diversity for consumers, new business models for commercial users, and more sustainable growth for rightsholders”* and that it is *“essential that legal offers can evolve to allow consumers access on a cross-border basis.”* A greater availability of attractive legal offers available on a pan-EU basis would have benefits for consumers, rightsholders, and commercial users alike. It would also simultaneously help to curb online piracy by providing viable legal alternatives and making available a wider selection of culturally diverse content. Policy designed to combat copyright infringement, therefore, must support and complement, not impede, innovation and should not penalise those involved in developing innovative business models for the legitimate distribution, creation or consumption of content. Copyright infringement affects all stakeholders, not only content owners/rights holders, and policies meant to address copyright infringement should take full account of this fact.

As the Commission highlights significant obstacles and challenges to the development of such a dynamic digital market exist and consumers and commercial users alike encounter difficulties in trying to take full advantage of the benefits of Europe’s Internal Market. Recent developments in the market for securing licences for online audio and audiovisual use are changing the landscape and posing both new challenges and opportunities for online media providers. Intended to benefit both licensors and licensees, some of these changes have resulted in increased complexity, cost and legal uncertainty for some licensees. Although necessary and a welcome development for a Digital Single Market, the evolution of copyright licensing from the traditional national collection society system of facilitating rights clearance on a country-by-country basis is creating new complexities. In particular these issues are creating problems of legal clarity and certainty for online media providers that require the collaboration of all parties so they may be solved, in the long run, in the new licensing environment.

#### **Background and current challenges**

Licensing of digital services has undergone considerable change over the past five years and such developments continue. EDiMA does recognise that, in theory, the one-stop shop licensing principle has significant advantages for certain licensees or types of uses. However, we note, that as things currently stand there is no one-stop shop available.

In order to provide a comprehensive pan-European music service licensees also need to secure rights from all 27 national societies for their member repertoires, and repertoires from outside the EU, thereby only increasing the number of licences that are required for coverage of all repertoire. The market needs a mechanism so that rights holders may aggregate their repertoires so that the number of licenses needed is reasonable. We note the progress the Nordic collecting societies are making by seeking to aggregate their repertoires under one licensing stream through NCB. Furthermore, and as the Commission has identified,

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<sup>6</sup> For the purposes of this policy statement, we reserve our comments strictly to the system of commercial rights clearance for online, interactive digital audio and audiovisual services such as webcasting, streaming, and downloads.

without transparency in repertoire from each rights agent, it can make it difficult for the commercial user to determine the need for, or value of, the license on offer.

This complexity and lack of transparency in rights ownership have led to uncertainty in the securing of rights. It is not necessarily clear by whom certain rights are held, leading to possible double payments by licensees for the same right. This must be rectified through technical means to identify the rights holder or manager of given works, and in this respect, EDiMA welcomes the initial, albeit by no means definitive steps taken by the roundtable process sponsored by DG Competition. Licensees wish to increase their legal protections (such as via indemnities in licence terms and conditions) in order to alleviate the potential burden of such risks, and to this end the efforts to create a comprehensive database of global repertoire works must be accelerated.

Online content distribution has created new important and growing revenue streams for rightsholders and is a means of strengthening cultural diversity across the EU. **A well-functioning and flexible market-based licensing regime is critical to the promotion of cultural diversity in Europe and to the development of a dynamic and successful new media sector.** Recent developments in securing licences for audio and audiovisual works have significantly changed the licensing processes and the landscape of associated rights. These changes have in some instances encouraged the development of new business models but have also led to increased compliance and liability costs. Indeed the simple cost of administering a licence has challenged the viability of some online business models at a time when the industry must cut costs in order to remain competitive. The high administrative costs of licensing have caused some providers to exit the market, removing revenue from the content market. More change is necessary to encourage the market to adjust to the realities of the online world, to respond to unmet consumer demand and to deliver economies of scale.

### **Recommendations for improvement in rights clearance**

EDiMA believes that cultural diversity and a dynamic Digital Single Market are best secured by ensuring there is a licensing system that is responsive to the needs of consumers and commercial licensees. This will allow new business models to develop, ease the barriers to entry and ensure reward for rights holders and their agents. A well-functioning, market-based licensing regime is **critical to the development of a dynamic and successful digital market in Europe.**

**EDiMA believes that the market needs to deliver pan-European solutions that enable the licensing of the full catalogue of repertoire, respecting individual business models and their own rights requirements.**

It is important to ensure that the licensing process enables, facilitates and accelerates bringing new business models to consumers and rewards and encourages business investment and innovation. In this respect, EDiMA also believes there is scope for more innovation and flexibility in the licensing models to reflect the diversity of distribution and revenue models for digital content and to address the challenges arising from the move towards repertoire source based licensing.

Key changes in collective rights management and commercial licensing, as put forward by the Commission and desired by EDiMA, include:

- 1) **Commercial licensing** - licenses must reflect the needs of the given business model and licensing terms must be commercial and market driven. Today's digital distribution markets require innovative and flexible licences for different business models, which reflect the differing approaches and services of different commercial users. For example, some service providers place

priority on securing a blanket license to maximize certainty that the whole repertoire is appropriately licensed, whereas other services may consider there to be benefits in acquiring repertoire piece by piece. If collecting societies are to unlock new sources of revenue from digital media, they must adapt licensing frameworks accordingly in order to meet these varied needs.

- 2) **Pan-European licensing** – licenses must be available which cover the whole of the European Union, the European Free Trade Area, and European Economic Area, or one country or a specific group of countries, in order to facilitate rollout and service availability and to ensure the realisation of a true Digital Single Market.<sup>7</sup> This is essential if EU startups are to achieve the scale they need to thrive.
- 3) **Service licensing and coverage** - to the extent required, all repertoire should be offered in a license but with license terms and conditions that reflect the commercial user's requirements. Where multiple rights in a work co-exist in a single exploitation (in particular the reproduction/mechanical and performing right in online downloads), the rights should be licensed as a bundle to the commercial user from the same source.
- 4) **Transparency and Clarity** – As highlighted by the Commission here as well as in the context of the Roundtable exercise facilitated by DG COMP, it is important to understand and be able to verify which rights in which works an online digital media provider is receiving as part of any given licence. Online digital media providers should not have the responsibility for such verification. Now that licences are moving from a territory based system towards a repertoire/source based system, it is important that societies prioritize improving the transparency of ownership of rights so that licensees are not put in the position of remunerating rights to a society with respect to rights which it does not own or manage, nor of managing disputes between potential rights holders. This is particularly critical where more than one society or rights agent is either authorised to offer a license for the right or is claiming the right in question. To this end, societies should have to provide access to the works and rights they are entitled to license, to an extent that enables commercial users to identify what repertoire is being made available by each society or agent. Similarly, it is important for the purpose of legal clarity that the entities granting licenses to digital service providers affirm and ensure that their licenses authorise all uses permitted by the digital services they license.
- 5) **Legal disputes** – EDiMA believes that commercial users should have access to impartial legal fora for recourse in the event of disputes with rights holders or collecting societies, including with respect to disputes over rights and/or licence terms. These fora should attract the right expertise and be capable of delivering timely and balanced adjudications which meet the needs of a fast-moving digital market.
- 6) **Efficiency** – EDiMA supports current efforts by societies to move to a consistent and more efficient approach to reporting. Licences typically require bespoke reporting solutions which add costs for licensees which must be recovered from their revenues. With respect to some business models there may be scope for developing industry standard solutions or adapting existing measurement solutions such as those used to measure advertising audiences. Such efficiency savings should of course allow for change by flexibility for individual licensees, and particularly with respect to their particular differing business models.
- 7) **Copyright Levies** – EDiMA believes the issue of private copy levies is a relevant problem in **urgent** need of review. The diverse territorial nature of private copy levies causes fragmentation in the Internal Market, creates barriers to trade and distortions of competition in products subject to levies. Copyright levy systems are a legacy from the analogue world, whereas the digital era - characterised by digital content formats, proliferation of digital devices and ubiquitous connectivity – has fundamentally changed the way digital services enable consumers to acquire, consume and enjoy digital files of content such as music and video. Levies should not be seen as a

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<sup>7</sup> However, in this context it should also be recognised that the lack of harmonised consumer law, potential localisation requirements, commercial considerations, issues of scale and issues relating to the multiplicity of languages of the European Union present additional hurdles to the provision of such broad services.

primary revenue stream for digital content. Rightsholders should be remunerated through direct licensing, not private copy levies. Direct licensing is more appropriate and fairer for all. Copyright should recognise and reflect the ability of market players to address most uses of digital content in direct licensing arrangements and avoid creating incentives for right holders to limit the scope of licences in order to keep levy claims intact. For all reasons stated above a review of the system is required.

### **Other factors to be considered to achieve a Digital Single Market**

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In addition to the challenges presented by the current copyright framework as outlined by the Commission, EDiMA would also highlight other issues not covered in the Reflection Document which, if addressed appropriately, could eliminate additional barriers and open up new opportunities to facilitate the emergence of a Digital Single Market for creative content online.

#### **Promoting consumer confidence online**

As the Commission correctly emphasises, consumer access to creative content represents one of the main challenges to the development of a true Digital Single Market in Europe. While improvements in rights clearance, as cited above, would help address such access problems by fostering the development of legal offers, additional measures to promote online consumer confidence should also be examined.

For both consumers and business, the fragmented nature of consumer rules creates barriers to harnessing the potential of the online environment. This restricts consumer access to new media services which then prevents an Internal Market for such services from developing to its full potential and as a result consumer confidence is undermined.

**The establishment of a harmonised and strong set of consumer rights applicable throughout the EU - either through strict Internal Market guidelines or full harmonisation – would contribute significantly to achieving a real European market for not only e-commerce services, but also creative content online.**

Accordingly, EDiMA would advocate prioritizing the adoption of the draft Consumer Rights Directive based on fully harmonised rules whilst taking into account the specificities of digital audiovisual services and their inherent intellectual property rights. Furthermore, EDiMA would also call upon policymakers to prioritize the development of the Internal Market for consumers to not only boost online consumer confidence, but also facilitate the further development of Europe's new media and e-commerce services as highlighted in the recent Communication on Cross-Border Business to Consumer e-Commerce in the EU<sup>8</sup>.

#### **Co-ordinated policy formation**

While EDiMA welcomes the joint-DG MARKT/DG INFSO preparation of the Reflection Document and believes such cooperation and coordination is necessary when developing policy for the new media and Internet sector, the current policy and regulatory environment for the sector is unfortunately too often characterised by multiple and contradictory policy initiatives which frequently emanate from different EU institutions and sometimes even different parts of the same institution. An uncoordinated policymaking approach for new media services and creative content online creates significant uncertainty for both consumers and business and damages investment and innovation.

EDiMA would, therefore, recommend the establishment of a new European Commission Internet Task Force mandated to ensure coordination across different policy initiatives relating to new media services with a remit to promote online innovation. The Task Force could also be responsible for auditing and analyzing the impact of all EU policy initiatives on the new media sector to ensure that initiatives are

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<sup>8</sup> COM(2009) 557

coherent and consistent with the broader goal of achieving a Digital Single Market in Europe. Furthermore, such a group would be in a position to support the Commission's existing expertise in identifying existing barriers to the provision of new media services and their consumption.

### **Better implementation of EU law**

Where relevant and appropriate legislation does exist for the new media sector and where it can have a positive impact on the establishment of fully functioning Internal Market, such legislation is not always properly implemented at national level. This obviously results in a fragmented market marked by uncertainty and one in which it is difficult for new business models and services to be rolled-out quickly and efficiently. A fragmented market limits the benefits of scale that should theoretically come from the EU's Internal Market and which are of particular significance for new media services.

**The European Commission should ensure correct implementation of EU law and encourage consistent application in order to foster the development of a true Internal Market marked by legal certainty for the benefit of European consumers and businesses alike.** To pursue and achieve such objectives, EDiMA calls for European Commission benchmarking of best practice in the implementation of EU legislation across Member States and a European Commission audit of implementation of existing legislation relevant to the new media sector to assess consistency of application across the EU.

### **Conclusion**

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EDiMA welcomes the *Reflection Document on Creative Content in a European Digital Single Market: Challenges for the Future* in which we believe the Commission has correctly identified not just many of the challenges to developing the market for creative content in Europe, but also the main principles and objectives which should guide policy moving forward. EDiMA also welcomes President Barroso's 'Digital Agenda' objectives and expressed desire to work towards achieving a true Digital Single Market in Europe<sup>9</sup>, and is hopeful that the Commission will continue its emphasis on what truly represents a valuable opportunity for the development of Europe's creative industries and new media sector.

The Digital Single Market is a high priority for EDiMA members as we strongly believe this to be vital for Europe's cultural diversity, competitiveness, and innovation. EDiMA looks forward to continuing to engage and support the Commission in such endeavours as well as promoting the development of the Digital Single Market and its prioritization for the benefit of European consumers.

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<sup>9</sup> 3 September 2009 - European Commission President José Manuel Barroso proposes a partnership for progress and ambition to the European Parliament: available [here](#).